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September 30, 2013

Re: AG/13-00675 (F)
VRB:LAD:ND

This responds to your Freedom of Information Act (FOIA) request dated October 13, 2012, and received in this Office on November 5, 2012, seeking copies of the 1993 Report by Judge Nicholas J. Bua and the 1994 Department of Justice Report concerning the INSLAW/PROMIS matter. This response is made on behalf of the Office of the Attorney General (OAG).

Please be advised that searches have been conducted on behalf of the Office of the Attorney General, and copies of the above-referenced 1993 and 1994 reports responsive to your request were located. I have determined that these two documents, totaling 463 pages, are appropriate for release with excisions made pursuant to Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), which pertains to information exempted from release by statute, in this instance, Rule 6(e) of the Federal Rules of Criminal Procedure, which concerns certain information pertaining to grand jury proceedings. Please note that the redactions in this material were already on the documents as located by this Office.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through this Office's eFOIA portal at http://www.justice.gov/oip/efoia-portal.html. Your appeal must be received within sixty days from the date of this letter. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Vanessa R. Brinkmann
Counsel, Initial Request Staff

Enclosures

# REPORT OF SPECIAL COUNSEL

# NICHOLAS J. BUA

# TO

# THE ATTORNEY GENERAL

# OF THE UNITED STATES

# REGARDING THE ALLEGATIONS OF INSLAW, INC.

NICHOLAS J. BUA

HELENE B. GREENWALD
JOSEPH H. HARTZLER
CHARLES D. KNIGHT
DEAN J. POLALES
DAVID S. ROSENBLOOM

March 1993

THIS DOCUMENT HAS BEEN REVISED
IN ORDER TO DELETE MATERIAL
THE DISCLOSURE OF WHICH IS
PROHIBITED PURSUANT TO
RULE 6(e) OF THE FEDERAL
RULES OF CRIMINAL PROCEDURE

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## I. INTRODUCTION

On November 7, 1991, Attorney General William Barr appointed me to serve as a Special Counsel for the purpose of investigating all allegations of wrongdoing in connection with what has come to be known as the Inslaw matter. The Attorney General requested that I conduct a complete and thorough investigation, and determine whether there had been any misconduct by any individuals, either inside or outside the Department of Justice. The Attorney General told me that my investigation should be completely independent, and assured me that he would demand complete cooperation with my investigation by all Department of Justice employees.

I selected six Assistant United States Attorneys, all with significant criminal prosecution experience, and one of my law partners, to assist me in my investigation.[1] Together, my assistants and I selected two seasoned and highly regarded Special Agents from the FBI to work as our investigators. For purposes of this investigation, the Assistant U.S. Attorneys and the FBI agents reported solely to me, and to nobody else within the Department of Justice ("DOJ").

During the past year we have devoted considerable resources to investigating the myriad allegations that have been made about the conduct of DOJ employees, and others, in connection with the

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[1]One of the Assistant United States Attorneys I originally selected resigned from my staff after he was appointed Chief of the Public Integrity Section of the Criminal Division of the Department of Justice. We agreed that resignation was appropriate in order to maintain the independence of this investigation. In addition, Thomas M. Durkin, the former First Assistant United States Attorney for the Northern District of Illinois resigned from my staff when he entered private practice in February 1993.

administration of a contract between DOJ and Inslaw. At times, this has been a daunting task. The allegations in this case seem to know no bounds. They literally range from charges of murder and international espionage to claims of simple incompetence. In investigating these allegations, we necessarily had to assign priorities to our tasks. We have for the most part completed our investigation regarding what we consider be the most serious allegations. As is described more specifically elsewhere in this report, there remain a few areas where we have not completed our investigation. Our preliminary review of these remaining areas, however, leads us to believe that it is unlikely that we will find evidence that would affect the tentative conclusions set out in this report. We are forwarding our conclusions to you now in order to allow you to determine how you wish to proceed in this matter.[2]

[2]During our investigation we subpoenaed several third party witnesses to appear before a grand jury in the Northern District of Illinois. Matters occurring before the grand jury are described in several places in this report. Pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, those matters cannot be disclosed without leave of the Chief Judge of the district court. Consequently, unless and until that authorization is obtained, we will be taking the customary precautions to preserve the confidentiality of this report and the matters discussed herein.

## II. THE HISTORY OF INSLAW'S ALLEGATIONS

Inslaw has made essentially two kinds of allegations against DOJ concerning the reasons for its contract disputes with the Department. First, Inslaw has argued that C. Madison "Brick" Brewer, the DOJ official principally in charge of the PROMIS implementation contract for the Executive Office of the United States Attorneys (EOUSA), was biased against Inslaw because Brewer had been fired by Inslaw's President several years before. Under this theory, Brewer's alleged bias was the motivating factor behind a series of contract disputes between Inslaw and DOJ. Those disputes were allegedly engineered or exploited by Brewer, and by those DOJ employees subject to his influence and control, in order to harm Inslaw and its president, William Hamilton. This is the theory Inslaw advanced in its complaint and its trial presentation in the adversary proceeding in its bankruptcy case.

In addition to the Brewer bias theory, Inslaw has also advanced a theory that DOJ's disputes with Inslaw were the result of a far wider conspiracy or conspiracies, most of which purportedly sought to appropriate Inslaw's software for the benefit of Earl Brian, a private businessman alleged to have ties to officials of the Reagan administration.

Although the two kinds of theories proposed by Inslaw are not mutually exclusive, there is some tension between the two and each theory has a somewhat different evolution. Consequently, the histories of the two theories are discussed separately in this report.

A. The Brewer Bias Theory

Brewer started his duties at the EOUSA in January 1982. The PROMIS implementation contract with Inslaw was signed in March 1982 after at least one negotiating session in which Brewer participated. Inslaw first began complaining about Brewer's alleged bias in May 1982, after a meeting in which Brewer criticized Inslaw. Inslaw maintained that Brewer was biased against the company and its President, William Hamilton, because Brewer had been "fired" as the General Counsel of Inslaw's predecessor, the Institute for Law and Social Research. Inslaw repeated the charge of Brewer's bias against the company at various times and to various people within DOJ throughout the term of the contract.

In February 1985 Inslaw filed for relief under Chapter 11 of the Bankruptcy Code. Thereafter, the parties attempted to reach a settlement of their contract disputes, and Inslaw again renewed its charges that Brewer was biased and should be removed from participation in the negotiations. Although Brewer was removed from direct participation in the negotiations, the parties were unable to reach an accord. In June 1986 Inslaw filed its adversary complaint against DOJ. In its complaint, Inslaw charged, and Bankruptcy Judge Bason subsequently found, that DOJ, infected by Brewer's bias and hatred of Inslaw, obtained Inslaw's proprietary PROMIS software by the use of "fraud, trickery and deceit." Inslaw argued that Brewer was permitted to wage his personal vendetta against Inslaw by Deputy Attorney General D. Lowell Jensen. Inslaw

alleged that because of his personal involvement in the development of competing computer software, Jensen disliked PROMIS and was hostile toward Inslaw.

In February 1987, in its so-called request for "independent handling," Inslaw again charged that Brewer was biased against Inslaw, and suggested that his bias had hampered the efforts of Inslaw to settle its claims against DOJ.[3] Although an extensive hearing was held on the "independent handling" application, no substantial evidence was presented at that time about Brewer's alleged bias against the company. Nor was Brewer called as a witness at the hearing. Nevertheless, at the conclusion of the hearing, and immediately before commencing the hearing on the adversary complaint, Bankruptcy Judge Bason issued his oral findings and conclusions on the "independent handling" matter. In his findings, Bankruptcy Judge Bason stated that he believed Brewer had obtained a commitment from the Executive Office of United States Trustees to have the Inslaw case converted from a Chapter 11 reorganization to a Chapter 7 liquidation. In explaining his reasons for believing that a conspiracy to convert the case existed, Bankruptcy Judge Bason explained:

> The picture becomes even more clear if we go on the supposition, as alleged by INSLAW, and as is the subject of--or one of the issues

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[3]In its "independent handling" petition, Inslaw requested that the court establish "a means whereby the Justice Department will conduct [the Inslaw] Adversary Proceeding . . . completely and entirely independent of any Department of Justice officials involved in the allegations made in said Adversary Proceeding." The independent handling proceedings are discussed in greater detail in Part IX of this report.

> involved in a separate adversary proceeding, Inslaw against DOJ. If we go on the supposition that it was not simply the interests of DOJ as an institution that motivated Mr. Brewer and perhaps others in the Department of Justice, but, instead, there was a personal vendetta against INSLAW, when someone is engaged in a personal vendetta, then obviously, that person would desire to put the company out of business rather than desire to preserve them as a going concern.

When he announced his findings after the trial of Inslaw's adversary proceeding, Bankruptcy Judge Bason, this time after having the opportunity to see Brewer on the stand, reached essentially the same conclusion about the cause of the Inslaw-DOJ disputes. According to the Bankruptcy Court's findings, Brewer devised and implemented a strategy to ruin Inslaw because of his intense hatred of Inslaw. The Bankruptcy Judge found that Brewer's bias affected not only his own conduct, but also the conduct of other DOJ personnel with day to day responsibility for the Inslaw contract. He said that DOJ's Contracting Officer and the EOUSA Assistant Director for Information Systems "were infected by Brewer's poisonous attitude towards Hamilton and Inslaw, and they aided and assisted Brewer in his wrongful efforts to injure Inslaw." Bankruptcy Judge Bason also concluded that D. Lowell Jensen's biased attitude toward Inslaw contributed to the situation in which Inslaw's complaints about Brewer and the administration of the PROMIS implementation contract went unheeded.

B. **The Conspiracy Allegations**

In early 1988, after Bankruptcy Judge Bason announced his findings and conclusions in Inslaw's adversary proceeding, Inslaw

advanced a new theory about the origins of its disputes with DOJ. Under this new theory, Inslaw's difficulties with DOJ were the result of a high level conspiracy to "steal" PROMIS for the benefit of Earl Brian. Although there were a number of subplots and elements to this theory, it was well summarized by Inslaw in a pleading it subsequently filed with the United States District Court for the District of Columbia which described "a conspiracy among friends of Attorney General Meese to take advantage of their relationship with him for the purpose of obtaining a lucrative contract for the automation of the Department's litigating divisions":

> The combination of high-level hostility and lower-level vindictiveness does not sufficiently account for the persistence and tenacity of the attempts to wrest control of PROMIS from INSLAW. These began with DOJ's refusal to recognize INSLAW's ownership of enhanced PROMIS. Then came an offer from Hadron, Inc., a software company controlled by a long-time friend of Edwin Meese, to buy INSLAW. When Hamilton refused the offer, the chairman of Hadron said, "We have ways of making you sell." Soon thereafter a New York-based venture capital firm, following a meeting with a businessman who claimed to have access to the highest levels of the Reagan administration, tried to induce the Hamiltons to turn over to the firm their voting rights in INSLAW's common stock. When the contract disputes forced INSLAW to seek the protection of Chapter 11, Stanton attempted to push INSLAW into liquidation. After this failed, DOJ officials encouraged a Pennsylvania-based computer services company to launch a hostile takeover bid for INSLAW.

In September 1989 the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate, which had investigated many of Inslaw's conspiracy

allegations, issued a Staff Study. Briefly, the Staff Study found no proof that Attorney General Meese, Deputy Attorney General Jensen, or other Justice Department officials were involved in a conspiracy to ruin Inslaw or to steal the PROMIS software. Similarly, the Staff found no proof that Earl Brian or any company in which he had an interest was involved in a conspiracy to take over Inslaw. The Staff Study also found no proof that Inslaw's problems were related in any way to the DOJ "Project Eagle" procurement.

Following the release of the Senate's Staff Study in September 1989 (and the almost simultaneous decision of the Court of Appeals for the District of Columbia Circuit to deny Inslaw's request for appointment of independent counsel), Inslaw petitioned the District Court for the District of Columbia for a writ of mandamus to compel DOJ to conduct a criminal investigation of its allegations. The district court denied the petition in September 1990.

Soon after the denial of its petition, Inslaw returned to court seeking to reopen discovery in the bankruptcy proceedings in order to investigate whether DOJ had violated the Bankruptcy Court's injunction prohibiting DOJ from distributing Inslaw's enhanced version of the PROMIS software. In a series of papers filed to persuade the court to reopen discovery, Inslaw began to advance allegations of a broader conspiracy involving Earl Brian's alleged distribution of the proprietary PROMIS software. In general, these allegations involved not just the unlawful appropriation of Inslaw's enhanced PROMIS by DOJ for its own

internal uses or as part of an unsuccessful plot to benefit Earl Brian, but the actual distribution of enhanced PROMIS to other government agencies and internationally.

For example, Inslaw cited an article quoting a man named Charles Hayes as expressing his opinion that PROMIS was then being used at more than 200 locations throughout the federal government. Inslaw also filed with the court affidavits of Ari Ben-Menashe, in which Ben-Menashe implicated Earl Brian in the international distribution of PROMIS. By 1991, apparently based upon information provided to it by Michael Riconosciuto, Inslaw appears to have adopted the claim that Earl Brian was "given" the right to sell PROMIS by the Reagan administration. Under this theory, Brian was awarded the right to sell PROMIS as a reward for his participation in a plot by which supporters of then candidate for President, Ronald Reagan, allegedly made agreements with representatives of the Iranian government to delay the release of American hostages held in Iran until after the Presidential election (the so-called "October Surprise").

Inslaw's request for additional discovery was ultimately mooted by the U.S. Court of Appeals' decision holding that the Bankruptcy Court lacked jurisdiction over Inslaw's claims against DOJ. United States v. Inslaw, Inc., 932 F.2d 1467 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 913 (1992). The allegations of a conspiracy involving the actual distribution of Inslaw's proprietary software are discussed, along with other allegations, in the September 10, 1992, Investigative Report of the U.S. House

of Representatives Committee on the Judiciary entitled "The Inslaw Affair" (hereinafter the "House Committee Report"). The House Committee Report, however, does not reach any definitive factual findings regarding these allegations. Instead, the Report, for the most part, simply reports the various allegations that Inslaw has made and concludes that additional investigation is warranted.

C. Additional Allegations

These, then, are the two major allegations made by Inslaw: a personal vendetta and plan to ruin Inslaw motivated by Brewer's intense hatred of the company, and a far-reaching, high-level conspiracy to appropriate Inslaw's software. But these are not the only allegations. Over the course of the long disputes between Inslaw and DOJ many subsidiary allegations have surfaced which we have also investigated as described in this report.

As mentioned earlier, during the course of the bankruptcy proceedings Inslaw alleged that DOJ improperly attempted to force the U.S. Trustee to convert the bankruptcy case from a reorganization to a liquidation proceeding. Inslaw also claimed that when the plot was revealed, others suborned or committed perjury to attempt to conceal DOJ's actions and DOJ fired the "whistleblower" who first disclosed the scheme. During and after the bankruptcy proceedings, Inslaw has alleged that not only did DOJ plot to steal its software, but it has also improperly used and distributed that software.

Following the oral announcement of his decision that DOJ obtained Inslaw's software by "fraud, trickery and deceit,"

Bankruptcy Judge Bason learned that he had not been reappointed to a second term on the Bankruptcy Court by the Court of Appeals for the D.C. Circuit. This led to claims by Inslaw and others that DOJ must have improperly exercised its influence to obstruct Bason's reappointment.

As noted above, the number and seriousness of Inslaw's allegations against DOJ led to two Congressional investigations, one in the Senate and the other in the House of Representatives. The propriety of DOJ's conduct in connection with the Congressional inquiries has, in turn, been questioned. It has been suggested that DOJ unduly delayed the Congressional investigations, violated conflict of interest principles in connection with its representation of DOJ employees who appeared before Congress to testify, failed to produce, and perhaps even destroyed, documents requested during those inquiries, and interfered with Congressional attempts to interview one Congressional witness who was also the subject of a federal criminal prosecution.

These are the allegations to which we devoted the bulk of our investigative efforts. It does not, however, exhaust the list of allegations against DOJ. For example, there have been suggestions by Inslaw and others of DOJ's involvement in the death of a free-lance journalist who was examining Inslaw's claims. There have been claims that DOJ improperly exerted pressure upon Inslaw's own attorneys to force them to abandon Inslaw's claims. We have not thoroughly investigated each and every one of these remaining allegations, but we have reviewed the records and prior

investigations that have been made of the allegations in order to assure ourselves that there is little likelihood that additional investigation will discover substantial evidence of criminal or other intentional misconduct by DOJ. Our discussion of these remaining allegations appears in one of the final sections of this report.

## III. SUMMARY OF OUR CONCLUSIONS

Based on all the evidence we obtained and reviewed during our investigation, we reached the following conclusions. The reasons for our conclusions are set forth in detail in later sections of this report.

There is no credible evidence to support the allegation that members of DOJ conspired with Earl Brian to obtain or distribute PROMIS software. The overwhelming weight of the evidence is that there was absolutely no connection between Earl Brian and anything related to Inslaw or PROMIS software.

There is woefully insufficient evidence to support the allegation that DOJ obtained an enhanced version of PROMIS through "fraud, trickery, and deceit," or that DOJ wrongfully distributed PROMIS within or outside of DOJ. To the contrary, we are convinced that DOJ employees undertook actions with respect to Inslaw that they genuinely believed were in the best legitimate interests of the government.

We also find that DOJ conducted itself properly after it became involved in litigation with Inslaw.

We find that there is no credible evidence that DOJ employees sought to improperly influence the selection process that resulted in the decision not to reappoint Bankruptcy Judge Bason.

We find that there is insufficient evidence to support the allegations that DOJ employees attempted to improperly influence the U.S. Trustee to convert the Inslaw bankruptcy case, or that DOJ employees committed perjury in order to hide this obstruction.

Finally, we find that there is no evidence to support the allegation that DOJ employees destroyed any documents related to Inslaw or otherwise acted improperly in order to obstruct Congressional investigations into Inslaw's allegations.

## IV. THE DEVELOPMENT OF INSLAW'S CLAIMED PROPRIETARY SOFTWARE

Most of Inslaw's allegations of wrongdoing focus on alleged attempts to steal its property, specifically, an enhanced version of PROMIS software to which Inslaw claims ownership. It is undisputed that certain versions of PROMIS are in the public domain. Inslaw has consistently asserted, however, that it maintains proprietary rights in the enhanced version of PROMIS it developed after it became a for-profit enterprise. Because one of the central areas of disagreement between DOJ and Inslaw throughout this dispute has been whether, and to what extent, the software delivered under the 1982 implementation contract was proprietary to Inslaw, any analysis of the allegations of wrongdoing must begin with an understanding of the history of the PROMIS software, and of the circumstances surrounding the delivery of a claimed proprietary version to DOJ during the 1982 implementation contract.

Our discussion here of the factual background of the 1982 contract does not purport to be exhaustive. Instead, we have attempted to focus on those facts that are relevant to the conclusions we have reached. Where it is necessary to explain specific findings or conclusions, we have undertaken a more detailed examination of certain events in subsequent sections of this report.

### A. History of Inslaw

In 1973 William Hamilton and Dean Merrill formed the Institute For Law And Social Research ("the Institute") as a not-for-profit entity. Among the activities of the Institute was the development

of database management computer software to be used in automating law enforcement offices. The software tool the Institute developed for prosecutors' offices was called PROMIS, an acronym for Prosecutor's Management Information System. PROMIS is a computer based software tool designed to run on mainframe and mini-computers.[4] Between 1973 and 1979 PROMIS was used primarily by state and local prosecutors, and the Superior Court division of the United States Attorney's office for the District of Columbia. This original version of PROMIS is sometimes referred to as "Old PROMIS."

The Institute developed Old PROMIS with funding provided through contracts and grants from the Law Enforcement Assistance Administration ("LEAA"). Because of certain data rights clauses contained in the Institute's LEAA grants and contracts, Inslaw and DOJ agree that Old PROMIS is in the public domain, and that neither the Institute nor its successor, Inslaw, maintains any exclusive rights to that product.

In 1979 the Institute entered into two contracts with the government that are relevant to this dispute. The first, with the LEAA, was a three year "cost-plus" contract that called for the Institute to create certain upgrades and enhancements to Old PROMIS. When the LEAA was eliminated in 1981, the final year of this contract was transferred to DOJ's Bureau of Justice Statistics ("BJS"). Under the LEAA contract that was transferred to BJS, the

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[4]A mini-computer is a scaled-down version of a mainframe computer, and should not be confused with the much smaller personal computers that became abundant in the 1980's.

Institute continued to develop five specific enhancements to Old PROMIS.[5] These enhancements have been referred to throughout the Inslaw litigation as the five BJS enhancements.

The second 1979 contract was between the Institute and the EOUSA. This contract, usually referred to as the "Pilot Project," was designed to determine the feasibility of using PROMIS as a locally based case management program in United States Attorneys' offices throughout the United States. The Pilot Project called for the Institute to: (1) modify and install a modified version of Old PROMIS[6] in two large United States Attorneys offices (the Southern District of California, and the District of New Jersey), and (2) to develop and install a PROMIS-like software program on word processing equipment in two smaller offices (the Districts of West Virginia and Vermont).

As with Old PROMIS, Inslaw does not dispute that the Pilot Project version of PROMIS and the five BJS enhancements were created with public funding and are therefore in the public domain.[7]

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[5]As a matter of DOJ internal accounting, approximately $500,000 used to fund the contract after it was transferred to BJS came out of the budget of the Executive Office of United States Attorneys ("EOUSA"). This internal cost accounting does not affect the claim of EOUSA to any of the versions of PROMIS, old or enhanced.

[6]The most significant change made in the Pilot Project version of PROMIS was the addition of debt collection and other tracking capabilities designed to improve case management in the civil divisions of the United States Attorneys' offices.

[7]Prior to the 1982 contract award, Inslaw had tried to claim that it owned all versions of PROMIS, and that the government only (continued...)

In response to the announced liquidation of the LEAA, William Hamilton decided to form a private enterprise to support existing PROMIS users and to market new enhanced versions of PROMIS. Before engaging in this enterprise, Hamilton notified DOJ of his intentions, and DOJ expressed no objections to Hamilton's plans. In January 1981 Hamilton organized Inslaw as a for-profit corporation, and caused Inslaw to purchase the assets of the Institute. While Inslaw continued to receive certain funding from the federal government during the period of 1981-1982, it also began attracting private sources of both income and equity funding. During this same period, Inslaw continued working on various changes and improvements to the PROMIS software.

B. Negotiation of the 1982 Implementation Contract

After reviewing the results of the Pilot Project, DOJ decided to implement locally based case management systems in the United States Attorneys offices throughout the country. Toward that end, on November 2, 1981, DOJ issued a Request For Proposals (RFP), which solicited technical proposals on a contract to: (1) implement computer based PROMIS software in 20 "larger" United States Attorneys' offices, and (2) create and install word processing based case management software in the remaining offices. There appears to be no dispute that (as to the computer based programs) the RFP, and the resulting contract, required the installation only

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[7](...continued)
had a "non-exclusive plenary license for their use." Inslaw later abandoned this position, and conceded during the bankruptcy litigation that Old PROMIS, the Pilot Project version, and the five BJS enhancements were in the public domain.

of a functional version of the Pilot Project PROMIS plus the five BJS enhancements.

Inslaw responded to the RFP in early December 1981. In its initial response Inslaw notified DOJ that it intended to improve the original PROMIS software and to create enhancements beyond those contained in the version called for in the RFP. Specifically, Inslaw stated:

> During the life of this project -- but not as part of this project -- Inslaw plans new enhancements and modifications to the basic PROMIS software and to the original version of PROMIS for U.S. Attorneys.
>
> . . . .[I]mprovements funded by other [i.e. non-governmental] sources and developed and accepted for inclusion in the software supported by Inslaw, will be made available to the U.S. Attorneys' offices.

Neither in that proposal, nor in later pre-contract submissions or negotiations, did Inslaw clarify specifically what it meant by "accepted for inclusion" or "will be made available."

During the pre-award negotiations DOJ and Inslaw representatives specifically discussed the issue of the parties' respective rights in the software to be delivered under the contract. The original draft of the contract contained two data rights clauses: Article XII and Clause 74. Clause 74 of the contract gave the government unlimited rights in any technical data and computer software delivered under the contract.[8] Article XII,

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[8]A portion of that clause also contained a provision for giving the government limited rights in any specifically identified items. But no such items were identified in Clause 74. Instead, when the contract was signed DOJ's contracting officer inserted "N/A," for not applicable, in that portion of the clause.

on the other hand, purported to take the additional step of restricting Inslaw's right to market any products containing the software delivered under the contract.[9] Clause XII was removed when Inslaw expressed concerns that it would hinder Inslaw's ability to market its enhanced PROMIS products to other users.

While the negotiations with Inslaw were ongoing, DOJ hired C. Madison "Brick" Brewer to be the Project Manager overseeing the installation of PROMIS in United States Attorneys' offices. Brewer, who a number of years earlier had been General Counsel to the Institute, began working at EOUSA in late January 1982. He attended only one or two negotiating sessions prior to the signing of the contract.[10]

The final contract was signed on March 12, 1982. The contract, a cost-plus contract that also contained a fee provision, called for Inslaw to implement computer based PROMIS in 20 large United States Attorneys' offices, and to develop and implement PROMIS-like word processing based case management software in 74 smaller offices. Under the contract, DOJ retained an option to request the installation of PROMIS in 10 additional offices. The version of PROMIS required under the contract -- and therefore the only version to which DOJ could claim unlimited rights by virtue of

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[9]Specifically, Article XII provided, "[t]he contractor shall neither retain nor reproduce for private or commercial use any materials furnished or produced under the contract."

[10]We discuss the details of Brewer's hiring and performance elsewhere in this report.

the contract -- was a functional version of the Pilot Project PROMIS plus the five BJS enhancements.

C. Early Proprietary Rights Disputes

It was less than a month after the execution of the contract that Inslaw and DOJ had their first disagreement over the respective property rights of the parties. In early April 1982 Roderick Hills, one of Inslaw's outside lawyers, wrote to Associate Deputy Attorney General Stanley Morris regarding Inslaw's plans to market PROMIS privately. Hills' purpose in writing the letter was to obtain a "sign-off" from DOJ, so that Inslaw and its associates could have some assurance that DOJ would not attempt to hinder Inslaw's efforts to market proprietary software. Attached to Hills' letter was an April 1, 1982, memorandum that had been written by William Hamilton. The Hamilton memorandum indicated that Inslaw planned to market a product called PROMIS 82, over which it was asserting proprietary rights. In the memorandum Hamilton asserted that Inslaw's federal funding ended in May 1981, and that therefore improvements made by Inslaw to PROMIS after that date were proprietary to it.

On April 19, 1982, representatives of Inslaw and DOJ met and discussed Inslaw's plans as reflected in the Hamilton memorandum. DOJ's project manager, Brewer, made clear at the meeting that he took issue with the representations and conclusions set forth in the Hamilton memorandum, which he referred to as "scurrilous." Most of the people at that meeting agree that Brewer "got hot," and was adamant in his opposition to the positions taken in the

memorandum. Indeed, in an internal Inslaw memorandum created shortly after the meeting, the Inslaw representatives who were present at that meeting speculated that the force of Brewer's statements reflected an "obvious dislike of Bill Hamilton and a resentment for the success of Inslaw personified in him." Shortly thereafter, Inslaw representatives complained to Associate Deputy Attorney General Morris that Brewer was biased, and ascribed this bias to the fact that Brewer had been "asked to leave" his previous position as General Counsel at the Institute. As a result of this complaint, Morris instructed EOUSA deputy director Lawrence McWhorter that Brewer should no longer "take the point outside the Department" regarding DOJ's dealings with Inslaw on the data rights issue.

At least some of the positions taken by Brewer at the April 19 meeting, as opposed to the manner in which they were presented, appear to us to have been well founded. For example, Brewer argued that to the extent the memorandum claimed that all software developed after May 1981 was proprietary to Inslaw the memorandum was incorrect, in that the five BJS enhancements were in the public domain, even though they still had not been delivered by Inslaw as of April 1982. That was true, and Inslaw does not now dispute it. Similarly, the memorandum was incorrect to the extent that it suggested that Inslaw had received no federal funding after May

1981. The $500,000 under the BJS contract was but one example of federal monies received by Inslaw during that period.[11]

Ultimately, Inslaw and DOJ were able to come to a resolution that satisfied Inslaw's need for a sign-off and DOJ's need for assurance that Inslaw's marketing efforts would not diminish its rights under various contracts. In a series of letters and phone calls during late spring of 1982, Inslaw's lawyers assured DOJ personnel that Inslaw's marketing of PROMIS 82 would have no effect on the performance of the EOUSA contract or on the software to which the government was entitled. As to whether PROMIS 82 was in fact proprietary to Inslaw, Hills assured Morris in a letter of May 24, 1982, that PROMIS 82 contained "enhancements undertaken by Inslaw at private expense after the cessation of LEAA funding." Based on this representation, Morris responded to Inslaw in an August 11, 1982, letter, stating "[t]o the extent that any other enhancements to [PROMIS 82] were privately funded by Inslaw and not specified to be delivered to the Department of Justice under any contract or other arrangement, Inslaw may assert whatever proprietary rights it may have." This letter provided Inslaw the assurances it desired, and the data rights issue did not arise again until DOJ requested a copy of the software.

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[11]We found documentation indicating that after May 1981 Inslaw executed two modifications to the BJS contract alone, in July and October 1981, which resulted in $650,000 being allocated to the development of PROMIS modifications. In addition, we have been led to believe that during 1981 Inslaw was receiving funds from contracts with DOJ's Lands Division and with the District of Columbia United States Attorney's Office.

D. The Advance Payments Dispute

Under the 1982 EOUSA contract Inslaw was entitled to receive what have been referred to as "advance payments." This name is somewhat misleading. The so-called advance payments clause of the contract only permitted Inslaw to draw against a special bank account after receiving approval from the government's contracting officer. In practice, the government contracting officer's approval was forthcoming only after work had been completed and invoiced by Inslaw. This mechanism allowed Inslaw to receive payment in advance of the waiting period usually necessary to process an invoice, but not in advance of the completion of the work.

Advance payment clauses are unusual in government contracts.[12] They are approved only when there is evidence that the financial condition of the contractor is such that it will not be able to bear the burden of self-financing its receivables from the government. In order to qualify for the advance payments clause in the EOUSA contract Inslaw had to make a number of representations about its financial resources, including a representation that it was not reasonably capable of obtaining financing from banks or other traditional commercial sources.

The EOUSA contract also contained a contract provision that prohibited Inslaw from pledging or assigning its rights under the contract. On November 1, 1982, Inslaw informed DOJ that it had

[12]In fact, it appears that Inslaw was the only DOJ contractor that had such a clause at that time.

violated this provision by assigning its government invoices as collateral for a line of credit at the Bank of Bethesda. Upon receiving this notice, DOJ asked Inslaw to provide further information concerning Inslaw's line of credit at the Bank of Bethesda. The documentation supplied by Inslaw showed that the line of credit had been established at the bank in April of 1982, less than one month after the contract was executed.

On January 26, 1983, the contracting officer, Peter Videnieks, wrote Inslaw a letter confirming that DOJ considered the Bank of Bethesda line of credit to be a violation of the contract. Videnieks' letter stated that DOJ intended to terminate the advance payments provision of the contract pursuant to the default provisions of the agreement. While conceding for the most part that the line of credit was a "technical violation" of the contract, Inslaw adamantly opposed termination of the advance payments. Inslaw insisted that the government was not at financial risk as a result of the violation and emphasized that the loss of the advance payments could greatly disrupt Inslaw's business, a consequence that could only have negative ramifications for the EOUSA contract. This dispute over advance payments was not resolved until April of 1983, when Inslaw and DOJ executed Modification 12 to the EOUSA contract.

E. **The Events Leading Up To Modification 12**

During November 1982, at around the same time that DOJ first learned of Inslaw's borrowing from the Bank of Bethesda, Videnieks received additional information concerning Inslaw's financial

situation. Robert Whitely, DOJ's auditor on the Inslaw contract, told Videnieks that based on his review of Inslaw's financial statements and on his discussions with Inslaw's accountants, he felt that Inslaw was insolvent. Also, Videnieks himself was told by Inslaw's comptroller that Inslaw had missed at least one payroll. In addition, Videnieks and other DOJ personnel had concluded that Inslaw's cash flow was very tight, based on their having observed Inslaw personnel "hand-walk" advance payments checks through DOJ for signature, instead of simply relying on the mails.

As he received information about Inslaw's financial condition, Videnieks was aware that an Inslaw failure at that time would leave DOJ without any copies of the version of PROMIS called for in the contract. The problem was that as of November 1982 DOJ had not yet received any copies of the software Inslaw was to deliver under the contract. Because DOJ had not yet obtained the computer hardware on which PROMIS was to be installed in the various offices, Inslaw was providing PROMIS to the designated United States Attorneys offices on a time sharing arrangement from a VAX computer in Virginia. These United States Attorneys offices could access Inslaw's time sharing computer on remote terminals through telecommunications facilities, and thus use PROMIS in that way until DOJ's computers were installed on-site.

It was against this background, that on November 19, 1982, DOJ sent Inslaw a formal request for a copy of the software being used to perform the contract. The request stated:

> Pursuant to Article XXX[13] of the subject contract the Government requests that you provide immediately all computer programs and supporting documentation developed for or relating to this contract.

Inslaw responded to this letter on November 30. Inslaw noted that the request was technically deficient (in that the contract required that such a request be made by the contracting officer), but also stated that it would "proceed to produce the programs and documents requested" if a proper request was made. On December 6, 1982, Videnieks sent a formal request under Article XXX, requesting the production of all the PROMIS programs and documentation being provided under the contract.

The next significant discussion between DOJ and Inslaw concerning the request for software was on February 4, 1983.[14] The primary focus of the meeting was the advance payments dispute. Toward the end of that meeting, the subject of the government's

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[13]Article XXX permitted the government to request these materials at any time during the life of the contract.

[14]Inslaw had sent a letter to DOJ on February 2, notifying DOJ that it was claiming that the time-sharing version of PROMIS contained proprietary enhancements. The letter read, in part:

> In producing these tapes, Inslaw and the Department of Justice will have to reach an agreement on the inclusion or exclusion of certain proprietary features which Inslaw has been making available to U.S. Attorneys offices that utilize its time sharing service. These features are normally included only on tapes produced pursuant to license agreements.

This letter did not reach DOJ prior to the February 4 meeting.

request for a copy of the contract software was raised.[15] William Hamilton and others from Inslaw told the DOJ personnel in attendance that the VAX (i.e., the time sharing) version of PROMIS that was being used under the contract by the United States Attorneys' offices contained certain proprietary enhancements to which the EOUSA was not entitled. Hamilton said that Inslaw therefore could not provide those enhancements to DOJ unless DOJ agreed to limit dissemination of the software.

This was the first time that Inslaw had notified DOJ that any proprietary enhancements were in the time-sharing version of PROMIS being used by the U.S. Attorneys' offices.[16] The DOJ personnel stressed that they were entitled under the contract to a version of PROMIS in which the government had unlimited rights, and asked Inslaw to provide additional information about the enhancements it was claiming as proprietary. Inslaw agreed to provide the information. In addition, Hamilton made statements indicating that it would be very difficult to remove the enhancements from the time sharing version of PROMIS, but said that Inslaw would be willing to

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[15]It appears that from at least this point on, DOJ collapsed the negotiations of the advance payment dispute into the negotiations of the software request and the proprietary rights issue.

[16]Videnieks confirmed this fact in a March 8, 1983, letter to Inslaw's government contracts lawyer, Harvey Sherzer, in which he specifically asked Sherzer to identify any DOJ personnel to whom notice was given prior to February 4, 1983, that there were proprietary enhancements contained in the VAX version of PROMIS. Inslaw never responded to the letter, or in any other way identified any government representative it claimed had notice that Inslaw was providing DOJ access to a version of PROMIS other than the version called for in the contract.

provide the proprietary enhancements to DOJ without additional charge if DOJ would limit their dissemination.[17] DOJ took the position that it was not seeking to obtain any enhancements for free, but stressed that it was entitled under the contract to a version in which it had unlimited rights. In his March 8, 1983, letter to Sherzer, Videnieks reaffirmed DOJ's view that the contract called for Inslaw to produce software in which the government had unlimited rights, and that delivery of a version containing restrictions would not satisfy Inslaw's obligations under the contract.

On March 9, 1983, Sherzer wrote to Videnieks concerning the proprietary rights issues. Sherzer did not dispute that DOJ was entitled under the contract to software in which it had unlimited rights. Instead, the letter explained that in performing the contract through a time sharing computer Inslaw had been using a version of PROMIS that contained proprietary enhancements to which DOJ was not entitled. Sherzer said that Inslaw was prepared to provide a copy of the contract version of PROMIS, but suggested that it would be in the government's interest to obtain the "latest version" of PROMIS, which was then being provided under time

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[17]From what we have been able to determine at this point, the expense involved in producing an "unenhanced" version of PROMIS resulted from the fact that Inslaw did not maintain a version of PROMIS that contained only the U.S. Attorneys' offices enhancements, i.e., the Pilot Project version plus the five BJS enhancements. Instead, Inslaw maintained only one VAX version of PROMIS, which contained both public domain and claimed proprietary software. Thus, to produce a "stripped down" version of PROMIS in which DOJ had unlimited rights would have required Inslaw to manually back each enhancement out of each module of the program.

sharing. Sherzer again said that Inslaw would supply those enhancements at no additional cost if the government would agree "not to disseminate this enhanced and proprietary version of Inslaw software beyond those offices already covered by the present contract, i.e., the Executive Office and the 94 U.S. Attorney's Offices."

While DOJ was considering Inslaw's limited dissemination proposal, Sherzer sent a letter proposing an escrow arrangement to resolve the proprietary rights dispute. Under this proposal, Inslaw would provide a copy of the software to an escrow, who would then be instructed to deliver the software to DOJ in the event of Inslaw's financial demise.

Inslaw's escrow proposal caused internal debate at DOJ. Brewer and Videnieks were opposed to the idea. Videnieks, in particular, was opposed to any escrows, agreements, or modifications. His view was that Inslaw was required to provide DOJ with functional software in which the government had unlimited rights, and that it should be left to Inslaw to decide how it wanted to satisfy that obligation. Ultimately, a middle ground prevailed within DOJ. Instead of an escrow arrangement, DOJ would propose a contract modification whereby the parties would mutually agree on a method for resolving the proprietary rights dispute.

On March 18, 1983, Videnieks wrote a letter to Sherzer proposing a contract modification in place of the escrow solution. Videnieks outlined his alternative solution as follows:

> In lieu of the proposed escrow agreement which the department currently has under review, the

> Government offers to agree that it will not disseminate or disclose the PROMIS software requested in the Contracting Officer's letter of December 6, 1982 beyond the Executive Office for United States Attorney and the 94 United States Attorneys' Offices covered by the subject contract, until the data rights of the parties to the contract are resolved. We will do this in exchange for receipt of copies of all materials requested in the Contracting Officer's December 6 letter. The Government's agreement not to disseminate or disclose the PROMIS software pending resolution of the issues does not change the government's rights under the contract.

Videnieks' letter went on to describe the proposed format for resolving the data rights dispute. Under Videnieks' proposal, Inslaw was to identify its claimed proprietary enhancements and to demonstrate that those enhancements were developed at private expense and outside the scope of any government contract. DOJ would then:

> review the effect of any enhancements which are determined to be proprietary, and then either direct Inslaw to delete those enhancements from the versions of PROMIS to be delivered under the contract or negotiate with Inslaw regarding the inclusion of those enhancements in that software. The Government would then either destroy or return the "enhanced" versions of PROMIS in exchange for the Government software including only those enhancements that should be included in the software.

In the letter Videnieks acknowledged the importance of the data rights issue, and noted that it needed to be resolved "as soon as possible, but no later than the first PROMIS installation on Government Furnished Equipment."

Sherzer and Inslaw found DOJ's alternative proposal acceptable, and on March 23 Sherzer sent Videnieks a draft contract

modification consistent with Videnieks' March 18 letter. On April 11, 1983, Inslaw and DOJ executed Modification 12 to the contract. The text of Modification 12 stated that:

> The purpose of this Supplemental Agreement is to effect delivery to the Government of VAX-Specific PROMIS computer programs and documentation requested by the Government on December 6, 1982, pursuant to Article XXX--Data Requirements, and to at this time resolve issues concerning advance payments to the Contractor.

The modification went on to list the software to be delivered by Inslaw. As to DOJ's obligation, the modification said:

> The Government shall limit and restrict the dissemination of the said PROMIS computer software to the Executive Office for United States Attorneys, and to the 94 United States Attorneys' Offices covered by the Contract, and, under no circumstances shall the Government permit dissemination of such software beyond these designated offices pending resolution of the issues extant between the Contractor and the Government under the terms and conditions of Contract No. JVUSA-82-C-0074;

Pursuant to its obligation under Modification 12, Inslaw produced a copy of the VAX version of PROMIS on April 20, 1983.

F. <u>Inslaw's Efforts to Identify the Proprietary Enhancements</u>

Prior to the execution of Modification 12 Inslaw had not specifically identified the proprietary enhancements that it claimed were contained within the VAX version of PROMIS. Pursuant to the resolution procedure outlined in Videnieks' March 18 letter, and formalized in Modification 12, Inslaw made its first effort to identify the proprietary enhancements in an April 5, 1983, letter to Videnieks. On April 12 Inslaw supplemented its April 5 letter

in response to Videnieks' request for a clarification. These submissions described various changes Inslaw had made to PROMIS, and set forth Inslaw's "estimate" of what percentage of those changes were privately funded. Inslaw's submission did not include any primary materials, such as time sheets or change records.

Videnieks notified Inslaw by letter on April 21 that its April 5 and 12 submissions were inadequate.[18] Videnieks told Inslaw that as to each enhancement it "must provide all information necessary to demonstrate that the change was developed both at private expense and outside the scope of Inslaw's performance of any government contract."

Inslaw submitted a methodology that it thought addressed Videnieks' concerns in a May 4, 1983, letter from Sherzer to Videnieks. In that letter Sherzer noted that Inslaw's proposed methodology would require considerable effort on its part to retrieve various historical financial and technical documents. Sherzer therefore sought assurances from DOJ prior to undertaking such an effort that DOJ would accept the proposed methodology. Sherzer specifically asked DOJ in his letter to either accept the proposed methodology or to suggest whatever changes DOJ felt was necessary.

Videnieks' response to Sherzer's letter did not come for over a month. During that period Videnieks asked Rugh to evaluate the

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[18]Although Videnieks was nominally the person dealing with Inslaw on this issue, he was relying almost completely on Jack Rugh, Brewer's deputy, and the contracting officer's Technical Representative, Mike Snyder, to evaluate Inslaw's technical proposals.

methodology. Rugh told Videnieks it was unacceptable. Videnieks and Rugh then considered a number of potential responses, one of which was to propose an acceptable methodology. In the end, Videnieks and Rugh decided simply to reject Inslaw's proposed methodology and say nothing more. In a June 10, 1983, letter to Sherzer, Videnieks notified Inslaw that the proposed methodology was unacceptable. As to Sherzer's request that DOJ either approve the methodology or suggest revisions, the letter stated simply that "[t]he Government is in a position to do neither." The letter said it was Inslaw's burden to prove the existence of proprietary enhancements, and that if Inslaw did not do so by July 11, 1983, DOJ would be "forced to conclude that all 251 changes/enhancements . . . are to be delivered to the government for its unrestricted use."

Sherzer wrote an additional letter on July 21, 1983, stating that Inslaw was preparing to submit further documentation and information regarding the enhancements in early September. That approach was also rebuffed by Videnieks, and Inslaw submitted no other documentation regarding its claimed proprietary enhancements to DOJ during the life of the contract.

In August of 1983 Inslaw began the first installation of PROMIS on one of the government furnished Prime computers. In order to be able to run PROMIS on the Prime computers Inslaw ported the VAX version of PROMIS, which contained the alleged enhancements. Inslaw could have ported the Prime version of PROMIS from the Pilot Project version of PROMIS (that contained no

allegedly proprietary enhancements), but, according to trial testimony, chose to complete the port from the VAX version because it was easier and less expensive for Inslaw. Inslaw continued to install this same version in the other 19 designated U.S. Attorneys' offices. As far as we can tell, there were no specific discussions between Inslaw and DOJ about what version of PROMIS should be installed on the Prime computers.

Inslaw filed for protection under Chapter 11 of the bankruptcy laws in February 1985. The PROMIS implementation contract expired in March 1985. After the contract with Inslaw expired, DOJ self-installed the Prime version of PROMIS that had been supplied by Inslaw in at least 23 additional United States Attorneys' offices. Inslaw claims that it first learned of these self-installations in September 1985. Inslaw then wrote to DOJ, complaining that any use of the allegedly enhanced PROMIS beyond the 20 sites at which Inslaw installed PROMIS was a violation of Modification 12. Shortly thereafter Inslaw presented to DOJ a claim for $2.9 million dollars, which Inslaw characterized as the license fees owing from DOJ's unlawful use of the software. DOJ denied this claim. Inslaw did not appeal this denial of the license fees to the Contract Appeals Board. Instead, it filed an adversary proceeding in its bankruptcy case, claiming that DOJ's unauthorized use of the software, as well as certain other conduct by DOJ, violated the automatic stay provisions of the Bankruptcy Code. In July 1987 Bankruptcy Judge Bason held a two week trial on the liability phase of Inslaw's claims. Judge Bason ruled in favor of Inslaw, finding

that DOJ fraudulently converted Inslaw's software, and ultimately ordered DOJ to pay damages of approximately $6.8 million.

G. The Effect of The Bankruptcy Court's Findings

In investigating the various allegations made by Inslaw, we have given consideration to the findings and conclusions of Bankruptcy Judge Bason in the adversary proceeding. In re INSLAW, 83 B.R. 89 (Bankr. Ct. D.D.C. 1988). The judgment entered on those findings was affirmed by the district court, 113 B.R. 802,[19] but ultimately reversed on jurisdictional grounds by the Court of Appeals for the D.C. Circuit, United States v. INSLAW, 932 F.2d 1467 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 913 (1992). The Court of Appeals held that the automatic stay of the Bankruptcy Code did not reach the use of property in a party's possession under a claim of right at the time the bankruptcy was filed. Accordingly, the appellate court held:

> As the bankruptcy court had no jurisdiction to hear the claims asserted under [the Bankruptcy Code], we reverse the district court and remand the case with directions to vacate all orders concerning the Department's alleged violations of the automatic stay and to dismiss INSLAW's complaint against the Department.

The question of the weight to be given Bankruptcy Judge Bason's findings has been a subject of some controversy. The two

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[19]Contrary to the impression created by the Investigative Report of the House Committee on the Judiciary, the District Court did not review the evidence de novo and adopt as its own the findings made by the Bankruptcy Court. Instead, the district court reviewed the Bankruptcy Court's findings of fact under the familiar "clearly erroneous" standard. 113 B.R. at 814 (citing Bankruptcy Rule 8013).

Congressional committees that have investigated Inslaw's allegations have accorded Bankruptcy Judge Bason's findings different weight.

While Bankruptcy Judge Bason's findings were still subject to appeal, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs issued a Staff Study investigating the Department's treatment of Inslaw. In general, the Subcommittee did not attempt to reexamine Bankruptcy Judge Bason's rulings and "treated the Court's findings and conclusions as valid judicial decisions unless and until overturned within the judicial system." The Staff Study makes clear, however, that the Subcommittee felt free to reexamine the Bankruptcy Court's findings when it believed necessary.

Although issued more than a year after the D.C. Circuit Court of Appeals' reversal of Bankruptcy Judge Bason's judgment, the House Committee on the Judiciary took a different approach. The House Committee Report seems to accept as conclusively true all of the findings and conclusions of Bankruptcy Judge Bason. Indeed, the Committee Report criticizes DOJ for taking the "spurious position" in litigation pending between DOJ and Inslaw before the Department of Transportation Board of Contract Appeals ("DOTBCA")[20] that it was not bound by those findings. On August 27, 1992, however, DOTBCA had issued an opinion that agreed with DOJ's position that Bankruptcy Judge Bason's findings were a "nullity."

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[20]The contract disputes between the parties were presented to DOTBCA pursuant to the provisions of the Contract Disputes Act because DOJ has not established its own board.

As DOTBCA noted, the Court of Appeals' reversal rendered the Bankruptcy Court's findings without any binding effect. A vacated judgment has no preclusive effect either as a matter of collateral or direct estoppel or as a matter of the law of the case. Indeed, in any subsequent litigation between Inslaw and DOJ in all likelihood Bankruptcy Judge Bason's findings would not even be admissible in evidence, much less binding upon DOJ.

This is not to denigrate the seriousness of the charges made by Inslaw or the effort made by Bankruptcy Judge Bason in preparing his findings. We have considered the Bankruptcy Court's findings, but we have not regarded our inquiry as confined by those findings and conclusions. Instead we have considered those findings in the light of the evidence, produced at trial or otherwise, and made our own assessment of the weight of the evidence, including the credibility of the witnesses we interviewed.

As is apparent elsewhere in this report, we disagree with Bankruptcy Judge Bason's assessment of the evidence in several important respects. Unlike Bankruptcy Judge Bason, we are unwilling to make blanket adverse assessments about the credibility of virtually every witness associated with DOJ. Nor do we universally credit all Inslaw's witnesses as unfailingly accurate, truthful, and unbiased. Consequently, particularly with respect to our assessments of the motivation, purpose, and basis for the DOJ's handling of the contract with Inslaw, we have reached conclusions that are in many instances different from those reached by Bankruptcy Judge Bason.

## V. THE ALLEGATION OF A CONSPIRACY TO STEAL PROMIS

Perhaps the most serious allegation made by Inslaw is that high-level DOJ employees, including Attorney General Meese, conspired with Earl Brian to steal Inslaw's software and to destroy Inslaw. The purpose of this alleged conspiracy was to bring financial benefit to a company called Hadron, Inc., in which Brian had both a direct and indirect financial interest.[21] As originally set out in an affidavit authored by William Hamilton, the Hadron conspiracy theory postulated that DOJ wanted to force Inslaw into liquidation so that Hadron could buy Inslaw's assets, after which DOJ would award Hadron a "massive sweetheart contract." The theory has evolved over time. Inslaw has since presented testimony from witnesses who claim that DOJ employees actually delivered copies of Inslaw's proprietary software to Brian and Hadron before Inslaw's bankruptcy. According to these witnesses, Brian was involved in various covert intelligence operations, and DOJ officials gave Brian and Hadron copies of PROMIS to reward Brian for the covert role he played in the so-called "October Surprise" conspiracy.[22]

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[21]Earl W. Brian is a physician by training. He served as a combat surgeon in Vietnam, and later was a member of the faculty of the University of Southern California. He left medical practice and served as California's Secretary of Health and Welfare under then Governor Reagan in the early 1970s. (Edwin Meese was also a member of Reagan's staff at that time). After leaving government, Brian began working in the areas of business and investment. He founded an investment company called Biotech Capital Corporation, now known as Infotechnology, Inc. Both Brian and Biotech owned stock in Hadron in the early 1980s.

[22]We note that both the House Task Force to Investigate Certain Allegations Concerning the Holding of American Hostages By Iran in 1980 (the "October Surprise Task Force") and Special Counsel to the (continued...)

We are not the first to investigate the allegations that upper level DOJ employees conspired to destroy Inslaw and to reward Earl Brian and Hadron. In September 1989 the Staff of the Senate's Permanent Subcommittee On Investigations of the Committee on Governmental Affairs completed its more than year-long investigation into DOJ's handling of its contract with Inslaw. After reviewing thousands of documents and interviewing numerous witnesses, the Staff of the Senate Subcommittee concluded that it could find "no proof of any connection between Brian or Hadron and the Department with regard to the INSLAW contract."[23] Because of the seriousness of the allegations, we nonetheless undertook an independent review of evidence surrounding the alleged conspiracy to benefit Earl Brian. We not only reviewed materials obtained by

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[22](...continued)
Senate Foreign Relations Committee, Subcommittee on Near Eastern and South Asian Affairs ("Senate Special Counsel") recently released reports finding no credible evidence to support the allegations that members of the 1980 Ronald Reagan campaign staff negotiated to delay the release of the American hostages in Iran.

[23]The Committee On The Judiciary of the House of Representatives also investigated Inslaw's allegations regarding Hadron and Brian. In its report, the House Committee made no specific findings about these allegations, other than to note that they had been made. The House Committee Report called the allegations about Brian's role "intriguing ... but without the requisite degree of causation and factual convergence necessary to draw conclusions at this time into potential wrongdoing in the Inslaw matter." Although we admit some difficulty in interpreting this phrase, we understand it to mean that the House Committee's investigators, like the Staff of the Senate Subcommittee, found insufficient evidence on which to base any finding of wrongdoing by Brian.

the Senate Staff,[24] but independently interviewed witnesses and searched files as part of our own investigation of these allegations. We found that the evidence offered by Inslaw falls into two categories: "Direct proof" in the form of statements from witnesses claiming to have personal knowledge of Earl Brian's role in the conspiracy to steal PROMIS, and "indirect proof" in the form of statements from witnesses who, although they generally do not purport to have any knowledge of an attempt by Brian or Hadron to obtain Inslaw's assets, nonetheless provide evidence that William Hamilton believes supports his hypothesis that DOJ was attempting to award a "sweetheart deal" to Hadron. We address these two types of evidence in turn.

A. The Claimed Direct Evidence Of A Conspiracy

We have interviewed Material Omitted Pursuant to Fed. R. Crim. P. 6(e) individuals whom Inslaw officials and others have identified as having personal knowledge of the activities of Earl Brian in connection with the distribution of PROMIS software:

Material Omitted Pursuant to Fed. R. Crim. P. 6(e)

none of these individuals provided credible evidence that Earl Brian, Hadron, or any other Brian affiliate, was involved in theft, conversion, or distribution of Inslaw's proprietary software.

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[24]The House Committee to date has not provided us any of the evidentiary material it obtained during its three year investigation.

### 1. Michael Riconosciuto

Michael Riconosciuto can fairly be described as the key witness against Brian. Riconosciuto has claimed, among other things, that he personally met with Brian, that he received a copy of PROMIS from Brian, that he personally performed alterations to PROMIS software so that Brian and others could sell PROMIS internationally, and that he is personally aware of various entities to which altered PROMIS was distributed. Given the breadth and specificity of Riconosciuto's allegations, we devoted considerable effort to trying to determine whether there existed any evidence to corroborate these claims. We interviewed not only individuals whom Riconosciuto identified as having knowledge of his activities, but also people who would have known about these events had they taken place as described. We begin with a summary of the specific allegations made by Riconosciuto.

#### a. Summary of Riconosciuto's Allegations

During our investigation we reviewed various statements attributed to Riconosciuto. We identified four occasions on which Riconosciuto had made statements concerning Inslaw and PROMIS, where we could determine with a high degree of accuracy exactly what Riconosciuto had said on that occasion. Three of those statements were under oath and transcribed. The remaining statement was recorded in notes made by the person to whom the statement was made: William Hamilton.[25]

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[25]We are aware of a number of press reports attributing various statements to Mr. Riconosciuto. We have not placed primary (continued...)

(i) Riconosciuto's Calls To The Hamiltons

As best we can determine, Riconosciuto's first statements about PROMIS were made in the Spring of 1990. On May 18, 1990, a reporter for one of Lyndon LaRouche's publications called William and Nancy Hamilton. The reporter told the Hamiltons that a month earlier Riconosciuto had told him (the reporter) that "the INSLAW mess at the Justice Department is related to a decision by Ronald Reagan to provide a financial reward to Earl Brian for an intelligence contribution to the 1980 election." The reporter then completed a conference call and introduced the Hamiltons directly to Riconosciuto.[26]

According to the Hamiltons' records of that call, Riconosciuto said that he and Earl Brian were both hired as consultants to a company called Wackenhut Research, Inc., which Riconosciuto described as a subsidiary of Wackenhut Security Corporation. Riconosciuto said that he and Brian travelled together to Iran in 1980 and paid a $40 million bribe to certain Iranians in order to prevent the release of American hostages prior to the November 1980 election. He said that he personally handled the electronic funds transferring work in connection with these bribe payments. Riconosciuto also claimed that Brian mentioned Inslaw or PROMIS "as though Brian were a principal" in the company. Riconosciuto said

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[25](...continued)
reliance on these reports because we have no way of judging the accuracy of the attributions.

[26]Inslaw provided us with copies of two memoranda to file (dated May 18 and June 28, 1990), in which William and Nancy Hamilton summarize their telephone call with Riconosciuto.

that PROMIS was the payoff to Brian for his contribution to the Iran effort, and said that he (Riconosciuto) still had a copy of the PROMIS source code. Riconosciuto said a computer company he owned (which he referred to as TCS Software of Houston, Texas) had integrated PROMIS into a report generation software product that was marketed by TCS to government agencies. Riconosciuto said that he could provide the Hamiltons with various pieces of evidence to support these allegations, including: (1) photographs of him and Earl Brian together in Iran in 1980, (2) copies of his and Brian's 1099 forms from Wackenhut Security, (3) his passport reflecting a 1980 trip to Iran, and (4) a copy of the VAX version of PROMIS.

(ii) **Riconosciuto's March 21, 1991 Affidavit**

On March 21, 1991, Riconosciuto executed an affidavit for submission in connection with Inslaw's adversary proceeding in the Bankruptcy Court. In that affidavit Riconosciuto claimed that he had been Director of Research for a joint venture between Wackenhut Corporation and the Cabazon Indians of Indio, California. He described the Wackenhut-Cabazon joint venture as one engaged in the development and manufacture of certain military type materials, which were then intended to be sold to foreign governments and forces.

According to Riconosciuto's affidavit, Peter Videnieks was a frequent visitor to the Cabazon Indian reservation, and a "close associate" of Earl Brian. He then went on to describe the role he, Videnieks, and Brian played in converting and distributing stolen Inslaw software:

In connection with my work for Wackenhut, I engaged in some software development and modification work in 1983 and 1984 on the proprietary PROMIS computer software product. The copy of PROMIS on which I worked came from the U.S. Department of Justice. Earl W. Brian made it available to me through Wackenhut after acquiring it from Peter Videnieks, who was then a Department of Justice contracting official with responsibility for the PROMIS software. I performed the modifications to PROMIS in Indio, California; Silver Spring, Maryland; and Miami, Florida.

The purpose of the PROMIS software modifications that I made in 1983 and 1984 was to support a plan for the implementation of PROMIS in law enforcement and intelligence agencies worldwide. Earl W. Brian was spearheading the plan for this worldwide use of the PROMIS computer software.

Some of the modifications that I made were specifically designed to facilitate the implementation of PROMIS within two agencies of the Government of Canada: the Royal Canadian Mounted Police (RCMP) and the Canadian Security and Intelligence Service (CSIS). Earl W. Brian would check with me from time to time to make certain that the work would be completed in time to satisfy the schedule for the RCMP and CSIS implementations of PROMIS.

The proprietary version of PROMIS, as modified by me, was, in fact, implemented in both the RCMP and the CSIS in Canada. It was my understanding that Earl W. Brian had sold this version of PROMIS to the Government of Canada.

Riconosciuto ended his affidavit by claiming that he had been threatened by Videnieks. Riconosciuto said that he had a telephone conversation with Videnieks in February of 1991, during which Videnieks told him not to cooperate with the House Judiciary Committee's investigation. According to Riconosciuto's affidavit, Videnieks said that if Riconosciuto cooperated with the Judiciary

Committee's investigation he would be "punished." The punishments allegedly outlined by Videnieks included the indictment of Riconosciuto for savings and loan fraud and for perjury.

(iii) Riconosciuto's Statement to Congress

The House Committee Report indicates that Riconosciuto provided a sworn statement to Committee investigators on April 4, 1991. We have not been able to obtain from the Committee a copy of Riconosciuto's statement. There are references in the report, however, to certain statements attributed to Riconosciuto. According to the report, Riconosciuto told the Committee that he received a copy of the proprietary version of PROMIS from Brian, who had obtained it from Videnieks. The report says Riconosciuto claims that someone (the report does not say who) loaded the PROMIS software into the trunk of Riconosciuto's car during a luncheon attended by both Videnieks and Riconosciuto. The report says Riconosciuto granted the Committee access to a storage facility containing computer tapes and documentation. The Committee then analyzed these tapes to determine if they contained any versions of PROMIS (presumably because Riconosciuto indicated that they would). According to the Committee's report, their expert analysis of the tapes failed to provide any evidence that the tapes contained any versions of PROMIS.

Finally, Riconosciuto told the Committee that the DEA had seized from him at the time of his March 29, 1991, arrest two copies of a tape recording he made of his conversation with Videnieks, in which Videnieks threatened to "punish" Riconosciuto

for cooperating in the Inslaw investigation. The report does not make clear whether Riconosciuto told the Committee that those were the only two copies of the tape that existed.

(iv) Riconosciuto's Testimony At His Trial

The most recent statements made by Mr. Riconosciuto of which we are aware (outside of this investigation) were made at his trial for manufacturing and distributing methamphetamine, which took place in federal court in Tacoma, Washington, in January 1992. Riconosciuto testified at length about the alleged theft of PROMIS software at his trial because his defense to those drug charges was that he was being "set-up" by the government on the drug charges as punishment for his giving testimony about the Inslaw matter.[27]

In his trial testimony Riconosciuto said that he first learned of PROMIS while on the Cabazon reservation in Indio, California. He said that he had received three versions of PROMIS, two with enhancements and one without, and that he had received them from John Philip Nichols[28] when "Peter Videnieks showed up on the reservation." Riconosciuto said that he had set up a VAX computer in a small mobile office that was behind the casino on the Cabazon reservation in order to work with the PROMIS software. He said he then worked with a lead programmer in supervising "programming

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[27]The jury rejected Riconosciuto's testimony, and convicted him on the charges of manufacturing and distributing methamphetamine. The trial judge sentenced Riconosciuto to 360 months imprisonment, which was the lowest available sentence under the applicable sentencing guidelines.

[28]Nichols was the non-Indian Administrator of the Cabazon's affairs.

groups" that were developing modifications to PROMIS. When asked when these modifications to PROMIS were taking place, Riconosciuto twice stated that it was in the period of late 1981 to early 1983. He said that during this period he was commuting between Indio, and Hercules and Santa Rosa, California, where he had other technical developments ongoing. Riconosciuto described Earl Brian as someone he would often see in regards to the PROMIS software when Riconosciuto was at the Cabazon reservation.

Riconosciuto testified that in February 1991 he had received a message on his answering machine from someone named Peter, and that the message instructed him to "be at a certain restaurant at a certain time and wear, you know, a yellow shirt." Riconosciuto said he went to this restaurant and was met there by some people, all of whom he did not know, except for one man he recognized as a person named "Norm." Riconosciuto said that Norm and the others then placed a call and gave him the phone. Riconosciuto said he expected to hear a person named Peter Zokosky on the phone, but that he didn't recognize the voice at the other end of the call. According to Riconosciuto, when he told the people who had placed the call that he didn't recognize Zokosky's voice, one of those people said, "It's no wonder, this is Videnieks."

Riconosciuto then testified that Videnieks told him that he "was making some people nervous," and that there might be problems for Riconosciuto in connection with a savings and loan matter and his wife's custody battle with her former husband if Riconosciuto didn't "just wise up ... and forget about what [he] was talking

about." Riconosciuto said that he understood Videnieks comments to be a reference to the prospect of Riconosciuto testifying in connection with the House Committee's then ongoing investigation.

Riconosciuto testified that he had made a tape recording of this February 1991 call from Videnieks.[29] He said that the DEA agents that arrested him had seized two copies of that tape. He said that the original of the tape still existed, but that he was "not sure" where it was.

Riconosciuto also claimed that an associate of his had turned over computer tapes to the House Committee under Riconosciuto's "partial" direction. Riconosciuto said those tapes contained "information related to PROMIS software and other financial information."

b. The Inconsistencies Within The Allegations

Before reviewing the results of our investigation, it is important to note that Riconosciuto's various accounts of his role in the alleged theft of PROMIS have not remained constant. He has been inconsistent both in his descriptions of from whom he received the software, and in his descriptions of when and where he altered the software. Also, it appears that the circumstances of his meeting Videnieks have not always been described in the same way.

In his affidavit, Riconosciuto said that he had received a copy of "the proprietary PROMIS computer software product" from Earl Brian. It is clear from the affidavit that Riconosciuto is

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[29]He did not explain how he managed to tape record a call placed by someone else from a public restaurant.

referring to a single copy of software. ("The copy of PROMIS on which I worked came from the U.S. Department of Justice. Earl Brian made it available to me through Wackenhut after acquiring it from Peter Videnieks...") In the House Committee Report there also is a reference to a single incident, where "enhanced PROMIS" was loaded into the trunk of Riconosciuto's car. By the time of his trial, however, Riconosciuto was claiming that he had received three versions of PROMIS, and that he received "them" from John Philip Nichols. This testimony clearly is not consistent with the affidavit, and from what we can tell is inconsistent with Riconosciuto's statement to the House Committee.

Riconosciuto also has varied in his descriptions of when and where he altered the PROMIS software. In his affidavit he said that during "1983 and 1984" he "performed the modifications to PROMIS in Indio, California; Silver Spring, Maryland; and Miami, Florida." At trial, however, he described himself as a supervisor of a lead programmer and programming teams, and mentioned only work done in Indio, California, in a mobile trailer behind the casino on the Cabazon reservation. He also testified at trial about when these alleged modifications took place:

> Q: And how long did it take you to perform these enhancements to the software?
>
> A: I was working on this for approximately a year and a half.
>
> Q: Between what times would that have been?
>
> A: From late 1981, it was November 1981, into the early part of '83.

Riconosciuto then went on to describe some night vision and heat transfer technology that he was working on, and that he took back down "to the Cabazon reservation in the form of, you know, a business joint venture." He was then asked about the timing of his work on this other technology:

> Q: Is this about the same time that this PROMIS software is being --?
>
> A: This is in 1980 and '81 and '82 this is all happening.
>
> Q: This is all happening simultaneously?
>
> A: Yes.

These statements directly contradict Riconosciuto's claim in his affidavit that the work was done in 1983 and 1984. The change in timing is significant. Riconosciuto's statement that he started work on PROMIS in late 1981 and finished in early 1983 is inconsistent with the undisputed facts concerning the EOUSA contract. It is undisputed that Inslaw did not produce a copy of enhanced PROMIS to DOJ until April 20, 1983. Indeed, Inslaw did not even enter into the EOUSA implementation contract until March of 1982. It would have been physically impossible for anybody from DOJ to produce anything but a public domain version of PROMIS in November 1981.

Immediately after Riconosciuto testified that his work on PROMIS was going on simultaneously with other projects (during 1980, 1981 and 1982), he was asked about where he was working during the period that he claimed to be working on the PROMIS conversion and the other technologies:

Q: So your focus wasn't totally on the PROMIS software at this time. You were doing other things?

A: Absolutely. I was spread thin.

Q: Without going into what each of these various ventures were, state the ventures you were involved in at that period of time?

A: Well, we had a small mining company up in Grass Valley where we had our pilot plant equipment for recovery technology going. We had a small pilot plant going in Hercules [California] at our facility there. We had Hercules Research and the Interprobe joint venture. We were developing prototypes for a high voltage power supply. And I was involved with -- I was responsible for all the development work at Sonoma engineering and research on the night vision system and on a small satellite dish communications package.

Q: So all this is going on at the same time as the PROMIS software is being enhanced?

A: Right. I was working between the facility at Hercules, the facility in Santa Rosa, and the facility in Indio on the Cabazon reservation. And I was, you know, flying -- there was an airport at Concord [California], which was just five minutes away from where we were at Hercules, and, you know, I was on a weekly basis, I was making the round robin.

Q: How much of that time would you be devoting on the Cabazon reservation?

A: I would say roughly a quarter of my time at that time. And I would say roughly half of my time at Hercules and -- no, about a quarter of my time at Hercules and the balance of my time between the Santa Rosa facility and other miscellaneous projects.

Thus, when asked directly about where he was working during the period he was converting PROMIS, Riconosciuto failed to mention Silver Spring, Maryland, and Miami, Florida, two of the three places where he had claimed in his affidavit that he converted

PROMIS. In fact, Riconosciuto did not mention Maryland or Miami anywhere in his testimony about PROMIS at trial.[30]

Neither in his initial calls to the Hamiltons nor in his affidavit did Riconosciuto identify where he first met Videnieks. According to the House Committee Report, he told them that he first met Videnieks at the Picatinny Arsenal, which is in Dover, New Jersey. This part of his story also changed at trial, however. The following exchange took place on direct examination of Riconosciuto:

Q: Have you met Peter Videnieks?

A: Yes I have.

Q: On how many occasions?

A: At least a dozen occasions.

Q: Where was the first place you met him?

A: In Indio, California.

c. **Results Of Our Investigation**

We, of course, spoke directly with both Earl Brian and Peter Videnieks. Each of them has categorically and under oath denied all the allegations made by Riconosciuto about them. They both stated that they had never met Riconosciuto, or each other, and that they had never been to Indio, California, either to the Cabazon reservation or to the Cabazon's offices within the city.

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[30]In addition, the Hamiltons' memoranda of their call from Riconosciuto indicate that Riconosciuto claimed that his Houston based computer company modified PROMIS. We cannot tell from those memoranda, however, if Riconosciuto was specific about where the alterations took place. At trial he made no mention of any alteration of PROMIS in Houston, or of a role played by his Houston based company.

We found both men to be credible witnesses, both in their demeanor and in the substance of their statements.

We then interviewed a number of people whom Riconosciuto identified as having knowledge of the activities involving PROMIS at the Cabazon reservation. Included within that group are Peter Zokosky, A. Robert Frye, John Philip Nichols,[31] and Robert Nichols. We also interviewed Art Welmas (the former Tribal Leader of the Cabazon Band of Mission Indians) and his wife, Sam Cross (retired Chief of the Indio Police Department), Material Omitted Pursuant to Fed. R. Crim. P. 6(e) Material Omitted Pursuant to Fed. R. Crim. P. 6(e) and a number of other individuals, in order to determine whether it was likely, or even possible, that Riconosciuto and others were involved with altering PROMIS at the Cabazon reservation. The evidence we have compiled to date suggests that: (1) Riconosciuto was in fact in Indio, California during the early 1980s; (2) Riconosciuto did work with John Philip Nichols and the Cabazons; and (3) the Cabazons did enter into a joint venture with Wackenhut Corporation. That is where the truth in Riconosciuto's story stops. The evidence contradicts Riconosciuto's testimony about PROMIS, and suggests that there were absolutely no activities undertaken by Wackenhut, Riconosciuto, or the Cabazons that had anything to do with PROMIS or any other computer software.

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[31]We spoke to John Nichols for a brief period in his home. He was not expecting us, and was not comfortable (in light of his past criminal problems, apparently) having an extended interview without his lawyer present. He was, however, willing to comment freely about Riconosciuto and the allegations he is making.

(i) The Wackenhut-Cabazon Joint Venture

The Cabazon Band of Mission Indians is a very small tribe located in Indio, California, which is just east of Palm Springs. As of 1981 there were approximately 30 voting members of the tribe. Arthur Welmas was the Tribal Chairman at that time. A non-Indian man, John Philip Nichols, was the Tribal Administrator and managed the business affairs of the tribe. Most of the reservation is located alongside the interstate in Indio. During the early 1980s the only building located on the reservation was a casino building. Behind the casino was a small mobile trailer of the type usually found on construction sites. The trailer was used as a small office for the Cabazons and the casino operation.

During early 1981 the Cabazons formed a company known as Cabazon Security Corporation ("CSC"). According to A. Robert Frye, CSC solicited capabilities statements from a number of major U.S. security firms. Frye, who was then President of Wackenhut Services, Inc. ("Wackenhut")[32], responded on behalf of Wackenhut. Wackenhut was interested in working with the Cabazons because CSC, as a qualified minority contractor, would be eligible to obtain government contract work pursuant to various set-aside programs. Negotiations went forward with Frye participating on behalf of

[32]Wackenhut Services, Inc. is a subsidiary of Wackenhut Corporation. Wackenhut Corporation is a publicly traded firm that provides security and other support services to industrial and governmental entities worldwide. The firms described by Riconosciuto in his call to the Hamiltons (Wackenhut Research, Inc. and Wackenhut Security, Inc.) do not exist.

Wackenhut, and John Nichols conducting the negotiations on behalf of the Cabazons.

In April of 1981 Wackenhut entered into a joint venture agreement with CSC. The agreement was signed by Frye on behalf of Wackenhut, and Tribal Chairman Art Welmas on behalf of CSC. The joint venture agreement indicates that it was the primary purpose of the joint venture to "qualify for, bid on, and obtain government guard service contracts." Through Frye's testimony and a review of Wackenhut's files we identified two government security contracts on which the joint venture bid, but which it did not receive.

Early on in the joint venture John Nichols indicated a desire to have the joint venture engage in the sale of night vision goggles and rifle scopes to foreign governments. We found within Wackenhut's files various documents that demonstrate the efforts Nichols was making to market this night vision equipment to individuals identified as representatives of the governments of Guatemala and Honduras. It was Nichols' view that the Cabazon's, as a sovereign nation, were not subject to the usual export and import controls.[33] In furtherance of this sales effort, a demonstration of night vision equipment was held on the evening of September 10, 1981, at the Lake Cahuilla gun range in Indio,

[33]A review of Wackenhut's files shows that they did not share Nichols' view. We found internal memoranda in which Wackenhut personnel express their opinion that any sales of night vision equipment would have to obtain State Department approval. We also found copies of preliminary applications that Wackenhut filed with the State Department in anticipation of possible sales of night vision equipment. As far as we could tell, no sales were ever made.

California. That demonstration is discussed at length in the following section.

Another area of possible business that the joint venture explored was the manufacture and/or sale of combustible cartridge casings for large caliber cannons. The Cabazons were introduced to the possibilities of this rather arcane area by Peter Zokosky.

Peter Zokosky is the former President of a Coachella, California, company called Armtec Defense Products. Zokosky said that during the early 1980s Armtec was a single source supplier producing combustible cartridge casings for the United States Army. According to Zokosky, during 1981 he was retired from Armtec and was aware that the Army was looking for a second source supplier for the combustible casings. Zokosky says he then began having discussions with Nichols about the possibility of the Cabazons becoming that second source. Ultimately, Zokosky became an advisor to Nichols and the joint venture as they pursued the possibility of becoming a second source supplier.

Zokosky said he thinks he first heard the name Riconosciuto from somebody at Wackenhut, although he cannot say who.[34] He said he first met Riconosciuto one day in July of 1981 when he went to see Nichols at Nichols' office in Indio. He said that he does not know who introduced Riconosciuto to Nichols. Zokosky said that

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[34]Zokosky also claims that it was he who first put Wackenhut in contact with Nichols. This claim is contradicted by other evidence we found.

Riconosciuto appeared scientifically oriented, and that he and Nichols took him when they went to visit the Picatinny Arsenal.[35]

The Picatinny Arsenal is located in Dover, New Jersey. It offices the U.S. Army Armament Research & Development Command, Large Caliber Weapon Systems Laboratory. Zokosky and the other people from the joint venture travelled to the Arsenal to meet with Dr. Harry Fair and an Army project officer named R. Scott Westley. Zokosky knew both these men from the time he worked at Armtec, and knew that both could be helpful to the joint venture in its efforts to establish a second source combustible cartridge production facility on the Cabazon reservation. The meetings at the Arsenal were set up to discuss with Fair and Westley both the technical and administrative challenges of establishing a successful operation.

Frye's recollection of meeting Riconosciuto roughly comports with Zokosky's. Frye says he first met Riconosciuto on a trip to the Picatinny Arsenal. Frye believes this trip was in May of 1981. Zokosky agrees that there was a trip to the Arsenal in May 1981, but he believes that Riconosciuto was not on that trip. Zokosky says that Frye actually met Riconosciuto on a second trip to the Arsenal in October 1981. We do not believe that this disagreement as to the dates is material.

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[35]Notably, neither Nichols nor Zokosky were employees of the joint venture. Indeed, the joint venture had no employees at any time. The only individual employed by Wackenhut was Frye. We found no evidence to support Riconosciuto's claim that he and Earl Brian were employed by Wackenhut or by the joint venture. Any business relationship Riconosciuto had was between him and Nichols and/or the Cabazons.

Frye and Zokosky agree on a number of points that are relevant to this investigation, however. Both agree that they neither saw nor heard about Earl Brian in connection with the joint venture. Both agree that they never saw Riconosciuto conducting any computer operations. Both agree that they never saw any large computers or computer facilities anywhere on the reservation or in the Cabazon offices during this period.

We also interviewed Art Welmas, who was the Tribal Chairman during the time of the joint venture, and his wife. Welmas and his wife both said they never saw or met anyone named Earl Brian at the reservation, and that they never heard the name Earl Brian mentioned by Nichols, Riconosciuto, or anyone else at the reservation. They also told us, as did everyone we talked to, that the Cabazons had no large computers during this time period, either in the mobile trailer behind the casino or in the offices in the city of Indio.[36]

Sam Cross, the Chief of the Indio Police Department during the years Riconosciuto was in Indio, told us that he had personally been in the mobile trailer behind the Cabazon's casino, which Riconosciuto described in his trial testimony. He was quite sure there never was any computer equipment in the trailer. He also told us that he made a point of staying aware of what was going on at the Cabazon reservation during that period, and that he never heard any mention of the name Earl Brian. Material Omitted Pursuant to Fed. R. Crim. P. 6(e)

[36]Witnesses told us that the Cabazons obtained small personal computers for word processing later in the 1980's.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Considering the extremely small size of the Cabazon reservation, if there had been any computer software modification project going on at the reservation, we are confident these witnesses would have known about it.

John Nichols was emphatic that Riconosciuto's allegations concerning PROMIS are fabricated. He said that there never was any computer equipment around the reservation or the tribal offices, and that he had never heard of Earl Brian or any of his companies prior to Riconosciuto's allegations.[37]

In summary, we were not able to find any witness who could even corroborate that Riconosciuto had access to computer equipment while on the Cabazon reservation, much less that he was involved in the modification and distribution of software for Earl Brian. In fact, the evidence is to the contrary. The evidence is that Riconosciuto was working with Nichols and the Cabazons in connection with their efforts to establish various quasi-military business opportunities for the joint venture.

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[37]We should note that Riconosciuto has made numerous allegations throughout his life claiming that John Nichols is involved with various nefarious and criminal enterprises. While we do not assume the truth of these allegations, Nichols arguably would have a motive to call Riconosciuto a liar. We note, however, that everything Nichols told us was consistent with the great weight of the evidence we obtained from other sources.

### (ii) The September 10, 1981 Weapons Demonstration

The House Committee Report said that it was aware of a Riverside California police report that indicated that Earl Brian was present at a shooting demonstration at the Lake Cahuilla gun range in Indio, California, on September 10, 1981. According to the police report, the purpose of the demonstration was to test a new night vision device (of the type that the joint venture was trying to market). The report identifies by name 16 people who were present at the gun range (and four police officers who were in the surrounding hills conducting surveillance), including Peter Zokosky, Michael Riconosciuto, John Nichols, Art Welmas, Sam Cross, and Earl Brian. Brian's presence at this demonstration would be significant because he has steadfastly denied ever having been to the Cabazon reservation, or ever having met Riconosciuto or any one affiliated with the Cabazons.

We located the report to which the Committee referred. It is a singularly unusual document. It is a four page report on a "Special Operations Report" form. Under the heading "Subject" it lists "Cabazon Indians." The title of the report is "Nicaraguans and Earl Brian at Lake Cahuilla - 9/10/81." The typing date of the report, however, is ten years later, on "10/10/91." Although the word "intelligence" appears at the top of the first page, from a quick reading of the report one is given the impression that it is a surveillance report. This results, in part, from the fact that the report lists no informants or sources, or in any other way indicates that the information in the report is something other

than a law enforcement officer's observations. Also, the report contains various license plate numbers and automobile registrations for the cars that were observed at the demonstration, just as one would expect to find in a regular police surveillance report.

We were intrigued by this report, and thought it might be the key to our finding evidence that would corroborate Riconosciuto. Such was not the case. What we found was that all the information in that report, save for the license plate numbers and the registrations, came from Riconosciuto.

The report was prepared by Gene Gilbert, an investigator for the Riverside, California, District Attorney's Office. We interviewed Gilbert. He told us that he prepared the report in 1991 after interviewing Riconosciuto in jail. He said that the purpose of the interview was to find out if Riconosciuto could provide any information about an unsolved murder that happened in Indio in 1981. He said that he had obtained the license plate and registration information from Dave Baird, a former Indio police officer who was present at the demonstration, and who had saved this information over the years.

The Riverside County District Attorney's Office was not pleased with all the attention this report had brought to them. The problem was that the report had been leaked, and virtually every reporter interested in the Inslaw case had a copy of it, as did many private citizens.[38] When we met with Gilbert he told us

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[38] Material Omitted Pursuant to Fed. R. Crim. P. 6(e)

words to the effect of "if I had known what a stir it would cause I would have left Earl Brian's name out, because he has nothing to do with the murder investigation." We found it difficult to believe that the mention of Earl Brian's name was coincidental. For example, we asked Gilbert why he put Earl Brian's name in the title of the report. He said it was because Brian was a new name to the investigation. When we pointed out that there were a lot of names in the report that were new to his investigation, Gilbert had no explanation as to why their names were not in the title. We also never received an explanation as to why Gilbert did not mention Riconosciuto in the report as the source of the information, or why Gilbert created a separate report concerning everything else Riconosciuto told him in the interview.

Gilbert told us that after he began to get numerous inquiries from the press about the report, it became apparent to him that the name in the report that everybody was most interested in was Earl Brian. He said at that point he decided to see if anybody besides Riconosciuto would say Earl Brian was there. Gilbert then went to see Dave Baird, the officer from whom he had obtained the license plate numbers. After meeting with Baird, Gilbert prepared another report saying that he had shown Baird a photograph of Brian, and that Baird had identified Brian as being one of the individuals at the gun range on September 10, 1981. We went to see Dave Baird. That is not what he told us.

Dave Baird is now a Riverside County Deputy Sheriff. During 1981 he was an officer with the Indio Police Department. He told

us that shortly before September 10, 1981, he was told by then Police Chief Sam Cross that City Manager Phil Hawes had arranged for a demonstration by the Cabazons to take place at the Lake Cahuilla gun range. Baird said that Hawes and Cross asked him to be present at the demonstration to determine if the Cabazons were engaged in any illegal activities involving automatic weapons. He said that when he went to the demonstration he was suspicious about what was going on, and so he memorized the license plates of some of the cars that were there. When the demonstration was over he checked the registrations of the plates he had memorized. We obtained a copy of the registration printouts he ran.

One of the cars at the demonstration was a Rolls Royce that belonged to a real estate developer named Wayne Reeder. According to Riconosciuto (as reported in Gilbert's first report), Wayne Reeder arrived with Earl Brian. Baird said that he remembered that Reeder did arrive with someone, but that he didn't know who it was. Baird's handwritten notes that he made when he originally ran the registrations, however, refer only to Wayne Reeder in the Rolls Royce.[39] We then asked Baird if he had previously told investigator Gilbert that the other occupant was Earl Brian. Baird said he did not. Baird told us that Gilbert showed him a poor quality photocopy of a picture in a magazine, which Gilbert said was Earl Brian. Baird told us that the most he could say was that the person in the magazine photograph had the same general physical

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[39]The absence of such an indication in his notes is significant, because his notes for other cars indicate that they had multiple occupants in them.

characteristics as the person who was with Reeder.[40] When asked what those physical characteristics were, Baird said, "large, middle-aged, white, male." We then asked Baird if he thought he could identify Brian if we showed him a clear photograph of Brian taken in 1981. He said that the most he ever would be able to say was whether the person had the same general physical characteristics as the occupant of the car. This hardly constitutes an identification of Brian.

We also spoke with Peter Zokosky, Material Omitted Pursuant to Fed. R. Crim. P. 6(e) Wayne Reeder, John Nichols, and Art Welmas, all of whom were at the September 10, 1981 demonstration. While they have somewhat conflicting recollections of the event[41], they all agree on one point: Earl Brian was not there. When asked if there were any people at the shooting they did not know, they mentioned only some unidentified Spanish speaking men that Nichols had invited, all of whom were Hispanic and do not fit Brian's description. We also talked to Scott Westley of the Picatinny Arsenal, who Riconosciuto identified as being there. He absolutely denies being at the demonstration. Given that Westley makes no attempt to hide the fact that he met on

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[40]Given the nature of the identification attempted by Gilbert--a one person photo "show-up" ten years after the witness saw the subject on one occasion, at dusk--we suspect that even a positive identification by Baird would be inadmissible in court.

[41]For example, Reeder recalls that he had a date that night, and for that reason believes he came alone. Zokosky also recalls Reeder having to get to a date that night, but says that he thinks he drove Reeder there, and that's why Reeder couldn't get to his date until the demonstration was done. It seems more likely that Zokosky is mistaken, given that Baird is quite certain he saw Reeder's car there, and in fact "ran" Reeder's license plates.

occasion with the people from the joint venture, it seems he would have little motive to lie about whether he was at this demonstration.

In summary, Riconosciuto's allegation that Earl Brian was at the demonstration at the Lake Cahuilla gun range does not withstand scrutiny. The credible evidence is overwhelming that Brian was not there. Moreover, we obtained considerable evidence tending to show that Brian was in his New York office on September 10, 1981. We obtained a copy of Brian's personal calendar from 1981. In it is the handwriting of Brian's former personal assistant. The personal assistant's writing, Material Omitted Pursuant to Fed. R. Crim. P. 6(e) indicates that Brian flew from Washington to New York on the afternoon of September 9, and that she (the personal assistant) ordered a limousine to take Brian between his New York office and his home on September 10. Brian's expense records, including an airline receipt for the trip from Washington to New York, indicate that the calendar is accurate for that week.

(iii) Riconosciuto's March 29, 1991 Arrest

Riconosciuto and others have suggested that the timing of his 1991 arrest on drug charges, coming as it did only eight days after he executed his affidavit in the Inslaw case, demonstrates that the government was retaliating against him for his testimony. As already noted above, Riconosciuto's defense at his drug trial was that he was being framed by the government.

We reviewed the entire transcript of Riconosciuto's trial, along with many of the DEA reports, and spoke with the Assistant

United States Attorneys who prosecuted the case against Riconosciuto. We are convinced beyond all doubt that there was absolutely no connection between Riconosciuto's prosecution and his allegations in the Inslaw matter. The fact of the matter is that the case that resulted in Riconosciuto's arrest and prosecution began as a local drug investigation by Washington State authorities. As part of that local investigation a small time methamphetamine dealer began to cooperate with the police. It was only after the local authorities determined that the supplier of the cooperating drug dealer was distributing on a large scale, that they decided to call in the Seattle office of the DEA to assist in the investigation. There is no evidence that anybody from Washington, D.C., either from DOJ or elsewhere, had anything to do with the prosecution of Riconosciuto in Tacoma.

In addition, the evidence against Riconosciuto at trial was overwhelming. The DEA in that case captured Riconosciuto delivering methamphetamine on videotape on more than one occasion. The testimony also established that Riconosciuto was running a large methamphetamine lab at the property where he was living. Riconosciuto testified that the case was a set up, that the DEA had altered the videotapes to make it appear that he was where he wasn't, that the government had altered telephone records, and that his lab was only for mining metals, not for making drugs. It is not surprising that the jury rejected this testimony. It was as

unbelievable then as it is now.[42] Even the judge commented at sentencing that he was not sure whether Riconosciuto could tell fact from fiction.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

[42]Claiming that he is the victim of a frame up is nothing new to Riconosciuto. When he was arrested, tried, and convicted on PCP charges in the early 1970s, Riconosciuto's defense was that someone had planted the PCP on him.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Riconosciuto (along with two local gadflies) filed a lawsuit purporting to challenge the authority of this investigation. Included within the bizarre allegations of the lawsuit were claims that I was involved in various organized crime murders and that one of the FBI agents assigned to the case had murdered the journalist Danny Casolaro. Riconosciuto also claimed that my staff had threatened to kill him, and that he and his family were in danger.

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Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

[43]Riconosciuto's lawsuit was subsequently dismissed by the district court as patently frivolous. Riconosciuto v. Bua, No. 92 C 6217 (U.S.D.C. N.D. Ill.)

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Based on Material Omitted Pursuant to Fed. R. Crim. P. 6(e) his dealings with the Congress, the Hamiltons, and reporters, we do not believe that Riconosciuto in fact has any of the evidence he claims to have about PROMIS.

Material Omitted Pursuant to Fed. R. Crim. P. 6(e) Yet Riconosciuto was out of prison for almost a year after his initial call to the Hamiltons. During that period he never produced the 1099 forms, the photographs of him and Earl Brian in Iran, or the version of PROMIS he told the Hamiltons that he would give them. Riconosciuto also has had enough contact from prison with people on the outside that he was able to arrange for the House Committee investigators to get access to what he claimed at trial was software tapes containing PROMIS. Congress, too, came up empty-handed.

In analyzing Riconosciuto's allegations we have attempted to focus on the substance of his claims and whether they are supported or contradicted by other evidence. We cannot entirely ignore certain general credibility issues, however. Riconosciuto was involved with hallucinogenic drugs at least as far back as 1972, when he was convicted on a PCP charge. In addition to that charge

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Material Omitted Pursuant to Fed. R. Crim. P. 6(e)

and his 1992 drug conviction, NCIC records indicate he also has burglary and bail jumping convictions from the early 1970s.

Most people who know Riconosciuto told us that he displays a high degree of familiarity with scientific and technical concepts. None of the people we talked to, however, could confirm the extraordinary claims Riconosciuto makes about his past exploits. He claims, for example, to have worked with the CIA, to have developed a radio detonator device used to overthrow the Allende government in Chile, to have patented various revolutionary devices, to have recovered computer data from computers damaged during the overthrow of the Shah, to have personally been involved in handling the so-called "October Surprise" payments, and to have convinced certain organized crime members associated with Tony Accardo (a now-deceased head of the Chicago mob) not to commit a murder. We came across no credible witness who could confirm any of this.

In conclusion, we found Riconosciuto to be a totally unreliable witness in connection with the allegations he has made about the alleged theft of PROMIS software. Riconosciuto's story about PROMIS reminds us of a historical novel; a tale of total fiction woven against the background of accurate historical facts. For example, it is true that there was a Wackenhut-Cabazon joint venture, and that there was a demonstration in September 1981 at a gun range in Indio. The overwhelming weight of the evidence, however, is that Earl Brian had nothing to do with either of these events. Riconosciuto's efforts to place Brian at the Cabazon

reservation and at the center of a conspiracy to steal PROMIS do not withstand any level of scrutiny.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

2. Ari Ben-Menashe

Inslaw also has claimed that Ari Ben-Menashe has personal knowledge of Earl Brian's distribution of Inslaw's PROMIS software. Based on our investigation, we conclusively reject that assertion.

We met with Ben-Menashe on a number of occasions Material Omitted Pursuant to Fed. R. Crim. P. 6(e) Ben-Menashe makes a number of extraordinary claims, most of which are not subject to corroboration. One thing Ben-Menashe absolutely does not say, however, is that he has any information about DOJ or Earl Brian distributing Inslaw's software. To the contrary, the story Ben-Menashe now tells involves what he says is a different PROMIS program, software that is not Inslaw's. Ben-Menashe claims that Earl Brian has been travelling around the world peddling software, also called PROMIS, that was developed not by Inslaw, but by the United States National Security Agency (NSA).

a. Ben-Menashe's Previous Allegations

Inslaw submitted to the Bankruptcy Court two affidavits executed by Ari Ben-Menashe. In the first affidavit, dated February 17, 1991, Ben-Menashe claimed to have been personally present at a 1987 meeting of the External Relations Department of the Israel Defense Forces, "during which Dr. Earl W. Brian of the United States made a presentation intended to facilitate the use of

the PROMIS computer software." Ben-Menashe's affidavit states that Brian said at that meeting that he owned the rights to PROMIS, and that Brian had been allowing the CIA, the NSA, DOJ, and the "Israeli intelligence communities" to use PROMIS since 1982. According to this affidavit, in 1987 Brian consummated the sale of PROMIS to the Israeli government "for internal use as well." Finally, in his first affidavit Ben-Menashe claimed that in 1989, in Chile, he was told by a Carlos Carduen that Carduen had brokered a sale of PROMIS by Earl Brian to a representative of Iraqi Military Intelligence.

Ben-Menashe's second affidavit, dated March 21, 1991, describes a 1982 meeting Ben-Menashe says he had with Rafael Eitan, who he says was the Israeli Prime Minister's Anti-Terrorism Advisor at the time. Ben-Menashe's affidavit describes that meeting as follows:

> In a meeting that took place in December 1982 in Mr. Eitan's office in the Kirya in Tel Aviv, Israel, Mr. Eitan told me that he had received earlier that year in the United States, from Mr. Earl W. Brian and Mr. Robert McFarlane, PROMIS computer software for the limited use of the [Israeli Defense Force's] Signals Intelligence Unit for intelligence purposes only. Mr. Eitan stated on this occasion, and on earlier occasions as well, that he had special relationships with both Mr. Brian and Mr. McFarlane.

According to the House Committee Report, investigators for the Committee interviewed Ben-Menashe in May 1991. The report states that Ben-Menashe gave testimony that was essentially consistent with his affidavits. Specifically, Ben-Menashe is reported to have said that "in 1982, Dr. Earl Brian and Robert McFarland [sic], the

former Director of the National Security Council, provided the public domain version of INSLAW's PROMIS software to the Israeli Government's special intelligence operation Defense Forces." (emphasis added) The Report says that Ben-Menashe described the 1987 sale by Earl Brian of "Enhanced PROMIS" to the Israeli intelligence community and the Singapore Armed Forces. According to the Committee Report, Ben-Menashe also claimed to have information about the sale of a "public domain" version of PROMIS by the Israeli government to the Soviet Union, and of the sale by Earl Brian of "the enhanced version" (apparently of the public domain software) to Canada. The House Committee Report does not identify any witnesses or documents corroborating Ben-Menashe's testimony about PROMIS.

b. Our Investigation

In our meetings with Ben-Menashe he told a different story.[47] Ben-Menashe told us that from 1974 through 1977, he was in the

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[47]We confined our investigation to Ben-Menashe's claims that related to DOJ misconduct in the use or distribution of PROMIS. As noted by the Senate Special Counsel's Report, Ben-Menashe's claims have been wide-ranging. According to the Special Counsel's Report, in addition to the October Surprise allegations investigated by the Senate and those relating to Inslaw and PROMIS,

> Ben-Menashe claims to have had a role in the Mossad's kidnapping of a renegade Israeli nuclear technician, Mordecai Vannunu; in the Israeli raid on Entebbe Airport in Uganda in 1976; and in the Israeli attack on Iraq's nuclear reactor in 1981. Ben-Menashe says he was the first person to leak the Iran-contra scandal to the press. . . .

We did not have the time, manpower or mandate to investigate each of Ben-Menashe's claims about his adventures.

Israeli military assigned to the Iranian Desk of the Signals Intelligence Unit. In that position, he had access to a software program called "Milon" (phonetic), which he stated was a computer program used to compile dictionaries. Ben-Menashe said that the Israeli government used the program to develop a Hebrew-Farsi dictionary and to assist in the translation of Farsi documents by his unit. He stated that the United States NSA developed the Milon program to translate Vietnamese into English. According to Ben-Menashe, William Hamilton worked on this program while employed at the NSA, long before the formation of Inslaw.[48]

Ben-Menashe told us in no uncertain terms that he has absolutely no knowledge of the transfer of Inslaw's proprietary software by Earl Brian or DOJ. According to Ben-Menashe, the "PROMIS" program he referred to in his previous affidavits and statements is not Inslaw's PROMIS. Instead, he says, the "PROMIS" program delivered to Israel by Brian was developed and enhanced by NSA. Ben-Menashe was adamant that this "other PROMIS" was developed by NSA independent of any Inslaw program and years prior to the formation of Inslaw. He also insisted that he has never said otherwise to the Hamiltons, to Congress, or to anyone else. When we asked Ben-Menashe about Inslaw's PROMIS, he said he had no information that Inslaw's software was pirated by DOJ and no reason to believe that DOJ did anything improper with the PROMIS software

[48]We requested confirmation of this from NSA. NSA informed us that William Hamilton worked for NSA in the 1960s. Because Hamilton's personnel records had been purged, however, NSA was unable to tell us whether he had worked on or developed such a program while at NSA.

provided it by Inslaw. He was quite specific in saying that he did not believe that DOJ had distributed Inslaw's software to any other person or entity.

While these statements by Ben-Menashe appear to contradict everything Ben-Menashe has previously said on this subject, Ben-Menashe says no. According to Ben-Menashe, he simply let the Hamiltons and others "assume" that he was referring to Inslaw's PROMIS when he discussed the PROMIS program that he says Earl Brian distributed, even though in his mind he was referring to the different software program developed by NSA. Ben-Menashe said that he never affirmatively asserted that the software he was referring to was Inslaw's PROMIS.[49]

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

[50] We believe that the apparent contradiction in Ben-Menashe's statements is best explained by his own statement regarding his motivation in signing the Inslaw's affidavit. Ben-

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[49]The House Committee Report clearly states that Ben-Menashe referred to "Inslaw's PROMIS." Because we do not have a copy of the testimony Ben-Menashe gave to the House Committee, we cannot know whether he is now misstating what he told them, or whether the investigators misinterpreted what he said.

[50]

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e) Ben-Menashe also claimed that the Hamiltons had repeatedly urged him to sign affidavits that specificallv referred to "Inslaw's PROMIS," but that he always refused.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Menashe admitted that one of the reasons he failed to clarify his statements was because he was preparing to publish a book about his various exploits and he wanted to make sure that his affidavit was filed in court and came to the attention of the public.[51]

In his book Ben-Menashe claimed to have knowledge of a complex web of foreign and domestic intelligence agencies that use the NSA developed PROMIS to gather intelligence from banks and governments around the world and to move moneys in payment for arms sales and other nefarious activities. According to Ben-Menashe, Israel installed a "trap door" in the NSA version of PROMIS. After the program was distributed worldwide by Earl Brian and others to various private and governmental users, the "trap door" allegedly permitted intelligence agencies to access the users' databases to obtain confidential information. Ben-Menashe claimed that by employing this "trap door" he had learned that friends and relatives of President Bush and other Administration officials were involved in the supply of arms to Iran for profit.

Although we requested, Material Omitted Pursuant to Fed. R. Crim. P. 6(e) Ben-Menashe for documentary evidence to support any of his allegations, and although he claimed to have access to such documents in safekeeping with a publisher in Australia, he failed to produce any documents.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e).

[51]The book was published in June 1992.

We were not disposed to conduct an international search of foreign governments and intelligence operatives on the basis of Ben-Menashe's allegations. Even if one believes Ben-Menashe--and we certainly are not saying we do[52]--he offers no evidence of any wrongdoing by DOJ. Material Omitted Pursuant to Fed. R. Crim. P. 6(e) he emphasized his lack of any knowledge and any information suggesting any distribution of Inslaw's software by DOJ.

We did, however, conduct some investigation of Ben-Menashe's allegations. Our investigative efforts revealed precious little evidence to corroborate Ben-Menashe's story. Earl Brian, under oath, and Robert McFarlane, in a telephone interview, strenuously denied the entirety of Ben-Menashe's allegations, each categorically denying any improper connection to the Israeli

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[52]The House October Surprise Task Force extensively examined allegations Ben-Menashe has made about the subject of its inquiry. The Task Force concluded that, although Ben Menashe did work for the External Relations Department of Israeli Military Intelligence between 1977-1987, "the evidence . . . shows that he worked the entire time as a translator of materials of relative insignificance and low levels of classification." The Task Force Report states that "[c]ontrary to Ben-Menashe's claims, his records also reveal he had no responsibilities involving contacts with the CIA or the intelligence service of any other country." Furthermore, the Task Force Report noted that Rafi Eitan, an Israeli official who was the alleged source of Ben-Menashe's information in the second affidavit Ben-Menashe provided to Inslaw, was examined by the government of Israel at the Task Force's request. According to the Task Force Report, Eitan stated that he does not know Ben-Menashe, has never met Ben-Menashe, and heard of him only after Ben-Menashe began making his allegations in 1991.

After a thorough investigation, the Task Force described Ben-Menashe's testimony variously as "totally lacking in credibility," "fabricated," "demonstrably false from beginning to end," "riddled with inconsistencies and factual misstatements," and "a total fabrication." The Task Force specifically found "no evidence to substantiate Ben-Menashe's allegations regarding a trip to Iran by Robert McFarlane and Earl Brian."

government or to any version of PROMIS.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

We also contacted NSA and asked whether it used or developed any program called PROMIS. NSA informed us that it used a commercial off-the-shelf software package that was purchased from Computer Corporation of America. In 1974-1975, six years before the incorporation of Inslaw, NSA developed a database with query search and report features in the M204 language. This particular database is called PROMIS, an acronym for Product Related On-line Management Information System. (NSA explained that its intelligence reports are referred to within NSA as the agency's "product.")

NSA has informed us that NSA's PROMIS has no relationship to Inslaw's PROMIS and NSA believes that the use of the same name for the different software is purely coincidental. NSA's PROMIS is written in a language called M204, a language different from COBOL, the language used for Inslaw's PROMIS. NSA's PROMIS serves different purposes than Inslaw's PROMIS, and it is used with a different database.

NSA's General Counsel's office informed us that many personnel in the agency know of the existence of NSA's PROMIS and that over the years many employees with knowledge of PROMIS have moved on to employment with other agencies in the government and with private

employers. It is not particularly surprising, therefore, that Ben-Menashe could learn of its existence.[53]

We are unwilling to credit the rest of Ben-Menashe's story based on his knowledge of the existence of the NSA program. Frankly, Ben-Menashe's story is too incredible to rest on so small a foundation. It has been convincingly denied by two witnesses whose statements we believe. We have good reason to doubt the word of a man who implies that he allowed the use of his plainly misleading affidavits in order to promote his book's sale.

Finally, we note also that according to Ben-Menashe's story, Israel received "PROMIS" from Earl Brian and Robert McFarlane during or before December 1982. Yet in December 1982 DOJ had available to it only public domain versions of PROMIS. Inslaw did not deliver an allegedly enhanced version to DOJ until April 1983.

It is clear to us that Ari Ben-Menashe offers no support for the allegation that DOJ and Earl Brian conspired to steal and distribute the software in which Inslaw claims proprietary rights.

3. Charles Hayes

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Hayes is a Nancy, Kentucky, salvage dealer who was contacted by William Hamilton after Hayes' own disputes with DOJ were

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[53]We received this information by telephoning the NSA. The General Counsel's office indicated that NSA has not distributed NSA's PROMIS outside the agency because it is configured to operate on NSA's database and would not be useful to a user outside the agency.

reported in the press. In statements to William Hamilton and to investigators of the House Committee, Hayes has made a variety of allegations about the alleged distribution of Inslaw's enhanced PROMIS software.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e).

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

The House Committee, which has also heard Hayes' accusations about various subjects related to Inslaw, called Hayes' testimony "intriguing," but noted that Hayes had failed to provide any documentation corroborating his charges. The Committee noted that even William Hamilton regarded as "highly improbable" Hayes' claim

that a local U.S. Attorney's office had sold him surplus word processing equipment that contained enhanced PROMIS. The Committee's examination and test of computer disks turned over by Hayes (and that allegedly contained enhanced PROMIS) established them to be nothing more than training programs for the word processing equipment. Hayes' promises to provide information that would establish that enhanced PROMIS was in use by the Canadian government were never fulfilled.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e).

B. The Claimed Circumstantial Evidence Of A Conspiracy

In addition to the witnesses who claim to have personal knowledge of Earl Brian's efforts to obtain and distribute PROMIS, Inslaw has identified a number of witnesses whose testimony, Inslaw officials believe, provides circumstantial evidence of a conspiracy involving Earl Brian and DOJ officials. An affidavit submitted by William Hamilton in 1989 in support of Inslaw's Petition for a Writ of Mandamus succinctly describes various events (and the witnesses with knowledge of those events) that Inslaw says support its conspiracy theory. Later, in memoranda submitted to us, Inslaw's attorneys again summarized the evidence that Inslaw says can be obtained from these witnesses.

Inslaw's allegations are not readily susceptible to summarization, but the gist of these allegations is that beginning at least by 1983, a company controlled by Earl Brian, Hadron, Inc., attempted to obtain Inslaw's PROMIS software or control of Inslaw

through a variety of different stratagems. According to Inslaw, Hadron had ties to DOJ through Earl Brian's supposed influence with the Reagan administration and prior contacts with DOJ's contracting officer, Peter Videnieks. Under Inslaw's theory, presumably because of Brian's political influence, Hadron was able to induce Lowell Jensen, through various subordinates, to engineer disputes with Inslaw which eventually drove Inslaw into bankruptcy. Inslaw's allegations detail a series of events which, it claims, establish the plot to obtain its software.

We tried to interview virtually all of the witnesses identified in Mr. Hamilton's affidavit and in the memoranda submitted by Inslaw's lawyers as supporting these claims. As is described in detail in the following pages, we found that many of the witnesses deny making the statements attributed to them by Mr. Hamilton. In other cases, the individuals confirmed the particular statements attributed to them, but then admitted that they were only repeating things that other people had told them. In the end, we found that much of the supposed "circumstantial evidence" identified by Inslaw does not in fact exist, and that what does exist is woefully insufficient to support a finding of a conspiracy or, indeed, any connection between Inslaw and PROMIS on the one hand, and Hadron or Earl Brian on the other.

The following is a summary of the various alleged occurrences that Inslaw believes support its allegation that DOJ officials conspired to steal PROMIS for the benefit of Hadron:

1. The Alleged Call From Dominic Laiti

In his affidavit, Hamilton states as follows:

> On April 20, 1983, about two weeks after [modification 12] and less than a month before the first sham contract disputes, Hamilton received a phone call from Dominic Laiti, Chairman of Hadron. Laiti told [Hamilton] . . . that Hadron needed the PROMIS software for federal government contracts that it expected to receive as a result of its political contacts . . . [with Edwin Meese]. Laiti said that Hadron intended to become the leading vendor in the United States of software for law enforcement and courts and that this was why it had recently bought SIMCON Inc (police software) and ACCUMENICS Inc (litigation support software) and why it was seeking to purchase Inslaw (court and prosecution software). . . . When [Hamilton] declined to meet with Laiti to discuss his [Laiti's] proposition, Laiti said, "We have ways of making you sell."

We interviewed Laiti. Laiti denied making the statements attributed to him by William Hamilton in Hamilton's affidavit. Although Laiti does not recall ever calling Hamilton about Inslaw, he does not exclude the possibility that he may have called Hamilton to inquire about the company. He is quite certain, however, that he never made any threat about having "ways of making [Hamilton] sell."

2. The 1983 Laiti Trip To New York

In his affidavit, Hamilton also describes a 1983 Hadron fund-raising trip to New York, which he claims was made for the purpose of raising capital to buy PROMIS. Specifically, he stated:

> Paul Wormeli, former Vice President of Simcon, Inc., a Hadron subsidiary, and Marilyn Titus, former secretary at both Simcon and Hadron, [told] Inslaw [that] . . . Laiti, Wormeli and Brian met in New York in September

> 1983 to raise capital for Hadron. Wormeli said that their aim was to raise $7 million for Hadron's expansion into criminal justice information systems. Titus, then secretary to Wormeli, added that the purpose of the trip was to "raise capital to buy the court [i.e. PROMIS] software." Wormeli also stated that he and Laiti met during this September 1983 visit to New York with Mark Tessleman, then Vice President of Allen and Company, a Wall Street Investment Bank, to discuss raising the capital.

We talked to all involved. They did not support Hamilton's thesis that this was a trip to raise money to buy PROMIS.

a. Earl Brian

Earl Brian denies any knowledge of any efforts by Hadron to buy Inslaw or to raise capital for that purpose. As described below, his denials are well corroborated.

b. Dominic Laiti

Laiti stated that he made a business trip to New York City in late 1983 to raise capital funding for a Hadron subsidiary, Simcon, which manufactured software products for public safety companies. Laiti was accompanied on this trip by Paul Wormeli, a Simcon executive. Laiti said that on this trip a presentation was made to Allen and Company to obtain funding. Mark Kesselman was the Allen and Company executive with whom Laiti dealt. Kesselman made a subsequent trip to Simcon in Northern Virginia to review the company's operations. Laiti stated that the search for capital for Simcon had nothing to do with acquiring Inslaw or PROMIS.

c. Paul Wormeli

Wormeli was the Vice President in charge of Product Development for Simcon. In 1982, Simcon was purchased by Hadron.

Dominic Laiti was president of Hadron at that time. Wormeli remained with Simcon for two years after the Hadron purchase. Wormeli essentially confirmed what Laiti told us.

Wormeli said that he accompanied Laiti to New York City in an effort to raise money. Wormeli said that he and Laiti went to the office of Earl Brian, who was a stockholder and member of the Board of Directors of Hadron at that time. According to Wormeli, it was apparent from this meeting with Brian that appointments had been set up with financial people to discuss funding for Simcon. Wormeli and Laiti then went to the office of Allen and Company where they met with Mark Kesselman and a young man whose last name was Allen. After this meeting at Allen and Company, Laiti and Wormeli also visited other potential sources of funding.

Wormeli said that neither Laiti nor Brian ever discussed with him the acquisition of PROMIS or Inslaw, and that he does not know whether the money sought during the 1983 New York trip had anything to do with Inslaw or PROMIS. Laiti never mentioned PROMIS or Inslaw to him or at any of the New York meetings.

Wormeli stated that he first became aware of the Inslaw problems with DOJ from reading newspaper articles. Wormeli knows William Hamilton from when Wormeli worked at the LEAA. He said he likes Hamilton very much, respects him, and feels bad for him with respect to Inslaw's problems. While Wormeli is sympathetic to Hamilton's view of the matter, Wormeli told us that he does not have any knowledge of a connection between Hadron and Inslaw.

d. Marilyn Titus

Titus worked for Simcon from September 1982 until January 1984. Her title was Administrative Support Analyst. After leaving Simcon in January 1984, she worked for Hadron for four years.

Titus told us that to her knowledge the only court-related software company in which Simcon/Hadron ever had an interest in purchasing was a Southern California company called Responsive Design. Titus said that she never heard any discussion at all about Hadron obtaining PROMIS software, and she does not believe she ever told William Hamilton that the purpose of the 1983 fund-raising trip was to raise capital to obtain PROMIS or Inslaw. She also said that she was not present at or a participant in any conversations that Simcon or Hadron personnel had about Inslaw, and that no one ever made a statement in her presence that indicated that Wormeli and Laiti attempted to raise capital to buy Inslaw, or that Hadron had any interest in acquiring Inslaw or PROMIS. Further, she said no one made any statements in her presence that indicated they were contemplating any unethical or illegal activities to acquire PROMIS.

e. Mark Kesselman

We interviewed Mark Kesselman, who is employed by Citibank in Geneva, Switzerland, by telephone. Mr. Kesselman stated that he was formerly associated with Allen and Company in New York City, and resigned from that firm in February of 1984. In late 1983, Kesselman was asked by Charles Allen to assist Allen's nephew, Nathaniel Kramer, in an analysis of a company in Northern Virginia.

Kesselman did not recall the name of the company, but remembers that Dominic Laiti, Paul Wormeli and Robert Burke were executives of this company, and that this company was developing computer software for police patrol cars. Kesselman spent one day in Northern Virginia looking over this company. Kesselman does not recall any additional involvement with this company after that.

As is apparent from our interviews of these people, Hamilton's affidavit, to the extent it speculates that Laiti traveled to New York to raise money related to Inslaw or PROMIS, is incorrect. Not only is there no evidence that Laiti's 1983 trip to New York had anything to do with Inslaw, there is no evidence from these individuals that Hadron or Simcon ever had any interest in obtaining Inslaw's software.

3. The 53rd Street Ventures Connection

During 1984 Daniel Tessler managed a venture capital fund called 53rd Street Ventures. In his affidavit, Hamilton claims that Daniel Tessler is related to Alan Tessler, a partner in a law firm that represented Hadron, and that Daniel Tessler helped organize Hadron's efforts to "get" Inslaw:

> In December 1984, shortly before INSLAW's Chapter 11 filing, Daniel Tessler, the Chairman of 53rd Street Ventures, came to INSLAW and tried to induce [the Hamiltons] . . . to turn over to him the voting rights of their controlling interest in INSLAW common stock. Daniel Tessler told Hamilton that neither 53rd Street Ventures nor Hambro Venture Capital would attempt to help INSLAW raise capital and avoid possible disintegration unless . . . [the Hamiltons] turned over the voting rights of . . . [their] stock to him by the end of the business day. Daniel Tessler is a relative of Alan Tessler,

> the senior partner in the New York City law firm of Shea and Gould responsible for Brian's and Hadron's mergers and acquisitions work. At a national venture capital meeting in Washington D.C., in May 1988, Patricia Cloherty, Daniel Tessler's wife and former business partner, told Richard D'Amore, an officer of Hambro International Fund, that she "knew all about" Brian's role in the INSLAW matter.

We could not find anybody who could confirm any of the substantive allegations found in this paragraph. To the contrary, the individuals involved deny these allegations.

a. Daniel Tessler

Daniel Tessler told us that 53rd Street Ventures, Inc., was formed in about 1976 as an investment company. The company took in capital from its investors/shareholders and invested that capital in high risk, high reward ventures. The investment company was originally managed by Patricof and Company Ventures.

In about 1984, Patricof and Company ceased managing 53rd Street Ventures Inc. At that time, Daniel Tessler and his wife, Patricia Cloherty, through their investment management company, Tessler & Cloherty, Inc., assumed management of 53rd Street Ventures, Inc.

At the time Tessler and Cloherty took over the management of 53rd Street Ventures, Inc., the investment company had a $100,000 investment in Inslaw, which represented less than 1% of the total value of the fund's portfolio. This investment had been made in about 1982, during the time that 53rd Street Ventures, Inc., was under the management of Patricof and Company. Jonathan Ben Cnaan, who had been an employee of Patricof and Company, arranged for the

investment under the supervision of Patricof & Company. 53rd Street Ventures' investment in Inslaw resulted in 53rd Street Ventures' ownership of about 1.2% of the total ownership of Inslaw.

According to Tessler, he and Cloherty looked into the Inslaw investment after they assumed management of 53rd Street Venture. They determined that Inslaw had serious operating difficulties. They determined, from their inspection of the company and its records, that Inslaw could not meet its production obligations and was heavily in debt. At about this same time, Ed Goodman of Hambro International, another investor in Inslaw, asked Tessler to meet with William Hamilton to suggest to Hamilton ways that Inslaw could deal with its cash flow difficulties and debt problems.

Tessler met with Hamilton in late 1984 at the Inslaw offices. Tessler is not sure if there was only one meeting with Hamilton or others, or if they also spoke by telephone in connection with Inslaw's financial difficulties. Tessler does recall that during his discussions with Hamilton, Hamilton asked Tessler about 53rd Street Ventures investing additional capital in Inslaw. Tessler denied that he ever tried to induce (or even suggested) to Mr. or Mrs. Hamilton that the Hamiltons turn over to him the voting rights of their controlling interest in Inslaw common stock. According to Tessler, he did not tell Mr. Hamilton that 53rd Street Ventures (and Hambro) would not help Inslaw raise capital and avoid possible disintegration unless the Hamiltons turned over the voting rights of their stock to Tessler by the end of the business day. Tessler maintained that he never sought control of the Hamilton stock.

Tessler stated that he discussed the issue of control with Hamilton only in the context of it being an issue with respect to future investments in Inslaw. According to Tessler, he only told Hamilton that investors were very unlikely to invest additional capital in Inslaw if the company continued to be managed and controlled by the same people who were in charge of the company when it got into financial difficulties. In short, Tessler maintained that he never sought to gain control of Hamilton's stock and never gave Hamilton the "ultimatum" described in the Hamilton affidavit.

Tessler told us that he does not know Earl Brian, Edwin Meese, Dominic Laiti or Lowell Jensen. Tessler told us that he never discussed--or communicated in any way--with Earl Brian, Edwin Meese, Dominic Laiti, Lowell Jensen or any employee/official of DOJ, the White House staff or the Reagan/Bush administrations, about 53rd Street Ventures' investment in Inslaw, Tessler's conversations with William Hamilton, or the issue of 53rd Street Ventures putting additional capital into Inslaw. Tessler assured us that he has never had any dealing with Hadron, Simcon, or Biotech, and never discussed 53rd Street Ventures' investment in INSLAW with anyone from those companies.

As to the claimed connection between Tessler and Earl Brian's lawyers, Tessler told us that he is not a relative of, and does not even know, Alan Tessler. Additionally, Tessler has had no dealings with the law firm of Shea and Gould, and had no discussions with that firm regarding 53rd Street Ventures' investment in Inslaw.

Tessler told us that to his knowledge, his wife, Patricia Cloherty, has no knowledge of Earl Brian or any connection between Brian and Inslaw. Further, he said, Cloherty has never told him that she "knew all about" Brian's role in the Inslaw matter, nor has she ever said words to that effect.

b. Richard D'Amore

Richard D'Amore is a partner in Hambro International Equity Partners ("Hambro"), Boston, Massachusetts. He stated that Hambro is a venture capital company in the business of investing in existing businesses. In 1983, Hambro invested approximately $400,000 in Inslaw. D'Amore was placed on the Board of Directors of Inslaw because Hambro was the lead investor.

We showed D'Amore the statement attributed to him in the Hamilton affidavit -- namely, that Patricia Cloherty, Daniel Tessler's wife and former business partner, had told D'Amore that she knew "all about" Brian's role in the Inslaw matter. D'Amore told us that Cloherty never made such a statement to him, and that he never told Hamilton (or anyone else) that she did. D'Amore said that he does not know of any role played by Brian, or whether Cloherty knows of any such role.

c. Patricia Cloherty

Patricia Cloherty worked for Patricof and Company in New York from about 1970 until about 1977, when she was appointed by President Carter to be Deputy Administrator of the Small Business Administration ("SBA"). When she left the SBA in about 1980, she worked at Tessler & Cloherty, Inc., an investment management

company that she ran with her husband, Daniel Tessler. In February of 1988, Cloherty returned to Patricof and Company, where she has been employed ever since.

Cloherty's description of the history of the 53rd Street Ventures' investment with Inslaw is consistent with what her husband, Daniel Tessler, told us as described above. She said that she had no involvement with Inslaw until she and her husband took over management of 53rd Street Ventures in 1984.

Cloherty said that she knows Earl Brian. She said she met Brian sometime in the 1980s, when they both served on the board of the National Association of Small Business Investment Companies. Cloherty met Brian at board meetings. Cloherty said that in 1990, Brian contacted Patricof and Company with a deal proposal regarding UPI. Cloherty never met with Brian directly and sent an associate in the firm to look into the deal. Patricof and Company decided not to pursue the deal. This was the extent of Cloherty's contact with Earl Brian.

Cloherty told us that she has never heard of and has had no involvement with Hadron or Simcon. She does not know Dominic Laiti, Edwin Meese, or Lowell Jensen. Cloherty never discussed 53rd Street Ventures' investment in Inslaw with Earl Brian, Lowell Jensen, Ed Meese, Dominic Laiti, or any officials or employees of DOJ or of the Reagan or Bush administrations.

While Cloherty knows Richard D'Amore, she insists she never told Richard D'Amore (or anyone else) that she "knew all about Brian's role in the Inslaw matter." Indeed, Cloherty maintains

that she does not know anything at all about Earl Brian's connection, if any, to Inslaw.

4. The Jonathan Ben Cnaan Allegations

Hamilton's affidavit also referred to a person by the name of Jonathan Ben Cnaan. According to the affidavit,

> Jonathan Ben Cnaan, an account executive with 53rd Street Ventures, a New York City venture capital firm that then had a small equity investment in Inslaw, described a meeting in September 1983 at 53rd Street Ventures with a "businessman with ties at the highest level of the Reagan Administration" who was eager to obtain the PROMIS software for use in federal government contract work. The meeting took place several months after the contract disputes with DOJ had emerged, and the businessman assured 53rd Street Ventures that INSLAW would never be able to resolve them. According to Ben Cnaan, the businessman was annoyed that [Hamilton] . . . had rebuffed an attempt earlier that year to buy INSLAW in order to obtain title to the PROMIS software.

Earl Brian denied knowing Ben Cnaan and insisted that he is not the unidentified businessman who, according to the Hamilton affidavit, met with Ben Cnaan.

We tried to find Jonathan Ben Cnaan. The number for Ben Cnaan supplied by Inslaw was disconnected with no forwarding number. We learned that Ben Cnaan had last been employed by Patricof and Company Ventures in New York City, and we went to the offices of that company and met with Office Manager Susan Thomas Smith. Smith told us that Ben Cnaan formerly worked for Patricof and Company but had left several years ago to start up a company called Axiom Capital. Smith believed that Ben Cnaan may have returned to Israel.

We went to the address of Axiom Capital in New York City but the company was no longer there and there was no forwarding address for the company available.

We also asked Daniel Tessler if, as a result of his purchase of 53rd Street Ventures, he could help us in our search for Ben Cnaan. He told us he had not had contact with Ben Cnaan in years and, like Smith, told us that Ben Cnaan had started a company called Axiom some time back. Tessler did not know if the company was still in business. He also thought that Ben Cnaan had probably returned to Israel.

Although we would have liked to talk to Ben Cnaan, our inability to locate him does not preclude us from concluding this matter. Because it appears that Tessler, D'Amore, and Cloherty did not say what Hamilton claims they said, even if the attribution to Ben Cnaan were correct, there would be nothing to tie that claim to Hadron or Brian, since Brian denies it and Ben Cnaan himself did not refer to Brian (according to the affidavit).

5. <u>The Edward Hurley Overtures</u>

Hamilton's affidavit identified a statement allegedly made by a Hadron employee named Edward Hurley, in which Hurley supposedly stated that Hadron "wanted to acquire" PROMIS:

> In approximately June 1985, Edward Hurley, then a Hadron Vice President in charge of its criminal justice systems work, told Theresa Bousquin that he did not believe that INSLAW would be able to survive a Chapter 11 and that Hadron wanted to acquire INSLAW's "court software" to complement its law enforcement software. Hurley resigned from Hadron in August 1985, the month after the US Bankruptcy Court issued a Confidentiality

Order sealing INSLAW's proprietary and customer information from DOJ. The Confidentiality Order thwarted DOJ's covert efforts to liquidate INSLAW. In the fall of 1985, Hadron divested itself of the law enforcement software that Hurley had earlier that year cited as a key part of Hadron's ambitions in the criminal justice field.

Theresa Bousquin is a current INSLAW employee, having begun working for INSLAW in August 1989. Prior to joining INSLAW, Bousquin was employed with Fairfax County, Virginia for a number of years. While employed there, she worked with the implementation and development of computer programs and systems for the county courthouses.

Bousquin told us that in 1985 she interviewed for a position at Hadron. The interview was with Ed Hurley, who was a Hadron Vice President. During the interview, Bousquin mentioned to Hurley that she was offered a position at INSLAW. Hurley inquired why she did not accept this position, and Bousquin responded that she was concerned because INSLAW was in a Chapter 11 bankruptcy and she was not sure that INSLAW could survive. Hurley responded that he also doubted INSLAW could survive this bankruptcy. According to Bousquin, Hurley told her that INSLAW was the only real vendor for court systems, both in the product INSLAW had and in the manner in which INSLAW could respond to differences in the various courts and prosecutors' offices. She and Hurley agreed that INSLAW had good technology. Bousquin said that Hurley added words to the effect of "it would be nice to get one's hands on that software." Bousquin did not identify any statements Hurley made about any effort by Hadron to acquire INSLAW. Instead, she told us that it was her

impression that Hurley was not doing anything active to acquire the INSLAW software, and that his remark about the software had been made in passing conversation.

Again, a claim in the Hamilton affidavit about what somebody said proved inaccurate. Nothing about Bousquin's statement suggests an effort by Hadron to acquire INSLAW or PROMIS.

6. The Accumenics Contract Award

In his affidavit, Hamilton states:

> A[n] . . . informant who fears reprisal told Inslaw that James L. Byrnes, a Deputy Assistant Attorney General in the Land and Natural Resources Division with close ties to Meese, spearheaded the award by DOJ in October 1987 to a Hadron subsidiary of a $40 million computer services contract for litigation support in that Division.

The award to which Hamilton apparently is referring in this paragraph is a contract awarded to a company called Accumenics. Mr. Hamilton and his attorneys refused to disclose to us the identity of the alleged informant. We then interviewed Mr. Byrnes in order to determine what role he played in the Accumenics contract, and what connection he had to Hadron.

James Byrnes, who is currently an Administrative Law Judge with the Department of the Interior, was employed by DOJ during 1986 as an Associate Deputy Attorney General to then Deputy Attorney General Arnold Burns. In November 1987, Byrnes transferred to the Land and Natural Resources Division of DOJ. Byrnes explained that he had transferred to the Land and Natural Resources Division because he was very interested in environmental law and wanted to practice in a line division.

Byrnes said that he did not know that he had been named in Hamilton's affidavit. We then read him the allegations in the Hamilton affidavit, that Byrnes had "close ties to Meese" and had "spearheaded the award by DOJ in October 1987 to a Hadron subsidiary of a $40 million computer services contract for litigation support in that Division." Byrnes denied any knowledge of the awarding of such a $40 million computer services contract, and does not know if such a contract was, in fact, awarded. Byrnes further stated that he had no knowledge of, or contact with, Hadron, Simcon, Accumenics or any Hadron subsidiary.

Byrnes told us that he recognized the name Earl Brian, but said that he had never met him. Byrnes denied that he now has or ever had "close ties" with former United States Attorney General Edwin Meese. According to Byrnes, he was interviewed by then Deputy Assistant Attorney General Arnold Burns and then Attorney General Edwin Meese when he was initially seeking employment by DOJ. After joining DOJ, Judge Byrnes was involved in personnel matters and often attended meetings where then Attorney General Meese was present. Byrnes described Meese as a friendly individual, and said that he has used Meese as a reference. Byrnes does not know, however, if Meese ever has been contacted as a reference for him. Byrnes told us that he never had any discussions with Meese about Inslaw or Earl Brian.

7. <u>The Alleged Videnieks/Hadron Connection</u>

The Hamilton affidavit purports to identify a connection between DOJ's Contracting Officer, Peter Videnieks, and Hadron:

John Schoolmeister, a former Customs Services Program Officer, told Inslaw that Videnieks, at the time he was hired as the PROMIS Contracting Officer, was the Contracting Officer for two contracts between U.S. Customs Service and Hadron, Inc., and that Videnieks came to know the Hadron management during the course of that assignment.

John Schoolmeister told us that during the late 1970s he was employed by the Department of Customs. He said that he was employed by the Branch Chief of Engineering Services and his main task was to support the field patrol offices with high technology equipment.

According to Schoolmeister, Peter Videnieks was an employee at Customs during the time Schoolmeister worked there. Schoolmeister said that he believed Videnieks to be a "by-the-book" contracting officer. Schoolmeister did not have a great deal of contact with Videnieks at Customs, but knew him to be a contracting officer with Customs who later went to DOJ as a contracting officer.

Schoolmeister said that Videnieks had some dealings with Hadron while he was at Customs. According to Schoolmeister, Hadron had a number of contracts with Customs, but only two were handled by Videnieks. Schoolmeister could not recall which two contracts Videnieks handled. Although Schoolmeister did not claim to have any personal knowledge of Videnieks ever meeting any particular person at Hadron, he said he believed that Dominic Laiti, president of Hadron, would almost certainly have met Videnieks because Laiti, according to Schoolmeister, "met everyone in government."

Schoolmeister could not recall any specific significant event occurring between Hadron and Videnieks.

Videnieks told us that he does not recall being the contracting officer on any Hadron contract. Neither does Videnieks ever recall visiting Hadron, or meeting Hadron management. Videnieks told us that during 1978 to 1981 he worked primarily as a supervising contracting officer at the Customs Service, and that it was possible that one of the contracting officers he supervised administered a Hadron contract.

We attempted to determine whether Videnieks in fact ever worked on a Hadron contract. Hadron's records show that during the time Schoolmeister says Videnieks "must have" met Laiti, two Hadron subsidiaries had contracts with the Customs Service. Videnieks was not the Contracting Officer on either of these contracts, and his name does not appear in Hadron's records regarding those contracts. We determined that Videnieks did supervise the contracting officers in these two procurements, but Videnieks has no recollection of these contracts and he is fairly sure that he never traveled to any vendor location (certainly not to Hadron) with those subordinates.

We did find one connection between Videnieks and a Hadron subsidiary, but it is extraordinarily tenuous. In December 1980 Hadron purchased a company called Universal Systems, Inc. In 1978 and 1979, prior to Hadron's purchase of Universal Systems, Videnieks had been the Contracting Officer on a contract between the Customs Service and Universal Systems. It is possible that Schoolmeister may have had this contract in mind. In any event,

the record is quite clear that Videnieks' involvement with Universal Systems ended prior to Hadron's purchase of that company.

Whether or not Videnieks in fact played some role in connection with a Hadron contract, we are persuaded from our discussions with him that those contacts were so insignificant that they have genuinely lapsed from Videnieks' memory. We find no evidence to support the claim that Videnieks' connection with Hadron (if, indeed, there is any connection at all) was part of a conspiracy to obtain PROMIS. At most, Schoolmeister's statement tends to show that it is possible that Videnieks once met Laiti. This, both by itself and in conjunction with the other evidence reflected in this report, falls far short of anything that could fairly be called evidence of a conspiracy.

8. The Attempted Purchase of Inslaw By SCT

William Hamilton devoted approximately three pages of his affidavit to a discussion of a 1986 attempt to purchase Inslaw by a company called Systems and Computer Technology, Inc. ("SCT"). We have found so little evidence to support these allegations (and the inferences that they are supposed to support) that we believe it unnecessary to repeat these allegations verbatim here.[54] In general terms, Hamilton describes a "hostile" effort by SCT to purchase Inslaw in early 1986. He alleges that in "late 1985" DOJ officials met with SCT representatives "to encourage" the SCT takeover of Inslaw. Even Hamilton does not allege any direct

[54]We note that the House Committee similarly felt no need to comment on the allegations made by Inslaw about the attempted purchase by SCT.

evidence of a link between Brian and SCT. Instead, he refers to two events that he apparently believes support the inference that Brian was behind SCT's efforts to obtain control of Inslaw. First, he says that he has second-hand hearsay information that the investment firm Allen and Company bought 7.8% of SCT stock on behalf of an unnamed third party. Second, he says that one of the law firms that did work for Earl Brian also did work for SCT.

To begin with, we note that it is difficult to understand how the allegations about SCT would fit into Inslaw's theory of a Hadron conspiracy. It is undisputed that as of late 1985 Inslaw's implementation contract with DOJ was terminated and that DOJ was beginning to self-install PROMIS. Moreover, Inslaw now claims that by 1985 Earl Brian had obtained enhanced PROMIS and was selling it to governments all over the world. Therefore, there would be no apparent reason for Brian or Hadron to be attempting to control Inslaw (through SCT) in 1986.

More importantly, none of the evidence we found supports the allegation that DOJ encouraged SCT to buy Inslaw, or that Earl Brian had any connection to the SCT effort. We interviewed the SCT officers and employees who were primarily involved with the effort to purchase Inslaw. They told us that in late 1985 SCT officials approached Hamilton about a possible purchase of Inslaw and that Hamilton was initially receptive but later rejected the offer. They also told us that the only contacts between SCT and DOJ officials occurred when SCT was doing its due diligence in anticipation of its purchase of Inslaw. They told us that they

contacted DOJ in order to determine the nature of Inslaw's disputes with DOJ and the possibility of Inslaw obtaining additional contract work from DOJ if SCT purchased Inslaw. None of the SCT employees identified in Hamilton's affidavit had any knowledge of an effort by DOJ to encourage SCT to purchase Inslaw. Likewise, none had any knowledge of any connection between Earl Brian and SCT.

9. **The Lois Battistoni Allegations**

In his affidavit, William Hamilton attributes the following information to Lois Battistoni:

> Lois Battistoni, a former DOJ Criminal Division employee, told INSLAW that an employee of the Criminal Division disclosed to her in 1988 that the company chosen to take over INSLAW's business with DOJ was connected to one of the top DOJ officials through a California relationship and that Hadron fit the bill because both Brian and Meese served together in Governor Reagan's administration in California.
>
> . . . Battistoni also learned from another employee of the Criminal Division in July 1989 that DOJ intended "to bury INSLAW," meaning cover up what it had done to INSLAW.

a. **Lois Battistoni**

Not surprisingly, we began our investigation of these allegations with an interview of Ms. Battistoni herself. Lois Battistoni is a former DOJ administrative employee. It became apparent during our interview of her that she has absolutely no first hand information regarding Inslaw's allegations. In fact, virtually all of the information that she provided came from newspaper and journal articles that she saved.

With respect to the statement that "an employee of the Criminal Division disclosed to her in 1988 that the company chosen to take over Inslaw's business with DOJ was connected to one of the top DOJ officials through a California relationship and that Hadron fit the bill because both Brian and Meese served together in Governor Reagan's administration," Ms. Battistoni told us that she was given this information by an attorney at DOJ who did not wish to have his identity revealed.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Battistoni did, however, tell us that she was told in 1989 by Floyd Bankson, who was a system engineer in the Criminal Division, that DOJ intended to "bury Inslaw," meaning cover up what it had done to Inslaw. Additionally, she later told us that Garnett Taylor and Charles Trombetta had information about DOJ and Inslaw.

While these were the only leads that Battistoni was able to provide, we must add that, for the following reasons, any information provided by Battistoni is extremely suspect. To begin with, Battistoni appeared to manipulate and misstate evidence in

order to support her generalized suspicions of wrongdoing at DOJ. For example, Battistoni told us that she did not believe that we were actively investigating the Inslaw matter. We then wrote Battistoni a letter in which we assured Battistoni that we were actively investigating the matter, and we would very much like to meet with anyone who she believed had information that would assist our investigation. We urged her to contact us to arrange such a meeting. This letter was sent to the real estate office where Battistoni worked. Shortly after this letter was sent, a reporter called to advise that he had been given a copy of our letter and that this copy of the letter had on the bottom of it "CC:AG/WH." The letter that we sent Battistoni was not carbon copied to anyone and had no "CC" reference on it. Battistoni denied altering the letter and claimed to us she received the letter in that condition. It appears to us, however, that Battistoni added this "CC" information in an attempt to suggest that we were sending information gathered in our investigation to the Attorney General and the White House (which we, of course, were not). In an attempt to undermine the credibility of this investigation, she then gave this doctored letter to William Hamilton, presumably knowing that Hamilton would give it to the press.

The second credibility problem was that Battistoni appeared to be extremely biased against DOJ. During our interview of her, she accused DOJ of being involved in numerous acts of wrongdoing that had nothing whatsoever to do with Inslaw. Despite the fact that we informed Battistoni that the focus of our inquiry was solely on the

Inslaw allegations, Battistoni kept returning to these other alleged wrongdoings by DOJ. Battistoni's information about these other alleged wrongdoings by DOJ--like her information regarding Inslaw--consisted purely of hearsay information and speculation.

b. Charles Trombetta

We interviewed Charles Trombetta, one of the individuals who Battistoni identified as having information about DOJ and Inslaw. Trombetta stated that he had no direct knowledge of the Inslaw matter. He further stated that Garnett Taylor might have information concerning the possession of Inslaw documents by the DOJ security office, but Trombetta could not provide any further details.

c. Garnett Taylor

Lois Battistoni told us that Garnett Taylor had information about DOJ and Inslaw. In addition, William Hamilton told us that a senior U.S. Government official, whom Hamilton refused to identify, told Hamilton that Taylor, a former security officer at DOJ, had information about DOJ malfeasance in regard to INSLAW. Specifically, according to Hamilton's source, Taylor knew about the destruction of a number of INSLAW documents by the Justice Department's Office of Security.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

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Fed. R. Crim. P. 6(e)

d. James Walker

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Fed. R. Crim. P. 6(e) we spoke with James Walker, who is the Chief Security Specialist with the Justice Management Division. Walker has been employed by DOJ for eight years. As part of his duties he operates a Sensitive Compartment Information Facility ("SCIF"), a specially constructed room with special locks and alarms within the DOJ building. DOJ attorneys cannot store classified national security/foreign intelligence documents in their offices.

Walker supervised Garnett Taylor for approximately one year before Taylor was transferred to Personnel Security, where Taylor was assigned for about one year. As a control officer, Taylor had responsibility for shredding classified documents once a determination was made that the documents need not be retained. However, Taylor did not review the classified files of departing DOJ attorneys to determine whether the documents should be retained or shredded. Rather, the DOJ attorney would review the classified documents and determine whether the documents should be shredded or retained.

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Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Walker stated that it was conceivable that Taylor had been dispatched to take care of a file cabinet belonging to a DOJ employee who had left. However, Walker had no recollection of an incident where he reassigned Taylor to another task and handled the disposition of the documents in the file cabinet himself.

Walker stated that there were no Inslaw or PROMIS documents in the DOJ Security Department. To Walker's knowledge there were never any Inslaw documents in any of the safes he controlled or any of the safes he knew about.

e. **Floyd Bankson**

We interviewed Floyd Bankson about Battistoni's allegations that he told Battistoni that DOJ intended to "bury Inslaw." Battistoni was a secretary at LEAA when Bankson worked there in 1977. Bankson later went on to work in the Office of Policy and Management Analysis within DOJ's Criminal Division. There, Bankson was involved with the implementation of Project Eagle.

Bankson absolutely denied the allegations made by Battistoni and Hamilton. He said that he never heard Lowell Jensen say anything derogatory about Inslaw, and that Jensen had never pressured him to select the DALITE system for DOJ's case tracking needs. Bankson also said that he never said that DOJ intended to "bury INSLAW," and that he in fact was not aware of any wrongdoing in connection with PROMIS that needed to be "buried." According to Bankson, Lois Battistoni was "constantly" calling him to ask whether he had read various news articles. It was Bankson's

opinion that Battistoni liked the publicity that she had obtained as a result of Inslaw's allegations.

10. Ronald LeGrand

In his December 1989 affidavit, William Hamilton swears to the following:

> In late April 1988, Ronald LeGrand, then Chief Investigator of the Senate Judiciary Committee, telephoned me to request a full briefing on the disputes between INSLAW and DOJ. My wife and I subsequently briefed LeGrand at INSLAW on the morning of May 11. LeGrand telephoned me two days later with information that he said a trusted source had asked him to convey. LeGrand described the source as a senior career official in DOJ "with a title" whom LeGrand had known for 15 years and whose veracity LeGrand could attest to without reservation. Shortly after DOJ's public announcement on May 6, 1988 that it would not seek the appointment of an independent counsel in the INSLAW matter and that it had cleared Meese of any wrongdoing, the source told LeGrand that "the INSLAW case was a lot dirtier for the Department of Justice than Watergate was, both in its breadth and in its depth." The source also said that the "Justice Department has been compromised on the INSLAW case at every level." On several occasions since then, LeGrand has confirmed what he told me, and on October 11, 1988, Elliot Richardson, counsel to INSLAW, sent Robin Ross, an assistant to Attorney General Dick Thornburgh, a memorandum summarizing the statements attributed by LeGrand to his source. In addition, the source made the following statements:
>
> Jensen engineered INSLAW's problems right from the start and relied for this purpose principally upon three senior DOJ officials: Miles Matthews, Executive Officer of the Criminal Division; James Knapp, a non-career Deputy Assistant Attorney General in the Criminal Division; and James Johnston, Director of Contract Administration in the Justice Management Division. Miles Matthews stated in the presence of LeGrand's source that "Lowell [Jensen] wants to get INSLAW out of the way and give the business to friends."

> The source told LeGrand that John Keeney and Mark Richards, each a career Deputy Assistant Attorney General in the Criminal Division, and Philip White, the recently retired Director of International Affairs for the Criminal Division, knew "all about" the Jensen malfeasance in the INSLAW matter. Although Richards and White were "pretty upset" about it, the source did not believe that either of them would disclose what they knew except in response to a subpoena and under oath. The source added that he did not think either Richards or White would commit perjury.
>
> The source believes that documents relating to Project Eagle were shredded inside DOJ but that INSLAW should nevertheless subpoena DOJ paperwork prepared by a Jensen subordinate relating to the purchase of large quantities of computer hardware for which the senior DOJ career staff could see no justification.

We contacted LeGrand, who no longer works for the Senate. LeGrand said he would tell us about his source's information, but would not disclose his source's identity.

**Material Omitted Pursuant to Fed. R. Crim. P. 6(e).**

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We interviewed Lowell Jensen, who is now a federal district judge in San Francisco. Judge Jensen denied engineering any contract disputes with Inslaw or directing any DOJ action for the purpose of hurting Inslaw. Although Judge Jensen believed that he may once have met Earl Brian in Sacramento, California sometime

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

during the 1970's, he denied having any involvement of any nature whatsoever with Brian during his service with DOJ or thereafter. Judge Jensen denied having any financial interest in any company controlled by Brian, including Biotech, Hadron, Accumenics, and Simcon. He also denied ever owning or ever being promised stock in any computer-related company.

In a sworn statement to OPR Judge Jensen previously denied any plot to injure or bankrupt Inslaw and he reiterated that denial to us. Judge Jensen seemed to us to be sincerely interested in employing computer technology to modernize DOJ operations and management. He recalled Project Eagle, a multi-million dollar project to automate the litigating divisions of DOJ, but denied any involvement in awarding contracts for the project. (Indeed, the RFP for the project issued in May 1986 and Judge Jensen was appointed to the bench the following June.) Judge Jensen impressed us as truthful, sincere, and straightforward in his denials of any wrongdoing or impropriety in connection with either PROMIS or Inslaw. As discussed below, none of [Material Omitted Pursuant to Fed. R. Crim. P. 6(e)] other individuals identified by LeGrand's source who we talked to gave us any reason to question Judge Jensen's conduct or his truthfulness.

Miles Matthews, the former Deputy Associate Attorney General, told us that he never stated or thought that Lowell Jensen wanted to get Inslaw "out of the way" and give business to friends. Matthews also told us that he had never heard of procurement documents regarding Project Eagle (or anything else) being

improperly shredded. Matthews said he has never met or had any contact with Earl Brian, Hadron, Dominic Laiti, Simcon or Accumenics.

James Knapp, a former Deputy Assistant Attorney General in the Criminal Division, told us that he was unaware of any negative feelings toward Inslaw by Jensen, and denied any knowledge of (or participation in) a scheme to cause problems for Inslaw and to give Inslaw's contracts to friends of Jensen or Meese. Knapp also said that he did not even know James Johnston (who, according to LeGrand's Material Omitted Pursuant to Fed. R. Crim. P. 6(e), conspired with Knapp to implement Jensen's alleged scheme).

James Johnston, the current Director of Contract Administration for DOJ, likewise told us that he does not believe he has ever met James Knapp. Johnston told us that he never discussed Inslaw or PROMIS with Lowell Jensen, and that he never received any directions from any superior at DOJ regarding Inslaw.

Our interviews of Phil White, a former Acting Deputy Assistant Attorney General for the Criminal Division, and John Keeney and Mark Richard, both current Deputy Assistant Attorney Generals of the Criminal Division, produced similar results. Each told us that he had no knowledge of any wrongdoing by Lowell Jensen generally, or of the type of wrongdoing described in the Hamilton affidavit specifically.

C. Conclusion Regarding The Alleged Earl Brian Connection

Our investigation has led us to conclude that Inslaw's allegations of a conspiracy to takeover Inslaw or to "get PROMIS" involving Earl Brian and DOJ simply do not withstand any level of scrutiny. Those individuals claiming to have direct knowledge of this conspiracy not only are unworthy of belief, but are contradicted by an abundance of believable and verifiable evidence to the contrary.

Similarly, the claimed "circumstantial evidence" of such a conspiracy, as outlined by William Hamilton and Inslaw's lawyers, falls far short of being proof of anything. Laiti and Brian convincingly deny ever seeking to obtain PROMIS or Inslaw. Laiti has denied telling Hamilton that he had ways of making Hamilton sell. Neither Paul Wormeli, Marilyn Titus nor Mark Kesselman substantiate Inslaw's claim that there was a 1983 trip to New York for the purpose of raising capital to buy Inslaw or PROMIS. Richard D'Amore denies telling Hamilton that Tessler's wife and former business partner, Cloherty, told him that she "knew all about" Brian's role in the Inslaw matter, and Cloherty denies making this statement or knowing anything about Brian's alleged role. Theresa Bousquin, a current Inslaw employee who has no reason to lie or to say anything that would not help Inslaw, claims that she told Hamilton about her conversation with Hurley, but her description of the conversation with Hurley is different from the one that appears in Hamilton's affidavit. In particular, Bousquin says that Hurley did not state, and she was not under the

impression that, Hadron was trying to acquire Inslaw or PROMIS. Additionally, Tessler denies being aware of or participating in any effort by Earl Brian or others to gain control of Inslaw, and he denies ever telling Hamilton that 53rd Street Ventures would not help Inslaw raise capital unless the Hamiltons turned over the voting rights of their stock to him. Finally, Byrnes denies having spearheaded, or having any knowledge of, DOJ awarding a $40 million computer services contract for litigation support to a Hadron subsidiary. It is possible that all of these people were lying, but we do not believe that was the case. The substance and the presentation of their statements persuaded us that these witnesses were telling the truth.

The information from Lois Battistoni and Ivan to [redacted] leads" and the information from LeGrand's [redacted] source find absolutely no corroboration from the witnesses they identified. Indeed, those witnesses fail to provide any support for a conspiracy of any kind, and fail to tie any DOJ official to any misconduct with respect to Inslaw or the PROMIS software.

Material Omitted Pursuant to Fed. R. Crim. P. 6(e).

In short, there is no credible evidence that Hadron ever tried to acquire Inslaw or PROMIS, except for Hamilton's claim about his conversation with Dominic Laiti and his claims that Ben Cnaan told him about a meeting with a businessman with "ties at the highest level of the Reagan Administration" who was eager to obtain the PROMIS software for use in federal government contract work. In light of the fact that virtually none of Hamilton's other statements in the affidavit are supported by the witnesses we have

spoken to, we are not inclined to rely on Hamilton's representations as to his conversations with Laiti and Ben Cnaan as the basis for concluding that Hadron sought to acquire Inslaw.

None of the other evidence we found supports Inslaw's allegation regarding the Brian-DOJ conspiracy. Like the Senate Subcommittee Staff, we find no credible evidence of any connection between DOJ and Earl Brian or Hadron with regard to Inslaw.

## VI. THE ALLEGATION THAT DOJ OBTAINED AN ENHANCED VERSION OF PROMIS THROUGH FRAUD AND DECEIT

Inslaw's original allegations against DOJ were that certain DOJ employees, because of their intense bias against Inslaw, schemed to "get the goods" from Inslaw; that is, to fraudulently trick Inslaw into providing DOJ with Inslaw's proprietary software. This is the theory that Bankruptcy Judge Bason adopted in entering his findings of fact and conclusions of law.

Bankruptcy Judge Bason found that "DOJ converted Inslaw's enhanced PROMIS by trickery, fraud, and deceit." According to Judge Bason's view, DOJ used the threat of terminating advance payments as a "pretense" in order to gain the "leverage" necessary to obtain an enhanced version of PROMIS. He found further that when DOJ entered into Modification 12 it "never intended to meet its commitment" under that agreement, and that once DOJ received enhanced PROMIS pursuant to Modification 12 it "thereafter refused to bargain in good faith with Inslaw and instead engaged in an outrageous, deceitful, fraudulent game of 'cat and mouse', demonstrating contempt for both the law and any principle of fair dealing."

The reason for this wrongful conduct, as alleged by Inslaw and found by Bankruptcy Judge Bason, was Brewer. Judge Bason found that Brewer was "consumed by hatred for and an intense desire for revenge against INSLAW." Judge Bason went so far as to find that the reason Brewer applied for the PROMIS project manager position was to "use that position to vent his spleen against INSLAW." The advance payments dispute and the request for the enhanced software

were said to be part of "Brewer's strategy for the ruination of INSLAW." Judge Bason suggested that Brewer's hatred of Inslaw poisoned other lower level DOJ employees, and that upper level DOJ officials consciously ignored Inslaw's complaints about Brewer because Deputy Attorney General D. Lowell Jensen had a "previously developed negative attitude about PROMIS and INSLAW."

During our investigation of these allegations we reviewed deposition and trial testimony, interviewed many of the individuals involved, reviewed documents produced at trial, and located additional documentary evidence regarding these matters. The evidence we have compiled to date does not support a finding that DOJ employees intentionally deceived or defrauded Inslaw, or that there was a scheme to trick Inslaw into turning over its proprietary software. To the contrary, we are persuaded that all of the actions taken by DOJ employees were done with a good faith belief that they were in the best legitimate interests of the government. We conclude from our review of the evidence that DOJ's actions in connection with the advance payment dispute and its request for a copy of the software were reasonable, and not made for illegitimate or unlawful purposes. Likewise, we do not believe that the evidence supports the conclusion that DOJ entered into Modification 12 without any intention of complying with its terms, and for the purpose of getting Inslaw to "give up the goods."

We do, however, find one area where the judgment of DOJ personnel might be subject to criticism. After the execution of Modification 12, and after Inslaw had submitted its proposed

methodology for identifying privately funded enhancements, DOJ employees could have made a greater effort to resolve the proprietary enhancements dispute. The position that DOJ took--that its only obligation was to either accept or reject Inslaw's submissions--can be criticized as inconsistent with the higher standard of reasonableness and fair dealing to which DOJ should hold itself.[61]

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[61]We emphasize that we have not found that Inslaw has demonstrated any proprietary rights in the software. The implication in the House Committee Report that DOJ has admitted Inslaw's superior proprietary rights in the software appears to us to be entirely unwarranted. The House Report relies upon a statement of Deputy Attorney General Arnold Burns to OPR, as essentially an admission that DOJ would lose any litigation to determine the parties rights in the software. The House Report cites the statement as "one of the most damaging statements" discovered by the Committee. Burns' remarks, the Report claims, establish that Burns was told by "Justice Department attorneys that the Department would probably lose the case" on the proprietary rights issue. The Committee's recounting of the statement completely distorts and misconstrues the context and import of Burns' statement.

Read fairly and in the context of the entire statement, it is unambiguously clear that Burns was not saying that DOJ did not have a valid defense to Inslaw's proprietary rights claims. All that Burns referred to was the uncontested fact that DOJ could not successfully counterclaim against Inslaw for Inslaw's use and sale of the PROMIS software. A counterclaim by DOJ would be unsuccessful even though that software had originally been developed at the public's expense, because DOJ had already acknowledged that the original PROMIS was in the public domain. To say, as Burns did, that DOJ had no claim against Inslaw for Inslaw's use of the PROMIS software does not constitute an admission that DOJ would lose Inslaw's case against DOJ. Burns' statement did no more than admit the uncontested fact that the original PROMIS software was in the public domain and that DOJ would certainly lose any suit in which it took a contrary position.

A. The Advance Payments Dispute

From what we can discern, Inslaw was the only DOJ contractor with an advance payments provision in its contract during 1982. In order to obtain such a provision Inslaw had to submit to DOJ an official request that demonstrated that Inslaw qualified for advance payments under the applicable regulations. Inslaw submitted that request on February 19, 1982, in the form of a letter signed by James Kelley, Inslaw's General Counsel. Because the relevant regulations required that a contractor requesting advance payments show that no means of adequate financing other than by advance payments were available to the contractor, Kelley's February 19 request letter claimed that commercial "borrowing is not reasonably available as a solution to Inslaw's cash flow problem." In reliance on that representation, Videnieks obtained specific approval for the advance payments clause of the contract from the Assistant Attorney General for Administration.

On November 1, 1982, Inslaw notified Videnieks that it had violated the advance payments clause by assigning its receivables under the contract as collateral for a line of credit. Videnieks' immediate response to this notice was far from rash. On November 10, 1982, he sent Inslaw a letter instructing Inslaw immediately to terminate the event of default (the assignment of its receivables), and requesting Inslaw to provide all documentation concerning the assignment and the line of credit.

When he received the requested information from Inslaw, Videnieks learned that Inslaw had arranged the line of credit

secured by the receivables during late March and early April 1982. Both Videnieks and Brewer told us that they were extremely angry to learn that Inslaw had obtained commercial financing less than two months after it had declared that financing was not "reasonably available." Both felt that they had been lied to by Inslaw.

Videnieks told us that it was this misrepresentation by Inslaw that was the primary reason for his giving notice of termination of advance payments. Having viewed Videnieks demeanor, and having considered all the surrounding circumstances, we believe Videnieks on this point. Not only did Videnieks feel he had been lied to, but he also had evidence before him that Inslaw did not in fact qualify for the advance payment program. Virtually everyone we spoke to, including witnesses identified by Inslaw, agreed that Videnieks was a very "by the book" contracting officer. Indeed, he appeared to us to be a man who is most comfortable when discussing precise contractual issues. His denial that he had any intention of trying to force Inslaw into "giving up the goods" when he decided to terminate the advance payments is supported by the weight of the evidence.

Inslaw, and Bankruptcy Judge Bason, go to great lengths to emphasize that Inslaw's "technical violation" of assigning its receivables did not put the government at financial risk. They appear to be correct on that point. But that does not lead to the conclusion that DOJ's decision to terminate the advance payments was wrongful or a pretext. Videnieks explained the primary reasons for the threatened termination in terms of the nature of Inslaw's

default, not in terms of risk to the government. The fact that the government was relatively secure did not mean that Inslaw still qualified for advance payments, or that DOJ had not been misled. If Inslaw wanted seriously to challenge Videnieks' explanation of his decision, it would be much more effective to present evidence that DOJ knew that Inslaw was obtaining commercial financing at the same time it was representing in its formal request that it could not. To our knowledge, no such evidence exists.

B. DOJ's Demand For a Copy Of PROMIS

In November 1982 Brewer requested Inslaw to produce "all computer programs and supporting documentation developed for or relating to this contract." After Inslaw informed DOJ that the contract required the contracting officer to make such a request, Videnieks sent Inslaw a letter on December 6, 1982, requesting in more specific detail essentially the same materials.

In their prior testimony, and in their statements to us, Brewer, Videnieks, and Rugh, have maintained that this request was made out of a concern about Inslaw's financial condition. This concern arose from the fact that DOJ did not yet have any copies of the version of PROMIS that was called for in the contract: the Pilot Project version plus the five BJS enhancements. Because as of December 1982 DOJ had not yet selected or purchased its mini-computers, Inslaw had not completed any permanent installations under the contract. At that point Inslaw was making PROMIS available to United States Attorneys' offices by way of telecommunications links to Inslaw's time sharing computer in

Virginia. DOJ's concern was that if Inslaw failed prior to the first installation DOJ would not have available to it a functioning copy of the contract version of PROMIS.

Bankruptcy Judge Bason found that DOJ's claimed concern about Inslaw's finances were just a pretense and a ruse to "get the goods" from Inslaw. We do not agree, and cannot even find support for such a theory in the evidence Judge Bason cites.

All of the actions taken by DOJ employees around the time DOJ made its request for the software are consistent with its explanation of its conduct. The internal memoranda and the handwritten notes created around that time by DOJ employees reflect an ongoing institutional concern about Inslaw's financial health, and about the "programmatic risk" created by not having a copy of PROMIS. The testimony of all of the DOJ witnesses points to continuous discussions within DOJ about Inslaw's financial health and about how DOJ would and could respond in the event of a failure. To believe that DOJ's concerns about Inslaw's financial health were actually a pretext, would require a finding that certain DOJ employees were so prescient that they created numerous internal documents, and indeed even misled their superiors, just so that they could defend themselves against a claim of theft years later.

At trial, Bankruptcy Judge Bason refused to believe any of the DOJ witnesses who expressed concerns about Inslaw's financial viability. He found that during the winter of 1982-83 Inslaw was not in a vulnerable financial position, and therefore concluded

that DOJ's claimed concern about Inslaw's financial condition was a "known false pretext," put forward as part of a scheme to obtain a version of PROMIS to which the government was not entitled.[62]

Videnieks testified at trial that he had been told by Robert Whitely, the government's auditor on the Inslaw contract, that Inslaw was near insolvency. Whitely likewise testified that after reviewing Inslaw's financial statements and meeting with Inslaw's accountants, he expressed his view that Inslaw either was or was nearly insolvent.

Bankruptcy Judge Bason, however, said he believed Whitely's testimony was "manufactured solely for use at trial." (Oddly, elsewhere in his findings and conclusions, Bankruptcy Judge Bason found that Whitley was "generally truthful.") Judge Bason stated this conclusion after finding that Whitely never prepared any report, that Whitely never referred to the potential of Inslaw's insolvency in his deposition, and that Videnieks did not mention Whitely in his deposition. All of these factual assertions appear

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[62]Bankruptcy Judge Bason neither acknowledged nor addressed the inherent tension between his finding: (a) that in December 1982, when DOJ requested a copy of the contract version of PROMIS, Inslaw's financial position was so strong that any claimed concern by DOJ employees must have been pretextual, and (b) that in January 1983 (one month later), when DOJ threatened to terminate the advance payments, DOJ employees were "well aware of Inslaw's financial position and were equally well aware of the potential for harm to Inslaw from delayed payments". Ironically, one item of evidence Judge Bason cited as evidence of Inslaw's strength was its $1.2 million line of credit at Bank of Bethesda. Obviously, Judge Bason felt that the willingness of a bank to lend to Inslaw was a sign of financial health. He never addressed, however, what it said about Inslaw's financial health that in order to get a loan Inslaw was required to pledge assets it had agreed not to assign, and that Inslaw had apparently borrowed more than it had planned to borrow at the time of the contract award.

to be just plain wrong. Even in the pages of trial testimony that Judge Bason cites as support for the proposition that Whitely never documented his concerns, Whitely testified that he did in fact prepare work papers that he submitted to Justice Management Division officials. Likewise, Whitely stated quite clearly in his deposition, "I thought Inslaw, unless they became a more profitable corporation, was facing insolvency, period." Finally, Videnieks stated in both his deposition and his trial testimony that he was informed by the "audit staff" of the potential for an Inslaw failure. Whitely, of course, was part of the audit staff.

Not only did the evidence support DOJ's claim that its employees were subjectively concerned about Inslaw's financial health, but also independent evidence suggests that those concerns were not unreasonable. One of Inslaw's investors, a former member of its Board of Directors, told us that by the Spring of 1983, shortly after he made his initial investment in Inslaw, he had decided not to invest further in the company because he felt it did not have a strong future. Another investor expressed a similar view of the company based on his analysis of Inslaw's condition in 1984.

In summary, we find that DOJ requested a copy of PROMIS not as a pretext, but out of a good faith belief that the possibility of an Inslaw failure left the government in an extremely vulnerable position.

C. DOJ's Original Demand Was Not For Enhanced PROMIS

There is a fundamental, and perhaps fatal, flaw to the theory of conversion advanced by Inslaw and Bankruptcy Judge Bason. According to that theory, DOJ asked for a copy of PROMIS and then used "the pretense of threatened termination of advance payments" as part of a plan whereby DOJ "knowingly set out to obtain a version of PROMIS to which it was not entitled under the contract and which DOJ understood contained proprietary enhancements belonging to Inslaw." As is apparent from Judge Bason's formulation of the plan, this theory requires proof that DOJ set out to obtain something to which it was not entitled. That proof is missing.

The contract required Inslaw to provide only public domain software; i.e., the Pilot Project version plus the five BJS enhancements. DOJ's initial request was for the software being provided under the contract. If Inslaw had in fact maintained a contract version of PROMIS there would have been no proprietary rights dispute. Inslaw's production of such a version would have satisfied any obligation it had under the contract, and DOJ would have been protected from an Inslaw failure.

Inslaw did not maintain such a version, however, and therefore it faced the possibility of producing a version of PROMIS that it considered proprietary. It was as a result of this situation that Inslaw notified DOJ in February 1983 that the time-sharing version of PROMIS contained proprietary enhancements. But the fact remains that there is no evidence that anyone at DOJ knew before February

1983 that Inslaw was unable to produce a contract version of PROMIS.[63]

The absence of such evidence is critical. Throughout his opinion Bankruptcy Judge Bason refers to DOJ's attempts to "obtain a version of PROMIS to which it was not entitled." But Brewer, Videnieks and the others at DOJ could not have been trying to get a version of PROMIS to which they were not entitled unless they knew that Inslaw was unable to produce the version of PROMIS to which they were entitled.[64] We have scoured the record trying to find evidence that Inslaw told DOJ that it did not maintain a copy of the contract version of PROMIS, but we find nothing. In fact, we cannot even find evidence that anyone at DOJ knew that Inslaw was providing something other than the contract version of PROMIS through time-sharing.[65]

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[63]Inslaw's statement in its technical proposal that it would "make available" to DOJ privately financed enhancements during the life of the contract does not constitute such evidence. To begin with, it is a far different thing to say "enhancements will be made available" than to say "enhancements were unilaterally inserted in your program and the old version was discarded." Moreover, any claim by Inslaw that its technical proposal allowed it to put proprietary enhancements in the contract version of PROMIS is completely inconsistent with Inslaw's conduct. If Inslaw had believed that the contract permitted it to provide DOJ with software in which the government had only limited rights, the whole Modification 12 dispute would not have arisen the way it did. The problems arose when, faced with a request for a copy of software being used to perform the contract, Inslaw declined to produce the software requested because it recognized that the government had unlimited rights in the contract version of PROMIS.

[64]Inslaw does not dispute that DOJ was entitled under the contract to have Inslaw produce some version of PROMIS.

[65]Videnieks specifically asked Inslaw in his March 8, 1983, letter to identify any government personnel to whom notice was
(continued...)

Bankruptcy Judge Bason found that DOJ's request for the software, by its very nature, "required Inslaw to produce software codes for the enhancements otherwise not deliverable under the contract." (emphasis added). This is not the case. DOJ's initial request required Inslaw to produce the version of PROMIS it was using to perform the contract. It was the failure of Inslaw to maintain an "unenhanced" version of the software that "required" it to produce an enhanced version in response to the government's request. The evidence is quite clear that the decision to maintain only one version of PROMIS was made by Inslaw alone, without consultation with or request from DOJ. The testimony of Inslaw's witnesses at trial, as well as internal Inslaw documents from that period, makes clear that the allegedly proprietary enhancements were "incorporated into the Executive Office of the U.S. Attorney's VAX version of PROMIS ... [in order] to simplify maintenance of VAX/PROMIS i.e., to maintain a single version of most of the computer programs for EOUSA and for Inslaw's other VAX clients." Indeed, one of Inslaw's officers testified at trial that it was "inevitable" that Inslaw would produce the claimed proprietary enhancements to DOJ because Inslaw didn't have another version of PROMIS that was frozen and bug free.

It is this absence of evidence that DOJ knew, when it requested a copy of the PROMIS codes, that it would obtain

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[65](...continued)
given prior to February 4, 1983, that Inslaw was using a proprietary version of PROMIS to perform the contract. Inslaw never identified anyone in response to this request.

something other than the contract version, that is one of the great weaknesses in Bankruptcy Judge Bason's conversion theory. This, along with the other evidence described above, leads us to conclude that DOJ's demand for a copy of the PROMIS codes was made in good faith and for legitimate reasons.

D. DOJ's Conduct After Modification 12

By the time the parties executed Modification 12 the situation was different, however. At that point Inslaw had informed DOJ: (1) that the VAX version of PROMIS being provided under the time sharing arrangement contained enhancements that Inslaw considered proprietary, and (2) that Inslaw could and would remove these enhancements if DOJ wanted, but that backing out the enhancements would be a difficult and costly process. It was in response to these representations by Inslaw that DOJ presented in its March 18 letter the proposed solution that resulted in Modification 12.[66] Under DOJ's proposal Inslaw first was "to identify the 'proprietary enhancements' that it [could] demonstrate were developed at private expense and ... outside the scope of Inslaw's performance of any government contract." DOJ would then either direct Inslaw to remove the enhancement or negotiate with Inslaw regarding inclusion of the enhancement. Pending resolution of the inclusion/removal issues, DOJ could not disseminate the software beyond the offices covered by the contract.

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[66]Although Modification 12 itself does not mention the dispute resolution procedure outlined in the March 18 letter, we think it clear, and most at DOJ do not dispute, that DOJ was obligated to live up to its proposal of March 18.

In agreeing to this dispute resolution process DOJ was bargaining away some of its rights. Prior to Modification 12, DOJ could claim unlimited rights in any software provided to it by Inslaw. If Inslaw had voluntarily provided more software than required, it appears to us that the data rights clause, in conjunction with the voluntary efforts provisions of the contract, would have given DOJ unlimited rights in the software produced. Under Modification 12, however, the government in effect agreed to "give back" any enhancements it did not want by instructing Inslaw to delete those enhancements from DOJ's copy of the software.

Bankruptcy Judge Bason found that DOJ "never intended to meet its commitment" under Modification 12. We do not believe the evidence supports that finding. The weight of the evidence demonstrates that the DOJ employees involved reviewed Inslaw's submissions in good faith, and responded in ways that they subjectively believed were within the government's legitimate rights under the contract. We find no evidence of bad faith or intentional wrongdoing.

On May 4, 1983, Inslaw proposed to DOJ a specific methodology for identifying proprietary enhancements. Under this proposed methodology, for each claimed enhancement Inslaw would identify the date of the change and the programmer(s) responsible for that change. Inslaw would then review the time sheets of the programmer(s) for the relevant period to determine if the programmer(s) had billed sufficient time to non-government projects so that the change could fairly be described as privately funded.

Inslaw told DOJ that in pursuing this methodology, it would be required to retrieve and review thousands of pages of historical documents. Inslaw asked DOJ to confirm at the outset that this was an acceptable method. In its letter, Inslaw also asked DOJ to suggest revisions to the methodology if this approach was unacceptable.

Videnieks relied primarily on Jack Rugh in responding to this proposal. Rugh considered the proposed methodology inadequate. Rugh told us that his strongest objection was to the part of the proposal that would count privately funded hours first.[67] He felt the issue was not whether a programmer billed "sufficient" time to have billed a change to a private client, but whether the programmer billed the "actual" hours in which the change was made to a private client. Rugh also told us that he believed from Inslaw's submissions that Inslaw did not keep sufficient records to prove that the changes were privately funded.

Rugh considered whether to propose to Inslaw an acceptable methodology. In the end, Videnieks and Rugh chose neither to accept Inslaw's methodology nor to propose revisions or an acceptable methodology. Neither Videnieks nor Rugh informed Inslaw why its methodology was unacceptable, or that Rugh had concluded that sufficient records did not exist to support any methodology.

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[67]In other words, if a programmer billed 20 private hours and 20 government hours in a week in which it took him 19 hours to make a particular change, Rugh understood that the proposal would count that change as privately funded.

This is not a response we would have recommended. It is difficult for us to see a good reason not to tell Inslaw what criticism DOJ had of Inslaw's methodology. Perhaps Inslaw could have addressed those concerns. Perhaps not. But the point is that it was in neither party's interest to have Inslaw guessing about what was the problem with the methodology. We think that instead of simply signalling "thumbs down" without further explanation, it would have been preferable for DOJ to have articulated its reasons for rejecting Inslaw's proposal.

But the question for our investigation was not whether DOJ employees behaved as we would have, but rather whether there is sufficient evidence to conclude that these employees responded in bad faith with the intent wrongfully to obtain Inslaw's property or injure Inslaw. We found no such evidence. Videnieks and Rugh felt that their position was proper because, as they read Modification 12, they only had an obligation to negotiate about whether to include enhancements once they were demonstrated, not to negotiate about whether the enhancements existed. In addition, Rugh did not propose an alternative methodology because he believed that Inslaw had insufficient records to support any reasonable methodology. He told us that he in fact considered proposing an alternative methodology as a theoretical matter, but that after he became aware of the type of records Inslaw kept he was unable to devise any acceptable methodology. We are persuaded from our meetings with Rugh and Videnieks and from our review of the evidence that these reasons, and not a desire to cheat Inslaw, explain DOJ's conduct.

While we may have responded differently, we do not divine from the conduct of DOJ's employees here some conspiracy or intent on anyone's part to cheat Inslaw. In our judgment, this conduct stemmed from a desire to protect the legitimate interests of the government. We believe, however, that the judgment exercised by DOJ in this instance failed to respond to Inslaw's legitimate request and failed to aid resolution of the issues about the alleged enhancements. We attribute this conduct mostly to the atmosphere of distrust that surrounded the administration of this contract. Within months after the start of the contract, Brewer and other DOJ employees had come to question Inslaw's credibility on key issues (and they can point to specific instances in which Inslaw made what they felt were inaccurate statements). Likewise, within a couple of months after the start of the contract, Hamilton and other Inslaw employees came to question Brewer's objectivity (and they, too, can point to episodes from which they concluded that Brewer was overtly hostile). In short, there may have been poor judgment here, but not intentional wrongdoing.

## VII. THE ALLEGATION THAT DOJ WRONGFULLY DISTRIBUTED PROMIS

In addition to claiming that Earl Brian and Hadron illegally obtained and distributed PROMIS, Inslaw has alleged that DOJ itself wrongfully distributed PROMIS. These allegations focus on three separate areas: (1) the claimed use of PROMIS by the FBI in creating its FOIMS computer program, (2) the installation of PROMIS in U.S. Attorneys' offices beyond the 20 sites at which Inslaw installed PROMIS, and (3) the claimed distribution of enhanced PROMIS to various foreign governments. We will address these in turn.

### A. A Comparison of FOIMS and PROMIS

#### 1. The Allegation that FOIMS is Pirated From PROMIS

Inslaw first raised the prospect that the FBI's Field Office Information Management System ("FOIMS") was a pirated form of Inslaw's PROMIS software in papers filed with the Bankruptcy Court in early 1991 in support of its motion to reopen discovery. To support this charge, Inslaw relied upon a January 1991 letter from Terry D. Miller, President of Government Sales Consultants, Inc., to FBI Director William Sessions. Miller's letter charged:

> I Have [sic] reason to believe that the software that your agency uses throughout the U.S. -FOIMS- is stolen.

Miller's letter stated no basis for his belief that FOIMS was stolen, but urged the Director to investigate.

The FBI did just that. In response to Miller's letter, Kier T. Boyd, the Deputy Assistant Director of the FBI's Technical Services Division, wrote Miller asking for the basis of his charge,

including the individual or company from whom the software was stolen, a description of the software, who stole the software and when. Miller's reply to the FBI's letter was to charge that the FBI's response was "defensive." Miller did not provide any of the information the FBI requested.

Miller's letter and the FBI's response promptly found their way to Inslaw and were attached to Inslaw's brief in the Bankruptcy Court. Inslaw's submission essentially charged that, by not rejecting Miller's charge out of hand, the FBI admitted that FOIMS was stolen and that FOIMS was PROMIS. In a subsequent affidavit filed with the Bankruptcy Court, the FBI's Boyd provided the denial that Inslaw claimed was missing. In his affidavit Boyd stated:

> . . . since learning of Inslaw's assertion respecting PROMIS, I have reviewed the matter with the FBI staff responsible for the development of FOIMS from September 1977 to the present. On the basis of that review, I can state that a) the FBI does not use, nor has it ever used, the enhanced version (or any other version) of PROMIS and that b) FOIMS was developed entirely by the FBI in-house; it is not based on and does not contain the enhanced version (or any other version) of PROMIS -- or any portion thereof.

In subsequent correspondence with the FBI, Miller stated that he did not know whether FOIMS contained stolen software and acknowledged that he based his allegations on claims made by others. Inslaw, however, disagreed. In a submission to us, Inslaw claimed that an unnamed "senior career Justice Department official" told Inslaw that John Otto, former Acting Director of the FBI, had admitted that FOIMS was PROMIS.

The House Committee Report repeated some of the allegations that had been made by Inslaw about FOIMS, but did not purport to answer Inslaw's questions. The Report noted, however, some of the preliminary steps we had taken during our investigation to resolve the issue.

2. Our Investigation

Early in our investigation of Inslaw's allegations, we talked to Otto about the admission Inslaw claimed he made. Otto denied making the statement that FOIMS is PROMIS. Otto told us that he is essentially "computer illiterate" and he had insufficient technical knowledge even to discuss such a subject.[68]

Nevertheless, because of the importance Inslaw attached to this issue, we hired an expert consultant to settle the issue whether FOIMS was derived from PROMIS. Director Sessions offered us the FBI's complete cooperation and agreed with our request to conduct an examination of the FOIMS software. The Director requested several reasonable security related conditions, including requiring that our expert have appropriate security clearance. We agreed with the conditions proposed by the Director.

We asked Inslaw to provide us suggestions on the selection of an expert and specifically indicated our desire to retain a person with no previous contact with the PROMIS controversy. Mr. Hamilton directed us to Marian Holton, an Inslaw employee. Holton, after

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[68]Inslaw also suggested to us that the Drug Enforcement Agency (DEA) also used PROMIS. We spoke with Philip Cammera, from DEA Information Systems, who told us that DEA used neither PROMIS nor FOIMS. Instead, DEA used a third case tracking management system that DEA had developed internally.

first advising us that she would need to study our request, finally advised us that the only expert that she could recommend was the expert that Inslaw had used in the adversary proceeding against the DOJ. We again explained that we wished to retain an independent expert who had not previously formed opinions about the PROMIS dispute. Holton later indicated that she could suggest no one other than Inslaw's prior litigation consultant. In August 1992, Inslaw did provide us with a proposed plan for the analysis of FOIMS.

Despite the absence of any helpful suggestions about an expert from Inslaw, we retained Professor Dorothy Denning, Chair of the Computer Science Department at Georgetown University. Professor Denning had served as a expert for the defendant in a criminal matter tried before me in the Northern District of Illinois. The successful defense in that case resulted in the mid-trial dismissal of the charges. The FBI voiced no objection to our choice and processed her security clearance.

We believe Professor Denning's impartiality cannot reasonably be questioned. Professor Denning's credentials are impeccable. We provided a copy of her curriculum vitae to Inslaw for comment and received no objections. We also provided the professor with a copy of Inslaw's FOIMS analysis plan to facilitate her comparison of FOIMS and PROMIS.

We attempted to reach William Hamilton on three separate occasions to invite him or another Inslaw representative to the on-site review of FOIMS at the FBI headquarters. Our calls were not

returned. We specifically informed Hamilton's office that we would be at FBI headquarters on January 8, 1993, to review the FOIMS software. We left a message asking Hamilton to telephone us so that we would know the identity of the Inslaw representative who would accompany us during the review. Again, our calls were not returned. After the close of business on January 7, 1993, the day before our review, however, Hamilton sent a facsimile transmission of a letter to the U.S. Attorney's Office in Chicago.

In his lengthy letter, Hamilton reiterated his belief that FOIMS had been derived from PROMIS. He informed us, however, that Inslaw did not wish to participate in our comparison of FOIMS and PROMIS, and speculated that the FOIMS software might have been switched by the FBI during the course of our investigation. Hamilton's letter also repeated his request for the appointment of independent counsel and suggested that the new administration appoint one. Hamilton also suggested that a "last minute" examination, i.e., one prior to the appointment of a new Attorney General, would inhibit his ability to discover the truth. We proceeded with our investigation without participation by Inslaw.

Before Professor Denning's review, we spoke with Gordon Zacrep. Zacrep has been Section Chief of the FBI's System Development Section since 1985. He denied that FOIMS had any relation to PROMIS. Zacrep told us that the FBI had independently developed FOIMS and that the FBI had never received a copy of the PROMIS software. Zacrep offered whatever assistance he and the FBI could provide to facilitate our review of the software. He offered

to make available all programmers and support staff we needed to assist us and any information that we wished to review.

We asked Professor Denning to do whatever she believed was necessary to evaluate the claim that FOIMS was derived from PROMIS. Professor Denning viewed both the operation of FOIMS at the FBI Headquarters and the operation of PROMIS at DOJ. After Professor Denning's review of the two programs, she told us that there could be no relation between the two programs. She was extremely confident of her conclusion. She said that the PROMIS software, which is written in COBOL, is so different from FOIMS that it could not have served as the platform for the development of FOIMS, which was written in the NATURAL/ADABASE programming/database management environment. Professor Denning concluded that the two programs were so obviously different that any further examination of the source code would be a waste of her time and the government's money.

We have complete confidence in the opinions and conclusions of Professor Denning. We also credit the representations of Zacrep concerning the origins of the FOIMS software. We conclude that the FBI's FOIMS software is not PROMIS or any derivative of PROMIS. It is unfortunate Inslaw declined to participate in the review of the operation of the two software systems. We are confident that after seeing the operation of the software, any reasonable person would readily agree that FOIMS and PROMIS are completely different.

B. DOJ's Self-Installation of PROMIS

After the expiration of the 1982 contract DOJ began self-installing PROMIS in additional U.S. Attorneys' offices. The version of PROMIS that DOJ used to make these installations was the Prime version of PROMIS that Inslaw had installed at the 20 large offices listed in the contract. Inslaw now claims, and Bankruptcy Judge Bason found, that these additional installations violated Modification 12, which limited dissemination of PROMIS "to the 94 United States Attorneys' Offices covered by the contract." Inslaw says that Modification 12's reference to 94 offices should be understood to mean that DOJ could install PROMIS only at the 20 offices designated to receive PROMIS under the contract, and that as to the other 74 offices DOJ could install only word processing software. DOJ, on the other hand, takes the position that Modification 12 had nothing to do with the word processing software, and that it only agreed to limit dissemination of PROMIS beyond the various U.S. Attorneys' offices. After reviewing the entire record, we agree with DOJ, and find that it was neither improper nor unreasonable for DOJ to self-install PROMIS after the expiration of the contract.

To begin with, all of the various correspondence and documents surrounding the execution of Modification 12 refer exclusively to PROMIS computer software. DOJ's original request was for PROMIS, and Modification 12 itself recited that its purpose was "to effect delivery to the Government of VAX-Specific PROMIS computer programs and documentation requested by the Government on December 6,

1982. . . ." Similarly, the dissemination restriction contained within Modification 12 specifically said that the "Government shall limit and restrict the dissemination of the said PROMIS computer software. . . . ." These specific references to PROMIS cannot reasonably be viewed as intending to cover word processing based programs as well. Throughout the contract, the statement of work, and Inslaw's technical proposal, a distinction was always made between PROMIS and the word processing based software that would perform PROMIS-like case management functions. When the parties wanted to refer to word processing software in addition to PROMIS they knew how to do it. There is no reference to the word processing software in Modification 12 or in the government's request for a copy of the contract version of PROMIS.[69] Indeed, at least one Inslaw employee admitted at trial that nothing in Modification 12 requested word processing based software.

Consistent with such a request, Inslaw delivered to DOJ only PROMIS computer software on April 20, 1983, when it complied with its obligations under Modification 12. Although Inslaw did deliver word processing software to DOJ from time to time, this was done both before and after Modification 12, and never with reference to Modification 12.

DOJ's interpretation is also far more consistent with the positions taken by the parties prior to the execution of

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[69]As part of its Modification 12 request the government asked for computer programs developed for extracting data from word processing based systems. Such programs are separate from the word processing based systems themselves, and are necessary only to transfer data to the computer based system.

Modification 12. In negotiating Modification 12, Inslaw wanted to limit dissemination in order to protect property in which it claimed a proprietary interest. Yet Inslaw has never claimed any proprietary interest in the word processing software. Any reference to word processing software in connection with Modification 12 would have been unnecessary and superfluous. Likewise, Inslaw's position from the start, even as explained to its own lawyers, was that it would give enhanced PROMIS to DOJ at no extra cost if DOJ would agree "not to disseminate the U.S. Attorneys' Office version [of PROMIS] beyond the U.S. Attorneys' Offices, currently numbering 94." (emphasis added)

Bankruptcy Judge Bason's finding that Modification 12 limited dissemination of PROMIS computer based software to the 20 offices at which Inslaw installed PROMIS ignores the essential nature of the contract. The 1982 contract was an implementation contract. It called for the contractor to install (and tailor) a public domain version of PROMIS in 20 offices. Although Inslaw was only obligated to install the contract version of PROMIS at 20 cites, nothing in the contract purported to limit DOJ's right to self-install that public domain software at additional offices.

Bankruptcy Judge Bason suggested that a reading of Modification 12 "in the context of" the original contract leads to the conclusion that DOJ agreed to limit dissemination to the 20 designated offices. This makes little sense. The original contract called for Inslaw to implement a version of PROMIS with which DOJ could do anything, including self-install at other sites.

Nothing about this "context" suggests that in negotiating Modification 12 DOJ intended to give up its right to fully automate all U.S. Attorneys' offices with PROMIS if it so chose. Rather, against this background a much more reasonable interpretation of Modification 12 is that it operated to eliminate DOJ's right to disseminate PROMIS outside of U.S. Attorneys' offices, but not its right to self-install PROMIS within the jurisdiction of the EOUSA.

Accordingly, we believe that DOJ's self-installation of PROMIS did not violate Modification 12.

C. The Alleged International Distribution of PROMIS by DOJ

Inslaw and others have made various allegations about the international distribution of PROMIS that are independent of the allegations about Earl Brian and Hadron. They allege that DOJ distributed a proprietary version of PROMIS to various foreign governments around the world for use in intelligence and law enforcement operations. We have found no evidence to support these claims.

DOJ personnel (and internal memoranda) tell us that only public domain versions of PROMIS (Old PROMIS and the Pilot Project version) have been distributed. There is one documented international distribution. In May 1983 DOJ responded to a request from an Israeli official by giving him a copy of Old PROMIS. The House Committee found that "it was uncertain" what version DOJ actually turned over. Although we do not know what evidence the House Committee had before it when it made this statement, it appears to us that every available piece of evidence indicates that

it was the LEAA version. Indeed, the allegation that there was something sinister about the distribution to Israel leaves unanswered the question of why DOJ would go to all the trouble of documenting the fact that it was giving a copy of PROMIS to Israel if this was some sort of covert operation. As far as we can tell, the allegation that DOJ distributed enhanced PROMIS internationally is pure speculation, for which there is absolutely no evidentiary support.[70]

Admittedly, our investigation of the claimed international distribution of PROMIS by DOJ has not proceeded past the preliminary stages. We do not believe that it needs to. Theoretically, we could continue our investigation of this subject by contacting various foreign governments, asking them to provide us with the source code to their law enforcement software, and then hiring an expert to compare that software to PROMIS. We do not think this is a prudent course to take for a number of reasons, not the least of which is the failure of Inslaw's other allegations of excessive distribution and criminal conspiracies to withstand scrutiny. Given the enormity of undertaking a full scale

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[70]The House Committee also investigated allegations that the Canadian Government was using PROMIS. According to the Committee Report, all of the Canadian government officials with whom Committee investigators spoke told them that the Canadian government was not using PROMIS or PROMIS derivatives. The Report indicates that the Committee was unsatisfied with the degree of cooperation provided by the Canadian government, and therefore felt that it was "thwarted in its attempts to support or reject the contention" that the Canadian government was using PROMIS. The Report identifies no reason why the Committee would believe that the Canadian officials with whom they spoke were less than truthful.

international investigation of these allegations, we feel that it would be an irresponsible use of the taxpayers' money to initiate this type of international fishing expedition where there is so little reason to believe that we would find evidence of a crime or other wrongdoing by the government.

## VIII. THE ALLEGATION THAT DOJ OBSTRUCTED THE REAPPOINTMENT OF BANKRUPTCY JUDGE BASON

Three months after announcing his ruling on liability in Inslaw's adversary proceeding, Bankruptcy Judge Bason was informed that he would not be reappointed as the bankruptcy judge for the District of Columbia. The Merit Selection Panel (the "Panel") that reviewed the candidates for the position had recommended another attorney as its top choice for the job. The D.C. Circuit's Judicial Council essentially agreed with that recommendation, and the Court of Appeals, which made the actual selection, adopted that choice. Almost immediately, Bason suggested that DOJ must have improperly influenced the selection process in retaliation for his ruling in Inslaw.

We reviewed documents and interviewed numerous people who were involved in this matter, including those attorneys with DOJ who have been suspected of having obstructed Bason's reappointment. We found no evidence that anyone tried to influence the selection process improperly.[71] Indeed, we found evidence of only one relevant communication between anyone associated with DOJ and

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[71]As part of our investigation, we reviewed certain records of the Merit Selection Panel and of the U.S. Court of Appeals for the D.C. Circuit. Those records were made available to us only upon our promise that they would not be disclosed beyond the Office of the Attorney General without the permission of the Chief Judge of the U.S. Court of Appeals for the D.C. Circuit. Those records largely confirmed information that we had already obtained from other sources, without a pledge of confidentiality. There was little new information. None of the new information--such as the precise vote of the Court of Appeals or the comments of individual judges--affected our analysis. Accordingly, we have avoided reporting any information which would require the permission of the Chief Judge prior to disclosure of that information beyond the Office of the Attorney General.

anyone involved in the selection process. Specifically, the then Chief of the Civil Division for the U.S. Attorney's Office for the District of Columbia, who had been nominated and was awaiting confirmation for the District Court, provided to the chair of the Panel a copy of Judge Bason's oral ruling on liability in the Inslaw case.[72]

The deliberations of the Panel and the Court are confidential. Nevertheless, we were provided access to confidential documents of the Panel and Court, and we interviewed members of the Panel. Although it was not part of our task to discover why Bankruptcy Judge Bason was not reappointed, we learned enough to reach conclusions on that subject. For example, we learned that opposition to Bason's reappointment was not limited to the Chief of the Civil Division of the U.S. Attorney's Office for the District of Columbia. The Panel also heard from bankruptcy practitioners, including a former bankruptcy judge, who opposed Bason's reappointment for reasons wholly unrelated to Inslaw. Indeed, two members of the Panel advised us that the Inslaw ruling did not influence the Panel unfavorably toward Bason. In short, there is every indication that the decision was not influenced significantly by either DOJ or the ruling in Inslaw.

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[72]Judge Bason did not issue his written opinion until after the Court of Appeals decided not to reappoint him.

A. The Selection Process

1. The Vacancy

On February 8, 1984, George Francis Bason, Jr., was appointed to fill the vacancy created by the resignation of the District of Columbia's only bankruptcy judge, Roger Whelan. Shortly after that appointment, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. That Act established the expiration of Judge Bason's term as four years after his appointment -- that is, February 8, 1988. The Act also authorized the Judicial Conference of the United States to prescribe regulations for the selection of bankruptcy judges.

2. The Merit Selection Panel

In March 1985, the Judicial Conference promulgated regulations that permitted the judicial councils of each circuit to establish a merit selection panel to submit to the Judicial Council the names of the best qualified candidates, and for the Judicial Council to submit the names of the three best candidates to the Court of Appeals.

The first opportunity for the federal judges in the District of Columbia to use this procedure was in 1987 -- prior to the expiration of Judge Bason's term. Judge Bason sought reappointment even before adoption of the selection process. He did so in May 1987 by letter to Chief Judge Patricia Wald of the United States Court of Appeals for the D.C. Circuit. In June 1987, the Circuit Executive sent the Chief Judges of the District Court and the Court

of Appeals a memorandum proposing a selection process consistent with the regulations prescribed by the Judicial Conference.

Following these procedures, Chief Judge Aubrey Robinson of the district court recommended four persons for membership in the Merit Selection Panel ("Panel"). Chief Judge Wald invited all four persons to serve on the panel, and each accepted the invitation. They were District Judge Norma H. Johnson, Dean Jerome A. Barron, Wesley Williams, Jr., and Thomas C. Papson. The letters of invitation were sent to the prospective panelists during the first week of August 1987, just as testimony in the Inslaw case before Judge Bason was concluding. There has been no suggestion that the concurrence of these events was due to anything other than pure coincidence.

3. The Panel's Consideration of the Inslaw Ruling

Thereafter, the Panel solicited applications, interviewed the candidates and contacted references. Judge Norma Johnson, who chaired the Panel, also solicited her colleagues' views of Judge Bason. It was during this process that Judge Bason ruled orally that DOJ had stolen and converted Inslaw's software. His written opinion came later. Judge Johnson had previously read about the case in the newspaper, but she had no genuine understanding of the Bankruptcy Court's role in the case until Bankruptcy Judge Bason's oral ruling of September 28, 1987, was brought to her attention.

Judge Johnson initially recalled to us that it was one of the district judges who recommended that she obtain a copy of the transcript of Judge Bason's oral ruling in Inslaw. Because

information presented to the Panel was viewed as confidential, Judge Johnson initially declined to disclose the judge who directed her to the Inslaw ruling without first consulting that person. Upon contacting the judge who she believed provided the information, she discovered that she had been mistaken. It was not that judge who directed her to Bason's ruling; it was District Court Judge Royce Lambreth.

a. **AUSA reported Inslaw ruling to Civil Division Chief**

Judge Royce Lambreth was confirmed for the United States District Court for the District of Columbia on November 13, 1987. On the date of Judge Bason's oral ruling, September 28, 1987, Lambreth was still the Chief of the Civil Division for the U.S. Attorney's Office for the District of Columbia.

The U.S. Attorney's Office for the District of Columbia maintained a file on the Inslaw case, but no one in that office performed any substantive work on the case. The file was opened because, by statute, Inslaw's complaint against DOJ had to be served on that office. Patricia Froman, the Assistant U.S. Attorney who handled nearly all bankruptcy cases that were filed in the District of Columbia in which the United States was a creditor, was assigned the file when the complaint was received. Attorneys from DOJ immediately notified Froman that they would handle the case. They did so. This is not an unusual arrangement for complicated cases or, for that matter, for any case in which DOJ has prior involvement. DOJ assumed full responsibility for the

case, and the U.S. Attorney's Office assumed none. In fact, no one in the U.S. Attorney's Office followed the case formally.

USAO Civil Chief Lambreth periodically spoke to Stuart Schiffer, the Deputy Assistant Attorney General of DOJ's Civil Division, about various cases. Inslaw was mentioned only in passing. Although he cannot recall any specific discussion of Inslaw, Schiffer advised us he almost certainly revealed his displeasure with Bason to Lambreth by joking that Lambreth's office should assume responsibility for the problematic case. Schiffer never encouraged Lambreth to speak to the Merit Selection Panel about Judge Bason. Nor did Lambreth indicate that he had or was going to speak to the Panel. The subject simply never arose.[73]

Ultimately, Lambreth did communicate with a Panel member, but this communication was not prompted by anything Schiffer said. Rather, Lambreth's contact with the Chair of the Panel resulted

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[73]Schiffer's knowledge of Judge Bason was limited to that derived from his experience with the Inslaw case. Schiffer believed that persons with greater experience with Bason would be better suited than he to assess Bason's qualifications for the bench. He assumed (indeed, hoped) that if the Inslaw case was not an isolated incident, some person or persons who were knowledgeable about Bason would oppose Bason's reappointment. Schiffer advised us that he did not know Lambreth would complain about Bason and that he did not complain to Lambreth about Bason in the hope that Lambreth would address the Panel. Cynics may point to this communication between Lambreth and Schiffer as evidence that the Department secretly campaigned to retaliate against Bason because of his rulings in Inslaw. We found no evidence of any such campaign. We also note that it is entirely appropriate for a Deputy Assistant Attorney General of the Department of Justice to discuss with a Civil Chief of a United States Attorney's Office cases that are pending in that Chief's district. Such discussions should be open and candid and might properly include criticisms of particular rulings.

from the special interest that one of the Assistants in Lambreth's Division had in the Inslaw case.

That Assistant was Patricia Goodrich Carter. She had preceded C. Madison Brewer as project manager at EOUSA for the implementation of PROMIS. She had no contact with the project after Brewer replaced her until Inslaw filed its complaint against DOJ. After the complaint was filed, one of the attorneys from DOJ questioned her to determine whether her testimony might be useful at trial. When it was determined that Carter would not be a witness at trial, she was advised that she was free to observe the trial. She attended the opening statements and heard at least William Hamilton's testimony. She was also present for Judge Bason's oral ruling on liability.

Carter regarded Bason's ruling as truly unbelievable. She had heard Hamilton's testimony regarding Brewer's departure from the Institute, which sounded to her like a fairly amicable separation. She was amazed therefore at Judge Bason's conclusion that Brewer's conduct toward Inslaw resulted from personal animosity for having been fired. She was similarly amazed at the conclusion that DOJ stole Inslaw's software by trickery and fraud.

Carter recalled that after hearing the oral ruling, she bumped into Royce Lambreth in a common area of their office. She told him about the ruling and expressed her amazement. He invited her to his office to describe the ruling in greater detail. Carter assumed that Lambreth's interest in the matter arose solely from his being Chief of the Civil Division and having a concern as a government

attorney about a decision from their district that harshly criticized the government.

Thereafter, Lambreth received a copy of the transcript of the ruling. How and when he obtained the transcript are uncertain, for no one recalls precisely who obtained a copy of the ruling for the U.S. Attorney's Office.[74] Nevertheless, there is no question that one was obtained. Carter still has a copy. Pat Froman, who handled most bankruptcy cases in the District of Columbia for the government, also had a copy in her files prior to her retirement.

**b. Royce Lambreth reported Inslaw ruling to Judge Johnson**

Lambreth either delivered a copy of the transcript of Bason's ruling to Judge Norma Johnson or suggested that she obtain a copy.[75] Although Lambreth did not comment on the ruling, it was clear to Judge Johnson from his tone or his words that he viewed the ruling as reflecting unfavorably on Judge Bason.

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[74]Copies of the printed transcript of the opinion were delivered to Inslaw's attorney, DOJ's attorney and the Clerk of the Bankruptcy Court on the day following the ruling, that is, September 29, 1987. Lambreth recalled that he asked Pat Froman, the Assistant in that office who handled most bankruptcy cases in the District of Columbia for the government, to obtain the opinion. Froman recalled telling Lambreth, at his invitation, her unfavorable opinion of Judge Bason, but she has no recollection of being asked to obtain or of obtaining the Inslaw ruling.

[75]Lambreth cannot now recall whether he delivered the transcript or merely referred Judge Johnson to it. Judge Johnson initially recalled that a young man from the Circuit Executive's office who assisted her obtained a copy after another judge suggested she obtain it. After contacting Judge Lambreth at our request, Judge Johnson recalled that he handed her a copy of the transcript and said something to the effect of "You ought to see this."

Lambreth brought Bason's ruling to Judge Johnson's attention because he wanted to avoid "blindsiding" the other judges on the committee that he imagined would vote on Judge Bason's reappointment.[76] More specifically, Lambreth correctly assumed that he would be confirmed and sworn in to the District Court prior to the selection of a bankruptcy judge for the district. He erroneously believed, however, that he would have a role in the selection process. Being unfamiliar with the new rules for the selection of bankruptcy judges, Lambreth believed that the District Judges would make that selection. He wanted Judge Johnson to be aware of Bason's ruling in Inslaw so she and the other District Court judges would not be surprised when he joined the court and made known his opposition to Bason's reappointment.

Lambreth's opposition to Bason's reappointment was not based exclusively on his reading of the Inslaw ruling. Lambreth also solicited the views of AUSA Patricia Froman who had worked in the U.S. Attorney's Office for many years and had appeared before many

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[76]Judge Lambreth is not certain whether he directed Judge Johnson's attention to the Inslaw ruling before or after he became a judge. Although the fact has relatively minor significance for our purposes, we conclude that the event occurred while he was still with the U.S. Attorney's Office but shortly before he became a judge. Judge Johnson knows that she obtained and read the Inslaw ruling before Veterans' Day of 1987 because that is the day that the Panel held a hearing regarding Judge Bason. Judge Johnson had invited attorney Charles Work to appear at the hearing upon reading in Bason's oral ruling that Work represented Inslaw. Prior to reading Bason's oral ruling, Judge Johnson did not realize that Work, whom she knew previously as an Assistant U.S. Attorney, did any bankruptcy work. Because Judge Lambreth was not sworn in until November 16, 1987, it appears to us that he must have directed Judge Johnson's attention to Bason's ruling prior to his assuming the bench.

bankruptcy judges, including regular appearances before Judge Bason. Froman described Bason to Lambreth as courteous and likable but often unfair. She described Bason's tendency, in her opinion, to "bend over backwards" to favor debtors. According to Froman, she cited an egregious example and noted that Bason often allowed debtors "one more chance" after they had already been given many chances to comply with prior orders. Froman told Lambreth that the government would be better off if Bason were not reappointed.

Lambreth did not discuss with either Froman or Carter the fact that he spoke with Judge Johnson. Indeed, both of them assumed that information regarding Judge Bason was of interest to Lambreth solely in his capacity as Chief of the Civil Division in the district in which Bason presided. Lambreth himself regarded his conversation with Judge Johnson as a confidential judge-to-judge communication on a matter in which they both had, or soon would have, an interest as judges.

c. The Panel considered the Inslaw ruling

After obtaining a copy of Judge Bason's oral ruling in Inslaw, Judge Johnson circulated copies to the Panel members. It was the only judicial opinion that was circulated. Although Judge Johnson presented the opinion without commentary, at least one Panel member perceived that the opinion was presented, not because it revealed great wisdom or scholarship, but because it reflected unfavorably on Judge Bason's suitability for the bench.

According to three Panel members, the Panel discussed Bason's ruling at one of its meetings and found nothing untoward about it.

It appeared to the Panel to be simply one judge's opinion on a fact-specific matter about which the Panel did not know the facts. One Panel member said he derived little information about Bason from the opinion other than the fact that Bason was not timid. The Panel members agreed that the Inslaw opinion should not influence their evaluation of Judge Bason.[77]

We reviewed the materials of the Panel that have been maintained by the Circuit Executive. Those materials include notes of the Panel and of the Judicial Council. There is no indication that the Inslaw ruling played any role in the process.

### d. Our Conclusions Regarding Lambreth's Communication With Judge Johnson

Assuming (contrary to the information we received) that the Inslaw ruling did influence the Panel's evaluation, we find nothing untoward in the fact that Royce Lambreth brought that ruling to the attention of Judge Johnson, who circulated it to the other Panel members. Lambreth had an interest in the matter which was different than that of most bankruptcy practitioners. He was soon to be a member of the District Court that presided over Judge Bason. He had every reason to try to influence the selection process to select a bankruptcy judge in whom he had confidence.

Lambreth told us that he was motivated to speak with Judge Johnson exclusively because of his expectation that he would soon

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[77]This statement is contradicted somewhat by the statement of Attorney Charles Work, who advised us that Judge Johnson asked that he speak to the Panel about Inslaw because Judge Bason's reappointment was "in trouble." Work assumed that the "trouble" resulted from the Inslaw ruling.

preside on the District Court. We do not doubt his statement. Indeed, he apparently told no one in his office of his plans or of his communication with Judge Johnson, although he may have discussed Bason with other soon-to-be fellow judges.

Regardless of Lambreth's motivation, he nonetheless was a government attorney at the time he spoke with Judge Johnson. Thus, we have considered whether it is proper for a government attorney privately to approach the Chair of a Merit Selection Panel to express his views. We conclude that such an approach is proper, and Lambreth's approach of Judge Johnson was proper even if he did so solely as a government attorney interested in opposing the appointment of a judge whom he regarded as unfair to the government.[78]

There is no legal or ethical obligation that prohibits an attorney from communicating his or her views or those of a client to a panel that is considering the appointment, reappointment or advancement of a judge about whom that attorney has information, whether positive or negative. Indeed, that is the way the merit selection system is supposed to work. All interested parties are encouraged to express their opinions, and the panel weighs those opinions and the source of those opinions and determines independently which candidate is best for the position. Obviously, a Merit Selection Panel cannot create a complete profile of a

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[78]Whether DOJ itself may properly take a position in favor of or opposed to a particular judicial candidate is a different question as to which we express no opinion.

candidate if an entire class of interested persons self-censors its criticism.

Insofar as Lambreth may be criticized for using his circumstance as a soon-to-be judicial officer to influence the Panel, we think the criticism is unfounded. As Chief of the Civil Division for the U.S. Attorney's Office in Bason's district, Lambreth was in a unique position to collect information regarding Judge Bason. He should not have been precluded from communicating that information to Judge Johnson simply because he expected soon to be her colleague. Indeed, as we have noted, that expectation gave him all the more reason to express his views. Additionally, Lambreth apparently collected information about Bason to satisfy himself that the Inslaw ruling was not an isolated incident. Yet, he communicated no information to Johnson other than the Inslaw ruling and a tone of voice that allowed Judge Johnson to surmise Lambreth's negative view of Bason's ruling. His conduct bespeaks restraint, not a campaign to unseat Bason in retaliation for the Inslaw ruling.

Finally, no one we interviewed described Judge Johnson as anything less than fiercely independent, a view that she shares. To the degree that Royce Lambreth attempted to influence Judge Johnson in his capacity as either an Executive Branch employee or a prospective judicial officer, the effort had little effect, according to Judge Johnson. She considered the Inslaw ruling along with all the other information the Panel received. She obviously was not greatly influenced by the fact that the ruling came to her

from Lambreth. When we first spoke to her, she did not even recall that it was Lambreth who gave her the opinion.[79]

4. Opposition to Bason From Outside DOJ

Royce Lambreth was not the only person who communicated opposition to Judge Bason to the Panel. The Panel also solicited views from attorneys who practiced before Judge Bason. (For the other candidates, the Panel solicited comments from references, supervisors and opposing counsel, as is discussed below). One lawyer who commented negatively about Judge Bason to the Panel was Roger Whelan, the bankruptcy judge who preceded Bason. Whelan, a practicing bankruptcy attorney, reportedly had received complaints about Bason from several of his colleagues. According to Whelan, these attorneys shared his view that Bason was pro-debtor and too slow in making decisions. Whelan reported these views to the Panel by telephone.

Whether there is any truth to the charge that Judge Bason did not administer his docket efficiently is not especially relevant to our investigation. What is relevant is the perception that Judge Bason was a poor administrator. This perception, accurate or not, was made known to the Panel at least by former Judge Whelan and

[79]When Judge Johnson spoke to the Senate Subcommittee, she apparently also did not recall that the transcript came from Lambreth or she did not recall that Lambreth was a member of DOJ when he gave her the ruling. According to a memorandum authored by the Assistant Counsel of the Senate Subcommittee, Judge Johnson told the Subcommittee that she had no contacts with DOJ regarding Judge Bason and she received no negative input from DOJ regarding the Inslaw case. So far as we can tell from the House Report, she told that Committee the same thing. The Senate and the House Reports both found no evidence that anyone from DOJ had attempted to influence the selection process.

almost certainly by others. One Panel member who had not spoken to Whelan and was not aware of Whelan's views acknowledged to us that the Panel was concerned about Judge Bason's administrative abilities.

We do not know the extent to which this perception influenced the Panel's ultimate recommendation. As previously indicated, under the procedures adopted by the U.S. Court of Appeals for the District of Columbia Circuit, the Panel's deliberations are confidential, and Panel members have declined to discuss their deliberations with us. The perception that Judge Bason was a poor administrator, however, almost certainly influenced the Panel's process. After soliciting views informally, the Panel invited bankruptcy practitioners to appear before it to address the Panel more formally regarding Judge Bason's qualifications. Such a proceeding would not likely have been suggested if the informal comments about Judge Bason had been uniformly positive.

Sixteen lawyers accepted the Panel's invitation. One of them was Charles Work, an attorney for Inslaw, who appeared after being assured that DOJ had been afforded the same opportunity. DOJ declined to appear at the hearing in view of the pendency of the

Inslaw case.[80] The hearing was held on November 11, 1987, and lasted several hours.

One member of the Panel characterized the attorneys' comments about Judge Bason as predictably "guarded."[81] At least two of the attorneys at the hearing, however, reportedly did speak against Judge Bason.

We do not know what impact, if any, this proceeding had on the Panel's recommendation. It is clear, however, that there was opposition to Judge Bason's reappointment, some of which was voiced at the hearing. None of that opposition was voiced by DOJ, because DOJ had declined to participate in the hearing.

Obviously, the fact that DOJ did not participate in the formal selection process does not eliminate the possibility that DOJ waged a whispering campaign against Judge Bason. It would be odd, however, if DOJ had foregone an opportunity to fully express its

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[80]In retrospect, this appears to us to have been a prudent decision. Apparently, DOJ's unwillingness to communicate its views about Bason to the Panel arose from a combination of practical and ethical considerations. Included among the practical considerations was the fear that an unflattering review might somehow be revealed to the Bankruptcy Judge and he would extract vengeance in his written opinion in Inslaw. The DOJ attorneys who were involved in the Inslaw case told us that they expected that Bason would be reappointed regardless of their views.

[81]Despite the Panel's pledge of confidentiality to the participants at the hearing, nothing more should have been expected. After all, attorneys who regularly practice in the federal courthouse were being asked to comment to a sitting district court judge and three attorneys, who may have been complete strangers, about the qualifications of the incumbent bankruptcy judge. At that point in the process, there was no certainty that Bankruptcy Judge Bason would not be reappointed and there was a good possibility that the very attorneys who spoke against him would be appearing before him in the near future.

views of Judge Bason in an ex parte proceeding with a pledge of confidentiality, in favor of a covert mission to unseat him. We found no evidence of any such covert effort by DOJ.

5. The Other Possible Opposition Effort

We do not mean to suggest that former Bankruptcy Judge Roger Whelan single-handedly derailed Bankruptcy Judge Bason's reappointment. Based on our discussions with Panel members, he could not have done so. Indeed, if Whelan alone had raised concerns about Bankruptcy Judge Bason's administrative ability and all other respondents had praised his performance, the Panel would not likely have held a hearing to address the subject.

Whelan's opposition to Judge Bason's reappointment is significant, however, for yet another reason. One witness alleged that Whelan threatened a concerted effort by persons outside DOJ to prevent Bankruptcy Judge Bason from being reappointed. Specifically, Charles Docter, an attorney for Inslaw, reported to the House Committee on the Judiciary that in July 1987, Whelan had threatened to oppose Bason's reappointment because Bason had not ruled on a fee petition filed by Whelan.[82] Docter reportedly informed the House Committee that Whelan came to his office in July, 1987, and complained about Bason's delay in ruling on a fee application filed by him in the UPI case. Whelan allegedly told

[82]A summary of Docter's statement to the House Committee was included in a draft chronology of events relating to the failure to reappoint Judge Bason. We obtained this unsigned document from a counsel to the Senate Subcommittee, who apparently obtained it from someone on the House Committee. Both Docter and Whelan confirmed that they testified in private before the House Committee.

Docter that Senior District Court Judge Irwin Gasch would organize the opposition to Bason's reappointment.

Docter told Bankruptcy Judge Bason about his conversation with Whelan and recommended that Bason act promptly on Whelan's fee application. Bason ruled on Whelan's fee application on July 17, 1987. Docter referred us to his testimony before the House Committee, but refused to provide us any additional information.

Whelan reportedly testified before the House Committee and spoke to us. He acknowledged that he represented a party in the UPI case and that he had been frustrated by Judge Bason's delay in ruling on an application he had filed in the case. He stated that the pleading was an application for compensation for his client and not an application for attorney's fees. He also acknowledged that he is a friend of Senior Judge Gasch. He denied, however, that he ever spoke with Charles Docter about the UPI case or that he ever tried indirectly to put pressure on Judge Bason to rule on his application for compensation in that case.

We have not attempted to resolve this seeming disagreement between the statements of Doctor and Whelan.[83] For example, we have not interviewed Judge Gasch, requested Docter's and Whelan's records for the relevant period, or asked Bason about the alleged nudge from Docter. This conflict bears only tangentially on whether DOJ improperly influenced or attempted to influence the selection process for the District of Columbia bankruptcy

[83]Without copies of the statements Doctor and Whelan gave to the House Committee, it is impossible to definitely conclude that there was a conflict in testimony.

judgeship. Nevertheless, the possibility of concerted opposition to Bason by district court judges or others might explain why he was not reappointed.

6. The Panel's Recommendation

Of the twelve candidates who applied for the position, the Panel concluded that six of them were worthy of further consideration. Bason was one of those six. The six finalists were invited for a second round of interviews by the Panel, after which the Panel voted on their choices. S. Martin Teel, Jr., an attorney in the Tax Division of DOJ, received the most votes.

On or about November 24, 1987, the Panel submitted to the Judicial Council a list of four names in order of preference. The list included Judge Bason. S. Martin Teel, Jr. was listed first.

7. The Judicial Council's Recommendation

The Judicial Council then consisted of the twelve active judges on the Court of Appeals and six judges of the District Court. On December 15, 1987, the Judicial Council considered the report of the Merit Selection Panel and, after approximately one and one-half hours of discussion, voted to recommend the first three names on the Panel's list to the Court of Appeals for its consideration. Teel and Bason were included on the Judicial Council's list of three names.

Tangentially, Bason reported to us that Chief Judge Aubrey Robinson and another judge whom he refused to identify later reported to him that most of the district court judges on the Judicial Council were "not in sympathy" with the Panel's

recommendation. Judge Bason was advised that some of the judges wanted to remand the matter to the Panel for reconsideration. We did not question Chief Judge Robinson or any other judge about these representations, as they are not relevant to the allegation that DOJ obstructed or attempted to obstruct Bason's reappointment. Moreover, if the judges were in fact unhappy initially with the Panel's recommendations, they obviously were satisfied with the recommendations by the end of the meeting, for the Judicial Council voted without apparent dissent to essentially adopt the Panel's recommendations.

8. **The Selection By the Court of Appeals**

Each of the three finalists was interviewed by seven judges of the Court of Appeals. Some of the judges also contacted individual members of the Merit Selection Panel for details about their recommendations. On December 21, 1987, the judges of the Court of Appeals voted either in person or by telephone on the selection of the bankruptcy judge. Judge Teel won by a substantial majority.

9. **The Confidential Memorandum**

During the House Committee's investigation of the non-reappointment of Judge Bason, one of the judges who was interviewed provided the Committee with a "confidential memorandum" dated December 8, 1987. We obtained a copy of this memorandum through the Circuit Executive. The memorandum describes each of the four finalists for the position of bankruptcy judge. Each description except that for Judge Bason begins with positive commentary. Judge Bason is described as "inclined to make mountains out of

molehills," "having a reputation for favoring debtors," and failing to take control of the poorly managed Bankruptcy Court Clerk's Office. The memo also bears the direction, "Please read and destroy." Obviously, every copy was not destroyed.

The House Report states that several members of the Panel were shown the memorandum, which was unsigned, but did not recognize it. The Report also states, seemingly inconsistently, that a member of the Panel identified the author of the memorandum as another member of the Panel. That person denied having written the memo.

All four of the Panel members with whom we spoke stated that they were not familiar with the memo. Indeed, they did not recall even having been shown the memo by a House Committee investigator. One member of the Panel said that the memo sounded like a compilation of four of the summaries that were written by each of the Panel members about the candidates he or she was assigned to investigate. The memo's description of Judge Bason was consistent in general with this member's memory of the Panel's conclusions about Judge Bason.

The House Report states that the memo apparently was given to several judges on the Court of Appeals after Judge Bason asked the Court to reconsider its decision not to reappoint him. Although the memo may have been circulated after Bason complained, it seems likely that it was prepared in anticipation of the Judicial Council's meeting. The Panel issued its report to the Judicial Council on November 28, 1987. The confidential memo is dated December 8, 1987. The Judicial Council met to discuss the Panel's

recommendations on December 15, 1987. In light of these dates and the memo's statement that "its purpose is to 'help' elucidate in particular our reasoning in ranking the candidates as we did," we assume that the memo was prepared for and provided to the Judicial Council or, at least, certain members of that Council.

Without knowing the author of the memo, we cannot reach many conclusions about it. For example, we do not know whose views are reflected in the memo, although the text of the memo suggests that it is intended to reflect only an individual Panel member's views. Nevertheless, even assuming that the memo did influence the selection process, it is difficult to imagine how the influence was improper or how DOJ played a role in the matter. There is no indication that someone from DOJ either prepared or planted the memo. The views expressed in the memo do not contain any criticism of Bankruptcy Judge Bason's rulings in the Inslaw matter.

The House Committee commented particularly on the criticism of Bason in the confidential memo in contrast to the description of the other candidates. This circumstance, however, does not strike us as unusual. For the Panel to have recommended against an incumbent bankruptcy judge in favor of a government lawyer with less bankruptcy experience and no judicial experience, it must have had some reason for doing so. No one has suggested that the Panel's recommendation was the result of personal vengeance or a mere desire to bring a fresh face into the federal courthouse. Accordingly, it should come as no surprise that the Panel, or at least one of its members, found reasons to criticize Bason. Again,

we reach no conclusions about the validity of any of these criticisms. We note only that the Panel's apparent perception that Judge Bason was an inefficient administrator was not totally baseless, and, more importantly, was not attributable to a DOJ campaign against Bason. The Panel had heard that criticism at least from former Bankruptcy Judge Whelan who reported his own evaluation of Bason and those of other bankruptcy practitioners who reportedly had communicated their views to him.

B. **The Initial Allegation**

On December 28, 1987, Chief Judge Wald informed Judge Bason of the Court's decision. On January 12, 1988, Judge Bason sent a 14-page letter to Chief Judge Wald with copies to every judge on the Court of Appeals. For the most part, the letter underscored Judge Bason's qualifications and his supervisory administrative abilities, the lack of which he claimed was the only stated reason for his not being reappointed.

The letter also raised for the first time the allegation that DOJ may have obstructed Bason's reappointment. Specifically, the letter stated:

> A number of lawyers and others have suggested to me that there may be a more sinister, hidden force behind what has happened. They suggest that somehow the Department of Justice has undertaken to influence the judicial selection process as a means of retaliation against me for my recent rulings in Inslaw, Inc., v. United States Department of Justice.

In response to our questions, Bason recently identified three people as the "lawyers and others" to whom he referred in his letter. They are Nelson Deckelbaum, Marcie Docter (an attorney for

Inslaw) and Nelson Kline. According to Bason, each of these people separately commiserated with Bason and speculated that his decision in Inslaw must have been the cause of his not being reappointed. None of these three people provided Bason with any support for their suspicions. In fact, when Bason asked Deckelbaum for the grounds for his remark, Deckelbaum admitted that he had no evidence; it was just a feeling.

Bason also believes that there was a general feeling among the bankruptcy bar in the District of Columbia that he should have been reappointed. Bason bases this statement on a conversation he had with a reporter for the Washington Post whose name he could not recall. Presumably, the reporter was Elizabeth Tucker, who investigated the matter for the Post. She told Bason that she had called twenty to thirty attorneys and that they all said that Bason was an excellent judge and that they could not understand why he was not reappointed.

C. DOJ's Motion to Recuse Bason

Soon after receiving a copy of Judge Bason's letter to Chief Judge Wald, DOJ moved to recuse Bason from further proceedings in Inslaw. The motion's purpose, of course, was to disqualify him from the case before he could either issue a written order consistent with his oral ruling against DOJ or rule on the damages portion of the case.

1. Prior Consideration of a Recusal Motion

This was not the first time that DOJ had considered moving to disqualify Judge Bason in Inslaw. Indeed, in June of 1987, DOJ was

considering internally whether there was a sufficient legal basis for moving to disqualify Judge Bason. The trial on the merits of Inslaw's complaint had not yet begun, but attorneys for DOJ already had reason to predict an adverse outcome at trial. As early as July 2, 1985, Judge Bason found William Hamilton's testimony to be "highly credible" and concluded that a former Inslaw employee who was then working for DOJ possibly had a "personal vendetta" against Inslaw. Various other rulings and comments by Judge Bason gave DOJ's attorney's no reason to hope for a favorable ruling on the merits. Nevertheless, pursuant to the recommendation of DOJ's Director of the Commercial Litigation Branch, Michael Hertz, DOJ concluded that it then had insufficient legal grounds for seeking Judge Bason's disqualification. In particular, DOJ knew of no extrajudicial basis for the Judge's perceived bias against DOJ.

2. Letter to Wald as Basis for Recusal

Bankruptcy Judge Bason's letter to Chief Judge Wald provided such a basis. In light of Bankruptcy Judge Bason's assertion that DOJ may have played a role in unseating him, combined with the fact that the information came from outside the courtroom, we believe DOJ had a satisfactory basis for moving to disqualify him. See 28 U.S.C. § 455(a) and (b)(1).

This is not to say, however, that DOJ necessarily should have prevailed on the motion. Bankruptcy Judge Bason's statement in his letter to Chief Judge Wald fell short of an explicit accusation of DOJ or even a conclusion by him that DOJ played a role in the selection process. The letter could be read as merely a reflection

of rumors he had heard from others and not as a reflection of his personal views.

The fact that DOJ would likely lose its motion to disqualify, which DOJ's attorneys probably predicted, counseled against filing the motion. Nevertheless, Bankruptcy Judge Bason had already signalled by his prior orders and his oral ruling in Inslaw that DOJ was going to lose on the merits of the case and lose badly in his courtroom. DOJ must have realized that it already lacked credibility before Bason in the case and concluded that it would be better off before any other judge. Thus, despite the odds against success, DOJ had little to lose by trying to disqualify the judge.

With the benefit of hindsight, we know that DOJ's hopes of disqualifying Bankruptcy Judge Bason were not realistic. Bankruptcy Judge Bason predictably denied the motion. Chief Judge Robinson of the District Court denied DOJ's request for a writ of mandamus, ruling that DOJ's declaration in support of its disqualification motion was "inadequate." DOJ raised the issue again in its direct appeal of the final order to the District Court. District Judge William Bryant, who was assigned the case on appeal, found "no basis in fact to support" the motion for recusal.

Despite these adverse rulings, we do not conclude that DOJ acted improperly or even imprudently in seeking disqualification. The recusal effort, while admittedly a long shot, was not absolutely destined to fail. Rather, it was an understandable and reasonable attempt to avoid further adverse rulings from a judge who DOJ had little reason to believe would be inclined to rule in

its favor. Under those same circumstances, we likely would have filed the same motion.

3. House Judiciary Committee's Implied Criticism

Immediately preceding the conclusion of its Investigative Report, the House Committee on the Judiciary details DOJ's efforts to disqualify Bankruptcy Judge Bason. The report reaches no conclusion about DOJ's efforts in this regard. Indeed, it expresses no explicit criticism of DOJ on this issue. Nevertheless, criticism is implicit in the report's discussion of the subject.

The report first details DOJ's internal consideration of the recusal issue and its conclusion that there were insufficient grounds for recusal. It then states:

> On October 29, 1987, [Deputy Assistant Attorney General of the Civil Division Stuart] Schiffer wrote in a memorandum to the Chief of the Civil Division that:
>
> > Bason has scheduled the next [INSLAW] trial for February 2 [1988]. Coincidentally, it has been my understanding that February 1 [1988] is the date on which he [Bason] will either be reappointed or replaced.
>
> Judge Bason learned from Chief Judge Patricia Wald, U.S. Court of Appeals, that he would not be reappointed to the bankruptcy bench on December 28, 1987.
>
> On January 19, 1988, the Department filed a motion that Judge Bason recuse himself from further participation in the case, citing that he was biased against the Department. This motion was filed even though Michael Hertz [the Director of the Department's Commercial Litigation Branch, Civil Division] had previously advised against such a move.

The important detail that the House Committee Report neglects to mention is the fact that Bankruptcy Judge Bason's letter to

Chief Judge Wald was written after Hertz recommended against the recusal effort. That letter significantly changed the analysis. DOJ might be criticized, although we think unfairly, for filing a motion that had little chance of success. It should not be criticized for filing such a motion in the face of Hertz's recommendation. DOJ's motion was based on Judge Bason's letter, not on the facts that Hertz had before him when he analyzed the disqualification issue.

D. Bason's Lawsuit

Bason's letter to Chief Judge Wald and the rest of the Court did not result in his reinstatement. On February 1, 1988 -- seven days before the expiration of his term -- Bason filed a lawsuit and a motion for a temporary restraining order in the federal district court seeking to enjoin Martin Teel from being sworn in.[84] Judge Bason's complaint incorporated his letter of January 12, 1988, to Chief Judge Wald, but it did not otherwise allege or refer to the allegation that DOJ interfered with the appointment process.

Bason's lawsuit was unsuccessful. He left the bench on February 8. On January 25, 1988, just prior to his departure, he issued a written opinion in favor of Inslaw and sharply critical of DOJ. During the week before his departure, he issued an award of damages and attorneys' fees against DOJ.

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[84]Bason filed a similar lawsuit when he was denied tenure by American University College of Law in 1972. As with his suit against the Court, he challenged the process and the fact that he was not provided with reasons for being denied tenure. After summary judgment for the University was reversed and remanded for trial, the parties settled out of court.

E. More Detailed Allegations

Bason added details to his allegations about the DOJ's involvement in the decision not to reappoint him when he testified and spoke to the House Committee on the Judiciary.

1. The Overheard Remark of a DOJ Attorney

Bason told the Committee, and repeated to us, that one of William Hamilton's children overheard a DOJ attorney state during a March 1987 hearing in the Inslaw case that "We've got to get rid of this judge."

As inappropriate as such a remark is, it does not evidence an intent to obstruct Bason's reappointment. The reappointment process had not even begun at the time the remark was allegedly made. Nor had Bason yet expressed an interest in reappointment, although such an interest was predictable. Additionally, DOJ's frustration with Bankruptcy Judge Bason was likely palpable by the Spring of 1987. We do not know if the remark was made and, if it was, who made the remark or in what context, but we would not be surprised if the frustration DOJ attorneys felt found expression in an articulated desire to "get rid" of Judge Bason, meaning only that the attorney wished that the case were assigned to another judge. No one can dispute that DOJ would have liked to have the case reassigned. It formally evaluated the possibility of achieving that end soon after the remark was allegedly made. However injudicious the alleged remark may have been, it does not, in our opinion, provide any evidence of improper DOJ involvement in the decision not to reappoint Bankruptcy Judge Bason.

2. Reporter Chris Welles

Bason also advised the House Committee and us that Chris Welles, a reporter with Business Week Magazine, told him that a high-level DOJ official boasted to him that DOJ had been responsible for his non-reappointment. We asked Welles about this statement. He could not recall ever having made it. He responded that, if he had had such a credible source, he would have published the statement in his article about Inslaw. No such statement was published. To the contrary, Welles' article states that "[T]here is no evidence that Justice influenced the selection made by the Court of Appeals."

Welles speculated that Bason may have misinterpreted Welles' questions or comments during their discussion of Bason's non-reappointment. For example, Welles may have spoken to someone at DOJ who commented on the outrageousness of Bason's Inslaw opinion and who said the Court of Appeals must have been influenced by that opinion. Welles advised us that, although he could not recall having done so, he may have related such a statement to Bason, who interpreted Welles as saying that a source in DOJ confirmed that the Inslaw ruling (and DOJ) influenced the Court of Appeals. Welles said no such thing. He had no such source. As he told us, he would have loved to have had such a source.

3. Stuart Schiffer

Bason also told the Committee and us that Welles speculated that Judge Johnson was approached privately and informally by one of her "old and trusted friends from her days in the Justice

Department." It has been suggested to the Committee and to us that the most likely candidate for such an approach is Stuart Schiffer, then the Deputy Assistant Attorney General for the Civil Division, who had supervisory responsibility over the Inslaw case.

Judge Johnson and Stuart Schiffer were office partners when both began their legal careers as staff attorneys with DOJ in the early 1960's. They have stayed in touch over the years, mostly when Judge Johnson has called Schiffer to recommend one of her clerks for employment with DOJ.

Judge Johnson did call Schiffer during the merit selection process. As soon as Johnson told Schiffer the general subject of her call, the selection of a Bankruptcy Judge, he advised her that DOJ had a sensitive matter pending in front of Bankruptcy Judge Bason. Judge Johnson replied that she was not calling about Bason and that she did not want to hear anything about Bason; she wanted Schiffer's candid appraisal of two candidates from DOJ who were on the Panel's "short list." One of them was Martin Teel. Schiffer, who has always worked in the Civil Division, knew nothing about Teel, who worked in the Tax Division. He explained DOJ's divisions to Judge Johnson and provided an evaluation of the other candidate about whom Judge Johnson inquired. Schiffer said nothing about Bason.

Schiffer is identified in the House Report as a DOJ official who may have soured Judge Johnson on Bankruptcy Judge Bason. Yet, the Committee never questioned Schiffer. Indeed, according to

Schiffer, no one ever asked him about his conversation with Judge Johnson prior to our interview.

The House Report states, "The committee has no information that Judge Johnson talked to Mr. Schiffer about Inslaw, Judge Bason or the bankruptcy judge selection process." Although this statement can be read as consistent with Johnson's and Schiffer's statements to us, we question whether the Committee was fully aware of all the facts concerning the Merit Selection Panel's review of the background of candidates. A conversation about two candidates for the bankruptcy judgeship is not necessarily a conversation about "the bankruptcy judge selection process." We do not know whether the Committee intended such narrow meaning or whether it simply did not learn of <u>any</u> contact between Judge Johnson and Schiffer. Judge Johnson cannot now recall what the Committee asked her. As noted previously, Schiffer was not interviewed by the Committee. We have asked the General Counsel to the House Judiciary Committee for copies of witness statements. We have not, however, received a response.

4. **<u>Judge Tim Murphy</u>**

Bason also suggested that former D.C. Superior Court Judge Tim Murphy was another possible candidate for a private approach by DOJ to Judge Johnson. Johnson and Murphy had been colleagues when Johnson served in D.C Superior Court. Murphy left the bench in 1985 and went to work for DOJ with C. Madison Brewer as Assistant Director on implementation of the PROMIS software. Obviously,

Murphy was in a position to and did know about DOJ's problems and frustration with Judge Bason.

The suggestion that Murphy may have influenced the bankruptcy judge selection process appears to us to be nothing but rank speculation. Murphy advised us that he was not especially close to Judge Johnson, although they had been colleagues many years ago and even though he had worked with her husband. He advised that Judge Johnson is extremely independent and she never consulted him about anything, except possibly when they were on Superior Court committees together. Murphy stated that he had no contact with Judge Johnson about the bankruptcy judge selection process; he did not even know that she was involved in that process until we questioned him.

5. **Kevin Reynolds/William Hamilton**

More recently, Bason reported that he had heard third-hand that someone at DOJ bragged that he knew all about Bason's non-reappointment and that accomplishing that feat had been "as easy as turning off a light switch." Bason identified Kevin Reynolds as the source of this statement and understood that Reynolds received the information from William Hamilton.

Reynolds, who now practices law in Hartford, investigated the Inslaw matter as an aide to Senator Dodd of Connecticut and later as a summer law clerk at McDermott, Will & Emery when that firm was preparing Inslaw's Petition for Writ of Mandamus. Reynolds acknowledged to us that he periodically speaks with and receives information from William Hamilton. He also has spoken with Bason,

although not recently. He stated that, while he was investigating the Inslaw matter, he received information from a large number of sources, some of whom he characterized as "not credible." Reynolds could not recall ever hearing or using the expression "as easy as turning off a light switch." Nor could he recall ever hearing that someone at DOJ bragged about having played a role in Judge Bason's non-reappointment. Reynolds had heard only that District Judge Stanley Sporkin had supposedly mentioned that it was generally "accepted" that Bankruptcy Judge Bason was removed from the bench by DOJ.

We spoke with Judge Sporkin. He had no recollection of any involvement or knowledge regarding the bankruptcy judge selection process. He barely knew of Bason, and had little, if any, interest in the process. He said he never commented or even speculated about the cause of Bason's failure to achieve reappointment as a Bankruptcy Judge.

6. **William Hamilton/Garnett Taylor**

We asked William Hamilton about the statement that Judge Bason attributed to him through Reynolds. By letter, Hamilton stated that former DOJ security officer Garnett Taylor knew that Anthony Moscato, who is now Acting Director of EOUSA, played an affirmative role on behalf of DOJ in denying Judge Bason's reappointment. Hamilton explained that he had obtained this information from a "senior U.S. Government official, holding a position of considerable responsibility." Hamilton suggested that we issue a subpoena for Taylor to appear before the grand jury. Hamilton

stated that, if subpoenaed and interrogated under oath, Taylor would reveal the information that he knew.

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

Hamilton refused to identify the "senior U.S. Government official" who was the source of this information. In his letter to us, he stated that he contacted his source and "the source declined to permit Hamilton to furnish his name to [us]." More recently, we again asked Hamilton to determine whether the source might reveal himself or, at least, agree to speak to us by telephone without our knowing or being able to determine his location or identity. Hamilton responded that his source's position was unchanged.[85]

We also contacted Anthony Moscato. According to Moscato, he had nothing whatsoever to do with the selection of bankruptcy judges. He convincingly stated that he is not familiar with Judge Norma Johnson, did not know that she chaired a selection panel, and did not even know there was a Merit Selection Panel. He stated that he spoke to no one about Bason's qualifications for reappointment. He cannot explain why his and Garnett Taylor's names would be used in the same sentence as Bankruptcy Judge Bason. Taylor and he are not even social friends, much less confidants.

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[85]We had hoped to meet with the Hamiltons to question them further about this source and other matters relevant to our investigation. After scheduling conflicts delayed our meeting, the Hamiltons, through their attorney, advised us that they would not meet with us, preferring to deal directly with the new Attorney General.

F. Conclusion

The Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs devoted substantial time and effort to the investigation of the allegation regarding the non-reappointment of Bankruptcy Judge Bason. So did the House Judiciary Committee. Neither committee found any evidence to support the allegation that DOJ obstructed the reappointment of Bankruptcy Judge Bason in retaliation for his ruling in Inslaw. The only evidence that we found of anyone within DOJ trying to influence the selection process against Judge Bason was the evidence relating to Royce Lambreth. For the reasons stated above, we do not believe that Royce Lambreth's conduct was improper. District Judge Johnson of the Merit Selection Panel and Chief Judge Wald of the Court of Appeals both unequivocally deny that DOJ obstructed or attempted to obstruct the reappointment of Bankruptcy Judge Bason.

The allegation that DOJ improperly interfered with the judicial selection process was not first lodged by an independent, unbiased observer of the selection process. It was made by Bankruptcy Judge Bason himself, who is convinced that he was the best qualified candidate and who was understandably disappointed when he was not selected. The allegation has been fed by William Hamilton who has claimed, but declined to provide proof, that a high-level government official with whom he has allegedly spoken can confirm the claim. We believe that the great weight of the

evidence clearly supports the conclusion that there was no attempt by DOJ to obstruct Judge Bason's reappointment.

## IX. THE ALLEGATION THAT DOJ OFFICIALS TRIED TO CONVERT INSLAW'S BANKRUPTCY TO A LIQUIDATION, AND THEN COMMITTED PERJURY AND FIRED A WHISTLEBLOWER TO COVER UP THIS MISCONDUCT

Inslaw alleges, and Bankruptcy Judge Bason found, that "DOJ, acting through its employees, unlawfully, intentionally and willfully sought to cause the conversion of Inslaw's Chapter 11 reorganization case to a Chapter 7 liquidation case without justification and by improper means." Inslaw further alleged that after it brought this misconduct to the attention of the bankruptcy court, DOJ employees committed perjury in order to conceal the truth of what happened, and that DOJ subsequently fired a "whistleblower" in retaliation for his exposing the scheme to convert the bankruptcy. We reviewed the evidence from the numerous investigations that previously looked into these allegations, as well as conducting our own interviews of those involved. Although the matter is not free from doubt, we conclude that there is insufficient evidence to support a finding that DOJ planned or attempted to convert Inslaw's bankruptcy case or engaged in any cover-up to conceal the conduct alleged.

### A. Background

When Inslaw filed its bankruptcy petition in February, 1985, it sought to reorganize under the provisions of chapter 11 of the Bankruptcy Code. It did not seek to liquidate under chapter 7. Pursuant to the usual bankruptcy procedures, the United States Trustee with responsibility for the District of Columbia, technically a DOJ employee, was assigned to monitor Inslaw's bankruptcy case.

At the time of Inslaw's bankruptcy petition, the United States Trustee program was still experimental. Under that program, which has since been extended, the United States Trustee is an impartial third party that monitors and supervises the administration of bankruptcy cases. In a chapter 7 case, for example, the United States Trustee appoints a private trustee to liquidate the estate. In a chapter 11 case, on the other hand, the United States Trustee is responsible for monitoring the debtor in possession's business operation and its submission of operating reports, fee applications, plans, and disclosure statements. In chapter 11 cases the United States Trustee also has certain responsibilities in connection with the creditors' committees. The United States Trustee does not have the power to convert a chapter 11 bankruptcy reorganization to a chapter 7 liquidation. The trustee does, however, have the authority to request the bankruptcy court to order such a conversion. Such a motion by the United States Trustee is properly made only when the United States Trustee believes that a conversion is in the best interests of the creditors and the estate. Although the United States Trustee program is administered by DOJ, it would be improper for the United States Trustee to seek a conversion solely for the purpose of helping DOJ to avoid contract obligations to a debtor.

1. **The Primary Allegation**

In the Inslaw bankruptcy case, the U.S. Trustee never moved to convert the case from a reorganization to a liquidation. Nevertheless, some two years after it filed its petition, Inslaw

alleged that DOJ improperly plotted to convert Inslaw's chapter 11 reorganization into a chapter 7 liquidation.

The allegation arose from a private conversation that William and Nancy Hamilton had with Anthony Pasciuto, a DOJ employee who was then Deputy Director of the Executive Office of U.S. Trustees (EOUST). According to later testimony by Nancy Hamilton, Pasciuto told the Hamiltons that the Director of EOUST, Thomas Stanton, had pressured the U.S. Trustee assigned to the Inslaw case, William White, to convert it to chapter 7. Pasciuto also told the Hamiltons that Stanton had tried to detail a talented attorney from the U.S. Trustee's Office in the Southern District of New York to Washington, D.C., to work on converting the Inslaw case.

This allegation found support in the initial deposition testimony of Cornelius Blackshear, now a Bankruptcy Judge for the Southern District of New York, and previously the U.S. Trustee in the Southern District of New York. Blackshear swore during his deposition that the U.S. Trustee with responsibility for the District of Columbia, White, had called him and stated that EOUST Director Stanton wanted the Inslaw case converted and wanted a particular attorney from Blackshear's office assigned to handle the matter.

According to Inslaw's allegations, White rejected Stanton's suggestion. When White later requested that language be added to a confidentiality order to prohibit disclosure of confidential Inslaw materials to DOJ employees other than those associated with the U.S. Trustee's Office, this request was viewed as support for

the allegation that EOUST Director Stanton had importuned U.S. Trustee White to do DOJ's bidding and that White wanted to protect himself from further importuning.

According to the findings of Bankruptcy Judge Bason, the "smoking gun" that allegedly links this plot to DOJ are Peter Videnieks' notes of a conversation between Videnieks and Jack Rugh, which took place shortly after Inslaw filed for relief under the Bankruptcy Code. Those notes reflect two items: (1) that Brewer spoke to EOUST Director Stanton, and (2) that the Inslaw case would be converted from chapter 11 to chapter 7. As discussed below, one cannot tell from the notes alone what the connection is, if any, between the first and the second item.

In fact, Brewer and Stanton did speak about the Inslaw case soon after the petition was filed. Both men, however, deny any mention of conversion or liquidation. Rugh and Videnieks say that the first item in Videnieks' notes (that Brewer and Stanton talked) was something Brewer told Rugh (and which Rugh then relayed to Videnieks), but that the second item in the notes reflects Rugh's expression of Rugh's own opinion. Nevertheless, Bankruptcy Judge Bason found that the notes were proof that Brewer originated a plan to liquidate Inslaw and he enlisted Stanton in that effort.

2. **The Cover-Up Allegations**

The alleged plot thickened almost immediately after its discovery, when Bankruptcy Judge Blackshear quickly recanted his deposition testimony. After discussing his deposition testimony with D.C. Trustee White and an AUSA who represented him during his

deposition, Blackshear submitted an affidavit recanting his testimony and asserting that he had mistaken the Inslaw case for the UPI case. Inslaw cried foul, alleging that DOJ had procured a perjurious recantation to cover up its plot to liquidate Inslaw.

The claim of cover-up was later buttressed by the termination of Anthony Pasciuto's employment following an OPR investigation. The OPR investigation of Pasciuto was initiated after Pasciuto admitted in open court that he had made inaccurate statements to the Hamiltons, and that in meeting the Hamiltons he had wanted to hurt his boss, Thomas Stanton. Inslaw alleged that Pasciuto was fired because he blew the whistle on DOJ's wrongdoing.

3. The Bankruptcy Court Decision

The Bankruptcy Court heard evidence on the matter during a hearing on Inslaw's petition for "Independent Handling"[86] and concluded that "DOJ acting through its employees unlawfully, intentionally and willfully sought to cause the conversion of Inslaw's chapter 11 re-organization case to a chapter 7 liquidation case without justification by improper means." The court's conclusion was based on several subsidiary findings. Bankruptcy Judge Bason found that Stanton struck a bargain with Brewer. The agreement was for Stanton to make efforts to liquidate Inslaw in

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[86]This hearing was held in response to Inslaw's request that its complaint against DOJ be handled "entirely independent of any DOJ officials who [were] involved in the allegations" in the complaint. This hearing came to be known as the "Independent Handling proceeding," although Inslaw ultimately dropped its request for that particular form of relief. It was during this hearing in June, 1987, that Bankruptcy Judge Bason heard evidence of DOJ's alleged effort to convert Inslaw to chapter 7.

order to rid DOJ of its contract problems with Inslaw. The Bankruptcy Court found that Stanton made this commitment to curry favor with the EOUSA and with higher DOJ officials in order to win the support of these officials for anticipated legislation that was to make permanent the then-temporary United States Trustee program, which he headed. To effect this liquidation, Bankruptcy Judge Bason concluded, Stanton agreed to put pressure on his subordinate, William White, to liquidate Inslaw. The court found that when White resisted Stanton's pressure, Stanton sought to have Harry Jones, an Assistant U.S. Trustee in New York, detailed to either White's office in Alexandria or to Stanton's office at EOUST, in order for Jones to accomplish the conversion. Although none of the DOJ employees who would have been parties to or affected by the alleged agreement testified that there was such an agreement, or that the actions supposedly contemplated were ever discussed, Bankruptcy Judge Bason decided that the testimony of these DOJ employees was unworthy of belief, and, in essence, that they had lied.[87]

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[87]The Bankruptcy Court Judge found the testimony of Stanton, one of the principal government witnesses in the Independent Handling proceedings, to be "evasive and unbelievable." The Court also found Rugh, another government witness, to have given testimony that was "simply on its face not believable." Specifically, the Court stated that "Rugh was perhaps the Elliott Abrams of this Bankruptcy Court because, although he managed to maintain his composure throughout, his testimony is simply on its face not believable." The Court did not find that Blackshear had lied, however. The Court stated:

> [B]ecause Judge Blackshear's original testimony is in accord with the other credible evidence, and his recantation is not, this
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> (continued...)

4. The OPR Investigation

In response to the Bankruptcy Court's ruling--and a complaint filed by William Hamilton--DOJ's Office of Professional Responsibility investigated the allegations that Stanton, Brewer, Rugh and Videnieks tried to obstruct the Inslaw bankruptcy proceedings by attempting to have Inslaw converted to a chapter 7 proceeding. A related allegation--based on Judge Bason's disbelief of a number of DOJ witnesses--was that certain DOJ employees and officials had lied during the Independent Handling proceeding to cover up the conversion attempt.

Also, in July of 1987, pursuant to a referral from the office of the Deputy Attorney General, OPR initiated an investigation into allegations involving Anthony Pasciuto, who at the time was still Deputy Director for Administration of EOUST. Specifically, these allegations--which were subsequently spelled out by Thomas Stanton --were that: (i) Pasciuto's meeting with the Hamiltons violated the Standards of Conduct for Department employees; (ii) Pasciuto provided official non-public information to the Hamiltons in violation of the Standards of Conduct; (iii) Pasciuto violated 18 U.S.C. § 210 by agreeing to meet with the Hamiltons in exchange for

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[87](...continued)
Court accepts as true Judge Blackshear's original testimony and holds that his recantation is the result of an honest mistake on his part.

However, several years later in January, 1991, Bason filed a complaint with the Judicial Council of the Second Circuit Court of Appeals against Judge Blackshear, in which Bason stated that he now concludes that Judge Blackshear recanted not because of an honest mistake but because he made a conscious choice to testify falsely.

their assistance in obtaining a position Pasciuto wanted as an Assistant U.S. Trustee in Albany; and (iv) Pasciuto concealed and/or misrepresented material facts regarding his meeting with the Hamiltons from superiors and from the Civil Division attorney representing the Department in the Inslaw matter.

In addition to reviewing the evidence presented during the Independent Handling proceeding, OPR conducted its own interviews. Ultimately, OPR had before it much the same evidence as was before the bankruptcy court.

OPR concluded its investigation of Pasciuto's conduct in December 1987. It recommended that Pasciuto's employment be terminated primarily because of his admitted decision to harm his superior, Stanton, by any means possible, including providing false information to the Hamiltons during their meeting. In a subsequent report issued on March 31, 1989, OPR concluded that Bankruptcy Judge Bason's findings on the Independent Handling proceeding were "clearly erroneous," and that there was no evidence that DOJ employees and officials had tried to put pressure on White to convert Inslaw's case into a chapter 7 liquidation. OPR further found that there was no evidence that DOJ officials and employees had lied during the Independent Handling proceeding to cover up the conversion effort. OPR pointed out that the final testimony of all the witnesses with pertinent knowledge was largely consistent: All said there was no plan or pressure to convert. Although it was not reviewing the propriety of Bankruptcy Judge Blackshear's conduct, OPR credited Blackshear's recantation for a variety of reasons,

including the fact that Blackshear had no apparent motive to lie about the matter.

5. The Public Integrity Investigation

In 1988--following the bankruptcy adversary proceeding and decision--Inslaw's attorneys complained to the Public Integrity Section of DOJ's Criminal Division alleging that Blackshear and White perjured themselves in testimony regarding the Inslaw bankruptcy proceedings and that White suborned Blackshear's perjury. Additionally, Stuart Schiffer, Deputy Assistant Attorney General in the Civil Division, referred to the Criminal Division an allegation that Anthony Pasciuto, who by the time of Public Integrity's investigation had left DOJ,[88] had committed perjury. Specifically, it was alleged that Pasciuto had: (i) testified at the Inslaw trial that he had told the Hamiltons that there was a conspiracy afoot in DOJ to drive Inslaw into liquidation but subsequently admitted in his trial testimony that his statements to the Hamiltons were not based on any first-hand knowledge, and instead were made in order to cause trouble for his boss Thomas Stanton; and (ii) in contesting OPR's recommendation that Pasciuto be fired, Pasciuto gave various written and oral statements to DOJ and the news media in which he contended that his original statements to the Hamiltons were true, which would make his trial testimony false.

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[88]While Pasciuto, through his counsel, fought OPR's recommendation that he be fired, DOJ intended to follow the recommendation. Faced with DOJ's position, Pasciuto ultimately (and reluctantly) resigned.

Public Integrity thoroughly investigated the allegations, reviewing and analyzing the testimony and statements made by everyone involved, and interviewing all subjects and witnesses who would meet with them.

Public Integrity concluded that perjury cases could not be proven and that the matter should be declined. With respect to the allegations that White and Blackshear committed perjury, Public Integrity concluded that evidence that their testimony was false was entirely lacking for essentially the same reason that the OPR found no disciplinary action against DOJ employees was warranted: The final testimony of all witnesses with knowledge was largely consistent. As to Bankruptcy Judge Blackshear, Public Integrity noted that he had given credible explanations for his change in testimony.

With respect to allegations of perjury against Pasciuto, Public Integrity concluded that prosecution should be declined because the only sworn testimony by Pasciuto available to Public Integrity was Pasciuto's trial testimony--and all the evidence suggested that Pasciuto's trial testimony was truthful. Public Integrity noted that it had been informed by Pasciuto's counsel that Pasciuto had given testimony contrary to his trial testimony before the Senate PSI, but at that time transcripts of that testimony were unavailable. Furthermore, assuming Pasciuto's testimony to the Subcommittee was that Stanton had tried to convert Inslaw, Public Integrity noted several discretionary factors which counseled against criminal prosecution. Charging Pasciuto could

leave DOJ vulnerable to the charge of conducting a political trial based on vindictiveness against a DOJ employee who claimed to be a whistleblower. Public Integrity also noted that Pasciuto had already lost his job and endangered his career. From reading his testimony and hearing accounts of his demeanor at trial, Public Integrity viewed it as clear that Pasciuto was emotionally near the end of his rope. Public Integrity concluded that there was no good reason to add to his difficulties.

6. **The Senate Subcommittee's Investigation**

The investigation of these allegations has not been limited to the bankruptcy court and DOJ. The Senate's PSI also investigated the matter. In the course of its investigation, the Subcommittee Staff deposed Pasciuto, Harry Jones (the Assistant Trustee from the Southern District of New York who was to be detailed to the Inslaw case) and Thomas Stanton. The Subcommittee's Staff also interviewed Cornelius Blackshear and William White.

In its report, which issued in September 1989, the Subcommittee Staff found "no proof that an effort to convert Inslaw's bankruptcy proceedings was conducted by individuals beyond those the Bankruptcy Court had found responsible [i.e., Stanton and Brewer]." The Staff Report said that, while there was conflicting evidence as to whether Stanton went so far as to urge White to convert the Inslaw case into a liquidation, it was clear that Stanton urged special treatment for the Inslaw case. The Staff said that Stanton's only motive in giving special treatment to the Inslaw case was because DOJ was interested in the proceeding.

According to the Staff, Stanton saw the Inslaw case as a means of favorably impressing DOJ and thereby ensuring continued DOJ support for his office. The Staff concluded that, while such actions do not equate with the type of conspiracy that the Hamiltons had alleged, they were, as attempts to influence the handling of the case by the U.S. Trustee, improper.

The Staff also concluded that Bankruptcy Judge Blackshear's recantation was implausible. The Staff noted that on four occasions prior to his recantation Blackshear had stated that White told him about pressure from Stanton to convert the Inslaw case and it was only after talking to White that Blackshear suggested that he had confused Inslaw with the UPI case.[89]

The Staff also discounted Blackshear's explanation that he had confused the Inslaw case with his discussions with White about the UPI case, during which White told him about pressure from the IRS to convert the UPI case. The Staff found no evidence to support this explanation. White told the Subcommittee Staff that he had never been pressured to convert the UPI case, and representatives of the IRS and the Tax Division of DOJ told Inslaw that their offices had never attempted to have the UPI case converted. Moreover, Blackshear told the Staff that one of the reasons he was sure that he had confused Inslaw with UPI was that both he and White had spoken at an ABA conference in 1986 about the

[89]The four occasions were a telephone conversation with Jane Solomon, an acquaintance of Judge Blackshear who called him at the request of Inslaw's attorneys, two interviews with Inslaw's attorneys, and Blackshear's first deposition in the Independent Handling proceeding.

independence of the U.S. Trustee program and that both had used the UPI case as an example of how trustees could resist pressures upon them from other units of DOJ. White told the Staff that he had not talked about the UPI case at the conference, however, and the Staff obtained official tape recordings of the conference, which showed that at no time during his presentation did Blackshear mention the UPI case.

7. The House Judiciary Committee Investigation

The House Judiciary Committee also investigated the allegations regarding the conversion issue. The Committee has not made the materials, interviews, and documents underlying its report available to us. It appears to us from the House Committee's report, however, that most of the witnesses interviewed by the House Committee provided statements essentially consistent with their most recent testimony.

In its report, the Committee credited Pasciuto's testimony to it and the original testimony of Bankruptcy Judge Blackshear, and implicitly criticized DOJ for holding Pasciuto accountable for his discussions with the Hamiltons while "excus[ing]" Bankruptcy Judge Blackshear for making statements identical to Pasciuto's. Although the Committee did not expressly conclude that DOJ officials and employees had schemed to have Inslaw converted to Chapter 7 bankruptcy, it did state that "[t]he committee encountered numerous situations that pointed to a concerted effort by Department officials to manipulate the litigation of the Inslaw bankruptcy, as alleged by the president of Inslaw."

B. Our Analysis

In investigating these allegations, we reviewed all the records from the bankruptcy court proceedings, as well as all available records from the prior DOJ and Senate Subcommittee investigations outlined above. We also attempted to interview personally most of the relevant witnesses. Based on our review of this evidence we believe that there is insufficient evidence to conclude that DOJ pressured the U.S. Trustee to attempt to convert the Inslaw Bankruptcy case or otherwise improperly interfere with the case, or that DOJ attempted a cover-up. What follows is a discussion of why we believe the evidence does not support a finding of wrongdoing.

1. Brewer's Conversation with Stanton

There is no question that Brewer and EOUST Director Stanton discussed the Inslaw case. Shortly after Inslaw filed its bankruptcy petition in February 1985, Director of EOUST Thomas Stanton called William Tyson, the Director of EOUSA, to advise him of the filing. Tyson was not in when Stanton called, and Stanton left a message. Brewer returned Stanton's call for Tyson. During his conversation with Stanton, Brewer asked for copies of Inslaw's bankruptcy petition, and Stanton agreed to get them. Stanton then called U.S. Trustee White to ask for copies. White provided Stanton with the petition, which Stanton sent to Brewer. Stanton and Brewer claim that this was the only conversation they ever had about the Inslaw bankruptcy, and that this was the sum and

substance of that conversation.[90] Moreover, prior to this telephone conversation, Stanton and Brewer had not spoken before and did not know each other.

Thus, there is no direct evidence that Brewer (or anyone else from DOJ) asked Stanton to try to convert Inslaw's bankruptcy to a liquidation. That evidence is entirely circumstantial.

There are essentially six pieces of circumstantial evidence that arguably support this allegation: (1) Pasciuto's statements; (2) the Videnieks' notes; (3) the testimony of Gregory McKain; (4) the language that White proposed as an addition to Judge Bason's confidentiality order; (5) Blackshear's statements to Inslaw's bankruptcy attorneys and Judge Solomon prior to his first deposition and his testimony at his first deposition; and (6) the consideration that was given to transferring Assistant U.S. Trustee Harry Jones from the Southern District of New York to the District of Columbia to work on the Inslaw case. For the reasons discussed below, we do not find these pieces of evidence, either individually or cumulatively, sufficient to conclude that DOJ was guilty of any of the alleged wrongdoing.

### 2. Pasciuto's Allegation that Stanton Pressured White to Convert the Inslaw Case

On March 17, 1987--during the pendency of the Inslaw bankruptcy litigation with DOJ--Anthony Pasciuto, who was then

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[90]Stanton testified that, some time later, Stanton ran into Brewer. Brewer introduced himself to Stanton and said "you thought you were done with INSLAW but you are about to get subpoenaed." Stanton maintains that they did not discuss Stanton's testimony or anything about INSLAW.

Deputy Director of Administration for EOUST, and who worked under Stanton, contacted the Hamiltons because he had been told that they had connections that could help him obtain a trustee appointment in Albany, New York, which he desired. Pasciuto met with the Hamiltons. During the course of the meeting, according to Nancy Hamilton, Pasciuto told them that Stanton had exerted pressure on White to convert the case to chapter 7 and that Stanton had tried to assign Harry Jones to White's office in order to work on converting the Inslaw case. Pasciuto said he got this information from Blackshear and White.

But Pasciuto himself testified during the Independent Handling hearing that no one had ever told him that Stanton had pressured White to convert the case to a chapter 7 liquidation, that he did not recall telling the Hamiltons about any pressure to convert the Inslaw bankruptcy, and that he had no personal knowledge of the subject. He went on to say that if he did tell the Hamiltons of such pressure to convert, then that was his recollection at the time, but he was very upset and would have done anything, including exaggerating and making things up, to hurt Stanton (who was his boss and with whom he was having problems). Pasciuto did add, however, that at a meeting in New York with Blackshear and U.S. Court of Appeals Judge Lawrence Pierce, Blackshear made some statement about learning from White that Stanton had pressured White to convert Inslaw. Pasciuto did not remember the words that Blackshear used or what exactly Blackshear said.

Pasciuto told the OPR attorneys essentially the same version of events that he recounted to the bankruptcy court. Specifically, Pasciuto told OPR that all of the information he told the Hamiltons regarding pressure to convert Inslaw was second or third hand, that he told the Hamiltons to talk to Blackshear and White, and that Blackshear had been requested to provide staff help to White. Pasciuto again said that no one was being sent to convert the Inslaw case, but rather it was a matter of sending someone to help White with the case because he needed assistance.

Based on Pasciuto's admissions that he made false statements to the Hamiltons in order to harm Stanton, OPR recommended that Pasciuto be fired. After this recommendation, Pasciuto's testimony changed.

In a letter sent by Pasciuto's attorney to DOJ following OPR's recommendation that Pasciuto be dismissed, Pasciuto's attorney argued against termination. The attorney claimed that what Pasciuto had told the Hamiltons was true, and that Pasciuto had backed away from those statements at trial because Blackshear and White would not acknowledge the truth and because Stanton was putting pressure on Pasciuto to "play ball" if Pasciuto wanted to get his appointment as a trustee in Albany. Specifically, in this letter, Pasciuto's attorney claimed that:

> --Pasciuto had a long-standing personality conflict with Stanton, culminating in early 1987 in Pasciuto's belief that Stanton wanted to fire him;
>
> --A friend suggested that Pasciuto meet with the Hamiltons, and Pasciuto felt that the Hamiltons would know that DOJ was treating him unfairly;

--At this meeting with the Hamiltons, Pasciuto told them that Stanton had pressured Blackshear to detail Jones to White's office to convert Inslaw and that Blackshear had told Pasciuto of Stanton's plans;

--After this meeting, but before his testimony before the bankruptcy court, Pasciuto learned that Blackshear's original deposition testimony corroborated Pasciuto's recollection of their conversation regarding Stanton's efforts to convert Inslaw and that Blackshear had subsequently recanted that testimony and that White could not recall a conversation with Pasciuto regarding Inslaw;

--As a result of learning that there was no corroboration of his assertions regarding Stanton's attempts to pressure the conversion of the Inslaw bankruptcy, Pasciuto became very fearful since he was now alone in making this accusation against Stanton;

--Stanton put job-related pressure on Pasciuto on account of Pasciuto's statements about Stanton's attempt to convert the Inslaw bankruptcy;

--Pasciuto felt tremendous pressure over this matter, and, when he gave his trial testimony, he was not adequately prepared by the DOJ trial attorney and was "overly circumspect" about his testimony and tried to somehow get out of the difficult position he found himself in by testifying primarily about the way Stanton had been treating him; and

--In July 1987, at a social function in the home of Harry Jones, Blackshear came up to Pasciuto and told him that "you told the truth ... I got confused ... I thought that by changing my story I would hurt less people ... the easiest thing to do was recant ...."

Before the Senate Subcommittee, Pasciuto testified (in most respects consistently with his attorney's letter to DOJ) that White had told him that Stanton had pressured White to take some sort of action with respect to Inslaw, that Blackshear had stated in Pasciuto's presence that Stanton had pressured Blackshear to send Jones to Washington to work on Inslaw, and that Blackshear had told Pasciuto that he had recanted in order to "hurt less people."

According to the House Committee Report, Pasciuto told the Committee's investigators that he attended a January 1987 luncheon meeting with Blackshear, Judge Lawrence Pierce, Harry Jones and Elliott Lombard. The House Committee Report says that during this meeting Blackshear described Stanton's attempt to pressure Blackshear into sending Jones to work on the Inslaw bankruptcy. Pasciuto apparently testified that it was clear in Pasciuto's mind that Blackshear implied that Stanton wanted Inslaw converted to chapter 7 status and needed Jones to accomplish this. Pasciuto, consistent with his attorney's letter to DOJ, said that his testimony at the Independent Handling hearing was the result of pressure from DOJ.

During our interview of Pasciuto he essentially maintained the position that the statements set forth in his attorney's letter are the truth. Specifically, Pasciuto told us that at a luncheon meeting in Judge Pierce's chambers, Blackshear said something about Thomas Stanton wanting Jones to go to White's office to help with Inslaw. Blackshear told Pasciuto he refused, and Blackshear expressed concern about the pressure from Stanton. Pasciuto told us that he was left with the clear impression that Stanton was trying to get Blackshear to send Jones to White's office to convert Inslaw. Pasciuto cannot, however, recall what words Blackshear used or what it was that Blackshear in fact said, and Pasciuto does not remember whether the word "conversion" was ever used. Additionally, Pasciuto said that his testimony at trial differed from his current version of events because the DOJ attorney did not

adequately prepare him for his testimony, because he knew that neither Blackshear nor White would corroborate his testimony, and because Stanton put job related pressures on him.

For several reasons Pasciuto's statements and testimony are extremely unreliable.

First, Pasciuto has never claimed to have personal knowledge or first-hand information about anything related to the alleged plot to convert the Inslaw case. His knowledge has only been second and third hand.

Second, Pasciuto in his testimony before the Bankruptcy Court acknowledged that neither White nor Blackshear had told him that Stanton had pressured White to convert the Inslaw bankruptcy.

Third, Pasciuto's most recent statements are little more than inarticulate, and inadmissible, impressions. For example, Pasciuto claims that during a luncheon meeting with Pasciuto and Circuit Judge Pierce of the United States Court of Appeals for the Second Circuit Blackshear said something about Stanton having wanted Blackshear to send Jones to White's office to work on the Inslaw case. While, according to Pasciuto, Blackshear's statements left him with the distinct impression that Stanton was doing this in order to have the Inslaw bankruptcy converted to a chapter 7 liquidation bankruptcy, Pasciuto cannot remember what Blackshear said that left him with that impression. Moreover, the other participants in this conversation, Blackshear and Judge Pierce, do not remember anything at all being said about Inslaw. Thus, not

only is Pasciuto's current version based on sheer hearsay, the hearsay itself is entirely without corroboration.

Finally, Pasciuto is utterly impeachable. During the Independent Handling proceeding, Pasciuto said, under oath, that if he said anything about an effort to convert to the Hamiltons, he may have exaggerated or falsified things in order to hurt his boss Stanton, with whom he was having difficulties at work and who he believed was hindering his appointment to a desired Assistant Trustee position in Albany. Pasciuto later claimed that he had testified this way at the Independent Handling proceeding because he knew Blackshear and White would not corroborate his testimony and because of job related pressures. Pasciuto, however, made this later claim for the first time in his attorney's response to the recommendation by OPR that he be fired for providing false information to the Hamiltons in order to hurt Stanton. Thus, the argument is strong that Pasciuto's later claim was made in order to try to save his job.[91]

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[91]In its Report, the House Judiciary Committee implicitly criticizes DOJ for seeking to fire Pasciuto and thereby holding Pasciuto "very accountable for his discussions with the Hamiltons," while not prosecuting Judge Blackshear for perjury, thereby excusing him for making statements identical to Pasciuto's. We believe this criticism is unjustified. At the time OPR recommended that Pasciuto be dismissed, he had told OPR--consistent with his testimony at the Independent Handling proceeding--that he made exaggerated and false statements to the Hamiltons in order to hurt Thomas Stanton. It was only after OPR recommended that Pasciuto be terminated that Pasciuto changed his story--yet again--and claimed his statements to the Hamiltons were true. In contrast, Judge Blackshear has always maintained that at the time he made the statements in his first deposition, he believed them to be true, and that it was only after he made the statements that he realized he had been mistaken and corrected himself. Furthermore, DOJ did

(continued...)

### 3. The Videnieks' Notes

In February of 1985, Jack Rugh had a telephone conversation with Peter Videnieks. Videnieks made a handwritten note of the conversation, which read:

> 2/20/85 JR called re/'our computer.' Brick talked to Stanton . . . 'no way' 11 will be '7.' Need home for computer

Rugh testified that he did not remember this conversation with Videnieks, but that the note accurately reflected his view of Inslaw's prospects at the time, and his belief that Inslaw would end up in liquidation bankruptcy. Rugh was pessimistic about Inslaw's financial future even before the company filed for bankruptcy. Rugh thought that DOJ accounted for most of Inslaw's business and, in February 1985, he knew that Inslaw's contract with DOJ would expire in less than a month. Videnieks also testified that, while he did not have a specific recollection of the conversation, he believed that Rugh told him that he (Rugh) believed that Inslaw would end up in chapter 7.

Bankruptcy Judge Bason interpreted this note to mean that Stanton had assured Brewer that the Inslaw bankruptcy would be converted to chapter 7. This interpretation of the Videnieks' notes is not entirely implausible when viewed in the light of the testimony of Gregory McKain, which is discussed in the following section. It is, however, inconsistent with the testimony of every

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[91](...continued)
not have the authority to dismiss or otherwise reprimand Judge Blackshear. For the reasons previously discussed, Public Integrity concluded (correctly, we believe) that there was insufficient evidence to prosecute Judge Blackshear for perjury.

witness who has personal knowledge of the conversations reflected in the notes. The interpretation given the notes by Videnieks and Rugh is not only equally reasonable, but is supported by virtually all the evidence. There is a space in the notes between the words "Brick talked to Stanton" and the words "no way 11 will be 7." It is thus reasonable to infer that Rugh told Videnieks that Brewer talked to Stanton (which Brewer had--at least about getting the Inslaw pleadings), and that, apart from that, Rugh told Videnieks that he thought Inslaw would end up in chapter 7. This is what Rugh and Videnieks say they think happened. Because this interpretation is both reasonable and consistent with virtually all other evidence, we are unable to conclude that this note means that Stanton told Brewer that he would see to it that Inslaw would end up in chapter 7.

4. **McKain's Testimony**

On about February 21, 1985, shortly after Inslaw had filed for protection under the Bankruptcy Code, Rugh talked with Gregory McKain, an Inslaw employee, to ask him whether he would be interested in working for DOJ. Rugh had been very impressed for some time with McKain's work and had discussed with McKain on several occasions the possibility of McKain working for DOJ. McKain testified that during their conversation, Rugh told him that DOJ had talked to the "Trustees" who said that Inslaw would not survive in chapter 11 bankruptcy and would probably be in chapter 7 within 30 to 60 days. Rugh testified that he might have told McKain that there had been a conversation with the U.S. Trustee's

office because he understood from Brewer that there had been such a conversation. Rugh also said, however, that as far as he knew, the Trustee's Office had not said that Inslaw would not make it in chapter 11. He was not aware of what view, if any, the Trustee's Office had on Inslaw's prospects. Rugh testified that he told McKain that Inslaw would not be able to survive in chapter 11 because that was his own view.

Following his conversation with Rugh, McKain told his boss, William Hamilton, of his (McKain's) version of the conversation with Rugh. Hamilton assured McKain that the company would continue in business. Hamilton was upset by the conversation between Rugh and McKain and called one of his bankruptcy lawyers, Stanley Salus, to ask him to look into the matter. Salus and Inslaw's other bankruptcy attorneys called U.S. Trustee White and told him McKain's version of Rugh's call. White promised to investigate and assured Inslaw's counsel that his office was and would remain independent of DOJ in the matter. Later that day, White called Salus and told him that he had been assured that his staff had expressed no opinions to DOJ regarding the likelihood of a successful reorganization. White also assured Salus that nothing other than public records would be given to DOJ.

Although McKain's testimony at the Independent Handling proceeding gives some circumstantial support for the conversion theory, Rugh has testified to a different version of this conversation. Rugh claimed that he himself believed that Inslaw would end up in liquidation and he merely expressed that personal

opinion to McKain. Arguably there is no more reason to think that Rugh is lying about this than there is to think that McKain is. If Rugh can be said to have lied to protect his employer, DOJ, it is equally plausible that McKain lied to help his employer, Inslaw. It is equally possible, of course, that Mr. McKain simply misunderstood what Mr. Rugh had said. In the end, McKain's testimony provides some support to the conversion theory, but not enough to satisfy us that the theory is true.

5. White's Addition to Confidentiality Order

On July 11, 1985, the Bankruptcy Court ordered that certain information filed by Inslaw be kept confidential. U.S. Trustee White reviewed that order before it was signed and, at his suggestion, the following sentence was added to the last paragraph of the order:

> No other employee or agent of the Justice Department [i.e., other than in the office of the United States Trustee] shall have any access whatsoever, directly or indirectly, to the confidential materials covered by this order.

Bankruptcy Judge Bason found during the Independent Handling hearing that White requested this language to protect himself from importuning by Stanton.

We do not believe the evidence supports Bankruptcy Judge Bason's finding. William White has explained that he asked for this language to preclude criticism such as Inslaw's counsel, Mr. Salus, had made to him the preceding February following the Rugh-McKain conversation. White explained that he sought to preclude such criticism by ensuring that only personnel in his office would

be involved in the case. No evidence contradicts White's explanation for including this language and there is no good reason for doubting White's word. The evidence clearly indicates that White did not think highly of Thomas Stanton. So there is no reason to doubt that had there been an improper attempt to influence White, White would have so testified, particularly when he was no longer a U.S Trustee and had gone into private practice. Bankruptcy Judge Bason speculated that White's very independence from EOUST somehow cast doubt upon White's testimony. According to Bason, White's "memory" was faulty because he had returned to private practice and he might think he would have difficulties practicing bankruptcy law if he antagonized the Executive Office of U.S. Trustees. But there is no evidence that suggests that White's practice was dependent upon the goodwill of EOUST, or that White would lie under oath even if his livelihood were affected by EOUST.

6. Cornelius Blackshear

On March 25, 1987, Inslaw attorneys deposed Blackshear, a former U.S. Trustee in New York who by that time had become a United States Bankruptcy Court Judge for the Southern District of New York. Bankruptcy Judge Blackshear initially testified that White had told him that Stanton had tried to pressure White to convert the case and to have Jones assigned to White to effect the conversion. Blackshear also testified that Stanton had never contacted him about detailing Jones to work on the Inslaw case, but he thought Stanton might have approached Jones on the subject directly. White, on the other hand, had been deposed shortly

before Blackshear and had testified differently. In his deposition, White testified that while Stanton had inquired of him about the Inslaw case, Stanton had not tried to exert any pressure on White to convert Inslaw. White also testified that Blackshear had told him that Blackshear's assistant Harry Jones was going to be detailed to Washington to work on Inslaw, but Blackshear did not say the detail was for the purpose of converting Inslaw.

When White learned that Blackshear had testified differently from White in his deposition, White contacted Blackshear and eventually Blackshear and White spoke by telephone. White told Blackshear that Blackshear was mistaken and that White had not told Blackshear those things about the Inslaw bankruptcy. Blackshear says that after his conversation with White he realized that he had been mistaken and had confused Inslaw with another case about which White had spoken to him. Blackshear, with the assistance of his attorney (an Assistant United States Attorney in the Civil Division of the U.S. Attorney's Office for the Southern District of New York), prepared and signed an affidavit recanting his deposition testimony. In the affidavit, Blackshear stated that at the time he gave the deposition he believed all the things he said to be true, but that he subsequently realized, after his conversation with White that: (i) White had not told him that Stanton had tried to pressure White to convert Inslaw; and (ii) Blackshear had confused Inslaw with the UPI case, about which White had told Blackshear that the IRS had pressured White to join in a motion to convert. Blackshear also gave a second deposition in which he basically

repeated his new recollections that White had not told him that Stanton had tried to pressure White to convert Inslaw and that he had confused the Inslaw case with UPI.

During the OPR investigation Blackshear essentially repeated the statements he had made in his recanting affidavit and second deposition, stating that White had not told him that Stanton had put pressure on him to convert Inslaw, and that Blackshear had confused Inslaw with UPI. Blackshear, however, disagreed with White regarding a conversation they had about the possible assignment of his assistant Harry Jones to Washington. Blackshear believed that White had told him that Stanton planned to bring Jones to Washington. White, on the other hand, maintained that Blackshear told this to White. Blackshear also denied that he had discussions with Pasciuto at a social gathering (or anywhere) in which he admitted that he was sorry for his conduct in the Inslaw matter and that he had given false testimony in his recantation to avoid hurting people.

The statements attributed to Bankruptcy Judge Blackshear in the House Committee Report appear to differ somewhat from his prior testimony to OPR and the Senate subcommittee. According to the report, Blackshear stated, among other things, that the information he provided in his prior depositions was not based on personal knowledge but on hearsay information provided by other sources. Blackshear apparently stated that he now remembered that much of the information came in fact from Anthony Pasciuto. Blackshear stated that he first became aware of the Inslaw case when Pasciuto

told him that Stanton was attempting to have Jones assigned to the case. Blackshear stated that he now remembered that he did not discuss the Inslaw conversion issue with White, but rather with Pasciuto.

We also interviewed Bankruptcy Judge Blackshear. At the start of the interview, Judge Blackshear gave us a document dated January 16, 1991, and entitled "Response of the Hon. Cornelius Blackshear Re Inslaw." Judge Blackshear told us that he had also provided a copy of this document to James Lewin, an Investigator for the House Judiciary Committee, and that, upon much reflection during the past years about this whole incident, he believes that the document reflects his best recollection of what happened.

Bankruptcy Judge Blackshear's statement recounts the following:

(1) Judge Blackshear did not communicate with White prior to his first deposition. After talking with White after his first deposition (and White telling him that White had never told Blackshear that Stanton had pressured White to convert Inslaw), Blackshear believed that White had not given him the information about the conversion for two reasons: (i) upon reflection, Blackshear honestly could not pinpoint having had a conversation with White about a motion to convert Inslaw; and (ii) White and Stanton were not the best of friends and thus there would be no reason for White to try to protect Stanton.

(2) During early 1985, White called Blackshear frequently about Stanton's interference with White's office and requested

Blackshear's input regarding administration of bankruptcy cases in general. During that time, Blackshear was also in constant communication with Anthony Pasciuto. Pasciuto and Blackshear had developed a close relationship over the years and Pasciuto kept Blackshear abreast of developments in the Executive Office.

(3) After Blackshear became United States Trustee for the Southern District of New York, Stanton and Blackshear had a parting of the ways because Blackshear did not support some of Stanton's activities in the Executive Office. One of the factors that went into Blackshear's decision to apply for the judgeship was the deterioration of his relationship with Stanton. Pasciuto had disclosed to Blackshear that Stanton was attempting to retaliate because Stanton had branded Blackshear an "ingrate." Pasciuto also informed Blackshear of what Stanton was doing in other matters.

(4) Blackshear now recalls -- after much thinking about it -- that the information he testified to in his first deposition about an effort by Stanton to pressure White into converting Inslaw -- came from Anthony Pasciuto, who was frequently talking to Blackshear about things going on in the Executive Office. Blackshear believes that Pasciuto possibly overheard Stanton suggest that he would pressure White to make a motion of conversion, but that Stanton's superiors probably nixed the idea. This would explain, says Blackshear, why no motion to convert was ever in fact made.

(5) Blackshear continues to maintain that White told him that IRS put pressure on White to move to convert the UPI case.

With respect to the UPI issue, Bankruptcy Judge Blackshear gave us a copy of his testimony before the United States House of Representatives Subcommittee on Monopolies and Commercial Law (a subcommittee of the House Committee on the Judiciary) on March 20, 1986. Bankruptcy Judge Blackshear told us that it was during this speech -- rather than a speech to the ABA -- that he mentioned the UPI conversion matter. According to the transcript of that testimony, Blackshear testified about the U.S. Trustee program and its independence and conflict of interest issues, and stated:

> I know of one other situation where the U.S. Trustee had a problem in the sense that another agency was involved in it, but that agency being the IRS, was making a motion to convert the case, and the U.S. Trustee took a different position; and to the benefit of the IRS, the U.S. Trustee won because the IRS on a conversion would have received nothing. As a result of the U.S. Trustee's position, the IRS did receive 100 cent on the dollar of its claim.

Although reasonable people could differ on the subject, we do not believe there is sufficient evidence to conclude that Bankruptcy Judge Blackshear's recantation of his testimony is false. Our conclusion is based on all of the evidence, but our reasoning is essentially as follows:

(i) Although Blackshear had originally testified in his first deposition that White had told him of Stanton's pressure to convert Inslaw, Blackshear's recollection was subsequently refreshed and he corrected his testimony;

(ii) Blackshear's refreshed recollection was consistent with that of virtually all the other witnesses, who said that Stanton had not exerted pressure to have Inslaw converted;[92]

(iii) There did not appear to be any reason or motive for Blackshear to lie about this;

(iv) If Blackshear were going to lie, he would make sure his story was consistent with White's. But although Blackshear and White both admitted that they had spoken after Blackshear's first deposition, they nevertheless continued to disagree about who told whom about Harry Jones being sent to White's office and several other matters.

Bankruptcy Judge Blackshear's pre-deposition statements and first deposition do provide some support for Inslaw's allegations. But those statements were not based upon Blackshear's direct personal knowledge of the alleged conversion plot, and we have found no credible evidence that clearly supports the version of events set forth in those earlier statements by Bankruptcy Judge Blackshear.

We have also considered the fact, previously noted, that Bankruptcy Judge Blackshear has now suggested a third version of the events. The Judge now believes, after thinking about this for years, that he did hear of a conversion effort by Stanton, but that this information came from Anthony Pasciuto. It is evident to us that as an essentially disinterested third-party, Bankruptcy Judge

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[92]Pasciuto is the only exception. His contrary version has been discussed previously.

Blackshear had and continues to have difficulty recalling the sources of various conversations he has had as they relate to this matter. We believe poor memory explains this confusion, not intentional misstatements of the facts. We do not believe, as Bankruptcy Judge Bason apparently did, that Blackshear's poor memory means that we must accept his original testimony (in his first deposition) rather than his refreshed testimony (after talking to White). His recantation, in our opinion, is the most consistent with the facts described by other witnesses.

We do not mean to minimize the confusion that is evident from Bankruptcy Judge Blackshear's various statements. Blackshear's pre-deposition statements and his original deposition testimony tended to support the allegation (albeit through hearsay) that Stanton pressured White to convert Inslaw. In his subsequent testimony, however, Blackshear said he had heard nothing of an effort to convert the Inslaw bankruptcy. Most recently, Blackshear has said that in fact he did hear about an effort to convert the Inslaw case, but that this information came from Pasciuto. This series of contradictory statements can only be described as troubling. At best, it reveals a rather malleable witness who has difficulty recalling certain conversations and events. At worst, it shows a lack of truthfulness on at least one occasion. The problem for us is that if Blackshear was lying, there is insufficient evidence to determine on which occasion he lied. It is possible that, as Inslaw suggests, Blackshear lied when he denied that he had heard from White that Stanton had pressured

White to convert the Inslaw case. That possibility seems unlikely to us, however, because the weight of the other evidence suggests that Stanton did not pressure White to convert the Inslaw case. Although no one has suggested it up to this point, it is also at least theoretically possible that Blackshear lied in his initial statements when he claimed to have heard of misconduct by Stanton. We know that Blackshear was close to Pasciuto (who was no fan of Stanton's) and that Blackshear left his U.S. Trustee position in part because of Stanton. Again, however, there is a lack of credible evidence to show that this possibility is something more than speculation.

Ultimately, we conclude that there simply is not sufficient evidence to prove (by any standard) that Blackshear lied when he recanted his deposition testimony.

We do not see any reason why Blackshear--a sitting bankruptcy judge--would recant his original sworn testimony and then lie repeatedly thereafter. Bason suggested that Bankruptcy Judge Blackshear recanted because he wanted to be agreeable to White, or because Blackshear feared that as a result of his public remarks in support of the trustee program he would be exposed to the charge of "hypocrisy or worse" if it were learned that he knew of an instance in which DOJ attempted to influence a U.S. Trustee. We find it hard to believe, however, that Bankruptcy Judge Blackshear would for either of these alleged reasons commit perjury and jeopardize his career on the bench.

7. Stanton's Consideration of Transferring Harry Jones

Bankruptcy Judge Bason found additional support for his findings that DOJ had improperly attempted to convert the Inslaw case from the consideration given by Thomas Stanton, Director of EOUST, to transferring Harry Jones to work on the Inslaw case. Harry Jones was an assistant U.S. Trustee in the Southern District of New York. It is clear that at some point Stanton considered transferring Jones to the District of Columbia to assist in the Inslaw matter. Stanton testified that shortly after Inslaw filed its bankruptcy petition, Stanton called Blackshear, then the United States Trustee for the Southern District of New York, and asked Blackshear to detail Harry Jones, then an assistant to Blackshear, to work on the Inslaw case. Stanton said that he wanted Jones to set up the creditors' committee and to conduct the first meeting of creditors. Stanton thought highly of Jones and he wanted Jones to work on the initial stages of the Inslaw bankruptcy because he thought the matter was likely to receive publicity and he wanted to make sure that it got off to a good start. Stanton denied that Jones was to be assigned to effect a conversion of the case. He stated that he had not discussed with anyone at DOJ (including Brewer) his request for Jones to work on Inslaw. According to Stanton, Blackshear said that his office was too busy to spare Jones. Blackshear and White, although they disagree on the particulars of the conversation, agree that they discussed and were aware of a request to transfer Jones to work on the case. Thus although there is considerable conflict and contradiction among the

witnesses regarding the possibility of assigning Jones to the Inslaw case, there is no question that Stanton at least briefly entertained the idea.

It is equally clear that Jones was not actually sent to work on the Inslaw case. Harry Jones has testified that, while Stanton had on occasion detailed him to other offices, he was never requested by anyone, including Stanton, to go to Washington to work on the Inslaw case. There is no evidence to the contrary.

Stanton has explained that he appreciated the high-profile nature of the Inslaw case within DOJ and wanted to assign Jones to it to make sure that the case got off to a good start. Bankruptcy Judge Bason chose to entirely discredit Stanton's testimony, including his reasons for his wanting to assign Jones to the case. Bason viewed Stanton's conduct regarding Jones as additional evidence of a plan to effect the conversion of the Inslaw case to a chapter 7. We believe that Judge Bason's inference is unreasonable, and that the fact that Stanton considered transferring Jones provides no support for the conversion theory.

The scheme attributed to Stanton by the Court would have been self-defeating. All a trustee ever could do is request conversion. Ultimately, of course, it would be up to the Bankruptcy Court--in this case, Bankruptcy Judge Bason--to rule on the motion and actually effect the conversion. All involved agree that when Stanton was allegedly engaged in these machinations, it was obvious, particularly at the early stage of the proceedings, that there was no basis for a motion to convert. It is thus difficult

to imagine how or why the assignment of a new assistant trustee would further the supposed object of the alleged scheme to liquidate Inslaw. Any decision would have to be made by the Bankruptcy Court, even assuming that by assigning Jones to Washington, Stanton could somehow force White to permit such a motion to be filed.

There is, we believe, an even more compelling reason why the inference adopted by Bankruptcy Judge Bason does not withstand scrutiny. Stanton did not broach the subject of working on the Inslaw case with Jones. He obviously did not come to any understanding with Jones that Jones would file a motion to convert. Thus, for Stanton's alleged scheme to make sense, he had to have assumed that Jones, if assigned to the case, would make an obviously improper motion. Harry Jones has been repeatedly described by witnesses as a person of great integrity and an expert in bankruptcy matters. It is inconceivable that Stanton would choose such a person to execute his alleged scheme. Jones would have immediately recognized that the motion was baseless and refused to make it.

C. Conclusion

Based on our investigation, we conclude that there is not sufficient evidence to establish that DOJ and Stanton endeavored to have the Inslaw case converted. There are a number of reasons for our conclusion.

1. The Alleged Scheme To Convert

First, the allegations have been denied repeatedly by those who would have first-hand knowledge. Stanton, White, Brewer, Rugh and Videnieks have consistently denied these allegations, and we find no persuasive reason why all of these witnesses would collectively lie.

The evidence fully supports the denial of William White that any pressure was put on his office to convert the Inslaw case. The evidence indicates that William White did not think particularly well of Thomas Stanton or how Stanton performed his job. Thus, it is far from clear that White would lie to protect Stanton. Bankruptcy Judge Bason concluded that because White was now in private practice, White would be willing to tailor his testimony to avoid jeopardizing his relationship with the Trustee's Office. Nothing we have discovered supports this speculation. It is not at all likely that White would, or in fact did, lie for such a reason. Indeed, we believe that the opposite inference is more reasonable. Because White was no longer in government, he was less susceptible to pressure to tailor his testimony to suit DOJ's position.

In addition, we find little reason to suspect that Thomas Stanton would want to obtain the conversion of the Inslaw case in order to appease Brewer. As discussed elsewhere in this report, we have found no evidence of a DOJ conspiracy to steal PROMIS from Inslaw or to drive Inslaw out of business. Moreover, there is absolutely no evidence that senior DOJ officials ever considered a conversion of Inslaw's bankruptcy or directed Brewer to accomplish

such a conversion through Stanton. If upper-level DOJ officials did not back or seek such a conversion effort (and we have found no evidence that they did), then there is no reason why Stanton would agree to the alleged request by Brewer (whom Stanton did not know) to have Inslaw converted. In other words, absent any evidence that DOJ backed the conversion, there is no evidence to support Bankruptcy Judge Bason's conclusion that Stanton agreed to seek the conversion in order to curry favor with DOJ.

As we have noted elsewhere, any scheme to have Inslaw converted to a chapter 7 liquidation bankruptcy would have been doomed from the start. All the U.S. Trustee's Office could do to seek conversion was to move the Bankruptcy Court--that is, Bankruptcy Judge Bason -- to convert the case. All involved apparently agree, however, that it was obvious that the facts of the Inslaw case would not have supported a motion to convert, and thus such a motion never would have been granted by Judge Bason or any other bankruptcy judge. It is thus difficult to imagine why DOJ and Stanton would scheme to convert Inslaw when such a scheme was destined to fail.

Finally, whatever Stanton's motives may have been in wanting Harry Jones to work on the case, it is not reasonable to conclude that his object was the conversion of the Inslaw case. An attorney of unquestioned integrity and expertise in bankruptcy matters would hardly be the choice to execute a scheme that, if it could possibly succeed, would at the very least require that the attorney file a frivolous motion with the Bankruptcy Court.

We acknowledge that this is a troublesome issue. It is troublesome because of the recantations of both Pasciuto and Blackshear. But the recantations of those witnesses do not convince us that there is any reason to credit their original testimony. To the contrary, their recantations convince us that we cannot rely upon any of their testimony to resolve this issue.

In short, we believe that the weight of the evidence does not support the conclusion that there was a scheme by DOJ to convert the Inslaw bankruptcy case to a chapter 7 liquidation.

2. **The Alleged Cover-up**

The foregoing largely disposes of the allegations of a cover-up. We have concluded that there is insufficient evidence of a scheme to convert. We also have found insufficient evidence of a cover-up of the apparently nonexistent scheme. Several related matters, however, merit brief mention.

a. **Blackshear's Recantation**

As noted above, the circumstances of Bankruptcy Judge Blackshear's recantation defy simple analysis. While reasonable people can (and do) disagree about Blackshear's motivations, we are convinced that the response of DOJ employees to Blackshear's recantations was entirely proper.

James Garrity, then an Assistant U.S. Attorney in the Civil Division of the U.S. Attorney's Office for the Southern District of New York, and now a U.S. Bankruptcy Judge for the Southern District of New York, represented Blackshear during the bankruptcy proceedings in the Independent Handling matter. Garrity

accompanied Blackshear to his first deposition. The next day, Garrity received a call from DOJ attorney Dean Cooper, the trial attorney defending the Independent Handling claims. Cooper told Garrity that he believed Blackshear's testimony was wrong and that DOJ was concerned that something should be done to correct the error. In his conversation with Garrity, however, Cooper did not suggest what "correct" testimony would be. Garrity then spoke to Blackshear, who also told Garrity that his testimony was wrong and that he wished to correct it. Blackshear told Garrity that after speaking with White he had become convinced that he had made a mistake about the "conversion conversation." Garrity and Blackshear then prepared the recantation affidavit, a copy of which Garrity sent to Cooper.

These facts indicate conduct that was consistent with the good faith effort expected of all attorneys to ensure that the record in any lawsuit contains the truth. Likewise, because we have already concluded that there is not sufficient evidence to conclude that White's testimony or Blackshear's recantation were untruthful, we necessarily conclude that there is not sufficient evidence to find that White suborned perjury by encouraging Blackshear to correct his deposition testimony.

b. Pasciuto's Termination

After the Independent Handling hearing, OPR conducted an investigation of Pasciuto's conduct in connection with that matter. During the investigation Pasciuto acknowledged that he exercised very poor judgment in meeting with the Hamiltons in March 1987.

OPR found several of the charges against Pasciuto to be unsupported. But after a careful review of the record in the Independent Handling proceedings, and after interviewing those involved in the hearing, OPR recommended that Pasciuto be terminated. The OPR's report states in part:

> Our recommendation is based principally on his decision to harm his superior, Mr. Stanton, in any way he could, even to the extent of providing what he acknowledged to be false statements to the Hamiltons on March 17, 1987.

The OPR recommendation, therefore, was based upon Pasciuto's demonstrated disloyalty to his superior by providing false information to the Hamiltons. Such conduct hardly qualifies Pasciuto as a whistleblower.

After the OPR's report, of course, Pasciuto changed his story once again, this time claiming that he told the Hamiltons the truth. But this recantation essentially admitted that he deliberately gave false testimony in the Independent Handling proceeding. Even if Pasciuto's recantation were true (and we do not find sufficient evidence that it is) we think that the admissions in Pasciuto's new account of his conduct established his unfitness for continued service in the position he then held.

Although Pasciuto might take some solace in characterizing himself as a whistleblower, we do not believe the label is apt. The conduct for which Pasciuto lost his job did not reveal the truth, but instead concealed and obscured it. We find that the DOJ's conduct in seeking and obtaining the termination of Pasciuto's employment was entirely appropriate.

## X. DOJ'S RESPONSES TO CONGRESSIONAL INVESTIGATIONS

Criticism of DOJ has not been limited to its administration of the PROMIS implementation contract and its litigation with Inslaw. DOJ has also been criticized for its response to the Congressional investigations of the Inslaw matter. Both the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs and the House Judiciary Committee issued reports that were sharply critical of DOJ's responses to their requests for information. The history of DOJ's responses to each committee is detailed in their respective reports. We confirmed some of the details of DOJ's responses, but except as noted below, we accepted as accurate the factual statements contained in the reports.

### A. Allegation that DOJ's Objections Created Delays

Both committee reports criticize DOJ for creating delays by objecting to various procedures and requests. The report of the Senate Subcommittee charges, for example, that DOJ initially objected to any Congressional investigation while the Inslaw adversary proceeding was still in litigation. When the Subcommittee rejected that request for delay, DOJ insisted that a member of its Inslaw litigation team attend any depositions of DOJ employees. That condition resulted in a six to eight week delay, apparently because all of DOJ's attorneys on the Inslaw litigation team were occupied with the preparation of DOJ's appellate brief in the Inslaw case when the Subcommittee wished to depose some DOJ

employees. Ultimately, those attorneys became available, and the depositions proceeded.

Additional delay occurred when the Attorney General decided that no depositions of DOJ employees would be taken unless daily copies of transcripts were provided to DOJ. Ultimately, that decision was reversed and the depositions proceeded.

The House Judiciary Committee experienced similar delays. Interviews of DOJ employees by the Committee were delayed by the Attorney General's initial insistence that a DOJ attorney be present at any such interview. That requirement was dropped after the Committee protested. Then, access to DOJ files was delayed, reportedly for several months, while the Committee and DOJ negotiated about the confidentiality of certain documents. After that issue was resolved, DOJ refused the Committee access to documents that DOJ considered to be protected by the work-product doctrine and the attorney-client privilege. After a Committee hearing on that issue, the Attorney General granted full access to all its Inslaw-related documents.

The Senate PSI Staff characterized DOJ's "lack of cooperation" as "hamper[ing]" a full, free and timely investigation. The House Committee reported that DOJ attempted to "thwart" the Committee's inquiry. Despite these characterizations, there is no allegation (or basis for suggesting, so far as we are aware) that the delays caused by DOJ's objections constituted a criminal obstruction or attempt to obstruct Congress.

Although it could be argued that some of DOJ's objections were expansive, they were by no means frivolous. Both Congressional inquiries touched on matters that were the subject of pending litigation. Many of the documents requested were for this reason particularly sensitive, and DOJ could be justly criticized if it failed to take precautions against further disclosure.

With perfect hindsight, it would be easy to conclude that DOJ acted improvidently in asserting objections that it later withdrew. Those objections caused delays and increased the committees' frustration with and skepticism about DOJ's candor. The delays and frustration apparently fueled the suspicions of at least the House Committee investigators, and generated hostility between DOJ and those investigators.

DOJ arguably derived some benefit from its objections and the consequent delays. At least some of the work and consequent criticism of the committees was delayed until after the Court of Appeals reversed the decision of the bankruptcy court. Also, DOJ negotiated some concessions from the committees as a result of its objections.

Whether any of these benefits outweigh the "cost" of DOJ's perceived lack of cooperation with the committees is, for the most part, a political question, not a legal one. It is not our role to provide political advice concerning these subjects, and we defer on such issues to those with appropriate expertise.

We note, however, the irony of the House Committee's criticism of DOJ for delaying access to documents. We have tried for months

to obtain access to the documents and information the House Committee compiled during its investigation of this matter. To date, we have received little outside of the published report and the public hearings. Although the House Committee has urged that further investigation be conducted into the "Inslaw Affair," it has not provided us or DOJ with the documents and information that it contends warrant further investigation. We do not conclude, however, that the Committee is attempting or has attempted to thwart our investigation. To the contrary, we recognize that the Committee has legitimate privacy and institutional concerns regarding its documents and the confidentiality of its sources. We respect the Committee's need to delay our access to its documents so that it has time to make a reasoned decision on our requests. Delay is an unfortunate, but perhaps inevitable, consequence of having coordinate branches of government attempt to investigate the same subjects. We note that we encountered similar delays in obtaining materials from the Senate PSI investigation. Although the Senate PSI's members, staff and counsel were extremely courteous and helpful, it took several months before the Subcommittee was able to authorize disclosure of their investigation materials. We, of course, thank the Senate and its staff for their aid and cooperation with our investigation.

### B. Allegation that DOJ Violated Conflict of Interest Principles

Although the Senate Subcommittee's staff was clearly concerned about the delays that DOJ's apparent uncooperativeness created, it leveled its most serious criticism at DOJ for assigning a DOJ

attorney to represent both DOJ and Department employees in an investigation that focused on DOJ itself. The Subcommittee reported that it believed that this arrangement violated principles of conflict of interest.

The Subcommittee apparently concluded that Bankruptcy Judge Bason's suggestions that DOJ committed crimes, whether correct or not, created such an inherent conflict of interest between DOJ and its employees that DOJ could not represent any employees in the Congressional investigation. We disagree.

The Bankruptcy Court's findings created a potential conflict of interest only if those findings were accepted as true, or if the employee to be represented believed them to be true. If those findings were incorrect, and the employee had no information or belief to the contrary, then there was no inherent conflict. DOJ attorneys could ethically represent both the interests of DOJ and the interests of the employees, whose actions the attorneys believed to have been consistent with the legitimate interests of DOJ.

The problem DOJ faced arose from the fact that the Bankruptcy Court's findings created an appearance of wrongdoing by DOJ. That appearance raised the further appearance of potential conflict between DOJ and its employees, especially those employees that the Bankruptcy Court believed to be involved in wrongdoing. An appearance piled upon an appearance, however, does not make a conflict. Although it might have been prudent for DOJ to provide outside counsel to represent its employees (and thereby avoid even

the appearance of a conflict of interest), it was not in our view ethically or legally required to do so.

Rather, the obligation of DOJ and its lawyers was to determine whether any of the employees who were to be questioned by the Subcommittee had any interest (or information) that differed from the interests of DOJ, such that the judgment of a DOJ attorney representing both of them might be adversely affected. According to the statements made by the Assistant Attorney General for the Civil Division at a Senate hearing, DOJ evaluated this question and concluded that there was no conflict. This appears to us to have been an appropriate approach to the problem. In view of our conclusions regarding the allegations against DOJ and the Bankruptcy Court's findings, we concur with the conclusion that there was no conflict.

C. Question of Whether DOJ Destroyed Documents.

The most serious suggestion of wrongdoing by either Congressional committee is not presented in the form of an explicit accusation. It is simply stated as a question. Specifically, during its investigation, the House Committee learned from DOJ that certain requested documents--compiled by Sandra Spooner, Deputy Director of the Commercial Litigation Branch, Civil Division--were missing. The Committee reported this fact and also reported that "[b]ased on the numbering system used by DOJ, . . . it appear[ed] that numerous additional documents [were] missing."[93] The

[93]We asked the Committee to clarify this conclusion because we have not been able to determine from the document-numbering system (continued...)

Committee noted that, in light of the allegations of criminal conspiracy against high level DOJ officials, some people will question whether the missing documents may have been destroyed. The Committee concluded by noting that the question of unauthorized destruction of documents also arose in the context of a former DOJ employee who alleged that Department employees illegally destroyed documents relating to the Inslaw case by shredding them.[94] Thus, without explicitly accusing anyone of illegally destroying documents, the Committee raised the possibility of just such illegal conduct.

We investigated this suggestion and found no evidence that anyone intentionally destroyed any documents that were requested by Congress. The circumstances surrounding the missing file and its reconstruction persuade us that it was lost and not destroyed.

Significantly, it was Sandra Spooner herself who discovered and reported that a file was missing. The missing file was a binder of privileged documents that she had compiled from her trial materials. All DOJ attorneys who were involved in the Inslaw litigation compiled such files when the House Committee first requested access to DOJ litigation documents.

Initially, DOJ agreed to provide access only to its non-privileged documents. As a result, DOJ attorneys reviewed their

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[93](...continued)
that any documents were missing. The Committee has not yet responded to our request.

[94]As noted elsewhere in our report, we found no evidence to support the allegation that DOJ employees had shredded Inslaw related documents.

files and removed all privileged documents, replacing each with a single sheet of yellow paper that bore a number corresponding to a Vaughn-type index for the privileged documents. Both the privileged and non-privileged documents were placed in an unlocked cabinet in an unlocked storage room on the same floor as Spooner's office in the Todd Building. Any person who worked on that floor had access to the file cabinet.

The Committee's investigators came to that floor to review the documents. The non-privileged documents were made available to the Committee's investigators in a conference room across the hall from the area where the documents were stored. The investigators were escorted to that room and files of documents were brought to them. No one from DOJ was present in the conference room with them. On occasion, one of the investigators accompanied Spooner to the storage room across the hall to retrieve more files. So far as Spooner is aware, the investigators never went to the storage room unaccompanied.

While reviewing the non-privileged documents, the investigators concluded that they would need to see the privileged documents as well. A second agreement was reached between DOJ and the House Committee whereby DOJ granted access to its privileged documents. Again, the investigators went to the office of the Commercial Litigation Branch to review the documents.

Typically, Spooner pulled files for the investigators' review a day before they arrived. For the first few days of her review, she pulled files other than her own. The review proceeded without

incident. When she went to the file cabinets to pull her own privileged files, she noticed that one of four binders of her documents was missing. Spooner could not recall when she last used this file before discovering that it was missing, although she was certain that she used it several times after its creation.

Upon discovering that the binder was missing, Spooner directed her secretary to try to locate the file. When it could not be located, Spooner sent out an office-wide notice directing all attorneys who worked on the Inslaw case to search their files and desks for the missing file. When the Committee investigators next arrived, Spooner advised them that one of her files was missing, and she provided them with other files of privileged documents.

Later, Spooner searched her house and car. She notified her supervisor and the Office of Legislative Affairs about the missing file. A look-a-like file was created, and every employee on the floor was required to examine the look-a-like file, search his or her office for the real file, and report the results of the search to a lead secretary.

Thereafter, DOJ management analysts searched the offices, including desks and file cabinets, on Spooner's floor for the missing file. The analysts then went to the Archive Center in Rockville, Maryland, and searched the boxes of files of cases that had recently been closed by any attorney in Spooner's office who might have accidentally picked up the missing file. Despite these efforts, the file has not been found.

It has, however, been largely reconstructed. Spooner knew from the Vaughn-type index and from memory that the missing file contained some trial notes, internal memos, and other materials. The memos and some of the other materials were simply duplicate copies of documents contained in other attorneys' files. As a result, much of the missing file was reproduced and made available to the Committee.

The Committee does not allege in its report that anyone intentionally destroyed the file. There is a suggestion, nevertheless, that the file may have been destroyed because it contained documents that implicated DOJ officials in a criminal conspiracy relating to Inslaw.

Such suspicion strikes us as far-fetched. First, there are no suspects. Spooner surely is not a suspect. She is the one who initially preserved, compiled and indexed the documents. If she had been intent upon destroying unfavorable information, she could have done so without arousing any suspicion simply by destroying the documents before they were bound and indexed. Moreover, although her announcement of the loss of the file might arguably be part of an elaborate cover-up, we think it more likely that, had she actually destroyed the file, she would have said nothing and waited to see if the investigators noticed that it was missing. In addition, Spooner appeared to us to be extremely credible and genuinely concerned about the loss of the file and the consequences of that loss. We credit her version of the event. Incidentally, Spooner herself believes the file was misplaced, not stolen.

We found no evidence to implicate anyone else. Many people had some access to the unlocked storage room in which the missing file had been located. Even the Committee investigators had limited access to the storage room and therefore the missing file. By no means do we suggest that one of the investigators stole the file. We found no evidence to support any such suggestion. Instead, our point is to underscore the near impossibility of prosecuting anyone for destroying the Spooner file based on circumstantial evidence.

### D. Allegation that DOJ Interfered With the House Committee's Interview of Riconosciuto

The House Committee also reported that DOJ interfered with its efforts to obtain information from Michael Riconosciuto. Specifically, after the Committee had arranged to interview Riconosciuto at a county jail,[95] DOJ informed the Committee that the interview could only be conducted at the U.S. Courthouse in Seattle. Thereafter, the Committee investigators asked the Assistant United States Attorney who was prosecuting Riconosciuto to provide a sworn statement that the interview would not be monitored or recorded by DOJ. According to the House Committee's report, the AUSA declined, stating that it was not DOJ policy to record private conversations between clients and their attorneys,

[95]Riconosciuto was in federal custody, but was housed at a county jail pursuant to a contract between the jail and the U.S. Marshal's Service.

and he considered the Committee's interview of Riconosciuto to be of the same category.[96]

The Committee also reported that DOJ refused to allow the Committee access to DOJ's investigative files on Riconosciuto or to interview the agents who arrested him. It stated that DOJ used as a justification for these refusals the fact that the investigation of Riconosciuto was on-going. It appears to us that the Committee's report may be slightly inaccurate on this point. When the Committee investigators first visited Riconosciuto it was just days after Riconosciuto's arrest. It may well be that a request made at that time for the investigative files was denied. The AUSA who tried the case told us, however, that shortly after he was assigned the case (in late summer of 1991) he called one of the Committee's investigators and offered to give the Committee complete access to all files on the Riconosciuto investigation. The AUSA told us that nobody from the Committee ever followed up on this offer, which was made over a year before the House Committee issued its report.

We did not attempt to resolve this conflict. The underlying controversy, such as it is, appears largely to raise questions of comity. The complaints of the Committee investigators raise

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[96]The prosecutor to whom this request was made told us that he found the Committee's request for a sworn statement offensive. We are inclined to agree, since the investigators were, in effect, asking the prosecutor to give a written affirmation that he would not commit a felony. Yet, the mere fact that Committee investigators thought they needed such an assurance reveals their skepticism about the integrity of DOJ attorneys and the depth to which the relationship between DOJ and the Committee had fallen.

questions of criminal law only insofar as the Committee Report insinuates that DOJ arrested Riconosciuto, threatened to monitor his interview, and refused to disclose investigative information in an effort to muzzle Riconosciuto and cover-up DOJ's involvement in the theft and sale of Inslaw's software. We investigated these insinuations and, as is reported in our findings and conclusions regarding Riconosciuto and the alleged conspiracy with Earl Brian (Part V.A.1 above), we found absolutely no evidence to support the claim that there was a connection between the prosecution of Riconosciuto and his statements to the House Committee.

## XI. REMAINING ALLEGATIONS

Our investigation has not comprehensively covered all of the allegations Inslaw has made during the course of its disputes with the DOJ. In addition to the allegations described above, about which we have reached and stated conclusions, there are other allegations as to which we conducted only preliminary investigations. For the reasons discussed below, based on what we found during our preliminary review of these remaining matters, we do not believe further investigation of these matters is likely to uncover substantial evidence of criminal or other intentional wrongdoing by DOJ.

### A. Allegations Concerning Dickstein, Shapiro & Morin

While the adversary proceedings against the DOJ were pending, Inslaw filed an unusual objection to the application for fees filed by its former counsel, Dickstein, Shapiro & Morin. The Dickstein, Shapiro firm had originally represented Inslaw in prosecuting its

adversary complaint against DOJ. Lee Ratiner was the Dickstein Shapiro partner in charge of the matter. In its objection to Dickstein, Shapiro's application, Inslaw charged that the firm, because of pressure by DOJ, forced Ratiner out of the firm and effectively abandoned Inslaw. Bankruptcy Judge James F. Schneider found there was no credible evidence to support Inslaw's charge. The Bankruptcy Court concluded that Inslaw's allegations of wrongdoing were "built upon supposition, suspicion and uncorroborated hearsay, all of which [are] unworthy of belief." In re Inslaw, 97 B.R. 685 (Bankr. Ct D.D.C. 1989). The Senate Permanent Subcommittee on Investigations also investigated Inslaw's claim. The Senate Staff also found no proof of any DOJ pressure on the Dickstein, Shapiro firm which in any way affected the firm's representation of Inslaw.

In the light of the conclusions reached by agencies of both the judicial and the legislative branches of government, we saw no reason to investigate the Dickstein, Shapiro matter any further and we determined early in the course of our investigation not to independently investigate these allegations. More recently, Ari Ben-Menashe has published a book in which he claims to have seen evidence suggesting that the Dickstein, Shapiro firm was to be paid $600,000 by Hadron or Earl Brian in order to remove Ratiner from the firm. In light of our conclusions about Ben-Menashe's testimony noted elsewhere in this report, we see no reason to reopen our investigation because of this implausible claim.

B. The Death of Joseph Daniel Casolaro

As part of our inquiry, we reviewed the investigation undertaken by local authorities concerning the death of Joseph Daniel Casolaro. Casolaro was a self-styled free-lance author/investigative reporter investigating claims made by Inslaw. According to second-hand accounts, Casolaro was reportedly investigating suspected links between the Inslaw controversy and what Casolaro called "the Octopus," supposedly a secret intelligence organization with links to international arms-dealing, covert operations, and, perhaps, organized crime. Casolaro had told several persons he planned to meet a source in Martinsburg, West Virginia. Casolaro's body was found in the bathroom of his hotel room at the Sheraton Inn in Martinsburg on August 10, 1991. Casolaro died in the bathtub. Both wrists were slashed several times with a razor blade. His death was ruled a suicide by local authorities.

Casolaro's death has attracted a great deal of attention in the press, at least in part because of the threat posed whenever a reporter investigating a story is found dead under questionable circumstances. We have reviewed the investigation of Casolaro's death to assure ourselves that no improper influences were brought to bear on the investigation and that the conclusions of the investigation were supported by substantial evidence.

First, we have concluded that there is no evidence suggesting that DOJ exerted any influence on the investigation conducted by the local West Virginia authorities concerning Casolaro's death.

A private citizen's death, whether a suicide or a murder, is outside the normal jurisdiction of the federal government. Instead, it is a state or local matter. Accordingly, we find nothing unusual in the fact that DOJ did not undertake to investigate Casolaro's death. We have found no evidence of any DOJ involvement in the investigation into the circumstances of Casolaro's death, beyond the normal and expected assistance law enforcement agencies typically provide one another. Specifically, aside from assistance and information sharing between the local authorities and the regional FBI office, we have found no evidence of any federal government influence on the local investigation.

Second, the physical evidence in Casolaro's hotel room strongly supports the conclusion of the local authorities that the death was a suicide:

- There was no sign of forced entry to the hotel room;
- There was no evidence that a struggle occurred;
- A note was found in Casolaro's room. The note stated: "To my loved ones, Please forgive me -- most especially my son -- and be understanding. God will let me in."
- There were no indications that the personal effects found in the hotel room had been disturbed;
- Although there was extensive pools of blood and blood stains throughout the room in which the body was found, there was no evidence, such as foot prints, that others were present when Casolaro's wrists were slashed.

Third, subsequent tests and analyses of the physical evidence corroborate the conclusion of suicide:

- Handwriting analysis of the suicide note confirmed that it was written by Casolaro;

- Fingerprint analysis of the bathroom and the pad of paper in which the suicide note was found revealed the prints of Casolaro and no others except for a single print on the bottom of an ash tray. The existence of Casolaro's prints, and the absence of others, support the conclusion that Casolaro was alone and tend to negate the possibility that someone "wiped down" the premises;

- Hair and fiber analyses conducted on items from the scene revealed no evidence that others were present in the hotel room;

- An analysis of the blood stains and related physical evidence conducted by Dr. Lee of the Connecticut State Police Forensic Science Laboratory concluded that the evidence was consistent with a suicide.

- The autopsy found that the cause of death was the hemorrhage from the multiple wounds to the wrists.

- No evidence from the autopsy or subsequent tests of blood and urine revealed any evidence that Casolaro was unconscious or debilitated when his wrists were cut.

- The autopsy revealed no contusions, lacerations, or trauma to the body of the kind that one might expect were Casolaro involved in a struggle.

Fourth, subsequent police interviews of those with knowledge of Casolaro's activities during the two days preceding his death failed to develop any substantial evidence that any other person had the means or opportunity to murder Casolaro.

Fifth, there was ample reason to believe Casolaro had a motive to commit suicide. He had been for all practical purposes unemployed for months. He was dependent upon financial assistance from his family to support himself. The balloon mortgage on his home was soon to be due. Moreover, shortly before his death he was told by a prospective publisher that the publisher would not advance him any monies on his proposed book about the "Octopus."

The foregoing facts persuade us that Mr. Casolaro's death was fully and fairly investigated and that the conclusion of the local authorities that his death was a suicide was amply supported by the facts. Indeed, in an independent review of the autopsy James E. Starr, Professor of Law and Forensic Sciences at George Washington University, reportedly has arrived at the same opinion as that expressed in this report. Several criticisms that have been made of the investigation do not alter our opinion that Mr. Casolaro's death was correctly determined to be a suicide.

It has been suggested that "immediately following the discovery of the body, the room was not sealed by Martinsburg authorities potentially allowing for the contamination of the possible crime scene." Our review of the Martinsburg Police Department's report does not confirm this allegation. On the contrary, upon the Police Department's arrival at the scene, the hotel room was examined, photographs were taken, and the coroner was called and investigated the scene. No evidence supports the speculation that the scene was subsequently contaminated after the body was released by the coroner to a local funeral home. On the contrary, the results of the fingerprint evidence collected when the hotel room was dusted for fingerprints on August 12 suggests that there was no contamination.

It has also been suggested that there was undue delay in notifying Casolaro's next-of-kin following the discovery of his body and that, in the meantime, Casolaro's body was embalmed, possibly limiting the effectiveness of the autopsies or toxicological examinations. There was some delay in notifying Casolaro's

next-of-kin. Martinsburg authorities requested the assistance of the Fairfax County, Virginia, Police Department in order to personally notify next-of-kin. Next-of-kin, however, were not at home when visited by the Fairfax authorities and apparently did not respond to a request that they call. In the meantime Casolaro's body was embalmed. The medical examiner, however, was of the opinion that the embalming did not impair his ability to perform the autopsy and to perform necessary tests.

Finally, it has been suggested that the Martinsburg authorities failed to give appropriate weight to various suspicions that had been voiced by several people, including Casolaro's family members and friends, that various "sources" whom Casolaro had been interviewing might have been responsible for his death. The Martinsburg Police did receive a number of suggestions, of various quality and specificity, that Casolaro conceivably could have been killed because of his investigation into the Inslaw matter and other allegedly related subjects. Aside from wholly speculative possibilities, no credible evidence suggested that any of Casolaro's "sources" played any role in his death. Substantial physical evidence supported the conclusion of suicide. We do not believe the circumstances warrant an exhaustive investigation to exclude every conceivable possibility that any of the several potential "sources" suggested as potential participants in a hypothetical murder plot did not in fact murder Casolaro.

C. <u>The Alleged Sham Contract Disputes</u>

During the pendency of the adversary proceedings initiated by Inslaw in the Bankruptcy Court and throughout most of our

investigation, various disputes and related claims arising under the implementation contract were also pending before the Department of Transportation Board of Contract Appeals ("DOTBCA"). (As previously noted, the contract disputes were presented to DOTBCA pursuant to the provisions of the Contract Disputes Act because DOJ has not established its own board.) The disputes between Inslaw and DOJ before DOTBCA concerned Inslaw's claims for allegedly reimbursable costs (computer center costs, other direct costs, "out-of-scope" work, overhead and fringe benefits), additional fees, and amounts due pursuant to DOJ's termination for convenience of the word processing portion of the implementation contract. DOJ also filed claims in the DOTBCA proceedings to recover certain overpayments allegedly made to Inslaw under the contract. Most of the issues before DOTBCA were not passed upon or decided as part of the adversary proceedings before the Bankruptcy Court. Indeed, prior to the hearing on Inslaw's adversary complaint, Bankruptcy Judge Bason entered an order specifically excluding from the trial before him issues such as the controversy over the computer center charges, the withholding of payments by DOJ, and the termination of the word processing portion of the contract. Neither the Senate PSI's Staff Study nor the House Committee Report made any findings on the merits of the claims before DOTBCA.

Similarly, we did not examine the merits of the claims before the DOTBCA in great depth. The issues before DOTBCA touched only indirectly upon the allegations of conspiracy and other criminal misconduct that were the focus of our investigation. Moreover, we had anticipated that DOTBCA would soon hear and determine the

parties' claims under the implementation contract. The hearing on the merits of the parties' claims was scheduled for the autumn of 1992. In October 1992, however, Inslaw unilaterally moved to withdraw its claims before DOTBCA. In a lengthy eighteen page brief, Inslaw claimed to be unable to afford counsel to prosecute its claims. The bulk of Inslaw's brief, however, took exception to several adverse, pre-hearing rulings of DOTBCA and reargued the merits of some of the same claims Inslaw had previously made before the Bankruptcy Court. Without specifically addressing the assertions made in Inslaw's motion to withdraw, DOTBCA, without DOJ objection, granted the motion. Accordingly, Inslaw's appeals before the Board were dismissed with prejudice on November 9, 1992.[97]

In light of the final disposition of Inslaw's claims by DOTBCA, we did not believe it was appropriate to reexamine the parties' monetary claims presented to DOTBCA or to attempt to determine the esoteric government cost accounting issues that were the principal subjects of the DOTBCA proceedings. It is unfortunate that Inslaw chose not to pursue its claims before DOTBCA. Almost from the beginning of the disputes between DOJ and Inslaw, Inslaw has claimed that DOJ, because of self-interest, improper personal influence, or some other extraneous factor, has been unable to fully and fairly determine the merits of Inslaw's

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[97]Although DOJ also had filed claims before DOTBCA, DOTBCA found that DOJ's claims had been limited to "set-off status, that is, they [could] only be used as set offs against any amount which the Board might find to be owing to Inslaw." In light of this ruling, the allowance of Inslaw's motion to withdraw its claims necessarily disposed of all claims before the Board.

claims, whether they be contractual, criminal or otherwise. When offered the opportunity to have some of its claims determined by another department that presumably would be free of such influences, Inslaw gave up its right to a full hearing and a determination of its claims.

Although there was no hearing on the merits of the parties' claims, a disposition with prejudice is nevertheless a final, binding disposition. Accordingly, as a civil matter Inslaw is almost certainly not entitled to retry the merits of its contract appeals.

We did, however, consider the parties' claims before DOTBCA to the extent we believed necessary to determine whether the DOJ's positions and actions leading up to the parties' disputes were so clearly baseless or without foundation as to give rise to a reasonable inference that the origins of the disputes must have been motivated by improper purpose and a desire to force Inslaw into bankruptcy. In other words, were these "sham contract disputes" that were deliberately engineered by DOJ in order to force Inslaw into bankruptcy and to surrender its rights to the PROMIS software? Or, instead, did legitimate differences of opinion concerning the parties' rights give rise to the parties' contract disputes? Our preliminary review of the parties filings before DOTBCA and related discovery and documentary evidence leads us to believe that the latter conclusion is the correct one.

During 1983 DOJ suspended payment to Inslaw of certain invoices for computer center costs. As part of the implementation project, Inslaw provided temporary computer services directly to

U.S. Attorneys' offices until their own PROMIS systems were installed. This service required that Inslaw provide access to its computers at its own computer center. Pursuant to the implementation contract, Inslaw billed DOJ for these services. In April 1983, Inslaw requested a modification of the contract to allow increased time sharing costs, which Inslaw attributed to higher than projected usage by the U.S. Attorneys' offices. In reviewing this request, the contracting officer became concerned, not just about a potential cost overrun, but whether Inslaw's cost accounting for these services overcharged the government. This concern ultimately led to the partial suspension of payment of Inslaw's invoices for computer center services pending an audit of Inslaw's costs.

Whether the contract permitted suspension of payments of invoices has been questioned. Regardless of whether contractual provisions permitted suspension of payments, however, the issue relevant to our inquiry is the purpose and motive of the suspension of payments. The evidence we reviewed indicates that Videnieks suspended payment of invoices for computer center services because of genuine concerns about potential cost overruns that were brought to his attention by Inslaw's request for a contract modification. Inslaw's request led to a technical analysis by Jack Rugh. Rugh's analysis clearly raised the prospect of substantial overcharges having been made by Inslaw. Based on Rugh's analysis, Videnieks immediately requested audit staff assistance to investigate the computer center costs. The audit staff recommended that Videnieks

consider suspending payment of invoices relating to computer center costs.

It is telling that when the audit staff eventually completed its audit of Inslaw's computer center costs for the relevant period of time, fiscal year 1983, the staff concluded that Inslaw had overcharged the government more than $400,000. Perhaps more significant was the audit staff's conclusion that Inslaw's cost records were essentially unauditable and its recommendation that the contracting officer deny all of Inslaw's claimed computer costs because its method of accounting for computer center costs was so unreliable. Indeed, Inslaw appears to have changed its system of accounting for computer costs for subsequent fiscal years.

After the contracting officer's initial decision to suspend payment of computer center costs, DOJ in negotiations with Inslaw's counsel agreed to and did modify its suspension policy and released some funds in order to avoid undue hardship upon Inslaw. This conduct, in our opinion, is consistent with a good faith attempt to protect the government from potentially serious cost overruns and overcharges, and belies Inslaw's claim of a plan to force it into bankruptcy. The circumstances would not seem to support a finding of any motive or desire upon the part of any DOJ employee to inflict harm upon Inslaw or to force it into bankruptcy.

There were similar cost accounting disputes between the parties relating to other cost accounting issues and relating to other fiscal years. The net result of these controversies was that by the time that the implementation contract ended in 1985, Inslaw was claiming it was entitled to millions of dollars from DOJ and

DOJ was claiming that it was entitled to a similar amount by way of a counterclaim. The events leading up to many of these disputes are long and many of the issues complex, but in every significant case DOJ's claims were backed up, not just by the opinions of the EOUSA or the contracting officer, but also by reports of DOJ audit staff. Moreover, the Defense Contract Audit Agency ("DCAA"), an agency independent of DOJ, subsequently audited Inslaw's books and records for the bulk of the contract period and concluded that Inslaw was overpaid approximately $590,000. Even if the DCAA's conclusion is incorrect, we believe it provides considerable weight to our conclusion that whatever the merits of the parties' contract disputes, the government's positions about overcharging and cost overruns were founded upon legitimate, good faith concerns and the desire to protect the government's interests, and not out of the desire to bankrupt Inslaw or to force its liquidation.

D. Response Of DOJ To Claims of Brewer Bias

In May of 1982 one of Inslaw's outside attorneys complained to DOJ officials that Brewer was biased against Inslaw and William Hamilton, and that this bias was causing Brewer to treat Inslaw unfairly in connection with the EOUSA contract. According to Inslaw, Hamilton had fired Brewer from his job as General Counsel for the Institute for Law and Social Research, Inslaw's predecessor, and Brewer's actions in connection with the contract were designed to extract a measure of revenge against Hamilton. Between 1982 and 1985, Inslaw repeated this complaint to various DOJ officials on several occasions, usually when questioning one of the decisions of Brewer or the contracting officer. Bankruptcy

Judge Bason found that DOJ "ignored" Inslaw's claims of bias, and suggested that it did so because Deputy Attorney General Jensen had a "previously developed negative attitude about PROMIS."

OPR thoroughly investigated this allegation during 1988 and 1989. In its March 31, 1989 report, OPR concluded that there was no misconduct by any past or present DOJ employees in connection with their responses to Inslaw's claims of bias. We found OPR's conclusions to be both reasonable and consistent with the evidence we obtained and reviewed in connection with our investigation of other allegations. Therefore, we have not independently interviewed all of the various witnesses implicated by this allegation. We feel it appropriate, however, to mention several items that came to our attention during our review.

To begin with, we agree with the conclusion reached by the Senate Subcommittee Staff, that in hiring a former Inslaw employee to be the Project Manager of the PROMIS project DOJ was not sufficiently attentive to the potential for the appearance of a conflict of interest. Bankruptcy Judge Bason felt that "such prior employment would generally lead the former employee either to favor or disfavor the former employer, thus preventing that person from being impartial in the discharge of his duties." While reasonable people could disagree whether the potential conflict would, as Bason assumed, always become an actual conflict, it appears to us that the appearance of such a conflict should have weighed against

hiring an individual to administer a project where his former employer is the primary vendor to the project.[98]

That said, however, there is no evidence that DOJ knew or should have known, prior to hiring Brewer as Project Manager, that there was any acrimony between Brewer and Inslaw. To the contrary, the evidence presented during the Inslaw adversary proceeding indicates that DOJ's inquiry to Inslaw about Brewer produced no hint of trouble between Brewer and Hamilton. EOUSA Deputy Director Lawrence McWhorter testified that he called William Hamilton to ask about Brewer, and that Hamilton told him he would have no problem working with Brewer. Hamilton testified that he did not remember such a call, but that he was aware that one of Inslaw's senior officers, John Gizzarelli, remembered Hamilton telling him about such a call at about the time DOJ hired Brewer. Likewise, Inslaw's former General Counsel, John Kelley, testified at trial that Gizzarelli told him that prior to Brewer's hiring by DOJ Hamilton had told DOJ that Inslaw would have no problem with Brewer. In other words, Hamilton did not deny at trial that McWhorter had called him, and the testimony of at least three people indicated that such a call did take place. Yet, Bankruptcy Judge Bason found that McWhorter did not call Inslaw to ask about Brewer. We believe

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[98]We do not say that no reasonable person could have hired Brewer for the position. DOJ officials have stated that they felt that Brewer's prior experience with the Institute was a positive factor, giving Brewer valuable knowledge of both PROMIS and Inslaw that could only help in administering the project. Moreover, the six year time lag between Brewer's hiring and his work at the Institute, along with Inslaw's initial lack of objection to Brewer, could be viewed as factors in favor of hiring Brewer. Our point is that DOJ appears to have been insensitive to the countervailing appearance of a potential conflict of interest.

this finding was not only plainly erroneous, but indicative of the degree to which Bankruptcy Judge Bason was willing to reject any evidence that did not support his theory of bias and revenge.

In any event, it is undisputed that prior to May 1982 Inslaw did not claim to DOJ that Brewer had been fired. Nonetheless, Bankruptcy Judge Bason found that, faced with Inslaw's allegations of bias, it was unreasonable for DOJ officials to accept Brewer's claim that he was not fired. Based on our preliminary review, we do not share that opinion.

We found little evidence to support the image of the acrimonious departure that Bankruptcy Judge Bason's written opinion conjures up. Indeed, we found a surprising degree of agreement in the testimony of Brewer and Hamilton about the circumstances of Brewer's departure. Both said that they were of the shared opinion that Brewer was not fitting in well at the Institute,[99] and both agreed that Brewer was given a long period of time in which to find a new job. While their testimony differed slightly as to who first decided that Brewer should leave, both agreed that the departure was not acrimonious. Perhaps it did not occur to Bankruptcy Judge Bason that in many cases the termination of an employee's employment, even in cases where it was suggested that the employee should look for a different position, is not an occasion for ill will, or feelings of hatred, and not necessarily viewed as a

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[99]William Hamilton testified that he told Brewer in April or May of 1975 that he did not think "the fit [between the Institute and Brewer] was a good one." Even according to Hamilton, however, Brewer said at that meeting that "he did not think the fit was a good one from his perspective either," and that "he desired to leave the Institute as well at that point."

"firing". In many cases, such as the case here, it is ambiguous whether the departure was voluntary or involuntary.

In addition, our investigation found little evidence of the deep-seeded desire for revenge that Bankruptcy Judge Bason found to be the explanation for most of Brewer's conduct.[100] In our discussions with Brewer he made no effort to hide his views about Hamilton and Inslaw. Brewer candidly told us that early during the implementation contract he reached the conclusion that Hamilton was dishonest and that Inslaw did not intend to live up to some of its obligations under the contract. As we indicated earlier, we believe this view caused Brewer and others to be aggressive in asserting what they felt were the government's legitimate rights under the contract. But it also appears to us that Brewer's opinions of Hamilton were based primarily on Hamilton's conduct in connection with the 1981 BJS contract and the 1982 EOUSA contract and not due to the circumstances of his leaving the Institute six years earlier. Brewer referred to numerous incidents and reasons, all unrelated to his departure from the Institute, that formed the basis of his opinions of Hamilton. Brewer's credible explanation of his conduct, along with Hamilton's own description of an amicable departure, support the conclusion of DOJ officials that Brewer was not biased against Hamilton.

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[100]Because we determined (for the reasons discussed in the previous sections) that Brewer and others at DOJ did not attempt to steal Inslaw's software or destroy Inslaw, we did not dwell extensively on Brewer's personal feelings about Hamilton. We did interview Brewer and others about the matter, however.

It is also important to note the context in which Inslaw's claims about Brewer's "firing" arose. This charge was usually made in connection with Inslaw's appeal of one of Brewer's (or Videnieks') decisions concerning the administration of the PROMIS implementation contract, or during discussions to attempt to reach a negotiated settlement of the parties' disputes. The charge was made in such a way to suggest that the DOJ's position was unfair and arbitrary. In other words, the charge was made to color the motives for a DOJ decision and to suggest that the decision was unreasonable. In this context, the individuals to whom Inslaw made its claims about Brewer's bias understandably had reason to doubt those claims, particularly where their review of the merits of DOJ's position convinced them that DOJ was being neither irrational nor unreasonable. Based on our preliminary review of this issue, we found no misconduct in DOJ's handling of Inslaw's claim that Brewer's "firing" caused him to be unfair to Inslaw and "out for revenge."

E. Inslaw's Proof Of Private Financing

Earlier in this report (in Part VI) we expressed the opinion that DOJ officials could have made a greater effort to determine if the version of PROMIS delivered pursuant to Modification 12 in fact contained any privately financed enhancements. We considered whether we should attempt to make that determination ourselves. We reviewed the testimony presented at the adversary hearing, as well as certain other evidence that was produced during discovery. It was obvious to us that in order properly to evaluate the quality and the reasonableness of Inslaw's proof we would need, at a

minimum, to obtain assistance from experts in the fields of accounting, software engineering, and government contracts. In light of the magnitude of such an undertaking, and given Inslaw's limited cooperation with our investigation, we decided to pursue other aspects of our investigation.

It later became apparent that our analysis of and conclusions regarding Inslaw's allegations of criminal and other intentional misconduct did not require a determination whether the allegedly enhanced PROMIS was in fact proprietary to Inslaw. Because our investigation focused on determining whether there was any criminal or intentional misconduct by DOJ employees, our inquiry required us only to examine what conduct occurred and why. Thus, we were more interested in trying to determine why and how DOJ obtained the allegedly enhanced version of PROMIS than in whether the enhancements were in fact proprietary. In our view, it would have been wrong for DOJ employees to "steal" the enhanced version of PROMIS even if it later turned out that the enhancements were not privately funded. Similarly, because the evidence showed that DOJ employees acted in good faith in obtaining and installing the allegedly enhanced PROMIS, we believe that it was irrelevant to our investigation whether Inslaw could assert a valid claim of proprietary interest in that version of PROMIS delivered under the contract. The question whether DOJ misappropriated the allegedly enhanced software, the issue addressed in this report, is entirely separate from the issue whether DOJ's use of the allegedly enhanced PROMIS was a breach of contract. The breach of contract claim was a civil matter that Inslaw could have litigated in the proper

forum, the DOTBCA, but instead chose to present as a novel legal theory in the Bankruptcy Court. In the end, that was an unsuccessful litigation strategy. This report expresses no opinion on that issue.[101]

[101]As noted elsewhere, we believe DOJ's current use of PROMIS (which is limited to EOUSA and the U.S. Attorneys' offices) is permitted under Modification 12. If DOJ wishes in the future to use "enhanced" PROMIS beyond EOUSA, then it will need to determine whether Inslaw has a valid claim of proprietary interest. That is a question that is beyond the scope of our investigation.

## XII. CONCLUSIONS

Based on all the evidence discussed in this report, we find that there is no credible evidence to support either the allegation that there was a scheme to defraud Inslaw, or the allegation that DOJ employees conspired with Earl Brian to steal Inslaw's software. Although we believe (for the reasons discussed in Part VI above) that it would have been preferable for DOJ employees to have told Inslaw why DOJ rejected Inslaw's attempted proof of private financing, we are convinced that these employees genuinely believed that they were acting within DOJ's rights under the contract.

In retrospect, it is easy to see that both Inslaw and DOJ possibly could have avoided many of their disputes by acting more wisely. If, for example, Inslaw had maintained a historical version of PROMIS that contained only the features called for in the EOUSA contract, it could have simply delivered that public domain version of PROMIS when asked by DOJ for a copy of the software being used to perform the contract. In that way, all of the questions about DOJ "stealing" a proprietary version of PROMIS would have been avoided. Similarly, if at the time of its original request for a copy of the software being used to perform the contract DOJ had insisted on an enhancement-free version of PROMIS, it could have avoided the problems that later arose in implementing the resolution procedures of Modification 12.

The disputes between DOJ and Inslaw were fueled by the mutual distrust that appears to have characterized Inslaw's relationship with DOJ. While we do not share Bankruptcy Judge Bason's view of Brewer as a man consumed with hatred and out to destroy Inslaw, it

does appear to us that, for the reasons discussed in this report, Brewer and others at DOJ distrusted William Hamilton, and felt a need to be aggressive in asserting what they believed to be the government's rights under the contract. At the same time, Hamilton and others at Inslaw distrusted Brewer, and quickly came to the conclusion that he and Videnieks were motivated by personal animus. Once they had reached that conclusion, every contract decision made by DOJ that was adverse to Inslaw seemed to them to be further evidence of a desire to ruin Inslaw.

While this atmosphere possibly explains Inslaw's claims that it was the victim of unfair and biased conduct, it offers no excuse for the ever-expanding allegations of widespread criminal conduct, especially the claims of a criminal conspiracy involving Earl Brian, the CIA, former Attorney General Meese, and others. We spent considerable time and resources trying to find evidence of the type of criminal conduct described by William Hamilton and his lawyers in their various affidavits and memoranda. As we have described in detail in the previous pages, there is a total lack of credible evidence to support the criminal conspiracy theories alleged by Inslaw.

**Material Omitted Pursuant to Fed. R. Crim. P. 6(e)**

Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

We cannot fail to note also the degree to which William Hamilton's statements and assertions do not withstand scrutiny. We repeatedly encountered witnesses who, in a very credible way, denied making the statements attributed to them by Hamilton. The witnesses who contradicted Hamilton were both friend and foe of Inslaw, and we could not explain the constant contradictions as simply the efforts of Hamilton's enemies.

There have now been at least five[104] formal investigations into the claim that DOJ officials engaged in a criminal conspiracy

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Material Omitted Pursuant to
Fed. R. Crim. P. 6(e)

[104]OPR, DOJ's Criminal Division, the Senate Permanent Subcommittee on Investigations, the House Judiciary Committee, and us.

to steal PROMIS for the benefit of Earl Brian and other "friends" of the Reagan-Bush administrations. Not one investigation has concluded that such a conspiracy existed. To the contrary, four of those investigations (including ours) have specifically concluded that there is insufficient evidence of any such conspiracy. Even the House Committee, which concluded that the allegations should be further investigated, stopped short of making any findings about the alleged conspiracy. It is remarkable that even after these separate investigations concluded that there is a lack of evidence to support the allegations made by Inslaw and others about a Brian-DOJ conspiracy, the claims still are repeated in the popular press. We are not so naive to believe that because we add our voice to the chorus the accusations of conspiracy will now end. But we note that the intense media coverage given to these claims of a criminal conspiracy reflects not so much the existence of any credible evidence to support the claims, but rather the willingness of many to repeat the allegations without regard to whether they are supported by any credible proof.

In summary, for all the reasons discussed in this report, we find that there is no basis for initiating any criminal charges or disciplinary action against any past or present DOJ employees.

# REPORT OF THE UNITED STATES DEPARTMENT OF JUSTICE

## On the Review of Special Counsel Nicholas J. Bua's Report on the Allegations of INSLAW, Inc.

September 27, 1994

[Portions of this report have been deleted
pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure.]

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## I. Introduction

In March 1982, the United States Department of Justice awarded a $10 million, three-year contract to INSLAW, Inc., to install the public domain version of a case management software program in 20 large U.S. Attorneys' offices around the country and a modified word processing version of the same software in 74 other offices. The software, developed by INSLAW with public funding from the Law Enforcement Assistance Administration, is known as the Prosecutor's Management Information System or PROMIS.

The relationship between the Department and INSLAW quickly deteriorated into a series of disputes that have continued for over 12 years. The most important early dispute centered on the question whether INSLAW had any proprietary rights in an allegedly enhanced version of the software that INSLAW used to perform its obligations under the contract, and, if so, whether the Department was obligated to compensate INSLAW for use of the enhanced software in an amount greater than that called for in the contract.

In the intervening years, the allegations of misconduct on the part of Justice Department officials made by INSLAW have grown considerably. INSLAW and its principals have accused Department officials of everything from conspiring to destroy INSLAW and steal the PROMIS software to being actively involved in the murder of a free-lance journalist. They have also alleged that a version of PROMIS modified on a California Indian

reservation with a "trap door" that allows eavesdropping by U.S. and Israeli intelligence agencies has become a major tool in the arsenals of those organizations. In the process of making these allegations, they and others have linked incidents involving the Justice Department's relationship to INSLAW with, among other things, the alleged conspiracy carried out by the Reagan campaign in 1980 to delay the release of American hostages held in Iran until after the 1980 election, the Iran-Contra affair and the late British publisher Robert Maxwell.

The dispute has spawned a lengthy bankruptcy proceeding that was eventually dismissed for lack of jurisdiction, several related suits including one seeking the appointment of an independent counsel, two congressional investigations and a series of internal Department reviews and inquiries. On November 7, 1991, then Attorney General William Barr appointed Judge Nicholas J. Bua to serve as a special counsel to investigate all allegations of wrongdoing related to the INSLAW affair. In March 1993, Judge Bua and his staff submitted their report to newly appointed Attorney General Janet Reno. Judge Bua's report concluded that there was no credible evidence of any criminal wrongdoing on the part of any past or present Department employee.

After providing INSLAW with an opportunity to comment on Judge Bua's findings, Attorney General Reno ordered a senior-level review of Judge Bua's report and INSLAW's analysis of that report and directed that whatever additional investigation

necessary to advise her on how to proceed on this matter be undertaken. This report summarizes the analysis and investigation undertaken pursuant to the Attorney General's mandate and contains our recommendations.

## II. Scope of Review

It should be noted at the outset that this report does not purport to reflect a completely new and separate investigation of all of the allegations relating to the INSLAW matter. Rather, this report primarily reflects our independent conclusions reached after a detailed review of the investigation and report of the Special Counsel as well as the documentation and testimony accumulated in several other investigations. Accordingly, this report should be read in conjunction with the Special Counsel's report, a copy of which is attached as Addendum A to this report.[1]

We have, however, conducted our own interviews and performed our own investigation relating to a few select allegations where we believed INSLAW raised legitimate questions in its rebuttal to the Special Counsel's report or where we believed additional

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[1] Because we intend this report to constitute a review of the Special Counsel's report and to be read in conjunction with that report, we have not repeated all of the allegations made by INSLAW that were addressed in the Special Counsel's report or all of the investigatory findings of the Special Counsel. Nor have we restated the facts concerning the relationship between INSLAW and the Department of Justice. It is our intention that the Special Counsel's report be considered the primary document and our analysis constitute a supplement to it.

efforts were warranted. In addition, INSLAW's allegations are constantly expanding and evolving. To the extent INSLAW raised new allegations following the completion of the Special Counsel's report that warranted additional investigation, we attempted to perform an appropriate review.

Our review and analysis included the following steps:

Review of the Special Counsel's Investigation: We carefully studied the Special Counsel's report, the July 12, 1993 Analysis and Rebuttal of the Bua Report submitted by INSLAW ("INSLAW Rebuttal") and the February 14, 1994 Addendum to the Analysis and Rebuttal of the Bua Report also submitted by INSLAW ("INSLAW Addendum"). In addition, we reviewed the papers, documents and testimony compiled by the Special Counsel and his staff during their sixteen-month investigation and spoke with several of the investigators about the investigation and their conclusions. The primary purpose of this review was to ensure that the results of that investigation fully supported the conclusions reached by the Special Counsel and were not reasonably susceptible to different interpretations.

INSLAW and its counsel have been extremely critical of the Special Counsel's report. Although those criticisms are contained in great detail in the INSLAW Rebuttal and INSLAW Addendum submitted to the Department of Justice, we held several meetings with INSLAW's principals, William and Nancy Hamilton, and its counsel to be sure that they had an opportunity to present fully the evidence that they maintain supports their

allegations. In addition to a general meeting, we also met with the Hamiltons and their counsel on one occasion to discuss their monetary claims against the government and on another occasion to allow them to present evidence related to the death of J. Daniel Casolaro, a free-lance journalist who police have concluded committed suicide but INSLAW maintains was murdered. These meetings lasted several hours.

Review of Other Investigations: We also carefully reviewed the reports prepared by other entities both within and outside of the Department of Justice on INSLAW's allegations, and we have read the various judicial opinions that have been issued. Although we analyzed all the available reports and published opinions, we concentrated our efforts on the two that were most critical of the Department of Justice: the September 10, 1992 report of the House Committee on the Judiciary, "The INSLAW Affair," and the January 25, 1988 opinion of Bankruptcy Judge George F. Bason, Jr. in In re INSLAW, Inc., 83 B.R. 89 (D.D.C. 1988).

We are grateful to Chairman Jack Brooks and his staff for their cooperation during our review of the House Committee on the Judiciary report ("House Report"). The Committee made all of the documents, notes and testimony compiled by the Committee investigators available to us. We carefully analyzed those documents that were the most relevant to our review.[2]

[2] We did not seek access to the records relating to the September 1989 report of the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the

We also carefully read and analyzed Judge Bason's opinion. While we did not review all the transcripts of the bankruptcy proceedings nor all of the exhibits introduced, we did spend a considerable amount of time reviewing documents and testimony presented during those hearings.

Anonymous Sources: Many of the allegations made by INSLAW have been based on statements that anonymous sources have allegedly made to Mr. Hamilton. According to INSLAW and Mr. Hamilton, these individuals -- many of whom are allegedly senior officials at the Justice Department and other government agencies -- are fearful that if they come forward they will fall victim to reprisals. Because of the change in Administrations and the new leadership at the Justice Department, we were hopeful that these alleged sources would feel comfortable speaking directly with us. As discussed below, we made considerable efforts to provide reasonable safeguards that would have protected any alleged sources were they to have come forward. Unfortunately, only one such source (and this source "belonged" to a Senate investigator and not to Mr. Hamilton) agreed to speak with us.

Investigation of the Death of J. Daniel Casolaro: INSLAW was also extremely critical of the Special Counsel's review of the investigation undertaken by local West Virginia authorities

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United States Senate ("Senate Staff Report") for two reasons. First, the Senate Staff Report concluded that there was no evidence of a conspiracy involving Department of Justice officials and, thus, is largely consistent with the Special Counsel's Report. Second, the Special Counsel was provided access to those records during his investigation but was not provided access to the House records.

following the death of Joseph Daniel Casolaro. Mr. Casolaro was a free-lance writer who had been investigating claims made by INSLAW at the time of his death in 1991. Although local police twice concluded that the cause of Mr. Casolaro's death was suicide, INSLAW and others have asserted that he was murdered in order to keep him from revealing information he had uncovered involving the government's wrongdoing in connection with INSLAW. We committed substantial resources to investigating the circumstances surrounding Mr. Casolaro's death. The breadth of that investigation and the conclusions reached are provided in detail in Section V below.

Other Investigation: In addition, we investigated several of the allegations made and leads provided by INSLAW that were not included in the other investigations. Those efforts focused on, among other things, INSLAW's allegations concerning the distribution of PROMIS to other government agencies and INSLAW's allegation that software currently in use by the Federal Bureau of Investigation is actually INSLAW's PROMIS. Those and other efforts are described in detail in the relevant sections of this report.

## III. Summary of Conclusions and Recommendations

Following our review and analysis, we reached the following conclusions and recommendations:

(1) We recommend that the Attorney General adopt the

Special Counsel's report in its entirety. More specifically, we recommend that the Attorney General adopt the following conclusions reached by the Special Counsel, all of which are fully supported by the available evidence:

> There is no credible evidence to support the allegation that members of DOJ conspired with Earl Brian to obtain or distribute PROMIS software. The overwhelming weight of the evidence is that there was absolutely no connection between Earl Brian and anything related to Inslaw or PROMIS software.
>
> There is woefully insufficient evidence to support the allegation that DOJ obtained an enhanced version of PROMIS through "fraud, trickery, and deceit," or that DOJ wrongfully distributed PROMIS within or outside of DOJ. To the contrary, we are convinced that DOJ employees undertook actions with respect to Inslaw that they genuinely believed were in the best legitimate interests of the government.
>
> We also find that DOJ conducted itself properly after it became involved in litigation with Inslaw.
>
> We find that there is no credible evidence that DOJ employees sought to improperly influence the selection process that resulted in the decision not to reappoint Bankruptcy Judge Bason.
>
> We find that there is insufficient evidence to support the allegations that DOJ employees attempted to improperly influence the U.S. Trustee to convert the Inslaw bankruptcy case, or that DOJ employees committed perjury in order to hide this obstruction.
>
> Finally, we find that there is no evidence to support the allegation that DOJ employees destroyed any documents related to Inslaw or otherwise acted improperly in order to obstruct Congressional investigations into Inslaw's allegations.

(Bua Report 13-14.)

(2) We also find that there is no credible evidence that employees of the Department of Justice conspired with anyone to steal PROMIS or to injure INSLAW in any other way.

(3) There is no credible evidence that the Office of Special Investigations in the Justice Department's Criminal Division is engaged in covert intelligence activities or that it has participated in the illegal trafficking of PROMIS software or in the death of J. Daniel Casolaro. Rather, the Office of Special Investigations appears to be wholly committed to its mission of locating World War II war criminals and other related matters.

(4) The conclusion reached by Martinsburg, West Virginia authorities that the death of J. Daniel Casolaro was a suicide is fully supported by the facts surrounding his death. There is no credible evidence that Mr. Casolaro was murdered. Furthermore, there is no credible evidence linking any Justice Department official or any individual other than Mr. Casolaro himself to his death.

(5) We find there is no basis for the appointment of an independent prosecutor to further investigate these allegations. Accordingly, we recommend that the Attorney General not appoint any such counsel.

(6) We find, after reviewing all the issues raised by INSLAW, that the circumstances surrounding these allegations do not warrant the waiver by the United States of statutory time bars to INSLAW's various monetary claims against the government and recommend that the Attorney General not accede to INSLAW's requests for monetary compensation. INSLAW was provided a full

and fair opportunity to litigate its claims against the government before the appropriate administrative and judicial tribunals. There is no credible evidence that individuals associated with the Department of Justice or any other government agency did anything to frustrate those efforts. Furthermore, we find that the positions taken by the Department on the issues in dispute were fully supported by the facts of the case. The ability of INSLAW and its counsel to keep this matter in the public spotlight by making a series of unsubstantiated allegations linking this affair to some of the major alleged conspiracies of the last 15 years should not be rewarded by acquiescing to their monetary demands.

(7) Finally, we recommend that the Attorney General take those steps necessary to bring this entire affair to closure from the Department's perspective. INSLAW's allegations have resulted in two congressional investigations, several internal Department of Justice inquiries, the appointment of a Special Counsel and numerous law suits. The Special Counsel concluded, and we concur, that virtually all of these allegations were based on nothing more than uncorroborated conjecture, on hearsay information from anonymous sources or on information received from patently unreliable sources. In the process, the reputation and integrity of several Justice Department employees have been unfairly impugned. We cannot measure the toll those attacks have taken. However, we believe that a statement from the Attorney General that she considers the matter closed (absent the

discovery of compelling and verifiable evidence contrary to the conclusions contained in this report) would at least begin the process of remedying the effects of INSLAW's groundless allegations.

## IV. The Allegations Of A Conspiracy By Department Of Justice Officials To Steal PROMIS And Distribute It Within The United States Government And Internationally.

INSLAW has made numerous allegations concerning conspiracies among high-level DOJ officials to steal INSLAW's Enhanced PROMIS. Although it is difficult to summarize those charges, they revolve around several basic theories. INSLAW's counsel described those various theories as constituting concentric circles with the outer circles encompassing the broadest and most far-reaching conspiracies. As a review of those theories will indicate, the conspiracy allegations have evolved over time, overlap with each other in some significant respects, and, on occasion, contradict one another. The primary focus of the Special Counsel's investigation was on these conspiracy accusations.

The most basic conspiracy theory focuses on the relationship between Madison Brewer, the Department of Justice official with primary responsibility to oversee the implementation of the PROMIS contract, and INSLAW. According to this theory, Mr. Brewer was consumed by hatred for both INSLAW and Mr. Hamilton as the result of his dismissal as general counsel of INSLAW's non-profit predecessor in the late 1970s. As a result, Mr. Brewer, in his role as the administrator of INSLAW's largest and most

important contract, set out to destroy the company. Peter Videnieks, the Department's contracting officer for the PROMIS contract, was allegedly an important accomplice in that effort.

An important element of this theory is the role played by Judge D. Lowell Jensen. According to INSLAW, Judge Jensen was the central figure in an effort "to force INSLAW out of business so that DOJ's PROMIS-based business could be awarded to political friends and supporters of the then-current administration." (INSLAW Rebuttal 67-71.) From 1981 to 1986, when he was appointed to the District Court for the Northern District of California, Judge Jensen served successively as Assistant Attorney General for the Criminal Division, Associate Attorney General and Deputy Attorney General. According to INSLAW, Judge Jensen was driven by the fact that he believed the Department of Justice made a mistake in installing PROMIS as its case management software rather than a competing software product that had been developed under Judge Jensen's supervision when he served as District Attorney of Alameda County, California in the 1970s.

INSLAW maintains that Judge Jensen "engineered" a series of sham contract disputes with INSLAW to drive it out of business. Furthermore, Judge Jensen allegedly furthered this conspiracy by ignoring INSLAW's complaints about the conduct of Mr. Brewer in the implementation of the PROMIS Contract and by failing to refer certain allegations to the Office of Professional Responsibility.

Another conspiracy theory advocated by INSLAW focuses on Dr.

Earl Brian. According to this theory, high level DOJ officials conspired with Dr. Brian, a businessman and formerly California's Secretary of Health and Welfare under Governor Ronald Reagan in the early 1970s, to steal PROMIS and destroy INSLAW. According to INSLAW, the goal of this alleged conspiracy was to force INSLAW into bankruptcy so that Hadron, Inc., a company connected with Dr. Brian, could buy INSLAW's assets, including its rights to PROMIS. Subsequently, the Justice Department would award Hadron a "massive sweetheart contract."

The evidence that INSLAW maintains proves the existence of this conspiracy focuses on efforts allegedly made by Hadron and related entities to purchase INSLAW's assets. INSLAW asserts that key Hadron officials travelled to New York in September 1983 to raise $7 million for the acquisition of INSLAW's PROMIS. When those efforts failed, INSLAW claims that Dr. Brian and the Department of Justice adopted another vehicle to provide Dr. Brian with the sweetheart deal from his friends in the Reagan Administration. In order to ensure that INSLAW would not be in a position to disrupt that deal, INSLAW maintains that Systems and Computer Technology, Inc., at the encouragement of the Department, attempted to purchase INSLAW. Those efforts were also unsuccessful.

A closely related but distinct series of allegations center around the "October Surprise" conspiracy. This conspiracy theory is largely the same as the Brian conspiracy described above. However, this theory contains two important additional

allegations. First, it maintains that Dr. Brian was involved in various covert operations and that "he had a central role in bringing about a delay until after the 1980 Presidential election in the release of the American hostages held by Iran." ("The INSLAW Case: Crimes, Criminals, and Grounds for Prosecution," Memorandum to Judge Bua from INSLAW, January 14, 1992 ["INSLAW Crimes"] 42-43.) The alleged conspiracy undertaken by the Reagan campaign to delay the release of the American hostages has been commonly referred to in the media as the "October Surprise." Second, this theory asserts that Department officials participated with Dr. Brian and Hadron in a conspiracy to steal PROMIS in order to reward Dr. Brian for his key role in the successful October Surprise conspiracy.

The next series of conspiracy theories advocated by INSLAW center on the roles allegedly played by various U.S. and foreign intelligence agencies. The first alleges that the primary motivation behind the alleged theft of PROMIS was "to use it as a means of penetrating the intelligence and law enforcement agencies of other governments." (INSLAW Crimes 33.) According to a summary of crimes allegedly committed in relation to these matters submitted to the Special Counsel by INSLAW, the scheme worked as follows:

> The first step in this scheme was the sale to the foreign government of a computer into which had been inserted a microchip capable of transmitting to a U.S. surveillance system the electronic signals emitted by the computer when in use. Where such a sale would have violated U.S. export administration regulations, U.S. intelligence personnel would connive with the U.S. Customs Service to slip the computer past the normal controls. To facilitate the

> National Security Agency's ability to "read" the signals transmitted by the microchip, the software used in the computer had to be a product with which the U.S. was already familiar. As explained in part I(A)(1) above, Enhanced PROMIS has capabilities that make it ideally suited to tracking the activities of a spy network. It was necessary, therefore, to induce the foreign purchaser of a doctored computer also to purchase PROMIS.

(INSLAW Crimes 33-34.) According to INSLAW, Dr. Brian was the principal sales agent of PROMIS to foreign governments and agencies.

Also, according to INSLAW, modifications to Enhanced PROMIS were made by Michael Riconosciuto in a trailer on the Cabazon Indian Reservation in Indio, California in the early 1980s. According to INSLAW he modified PROMIS with a "trap door" which allowed electronic eavesdropping by the United States government.

A slightly broader conspiracy theory advocated by INSLAW alleges that the Department of Justice and Israeli intelligence agencies acted as partners in the theft and international distribution of PROMIS. INSLAW also asserts that the late British publisher Robert Maxwell assisted Israeli intelligence agents in the dissemination of PROMIS to the intelligence and law enforcement agencies of other governments and to international commercial banks. According to this theory, Israeli intelligence agents also colluded with Department of Justice officials to prevent INSLAW from fully litigating its claims against the U.S. government. According to INSLAW, an Israeli agent "provided $600,000 from a slush fund, that was jointly controlled by U.S. and Israeli intelligence, in order to get INSLAW's lead counsel fired so that INSLAW could no longer prosecute its PROMIS

proprietary rights and license fee claims against the U.S. Justice Department." (INSLAW Addendum 16.)

Finally, in the Addendum to INSLAW's Analysis and Rebuttal of the Bua Report dated February 14, 1994, INSLAW advanced for the first time its latest conspiracy allegation. According to INSLAW, the Office of Special Investigations ("OSI") in the Criminal Division of the Department of Justice is, in fact, the Department's own covert intelligence agency with functions totally unrelated to OSI's declared mission of locating and deporting Nazi war criminals. INSLAW asserts that OSI participated in illegal trafficking of PROMIS software and in the alleged murder of Mr. Casolaro.

Although the above summary attempts to group INSLAW's many accusations into discrete conspiracy theories in order to make them more readily understandable, INSLAW generally does not make these distinctions. Rather, INSLAW apparently maintains that all of the allegations summarized above constitute one large conspiracy to deprive INSLAW of its rights in the PROMIS software and to profit at INSLAW's expense. Furthermore, INSLAW alleges the conspiracy was carried out by, among other things, (1) the coverup of the involvement of Department officials, including the commission of perjury by several Department employees during and after the bankruptcy proceedings; (2) the interference by Department officials with the reappointment of Bankruptcy Judge George Bason; (3) the illegal distribution of Enhanced PROMIS to other agencies within the U.S. government; (4) the illegal

distribution of Enhanced PROMIS to foreign governments and to international banking organizations; and (5) the murder of journalist J. Daniel Casolaro.

A. Anonymous Sources

INSLAW has based the majority of its allegations on statements allegedly made by individuals with first hand knowledge of relevant events but who insist on anonymity due to fear of government reprisals. In Exhibit B -- "A Synopsis of Specific Claims About U.S. Department of Justice (DOJ) Malfeasance Against INSLAW Made by Credible Individuals Who Are Fearful of Reprisal" -- to INSLAW's Rebuttal, INSLAW describes 11 such individuals and summarizes the information each has allegedly provided to INSLAW. According to INSLAW, these anonymous sources include six current or former Justice Department officials, two officials of unspecified U.S. government agencies, a former World Bank employee, a computer programmer aboard a U.S. nuclear submarine and a trusted friend of the Hamiltons who "has a close relationship with one or more persons currently holding senior level positions in the Central Intelligence Agency." INSLAW has referred to other anonymous sources in other parts of its rebuttal and in other papers submitted to the Department of Justice.

One of the central goals of our review of the Bua Report was to create an atmosphere that would encourage these alleged sources to come forward. We hoped that the change of

administrations and the appointment of Attorney General Janet Reno would be key factors in that effort. Furthermore, the Associate Attorney General asked INSLAW's counsel in a letter dated September 20, 1993 to convey the following extraordinary assurances to the alleged sources:

> First, the review of the entire matter is being conducted by attorneys in my office at my direction. Accordingly, the interviews of the subject witnesses will be conducted by attorneys from my office who have had no prior involvement in the INSLAW matter in any way. In addition, attorneys from the Attorney General's Office and the Deputy Attorney General's Office may participate in some interviews. If it is necessary to include other individuals from the Department in particular interviews, we will do so only after notifying the witness and receiving his or her approval.
>
> Second, the distribution of the information obtained from these interviews will be limited to the Attorney General's Office, the Deputy Attorney General's Office and my office to the extent possible. The distribution of any information beyond these offices will be done on a need-to-know basis only. Any disclosure of information provided by these witnesses that might lead to the identification of any such witness to individuals who have previously been involved in the matter will require my approval or the approval of the Attorney General.
>
> Third, the Attorney General and I provide our personal assurances that we will not tolerate any acts of reprisal by Department employees against individuals cooperating with this investigation.

In addition, an individual was designated within the Associate Attorney General's Office, pursuant to INSLAW's request, to receive information bearing on INSLAW's claims in confidence.

Despite these exceptional efforts, not a single INSLAW source contacted the Associate's office or otherwise indicated a willingness to cooperate with our review. On several occasions, we asked INSLAW and its counsel to communicate the Attorney

General's assurances and to encourage the alleged sources to speak with us. According to Mr. Hamilton, several sources indicated to him that they will not come forward unless an independent counsel is appointed to investigate INSLAW's allegations while others allegedly insisted that the Attorney General make a public statement guaranteeing their protection from reprisals.

B. There Is No Credible Evidence Supporting INSLAW's Allegations Of A Conspiracy Involving Judge D. Lowell Jensen.

INSLAW has made numerous allegations involving a Department of Justice conspiracy spearheaded by United States District Court Judge D. Lowell Jensen to destroy INSLAW and acquire PROMIS. During the period in which Judge Jensen allegedly "engineered" this conspiracy, he served successively at the Department as Assistant Attorney General for the Criminal Division, Associate Attorney General and Deputy Attorney General. According to INSLAW, Judge Jensen engineered a series of sham contract disputes with INSLAW and ignored INSLAW's complaints about its allegedly unfair treatment at the hands of the Department. Judge Jensen was allegedly driven by the fact that he believed a case management software program developed by the Alameda County (California) District Attorney's Office while he was District Attorney was superior to the PROMIS program.

INSLAW points principally to the following facts as "direct" evidence of Judge Jensen's involvement in a conspiracy:

(1) "As District Attorney of Alameda County in California

in the 1970s, Jensen developed case management software which competed unsuccessfully against PROMIS in California. By the time Jensen came to DOJ in early 1981, he believed that DOJ had been wrong to promote the use of PROMIS by district attorneys' offices instead of his own case management software." (Declaration of William Hamilton, December 22, 1989 ["Hamilton 12/22/89 Decl."] 4.)

(2) According to INSLAW, a Department of Justice source told Ronald LeGrand, chief investigator for the Senate Judiciary Committee, that "Jensen engineered INSLAW's problems right from the start." The source also allegedly identified several senior Department officials who allegedly had information concerning Judge Jensen's involvement.

(3) According to Mr. Hamilton, "An informant who does not wish to be named until assured of protection against reprisal told INSLAW with regard to the sham contract disputes that in 1984, Marilyn Jacobs, Jensen's secretary at DOJ, stated to the informant that 'Jensen was the main person behind the INSLAW problem' and that 'his style was to operate using his subordinates.'" (Hamilton 12/22/89 Decl. 11.)

(4) Janis Sposato, Deputy Assistant Attorney General for Administration, allegedly told INSLAW during settlement discussions involving a dispute over computer time-sharing billing in 1985 that, "My management upstairs is unwilling to allow me to make any more concessions." According to INSLAW, "At the time, Sposato reported directly to the Assistant Attorney

General for Administration, whose offices were on the same floor as Sposato's. That individual, however, reported, in turn, directly to Deputy Attorney General Lowell Jensen, whose offices were several floors upstairs. INSLAW inferred then and infers now that Sposato was alluding to Deputy Attorney General Lowell Jensen's unwillingness to permit a resolution on the merits of the Fiscal Year 1983 computer time-sharing issue because it was DOJ's main 'fig leaf' for its wrongful withholding of payments under the contract." (INSLAW Rebuttal 69.)

(5) According to INSLAW, William Tyson, then Director of the Executive Office of United States Attorneys, told Mr. Hamilton during a meeting on May 2, 1983, "Brick Brewer is not your only problem. There is a Presidential appointee in the current Administration who is so antagonistic to PROMIS and INSLAW that I have to maneuver to keep him away from the meetings of the U.S. Attorneys for fear that he will so poison the well that the project will have no chance of success." (INSLAW Crimes 10-11, n 7.) According to INSLAW, the presidential appointee referred to by Mr. Tyson must have been Judge Jensen.[3]

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[3] Mr. Tyson denies making such a statement to Mr. Hamilton. Nevertheless, Bankruptcy Judge Bason and INSLAW both argue that a March 29, 1987 letter sent by Mr. Tyson to Judge Jensen vowing to continue denying under oath that he had made such a statement constitutes evidence that Mr. Tyson actually made the statement and that Judge Jensen was the appointee to whom he referred. The text of the letter, which was apparently sent on the same day as an article quoting from Mr. Hamilton's affidavit about Mr. Tyson's alleged comments appeared in the Washington Post, states:

> I did not make the comments which Mr. Hamilton says I made. They are sheer invention on his part. I want you to know this because it appears that he is trying to show that these

After considering and investigating INSLAW's allegations of Judge Jensen's involvement in a conspiracy with Dr. Brian and others, the Special Counsel concluded that there was no credible evidence of such a conspiracy. (A discussion of the evidence involving Dr. Brian's involvement in the alleged conspiracy is discussed in Section IV(C) below.)

INSLAW is particularly critical of the Special Counsel's investigation due to his failure, according to INSLAW, to thoroughly investigate the specific allegations allegedly made by Mr. LeGrand's confidential source. INSLAW also criticizes the Special Counsel for simply interviewing the Department of Justice officials identified by the source rather than calling them before the grand jury. (INSLAW Rebuttal 44-46.)

Because of the extreme importance placed by INSLAW on the statements allegedly made by Mr. LeGrand's source, we spent considerable effort working with the staff of the Senate Judiciary Committee and Mr. LeGrand to arrange an interview of the source. Those efforts were ultimately successful. The

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statements, which I did not make, referred to you.

> My entire meeting with Mr. Hamilton consisted of listening to his litany of complaints concerning the handling of the INSLAW contract, especially in regard to Mr. Brewer, followed by my promise to look into his complaints. I have denied under oath in a deposition this week having made the comments he claims I made and I will continue to make such denials in any future proceedings.

Far from evidence of some sort of complicity between Mr. Tyson and Judge Jensen, we believe the letter reflects Mr. Tyson's sincere concern that Judge Jensen understand that he never made any such statements.

allegations attributed to that source and the results of our interview with him are described in detail below.

Based upon the results of that and other interviews described below and the records of the Special Counsel and House investigations, we conclude that there is no credible evidence of a conspiracy involving Judge Jensen or other senior Department of Justice officials.[4]

1. Ronald LeGrand's Confidential Source

Of all the individuals who have allegedly provided information to INSLAW and to others on a confidential basis suggesting a conspiracy against INSLAW by the United States government, the only one to come forward and agree to be interviewed during our review of the Special Counsel's report was Ronald LeGrand's confidential source. Mr. LeGrand, the former chief investigator for the Senate Judiciary Committee, had

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[4] Our conclusion and the conclusion of the Special Counsel is consistent with the findings of the Senate Staff study that it "found no proof that Attorney General Edwin Meese, Deputy Attorney General D. Lowell Jensen or other Justice Department officials were involved in a conspiracy to ruin INSLAW, or to steal INSLAW's product for their own benefit." (Senate Staff Report 22.) Although the Senate staff did indicate that some incidents raise the specter that Judge Jensen may have been biased against PROMIS and in favor of the Alameda County program, the report concluded:

> Although such bias, to the extent it existed, may have led Jensen, as the Bankruptcy Court found, to be indifferent to INSLAW's complaints about other Department officials, it does not, absent further evidence, translate into participation in a broad conspiracy to cripple INSLAW for the benefit of Jensen or other Department of Justice officials. The Staff found no such further evidence...

(Senate Staff Report 27.) We too failed to find any such evidence of Judge Jensen's involvement in a conspiracy.

several conversations in 1988 with an individual who requested anonymity regarding the allegations raised by INSLAW. After Mr. LeGrand shared some of the details of those conversations with Mr. Hamilton, a major controversy developed as to what information the individual ("LeGrand's Source") actually conveyed to Mr. LeGrand. (See Bua Report 113-120, INSLAW Rebuttal 44-46, House Report 61-63.) Despite repeated efforts by the Special Counsel and investigators from the House Judiciary Committee, LeGrand's Source refused to be interviewed. He did, however, agree to be interviewed by us as part of our review.[5]

In an affidavit dated December 22, 1989, Mr. Hamilton swore to the following:

> 5. In late April 1988, Ronald LeGrand, then Chief Investigator of the Senate Judiciary Committee, telephoned me to request a full briefing on the disputes between INSLAW and DOJ. My wife and I subsequently briefed LeGrand at INSLAW on the morning of May 11. LeGrand telephoned me two days later with information that he said a trusted source has asked him to convey. LeGrand described the source as a senior career official in DOJ "with a title" whom LeGrand had known for 15 years and whose veracity LeGrand could attest to without reservation. Shortly after DOJ's public announcement on May 6, 1988 that DOJ would not seek the appointment of an independent counsel in the INSLAW matter and that it had cleared Meese of any wrongdoing, the source told LeGrand that "the INSLAW case is a lot dirtier for the Department of Justice than Watergate was, both in its breadth and in its depth." The source also said that the "Justice Department has been compromised on the INSLAW case at every level." On several occasions since then, LeGrand has confirmed what he told me, and on October 11, 1988,

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[5] We are grateful to the Senate Judiciary Committee, Chairman Joseph Biden, the Senate Legal Counsel, Mr. LeGrand and, of course, LeGrand's Source for cooperating with us and allowing us to interview LeGrand's Source. LeGrand's Source stated that he was willing to cooperate with us despite his unwillingness to cooperate with past investigations because of his respect for and confidence in Attorney General Reno.

Elliot Richardson, counsel to INSLAW, sent Robin Ross, an assistant to Attorney General Dick Thornburgh, a memorandum summarizing the statements attributed by LeGrand to his source. In addition, the source made the following statements:

a. Jensen engineered INSLAW's problems right from the start and relied for this purpose principally upon three senior DOJ officials: Miles Matthews, Executive Officer of the Criminal Division; James Knapp, a non-career Deputy Assistant Attorney General in the Criminal Division; and James Johnston, Director of Contract Administration in the Justice Management Division. Miles Matthews stated in the presence of LeGrand's source that "Lowell [Jensen] wants to get INSLAW out of the way and give the business to friends."

b. The source told LeGrand that John Keeney and Mark Richards [sic], each a career Deputy Assistant Attorney General in the Criminal Division, and Philip White, the recently retired Director of International Affairs for the Criminal Division, knew "all about" the Jensen malfeasance in the INSLAW matter. Although Richards [sic] and White were "pretty upset" about it, the source did not believe that either of them would disclose what they knew except in response to a subpoena and under oath. The source added that he did not think either Richards [sic] or White would commit perjury.

c. The source believes that documents relating to Project Eagle were shredded inside DOJ, but that INSLAW should nevertheless subpoena DOJ paperwork prepared by a Jensen subordinate relating to the purchase of large quantities of computer hardware for which the senior DOJ career staff could see no justification.

(Hamilton 12/22/89 Decl. 19-20.)

According to the House Report, "Mr. LeGrand provided little corroboration of the Hamilton's [sic] allegations" during a sworn statement to House investigators. (House Judiciary Report 62.) Furthermore, Mr. LeGrand informed House investigators and the Special Counsel that, as far as he knew, none of the information provided to him by his source was obtained first-hand. However, Mr. LeGrand did confirm to both House investigators and the Special Counsel that he believed that his source did provide to

him some of the information reflected in Mr. Hamilton's affidavit.

On February 7, 1994, we met with LeGrand's Source in a private dining room at a local club. Mr. LeGrand and Morgan Frankel, Assistant Legal Counsel for the United States Senate, were also present. Although LeGrand's Source asked to remain anonymous in any report, he identified himself to us, and we were able to verify that he is a long time career employee of the Department of Justice. He informed us that he has known Mr. LeGrand for approximately 20 years. Mr. LeGrand confirmed that the individual we interviewed was indeed his confidential source.

LeGrand's Source informed us that he has no information indicating that anyone at the Department of Justice was involved in any wrongdoing involving the PROMIS software or INSLAW. He stated that he has no first-hand knowledge of any misconduct by anyone in relation to PROMIS or INSLAW. He further stated that he has not heard any rumors which he would consider credible about any such misconduct.

LeGrand's Source stated that the subject of INSLAW came up during a friendly conversation with Mr. LeGrand in 1987 or 1988. During the conversation, he told Mr. LeGrand that if he were investigating those allegations he would contact Miles Matthews. LeGrand's Source said that he suggested contacting Mr. Matthews because he was aware that the Justice Department had installed PROMIS in various U.S. Attorneys' offices in the early 1980s, because he believed Mr. Matthews was responsible for procurement

matters for the Criminal Division at that time, and because he did not particularly like or trust Mr. Matthews. He stated that he did not have any information -- nor had he heard any rumors -- linking Mr. Matthews to any wrongdoing connected with INSLAW or PROMIS.

He also stated that he never mentioned Lowell Jensen, Mark Richard, Philip White, James Johnston or James Knapp to Mr. LeGrand. He stated that he believed that there was "no way in a million years" that Mr. Keeney would be involved in any wrongdoing. LeGrand's Source also stated that he did not believe any of these other individuals would be involved in any type of cover-up.

Finally, we read the above excerpted portion of Mr. Hamilton's statement to LeGrand's Source. He stated that none of the statements or beliefs attributed to him in the statement are accurate. More specifically, he stated that he never said or believed any of the comments attributed to him, that he never had reason to believe that any of the Department officials identified in the statement were involved in any wrongdoing or had knowledge of any wrongdoing by other DOJ officials, and that he never had reason to believe that any documents related to Project Eagle were improperly shredded.

The investigation undertaken by the Special Counsel is consistent with much of what LeGrand's Source told us. In an interview with the Special Counsel and in an earlier sworn statement to the Office of Professional Responsibility, Judge

Jensen denied any effort on his part to injure or bankrupt INSLAW or to "engineer" any contract disputes with the company. Messrs. Matthews, Knapp, Johnston, White, Keeney and Richard all also denied having any knowledge of wrongdoing by Judge Jensen or of any wrongdoing of the type described in Mr. Hamilton's affidavit. (Bua Report 118-120.)

2. Marilyn Jacobs

We also interviewed Marilyn Jacobs who, according to Mr. Hamilton, told an anonymous informant that Judge Jensen "was the main person behind the INSLAW problem." Ms. Jacobs was Judge Jensen's secretary at the Department of Justice.

Ms. Jacobs stated that she continues to work for Judge Jensen. When Judge Jensen moved to San Francisco in 1986 following his appointment to the U.S. District Court for the Northern District of California, Ms. Jacobs also moved to California to continue to work for him.

Ms. Jacobs stated that the information contained in Mr. Hamilton's affidavit is false. She said that she never told anyone anything about INSLAW while she was at the Department. Furthermore, she said that she never told anyone that "Jensen was the main person behind the INSLAW problem" or anything to that effect. Nor did she ever tell anyone that "his style was to operate using his subordinates" or anything to that effect. She stated that, to her knowledge, Judge Jensen was not involved in any wrongdoing with regard to INSLAW.

We are aware that Ms. Jacobs' credibility must be viewed in

light of her continued employment with Judge Jensen. Nevertheless, in light of the failure of Mr. Hamilton's supposed source to come forward despite assurances by the Attorney General and the lack of any other evidence linking Judge Jensen to any INSLAW-related conspiracy, we find no reason to doubt her denial of Mr. Hamilton's allegations.

3. Janis Sposato

INSLAW inferred from Janis Sposato's alleged statement that "My management upstairs is unwilling to allow me to make any more concessions" that Ms. Sposato was referring to Judge Jensen and that Judge Jensen was therefore conspiring to ruin INSLAW and steal the PROMIS software. The only basis for these inferences appears to be the floor plan of the main Justice Department building. (Ms. Sposato was located on the first floor of the building at that time making nearly all senior management "upstairs" from her location.)

Furthermore, even if Ms. Sposato made such a statement and in fact was referring to Judge Jensen (two propositions which are not supported by the facts), we fail to see what the relevance of such a comment would be. INSLAW and the Department were attempting to negotiate a resolution of some of their claims against each other at the time. We would expect her to work with senior management as the Department's positions in the negotiations were formulated. The fact that Judge Jensen might have some interest in the matter in light of the direct request made by INSLAW's attorneys to Judge Jensen to initiate such

discussions does not seem unusual. Furthermore, we are not surprised that "concessions" to INSLAW during those negotiations eventually ceased.

Nevertheless, we interviewed Ms. Sposato regarding INSLAW's allegations. Ms. Sposato stated that she does not recall ever making the statement INSLAW has attributed to her and that the statement does not sound like something she would say. Furthermore, she stated that she never received any direction on the negotiations directly from Judge Jensen. However, she did occasionally deal with Associate Deputy Attorney General Jay Stephens. She stated that, to the best of her knowledge, every time Mr. Stephens contacted her with regard to INSLAW it was in response to a request from INSLAW. It was her impression that Mr. Hamilton would get frustrated with the process and then ask his attorney, former Attorney General Elliot Richardson, to contact Judge Jensen. Mr. Stephens would inform her when such contacts were made. Ms. Sposato stated that neither Mr. Stephens nor Judge Jensen ever tried to directly influence the negotiations. Rather, it was her impression that they were trying to stay away from the discussions.

### C. There Is No Credible Evidence Supporting INSLAW's Allegations Regarding a Department of Justice/Earl Brian Conspiracy.

INSLAW's allegations regarding Dr. Earl Brian's involvement in a conspiracy with the Department of Justice to steal Enhanced PROMIS fall into two categories. First, INSLAW alleges that DOJ officials conspired with Dr. Brian, a member of Ronald Reagan's

gubernatorial cabinet along with former Attorney General Edwin Meese, to destroy INSLAW so that Hadron, Inc., a Brian-affiliated company, could acquire the rights to PROMIS. This conspiracy was allegedly carried out by Hadron and affiliated companies through a series of efforts to acquire either PROMIS or INSLAW. The second category of allegations provides a different rationale for the conspiracy. These allegations maintain that the Justice Department's involvement in the conspiracy was based not simply on a desire to award a lucrative government contract to an old political acquaintance but on a desire to reward Dr. Brian for the critical role he played in the October Surprise conspiracy.

The evidence that INSLAW points to as establishing the existence of a Brian/Justice Department conspiracy consists primarily of the following: the fact that Dr. Brian and former Attorney General Edwin Meese served together as members of Governor Reagan's cabinet in the early 1970s; the testimony of Michael Riconosciuto, Ari Ben-Menashe and Charles Hayes; a series of suppositions involving the activities of various corporate entities; and the alleged statements of certain unnamed sources as conveyed by Mr. Hamilton.

After a thorough review of the Special Counsel's records, the House Judiciary Committee records, INSLAW's submissions and some additional investigation, we concur in the following conclusions of the Special Counsel:

> Our investigation has led us to conclude that Inslaw's allegations of a conspiracy to takeover Inslaw or to "get PROMIS" involving Earl Brian and DOJ simply do not withstand any level of scrutiny. Those individuals claiming to have

> direct knowledge of this conspiracy not only are unworthy of belief, but are contradicted by an abundance of believable and verifiable evidence to the contrary.
>
> Similarly, the claimed "circumstantial evidence" of such a conspiracy, as outlined by William Hamilton and Inslaw's lawyers, falls far short of being proof of anything.

(Bua Report 121.) These conclusions are in full accord with the findings of the Senate Subcommittee that it could find "no proof of any connection between Brian or Hadron and the Department with regard to the INSLAW contract." (Senate Staff Report 30.)

1. Michael Riconosciuto

Michael Riconosciuto is the primary source of information allegedly linking Dr. Brian to a conspiracy to steal PROMIS and destroy INSLAW. He claims, among other things: that he met with Dr. Brian from whom he received a copy of PROMIS; that he personally performed alterations to the software on the Cabazon Indian reservation in Indio, California and elsewhere; that the software was provided to Dr. Brian as payment for his involvement in the October Surprise conspiracy; and that he has personal knowledge of the dissemination of PROMIS to various entities around the world.

After an extensive investigation of Mr. Riconosciuto's allegations which is chronicled in his report (Bua Report 42-73) and supported by the records of the investigation, the Special Counsel "found Riconosciuto to be a totally unreliable witness in connection with the allegations he has made about the alleged theft of PROMIS software. Riconosciuto's story about PROMIS reminds us of a historical novel; a tale of total fiction woven

against the background of accurate historical facts." (Bua Report 72.)[6]

This conclusion was based on inconsistencies in Mr. Riconosciuto's various statements regarding Dr. Brian's involvement (id. 42-53), the absence of any documentary evidence corroborating any aspect of Mr. Riconosciuto's claims despite his repeated assurances that such evidence existed and that he would provide the same to investigators (id. 68-71)[7], and the failure of any of the witnesses interviewed by the Special Counsel to corroborate any of his allegations regarding Dr. Brian. (Id. 53-66.) None of the individuals interviewed by the Special Counsel as a result of Mr. Riconosciuto's statements -- Peter Zokosky, A. Robert Frye, John Philip Nichols, Peter Videnieks, Earl Brian, Art Welmas, Sam Cross, Material Omitted Pursuant to Rule 6(e) of Fed. R. Crim. Pro. Dave Baird, Wayne Reeder, Scott Westley and several others -- were able to corroborate any of his allegations of a conspiracy. (See Bua Report 53-66.)

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[6] The Investigative Report of the House Committee on the Judiciary did not express an opinion about Mr. Riconsociuto's credibility. However, it does note that he "could not provide evidence other than his eyewitness account that Dr. Brian was involved in the PROMIS conversion at the reservation." (House Report 72.) In light of Dr. Brian's denial of Mr. Riconosciuto's charges, the Committee concluded that it was "not in a position to make findings of fact on Dr. Brian's role, but would strongly recommend" further investigation. (Id.)

[7] There was one document referred to in the House Report: a Riverside, California police report indicating that Dr. Brian was present at a shooting demonstration in Indio, California in September 1981. As reflected in the Special Counsel's report, the document was prepared in October 1991, ten years after the event it describes, and was based almost solely on statements provided to the Riverside police by Mr. Riconosciuto in October 1991. (Bua Report 61-66.)

The conclusion is further supported by the finding of the Congressional Task Force to Investigate Certain Allegations Concerning the Holding of American Hostages by Iran in 1980 that there is no credible evidence supporting the basic premise of Mr. Riconosciuto's allegations. That is, the Congressional Task Force found no credible evidence, during a year long investigation, of any attempt by the Reagan presidential campaign or persons associated with the campaign to delay the release of the American hostages in Iran during the 1980 campaign. (Joint Report of the Task Force to Investigate Certain Allegations Concerning the Holding of American Hostages by Iran in 1980 ["October Surprise Task Force Report"], Jan. 3, 1993, p. 5.) If there is no credible evidence supporting the existence of an October Surprise conspiracy, Mr. Riconosciuto's claims that the Reagan Administration entered into a conspiracy with Dr. Brian in order to reward him for his involvement in the October Surprise conspiracy are obviously called into question.

Finally, it should be noted that many of Mr. Riconosciuto's INSLAW-related claims have already been heard and rejected by a federal court. In 1992, Mr. Riconosciuto was tried and convicted on drug charges arising from his production and distribution of methamphetamine. (His involvement with drugs dates at least back to 1972 when he was convicted on PCP charges.) He was sentenced to 30 years. Mr. Riconosciuto unsuccessfully defended himself during the trial by claiming he was framed as part of a government effort to keep the truth about the INSLAW affair from

becoming public.[8] During the sentencing hearing, U.S. District Court Judge Robert J. Bryan spoke to Mr. Riconosciuto about his credibility:

> I think you have a loose connection with the truth, and I think all these things we have heard about over the course of this proceeding it [sic] is very hard to determine what is truth and what is fiction, and I'm not at all satisfied that you know the difference yourself in regard to a lot of the things that have been discussed.

(United States v. Riconosciuto, No. CR91-1034B (W.D. Wash.), transcript of Sentencing Hearing, May 7, 1992, pp. 37-38.) The Court arrived at the same assessment of his credibility as the Senate investigators, Judge Bua and this report.

In its Analysis and Rebuttal of the Bua Report, INSLAW argues that Mr. Riconosciuto's statements are not necessarily in conflict, that certain of the witnesses interviewed by the Special Counsel with intelligence backgrounds cannot be expected to tell the truth unless put under oath, and that the credibility of certain witnesses is called into question in light of various charges made against those witnesses. (INSLAW Rebuttal 49-54.) After carefully considering INSLAW's comments and acknowledging that the assessment of the credibility of certain witnesses must take into account their previous or current troubles with law enforcement authorities, we continue to find Mr. Riconosciuto to

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[8] As noted in the Special Counsel's report, "[T]he evidence against Riconosciuto at trial was overwhelming. The DEA in that case captured Riconosciuto delivering methamphetamine on videotape on more than one occasion. The testimony also established that Riconosciuto was running a large methamphetamine lab at the property where he was living." (Bua Report 67.)

be a wholly unreliable witness.

2. Ari Ben-Menashe

The second major source of information linking Dr. Brian to a conspiracy with Department of Justice officials and others to steal and then distribute internationally INSLAW's PROMIS software is Ari Ben-Menashe, who claims to be a former high-level Israeli intelligence officer. In 1992, Mr. Ben-Menashe published a book, Profits of War: Inside the Secret U.S. - Israel Arms Network (Sheridan Square Press, New York 1992), detailing his alleged involvement in various covert operations, including the October Surprise, arms sales to Iraq, the Iran Contra affair and others. In that book and in various statements he has made, Mr. Ben-Menashe claims to have first-hand knowledge that Dr. Brian and Robert McFarlane, the former National Security Adviser, provided Enhanced PROMIS to Israel. He claims to have either first or second hand information concerning the sale of PROMIS to the Singapore Armed Forces, Jordanian military intelligence organizations, Iraq, the Soviet Union and Canada. (See, e.g., House Report 64.) Mr. Ben-Menashe also claims that certain Israeli officials would be able to corroborate his allegations although he refuses to identify those officials.

Despite the concerns raised by INSLAW regarding the credibility of Dr. Brian's and of Mr. McFarlane's denials of Mr. Ben-Menashe's allegations, we concur with the Special Counsel's conclusion that Mr. Ben-Menashe's "testimony offers no support for the allegation that DOJ and Earl Brian conspired to steal and

distribute the software in which Inslaw claims proprietary rights." (Bua Report 81.) We base this concurrence primarily on the factors identified below as well as on the other factors identified in the Special Counsel's report.

First, Mr. Ben-Menashe's credibility has already been called into serious question by two congressional investigations. The October Surprise Task Force, led by Chairman Lee H. Hamilton and Congressman Henry J. Hyde, conducted a thorough investigation of the allegations that the Reagan campaign acted to delay the release of American hostages held in Iran until after the 1980 election. The Joint Report of the October Surprise Task Force reached the following conclusions about Mr. Ben-Menashe's allegations concerning the alleged October Surprise conspiracy, many of which also form the basis of his INSLAW testimony:

> Credible testimonial and documentary evidence show Ben-Menashe to be totally lacking in credibility regarding his allegations about meetings in Spain in 1980 ... Aside from early biographical details, virtually everything Ben-Menashe told the Task Force has been found to be false. (p. 97.)[9]
>
> According to numerous pieces of documentary evidence, Ben-Menashe's account is demonstrably false from beginning to end. (p. 110.)
>
> Ben-Menashe's testimony is impeached by documents and is riddled with inconsistencies and factual misstatements which undermine his credibility. Based on the documentary evidence available, the Task Force has determined that Ben-

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[9] Among the facts that the Task Force found to be false was the existence of a relationship between Mr. Ben-Menashe and Rafi Eitan. The report indicates that Mr. Eitan claims he does not know Mr. Ben-Menashe and has never met him. (Id. 97.) This is of particular relevance to the INSLAW allegations as Mr. Ben-Menashe claims that Mr. Eitan provided much of his information to him and that Mr. Eitan was a key player in the misappropriation of PROMIS.

> Menashe's account of the October meetings, like his other October Surprise allegations, is a total fabrication. (p. 148.)

The Task Force also concluded, "There is no credible evidence supporting any attempt, or proposal to attempt, by the Reagan Presidential Campaign -- or persons representing or associated with the campaign -- to delay the release of the American hostages in Iran." (October Surprise Task Force Report 8.)

The Special Counsel appointed by the Subcommittee on Near Eastern and South Asian Affairs of the Senate Committee on Foreign Relations to investigate the October Surprise allegations, Reid H. Weingarten, reached similar conclusions regarding Mr. Ben-Menashe's credibility. In his report, he found:

> The primary sources for this allegation -- Brenneke, Ben Menashe, and Lavi -- have proven wholly unreliable. Their claims regarding alleged secret meetings are riddled with inconsistencies, and have been contradicted by irrefutable documentary evidence as well as by the testimony of vastly more credible witnesses. Not one aspect of Ben-Menashe's story, which alleges a series of meetings in Madrid, Amsterdam, Paris and Washington in furtherance of an "October Surprise" conspiracy promoted by Israel, was ever corroborated ... In sum, the Special Counsel found that by any standard, the credible evidence now known falls far short of supporting the allegation of an agreement between the Reagan campaign and Iran to delay the release of the hostages.

(The "October Surprise" Allegations and the Circumstances Surrounding the Release of the American Hostages Held in Iran, Report of the Special Counsel, November 19, 1992, pp. 114-115.)

Second,

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

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[10] The description of the contract dispute between INSLAW and the Department of Justice contained in Mr. Ben-Menashe's book is demonstrably false. For example, Mr. Ben-Menashe writes, "Hamilton and his wife Nancy sued the Justice Department, charging that Justice stole the enhanced PROMIS program from INSLAW and gave it to NSA. Justice claimed it did get a program from INSLAW but returned it unused." Profits of War, p. 131. Furthermore, his description of the power of the PROMIS program as "Big Brother-like" and a "monster" does not comport with reality. He describes the use of the software as follows:

> Using a modem, the spy network would then tap into the computers of such services as the telephone company, the water board, other utility commissions, credit card companies, etc. PROMIS would then search for specific information. For example, if a person suddenly started using more water and more electricity and making more phone calls than usual, it might be suspected he had guests staying with him. PROMIS would then start searching for the records of his friends and associates, and if it was found that one had stopped using electricity and water, it might be assumed, based on other records stored in PROMIS, that the missing person was staying with the subject of the investigation. This would be enough to have him watched if, for example, he had been involved in previous conspiracies.

(Profits of War 131-132.) PROMIS is a case tracking software program used to index relevant information on pending cases. The suggestion that it could be used to "'keep track of everyone'" is

Fourth, neither the House investigation nor the Special Counsel's investigation was able to uncover any credible evidence corroborating any aspects of Mr. Ben-Menashe's story. Mr. Ben-Menashe repeatedly promised House investigators that he would provide documentary evidence relating to the sale of PROMIS software and demonstrating the participation of Dr. Brian in those sales. He failed to produce any such documents or any corroborating witnesses. Finally, during his sworn statement to House investigators, he stated that he would not make that documentation available or identify those witnesses until he was "called as an official witness." He proved to be equally unforthcoming with the Special Counsel. Although the Special Counsel subpoenaed the relevant records in Mr. Ben-Menashe's possession, he never produced any documents. (Bua Report 78.)

In light of these factors, there is no reason to give any weight to Mr. Ben-Menashe's allegations.

3. Charles Hayes

INSLAW also relies heavily on the statements of Charles Hayes, a Kentucky salvage dealer who claims to have purchased word processing equipment that contained Enhanced PROMIS from a local United States Attorney's office. He also "previously told Mr. and Mrs. Hamilton that he met with Earl Brian, Richard Secord and Oliver North in Sao Paulo, Brazil, in the mid-1980's while those three individuals were purchasing weapons for the Contras in Nicaragua, and Brian was marketing INSLAW's PROMIS software to

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patently absurd.

the government of Brazil." (INSLAW Rebuttal 55.)[11]

The Special Counsel concluded as follows:

> Material Omitted Pursuant to
> Rule 6(e) of Fed. R. Crim. Proc.

(Bua Report 85.) Mr. Hayes had also failed to provide any documentation corroborating his allegations to House investigators. (House Report 66.)

INSLAW, which has not had the benefit of reviewing Mr. Hayes' grand jury testimony, is critical of the Special Counsel's conclusions based in large part on a statement allegedly signed by Mr. Hayes regarding the content of his grand jury testimony. After carefully reviewing Mr. Hayes' sworn statements to the Special Counsel's grand jury and to House investigators as well as the Special Counsel's analysis and INSLAW's rebuttal, we concur with the findings of the Special Counsel.

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[11] Material Omitted Pursuant to Rule 6(e) of Fed. R. Crim. Proc.

4. Circumstantial Evidence of a Conspiracy

In addition to the witnesses identified above, INSLAW points to a series of events involving various corporate entities and their principals as evidence of a conspiracy involving Dr. Brian and Justice Department officials to steal the PROMIS software. These allegations, which are set forth in detail in Mr. Hamilton's December 22, 1989 affidavit, can be summarized as follows:

(1) Starting in 1983, Hadron, Inc., a company owned by Dr. Brian, attempted to obtain the PROMIS software through a variety of different strategies. Mr. Hamilton identifies two alleged acts that directly involve Hadron as proof of its involvement in this alleged conspiracy. First, Mr. Hamilton claims that he received a telephone call from Dominic Laiti, chairman of Hadron, shortly after Modification 12 to the PROMIS contract was agreed to in which Mr. Laiti inquired as to whether INSLAW was interested in selling its rights to PROMIS. Among other things, Mr. Hamilton claims, "When I declined to meet with Laiti to discuss his proposition, Laiti said: 'We have ways of making you sell.'" (Hamilton 12/22/89 Decl. 8.) Second, Mr. Hamilton alleges that a 1983 trip to New York involving various Hadron officials was for the purpose of raising funds to acquire PROMIS.

(2) Mr. Hamilton alleges that individuals involved with 53rd Street Ventures, a New York venture capital fund with a small equity interest in INSLAW, were attempting to acquire INSLAW or PROMIS on behalf of individuals with "ties at the

highest level of the Reagan Administration." (Hamilton 12/22/89 Decl. 13.) These assertions are based largely on Mr. Hamilton's account of two conversations he allegedly had, one with Jonathan Ben Cnaan, an account executive for the fund, and the other with Daniel Tessler, the chairman of the company that managed the fund.

(3) Mr. Hamilton also alleges that the Justice Department encouraged a 1986 hostile takeover bid initiated by Systems and Computer Technology, Inc. ("SCT") "in order to preclude INSLAW from seeking redress in the courts for DOJ's 1983 theft of the PROMIS software and to remove INSLAW as an obstacle to the planned award of Project EAGLE to Tisoft and the planned implementation of PROMIS on the Project EAGLE computers." (INSLAW Rebuttal 61.)[12]

The Special Counsel spent a considerable amount of time investigating these allegations. He summarized the results of that effort as follows:

> We tried to interview virtually all of the witnesses identified in Mr. Hamilton's affidavit and in the memoranda submitted by Inslaw's lawyers as supporting these claims. As is described in detail in the following pages, we found that many of the witnesses deny making the statements attributed to them by Mr. Hamilton. In other cases, the individuals confirmed the particular statements attributed to them, but then admitted that they were only repeating things that other people had told them. In the end, we found that much of the supposed "circumstantial evidence" identified by INSLAW does not in fact exist, and that what

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[12] INSLAW and Mr. Hamilton make additional allegations involving Edward Hurley, a Hadron vice president, and a contract award to a Hadron subsidiary. These charges are fully and adequately addressed in the Special Counsel's report and do not warrant additional comment here. (See Bua Report 98-101.)

> does exist is woefully insufficient to support a finding of a conspiracy, or, indeed, any connection between INSLAW and PROMIS on the one hand, and Hadron or Earl Brian on the other.

(Bua Report 86.)

(a) Evidence of Direct Hadron Involvement

The two individuals identified by Mr. Hamilton -- Paul Wormeli and Marilyn Titus -- as the source of his information regarding the 1983 fundraising trip to New York informed the Special Counsel that they have no reason to believe that the purpose of the trip was to raise funds to purchase PROMIS as alleged by Mr. Hamilton. (See Bua Report 88-90.) Mr. Hamilton stated in his affidavit that Ms. Titus, a secretary to Mr. Wormeli, had informed him that the "purpose of the trip was to 'raise capital for the court [i.e., PROMIS] software.'" (Hamilton 12/22/89 Decl. 13.) However, Ms. Titus informed the Special Counsel that she "had never heard any discussion at all about Hadron obtaining PROMIS software, and she does not believe that she ever told William Hamilton that the purpose of the 1983 fund raising trip was to raise capital to obtain PROMIS or Inslaw." (Bua Report 90.)

Furthermore, Mark Kesselman (with whom Mr. Laiti and Mr. Wormeli met during their trip to New York) was unable to support Mr. Hamilton's charges. Mr. Laiti informed the Special Counsel that the 1983 New York trip had nothing to do with acquiring INSLAW or PROMIS and that he had no recollection of any efforts to acquire either the company or the software. He also stated that he did not recall ever talking to Mr. Hamilton, let alone

threatening him. Dr. Brian also denied any knowledge of any effort by Hadron to acquire INSLAW. Finally, Donald Stromberg, a former president of Simcon, informed Senate investigators that he never heard mention of either INSLAW or Mr. Hamilton while he was at Simcon. (Senate Staff Report 30.)

In light of the fact that the only "evidence" of a direct involvement by Hadron or its principals in an alleged conspiracy is Mr. Hamilton's sworn affidavit and that the alleged sources of the information reflected in that affidavit have disavowed its accuracy, we concur with the finding of the Senate staff that there is "no proof that officials of Hadron, Inc. were involved in a conspiracy with officials of the Department of Justice to undermine INSLAW in order to acquire its assets." (Senate Staff Report 28.)

(b) 53rd Street Ventures

INSLAW is particularly critical of the Special Counsel's conclusions regarding the alleged involvement of 53rd Street Ventures in an effort to acquire INSLAW. INSLAW's criticisms focus on the Special Counsel's failure to interview Jonathan Ben Cnaan and the Special Counsel's willingness to accept the unsworn statements of Daniel Tessler, the chairmen of 53rd Street Ventures; Patricia Cloherty, Mr. Tessler's wife; and Richard D'Amore, a partner at Hambro International, another venture capital firm; over Mr. Hamilton's sworn testimony.

According to Mr. Hamilton's affidavit:

> Jonathan Ben Cnaan, an account executive with 53rd Street Ventures, a New York City venture capital firm that then had

> a small equity investment in INSLAW, described a meeting in September 1983 at 53rd Street Ventures with a "businessman with ties at the highest level of the Reagan Administration" who was eager to obtain the PROMIS software for use in federal government work. The meeting took place several months after the contract disputes with DOJ had emerged, and the businessman assured 53rd Street Ventures that INSLAW would never be able to resolve them. According to Ben Cnaan, the businessman was annoyed that I had rebuffed an attempt earlier that year to buy INSLAW in order to obtain title to the PROMIS software.

(Hamilton 12/22/89 Decl. 13.) Despite efforts made by the Special Counsel, he was not able to locate Mr. Ben Cnaan. (Bua Report 97-98.)

With the aid of INSLAW and an Israeli journalist, we were able to locate Mr. Ben Cnaan in Israel. We interviewed him by telephone.

Mr. Ben Cnaan, a native of Israel, stated that he was employed by Allen Patricof and Associates ("APA") in New York from 1981 to 1987. 53rd Street Ventures was one of the venture funds which he helped to manage while at APA. He stated that the first investment he made for APA was a $100,000 investment in INSLAW. He said that he was a "follower" investor and did not take an active role in the negotiation of the deal.

Mr. Ben Cnaan stated that he never met with anyone with ties to high level officials of the Reagan Administration and that he never had any conversation with anyone regarding the government's alleged desire to obtain PROMIS. Furthermore, he stated that he had no reason to believe that the federal government had any desire to obtain the PROMIS software. He also said that he had no recollection of any of the events described in the above-

excerpted paragraph from Mr. Hamilton's declaration. Mr. Ben Cnaan denied that anyone ever told him that INSLAW would be unable to resolve its conflicts with the government. He also denied that he was ever told that someone was annoyed that Mr. Hamilton had rebuffed an earlier attempt to purchase INSLAW.

Mr. Ben Cnaan called the allegations contained in Mr. Hamilton's declaration "fabrications" and the result of a "creative imagination."

Mr. Hamilton also claims that Mr. Tessler attempted to coerce him into turning over control of INSLAW and that his wife, Patricia Cloherty, informed Mr. D'Amore that she "knew all about" Dr. Brian's role in the INSLAW matter. (Hamilton 12/22/89 Decl. 13-14.) He also asserts that Daniel Tessler is a relative of Alan Tessler, an attorney responsible for the mergers and acquisition work of Dr. Brian and Hadron. Mr. Tessler, Ms. Cloherty and Mr. D'Amore all denied these accusations during interviews with the Special Counsel. (Bua Report 91-96.) Mr. Tessler also stated that he was not related to Alan Tessler.

Nevertheless, INSLAW argues that these individuals are not credible. Specifically, INSLAW asserts that Mr. Tessler's statement that "to his knowledge, his wife, Patricia Cloherty, has no knowledge of Earl Brian" and Ms. Cloherty's subsequent statement that she once served on the board of the National Association of Small Business Investment Companies with Dr. Brian indicate their lack of trustworthiness. (INSLAW Rebuttal 58.) We disagree. We do not find it particularly unusual that an

individual would not know all the business associates of his or her spouse. Furthermore, even if Mr. Hamilton's statements are true, it would not connect either Dr. Brian or Hadron to any wrongdoing in connection with INSLAW or PROMIS.

(c) Systems and Computer Technology, Inc. ("SCT")

The Special Counsel reviewed in detail the events surrounding a 1986 effort by SCT to purchase INSLAW from the Hamiltons. (Bua Report 104-106.) A review of the Special Counsel's report and the memoranda memorializing interviews conducted with key SCT officials reveals that none of those involved with the attempted purchase were aware of any connection between either the Justice Department or Dr. Brian, on the one hand, and SCT's efforts to purchase INSLAW, on the other.

Nevertheless, INSLAW continues to assert that SCT was acting in union with Dr. Brian and the Department when it approached INSLAW. However, the "support" for this accusation contained in INSLAW's Rebuttal is nothing more than a series of unsubstantiated beliefs which INSLAW does not even attempt to corroborate:

> INSLAW believes that the PROMIS software was intended by DOJ to be the uniform case management software for the Project EAGLE computers. INSLAW further believes that Earl Brian's Hadron, Inc. was originally slated to receive the Project EAGLE contract award by DOJ as a sweetheart gift from Brian's long-time friend, then Attorney General Meese. INSLAW believes that Brian and DOJ abandoned the plan to use Hadron as the vehicle for the contract in the fall of 1985, following the failure of the covert DOJ effort to force INSLAW's liquidation.
>
> INSLAW believes that, by January 1986, Brian and DOJ had substituted Tisoft, Inc. as the vehicle for the planned sweetheart Project EAGLE award. That month, Tisoft was

awarded a $30 million computer systems contract by Meese's Justice Department, and Tisoft amended its articles of incorporation to permit the sale of common stock to new outside owners who would then have majority control of the company.

Margaret Wiencek, the former Director of Administrative Services at Earl Brian's Financial News Network (FNN), claims that Patrick R. Gallagher of Tisoft, Inc. was also someone who regularly telephoned the chairman's office at Earl Brian's FNN Headquarters in Los Angeles during at least 1987.

INSLAW believes that DOJ encouraged the SCT hostile takeover bid for INSLAW in 1986 in order to preclude INSLAW from seeking redress in the courts for DOJ's 1983 theft of PROMIS software and to remove INSLAW as an obstacle to the planned award of Project EAGLE to Tisoft and the planned implementation of PROMIS on the Project EAGLE computers.

(INSLAW Rebuttal 60-61 [emphasis added].) This is pure conjecture on the part of INSLAW.

Furthermore, House investigators interviewed several individuals involved with the EAGLE contract to determine if there was any link with INSLAW of the type alleged by INSLAW. Based upon our review of those interviews, there is no substantial evidence suggesting such a link. Similarly, the report of the Senate staff study "found no proof that INSLAW's problems with the Department were connected to the Department's 'Project EAGLE' procurement." (Senate Staff Report 31.)

5. John A. Belton

In its Analysis and Rebuttal of the Bua Report, INSLAW is critical of the Special Counsel for failing to interview John A. Belton, a former Canadian stockbroker, who has apparently been investigating the alleged illegal distribution of PROMIS in Canada and the role of Dr. Brian and Hadron in that distribution.

According to INSLAW, the June 10, 1993 memorandum from Mr. Belton to Mr. Hamilton, which is attached as Exhibit A to INSLAW's Rebuttal, "documents the existence of a business relationship between Earl Brian's Hadron, Inc., and two Canadian computer services companies on a large [PROMIS] software sale to the Government of Canada in 1983." (INSLAW Rebuttal 38.)

We spoke with Mr. Belton by telephone. According to Mr. Belton he was employed by Nesbitt, Thomson, Bongard, Inc. ("NTB"), a Canadian investment bank, from 1968 to February 26, 1982. He stated that he left NTB in 1982 following his discovery that NTB was involved in securities fraud with Dr. Brian and others. He has subsequently filed two suits against NTB, both of which are still pending. The suits apparently focus on the alleged securities fraud and include a claim for constructive dismissal. Mr. Belton stated that both suits should be settled shortly. Since leaving NTB, he has spent a majority of his time investigating his claims and prosecuting his cases.

Mr. Belton stated that he was aware of several sales of PROMIS to various entities by Dr. Brian or others involved in the "intelligence community." He stated that Dr. Brian was responsible for selling the "U.S. version" of the software through Hadron, Inc., while Robert Maxwell, the late British publisher, was responsible for selling the "Israeli version" of the software. According to Mr. Belton, Dominic Laiti, the president of Hadron, Inc., is a full-time employee of the Central Intelligence Agency, and Hadron was a CIA "cut-out." He also

claims that Janos Pasztor, vice-president of NTB, was a CIA agent. "Reliable sources" also allegedly informed Mr. Belton that Dr. Brian has acted as an agent of the National Security Agency.

Mr. Belton alleges that Dr. Brian and an NTB official sold PROMIS to the Bank of Montreal for $2 million in May 1987. He stated that he has first-hand knowledge of this sale although he refused to explain how he came to have that knowledge. Mr. Belton also claimed to have a document that reflects the sale; however, he said that he would not provide that document to anyone at this time. He stated he feels that he should not release any documents or further information about this sale until after his lawsuits have been settled.

Mr. Belton also claims that a sale of PROMIS was made to a Nuclear Regulatory Commission facility in New Mexico in 1983. He believes the facility was Los Alamos. According to Mr. Belton, the sale was made by Trans World Arms in Montreal and ORA. ORA is allegedly the Israeli half of a multi-billion dollar slush fund made up of Israeli and U.S. funds. Mr. Belton stated that the fund has been used, among other things, to fund arm sales to Iraq. He stated that his primary source of information concerning this sale was Mr. Hamilton. However, he claims that he confirmed Mr. Hamilton's allegations with a "very, very reliable source." He refused to identify that source.

Mr. Belton alleges that this same source informed him that the Canadian Security Intelligence Service purchased $10 to 12

million worth of PROMIS software in 1984. Again, he refused to identify the source or to provide any additional evidence of such a sale.

During our conversation, Mr. Belton claimed to have information about other sales of the PROMIS software. However, he was unable to supply any potentially corroborating information with respect to any of those alleged sales. He also claimed that he learned from a reliable source that former President George Bush put NTB and the Bank of Montreal under CIA control in 1976 while Bush was the Director of the CIA. He also claims that he is in the process of negotiating the return of $590 million to the pensioners of Mirror Newspapers in London. Mr. Belton also claims to have reliable information regarding conspiracies involving Robert Maxwell, Iraqi arm sales, Iranian arm sales and the October Surprise.

We found Mr. Belton to be unbelievable. He merely made a number of accusations based on unnamed "reliable" witnesses while refusing to identify those sources or provide any documentary support for those allegations. His claim that such documents exist but that he does not want to release them to us detracts rather than adds to the credibility of his allegations. Furthermore, he seemed to be a man dedicated to prevailing on his suits against his former employers.

6. <u>The Alleged Videnieks/Hadron Connection</u>

INSLAW has also asserted that the Justice Department's contracting officer, Peter Videnieks, had a relationship with

Hadron, Inc., and its officers and asserts that relationship as further evidence of a conspiracy involving Dr. Brian and the Department. INSLAW's allegations have centered on the statements of two individuals. First, INSLAW focuses on the statements of John Schoolmeester, a former Customs Service employee. Mr. Schoolmeester asserts that when Mr. Videnieks was employed at Customs prior to moving to the Department of Justice, he handled some contracts between Customs and Hadron. Mr. Schoolmeester informed the Special Counsel that Mr. Videnieks almost certainly would have met Dominic Laiti, Hadron's president, around that time as Mr. Laiti "met everyone in government." In light of Mr. Schoolmeester's admission that he has no first-hand knowledge that Mr. Laiti and Mr. Videnieks ever met, the investigation conducted by the Special Counsel and a review of Mr. Schoolmeester's 1991 statement to House investigators, we concur with the Special Counsel's conclusion that this allegation "falls far short of anything that could fairly be called evidence of a conspiracy." (Bua Report 104.)

Second, INSLAW points to the sworn statement of Margaret Wiencek, a former employee of Dr. Brian's Financial News Network, obtained by investigators for the U.S. Customs Service Internal Affairs Division in February 1993. In that statement, Ms. Wiencek states:

> 4. Peter Vedinecks [sic] and Michael Riconisuitto [sic] (as I am unaware of the proper spelling of these individuals' names, I have spelled them phonetically as I would have done on any phone log when uncertain of the spellings of names) were individuals who made several phone calls to FNN during the first quarter of 1987 asking for Mr.

> Bolen [FNN's chief financial officer] and/or Dr. Brian and leaving messages for Mr. Bolen and/or Dr. Brian requesting that Mr. Bolen and/or Dr. Brian return calls...
>
> 5. In the course of my official duties, I became aware of a file in Mr. Bolen's office marked M.I.S. that contained copies of correspondence relating to the PROMIS computer software product. Dominic Laiti, then CEO of Hadron, Inc., a company controlled by Dr. Earl W. Brian through Infotechnology, Inc. was either the author or recipient of the letters in question in this file...

(Wiencek, 2/7/93 p.1.) It is unclear whether the Special Counsel investigated these allegations.

Our investigation, however, has identified several factors that cast doubt on Ms. Wiencek's credibility. First, Ms. Wiencek has filed suit against Dr. Brian and FNN charging, among other things, that she was improperly discharged from her position with FNN in 1990 as a result of her refusal to participate in wrongdoing taking place at FNN. Ms. Wiencek stated that she has been laid off from several jobs since 1990 and is currently unemployed. She is representing herself in the litigation.

Second,

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

Third, the Customs Service Internal Affairs Division has indicated their intention to close their two-year investigation into allegations that Peter Videnieks committed perjury at the trial of Michael Riconosciuto when he testified that he did not know Dr. Brian due to a lack of credible evidence supporting those allegations.[13] According to Customs Service investigators, the investigation was initiated as the result of information received by an informant. The informant alleged that Mr. Videnieks committed perjury when he denied knowing Dr. Brian and others during the trial of Mr. Riconosciuto on drug charges. Mr. Riconosciuto unsuccessfully defended himself in that litigation by claiming that he was framed by the government as part of a greater INSLAW-related conspiracy. Due to the fact that Mr. Videnieks had returned to Customs after leaving the Justice Department and was a Customs employee at the time he testified at trial the anonymous charges against Mr. Videnieks were investigated by Customs Service Internal Affairs . Despite Ms. Wiencek's signed statement, the Customs Service investigators concluded, after what they described as an extensive investigation, that there was no credible evidence that Mr. Videnieks committed perjury when he denied knowing Dr. Brian. Despite promises by Mr. Riconosciuto and his former girlfriend to

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[13] The Customs Service's intention to close the investigation was conveyed to us in a telephone conversation with Customs Service Office of Internal Affairs Regional Director William Rohde and Deputy Director John Kelly on March 30, 1993. According to Mr. Rohde, his office intends to prepare a detailed report of their investigation over the next few months.

Customs investigators that they would provide physical proof that Mr. Videnieks and Dr. Brian knew each other, they failed to produce any such evidence.[14]

And fourth, Ms. Wiencek contradicted two important details contained in her written statements and in her sworn statement to House investigators during an interview pursuant to this review. During that interview, Ms. Wiencek stated that while she was organizing files at FNN she discovered an unlabelled file that contained promotional material regarding a software program called PROMIS. She then went on to state that she put the material in another file and labelled it "MIS" as she understood the PROMIS software to be a management information system. We asked her several times whether the file was labelled at the time she found it, and on each occasion she stated that the file was unlabelled and that she was the one to label it "MIS." In both her signed statement to Customs investigators and her sworn statement to House investigators, Ms. Wiencek stated that the file was already marked "MIS" when she found it.

The second inconsistency involves her testimony concerning the contents of that file. During our interview, Ms. Wiencek

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[14] Assistant United States Attorney Marc Bartlett was the lead prosecutor in the case against Mr. Riconosciuto. Mr. Bartlett informed us that he believed Mr. Videnieks' testimony during the trial was truthful. In the government's Sentencing Memorandum, it stated the following: "Regardless of the cause, the [Riconosciuto's] lies have wreaked havoc on numerous fronts. At an individual level, people such as Peter Viedinicks [sic] whose names were included in the defendant's seamless web of lies and paranoia have suffered countless personal and professional problems." United States v. Riconosciuto, No. CR91-1034B (W.D. Wash.), Government's Sentencing Memorandum, April 29, 1992, p. 3.

stated that there were two to four letters included with the promotional material in the file. She stated that one letter appeared to be from the federal government as she recalls seeing "United States Government" at the top of the letter. The only other letter she specifically recalled was one that she believed was from Hadron, Inc. She specifically stated that the letter did not have any other names on it and that the letter was not from Dominic Laiti. She also stated that she did not recall seeing any letter in the file with Mr. Laiti's name on it. However, in her statements to House investigators and to Customs investigators, Ms. Wiencek stated that Mr. Laiti was either the author or the recipient of the letters in question.

Even if Ms. Wiencek's statements were true, we believe that they are insufficient in conjunction with the other evidence reflected in this report and the Special Counsel's Report to be considered significant evidence of a conspiracy. Furthermore, in light of the discussion above and the repeated denials of both Dr. Brian and Mr. Videnieks, we believe that her statements lack credibility.

7. Conclusions Regarding a Brian/DOJ Conspiracy

Based on our review of all of the INSLAW allegations concerning a conspiracy between Dr. Brian and Hadron, Inc., on the one hand, and the Department of Justice, on the other, to acquire PROMIS or to destroy INSLAW, we conclude that there is no

credible evidence of such a conspiracy.[15] This conclusion is in accord with the conclusions of both the Special Counsel (Bua Report 121-123) and the Senate Staff Report (Senate Staff Report p. 30).

## D. There Is Insufficient Evidence to Conclude that INSLAW's PROMIS Has Been Distributed by the Department of Justice to Other Agencies or Departments of the U.S. Government.

### 1. There Is No Evidence that The FBI's FOIMS System Was Pirated From or Based on PROMIS.

#### a. The Allegations.

Since 1991, INSLAW has repeatedly asserted that the Federal Bureau of Investigation installed and is running PROMIS under the name Field Office Information Management System ("FOIMS"). These allegations are based primarily on two sources of information: Terry D. Miller, president of Government Sales Consultants, Inc., and an unnamed "confidential senior DOJ source" who, according to INSLAW, claims that former Acting Director of the FBI John Otto admitted to him that FOIMS was actually PROMIS. According to INSLAW's theory, the FBI and DEA were each ordered by the

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[15] There are several additional individuals other than those identified in this report who have been identified by INSLAW or their sources as having first-hand knowledge of a conspiracy. One such person is Lois Battistoni, a former employee of DOJ's Criminal Division. The Special Counsel's investigation revealed that she has absolutely no first hand knowledge of any relevant events and that her leads were dead-ends. (Bua Report 106-113.) A review of the files maintained by House investigators indicates that they too spent a considerable amount of time speaking to individuals identified by Ms. Battistoni without uncovering any credible evidence that corroborates the conspiracy allegations. The information provided by INSLAW's other sources also appears to lack credibility or is impossible to corroborate.

Department of Justice in 1988 to implement PROMIS and to get rid of their then existing case tracking software.

Despite the great importance placed on these allegations by INSLAW, there is simply no evidence that the FBI ever installed or used PROMIS or that FOIMS is some sort of derivative of PROMIS. (See Bua Report 141-146.) The FBI has always maintained that it never used PROMIS and that the FOIMS system was developed entirely in-house at the FBI. As the House Committee Report makes clear, Mr. Miller has no first-hand knowledge of the use of PROMIS by the FBI but has merely been repeating rumors that FOIMS contains PROMIS software stolen from INSLAW. (House Report 60.) Further, Mr. Otto denied that he ever said that FOIMS is PROMIS. (Bua Report 143.) The unnamed source who allegedly heard Mr. Otto make the admission never came forward during the Special Counsel's investigation or during our investigation despite our repeated requests to the Hamiltons and INSLAW's counsel to encourage this and other alleged sources to cooperate. Finally, the Special Counsel retained Professor Dorothy Denning, Chair of the Computer Science Department at Georgetown University, to compare FOIMS and PROMIS. After reviewing the functionality of the programs, Professor Denning concluded that PROMIS, which is written in the COBOL computer language, is so different from FOIMS, which is written in the NATURAL/ADABASE language, that one could not have served as a platform for the development of the

other.[16] She also concluded that it was not necessary to compare the code of the two programs. (Bua Report 145-146.)

The Special Counsel concluded that the FBI's FOIMS software is not PROMIS or any derivative of PROMIS. The House Committee also failed to uncover any evidence supporting INSLAW's allegations though it recommended further investigation:

> While there is no specific evidence that PROMIS is being used by the FBI, the matter could be resolved quickly if an independent agency or expert was commissioned to conduct a code comparison of the PROMIS and FOIMS system.

(House Report 61.)

INSLAW is extremely critical of the Special Counsel's analysis. (INSLAW Rebuttal 31-34.) INSLAW's principal criticism is the failure of Professor Denning actually to compare the code of the FOIMS program to the code of the PROMIS program.[17] It

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[16] The original version of FOIMS was written in COBOL. However, according to Gordon Zacrep who has been involved in the development of FOIMS since its earliest days in 1977, FOIMS was rewritten in the NATURAL language beginning in 1983. Mr. Zacrep believes the first installation of the NATURAL version of FOIMS was in 1985. He said the system was converted to the NATURAL language because of the greater power of that language as compared to COBOL.

[17] INSLAW also points to "possible dissembling" by the FBI as evidence of some type of cover-up. For example, INSLAW quotes John Maguire, the founder of the company that markets the NATURAL programming language, for the proposition that the description of the FOIMS system as containing 570,000 lines of code was "wrong by an order of magnitude." (INSLAW Rebuttal 33.) However, our discussion with Mr. Maguire revealed that his statement had been badly misrepresented by INSLAW. He did say that he had never heard of a single "program" with over 500,000 lines of code. He told us that programmers typically would create large complicated software systems by combining a large number of smaller discrete "programs." This allows for greater ease in debugging and otherwise managing the system. When we described the general contours of the FOIMS system (i.e. the number of programs and the number of lines of code), Mr. Maguire stated that such an

should be noted, however, that INSLAW does not identify any additional support for these allegations in its rebuttal papers.

b. Our Investigation Confirmed that There Is No Relationship between FOIMS and PROMIS.

Despite the fact that there is absolutely no support for INSLAW's claims (other than the statements allegedly made by the anonymous source), we made a considerable effort to investigate INSLAW's allegations about the connection between FOIMS and PROMIS because of the importance placed on these allegations by INSLAW in its rebuttal papers and in correspondence with us. Our investigation confirmed that FOIMS is not in any way related to PROMIS and that there is no evidence that PROMIS has ever been used by the FBI.

Our investigation proceeded on two tracks. First, we spoke to several FBI officials with varying degrees of involvement in the development and operation of the FOIMS system over the years. We also reviewed documents made available to us by the FBI regarding the early development of FOIMS as well as annual FOIMS System Plans. It appears that the concept for what eventually became FOIMS originated in 1977. At that time, the FBI committed itself to developing a system that would allow individual FBI field offices to coordinate their many tasks. (Thus, the name: Field Office Information Management System.) Coding on the prototype program -- which would be installed in the Richmond, Virginia field office -- began immediately in the COBOL computer

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arrangement sounded reasonable to him.

language. In 1979, the Richmond prototype was installed in the New York City office to see how it would run in a large office. Shortly thereafter, the FBI decided to change the hardware they were using to run FOIMS from DEC minicomputers to IBM mainframes.

In 1983, FBI programmers began to rewrite the entire program in the more powerful NATURAL language. The first NATURAL FOIMS program was installed in 1985, and the NATURAL version slowly replaced the COBOL version around the country. The COBOL version of FOIMS was used in the Richmond and New York City offices until the late 1980s.

All of the individuals we spoke with and documents we reviewed are essentially consistent with the above summary. We did not uncover any evidence inconsistent with the basic premise that FOIMS was developed entirely in-house by the FBI.

The second track of our investigation focused, because of the importance placed on a code comparison by INSLAW and the House Judiciary Committee, on the retention of an expert to compare the code of the FOIMS and PROMIS programs. We retained Professor Randall Davis of the Massachusetts Institute of Technology for that purpose. Professor Davis is a professor in the Electrical Engineering and Computer Science Department at MIT and is the Associate Director of the Artificial Intelligence Laboratory. He is highly regarded in his field. In a letter dated January 26, 1994, INSLAW's counsel concurred with this assessment:

> Your decision to engage the services of Dr. Randall Davis of MIT as an expert witness to assist in this

comparison is appreciated. We are aware that Dr. Davis has served as an expert witness in computer software infringement cases in the federal courts, and we do not question his technical qualifications.

We attempted to seek input from INSLAW and its counsel prior to Professor Davis' code comparison in order to enhance the possibility that INSLAW would find his conclusions acceptable. Accordingly, we invited INSLAW's principals and INSLAW's counsel to meet with Professor Davis several weeks before the scheduled code comparison. It was hoped that Professor Davis would be able to ask questions of those individuals about the structure of the PROMIS code and the nature of INSLAW's claims as they relate to the FOIMS system. We also invited INSLAW to have a representative observe Professor Davis as he performed his code comparison. INSLAW refused both invitations despite repeated statements by INSLAW's principals and counsel that they wanted to participate in that process.[18] Among the reasons INSLAW stated for its refusal to participate in these efforts were our refusals to comply with INSLAW's requests for detailed records regarding the development and functionality of FOIMS and for direct access to the FOIMS code. We were unable to comply with these requests based on the FBI's determination that the release of such information would compromise the system's security. We do not think the FBI's position is unreasonable.

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[18] According to the Special Counsel's report, Mr. Hamilton also refused to participate in Professor Denning's comparison of FOIMS and PROMIS. (Bua Report 144-145.)

INSLAW did, however, make some suggestions about what versions of the FOIMS and PROMIS systems should be compared. In a January 26, 1994 letter, INSLAW's counsel stated that it was important that "the FOIMS system that is being compared is written in the same COBOL programming language in which PROMIS is written." In a letter dated January 13, 1994 and forwarded to us along with the above-referenced correspondence, J.T. Westermeier, an expert retained by INSLAW, wrote:

> The comparison of the FOIMS and PROMIS software needs to be conducted properly. The proposed software comparison will be of very little probative value unless the comparison is made on the basis of the 1983-1984 version of FOIMS and PROMIS.

Professor Davis attempted to incorporate these suggestions into his analysis. Accordingly, he compared the code from the "Baltimore" version of PROMIS,[19] with a COBOL version of FOIMS. According to Louise Goldsworthy of the FBI's Information Resources Division, the COBOL FOIMS provided to Professor Davis was last used in either 1984 or 1985.[20]

After completing his comparison and analysis, Professor Davis summarized his findings in a letter:

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[19] The actual software which was used for the comparison is currently in use in the U.S. Attorney's Office in the Northern District of Texas. It was installed there in 1985. However, it is referred to as the "Baltimore" version as it is the same software originally installed in the District of Maryland in 1984.

[20] According to Ms. Goldsworthy, the FBI does not retain archival copies of every version of FOIMS. Because the COBOL version of the system was replaced by the NATURAL/ADABASE version during the 1980s, there are very few copies of the COBOL program still in existence.

As we discussed in your office on April 6, 1994, I have completed a thorough examination of the COBOL FOIMS code recovered from backup tape by the FBI programmers, I have compared it to the code for the "Baltimore" version of the Inslaw Promis system provided by the EOUSA, and I have examined the code for the current (Adabase [NATURAL]) version of FOIMS. I have also had ample opportunity to run both the Promis and the current FOIMS system in order to understand their capabilities, and have examined manuals for both systems.

I have reviewed a number of documents describing the background and circumstances of the case, including: the September 10, 1992, Investigative Report by the Judiciary Committee on the Inslaw Affair, Inslaw's Analysis and Rebuttal of the Bua Report, the 10 January 1993 letter and report from Dr. Dorothy Denning describing her findings, a current Promis manual, two Collections Procedure Manuals for Promis dating from 1984 (one for Southern CA, the other for Maryland), an article from Wired from 1993, a letter to you from Elliot L. Richardson, Esq., dated 26 January 1994, and the enclosure to that letter, a letter dated 13 January 1994 from J.T. Westermeier, Esq., to Mr. William Hamilton.

Based on all of this information, I am of the opinion that there is no support of any form for the allegation that either the COBOL FOIMS code or the Adabase FOIMS program were copied from or to any significant degree modeled after the Promis system. While there is some similarity in the tasks undertaken by both programs, there are only very minor functional similarities in the design of Promis and FOIMS, and the implementations of those functional similarities are entirely consistent with completely independent creation: Even where similarity in high level function appears, the actual code used to create the function in Promis and FOIMS is quite different.

Based on our investigation and the investigations of the House Judiciary Committee and the Special Counsel, we conclude there is no evidence that PROMIS has ever been used by the FBI or that FOIMS is or is based on PROMIS.[21]

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[21] INSLAW also alleges that the Drug Enforcement Agency was directed by the Attorney General in 1988 to install PROMIS. This allegation is based on statements allegedly made by Carl Jackson, a former DEA Deputy Assistant Administrator, that the Attorney General issued "non-negotiable" orders to the FBI and DEA to "chuck" their existing systems and replace them with PROMIS.

2. There Is No Credible Evidence that INSLAW's PROMIS Is in Use or Has Been in Use in Any Agency of the U.S. Government Other than the Department of Justice.

INSLAW also maintains that its PROMIS software has been used or is currently in use in a variety of U.S. government agencies outside the Department of Justice. Although the list of such agencies is constantly evolving, INSLAW's claims focus primarily on the Central Intelligence Agency, the National Security Agency and the U.S. Navy. We have carefully reviewed these allegations, interviewed individuals from each of these agencies and reviewed certain documents provided by the CIA and the Navy. We are unaware of any credible evidence that any of these organizations ever used INSLAW's PROMIS software system.

As with most of INSLAW's assertions, these claims are based almost completely on the alleged statements of anonymous sources who have refused to cooperate with our review of the Special Counsel's report.[22] However, each of these agencies has, in

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Philip Cammera, a current DEA Deputy Assistant Administrator for Information Systems, told the Special Counsel that the allegations were false and that the DEA had never used PROMIS. We attempted to interview Mr. Jackson who ultimately refused to speak to us. However, House Judiciary Committee records documenting their investigation indicate that House investigators were unable to substantiate any of Mr. Jackson's allegations through either minutes of the meetings in which the "non-negotiable" orders were allegedly discussed or through interviews with DEA computer technicians.

[22] For example, the sources for the claim that INSLAW's PROMIS is in use on U.S. nuclear submarines are "a trusted INSLAW source with close ties to the CIA," "another individual with ties to the CIA" and "a computer programmer on board a U.S. Navy nuclear submarine." INSLAW refused to identify any of these individuals. Unnamed sources also allegedly provided INSLAW with information relating to the CIA and NSA.

fact, acknowledged that they either use software systems or maintain databases that are identified by the "PROMIS" acronym. At the request of either INSLAW, individuals related to INSLAW or the House Judiciary Committee, each of these organizations has undertaken internal investigations to determine whether the "PROMIS" program or database in use within that organization is in any way related to INSLAW's PROMIS software. Each has determined that there is no connection.

The CIA uses a software system called Project Management Integrated System developed by Strategic Software Planning Corporation ("SSPC") of Cambridge, Massachusetts.[23] In response to congressional inquiries, the CIA undertook an extensive search to determine whether it had ever obtained INSLAW's PROMIS. As discussed in detail in the report of the House Judiciary Committee, it was subsequently determined that INSLAW's PROMIS had never been obtained or used by the CIA. (House Report 57-59.) We met with representatives of the CIA's General Counsel's Office and Office of Legislative Affairs who were involved in investigating the charges made by INSLAW. They detailed the breadth of the investigation undertaken by the CIA and confirmed the conclusion that INSLAW's PROMIS was never in use at the CIA. They also stated that their investigation uncovered the fact that SSPC's PROMIS system had been used at various times by two sections within the CIA. They also made their investigative

[23] SSPC's PROMIS is also used by certain Canadian government agencies. For a more detailed discussion about SSPC and its PROMIS software, see the discussion in the following section.

files available for our review. Those files were fully consistent with the CIA's findings and indicated that an extensive effort to search for the software had been undertaken.[24]

We also met with representatives of the National Security Agency. The NSA maintains a database known as Product Management Information Systems or "PROMIS" according to Carol Fay Boomer, branch chief for the office which maintains the database, and Nancy Starecky, who participated in the original development of the database. "Product" is a term used within the NSA to refer to intelligence reports. Accordingly, the NSA "PROMIS" database contains abstracts of intelligence reports generated by various parts of the NSA. Both Ms. Starecky and Ms. Boomer emphasized that the NSA "PROMIS" is not a software program, but rather is an

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[24] In INSLAW's Addendum, INSLAW argues that the CIA has made inconsistent and contradictory statements regarding the existence of INSLAW's PROMIS software at the CIA. (INSLAW Addendum 7.) In response to an inquiry from Chairman Brooks in late 1990, E. Norbett Garrett, the CIA's Director of Congressional Affairs, wrote:

> We have checked with Agency components that track data processing procurement or that would be likely users of PROMIS, and we have been unable to find any indication that the Agency ever obtained PROMIS software. If you have some more specific information regarding this matter, we would appreciate hearing from you.

Subsequently, the CIA conducted a more thorough search at Chairman Brooks' request. That search was fully documented in the materials provided to us by the CIA. In November 1991, CIA Deputy Director Richard Kerr informed Chairman Brooks that the more extensive search again revealed that INSLAW's PROMIS had never been obtained by the CIA although the CIA had used "PROMIS" software developed by Strategic Software Planning Corporation. We disagree with INSLAW that these statements are inconsistent or evidence of dissembling by the CIA.

application of the commercially available M204 database management system. According to Ms. Starecky, M204 is one of the earlier database systems. It basically allows the user to define data fields and other information to be contained in individual databases, such as the NSA PROMIS database. Ms. Starecky stated that she was involved in the original development of the NSA PROMIS database in the 1970s which was developed primarily to allow the accumulation of management information regarding the productivity of various NSA divisions.

Finally, the U.S. Navy has also acknowledged that it uses a database with the "PROMIS" acronym. According to a letter signed by the Navy's Inspector General, Vice Admiral D. M. Bennett, an internal Navy investigation revealed that the Naval Undersea Warfare Center Division had developed in-house a database referred to as the Program Management Information System or "PROMIS." The investigation also determined that the Navy did not use INSLAW's PROMIS software and that the Navy "PROMIS" database was in no way related to INSLAW's PROMIS. We reviewed internal Navy documents regarding that investigation which were all consistent with the findings stated by Vice Admiral Bennett. In addition, we spoke with several individuals associated with the Navy including a Supervisory Electronics Engineer employed in the Logistics Support Branch at the Naval Undersea Warfare Center, Newport Division. The Supervisory Electronics Engineer told us that he has been involved with the Navy's "PROMIS" database since it was developed in the early 1980s. He stated

that the database was designed and developed in-house under his direction. The word "program" in the database's name refers to the Fleet Modernization Program. The database is used to maintain an inventory of combat systems and other equipment aboard Navy submarines and, thus, to help plan for future changes in fleet configurations. According to the Supervisory Electronics Engineer, the database is not accessible from the submarines but only from certain land bases.[25]

It should be noted that we were concerned when we learned that all three of these agencies were using databases or software programs with the same "PROMIS" acronym. However, our investigation has failed to uncover any evidence that these programs were based on or in any other way derived from INSLAW's software. When one considers the frequency with which "MIS" -- "Management Information Systems" -- is used within the computer field, the fact the databases share the "PROMIS" acronym is less remarkable than it initially appears. In light of our findings and the lack of any support for INSLAW's allegations other than the shared acronym and the alleged statements of unknown sources,

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[25] INSLAW asserts that the database is maintained on U.S. as well as British submarines and not solely on land bases. These assertions are based on unnamed sources and a 1987 contract solicitation published in the Commerce Business Daily seeking technical and engineering services for, among many other things, the Navy's "PROMIS" database. Though the synopsis of the statement of work contained in the announcement does appear to be somewhat ambiguous, INSLAW has grossly mischaracterized the announcement in its Addendum. (INSLAW Addendum 6.) Furthermore, in light of the fact the announcement states that it is seeking services to support a "land based test facility," we do not think INSLAW's charge that the Navy has made contradictory statements with regard to this database withstands any scrutiny.

we conclude that there is no credible evidence that INSLAW's PROMIS software has been obtained by the CIA, the NSA or the U.S. Navy.

E. There Is No Credible Evidence that the Department of Justice or Individuals Involved with the Department of Justice Improperly Distributed PROMIS Software to Foreign Governments or Entities.

INSLAW alleges that Department of Justice officials, working with Dr. Brian and Robert Maxwell, were involved in the international distribution of Enhanced PROMIS. According to INSLAW:

> The accounts are generally consistent about the motivations for the sales: (1) the personal financial gain of Earl Brian and colleagues; (2) the generation of extra funds for financing U.S. covert intelligence operations that the U.S. Congress has declined to finance, such as the mid-1980's covert assistance to the Contras in Nicaragua; and (3) an initiative to penetrate the secret files of foreign intelligence and law enforcement agencies by inducing them to acquire and implement the PROMIS database management software and the necessary computer hardware, after the software and hardware have been secretly modified to permit electronic eavesdropping by the U.S. National Security Agency.

(INSLAW Rebuttal 36.) INSLAW maintains the software was sold to government agencies in Israel, Canada, Jordan, Egypt, Singapore, South Africa, eastern European countries, Central American countries and elsewhere.[26]

[26] We determined that it was unnecessary to investigate most of these allegations as they are based primarily on uncorroborated statements usually attributed to unnamed sources. In addition to foreign governments, INSLAW also asserts that PROMIS was distributed to certain international organizations, including the World Bank and the International Monetary Fund. (INSLAW Addendum 17-18.) The basis for these claims are also the alleged statements of unnamed government officials. (Reporter

The Special Counsel concluded after a preliminary investigation that additional investigation of these claims was not warranted and that it "would be an irresponsible use of the taxpayers' money to initiate this type of international fishing expedition where there is so little reason to believe that we would find evidence of a crime or other wrongdoing by the government." (Bua Report 152.) However, although it failed to uncover any direct evidence of the international distribution of PROMIS other than the testimony of Mr. Ben-Menashe and others discussed above, the House Judiciary Committee concluded that "questions remain" as to whether such distributions took place. (House Report 111.)

We have carefully reviewed INSLAW's allegations and the evidence which INSLAW claims supports them, the files of the House investigation and all other available documentation. Based on that review, we find absolutely no credible evidence that Enhanced PROMIS was distributed internationally by the Department of Justice or others associated with the Department. INSLAW's allegations are based on two basic sources: (1) the testimony of Mr. Ben-Menashe, Mr. Riconosciuto and others who, as discussed in

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Anthony Kimery also claims to have anonymous sources that confirm the World Bank uses PROMIS.) Mr. Ibrahim Shihata, Vice President and General Counsel of the World Bank, informed us that he conducted two investigations at the Bank after being informed by INSLAW's counsel of INSLAW's allegations. Both Mr. Shihata and Mr. Everardo Wessel of the Bank's Information Center informed us that they found no evidence that the Bank was using or had ever used any version of the PROMIS program.

detail above, are totally lacking in credibility,[27] and (2) the unsubstantiated conjectures and musings of INSLAW and its principals. As a result, we do not intend to recount all of the various charges made by INSLAW in this report.

However, there are three areas upon which INSLAW has focused its attention that we will address: (1) the alleged distribution of Enhanced PROMIS to Israel; (2) the alleged distribution of Enhanced PROMIS to Canada; and (3) the alleged role of the late Robert Maxwell in those efforts. Our review of those allegations leads us to conclude that there is no credible evidence supporting those claims.

1. The Alleged Distribution of Enhanced PROMIS to Israel.

INSLAW maintains that Enhanced PROMIS was provided to Israel in 1983 and that Israel later became heavily involved with U.S. intelligence agencies in the further international distribution of the software. The root of this allegation lies in the undisputed fact that the Department of Justice did, in fact, provide some version of the software to an Israeli government representative in May 1983. Justice Department officials have steadfastly maintained that the software provided to Israel was the public domain version of PROMIS (thus making it perfectly

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[27] Mr. Ben-Menashe is, according to INSLAW, the primary source for these allegations.

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

proper for the U.S. government to provide such software), and documents prepared contemporaneously with the transfer to Israel reflect that fact. Nevertheless, the House Report suggests that this transfer was a cause of concern for the Committee:

> Department of Justice documents show that a "public domain" version of the PROMIS software was sent to domestic and international entities including Israel. Given the Department's position regarding its ownership of all versions of PROMIS, questions remain whether INSLAW's Enhanced PROMIS was distributed by Department officials to numerous sources outside the Department, including foreign governments.

(House Report 111.)

Our review of the prior investigations and the results of our own investigation revealed no credible evidence that the software provided to Israel in 1983 was Enhanced PROMIS and, in fact, verified that it was the public domain version of the software that was transferred. Furthermore, there is no other credible evidence of which we are aware that indicates that Enhanced PROMIS was ever provided to Israel.

There is no question that some version of PROMIS was provided to an Israeli representative in May 1983. On May 12, 1983, Jack Rugh, a Department of Justice employee involved in the administration of the PROMIS contract, forwarded a magnetic tape and supporting documentation to Madison Brewer for transmittal to Dr. Joseph Ben Orr of Israel with a memorandum providing the following:

> Enclosed are the PROMIS materials that you asked me to produce for Dr. Ben Orr of the Government of Israel. These materials consist of the LEAA DEC PDP 11/70 [public domain] version of PROMIS on magnetic tape along with the printed specifications of that tape, as well as two printed volumes

of PROMIS documentation for the LEAA version of the system.

We spoke with Dr. Ben Orr, who lives in Israel, several times by telephone. In 1983, Dr. Ben Orr was the Senior Assistant State Attorney for the Israeli Justice Ministry. He spent part of 1982 and 1983 working in the Justice Department's Office of Legal Policy as part of a new and short-lived exchange program between the U.S. Justice Department and the Israeli Justice Ministry.[28] He told us that he essentially acted as a consultant to the Department on several issues. He retired in 1989 as District Attorney for the City of Jerusalem.

Dr. Ben Orr stated that while he was at the Department of Justice he learned that the Department had decided to computerize the U.S. Attorneys' Offices. He asked to be allowed to watch the process of automating those offices as he knew that Israel was considering automating certain functions in its prosecutors' offices. As part of that effort, he travelled to several locations around the country to observe both the installation and utilization of PROMIS.

Dr. Ben Orr also stated that he set up a meeting with Mr. Hamilton at INSLAW's offices. During that meeting, Mr. Hamilton provided Dr. Ben Orr with some papers that illustrated the data

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[28] INSLAW made a Freedom of Information Act request in March 1993 for Justice Department documents relating to Dr. Ben Orr and another Israeli participant in the exchange program. The search uncovered no responsive files. We asked the Office of Information and Privacy to expand their search beyond that statutorily required in order to determine for certain whether any responsive documents existed. They still were unable to locate any documents.

compiling potential of the PROMIS software. Dr. Ben Orr said he forwarded those papers to the Israeli Justice Ministry for their review. Dr. Ben Orr said that this was the only meeting that he ever had with Mr. Hamilton and that he was the only representative from the Department of Justice or the Israeli government at the meeting. He noted that Mr. Hamilton did not demonstrate the software during the meeting.[29]

Dr. Ben Orr subsequently inquired of the Department's "computer people" whether there was any way he could get a copy of the PROMIS software for possible use in Israel. After some negotiation, the Department gave him a reel of tape with the software on it and two large files of reading material. Dr. Ben Orr said that he was assured by Department personnel that the Department owned the software that was being provided to him. He could not remember the names of the "computer people" with whom he dealt.

Dr. Ben Orr stated that when he returned to Israel he brought the software to the Justice Ministry. He said that the Ministry decided not to use the PROMIS software for two reasons: (1) the computer then in place at the Ministry was too small to use the software; and (2) the Israeli government decided that

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[29] INSLAW maintains that Rafi Eitan, an Israeli intelligence officer, actually attended the meeting with Mr. Hamilton using "Dr. Ben Orr" as an alias. Dr. Ben Orr denied this was true. He stated that he attended the meeting with Mr. Hamilton. Furthermore, he stated that he knew of Mr. Eitan through the media but had never met him personally. Finally, Dr. Ben Orr described this and other allegations made by Mr. Hamilton as "sheer lies and imagination."

they wanted to install a program developed by an Israeli company rather than a foreign firm and one that was tailored specifically to the needs of the Ministry. The entire project was put out to bid. Dr. Ben Orr stated that the Israeli government never did and does not now use any version of PROMIS.

During our interview, Dr. Ben Orr stated that he still had the magnetic tape that was provided to him by the Department of Justice in 1983. After extensive negotiations, Dr. Ben Orr agreed to deliver the tape to the security officer at the American Consulate in Jerusalem. The tape was subsequently delivered to our offices.

With the aid of Dr. Randall Davis, we reviewed the contents of the tape in order to determine whether the tape contained the public domain version of PROMIS or Enhanced Promis. In particular, we looked for evidence that the software on the tape included the three major enhancements identified by INSLAW as the constituting the difference between public domain PROMIS and Enhanced PROMIS: the Data Base Adjustment subsystem, the Batch Update subsystem and the 32-bit Architecture VAX version of PROMIS. (See In re Inslaw, 83 B.R. at 98-100, for a detailed description of the functions of these enhancements.) We also reviewed the code contained on the tape to determine the dates the various programs were developed.

Based on that review, there was no indication that the software on the tape provided by Dr. Ben Orr included any of the primary enhancements that INSLAW maintains creates Enhanced

PROMIS. Perhaps most telling, the indicated source computer and object computer for each program on the tape was the "PDP 11" computer. This is consistent with the software being the public domain version. According to INSLAW, one of the major improvements in Enhanced PROMIS was the redesign of the software to be used on 32-bit architecture VAX minicomputers. None of the code on the tape in question indicated that it was for a VAX computer. Based upon the analysis of the code, Dr. Davis concluded that the tape almost certainly contained the public domain version of the software.[30]

Nevertheless, INSLAW maintains that the software delivered to Israel in 1983 was Enhanced PROMIS and that Israeli intelligence officer Rafi Eitan, using the alias of Dr. Joseph Ben Orr, was the individual who met with Mr. Hamilton. INSLAW bases these claims on the following: the testimony of Ari Ben-Menashe, the fact that the tape was delivered in May 1983 shortly after Modification 12 was ratified, and the fact that the description provided to Mr. Hamilton by an Israeli reporter of Dr. Ben Orr does not, according to Mr. Hamilton, match the description of the individual he met with in 1983. (See INSLAW Rebuttal 38-43; INSLAW Addendum 9-12.) As discussed above, we have already concluded that the testimony of Mr. Ben-Menashe

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[30] Based on the Bankruptcy Court's opinion, it is a little difficult to understand how any program delivered to Israel in May 1983 could include the three primary enhancements which INSLAW claims are proprietary to INSLAW. According to Finding of Fact 28, the Data Base Adjustment enhancements were not even delivered to the Department of Justice until 1985. In re Inslaw, 83 B.R. at 98.

lacks credibility. Second, we do not think the fact that the software was delivered after the implementation of Modification 12 necessarily leads to the conclusion that it was Enhanced PROMIS rather than public domain PROMIS. In fact, our review of the code on the tape indicates that the tape contains only the public domain version of the software. Finally, we question the credibility of the identification by Mr. Hamilton and other INSLAW employees from "a police-style photographic lineup" of Mr. Eitan as the individual with whom he met in 1983. (INSLAW Rebuttal 40-41, INSLAW Addendum 10-11.) In light of the fact that all the other evidence indicates that Enhanced PROMIS was not delivered to Israel, the alleged identification by Mr. Hamilton of Mr. Eitan does not, in our opinion, constitute significant credible evidence that either Mr. Eitan attended the 1983 meeting as "Dr. Ben Orr" or that the Department of Justice distributed Enhanced PROMIS to Israel.[31]

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[31] As further evidence of Israel's alleged involvement in the distribution of PROMIS, INSLAW points to a passage in Mr. Ben-Menashe's book in which he claims to have seen a cable directing that $600,000 from a CIA-Israeli slush fund be transferred to Earl Brian and then to the Washington, D.C. law firm of Dickstein, Shapiro & Morin ("DSM"). (Profits of War 141.) The money was allegedly used to fund the severance package of INSLAW's counsel, Leigh Ratiner, from the firm. Mr. Ratiner allegedly had been too aggressive in challenging the Department of Justice. According to INSLAW, "In a meeting at the Justice Department on December 16, 1993, INSLAW presented a sensitive document, authored by a self-evidently credible person, offering, under appropriate circumstances, to make available evidence corroborative of significant elements of Ben-Menashe's published claims." (INSLAW Addendum 4.) The source of this corroborative evidence was Reynaldo Liboro, the former office manager at DSM. Mr. Liboro is currently serving a five-year federal prison sentence at the Federal Correctional Institution in Butner, North Carolina for bank fraud and theft. Mr. Liboro pleaded guilty in

2. The Alleged Distribution of Enhanced PROMIS to Canada.

INSLAW is critical of the Special Counsel's Report due to the Special Counsel's alleged failure to adequately investigate allegations that INSLAW's PROMIS is in use in several agencies of the Canadian government. INSLAW is particularly critical of the Special Counsel's decision not to interview former Canadian stockbroker John Belton. As discussed in Section IV(C) above, we interviewed Mr. Belton and found his information was almost completely based on statements by sources who he insisted on keeping anonymous.

Nevertheless, the decision by the House Judiciary Committee granting us access to the records of its investigation allowed us to carefully review the statements of those individuals interviewed by Committee investigators about the alleged Canadian connection. Although the House Judiciary Committee concluded that it had "been effectively thwarted in its attempts to support or reject the contention that INSLAW software was transferred to the Canadian Government" (House Report 57), we found the transcripts of the relevant interviews to be most informative.

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1990 to defrauding DSM of approximately $1.3 million in a checking scam. According to the AUSA who handled the case, attorneys at DSM were aggressive in pursuing Mr. Liboro after the fraud was uncovered and Mr. Liboro had fled to the Philippines. During an interview with us, Mr. Liboro claimed to have first-hand knowledge of certain events consistent with the account provided by Mr. Ben-Menashe in his book. He also informed us that his former assistant at DSM might be able to confirm his story. We interviewed his former assistant who was unable to confirm any significant aspect of his story.

House investigators took statements from at least six current or former employees of the Canadian government, all but two of which were given under oath. All those statements were consistent.[32] In essence, these officials described the process by which two Canadian agencies, Public Works Canada and the Canadian International Development Agency, analyzed and purchased a project management software package from Strategic Software Planning Corporation, a Massachusetts based company, in the mid-1980s. The program was called Project Management Integrated System or "PROMIS". There is no evidence linking this software to INSLAW's PROMIS other than the shared acronym.

In 1991, the Canadian Workplace Automation Research Centre conducted a study to determine the then-current inventories of software packages, system development activities and hardware within the Canadian government. During that study, an error was made by a college student working on the inventory when he identified the vendor of the "PROMIS" software in use at the Canadian agencies as INSLAW rather than Strategic Software Planning Corporation. The student had been told that the software was called "PROMIS" and was tasked the responsibility of determining the vendor. He mistakenly concluded the vendor was INSLAW after a brief search of public records. A subsequent telephone call to INSLAW by that student seeking additional

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[32] The witnesses included two employees of the Canadian International Development Agency; one employee of Public Works Canada; a former contractor of the Canadian Workplace Automation Research Centre; and one current employee and one former intern of the Canadian Workplace Automation Research Centre.

information about PROMIS as part of the study led to the allegations that INSLAW's PROMIS had been distributed to Canada. However, there is nothing in the testimony of any of these witnesses which supports such an hypothesis.

Furthermore, Committee investigators also took a sworn statement from Massimo Grimaldi, president of Strategic Software Planning Corporation. As reflected in the House Judiciary Committee report, Mr. Grimaldi confirmed in that statement that his company had sold copies of its "PROMIS" software to Public Works Canada and CIDA. According to Mr. Grimaldi, the software was originally designed to perform scheduling, resource management and cost control functions on construction projects although its applications have become more generalized over the years.[33]

In conclusion, all of the available evidence indicates that the "PROMIS" program in use by certain Canadian agencies is not a version of INSLAW's PROMIS but rather a totally different program developed by a different company.

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[33] Two other aspects of Mr. Grimaldi's statement are noteworthy. First, Mr. Grimaldi stated that his company tried to file for a Canadian trademark for "PROMIS" but discovered that there was another company (not INSLAW) that was already marketing a manufacturing system called "PROMIS." Accordingly, his company marketed its product as "SSP's PROMIS" or "PROMIS by Strategic Software Planning Corporation" in Canada. Second, the transcript reflects that Mr. Grimaldi provided a copy of SSPC's PROMIS to House Committee investigators during the interview. During our review of Committee files, we were unable to locate the copy of the software or any documents describing any analysis of that software.

3. The Alleged Involvement of Robert Maxwell in the International Distribution of PROMIS.

In the Addendum submitted to the Attorney General by INSLAW in February 1994, INSLAW maintains that the late British publisher Robert Maxwell played a critical role in the alleged international distribution of PROMIS by Israel and the United States. (INSLAW Addendum 12-14.) According to INSLAW, Robert Maxwell was used as a "cutout" by Israeli intelligence. (Id. 4.) Furthermore, INSLAW maintains that "Maxwell's role as a cutout for a foreign nation's sale of computer software has been implicitly acknowledged by the actions of the FBI." (Id.) There is simply no evidence -- again, other than the statements by Mr. Ben-Menashe -- of any involvement of Mr. Maxwell in the sale or distribution of PROMIS.

The reference in INSLAW's Addendum to the implicit acknowledgement by the FBI of Mr. Maxwell's role in the dissemination of PROMIS and as a "cutout" for Israeli intelligence agencies apparently relates to the production of documents by the FBI pursuant to a FOIA request made by INSLAW in 1993. On January 10, 1994, the FBI produced 20 pages of FBI documents in response to INSLAW's request for all documents relating to the "involvement of the late Robert Maxwell in the dissemination, marketing or sale of computer software systems, including but not limited to the PROMIS computer software product, between 1983 and 1992." (Emphasis added.) The FBI redacted portions of those documents prior to their distribution to INSLAW. Based on INSLAW's analysis of certain unredacted

codes on those documents, INSLAW concluded that the Albuquerque, New Mexico office of the FBI conducted a "foreign counterintelligence investigation" of Mr. Maxwell and one of his corporations. (Id. 13.)

From this conclusion, INSLAW made a remarkable leap upon which it has based its Maxwell-related allegations:

> Why would the FBI conduct a foreign counterintelligence investigation of Robert Maxwell for selling computer software in New Mexico in 1984? It is reasonable to infer that the FBI office in Albuquerque opened a foreign counterintelligence investigation of Maxwell and Pergamon International because Maxwell sold PROMIS to one or more U.S. defense installations in New Mexico and because the FBI may have been concerned that a foreign nation [i.e. Israel] intended to use the PROMIS software as an electronic Trojan horse for penetrating the computerized database(s) of the targeted defense installation(s).

Id.

We disagree that such an inference is reasonable. There is no evidence supporting this flight of fancy by INSLAW. While we do not intend to comment on the accuracy of INSLAW's analysis of certain codes on the documents provided to INSLAW, we do note that none of the documents in question even mentioned INSLAW or PROMIS. The FBI made unredacted versions of the documents available to us for our review. None of the documents referred to INSLAW or PROMIS or to any other subject even remotely related to INSLAW's allegations. In short, there is nothing of which we are aware that links Mr. Maxwell to PROMIS.

F. There Is No Evidence that the Department of Justice's Office of Special Investigations Is a "Front" for the Department's Own Covert Intelligence Agency.

In the Addendum to INSLAW's Rebuttal submitted by INSLAW on February 14, 1994, INSLAW for the first time alleged that the Department's Office of Special Investigations ("OSI") was at the center of the various conspiracies which INSLAW claims exist. These remarkable -- and wholly unsubstantiated -- charges are summarized in the introduction to the Addendum:

> One of the organizational units that reports to Mark Richard is the Office of Special Investigations (OSI). OSI's publicly-declared mission is to locate and deport Nazi war criminals. The Nazi war criminal program is, however, a front for the Justice Department's own covert intelligence service, according to disclosures recently made to INSLAW by several senior Justice Department career officials.
>
> One undeclared mission of this covert intelligence service has been the illegal dissemination of the proprietary version of PROMIS, according to information from reliable sources with ties to the U.S. intelligence community. INSLAW has, moreover, obtained a copy of a 27-page Justice Department computer printout, labelled "Criminal Division Vendor List." That list is actually a list of the commercial organizations and individuals who serve as "cutouts" for this secret Justice Department intelligence agency, according to intelligence community informants and a preliminary analysis of the computerized list...
>
> According to written statements of which INSLAW has obtained copies, another undeclared mission of the Justice Department's covert agents was to insure that investigative journalist Danny Casolaro remained silent about the role of the Justice Department in the INSLAW scandal by murdering him in West Virginia in August 1991.

(INSLAW Addendum 6.) These allegations were repeated in an INSLAW press release of approximately the same date.

These charges are fantasy. There is no corroborative evidence that is even marginally credible. Rather, INSLAW finds

it sufficient simply to rely on unnamed "reliable sources" and anonymous "senior Justice Department career officials." Not surprisingly, none of those individuals has come forward to be interviewed. Considering the outrageous nature of these charges and the absolute lack of evidence to support them, it is difficult not to question the motivations of INSLAW in asserting them.

Nevertheless, we attempted to investigate these claims. Accordingly, we interviewed Deputy Assistant Attorney General Mark Richard, the individual INSLAW suggests oversees the covert operations of OSI. Mr. Richard stated that INSLAW's charges are ridiculous. He said that OSI is only involved in its stated mission of locating and deporting Nazi war criminals and in related projects such as the analysis of Kurt Waldheim's role during World War II. He did, however, note that OSI does work with various intelligence agencies in fulfilling its mandate of locating war criminals. He categorically denied any involvement by OSI in covert operations, the dissemination of PROMIS or the death of Mr. Casolaro. He said that he considers these and other allegations made by INSLAW to be slanderous.

We should also note that during our tenure at the Department we have not become aware of OSI engaging in any of the types of activities alleged by INSLAW.

With regard to the vendor list that INSLAW alleges lists those companies that serve as "cutouts" for the Department's covert intelligence activities, INSLAW relies for this assertion

on two "usually reliable informants." (INSLAW Addendum 23.) We showed the list to Robert Bratt, Executive Officer for the Justice Department's Criminal Division. Mr. Bratt said the list is exactly what it purports to be: a list of vendors used by the Criminal Division. According to Mr. Bratt, the Criminal Division has been using an automated system called PROCURE for requesting goods and services from the Justice Department's administrative offices since the beginning of the 1993 fiscal year. The main suppliers to the Division are maintained on a master list and given codes so that orders may be placed more quickly simply by inputting the vendor code. When the code is entered, the PROCURE system automatically pulls up the address, telephone number, contact person and other relevant data. Mr. Bratt stated that the list provided to us by INSLAW was simply a copy of the master list of Criminal Division vendors.

We asked Mr. Bratt to print a current version of the vendor list. He did so, and it was in the same format as the list provided to us by INSLAW. Furthermore, it appears that, although the list generated by Mr. Bratt was longer, all the vendors included in the list provided to us by INSLAW were also on Mr. Bratt's list.

We have no reason to believe that the vendor list is anything other than what it purports to be and what Mr. Bratt identified it as. Conversely, according to INSLAW's theory, many of the largest companies in the world (including AT&T, Canon, IBM and Xerox) are fronts for OSI's covert operations. There is

nothing to suggest this is true.

The "support" for INSLAW's allegation that OSI was involved in the death of Mr. Casolaro is equally absurd. INSLAW relies on a series of typed questions and answers that were allegedly prepared by an unnamed senior CIA official and faxed to "an individual who has stated under oath that he has served as an operative on national security issues for various agencies of the U.S. Government" who transmitted the questions and answers to a San Francisco journalist. (INSLAW Addendum 24-25.) Those questions and answers attribute to the unnamed CIA source the assertion that Mr. Casolaro was "murdered by agents of the Justice Department." (Id. at 25.) No matter how these charges may be presented, they are in essence allegations of an unnamed source without any corroborating evidence. As discussed in Section V below, we found no credible evidence that Mr. Casolaro's death was anything other than a suicide.

In conclusion, these newly articulated charges are totally devoid of substantiation and appear to have been either recently created by INSLAW or repeated by INSLAW without any regard to the truth.

## G. There Is No Credible Evidence that INSLAW-Related Documents Were Improperly Destroyed by the Justice Department Command Center.

INSLAW alleges that Garnett Taylor, a former Department of Justice employee, and others associated with the Department of Justice Command Center destroyed "classified national

security/intelligence documents" related to INSLAW. INSLAW insinuates that the alleged destruction took place in order to keep embarrassing documents from being revealed. The Special Counsel was unable to uncover any evidence that any such destruction took place. (Bua Report 109-113.) We too were unable to find any evidence that any documents relating to INSLAW were destroyed by Mr. Taylor or other Command Center personnel.

In its various papers, INSLAW has identified several sources as allegedly providing INSLAW with information linking Mr. Taylor to the destruction of INSLAW documents. In Exhibit B to the INSLAW Rebuttal, INSLAW asserts that two career DOJ employees -- who insist on anonymity -- have confided to INSLAW information related to the improper destruction of documents. The first, "Witness #7," allegedly claims to have witnessed admissions about the destruction of documents by Mr. Taylor. "Witness #11" allegedly saw Mr. Taylor and his supervisor, James Walker, remove classified documents from the Civil Division for destruction. In addition, Mr. Hamilton claimed in his 1989 affidavit that Ronald LeGrand's confidential source "believes that documents relating to Project Eagle were shredded inside DOJ."

None of these allegations have been corroborated.

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

Mr. Walker informed the Special Counsel that there were no INSLAW or PROMIS documents maintained in the DOJ Security Department and that to

his knowledge there were never any INSLAW documents in any of the safes he controlled or knew about.

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

In its Rebuttal, INSLAW argues that the testimonies of Messrs. Taylor and Walker are inconsistent and faults the Special Counsel for accepting the unsworn statement of Mr. Walker over the grand jury testimony of Mr. Taylor. This position is based on INSLAW's assumption (pursuant to FRCP 6(e), INSLAW was not provided access to grand jury testimony) that Mr. Taylor testified to the grand jury that "Walker had instructed Taylor to receive classified intelligence/national security documents relating to the INSLAW case from the files of a Civil Division attorney who had left DOJ, and then to destroy those documents." (INSLAW Rebuttal 46.)

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

In a November 19, 1993 letter, INSLAW's counsel stated the following:

> In this connection, you should be made aware of claims made directly to Mr. and Mrs. Hamilton by Mr. Garnett Taylor

based on first-hand knowledge Mr. Taylor acquired while employed in one of the Department's Sensitive Compartmented Information Facilities (SCIFs). Subsequent to his appearance before Judge Bua's federal grand jury in Chicago, Mr. Taylor told the Hamiltons that the one provable felony committed in the INSLAW affair is the destruction of documentary evidence by the Department regarding INSLAW and PROMIS. Mr. Taylor further told the Hamiltons that the lawyer who represented Mr. Taylor in the Bua investigation told Mr. Taylor that the Bua investigation was proceeding in such a way as to deliberately avoid the discovery of the truth.

We, of course, have no direct knowledge as to what Mr. Taylor told the Hamiltons

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

Furthermore, we interviewed Mr. Taylor about these alleged comments. Mr. Taylor admitted to speaking with the Hamiltons on several occasions Material Omitted pursuant to Rule 6(e) of Fed. R. Crim. Pro. but stated that he never told the Hamiltons that the "one provable felony committed in the INSLAW affair" involved the destruction of documents. Rather, he told us that he informed Mr. Hamilton in one of those conversations that there was nothing provable regarding the destruction of documents.

Mr. Taylor did, however, state that he told the Hamiltons that he believes there may have been a felony committed relating to the destruction of INSLAW documents. He said his belief is based on media reports and on his understanding of the conclusions reached by the House Judiciary Committee. Mr. Taylor stated that he has no first-hand knowledge that any INSLAW-related documents were destroyed by the Department's security staff or others. He also stated that he has no reason to believe

that Mr. Walker ever destroyed any documents related to INSLAW or to PROMIS.

Mr. Taylor also told us that his attorney, Susan Bogart, never said that the Special Counsel's investigation was proceeding in such a way as to deliberately avoid the discovery of the truth or anything to that effect. Mr. Taylor denied telling either of the Hamiltons that Ms. Bogart had made any such statements. However, he did tell the Hamiltons that he felt the Special Counsel's investigation was taking a long time and that he did not feel investigators asked him very penetrating questions.[34]

Further, Ronald LeGrand's confidential source also failed to support INSLAW's allegations. As set forth in more detail in Section IV(B) above, we interviewed LeGrand's Source in some detail. During that interview, LeGrand's Source stated that he had no information regarding the destruction of any documents and that he never indicated otherwise to Mr. LeGrand.

And finally, the anonymous sources that INSLAW and its principals claim have critical information concerning the destruction of documents never came forward to cooperate with our efforts. As discussed in Section IV(A) above, we attempted to

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[34] Material Omitted Pursuant to Rule 6(e) of Fed. R. Crim. Proc.

In addition, Mr. Taylor acknowledged to us that he is suing the Department of Justice through the Merit System Protection Board seeking reinstatement of his job. Mr. Taylor maintains that he was dismissed in retaliation for his decision to volunteer for service in the Desert Storm military operation.

provide adequate assurances to these individuals through INSLAW and its counsel. Nevertheless, neither these nor any of INSLAW's other anonymous sources agreed to be interviewed by us.

## H. There Is Insufficient Evidence To Support INSLAW's Allegation that Department of Justice Employees Conspired to Improperly Convert INSLAW's Bankruptcy Case.

Of all the allegations made by INSLAW, the allegations that Department of Justice employees improperly attempted to convert INSLAW's Chapter 11 reorganization proceeding to a Chapter 7 liquidation and that those employees subsequently committed perjury in order to cover-up their misdeeds are the most troubling. Unlike virtually all of INSLAW's other allegations, these allegations find some credible support in the testimony of some witnesses and in some, albeit ambiguous, contemporaneous notes. After exhaustively identifying and analyzing all of the relevant evidence (Bua Report 190-231), the Special Counsel concluded, "Although the matter is not free from doubt, we conclude that there is insufficient evidence to support a finding that DOJ planned or attempted to convert INSLAW's bankruptcy case or engaged in any cover-up to conceal the conduct alleged." (Id. 190.)

Based on our review of the Special Counsel's Report, INSLAW's Rebuttal and other analyses of these allegations, we concur with the Special Counsel. Although we are troubled by the recantation of testimony by two key witnesses, we believe that the weight of the evidence supports the conclusion that there was

no effort improperly to convert INSLAW's bankruptcy proceedings. Furthermore, we see no reason to overturn the decisions of the Office of Professional Responsibility and the Public Integrity Section on this matter.

The facts surrounding these allegations are cumbersome and, at times, confusing. The Special Counsel used 41 pages to address and analyze those facts and to describe the various investigations that have been undertaken as a result of these allegations. We do not intend to restate that which is already succinctly set forth in the Special Counsel's report, especially in light of the fact that the basic facts have not changed since 1987. We do note, however, that we believe the Special Counsel's analysis is well reasoned and is fully consistent with the underlying facts.

Furthermore, we wish to identify two factors that, in addition to the analysis set forth in the Special Counsel's report, were important to our conclusion.

(1) There is absolutely no evidence that any Justice Department official ever actually attempted to convert INSLAW's bankruptcy to a Chapter 7 liquidation during the time frame alleged by INSLAW.[35] It is important to note that the United States Trustee does not have the authority to convert a

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[35] A motion to convert INSLAW's bankruptcy proceeding to a Chapter 7 proceeding was filed on September 9, 1987, pursuant to a routine Internal Revenue Service request based on INSLAW's failure to pay federal taxes. See 11 U.S.C. § 1112. This was well after the alleged effort in 1985 to convert the proceeding which is the focus of INSLAW's allegations and after those allegations were litigated before the Bankruptcy Court.

bankruptcy proceeding; rather, he or she merely has the authority to petition the Bankruptcy Court to do so. However, it is undisputed that no such petition was ever made prior to 1987. Thus, if any effort to improperly convert INSLAW's bankruptcy was made, it proceeded only to the point that pressure to do so was brought to bear and fizzled before any step actually intended to effectuate that plan was taken.

This point is important for several reasons. First, even if the weight of the evidence supported INSLAW's allegation that Justice Department officials attempted to convert the bankruptcy proceeding (which it does not), it is clear that INSLAW was not in any way harmed by that effort. INSLAW did not even begin to allege that such an effort took place until after the Hamiltons had breakfast with Anthony Pasciuto in 1987, two years after the alleged conduct took place. There is no evidence, and none is alleged to exist by INSLAW, that INSLAW was hindered by these alleged efforts or that the bankruptcy proceedings before Judge Bason were prejudiced against INSLAW in any way as a result.

Second, the fact that no conversion motion was ever filed during that period seems to indicate, we think, either that no such efforts ever actually took place or that the system actually worked quite well on behalf of INSLAW. The process of filing a motion to convert a Chapter 11 proceeding to a Chapter 7 liquidation is a simple and routine matter. If a conspiracy existed involving high-level Department officials of the type described by INSLAW, it is difficult to believe that the

conspiracy would not be able to cause such a motion to be filed. The fact no motion was filed, therefore, seems to be more consistent with a scenario in which no such conspiracy existed.

Conversely, if there were improper efforts to convert the proceeding and those efforts failed, it seems to be an indication not that INSLAW's proceedings were unfairly prejudiced by activities undertaken by Department of Justice officials with improper motives, but that INSLAW was actually protected from such improper influences. There is no question that it would be inappropriate (and perhaps illegal) for a Department of Justice official to seek a bankruptcy conversion in order, on the relatively benign side, to further his or her own career (as the Senate Staff concluded Thomas Stanton, the Director of the Executive Office of U.S. Trustees, may have done) or, on the more fantastic side, to further a conspiracy to destroy a company and steal its most important asset. The fact that such efforts failed to result in even the filing of a motion indicates that, to the extent these pressures existed, the United States Trustee was able to insulate and protect the bankruptcy system, in general, and INSLAW, in particular, from them.[36]

(2) There is no <u>direct</u> evidence that anyone from the Department of Justice requested or pressured Mr. Stanton to

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[36] According to INSLAW, EOUST Director Stanton sought to reassign Harry Jones, an experienced bankruptcy attorney, from the U.S. Trustee's office in New York to the U.S. Trustee's office in Washington, D.C., in order to cause the conversion. Not only was no motion ever filed, Mr. Jones was never transferred to Washington. In fact, Mr. Jones testified that he was never even asked to move to Washington on detail.

convert the INSLAW proceeding. Everyone involved directly with the alleged efforts -- Mr. Stanton, Jack Rugh, former U.S. Trustee William White, Assistant U.S. Trustee Harry Jones -- deny that any such pressure was applied. There is no proof whatsoever that any senior Department of Justice official ever pressured Mr. Stanton.

Furthermore, the testimony of Judge Cornelius Blackshear that Mr. White had told him that Mr. Stanton had pressured him to convert INSLAW's bankruptcy was subsequently recanted by Judge Blackshear. Although the circumstances surrounding that recantation raise numerous questions, it is clear that, at the very least, Judge Blackshear's original testimony is called into considerable doubt. Furthermore, unlike the case with Anthony Pasciuto's change in testimony,[37] it is unclear what motive Judge Blackshear would have for changing his testimony. At the time he changed his testimony, he had already become a bankruptcy judge. Given his plausible explanation for the recantation, and the absence of any compelling evidence to the contrary, we believe that the benefit of the doubt must go in favor of Judge Blackshear.

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[37] Mr. Pasciuto testified before Judge Bason that he did not recall telling the Hamiltons that EOUST Director Thomas Stanton had pressured the regional U.S. Trustee to convert the INSLAW case as claimed by the Hamiltons. He further testified that he had no personal knowledge of any effort to convert the bankruptcy and, if he had claimed any to the Hamiltons, he did so in order to hurt Mr. Stanton. Following a recommendation by the Office of Professional Responsibility that he be fired, Mr. Pasciuto recanted his testimony and claimed that everything he had told the Hamiltons was true and that Mr. Stanton had, in fact, pressured the regional U.S. Trustee.

## I. There Is No Credible Evidence that the Department of Justice Obstructed the Reappointment of Bankruptcy Judge George Bason.

George Bason was appointed to serve as the United States bankruptcy judge in the District of Columbia on February 8, 1984 following the retirement of Judge Roger Whelan. His term expired on February 8, 1988. Although Judge Bason sought reappointment to a 14 year term, the Merit Selection Panel, chaired by U.S. District Court Judge Norma Holloway Johnson, identified another attorney as its top choice for the position on November 24, 1987. On December 15, 1987, the Judicial Council recommended the top three names on the Merit Selection Panel's list to the U.S. Court of Appeals for the District of Columbia Circuit. The Court of Appeals selected Martin S. Teel, a Justice Department attorney, for the position on December 21, 1987, thus foregoing the reappointment of Judge Bason.

Shortly thereafter, Judge Bason began to allege that the Justice Department improperly influenced the selection process and, ultimately, blocked his reappointment in retaliation for his September 1987 oral ruling in the INSLAW case. Judge Bason and INSLAW maintain that proof that the selection process was unfairly influenced by the Department can be found in the following facts, among others: Judge Johnson once shared an office with Deputy Assistant Attorney General Stuart Schiffer; Judge Bason's administrative skills and record were unfairly criticized; one of Mr. Hamilton's children allegedly overheard a Department attorney state in early 1987 that "We've got to get

rid of this judge"; and the Justice Department sought Judge Bason's recusal from the case in January 1988 (after Judge Bason had written to then Chief Judge Patricia Wald of the U.S. Court of Appeals for the D.C. Circuit suggesting the Department had improperly influenced the process). These allegations have been fueled by Mr. Hamilton's claim that a "senior U.S. government official" who demands anonymity told him that he knows of the involvement of certain officials in denying Judge Bason's reappointment.

Following an extensive review of the allegations made by Judge Bason and Mr. Hamilton regarding the selection process (see Bua Report 153-189), the Special Counsel concluded that "the great weight of the evidence clearly supports the conclusion that there was no attempt by DOJ to obstruct Judge Bason's reappointment." (Id. 188-189.) The Special Counsel also pointed out that two highly respected federal judges at the center of the selection process and the decision not to reappoint Judge Bason -- Judge Wald and Judge Johnson -- unequivocally deny that the Justice Department obstructed or attempted to obstruct the reappointment of Judge Bason. (Id. 188.)

The Senate staff reached a similar conclusion: "The Staff found no proof that the Department of Justice attempted to influence the selection process so as to deny Judge Bason reappointment." (Senate Staff Report 57.) The report of the House Judiciary Committee did not state any conclusion on this subject. However, the Committee did state that it "could not substantiate

Judge Bason's allegations." (House Report 103.)

We carefully reviewed the criticisms of the Special Counsel's Report contained in INSLAW's Rebuttal on the reappointment issue. (See INSLAW Rebuttal 72-80.) We found those comments to be rambling and incoherent. The criticisms are nothing more than innuendo and conjecture, often merely the repetition of suggestions of impropriety that were addressed and rejected in the Special Counsel's Report. They are not persuasive.

There is, however, one issue raised by INSLAW that warrants some comment. INSLAW notes that Judge Johnson apparently told Senate investigators that she "had no contacts with DOJ regarding Judge Bason" during the selection process and that she subsequently informed the Special Counsel that she recalled receiving a transcript of Judge Bason's oral ruling in the INSLAW proceeding from Judge Royce Lamberth, who at the time was the Chief of the Civil Division for the U.S. Attorney's Office for the District of Columbia. Judge Johnson initially failed to recall the contact with Judge Lamberth in discussions with the Special Counsel as well:

> Judge Johnson initially recalled to us that it was one of the district judges who recommended that she obtain a copy of the transcript of Judge Bason's oral ruling in Inslaw. Because information presented to the Panel was viewed as confidential, Judge Johnson initially declined to disclose the judge who directed her to the Inslaw ruling without first consulting that person. Upon contacting the judge who she believed provided the information, she discovered that she had been mistaken. It was not that judge who directed her to Bason's ruling; it was District Court Judge Royce Lambreth [sic].

(Bua Report 156-157.) Although it appears that at the time Judge Lamberth brought the September 28, 1987 INSLAW ruling to Judge Johnson's attention he was still employed at the U.S. Attorney's Office, he had, in fact, already been nominated to the federal bench and was sworn in shortly thereafter, on November 16, 1987. We do not believe that Judge Johnson's credibility is called into any doubt as suggested by INSLAW as a result of these events.

After carefully reviewing the records maintained by both the Special Counsel and the House Committee and INSLAW's comments, we concur with the opinion of the Special Counsel that there is no evidence of any effort by the Justice Department to improperly influence the bankruptcy judge selection process.

J. Conclusion

After spending considerable time and resources reviewing the allegations made by INSLAW and its principals concerning a far flung conspiracy by Department of Justice officials and others to steal their software in order to distribute it throughout the U.S. government and around the world, we are struck by one major observation: the lack of any credible evidence to support those charges. It has been over 12 years since the Department of Justice and INSLAW first entered into a contract for the installation of PROMIS in the various U.S. Attorneys' offices, and still we are unaware of any facts that would lead us to believe any significant part of INSLAW's various conspiracy theories.

INSLAW has relied on three principal sources of information (along with a significant amount of totally unfounded conjecture, speculation, and perhaps imagination) to fuel its fight against the United States government. First, it has repeatedly referred to the testimony of anonymous sources, all of whom are invariably described as "reliable," who refuse to cooperate with our investigation for fear of reprisal. Despite assurances from the Attorney General communicated to INSLAW's counsel, none of these alleged individuals came forward during our review. Nevertheless, to the extent we felt it was warranted, we attempted to verify the alleged claims of these anonymous sources. Those efforts revealed that virtually none of what these alleged sources claimed could be verified. As a result, we conclude that either these sources do not exist, they lack any first-hand knowledge of the facts to which they allegedly testified or INSLAW has inaccurately characterized the information which they possess.

Second, INSLAW relies on the testimony of a few patently untrustworthy individuals. The basis for INSLAW's conspiracy claims rests with the stories of Ari Ben-Menashe and Michael Riconosciuto. It is difficult to imagine a less credible pair. Two separate congressional investigations found Ben-Menashe to lack credibility.

Material Omitted Pursuant to
Rule 6(e) of Fed. R. Crim. Proc.

Mr. Riconosciuto is no more deserving of our trust. The federal judge who sentenced him to 30 years in prison on a drug conviction remarked on his inability to separate fact from fiction. These individuals are so lacking in credibility and their charges have received so little corroboration, it is difficult to believe that INSLAW's principals truly believe their tales.

And third, INSLAW has identified a very small number of additional individuals who have no direct evidence of any conspiracy but purportedly are privy to circumstantial evidence of the same. Though these individuals do not suffer from the same credibility problems of Mr. Riconosciuto and Mr. Ben-Menashe, it is remarkable that virtually every one of them has a clear and undeniable personal agenda. For example, Margaret Weincek has a suit pending against Dr. Earl Brian and his companies alleging wrongful discharge; John Belton, the former Canadian stockbroker, has spent much of the past decade suing his former employer and Dr. Brian, alleging constructive dismissal and conspiracy to commit stock fraud; and Reynaldo Liboro, the former office manager for INSLAW's bankruptcy counsel who claims that firm was involved in a conspiracy to drive INSLAW out of business, is currently serving a five-year sentence for embezzling funds from that very firm. Although we did not try to verify all of the claims made by these individuals, we were unable to verify those that we did investigate.

In contrast, INSLAW's charges have been categorically denied by everyone that was allegedly involved in the various conspiracies. We are mindful of the fact that we would expect conspirators to deny their involvement in an illegal conspiracy. However, we do not accept INSLAW's basic premise that the denial of involvement in a conspiracy following unsubstantiated charges that such a conspiracy exists is proof of both the conspiracy and that individual's involvement. After 12 years, it is time to put an end to the bizarre logic -- a sort of strange Orwellian version of Lewis Carroll reasoning -- that has given life to these charges for so long.

INSLAW has provided us with no credible direct evidence of a conspiracy of the type that they allege. Nor is there any significant documentary evidence of such a conspiracy. Finally, nearly all of the circumstantial evidence which INSLAW puts forward withers under scrutiny.

If, on the other hand, one were to accept <u>all</u> of INSLAW's conspiracy charges, then one would have to believe that all of the following individuals, along with many others, committed perjury in sworn statements, lied to federal or Congressional investigators or, in a few cases, were unwitting pawns in the perpetuation of the conspiracy:

Judge Patricia Wald of the United States Court of Appeals for the District of Columbia Circuit

District Judge Norma Holloway Johnson

District Judge D. Lowell Jensen

Vice Admiral D. M. Bennett, U.S. Navy Inspector General

Deputy Assistant Attorney General Mark Richard

Deputy Assistant Attorney General Janis Sposato

Deputy Assistant Attorney General John Keeney

Deputy Assistant Attorney General Stuart Schiffer

Deputy Assistant Director for the FBI's Technical Services Division Kier T. Boyd

Department of the Interior Administrative Law Judge James L. Byrnes

Former Acting FBI Director John Otto

Former CIA Deputy Director Richard Kerr

Former Deputy Assistant Attorney General James Knapp

Former Indio, California Police Chief Sam Cross

Former Jerusalem District Attorney Joseph Ben Orr

Professor Dorothy Denning

Professor Randall Davis

James Johnston

Phillip White

Gordon Zacrep

Louise Goldsworthy

Philip Cammera

Sandra Spooner

Dominic Laiti

Paul Wormeli

Marilyn Titus

Marilyn Jacobs

Jonathan Ben Cnaan

Daniel Tessler

Richard D'Amore

Patricia Cloherty

James Walker

Floyd Bankson

We have no reason to question the truthfulness of the individuals included in the above list. It should also be noted that the list is not exclusive, there are many other credible individuals who have denied various of INSLAW's allegations.

## V. The Weight of the Evidence Indicates that J. Daniel Casolaro Committed Suicide[38]

Joseph Daniel ("Danny") Casolaro was a free-lance writer who had been working on a story involving alleged links between various Washington "scandals" of the 1980s, including INSLAW, the Bank of Credit and Commerce International (BCCI), the October Surprise, the Iran-Contra affair, the Iraqi arms procurement network, and the collapse of the savings and loan industry. Mr. Casolaro's theory was that these scandals had all been the handiwork of a shadowy group of people whom he referred to as the "Octopus." Casolaro began working on the story full-time in mid-1990.

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[38] We are aware of the pain and suffering the family and friends of a suicide victim must experience. While we are obligated to revisit the difficult circumstances surrounding Mr. Casolaro's death as the result of the controversy involving INSLAW's relationship to the Department of Justice, we sincerely regret any additional pain this review may cause his family.

On Saturday, August 10, 1991, Mr. Casolaro was found dead in room 517 of the Sheraton Inn located in Martinsburg, West Virginia. His body was in the bathtub, and both of his wrists had been slashed. After a brief investigation at the scene, the local police department and the county coroner concluded that the cause of death was suicide. The coroner released the body to a local funeral home, where the body was embalmed. The Martinsburg Police Department sent a teletype to the Fairfax County Police Department in Northern Virginia requesting that Mr. Casolaro's relatives be notified of his death.

Mr. Casolaro's relatives, however, were not notified until Monday morning, August 12, 1991. His brother, a Fairfax County physician, told the Martinsburg police at that time about Mr. Casolaro's work on the "Octopus" story and suggested that many people would have had a motive to kill him. He explained that Mr. Casolaro had told people he was travelling to Martinsburg to meet a key source. He also insisted that an autopsy be conducted and questioned how Mr. Casolaro's body could have been embalmed so quickly, without either the knowledge or consent of Mr. Casolaro's family. Soon after the call from Mr. Casolaro's brother, the Martinsburg Police Department was deluged with inquiries from the news media, from friends of Mr. Casolaro and from congressional investigators. A series of questions were raised about the cause and circumstances of Mr. Casolaro's death.

Faced with this sudden and intense public interest in the case, the West Virginia authorities ordered an autopsy. The West

Virginia Deputy Chief Medical Examiner performed the autopsy on August 13-14, 1991, and determined the cause of death as suicide. The autopsy also disclosed that Mr. Casolaro had been suffering from multiple sclerosis and arteriosclerosis. The autopsy found no evidence suggesting that he had been murdered.

The autopsy findings, however, did little to quell the controversy over Casolaro's death. The media and others raised many questions about the circumstances of his death and the adequacy of both the police investigation and the autopsy. Many suggested that Mr. Casolaro had been murdered because he was about to expose the "truth" about the "Octopus." Various theories appeared in the media about "who killed Danny Casolaro."

Faced with these continuing questions about its investigation, the Martinsburg Police Department reopened the case and conducted a second, more intensive investigation. On January 25, 1992, West Virginia authorities announced that their additional investigation had led to the conclusion that Mr. Casolaro indeed had committed suicide, and that the case was closed.

Rumors and speculation continued to circulate despite the conclusions reached by the Martinsburg police. On September 10, 1992, the House Judiciary Committee issued its report on the INSLAW affair. The report raised many questions about the circumstances of Mr. Casolaro's death and recommended the appointment of an Independent Counsel to investigate six specific issues involving INSLAW, including "the lingering doubts over

certain suspicious circumstances surrounding the death of Daniel Casolaro."

After reviewing the Martinsburg Police Department's investigation of Mr. Casolaro's death, the Special Counsel concluded that there was no basis for challenging the conclusion that he had committed suicide. (Bua Report 246-250.) In its rebuttal, INSLAW was highly critical of the Special Counsel's review of this matter and was particularly critical of the Special Counsel's failure to interview certain witnesses.

In light of the intense media focus and the concerns raised by the House Judiciary Committee, we undertook a substantial review and investigation of the circumstances surrounding Mr. Casolaro's death. Based on that review and investigation, we conclude that Mr. Casolaro committed suicide.

A. Scope of Review

Our review consisted of two phases. During the first phase, we reviewed in detail the West Virginia investigations into Mr. Casolaro's death. We reviewed all the police reports and the autopsy report as well as the documents generated during an unsuccessful lawsuit the Casolaro family filed against the coroner and the funeral home regarding the embalming of Casolaro's body. Included among those documents were the sworn depositions, taken by the Casolaro family's attorneys, of the coroner and funeral home personnel. We also interviewed the police officers involved in the investigation of Mr. Casolaro's

death as well as the Deputy Chief Medical Examiner who had conducted the autopsy.

During the second phase of the review, we pursued various questions that had been raised in the media and in the House Judiciary Committee Report and attempted to answer other questions raised by Casolaro's family. During this phase, we conducted numerous interviews of Casolaro's friends, family and associates in Virginia, West Virginia, Washington, D.C., Maryland and California. We obtained documents from various sources throughout the United States, including many of Mr. Casolaro's personal papers on file at the Investigative Reporters' and Editors' Association at the University of Missouri.

We also obtained much of the physical evidence originally found in the hotel room and elsewhere and had the FBI laboratory conduct additional tests on some of that evidence. We examined Mr. Casolaro's background and had the FBI's Behavioral Sciences Unit at the FBI Academy in Quantico, Virginia conduct an equivocal death analysis, or "psychological autopsy." Other experts were consulted as well, including a former President of the National Academy of Forensic Sciences and a George Washington University Law Professor who had previously reviewed the Casolaro autopsy report on behalf of a group of Washington-based journalists.

We also reviewed documents at the Central Intelligence Agency and at FBI headquarters. In addition, we met with the Hamiltons and INSLAW's counsel, received documents and other

information from them and followed various leads they provided. Finally, we reviewed all the telephone calls and mail received by the producers of the television program "Unsolved Mysteries," following the airing on March 11, 1993 of a segment about Mr. Casolaro's death.

B. Casolaro's Death

1. Discovery of the Body

Mr. Casolaro arrived at the Sheraton Inn in Martinsburg, West Virginia on Thursday, August 8, 1991. He was supposed to have checked out from his room, number 517, by 12:00 p.m. on Saturday, August 10, 1991. At about 12:59 p.m., Sharon Palmer, the maid assigned to cleaning the fifth floor, knocked on Mr. Casolaro's door and got no answer. She used her passkey to enter the room. She noticed the bathroom door was halfway open. She looked inside and saw blood on the floor and blood on a towel. She did not go inside the bathroom, but left and called for help. Another maid, Linda Williams, arrived and saw the blood on the bathroom floor, but did not enter the bathroom. Ms. Williams left and returned with hotel employees Barbara Bettinger, David Avella, Sandy Bogert, and Eric Weidman. Mr. Avella called the police.

Minutes later Patrolman Glenn Macher of the Martinsburg City Police Department arrived. He ordered all the hotel employees who had just been inside the room to go the hotel manager's office and wait to be interviewed by other officers. The

patrolman then went inside Mr. Casolaro's room. Within minutes, Martinsburg Police Captain Ted Anderson, Detective John McMillen, Patrolmen Shannon Armel and Terry Stanley and paramedics arrived.

2. The Death Scene

Casolaro's Body

According to police reports and witnesses we interviewed, Mr. Casolaro's nude body was in the bathtub. The water was bloody and cold. The tub was about half to three-fourths full. Mr. Casolaro was sitting with his feet toward the faucet. He was leaning against the side of the tub with his head slumped over the side. His right arm was hanging over the side of the tub, and his right hand was lying flat on the floor. His left hand was submerged under water, tucked beneath his left thigh. Both of Mr. Casolaro's wrists had cut wounds. The fingernails on the thumb, forefinger and middle finger of his right hand appeared to have been chewed.

A used shoelace was draped loosely around Mr. Casolaro's neck. Another used shoelace was found inside the bathtub. Two white hefty trash bags were floating in the bathtub. A single-edge razor blade was inside the bathtub. An empty can of Milwaukee's Best beer was also inside the tub.

The Bathroom

The wrapper from the razor blade was resting against the side of the bathtub. Next to the bathtub, on the bathroom floor, there was a broken drinking glass and a half-full bottle of "Caves Alianca," a Portuguese white wine. There was a bloody

towel on the floor next to the tub. There were bloodstains on the tile around the tub, on the bathroom floor and on the toilet seat. Some bloody water had splattered across the small bathroom to the sink area.

There was an ashtray on top of the toilet tank. Three cigarette butts were in the ashtray, and a pack of Carlton cigarettes was on the toilet tank next to the ashtray. The bathroom was later dusted for fingerprints. Two prints removed from the bathroom sink were identified later as Casolaro's left index and left middle fingers.

There was no sign of any struggle having occurred inside the bathroom.

The Bedroom

The police inspected the bedroom area. They found no sign of forced entry, no sign of any struggle inside the room, and no sign that anyone else had been inside the room. The door to the adjoining room (room 515, occupied by two visitors from Pennsylvania who had come to Martinsburg for a soccer tournament, a 72-year old woman and 70 year-old man) was locked, and the safety chain was secure. The bedspread was partially turned down, but the sheets were not turned down. There was no blood in any part of the hotel room other than the bathroom.

Mr. Casolaro's clothes were laid out on top of the bed. None of the fixtures in the room had been broken or knocked over. Mr. Casolaro's personal effects appeared to be intact. His wallet and driver's license were found inside his coat pocket.

There was no sign that anyone had gone through any of Mr. Casolaro's belongings. The police described the scene as "quiet."

There was an unused ashtray inside the bedroom. It had a fingerprint on the bottom, but the police were unable to identify that fingerprint. The trash can inside the bedroom contained a Sheetz Convenience Store coffee cup. On top of it were five empty cans of Milwaukee's Best beer. The police later conducted hair and fiber analyses on various items recovered in the room, but no evidence was developed indicating that anyone other than Mr. Casolaro had been inside the room before he died.

The police found a large black tote back in the bedroom. Inside the bag were, among other items, an empty bottle of Vicodin pills (which the police later determined had been prescribed for relief of pain following oral surgery performed on Mr. Casolaro in 1988); one box of Hefty trash bags (with two bags missing); two green lawn-type garbage bags; one unopened bottle of "Caves Alianca" white wine; one corkscrew; and three packs of Carlton cigarettes.

The police found, on the coffee table, a box of razor blades with four unused single-edge blades inside. The box had room for five blades. The blades matched the single blade found inside the tub.

The police did not find a briefcase or any documents in the hotel room. They did find various credit card receipts, including two receipts from the nearby Stone Crab Inn for

Thursday, August 8 and Friday, August 9.

The Suicide Note

The police also found a suicide note, written on the fourth page of a legal pad sitting on the coffee table, next to the box of razor blades. The top three pages in the pad were blank and had been folded over the top and underneath the back of the legal pad. The note said:

> To my loved ones, Please forgive me -- most especially my son -- and be understanding, God will let me in.

The police later determined through handwriting and ink comparisons that Mr. Casolaro wrote the note with a pen that was on the coffee table near the legal pad. His right thumbprint was the only fingerprint found on the legal pad.[39]

Casolaro's Car

The police found Mr. Casolaro's car keys and located his car, a 1981 Honda Accord, in the Sheraton hotel parking lot. There was no sign that the car had been broken into or searched. They lifted two of Mr. Casolaro's fingerprints from the driver's side window. They also found a pack of Carlton cigarettes in the car. The car was impounded and sent to a local body shop for safekeeping.

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[39] Some individuals have suggested that Mr. Casolaro may have been forced to write the suicide note, and that he was leaving a clue by making the note uncharacteristically brief and by the reference to God "letting him in." Proponents of this theory note that, as a Catholic, Mr. Casolaro would have known that suicide was a sin, so he must have used that phrase to tip his friends that he was not dying voluntarily. We uncovered no evidence supporting this theory.

3. Interviews of Hotel Employees

While the patrol officers were examining the hotel room, Captain Anderson and Detective McMillen interviewed the hotel employees who had discovered Casolaro's body. None of the employees, including the maids, had seen anything suspicious that morning. None had seen anyone enter or leave Mr. Casolaro's room. The last employee who had seen Mr. Casolaro alive was Barbara Bettinger, who had talked with him outside his room Friday afternoon.

4. The Coroner's Investigation

Thirty minutes after the police arrived, Berkeley County coroner Sandra Brining and her husband, Martinsburg city paramedic David Brining, entered room 517. Mr. Brining photographed Mr. Casolaro's body and the bathroom area. Ms. Brining examined the body. She noted eight cuts on the underside of Casolaro's left wrist and four cuts on the underside of his right wrist. There was also a bruise on the inner part of the upper left arm. There were no other visible signs of trauma to the body. "Light" rigor mortis was present in both arms. Livor mortis was present, but had not yet set, in the buttocks, neck, face, arms and legs.

During Ms. Brining's examination of the body, the bloody bathtub water was drained. Ms. Brining failed to preserve a sample of the water.

Ms. Brining classified the death as a suicide, and contacted Brown's Funeral Home in Martinsburg to transport the body.

Funeral home employees John Arvin and Robert Fields arrived at room 517 at approximately 2:00 p.m. The bathroom door was removed to allow room for the body to be taken out of the room. The body was placed in an ambulance and taken to Brown's Funeral Home in Martinsburg.

5. Handling of Death Scene Following Removal of Body

After the body was removed, the Martinsburg police locked the room but failed to seal it formally.

On Monday morning, August 12, 1991, Detectives Catlett and McMillen returned to room 517 to conduct a further investigation after Casolaro's family had alerted them about Mr. Casolaro's work and the threats he had allegedly received. Although the police had not officially sealed the room when they left Saturday afternoon, the hotel manager, Sam Floyd, had kept the room locked for the remainder of Saturday and all day Sunday. Detective McMillen told us that the hotel room was in exactly the same condition as it had been when he and the other officers left it Saturday. The room had not been cleaned. According to the detective, nothing had been rearranged or disturbed. There was no sign that anyone had been inside the room.

6. Examination and Embalming of the Body at the Funeral Home

Ms. Brining spent two hours examining Mr. Casolaro's body at the funeral home on Saturday afternoon. Patrolman Armel arrived at Brown's Funeral Home at approximately 3:30 p.m., after the examination had started. He watched as funeral home employee Robert Fields drew a blood sample directly from Casolaro's heart.

Ms. Brining and Mr. Fields asked Patrolman Armel to notify Mr. Casolaro's next-of-kin. Patrolman Armel relayed that request to Detective McMillen, who had returned to the station.

Patrolman Armel asked Ms. Brining for the cause of death, and she said that Mr. Casolaro had bled to death. She determined that the wounds to the wrists had been self-inflicted, and that the manner of death was suicide.

As Ms. Brining and Patrolman Armel were preparing to leave, Charles Brown, the owner of Brown's Funeral Home, asked Ms. Brining if the body could be embalmed. Ms. Brining said that she was releasing the body to the funeral home, that an autopsy would not be conducted because the death was a suicide, and that the body could be embalmed. Mr. Fields then embalmed the body.

The decision to permit the embalming of Casolaro's body before an autopsy could be performed has been the subject of much controversy in the press and elsewhere. We have concluded that the decision was not unreasonable in light of the physical evidence suggesting that Mr. Casolaro had committed suicide and the well-established practice in the Martinsburg area of performing "courtesy" embalmings for decedents from other localities. We also note, however, that Ms. Brining should have waited a few more hours before releasing the body to see whether Casolaro's next-of-kin had been notified. Under West Virginia law, a deceased's body may not be embalmed unless the authorities have first made "due inquiry" as to the desires of the next-of-kin. West Vir. Code Ann., § 30-6-8 (1993). As discussed in the

next section, the Martinsburg Police requested the Fairfax County police to notify Casolaro's next-of-kin at 3:30 p.m., before the embalming. As described below, the Fairfax Police reported back at 5:00 p.m., after the embalming had started, that they had been unable to do so. Although Ms. Brining should have waited until after the Martinsburg police had heard back from the Fairfax County police, ultimately it made no difference as the body would have been embalmed once the Fairfax County police had reported they were unable to locate any next-of-kin.

We are unaware of any evidence that suggests that the decision by Ms. Brining approving the embalming of the body was made to further any type of cover-up or conspiracy.[40] In fact, the decision appears to be consistent with the custom and practice in the Martinsburg area. During a lawsuit filed by Casolaro's family against Brown's Funeral Home, Berkeley County, and the City of Martinsburg, an attorney for Casolaro's family took the sworn deposition of Mr. Brown. In his deposition, Mr. Brown testified that "courtesy embalmings" are standard procedure in Martinsburg for decedents from other localities. (Casolaro, et al., v. Brown Funeral Home, et al., No. 92-C-721, Circuit Court

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[40] The media have reported that Ms. Brining and Mr. Brown had a dispute over whether she had authorized him to embalm Casolaro's body. Our investigation found that they both agreed that she did authorize the embalming. In her deposition during an unsuccessful suit filed by the Casolaro family, Ms. Brining testified that, as she was leaving the funeral home, she told Mr. Brown that "the body is released." (Deposition of Sandra Brining, Jan. 14, 1993 at 92). Mr. Brown then asked whether the body could be embalmed, and Ms. Brining said yes. Mr. Brown confirmed Ms. Brining's recollection.

for Berkeley County, W. Va., Deposition of Charles Brown, Sept. 13, 1993, at 27, 35.)

Furthermore, the embalming of the body did not have the adverse impact on the subsequent autopsy that has been speculated. Embalming typically precludes the ability to obtain accurate toxicological studies of bodily fluids. Here, however, the embalming did not interfere with the autopsy as the medical examiner and toxicologist had access to four separate bodily fluid samples and organs that had been unaffected by the embalming: (1) the blood sample that Mr. Fields had taken directly from Casolaro's heart, before the embalming had been performed; (2) a small amount of urine that had not been evacuated at the time of death because of the submersion of Casolaro's body in the bath water, and that had not been tainted due to Mr. Fields' failure to inject embalming fluid into the bladder; (3) a small amount of vitreous fluid from behind the eye sockets; and (4) the liver, which Mr. Fields had entirely missed when he failed to insert the trocar (embalming tool) into that organ.

7. Notification of Next-of-Kin

At 3:30 p.m. on Saturday, August 10, Detective McMillen called the Fairfax County (Virginia) Police Department and notified them of Mr. Casolaro's name, address, and apparent suicide. He requested that the Fairfax Police Department notify Mr. Casolaro's family. The Fairfax police said they could not do so unless they were notified by teletype. At 4:00 p.m.,

Detective McMillen sent the requested teletype but received no acknowledgement. A few minutes later he sent a second teletype.

According to police records, a Fairfax County patrol car drove to Mr. Casolaro's house at approximately 4:30 p.m. The officer knocked. When no one answered, the officer left his business card on Mr. Casolaro's door. The officer returned to the station and called Detective McMillen at 5:00 p.m. Detective McMillen asked the officer to attempt to notify Casolaro's next-of-kin and to ask them to contact the Martinsburg police to provide instructions regarding funeral arrangements.

Inexplicably, the Fairfax County police made no effort to locate any of Mr. Casolaro's relatives, other than going to his house and leaving a business card. Fairfax police would have found the name of Dr. Tony Casolaro, Mr. Casolaro's brother, in the local phone book if they had looked. The anguish that was ultimately caused by the belated notification could easily have been and should have been avoided.

Finally, on Monday, August 12, the Martinsburg police authorities did what the Fairfax police department should have done two days earlier. Detective Sergeant Swartwood called directory assistance for Fairfax County, received the listing for Dr. Tony Casolaro, and called the number. Mr. Casolaro's mother was at Dr. Casolaro's house and answered the phone. Detective Sergeant Swartwood notified Mrs. Casolaro of her son's death at that time.

C. The Autopsy

Shortly after Mr. Casolaro's family was notified of his death, Dr. Tony Casolaro informed West Virginia authorities that his brother had been working on a sensitive story and that he had received death threats. Dr. Casolaro urged the police to conduct an autopsy. Detective Sergeant Swartwood relayed this information to Ms. Brining who agreed to contact the West Virginia Deputy Chief Medical Examiner, Dr. James L. Frost, to arrange for an autopsy. Casolaro's body was moved to Morgantown, West Virginia on Tuesday, August 13, 1991. That afternoon, Dr. Frost conducted preliminary and fluoroscopic examinations of the body. The results were negative. The next morning, August 14, 1991, Ms. Brining, Patrolman Armel, and Patrolman Stambaugh traveled to Morgantown to observe the autopsy.

The summary of the findings of the autopsy that follows is based on a review of the autopsy report and interviews of Dr. Frost and others who were involved with or observed the autopsy.

Dr. Frost spent a considerable amount of time examining Mr. Casolaro's wrists. The undersides of both wrists had deep cuts, though the depth was not extraordinary for a suicide, according to Dr. Frost. The angles of the cuts were consistent with the wounds being self-inflicted. Mr. Casolaro was right-handed. There were four cuts on Casolaro's right wrist and eight on his left. According to Dr. Frost, Mr. Casolaro probably made the cuts on his left wrist first. The uppermost cut on the left wrist appeared to be a superficial cut. Dr. Frost told us that

the superficial cut on the left wrist was not consistent with a so-called "hesitation cut," something that certain forensic pathologists look for in suicide cases. In Dr. Frost's view, the lack of a hesitation cut could be cited as evidence that the victim was particularly determined to commit suicide.

The autopsy revealed that Mr. Casolaro injured one of the tendons in his left wrist with a particularly deep cut. However, that injury would not have deprived him of the motor ability in his left hand to grasp the razor and cut his right wrist. According to Dr. Frost, that is exactly what Mr. Casolaro did. The other cuts were also deep, but not so deep as to be suspicious, according to Dr. Frost.

The autopsy found no indications that Mr. Casolaro had been involved in a struggle. Three of the fingernails on his right hand had been chewed. Mr. Casolaro's brother, Dr. Tony Casolaro, told us that his brother did not bite his nails. However, the autopsy uncovered no evidence that anyone else bit his nails or that he had bitten the nails during a struggle in the hotel room. There was also a faint contusion on Mr. Casolaro's left anterior bicep. Dr. Frost determined that the bruise was probably caused two days before Mr. Casolaro's death. There were other faint blue marks and contusions on the body, but those were determined to be postmortem skin discolorations caused by the embalming process.

Dr. Frost also noted during the autopsy that Mr. Casolaro's ongue was normal, indicating that he did not appear to have

ingested any foreign substance. There was no indication of force having been applied to his mouth or lips. There was no sign of choking, strangulation, or drowning. No water was found in Mr. Casolaro's lungs.

The neuropathologist, Dr. Sydney S. Schochet, examined Casolaro's brain and determined that he had been suffering from multiple sclerosis. Dr. Schochet opined that Mr. Casolaro probably had been experiencing vision problems. In addition, the autopsy revealed that Mr. Casolaro was suffering from "moderately severe" arteriosclerosis.

Dr. Frost determined that the cause of Mr. Casolaro's death was "exsanguinating hemorrhage from multiple incised wounds to the wrists." He concluded that the manner of death was suicide. He estimated that the time of death was between 7:00 a.m. and 8:00 a.m. on Saturday, August 10, 1991. Dr. Frost told us that Mr. Casolaro probably lost consciousness within five to eight minutes of cutting himself and that he likely died within 15 minutes.

Dr. Frost also submitted the blood sample that had previously been taken from the heart, the urine and vitreous fluids and a liver sample (none of which had been tainted by the embalming fluids) to the West Virginia toxicology laboratory for analysis. The results of the toxicology studies did not alter Dr. Frost's conclusions as to the cause and manner of death. Rather they were fully consistent with suicide.

The toxicology tests performed by Dr. Cash revealed several things. First, Mr. Casolaro had an alcohol content of .04 in his urine. According to Dr. Frost, that alcohol level is consistent with the metabolization rate for a man of Mr. Casolaro's height and weight consuming the six beers found in the hotel room as well as some of the white wine during the night and early morning hours before his death. No alcohol was found in the blood sample taken from the heart. Second, trace amounts of the chemical components for Vicodin were found in some of the samples. As indicated above, an empty bottle of Vicodin was found in Mr. Casolaro's luggage in the hotel room. And third, trace amounts of a tricyclic anti-depressant medication were also present. The tricyclic was never traced, and we were unable to determine its origins. However, the amount was insignificant. Dr. Cash also conducted a series of tests for the presence of a variety of "exotic" drugs or any other substance that could have been used to render Mr. Casolaro unconscious or that could have contributed to his death. All those tests were negative.

Dr. Cash also tested the wine found in the open bottle adjacent to the bathtub for the presence of any drugs. That test was also negative.[41]

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[41] Several months after the autopsy was conducted, a group of journalists in Washington, D.C. asked Professor James E. Starrs, a noted forensic pathology expert at the George Washington University law school, to review Dr. Frost's autopsy report. Professor Starrs agreed to do so. In an interview with the Washington Business Journal (week of Nov. 9-15, 1992, p. 13), Professor Starrs stated that he agreed with Dr. Frost that Mr. Casolaro's wounds had been self-inflicted. He also stated that he doubted whether any additional scientific techniques would

D. Additional Police Investigation

After learning from Dr. Casolaro and others about the nature of Mr. Casolaro's work and the threats that allegedly had been directed at him, the Martinsburg police began a more substantial investigation into the matter. We carefully reviewed the records of that investigation and conclude that it was sufficient given the nature of the allegations. Furthermore, we concur with the conclusion reached by the Martinsburg Police Department that the results of that investigation support the conclusion that Mr. Casolaro took his own life.

The following is a summary of some of the important findings of that investigation:

- The police located and interviewed the occupants of rooms 514, 515, 516, 519 and 520 on the night of August 9-10, 1991. None of the individuals staying in those rooms recalls hearing any unusual noises coming from room 517, Mr. Casolaro's room, either that evening or the next morning. Nor did any of them recall seeing anyone entering or leaving room 517 during the morning of August 10.

- The occupant of room 519, a man from St. Paul, Minnesota, had had several drinks with Mr. Casolaro on Thursday, August 8. Police noticed during their interview of him that his wrist was bandaged. He told the police officers conducting the interview that he had hurt himself playing volleyball. The officers were able to verify that story.

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have changed the outcome of the autopsy. Professor Starrs agreed with Dr. Frost that the small contusions on Casolaro's body were caused by the embalming fluid, although he criticized the West Virginia authorities for embalming the body so quickly. Professor Starrs also noted that the suicide note was typical in that it was unsigned and made apologies to Casolaro's family. Professor Starrs summarized his view of the case by saying, "[I]f this was a homicide, it would be the most singularly remarkable murder on record, either in fiction or nonfiction."

- During the interviewing of all of the hotel employees who may have had contact with Mr. Casolaro, a front desk employee told the police that Mr. Casolaro may have had a brown briefcase when he checked into the hotel. No other hotel employee recalled seeing Mr. Casolaro with a briefcase. Police were unable to locate any briefcase or documents during searches of Mr. Casolaro's hotel room, his car, the hotel or the area surrounding the hotel.

- The hotel manager stated that there were six keys for room 517. One key was found in the room among Mr. Casolaro's belongings during the initial search of the room on August 10. The remaining five keys were found at the front desk.

- The razor blades found in the bathtub and in the bedroom were manufactured by Techni-Edge Manufacturing Corporation in New Jersey. Although they checked several retail outlets in the Martinsburg and Fairfax County areas, the Martinsburg police were unable to determine where the blades had been purchased. The West Virginia State Police Crime Laboratory was unable to lift any fingerprints from the blade found in the bathtub because it had been immersed in water. (We asked the FBI laboratory to attempt to lift a fingerprint from the blade, but they too were unable to do so.)

- On August 21, 1991, during a search of Mr. Casolaro's home, police found two unopened bottles of "Caves Alianca" white wine under the kitchen sink. The bottles matched those found in the bathroom of the hotel room and in Casolaro's luggage. The Martinsburg police determined that the Giant Supermarket chain in Northern Virginia sells Caves Alianca wine. The brand is unavailable in West Virginia.

- During their search of Mr. Casolaro's house, the police found two tennis shoes from two different pairs -- one Nike and one Reebok -- that were each missing a shoelace. The shoes were in the closet in the upstairs bedroom. The police asked the West Virginia State Police Crime Laboratory to attempt to match the two laces found at the death scene with the two shoes from Mr. Casolaro's house. The crime laboratory was unable to make a definite match, although a visual comparison of the laces and the shoes seemed to indicate that the eyelet marks on the laces matched the eyelets on the shoes. (We had the FBI laboratory conduct a variety of tests on the laces and the shoes to attempt to match them, but the results were inconclusive.)

- On August 29, 1991, and on September 27, 1991, the Martinsburg police received copies of a passport photo of Hassan Ali Ibrahim Ali from various individuals. This may have been the same photograph that Mr. Casolaro had shown to Ben Mason in his basement office on Wednesday, August 7. (See discussion below.) There is no evidence that Mr. Casolaro ever met Ibrahim, or that Ibrahim -- whoever he is -- had anything to do with Mr. Casolaro's death.

- The West Virginia State Police Crime Laboratory determined that the blood stains found in the bathroom in room 517 matched Mr. Casolaro's blood.

- The West Virginia State Police Crime Laboratory determined that the handwriting on the suicide note matched Casolaro's known handwriting. The ink used to write the note matched the ink in the pen found next to the suicide note. Mr. Casolaro's right thumbprint was found on the legal pad containing the suicide note.

- The West Virginia State Police Crime Laboratory determined that Casolaro's fingerprints matched those lifted from the bathroom sink. The fingerprint found on the unused ashtray in the hotel bedroom could not be identified.

- The West Virginia State Police Crime Laboratory determined that the wine found in the open "Caves Alianca" bottle on the bathroom floor was untainted, as were the wine traces on the broken drinking glass on the bathroom floor.

Blood Spatter Analysis

In December 1991, the Martinsburg police and the Berkeley County Prosecuting Attorney asked Dr. Henry C. Lee, the Chief Criminalist at the Connecticut State Crime Laboratory and a nationally recognized blood spatter expert, to conduct a blood spatter analysis of the bathroom where the body had been found. The Martinsburg police provided Dr. Lee with the death scene photographs, as well as a videotaped reenactment of the death the police had prepared with Dr. Frost's assistance on December 12,

1991 in the room where Mr. Casolaro had died. After reviewing Dr. Frost's autopsy report and other evidence, Dr. Lee created a three-dimensional photographic montage from the photographs taken of Casolaro's body and the bathroom on August 10, 1991. Dr. Lee issued his report on January 24, 1992.

Based on the pattern of the blood found in the bathroom, Dr. Lee theorized that Mr. Casolaro filled the tub with an amount of water; poured himself a drink of wine, and sat the glass on the side of the bathtub; sat down on the side of the bathtub; cut his wrists with the razor blade; and then sat inside the tub. Mr. Casolaro then probably got into the bathtub and placed one of the white hefty bags over his head as added insurance that he would die. (According to his close friend, Ann Klenk, Mr. Casolaro had discussed with her several months before his death how author Jerzy Kozinski had committed suicide in a bathtub by tying a plastic bag over his head.)

Dr. Lee theorized that Mr. Casolaro next submerged his wrists into the water and bled into the water for a few moments. According to Dr. Lee, he probably became extremely uncomfortable with the bag over his head and pulled it off, flinging bloody water across the floor and to the sink opposite the bathtub. Mr. Casolaro then attempted to stand up in the tub, bracing himself against the tile wall. By that time, however, he had lost too much blood. According to Dr. Lee, he probably become woozy and slumped back into the tub, causing bloody water to slosh over the ide of the tub and onto the bathroom floor. As he fell back

down into the tub, Mr. Casolaro's arm knocked the drinking glass onto the floor, where it broke. His right arm hung outside the tub as he slumped against the side of the tub. His head came to rest on the side of the tub.

Dr. Lee concluded that the blood spatter analysis he had conducted established that Mr. Casolaro's death was "not inconsistent with a suicide."

Financial Review

The police also reviewed Mr. Casolaro's financial condition. They were unable to find any evidence that he had earned any income during the months before he died. When the Martinsburg police searched his house, they found his checkbook and checking account statements. The documents indicated that Mr. Casolaro had recently received loans from family members.

The police also found a copy of the promissory note for Mr. Casolaro's house. The note indicated that a balloon payment of $178,790 was due August 9, 1991. The police checked with the mortgage company and learned that Mr. Casolaro had received a 30-day extension, to September 8, 1991, on the payment. The police also found Mr. Casolaro's July 1991 phone bill, in the amount of $922.00.

The Martinsburg police officially concluded their investigation on January 25, 1992, after expending over 1,000 aggregate hours on the case. We believe that the criticisms directed at that investigation are not warranted. In our opinion, the Martinsburg City Police Department conducted a

thorough, professional investigation. Although Ms. Brining should not have authorized the embalming of Casolaro's body before hearing back from the Fairfax County police and although the Martinsburg police should have sealed the hotel room, those mistakes had no significant adverse impact on the investigation. We also believe that Dr. Frost, Dr. Cash, and Dr. Schochet performed excellent autopsy, toxicology, and neuropathology studies.

E. Our Investigation

1. "The Octopus"

During our investigation into Mr. Casolaro's death, it became clear that many of the sources for Mr. Casolaro's theories about the government's involvement with INSLAW were the same as those identified by the Hamiltons, though Mr. Casolaro's theory of "the Octopus" involved an even more far-flung conspiracy than that advanced by INSLAW. In a November 1990 book proposal he provided to a New York literary agent, he described the conspirators as follows:

> An international cabal whose freelance services cover parochial political intrigue, espionage, sophisticated weapon technologies that include biotoxins, drug trafficking, money laundering and murder-for-hire has emerged from an isolated desert Indian reservation just north of Mexicali. . . . I propose a series of articles and a book, a true crime narrative, that unravels this web of thugs and thieves who roam the earth with their weapons and their murders, trading dope and dirty money for the secrets of the temple.

At various times, the Octopus theory linked the INSLAW atter, the alleged connection of the Cabazon Indian reservation

with international arms dealing, the assassination of "super gun" inventor Gerald Bull, the suicide bombing of the U.S. Marine barracks in Lebanon, the BCCI scandal, the Iran Contra affair, the Iraqi arms procurement network, the collapse of the savings and loan industry and other matters.

Mr. Casolaro apparently first learned about INSLAW's dispute with the Justice Department in mid-1990 when Terry Miller, a friend, told him about the dispute and encouraged him to talk to the Hamiltons. By everyone's account, Mr. Casolaro became obsessed with the INSLAW story and the web of conspiracy allegations associated with it over the next few months. Mr. Casolaro soon began to develop his Octopus theory whereby the INSLAW affair was merely one arm of an octopus that had been engaged in international intrigue since the early 1950s.

During the period from mid-1990 to his death, Mr. Casolaro took hundreds of pages of notes during his telephone calls with the Hamiltons and others. Mr. Casolaro's close friend Ann Klenk found his notes in the basement office of his house the day his death was disclosed. Ms. Klenk provided the notes to Tara Sonenshine, a producer for ABC's Nightline program. Ms. Sonenshine examined the notes and told Ms. Klenk that they did not appear to contain any clues about Mr. Casolaro's death. Several other journalists looked at the notes and arrived at the same conclusion. Ms. Klenk sent the notes to the Investigative Reporters' and Editors' Association (IRE) at the University of Missouri, where they were catalogued and archived. We obtained a

complete set of the notes from IRE. We also obtained copies of certain pages that Ms. Klenk had kept.

We have carefully examined the notes, consisting of several hundred pages. The notes are filled with names, places, phone numbers, diagrams, and references to various international intrigues, including arms dealing, drug trafficking, chemical warfare, money laundering, terrorism and political assassinations. Some of the notes appear to have been taken during telephone conversations with various people, while other notes appear to reflect information obtained from newspaper articles and magazines. Finally, those notes indicate that Mr. Casolaro spent a considerable amount of time receiving and soliciting information from many of the same sources relied on by INSLAW: Michael Riconosciuto, Charles Hayes, Robert Booth Nichols, and others.

2. August 5-10, 1991

We spent a significant amount of time trying to reconstruct the last week of Mr. Casolaro's life in the hope that such a reconstruction might lead to some answers about his death. The following reconstruction is based on numerous interviews, documentary evidence and police records. (Several of the statements attributed to various witnesses are based on police reports of interviews with those witnesses and do not reflect separate questioning by us.)

Monday, August 5, 1991

On Monday, August 5, Mr. Casolaro saw his brother, Dr. Tony

Casolaro, during the day. Dr. Casolaro told us that he told his brother that he looked tired. Later that day, Ann Klenk saw Mr. Casolaro's car parked outside a bar at a local shopping center. According to Ms. Klenk, she went inside and saw Mr. Casolaro, head slumped down, sitting at the bar. She said that Mr. Casolaro "looked terrible." He told her in a tone that Ms. Klenk described as disgust: "I just broke INSLAW. Bill Hamilton's going to be real excited." Mr. Casolaro then told Ms. Klenk, "You can have the story, and if you don't want it, you can give it to Jack Anderson." (Ms. Klenk had once worked as a reporter for syndicated columnist Jack Anderson). Finally, Mr. Casolaro told Ms. Klenk he had "just gotten back" from West Virginia and that he was going back again.

Ms. Klenk said she was worried about her friend. She ordered a pizza for him, begged him to eat something and left.

Tuesday, August 6, 1991

On Tuesday, August 6, Mr. Casolaro again spoke to Ms. Klenk and discussed a book proposal he had sent to his agent two weeks earlier. Mr. Casolaro also had two phone calls that day with John Elvin, a journalist friend in Annapolis. According to Mr. Elvin, Mr. Casolaro asked him during those two calls to review the "stuff" he had sent him. Mr. Casolaro mentioned that he was going to West Virginia and said he would call Mr. Elvin when he returned.

Mr. Casolaro also called his friend Jim Pittaway that day and told him that he was going to West Virginia to meet someone,

but that he did not know that person's identity.

During the day, he spent some time packing a suitcase. According to Olga Mokros, Mr. Casolaro's neighbor and housekeeper, Mr. Casolaro told her while she was helping him pack that he would not be seeing his son again. Ms. Mokros also told us that he took her into his basement office and showed her where he kept his will.

That evening, Mr. Casolaro had dinner at the home of Larry Stich, a former IBM attorney he had known for several years. Mr. Stich told us that Mr. Casolaro did not seem depressed to him. Mr. Stich recalls his friend telling him that evening that he was going to meet with "somebody" regarding his book project.

After returning home, Mr. Casolaro called Robert Booth Nichols at his home in Los Angeles, speaking to him from 1:40 a.m. until 2:46 a.m. EST. Mr. Booth Nichols told us that he remembers Mr. Casolaro mentioning that he was planning a trip to the Cabazon Indian Reservation in Southern California where he would "wrap up" his research. According to Mr. Booth Nichols, Mr. Casolaro sounded confident and not depressed.

Wednesday, August 7, 1991

On Wednesday, August 7, Ben Mason, a close friend, came over to Mr. Casolaro's house to visit. Mr. Mason told us that Mr. Casolaro was in an "exuberant" mood that day. Mr. Casolaro showed Mason some papers in his basement office and told him that the papers were in a specific order. Mr. Mason recalls seeing a photocopy of a passport photo of a young man named "Ibrahim."

While Mr. Mason was still there, Mr. Casolaro received a call from Anne Weinfield and her husband. They were leaving Washington to spend a few days at their beach house, and they customarily called Mr. Casolaro to say goodbye whenever they left town. Both Ms. Weinfield and her husband spoke with Mr. Casolaro. They both recall that during the conversation Ms. Weinfield told her husband that something was "definitely wrong" with their friend. Ms. Weinfield told us that Mr. Casolaro rambled incoherently and seemed to have lost touch with reality.

Mr. Casolaro also spoke with his cousin, Dr. Louis Petrillo, a New York psychologist, that day. In a letter written ten days later, Dr. Petrillo wrote that Mr. Casolaro sounded "enthusiastic" on the phone, saying that he was "looking forward to meeting with a 'source.'" Dr. Petrillo noted in that letter that he had spoken frequently with his cousin during the months before his death, and that, in his judgment, he had not manifested "any symptoms or character traits . . . that could in any way be associated with a potential for suicide."[42]

That evening Mr. Casolaro and Ben Mason went out. Mr. Casolaro met a woman while they were at a hotel bar. At 2:00 a.m., after taking Mr. Mason home, he returned to the hotel and

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[42] We spoke with Dr. Petrillo more recently. He recalled the August 7, 1991 telephone call. With the benefit of hindsight, Dr. Petrillo now believes that Mr. Casolaro could very well have committed suicide. He stated that he was prepared to change the conclusions expressed in his August 17, 1991 letter based on what he now knew about the physical evidence and other circumstances surrounding Mr. Casolaro's death.

called the woman he had just met from the lobby phone to see if she would invite him to her room. She said no, and he returned home.

Thursday, August 8, 1991

According to Mr. Mason, Mr. Casolaro called him at 6:00 a.m. and told him of his failed attempt to rejoin the woman at the hotel. Mr. Casolaro laughed off the incident and told his friend he was going to West Virginia "to see the guys."

At about 10:00 a.m., Mr. Casolaro went to the office of his insurance agent, J.J. Kelly, Jr. Mr. Casolaro paid the premium for his homeowner's insurance to the Nationwide Mutual Fire Insurance Company. While he was at his agent's office, he called Danielle Stallings, his friend and real estate agent. Ms. Stallings told us that Mr. Casolaro mentioned that he wanted her to arrange a meeting for the following week with an acquaintance of hers whose mother-in-law was knowledgeable about the Philippines. As he was leaving Mr. Kelly's office, Mr. Casolaro asked Mrs. Kelly for directions to Interstate 66 - West, a common route from Northern Virginia to West Virginia.

Mr. Casolaro then drove to Martinsburg, West Virginia, and checked into the Sheraton Inn. The desk clerk, James Lopez, recalled that Mr. Casolaro checked in between 1:00 and 2:00 p.m. He had a reservation and gave Mr. Lopez a credit card. Mr. Lopez gave Mr. Casolaro one key to room 517. According to Mr. Lopez, Mr. Casolaro told him that he was not going to open the room right away because he was late for an appointment at the Stone

Crab Inn, a restaurant and bar not far from the Sheraton. Mr. Lopez said he thought Mr. Casolaro had an old, "beat up" briefcase with him, but he was not sure.

The bartender working at the Stone Crab Inn that day reported that Mr. Casolaro arrived at about 12:30 p.m.[43] The bartender who had previously worked at the Sheraton Inn, recognized Mr. Casolaro from a prior visit he had apparently made to Martinsburg about a year earlier. Mr. Casolaro told him that he was going to be meeting with "some Arabs" at about 1:00 p.m. According to the bartender, no one arrived. At about 1:20 p.m. Mr. Casolaro asked the bartender for four quarters. He went outside and returned a few minutes later. There are both cigarette machines and a public phone outside the Stone Crab Inn.

Mr. Casolaro had a bottle of wine and a draft beer that afternoon at the Stone Crab Inn. He spoke with another man at the bar about a vineyard the man owned. Mr. Casolaro charged twenty dollars worth of drinks on his Mastercard while at the Stone Crab Inn that afternoon.

Mr. Casolaro left the Stone Crab Inn at about 3:30 p.m., telling the bartender he wanted to go back to his hotel to check for messages and that he might be back later for the happy hour. However, Mr. Casolaro apparently went directly to a Pizza Hut restaurant located near the Sheraton. The waitress working

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[43] Although this is inconsistent with Mr. Lopez's recollection that Mr. Casolaro checked into the hotel between 1:00 and 2:00, and went to the Stone Crab Inn, we find the discrepancy insignificant.

there, a college student, positively identified him as having arrived at about 3:30 p.m. She said that he ordered a pitcher of beer and a small pizza. He drank the entire pitcher of beer but ate only one or two pieces of the pizza and left the Pizza Hut at about 4:00 p.m.

Mr. Casolaro was next seen at Heatherfield's lounge, located inside the Sheraton Inn. At this point there is a significant discrepancy in the recollections of two witnesses. The bartender, who had served Mr. Casolaro on a prior visit to Martinsburg, recalled that he walked into the bar between 5:30 and 6:00 p.m. She recalled that Mr. Casolaro drank beer by himself until about 6:30 p.m., when another hotel guest, the occupant of room 519 from St. Paul, Minnesota, sat down at the bar and began talking to him. The bartender remembered that Mr. Casolaro started drinking bottled beer, but later switched to draft beer. Mr. Casolaro spoke with the hotel guest from Minnesota until about 11:30 p.m., when the bar closed. The bartender does not recall seeing Mr. Casolaro talking with anyone else that night.

However, the waitress at the Heatherfield's Lounge told a different story. The police originally met her by chance, when they went to the home of one of the Sheraton desk clerks to interview him three days after Mr. Casolaro's death. She happened to be at the desk clerk's home. When the police showed her Mr. Casolaro's photograph, she said she remembered seeing him in the bar but could not remember anything else. Later that day

she contacted the police, saying she had now remembered that Mr. Casolaro had arrived at the bar at about 5:10 p.m., and that he sat at a table with another man whom she described as "dark skinned, like maybe Iranian or Arabian." The waitress recalled that both men were drinking draft beer, and that the "Iranian or Arabian" man was drinking very fast and was very insistent that he be served quickly. She claimed to have served four beers each to Mr. Casolaro and the other man. She also said the other man paid for all the beers in cash. Three days later, she helped the police prepare a composite drawing of the "Iranian or Arabian" person. On September 16, 1991, the police interviewed the waitress again. She still stood by her story, but, according to the police, her recollection seemed hazy and uncertain. No one has been able to determine who the "Iranian or Arabian" person was, if indeed there was such a person.

The waitress' recollection conflicts with the bartender's recollection in several respects, the most important of which are: (1) the bartender recalled Mr. Casolaro entering the bar alone and initially sitting by himself while the waitress recalled him sitting with an "Iranian or Arabian" man; (2) the bartender recalled that he sat at the bar while the waitress maintained that he sat at a table; (3) the bartender recalled that he started drinking bottled beer while the waitress claimed he only drank draft beer; and (4) the bartender claimed Mr. Casolaro only spoke with one person, the guest from Minnesota, the whole evening while the waitress claimed he spoke with the

"Iranian or Arabian" man.

The bartender's recollection is corroborated by Mr. Casolaro's bar tab, which shows that, beginning at 6:00 p.m., Mr. Casolaro purchased one bottled beer, then another bottled beer, and then switched to draft beer. In all, he purchased seven beers that evening.[44] The bartender's recollection is also corroborated by the Minnesota guest's memory of the evening. He recalled meeting Mr. Casolaro for the first time near the ice machine down the hall from their fifth floor rooms sometime between 5:00 and 6:00 p.m. A short while later, he went down to the hotel bar, saw Casolaro drinking alone and joined him. According to the hotel guest, they spent the rest of the evening talking. Mr. Casolaro told him all about the Octopus project and said he was waiting to meet "some Arabs." He recalled that Mr. Casolaro acted agitated when the "Arabs" failed to show.

Given the fact that both the guest from Minnesota and the credit card records are consistent with the bartender's recollection, we are led to believe her recollection is likely to be the more accurate. In any event, the Martinsburg police were unable to locate any individual matching the description provided

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[44] Mr. Casolaro's family and friends insist that Mr. Casolaro was neither an alcoholic nor a "heavy drinker". However, Wendy Weaver, a close friend, told us that he drank to excess two or three times per week. Furthermore, Ms. Weaver and Lillian Pittaway told us that he seemed to be drinking more heavily near the end of his life. Finally, an appointment book provided to us by his neighbor included passages written by Mr. Casolaro reflecting a struggle with his alcohol use. For example, in one passage, he wrote, "I wonder if the root of my drinking is loneliness -- for true companionship."

to them by the waitress, and there is no evidence linking such an individual with Mr. Casolaro's death.

Friday, August 9, 1991

The next day, Friday, August 9, 1991, Mr. Casolaro went to the front desk at the Sheraton at about 12:00 p.m. and told the desk clerk, Mr. Lopez, that he would be staying one more night. At about 1:30 p.m., a hotel maid, Barbara Bettinger, spoke with Mr. Casolaro outside his door. He asked whether the maids could clean his room right then because he had work to do. Another maid, Roxanne Willis, went inside the room and cleaned while he waited outside. Ms. Willis noticed a bottle of wine on the lamp table.

Mr. Casolaro was next seen at the Stone Crab Inn at about 2:30 p.m. He drank beer until about 5:30 p.m. According to the bartender who was on duty at that time, Mr. Casolaro seemed depressed and lonely and acted as if he wanted to talk to someone. He bought five beers, one shrimp cocktail and one crabcake sandwich with his credit card. The bartender who worked the 6:00 p.m. to 1:00 a.m. shift at the Stone Crab Inn did not see anyone matching Mr. Casolaro's description in the bar during her shift that night.

After leaving the Stone Crab Inn, Mr. Casolaro placed a collect call to his mother's house in Fairfax County at about 6:00 p.m. His family had planned a birthday party for his niece that evening. He spoke with his mother and told her he would be late for the party, if he made it at all.

At 7:00 p.m., a group of people from Pennsylvania, who had traveled to Martinsburg for a soccer tournament that weekend, checked into rooms 514, 515, 516 and 520. Mr. Casolaro was staying in room 517. At about 9:00 p.m., one of the occupants of room 515 saw someone matching Mr. Casolaro's general description enter room 517 with a key. She did not see the person's face, as his back was to her. However, she recalled that he was carrying a brown paper bag.

Shortly after midnight, Mr. Casolaro walked to the Sheetz Convenience Store across the parking lot from the Sheraton. He asked for coffee, and the store clerk brewed a fresh pot for him. She gave Mr. Casolaro a medium coffee and did not charge him because he had to wait for the pot to brew. Both the store clerk and another witness in the store at that time recalled that Mr. Casolaro seemed relaxed and that he made small talk with them both. When he left they saw him walk back toward the Sheraton.

The above account of Mr. Casolaro's movements on Friday, August 9 is not complete. We have not been able to pinpoint his whereabouts between noon and 1:30 p.m. or between 6:00 and 9:00 p.m.[45]

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[45] After learning of Mr. Casolaro's death, William Turner, one of Mr. Casolaro's sources for the Octopus theory, claimed to have met with him in the Sheraton parking lot on August 9. Mr. Turner has been unclear as to the time of the meeting, placing it anywhere between noon and 6:00 p.m. Mr. Turner has been inconsistent with other important aspects of his story as well. For example, shortly after Mr. Casolaro's death, he told local authorities that Mr. Casolaro had given him a "stack of documents eighteen inches high." However, he told us that Mr. Casolaro had given him three sealed manila envelopes containing documents before the August 9 meeting, and that he returned two of those

Saturday, August 10, 1991

As described above, Mr. Casolaro's body was found at approximately 1:00 p.m. Dr. Frost estimated the time of death as between 7:00 and 8:00 a.m.

3. Mr. Casolaro's State of Mind in August 1991

The most difficult aspect of any investigation involving the possibility of a suicide is the effort to determine why a particular individual might have taken his or her own life. Nevertheless, we felt it to be part of our task at least to address some of those issues. In our investigation, we found numerous factors that might have caused Mr. Casolaro concern and/or despair during the last year of his life. By identifying those factors, we do not pretend to conclude that they necessarily contributed to Mr. Casolaro's suicide. Rather, we identify them in order to provide a complete picture of the events leading up to his death.

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envelopes to Mr. Casolaro during that meeting. He said he kept the third packet in his safe. In any event, no one witnessed the meeting in the hotel's parking lot.

We find Mr. Turner's statements lack credibility. First, as indicated above, he has contradicted himself on several occasions. Second, he has made inaccurate statements about his background. Third, he has been convicted of a crime involving false statements. On September 13, 1991, he pleaded guilty in federal court to one felony count of making a false statement in 1988 to the Veteran's Administration. He was sentenced to 60 days in prison and five years probation. Then, on December 30, 1993, after Mr. Turner had moved to Tennessee and while he was still on federal probation, the Bureau of Alcohol, Tobacco and Firearms searched his home pursuant to a warrant. They found 23 firearms inside, including several with no serial numbers. As a result, Mr. Turner was sentenced on June 30, 1994, to six months for violation of his probation.

Financial Concerns

There is no question that, after spending over a year developing his Octopus theory, Mr. Casolaro found himself in a difficult financial condition and was greatly concerned as a result. As discussed above, Mr. Casolaro's home mortgage called for a balloon payment of $178,790 on August 9, 1991. Although the mortgage company extended the payment period for 30 days, that entire amount was coming due on September 8, 1991. The Martinsburg police investigation found that he had already borrowed substantial amounts from his family earlier in the year.

While he faced the balloon payment in a matter of weeks, Mr. Casolaro's income prospects appeared dim at the time of his death. Since the summer of 1990, when he first began to pursue the INSLAW story, he had repeatedly and unsuccessfully attempted to secure a publisher for his story. Mr. Casolaro asked his cousin, New York City psychologist and part-time author Dr. Louis Petrillo, to help him find an agent. In September, 1990, Dr. Petrillo arranged for him to meet a New York City literary agent. The New York agent agreed to represent Mr. Casolaro in attempting to negotiate a book deal.

On November 2, 1990, Mr. Casolaro sent a letter to the agent enclosing copies of various songs and poems he had written. Mr. Casolaro mentioned in the letter that he was now working on his investigation "exclusively," but that he was also looking for a paying job while waiting for an advance. Mr. Casolaro enclosed a resume that significantly overstated his prior professional

accomplishments. He also enclosed a six-page treatment for the book he was hoping to publish, which he entitled, "Behold, A Pale Horse: A True Crime Narrative."

In the treatment, Mr. Casolaro wrote about the Cabazon Indian reservation in Southern California and its alleged connection to international arms dealing; the assassination of "super gun" inventor Gerald Bull; and the suicide bombing of the U.S. Marine barracks in Lebanon. On the last page of the treatment, he proposed that "[t]he first three chapters of the manuscript should be finished within three months of an initial advance and each subsequent chapter will be delivered every month. The completed book should be ready for publication by the summer of 1991."

The New York City agent began searching for a more experienced literary agent who could put together a combined book and television deal for his client. He also asked Mr. Casolaro to sign a one-year "exclusive" representation agreement, under which the agent would receive a 20% gross commission, plus an additional 10% gross commission to any third parties, for any sales of "'Behold, A Pale Horse,' including without limitation phonograph recordings, video, television, motion pictures, radio, music publishing, songwriting, live performances, books, merchandising, lecture(s), seminar(s). . . ." The agreement was signed on March 14, 1991.

On December 10, 1990, Mr. Casolaro's New York City agent contacted Creative Artists' Agency (CAA), a major Hollywood

talent agency, to see whether they would be interested in meeting Mr. Casolaro. Six days later, CAA agent Melanie Ray flew to New York and met with Dr. Petrillo, Mr. Casolaro and his New York City agent for brunch. Mr. Casolaro had two drinks before Ms. Ray arrived and apparently did not make a good impression on her. During the meeting, Mr. Casolaro said the Octopus project was his "shot at a piece of investigative journalism to put me on the map," and that he wanted to do something "to make my son proud of me."[46] Ms. Ray said that CAA was not interested, but she offered to help him find another literary agent.

Several days later Ms. Ray wrote to the New York City agent, indicating that she had found another literary agent, Elizabeth Mackey, who was willing to read the "Pale Horse" treatment. In her letter Ms. Ray also referred to Casolaro's behavior at the New York brunch in unflattering terms: "To expect 'cloak-and-dagger' and to get slapstick was quite scintillating."

During the next six months, according to Ms. Ray's records, Mr. Casolaro and his New York City agent contacted both Ms. Ray and Ms. Mackey dozens of times to check the status of efforts to find a publisher and obtain an advance for Mr. Casolaro.

On April 20, 1991, after returning from a trip to see Mr.

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[46] This was not the first major investigative effort undertaken by Mr. Casolaro. In the mid 1970s, he spent considerable time pursuing an "alternative" theory on the Watergate break-in in which the break-in was actually engineered by intelligence operatives loyal to the Democratic Party. According to this theory, the Democrats knew they would lose the 1972 election, so they engineered the break-in to look like a Republican operation, thus sowing the seeds for President Nixon's eventual downfall.

Riconosciuto in Washington, Mr. Casolaro wrote a letter to the New York City agent. He enclosed another treatment, this time entitled "Update on the Pursuit of the Tape and the Jailing of Danger Man." In this treatment, Mr. Casolaro described his trip to Washington state and how he had spent hours unsuccessfully searching for a tape that Mr. Riconosciuto claimed contained threats by Mr. Videnieks directed at him. In his cover letter, Mr. Casolaro wrote:

> I must explain how much deeper in debt I am. Every month that goes by without income puts another $4,500 or so on my liability just keeping my family and self alive. On top of that, my mortgage which is now up to $300,000 is scheduled for final payment in September 1991.

On May 31, 1991, Ms. Mackey called Ms. Ray and told her that she had decided not to represent Mr. Casolaro. Ms. Ray notified the New York City agent of Ms. Mackey's decision. Several days later, Ms. Mackey telephoned Ms. Ray to see whether Ms. Ray could ask Mr. Casolaro's New York City agent to "keep Casolaro from calling her and pleading his case for representation now that she has turned him down." On June 6, 1991, Ms. Mackey wrote a letter to Mr. Casolaro, informing him that her agency would not represent him. Mr. Casolaro contacted Ms. Mackey again in July, and on July 31, 1991, Ms. Mackey sent another letter rejecting him yet again.

In addition to the efforts to find a publisher through Ms. Ray and Ms. Mackey, Mr. Casolaro and his New York City agent also contacted Time Warner and its subsidiary, Little, Brown & Co. On December 17, 1990, Mr. Casolaro, his agent and Dr. Petrillo met

with Kelso Sutton of Time Warner and Roger Donald of Little, Brown. Mr. Donald looked at Mr. Casolaro's materials, and rejected it. However, he suggested that Time Warner's magazine division might be interested, but that Mr. Casolaro would have to work with a Time Magazine staff writer to develop the story. Mr. Casolaro refused. He said that he wanted to do the project as a book, and he wanted to do it by himself.

Mr. Casolaro called Mr. Donald again approximately three weeks before his death and asked him to review some "new material." Mr. Casolaro faxed the material to Mr. Donald, who reviewed it. Mr. Casolaro contacted Mr. Donald again several days before his death, and Mr. Donald again told him that Time Warner and Little, Brown were not interested in publishing Mr. Casolaro's "Octopus" project or in paying him an advance.

On July 22, 1991, Mr. Casolaro faxed to his New York City agent his final treatment. The three and one-half page treatment is entitled "The Octopus." He attached to the treatment a two page list of 51 individuals and groups comprising a "Cast of Characters." The treatment surveys various scandals and other international events of the late 20th century. In the cover letter, Mr. Casolaro wrote:

> I have purposefully left out some names in the CAST OF CHARACTERS for two separate reasons. I will tell you those names and the reasons when we talk.
>
> This is my final week for these marathon hours over the last 12 months. Encountering this odyssey, meeting it with my whole life, is to grapple with something personal since I've risked everything. By Friday, I have to come up with about $5000 just to cover my mortgage payment and my real estate taxes and in

> September I'll be looking into the face of an oncoming train. Father, what will I do?
>
> Still, I feel the happiness that an eskimo must feel when he comes across fresh bear tracks when he's ahead of all the other sledges. It's just the way it has happened.

It appears that Mr. Casolaro never had any chance of finding a publisher for his work. Mr. Donald, for example, told the Martinsburg police, when they contacted him after Mr. Casolaro's death, that Mr. Casolaro's work was "amateur" and that it reflected simply a rehash of material commonly available in newspaper and magazine articles. Ms. Ray and Ms. Mackey likewise were unimpressed with his work.[47]

Dr. Tony Casolaro told us that his brother would never have committed suicide over money. He explained that their family was very close and his brother always knew that he could turn to his family for financial resources.

The Onset of Multiple Sclerosis

As discussed above, the autopsy revealed that Mr. Casolaro had been suffering from multiple sclerosis at the time of his death. We are unaware of any direct evidence that the disease was diagnosed before his death. Our investigation found that the last time he had been to a doctor was 18 months before his death

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[47] Mr. Casolaro's frustration in finding a publisher for his Octopus story was the last in a series of financial setbacks. Mr. Casolaro had enjoyed great professional success with a computer newsletter he owned called Computer Age. However, he was forced to sell the publication in 1990 after he began to experience some financial difficulties. Though he thought he would continue to work for the new owner, he was fired following the sale.

when he needed emergency treatment after accidentally dropping a barbell on his head.

However, there are some indications that the disease was beginning to affect his life and that he was concerned that he had some sort of illness. For example, during June and July 1991, some of Mr. Casolaro's friends noticed that he seemed to be having certain physical problems. Ann Klenk noted that Mr. Casolaro experienced some sort of motor difficulty with his right hand and had trouble opening a window in her house. On another occasion Mr. Casolaro, who was in apparently good physical shape, had trouble finishing a friendly volleyball game. On another occasion, he was too exhausted to help his friend Bill Webster paint his house. Mr. Casolaro also complained on separate occasions to both Wendy Weaver and Ann Klenk about vision trouble. He began borrowing Wendy Weaver's eyeglasses for reading and reduced his night driving. Ms. Weaver observed that Mr. Casolaro also seemed to have weakness in his limbs, and that he could not perform various simple tasks around the house.

Also, several weeks before his death, he confided to his friend Ann Klenk that he was "having trouble thinking." According to Ms. Klenk, he said that "if I ever couldn't think I'd kill myself."

Finally, Mr. Casolaro approached Anne Weinfield, a long-time friend and nurse, several months before he died and asked her about "research" he was doing about "slow acting viruses," including multiple sclerosis. Ms. Weinfield recalls that he

specifically asked her about the symptoms and consequences of multiple sclerosis.

Other Indications

There were some other indications that are, at the very least, consistent with a state of mind contemplating suicide. For example, several days before his death, Mr. Casolaro showed Zoe Gabrielle Milroy, a friend, a letter that he had written to his son in which he imparted what Ms. Milroy described as "heavy" fatherly advice. Ms. Milroy told us that she immediately asked Mr. Casolaro if the letter was actually a suicide note. She said he changed the subject.

Four days before his death, Mr. Casolaro's neighbor, Olga Mokros, came to his house. She worked as a housekeeper for Mr. Casolaro. Ms. Mokros helped Mr. Casolaro pack a suitcase as he told her he was going on a trip. She asked if she should prepare the house for his son, who was expected on a visit from Colorado in two weeks. According to Ms. Mokros, Mr. Casolaro told her that he "would not see [his son]" anymore. He then took her into his basement office and showed her where he kept his will.

There were other indications of strange and perhaps suicidal behavior as well. For example, in approximately May 1991, Mr. Casolaro was housesitting for his friend Bill Webster. According to Ms. Klenk, Mr. Casolaro called her at 5:00 a.m. one morning and told her he had hurt himself. He said he had "spent the night on the roof" of the house and that he had fallen off and hurt his leg. Several days later, however, Mr. Webster called

Ms. Klenk and told her he had found a broken ceramic object and some bloody towels in his basement. During the autopsy, Dr. Frost found a healed scar on the inside of Mr. Casolaro's right leg near the femoral canal and vein.

Ms. Klenk also told us that, in approximately October 1990, Mr. Casolaro had a mysterious auto accident in which his car went off the side of the highway. Mr. Casolaro told Ms. Klenk and Wendy Weaver that he thought he had been forced off the road, but he did not want to report the incident to the police or to seek medical treatment. We were unable to learn enough about this incident to determine whether it was a legitimate accident, a staged suicide attempt or a homicide attempt.

Some of his friends also noticed that he had become "obsessed" and "all consumed" with the "Octopus" story by early 1991. Two of Mr. Casolaro's closest friends, Wendy Weaver and Ann Klenk, both report that he was completely immersed in the story. They both told us that Mr. Casolaro slept and ate very little during the final months of his life. Jim Pittaway, who had known Mr. Casolaro for several years, told us that beginning in February, 1991 Mr. Casolaro slipped into a "fantasy land" of conspiracy and intrigue. Other friends say that Mr. Casolaro was "losing his grip" on reality.

Dr. Petrillo and Ann Klenk both told us that Mr. Casolaro was absorbing huge amounts of information, so much that he was having trouble organizing it in his mind. Mr. Casolaro told Ms. Klenk that he was becoming frustrated at his inability to

organize his thoughts and reduce his ideas to writing. Wendy Weaver and Ann Klenk report that he was "disappointed" and "hurt" at his failure to secure a publisher or obtain an advance. Ann Klenk, herself a professional journalist, suggested to Mr. Casolaro that he try to break the project into smaller, more manageable bits and to try publishing it piecemeal, perhaps as a series of newspaper or magazine articles rather than as a book.

Not all of Mr. Casolaro's friends, however, considered him to have been depressed or emotionally upset. Ben Mason and Wendy Weaver, for example, report that he appeared enthusiastic about the "Octopus" project and insist that he continued to be generally upbeat and happy.

Psychological Autopsy

Finally, at our request, the FBI's National Center for the Analysis of Violent Crime, located at the FBI Academy in Quantico, Virginia, conducted an equivocal death analysis, or "psychological autopsy," of Mr. Casolaro. Three FBI behavioral scientists prepared a report examining Mr. Casolaro's life history and his behavior during the final weeks and months of his life. They also reviewed the autopsy report. They concluded that Mr. Casolaro had committed suicide and that he may have intentionally "scripted" the end to his own life.

The behavioral scientists noted that the "one common denominator in the life of Mr. Casolaro up until 1990 appeared to be feelings of high expectations of success, followed by disappointments." They found that while Mr. Casolaro "wore the

facade of the eternal optimist . . . deep down inside he may have perceived himself as a failure as an author, an investigative reporter, a husband, a father and as a businessman." The behavioral scientists found his physical problems and possible concern about multiple sclerosis very significant, noting that "the thought of having a progressively debilitating disease may have been overwhelming."

Added to the other "stressors" in Mr. Casolaro's life, he may have believed that his situation was deteriorating and that "he was running out of time." The report noted that by "planting the seeds" in the minds of those close to him that he may have been killed, Mr. Casolaro thought he might be alleviating the guilt feelings his family and friends would feel for not preventing his suicide. In addition, Mr. Casolaro might have hoped that by making his death look mysterious, he might gain in death the journalistic fame he had never enjoyed in life, by "dying for a story," becoming "a martyr for truth and justice," only to have been "silenced on the eve of his greatest triumph by the forces of evil."[48]

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[48] Most forensic scientists regard the psychological autopsy tool as a valuable aid in understanding the mental state leading to an individual's decision to commit suicide. However, the courtroom evidentiary value of psychological autopsies has recently been criticized in a recent law review article. Ogloff and Otto, Psychological Autopsy: Clinical and Legal Perspectives, 37 St. Louis U.L.J. 607 (1993) (attacking reliability of psychological autopsies).

4. Allegations Concerning Mr. Casolaro's Death

There is no credible evidence that Mr. Casolaro's death was anything other than a suicide. Nor is there any evidence placing any other individual in Mr. Casolaro's hotel room on either the evening of August 9 or the morning of August 10, 1991. Furthermore, the evidence is wholly consistent with suicide. Nevertheless, several individuals have speculated that some sort of foul play was involved in Mr. Casolaro's death. In this section, we review those allegations.

Ethyl Alcohol Injection

INSLAW recently asserted that perhaps someone entered Mr. Casolaro's room and injected him above the spine with "ethyl alcohol absolute," thereby deadening his nerves. Dr. Cash, the West Virginia toxicologist, found no ethyl alcohol in Mr. Casolaro's blood. Moreover, Dr. Frost found no injection sites anywhere on his body. Pure ethyl alcohol would have been particularly irritating to the skin, but no such irritations were found during the autopsy.

We asked Dr. Yale Caplan, a Baltimore toxicologist and former President of the American Academy of Forensic Sciences, about the "ethyl alcohol absolute" theory. He agreed with Dr. Frost that it would have been impossible for Mr. Casolaro to have received such an injection without Dr. Frost seeing evidence of it during the autopsy. Dr. Caplan also noted that such an injection would have to have been precisely and expertly made, with Casolaro's cooperation, for it to have achieved a "nerve-

deadening" effect.

Involvement of Mr. Riconsciuto

On September 30, 1991, Robert Booth Nichols, one of Mr. Casolaro's primary sources, told Detective Sergeant Swartwood of the Martinsburg Police Department that he thought Mr. Casolaro had been murdered and that Michael Riconosciuto was probably involved in some way. He did not and has not provided any basis for those allegations other than his claims that Mr. Casolaro was investigating some dangerous individuals.

We are unaware of any evidence linking Mr. Riconosciuto to Mr. Casolaro's death. Further, Mr. Riconosciuto was in prison in Tacoma, Washington, awaiting trial on methamphetamine charges, on the day Mr. Casolaro's body was discovered.

Involvement of Robert Booth Nichols

Robert Booth Nichols, a self-styled "international businessman," was one of Mr. Casolaro's primary sources. Telephone records from the last few months of Mr. Casolaro's life indicate that the two men spoke regularly and at length during that time period.[49]

According to several of Mr. Casolaro's friends, he spoke often of Mr. Booth Nichols and described him as a mysterious figure with connections to Japanese organized crime, the

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[49] Mr. Booth Nichols and Mr. Casolaro also met at least once during the early summer of 1991. The two men had dinner at a restaurant in Virginia. The following day, Mr. Casolaro introduced him to his friend Wendy Weaver. Contrary to some published reports, Ms. Weaver told us that Mr. Booth Nichols did not punch, grab or beat up anyone in a bar while she was with him and that he did not boast of connections with organized crime.

intelligence community and international arms dealers. Mr. Casolaro told several friends that he had heard from other sources that Mr. Booth Nichols was dangerous and that he had been involved in several murders.

An article in the January 1993 issue of Spy magazine suggests that Mr. Booth Nichols may have had Mr. Casolaro killed because he feared Mr. Casolaro was about to expose him as someone who had years earlier offered to become an FBI informant against the mafia. We found no evidence that he had anything to do with Mr. Casolaro's death. Furthermore, he was in London on the day that Mr. Casolaro died.[50]

Involvement of Peter Videnieks

Mr. Riconosciuto and others have suggested that Peter Videnieks, the Department of Justice contracting officer on the PROMIS contract, was also somehow involved in Mr. Casolaro's death. There is no evidence whatsoever of Mr. Videnieks' involvement. The allegations appear to rest on the fact that Mr. Videnieks' wife works for Senator Robert Byrd of West Virginia,

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[50] Though Mr. Booth Nichols conveyed an image of intrigue to Mr. Casolaro, it is clear that at least some of that image was exaggerated. For example, in a lawsuit against the Los Angeles Police Department, he testified that he had been a member of the United States intelligence community for many years. (Booth Nichols v. City of Los Angeles, No. NCC 31322B, Trial Transcript, Mar. 11, 1993, 32 et seq.) No evidence supports that claim. In fact, the CIA informed us that it does not have, nor has it ever had, any employment relationship, contractual relationship or any other association with Mr. Booth Nichols. Mr. Booth Nichols also testified that he had once "been instructed" to make a bid to purchase the assets of the Summa Corporation in the late 1970s, following Howard Hughes' death. (Id. 141-51). The documents connected to that incident, however, reflect that Summa summarily rejected Booth Nichols' overtures.

the state in which Mr. Casolaro's death occurred, and that Mr. Videnieks was a friend of Joseph Cuellar.

In addition, Charles Hayes, the Kentucky salvage dealer, told Martinsburg police that Peter Videnieks and Dr. Earl Brian had gone to the Sheraton Inn in Martinsburg around the time of Mr. Casolaro's death to play in a "high-stakes poker game, requiring $10,000 minimum to sit at the table." The police found it difficult to believe that gaming of that magnitude could have been going on in Martinsburg without their knowledge. Nevertheless, they investigated this lead but were unable to corroborate it. As discussed above, we believe Mr. Hayes lacks credibility.

During an interview with us, Mr. Videnieks denied having any involvement in Mr. Casolaro's death and claimed that he was with his wife at their summer cottage in Treadwell, New York, from August 5 to August 11, 1991. His personnel records reflect that he was on leave during this time period, and a credit card receipt shows that he made a purchase at a bookstore in Oneonta, New York on August 9, 1991. His telephone records indicate that a call was placed to his brother from the Treadwell cottage on August 9, 1991 at 8:35 p.m.

We have no reason to question Mr. Videnieks' claim that he was in New York on August 10, 1991 and are unaware of any evidence linking Mr. Videnieks to Mr. Casolaro's death.

Involvement of Joseph Cuellar

Army Reserve Major Joseph Cuellar also was in contact with

Mr. Casolaro during the last few months of his life. Mr. Casolaro apparently met Mr. Cuellar by chance one afternoon in May 1991 at "The Sign of the Whale" bar in Arlington, Virginia. Mr. Cuellar had gone to the bar expecting to meet some friends who were going to celebrate his return from Operation Desert Storm. Mr. Casolaro, who was already seated at the bar waiting for his friend Lynn Knowles when Mr. Cuellar arrived, struck up a conversation with Mr. Cuellar. Mr. Cuellar talked of his exploits in the Army special forces, and, according to Mr. Cueller, Mr. Casolaro became fascinated. After Ms. Knowles arrived, she listened as the two men discussed various military issues. When Mr. Cuellar's friends arrived, they made arrangements to meet again.

The two men talked on the phone several times after they first met. They also saw each other at least two additional times. In addition, Mr. Cuellar started dating Ms. Knowles.

During one of their conversations, Mr. Casolaro apparently asked about various individuals involved in his "Octopus" story. Mr. Cuellar told him he knew Peter Videnieks. According to Mr. Cuellar, he explained that he knew Mr. Videnieks because his former fiance had worked with Mr. Videnieks' wife in the Capitol Hill office of West Virginia Senator Robert Byrd. Both Mr. Cuellar and Mr. Videnieks told us that their relationship was social, that they had double-dated with their significant others a number of times, and that they saw less of each other after Mr. Cuellar broke up with his fiance.

Once he learned of Mr. Cuellar's relationship with Mr. Videnieks, Mr. Casolaro asked Mr. Cuellar repeatedly to arrange a meeting with Mr. Videnieks. Mr. Casolaro wanted to interview Mr. Videnieks about the allegations made by Mr. Riconosciuto in his March 1991 affidavit that Mr. Videnieks had threatened him. Mr. Cueller called Mr. Videnieks to try to arrange a meeting, but Mr. Videnieks refused.[51]

After Mr. Casolaro died, Mr. Cuellar stopped dating Ms. Knowles. She told us that at one point, as their relationship was deteriorating, he made a veiled threat to her, stating that she was asking too many questions about Mr. Casolaro, that she had two children, and that she would not be doing them a favor if she were to wind up like Mr. Casolaro or another journalist who had been killed in Guatemala. Mr. Cuellar denied making those statements to her.

Several people have suggested that Mr. Cuellar was somehow involved in Mr. Casolaro's death. We found no evidence supporting that hypothesis. On the day Mr. Casolaro died, August 10, 1991, Cuellar was in Washington, D.C., working on his "outprocessing" from Desert Storm, and his "in-processing" into the Southern Command. Several witnesses have verified that he was in Washington on August 10, 1991.

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[51] According to Mr. Cuellar, Mr. Casolaro confided in him near the end of his life, expressing frustration that he had become so wrapped up in the "Octopus" story that he had lost his perspective and was unable to arrange the material into a cohesive story. Mr. Casolaro also told him that he was in financial distress and that he was close to losing his house.

Threats Directed at Mr. Casolaro

During the last few weeks of his life, Mr. Casolaro told several of his friends that he had been receiving death threats over the telephone. In addition, Mr. Casolaro's neighbor, Olga Mokros, told us that she was in Mr. Casolaro's house on the Monday before he died, that she answered the phone, and that the caller uttered a death threat. She could not recall any other specific occasions on which Mr. Casolaro received such a call, even though she was at his house nearly every day. Mr. Casolaro also told several people that the story he was working on was "dangerous" and that he had sent his younger brother John away from the house because of the danger. According to Dr. Tony Casolaro, his brother once told him, "If I die, don't believe it was an accident."

However, several of Mr. Casolaro's closest friends told us they now believe, with the benefit of hindsight, that he invented at least some of the threatening phone calls and the other "dangers" involved in his work so that people would believe, after he committed suicide, that he might have been murdered. Jim Pittaway told us that he thinks Mr. Casolaro committed suicide and that he "shrouded his death in mystery" so that his conspiracy theories would outlive him. He told us that when he suggested to Mr. Casolaro that he contact the phone company after he had allegedly received threatening calls, Mr. Casolaro quickly changed the subject. Lillian Pittaway, Jim Pittaway's wife, described Mr. Casolaro as self-destructive. Zoe Gabrielle

Milroy, a close friend of Mr. Casolaro's for fourteen years, believes that he "perpetrated this conspiracy theory" to make his death seem mysterious and to ease the pain his family would suffer from an outright suicide.[52] Pete Kennedy, a guitarist and friend, shares Ms. Milroy's view that Mr. Casolaro wanted everyone to think he was in danger so that his death would appear mysterious. Ms. Milroy also discounts the views of those who say Mr. Casolaro was not depressed, noting that he was a "consummate actor" who could be "laughing on the outside, but very hurting on the inside."

"Village Voice" Phone Call

On Sunday night, August 11, 1991, the day before news of Casolaro's death became public, a writer at the Village Voice in New York City named Dan Bishoff received a telephone call. Mr. Bishoff later told the Martinsburg police that he was in his office that evening when the phone rang on a direct dial line. The caller told him, "There has been a death of a journalist in West Virginia that needs to be looked into." Mr. Bishoff told the police that the caller may have mentioned the name "Casserole."

We spoke with Mr. Bishoff. Although he continues to assert that he received a telephone call on August 11, he said that, upon reflection, he is not sure whether the caller mentioned the

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[52] Sadly, Mr. Casolaro was not the first person to commit suicide in his family. In 1971, his younger sister took her own life by overdosing on drugs. She was 18 years old and living in the Haight-Ashbury district of San Francisco at the time.

name "Casserole" or anything else approximating Casolaro. He told us that many "conspiracy buffs" had his inside telephone line, and he frequently received calls about dead journalists. He indicated that at the time he spoke with the Martinsburg police, he "wanted it to be true" that Mr. Casolaro had been murdered, but that now he believes he committed suicide. He told us that he now regards the Sunday night telephone call as "not significant."

Casolaro's Fear of Needles and Blood

Some of Mr. Casolaro's family and friends suggest that he would not have committed suicide by cutting his wrists because he was frightened of needles and the sight of blood. We spoke with several doctors and dentists who treated Mr. Casolaro during the years before his death. Dr. Tony Casolaro's medical partner, Dr. Steven Zimmet, told us that during a routine physical examination approximately two years before Casolaro died, Casolaro put up a fuss before submitting to a blood test. However, Dr. Stanley Levin, who performed a root canal on Casolaro in December 1990, told us that Mr. Casolaro exhibited no fear of needles, blood, pain, or any of the other incidents of oral surgery.

Casolaro's Planned Meeting In West Virginia

Mr. Casolaro told many of his friends and family that he was going to West Virginia to meet a "source." No one with whom we spoke recalls Mr. Casolaro ever identifying who it was he supposedly planned to meet. Mr. Casolaro himself gave varying descriptions of the "source," telling the Weinfields that he did

not know the identity of the person he was going to meet; telling Lillian Pittaway that he was going to meet someone who would give him his "biggest tip;" and telling Ben Mason that he was going to see "the guys."

As discussed in some detail above, we were able to account for most of Mr. Casolaro's time in West Virginia. We were unable to find any conclusive evidence that he met with anyone while in Martinsburg other than his chance meetings with various individuals at bars and restaurants. However, as noted above, a waitress at the Sheraton's Heatherfield Lounge said she saw Mr. Casolaro meeting with either an "Iranian or Arabian" individual on Thursday, August 8. Also, William Turner claims to have met with Mr. Casolaro on the afternoon of August 9.

For the reasons indicated above, we are not convinced that either of these meetings took place. However, regardless whether these meetings took place, there is no evidence linking any of the alleged participants in the meetings to Mr. Casolaro's death.

The Paper in Casolaro's Shoe

During forensic testing, the West Virginia State Police Crime Laboratory found a folded piece of paper inside Mr. Casolaro's left shoe. The shoe had been found in room 517, next to the bed. The paper had indentations, as if someone had written something on a page on top of the paper. The laboratory determined that the paper had come from the same legal pad on which Mr. Casolaro had written the suicide note. The laboratory was able to reproduce the impressions left on the paper. The

writing was Mr. Casolaro's; and the paper read as follows:

Outline

Chapter on 1980.
Terrorist underground. Afghanistan. Mideast. Iran.
John Philip Nichols after arrival
Indian Reservation
Fred Alvarez
Paul Morasca
Philip Arthur Dempson
Fresno
Hercules -- Bill Kilpatrick The Big Tex -- Ricono
San Francisco
Finish up chapter w/ Paul M. & Fred A. / ord

There is no indication when Casolaro had written those words, or why he had put the piece of paper inside his shoe.

Lack of Documents

Several of Mr. Casolaro's friends and family members told us that Mr. Casolaro typically carried a significant number of notes and documents with him. The fact that no documents were found in Mr. Casolaro's hotel room following his death, they suggest, may indicate that he was killed and his notes taken.

There is no credible evidence that Mr. Casolaro ever had any documents with him while he was in Martinsburg. All the hotel employees, including the maids that cleaned his room, told the police that they never saw any documents either in Mr. Casolaro's room or in his immediate possession. Nor was he seen with any documents at any other location in Martinsburg. In short, there is no credible evidence that there were ever any documents reflecting his investigation in his hotel room.

Mr. Lopez, the desk clerk, said he may have seen Mr. Casolaro with a briefcase but he is not sure. In light of his

lack of certainty and the fact that none of the other hotel employees recall seeing a briefcase or documents, we believe that Mr. Lopez was probably mistaken.[53]

F. Conclusion

The overwhelming physical evidence points to the conclusion that Mr. Casolaro committed suicide: the crime scene, the autopsy, the blood spatter report and the toxicology report as well as the other aspects of the investigation undertaken by the Martinsburg police and us. Furthermore, there were indications during the last few months of Mr. Casolaro's life that he was despondent and exhausted. Although there were mistakes made during the original investigation into the death (most particularly the failure to seal the room and the early embalming of the body), we have no reason to believe that the original investigations were not thorough or undertaken in anything other than the utmost good faith. Based on our review of all the evidence, we concur with the conclusion reached by Martinsburg police authorities that Mr. Casolaro took his own life.

We reached that conclusion after carefully considering the questions and concerns raised by his family and friends as well as by others. After reviewing them, we believe that many of those questions are typical of the types of questions that follow any suicide. As for the allegations of foul play raised by some

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[53] William Turner claims to have given Mr. Casolaro some documents on Friday, August 9, 1991. As discussed above, we find his story to be wholly unreliable.

individuals, there is simply no evidence supporting the involvement of any of the individuals identified in Mr. Casolaro's death.

## VI. The Attorney General Should Not Appoint an Independent Prosecutor to Further Investigate INSLAW's Charges.

In its 1992 report, the House Judiciary Committee recommended that the Attorney General appoint an independent counsel to investigate, among other things, "INSLAW's allegations of a high level conspiracy within the Department to steal Enhanced PROMIS software to benefit friends and associates of former Attorney General Meese." (House Report 113.) Since that time, the independent counsel law has expired and subsequently been renewed. We strongly recommend, based on all of the conclusions reflected in this report, that an independent counsel not be appointed to investigate any claims related to the INSLAW affair.

First, INSLAW's allegations have been fully and fairly investigated by a special counsel and have been found to be totally lacking in credibility. There is no reason to question the integrity or independence of Judge Bua or his investigation. To the contrary, Judge Bua's integrity is above reproach, and our review of his investigation confirmed the thoroughness and independence of his efforts in this endeavor. An independent prosecutor would simply duplicate that effort. Accordingly, the

appointment of an independent prosecutor would, in our opinion, constitute a waste of government funds and an unwise use of the talents and energies of whatever respected lawyer was so appointed.

Second, the Department of Justice has already conducted a review of the allegations made by INSLAW and determined that they were not sufficient to warrant the initiation of a preliminary investigation under the Independent Counsel statute. In February 1988, INSLAW submitted a series of allegations to the Public Integrity Section of the Department of Justice which it maintained justified the appointment of an independent counsel. Those allegations included, among others, the charges that former Attorney General Edwin Meese and Judge Jensen conspired to steal INSLAW's software; that the conspiracy was intended to benefit Hadron and Dr. Brian; that the Department interfered with INSLAW's legal representation by inducing Dickstein, Shapiro & Morin to ask INSLAW's attorney to withdraw from the firm; that the Department sought to seek a conversion of INSLAW's bankruptcy to a liquidation proceeding; and that the Department instigated or encouraged a hostile take-over bid of INSLAW by Systems and Computer Technology, Inc., in order to obstruct INSLAW's suit against the Department. In May 1988, the Department informed INSLAW that the allegations were insufficient to warrant a preliminary investigation under 28 U.S.C. § 591 and that the matter was accordingly closed. The determination was made after careful consideration by the Department of the credibility of the

source of the allegations and the specificity of those allegations as required by the Independent Counsel statute. [54]

Third, there are no "covered" officials for whom the appointment of an independent counsel would be appropriate at this time. The Independent Counsel Reauthorization Act of 1994 limits the applicability of the law to one year after the covered government official leaves office. All the potential targets of such an investigation have been out of office for more than one year. Accordingly, there are no covered officials that would require triggering the provisions of the Independent Counsel law.

And fourth, the discretionary appointment of an independent counsel for officials not considered to be "covered" officials requires a determination that an investigation of such an official by the Department would result in a "personal, financial or political" conflict of interest. There is no indication that such a conflict exists or would exist if the Department were to bring charges against any of the individuals identified by INSLAW as allegedly being involved in a conspiracy to hurt INSLAW.

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[54] INSLAW subsequently submitted a request to the Division for the Purpose of Appointing Independent Counsels of the U.S. Court of Appeals for the District of Columbia Circuit to appoint an independent counsel. The request was rejected on jurisdictional grounds. In re INSLAW, Inc., 885 F. 2d 880 (D.C. Cir. 1989). INSLAW's petition for a writ of mandamus directing the Attorney General to conduct a criminal investigation based on INSLAW's various allegations also was rejected by the courts. INSLAW, Inc. v. Thornburgh, 753 F. Supp. 1 (D.D.C. 1990).

## VII. The Department of Justice Should Not Authorize The Payment Of Any Additional Compensation To INSLAW.

At the heart of the controversy between INSLAW and the Department of Justice is a dispute over money. The basic dispute centers on (1) whether INSLAW has any proprietary rights in the PROMIS software that it used to perform its obligations under its 1982 contract with the Justice Department, and (2) if so, whether INSLAW is entitled to compensation greater than that called for by the contract. INSLAW asserts that the answer to both of those inquiries is yes and that it is, therefore, entitled to the $6.8 million awarded it by the Bankruptcy Court and hundreds of millions of dollars more for consequential damages. The Department of Justice has maintained throughout the course of its dealings with INSLAW that INSLAW has failed to demonstrate the existence of any proprietary enhancements in its software and that, even if INSLAW did use software containing proprietary enhancements to satisfy its contractual obligations to the government, it is not entitled to any compensation beyond that provided for in the contract.

It should be noted from the outset that we considered this issue one of the most difficult ones before us. There is no dispute that, in the 12 years since the PROMIS contract was executed, INSLAW has failed to obtain any kind of enforceable judgment on any of its claims. INSLAW's failure in prosecuting its claims comes despite extensive litigation over the years. However, there is also no dispute that the Bankruptcy Court did

award INSLAW $6.8 million in damages based on the court's conclusion that the Department had violated the automatic stay provisions of the bankruptcy laws. In re Inslaw, 113 B.R. at 815-819. Although that decision was overturned by the U.S. Court of Appeals for the D.C. Circuit on the ground that the Department's actions did not constitute a violation of the automatic stay, 932 F.2d at 1475, we were troubled by the factual findings of the Bankruptcy Court.

After carefully reviewing all the relevant facts and the various judicial opinions that have been issued in relation to this dispute, we conclude that the Department of Justice should not authorize the payment of any moneys to INSLAW or its principals. There is no credible evidence that any Department of Justice official in any way hindered INSLAW's ability to litigate its claims against the Department. Moreover, we believe it is clear that any claims INSLAW may have once had against the government are now barred by the applicable statutes of limitations. After reviewing all the issues raised by INSLAW, we find that there is no basis warranting the waiver by the United States of the statutory time bars to INSLAW's claims. Furthermore, and most importantly, we do not believe that, even if INSLAW's claims were timely, it would be entitled to any additional compensation.

A. The History of INSLAW's Monetary Claims.

Under the Contract Disputes Act, 41 U.S.C. § 601 et seq.,

all claims arising under a government contract must be submitted to the appropriate government contract officer for resolution. The contract officer's decision becomes final and conclusive unless review is sought before the appropriate Board of Contract Appeals within 90 days or before the U.S. Court of Federal Claims within one year. Appeals from either the Board of Contract Appeals or the Claims Court lie solely with the U.S. Court of Appeals for the Federal Circuit. These procedures provide the exclusive jurisdiction for litigating claims against the United States arising under a contract governed by the Contract Disputes Act.

There are two groups of claims that INSLAW still maintains entitle it to additional compensation. The first involves a series of miscellaneous contractual claims ("DOTBCA Claims"). On August 8, 1984, INSLAW submitted a letter to Peter Videnieks, the Department's contracting officer, asserting claims for computer center costs ($160,583) and target fees ($331,447). Mr. Videnieks denied those claims on November 20, 1984, and INSLAW filed a timely notice of appeal with the Department of Transportation Board of Contract Appeals ("DOTBCA") in February, 1985.[55]

On October 17, 1985, INSLAW submitted additional claims totalling $4.1 million to Mr. Videnieks. These claims included a $2.9 million claim for licensing fees allegedly due as a result

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[55] The DOTBCA has jurisdiction over government contract claims against the Department of Justice.

of the Department's use of INSLAW's proprietary enhancements ("Data Rights Claim") and $1.2 million more in miscellaneous claims. The contracting officer denied these claims in rulings issued on February 21 and September 4, 1986. INSLAW appealed these rulings, with one exception, to the DOTBCA. In its May 1986 notice of appeal of the February 21 ruling, INSLAW made clear that it was "not appealing to this Board that portion of the [Contracting Officer's] Final Decision on Data Rights." All of the other October 1985 claims were appealed to the DOTBCA.

INSLAW failed to pursue vigorously the claims that it had appealed to the DOTBCA. In October 1992, the DOTBCA, noting that "it is clear that INSLAW is most anxious to avoid trial of the issues," concluded that the "principal reason that, after all these years, trial has not commenced, has been INSLAW's repeated requests for suspension and continuance, including a Bankruptcy Court suspension of Board proceedings at INSLAW's behest."[56]

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[56] Despite this finding, INSLAW and the House Report both maintain that Department of Justice attorneys were responsible for delaying and obstructing the various suits between the parties. For example, the House Report asserts that in 1990 the Department requested the United States Court of Appeals for the District of Columbia Circuit to consider the matter for the Court's Appellate Mediation Program in bad faith in order "to maintain the facade of working diligently to settle a tricky contract dispute while working behind the scenes to sabotage it and keep pressure on INSLAW by forcing it to expend additional resources on legal support during the mediation process." House Report 41-42.

The only support cited by the House Report for this conclusion is the fact that an October 1, 1990, Washington Post article quoted a Department spokesperson as disclosing publicly that the Department had requested that the matter be considered for mediation, and, following this disclosure, INSLAW elected to withdraw from mediation. Although the reported disclosure did

Later that same month, eight years after asserting its initial claims, INSLAW submitted a motion to the DOTBCA seeking to withdraw all of its claims, asserting that it could no longer afford legal counsel to pursue the case. In an order dated November 9, 1992, the DOTBCA granted INSLAW's motion and dismissed the claims: "The requested dismissal in effect results in a determination that no amounts are owing to INSLAW under its claims...The appeals before the Board are hereby dismissed with prejudice." Appeal of INSLAW, Inc., Docket Nos. 1609, 1673, 1775, 1828, Opinion by Administrative Judge Robertory (DOTBCA

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not violate any confidentiality rule of the Appellate Mediation Program, the Program's administrator inquired of the parties whether or not they wanted to continue with the mediation following the publication of the article as the disclosure violated the Program's goal of strict and total confidentiality. INSLAW elected to withdraw from the mediation at that time.

Despite the House Report's conclusion that the breach in confidentiality suggests bad faith on the part of Department attorneys, there was no indication in any of the internal Department documents we reviewed that suggest the Department sought a mediated resolution to its dispute with INSLAW in anything other than the utmost good faith. Furthermore, the fact that the Department had sought mediation had been reported in numerous articles more than six months earlier when the Department first applied to the program. In fact, several of those earlier articles reported that Mr. Hamilton denounced the use of a mediator in the case. ("U.S. Seeks Mediator in Software Lawsuit," The Washington Times, April 2, 1990, p. B5.) It is difficult to understand how a re-publication of a fact that had been published six months earlier -- and which had been commented on by Mr. Hamilton at that time -- prejudiced INSLAW in such a way as to "force INSLAW to withdraw from the program." There is simply no evidence to support the House Report's extremely critical interpretation of the events surrounding the mediation effort. If anything, the evidence suggests that INSLAW capitalized on an opportunity presented to it in October 1990 to get out of a process that it never supported.

Nov. 9, 1992).[57]

Rather than pursuing an appeal to the DOTBCA on its Data Rights Claims, INSLAW decided to pursue those claims as part of its bankruptcy proceedings. In a novel and ultimately unsuccessful litigation strategy, INSLAW filed an adversary proceeding before the Bankruptcy Court alleging the Department of Justice was willfully violating the automatic stay by its continuing use of Enhanced PROMIS. In essence, INSLAW repackaged its Data Rights Claims in the vernacular of a bankruptcy proceeding. In 1988, Bankruptcy Judge Bason issued his opinion in which he concluded, among other things, that (1) INSLAW's claims were not based on contract and therefore were not foreclosed by the exclusive jurisdiction of the Contract Disputes Act, and (2) INSLAW had established a violation of the automatic stay provisions of the Bankruptcy Act. United States v. Inslaw, Inc., 83 B.R. 89 (Bankr. D.D.C. 1988), rev'd, 932 F.2d 1467 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 913 (1992). Judge Bason found that the Justice Department had acquired Enhanced PROMIS by "fraud, trickery, and deceit." He awarded INSLAW $6.8 million in damages for violations of the automatic stay.

Although Judge Bason's decision was affirmed by the District Court, the U.S. Court of Appeals for the D.C. Circuit reversed the decision on the grounds that the Department's actions had not

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[57] The Department of Justice had filed a number of counterclaims against INSLAW before the DOTBCA. Those claims were also dismissed by the DOTBCA in light of its determination that the Department's claims were setoffs and did not seek affirmative recoveries.

violated the automatic stay and, therefore, the Bankruptcy Court had no jurisdiction over INSLAW's Data Rights Claims. The Court of Appeals directed the Bankruptcy Court to vacate all of its orders concerning the Department's alleged violations of the automatic stay and to dismiss INSLAW's complaint against the Department. 932 F.2d at 1475. INSLAW's petition for a writ of certiorari was denied. 112 S.Ct. at 913.

B. INSLAW Is Barred From Asserting Any Additional Claims Against The United States.

There are currently no claims pending before any judicial tribunal between the United States and INSLAW. Furthermore, we are convinced that INSLAW would be barred by the applicable statutes of limitation from attempting to pursue any monetary claims against the United States.

All of the DOTBCA Claims were dismissed with prejudice by the DOTBCA on November 9, 1992, pursuant to INSLAW's own motion to dismiss. Under § 8(g) of the Contract Disputes Act, the Board's decision "shall be final" unless the contractor files an appeal with the U.S. Court of Appeals for the Federal Circuit within 120 days of the Board's decision. 41 U.S.C. § 607(g). INSLAW did not do so, thus rendering the DOTBCA's decision final.

INSLAW's Data Rights Claims are also time barred. The contracting officer issued a decision with regard to those claims on February 26, 1986. INSLAW never appealed that decision to an appropriate forum, i.e., either the DOTBCA or the Court of Federal Claims. In fact, in its notice of appeal to the DOTBCA,

INSLAW specifically excluded its Data Rights Claims from its appeal. Instead, INSLAW and its counsel decided to pursue that claim using a novel theory in the bankruptcy court. As was ultimately determined, the bankruptcy court did not have jurisdiction to hear those claims. Any further pursuit of those claims would appear to be foreclosed by § 6(b) of the Contract Disputes Act, which provides: "The contracting officer's decision on a claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter." Accordingly, the contracting officer's 1986 decision rejecting INSLAW's Data Rights Claims is final.

In a meeting with us and in various other forums, INSLAW has asserted that its claims for the allegedly wrongful use by the Department of Justice of its proprietary enhancements (i.e., its Data Rights Claims) are not governed by the Contract Disputes Act as they do not arise from the PROMIS contract. INSLAW contends that these claims are better understood as grounded in the tort of conversion. We do not think the recharacterization of its claims as arising in tort will enable INSLAW to circumvent the applicable statute of limitations. First, the Contract Disputes Act applies to all claims that are essentially contractual in nature even if they are styled differently. Our analysis of the controlling case law leads us to conclude that INSLAW's claims are "essentially contractual." See, e.g., Spectrum Leasing Corp. v. United States, 764 F.2d 891 (D.C. Cir. 1985). In fact, it is

worth noting that when INSLAW first asserted these Data Rights Claims to the contracting officer in 1985 they were presented as "arising under the above-referenced [PROMIS] contract" and the amount claimed was certified by Mr. Hamilton as a "contract adjustment."

Second, even in the unlikely case that the Contract Disputes Act is not controlling, any claims that INSLAW would have under the Federal Tort Claims Act would almost certainly be barred by the FTCA's two-year statute of limitations. 28 U.S.C. § 2401.

C. The Circumstances Surrounding INSLAW's Allegations Do Not Warrant The Waiver By The United States Of The Statutory Time Bars To INSLAW's Monetary Claims.

One of the principal missions of the Department of Justice is to ensure that individuals are treated fairly and justly in their dealings with the United States government. Accordingly, the determination that any claims INSLAW may have against the United States are barred by the applicable statutes of limitation does not end our inquiry. We believe that in those exceptional cases where not to do so would result in the commission of a manifest injustice, the United States should be willing to provide compensation to individuals even if the government is protected by applicable time limitations. This is not one of those situations.

First, INSLAW has had ample opportunity to fully litigate its claims in the courts of this country. Over the years, INSLAW has been represented by some of the finest attorneys and law firms in the country who have vigorously and zealously

represented INSLAW's interests. According to a document filed by INSLAW with the DOTBCA in 1992, INSLAW had incurred over $6 million in legal fees by that time. We are aware that INSLAW and its counsel made strategic litigating decisions that they may want to take back today: they decided to let INSLAW's claims before the DOTBCA languish for eight years, and they decided to pursue a novel, untried theory in Bankruptcy Court rather than to litigate the Data Rights Claims in the forum they knew was proper. As noted by DOTBCA Judge Robert J. Robertory, these were strategic decisions:

> Inslaw elected to pursue the issue of ownership in Promis in the Bankruptcy Court as a violation of the automatic stay imposed by 11 U.S.C. § 362, which eventually led to the Court of Appeals ruling (932 F.2d 1467, supra) that such claim could not be maintained on that basis. In so doing, Inslaw avoided the two tribunals (this Board and the United States Claims Court) which unquestionably had jurisdiction to determine the legal propriety of the Justice Department's use of Promis. The reason for this election was stated by one of Inslaw's counsel to be a fear that this Board would apply the rationale of Bell Helicopter Textron, ASBCA No. 21,192, 85-3 BCA ¶ 18,415 (1985), and hold that the Data Rights clauses of the contract gave title to the Promis enhancements to the Justice Department. In other words, Inslaw and its counsel were of the opinion that under the law of government contracts as expressed in Bell Helicopter Textron, under the provable facts of this case the Justice Department had sufficient ownership interest in Promis to permit the uses which the Justice Department made of it, without liability to Inslaw. This indicates that Inslaw and its counsel were of the opinion that Inslaw's position in the linchpin portion of the parties' dispute, title to the Promis software (an issue which Inslaw's appeal did not place before the Board), might be without foundation in law or fact.

The lack of success flowing from those decisions does not entitle INSLAW to relief from the statutes of limitation.

Furthermore, there is no credible evidence that any Department of Justice official did anything to hinder or frustrate INSLAW's access to the courts or its ability to present fully its claims. Had INSLAW been denied such access and the statute had subsequently run, we would have a very different situation.

Second, we concur with the Special Counsel's conclusion that "all of the actions taken by DOJ employees were done with a good faith belief that they were in the best legitimate interests of the government." (Bua Report 125.) The reason why this dispute did not come to a close following INSLAW's unsuccessful efforts in the courts and before the DOTBCA is that INSLAW has cloaked its contract dispute with the government with allegations of conspiracies, international intrigue and murder. By doing so, INSLAW has been able to attract and sustain media interest in what otherwise is nothing more than a government contracts dispute. In the process, INSLAW and its principals have repeated and broadcast unsubstantiated rumors apparently without any concern for the reputations of those referred to in those rumors. Individuals previously of stellar reputation and unquestioned integrity have had to live under clouds created by INSLAW. Those clouds have almost all been created based on nothing more than the alleged statements of "anonymous sources." As detailed throughout this and the Special Counsel's report, we have found virtually no credible evidence supporting INSLAW's conspiracy allegations. We believe INSLAW should not be rewarded for its

ability to keep its story alive by ruining the reputations of innocent individuals.

And third, after carefully reviewing the record, we do not believe INSLAW is entitled as a matter of law to additional compensation for the use of its PROMIS software. We have studied the opinions of the bankruptcy court, some relevant portions of the bankruptcy court record, the analysis of the Special Counsel and the views of INSLAW as reflected in its written submissions and in various meetings with its principals. Based on that review, we concur with the analysis and conclusions of the Special Counsel regarding the rights of the parties under the contract and the propriety of the government's conduct under the contract. (Bua Report 15-38, 124-140, 147-150, 250-255, 261-263.) Further, we believe the current use of INSLAW's PROMIS software by the Department in the Executive Office of United States Attorneys and in U.S. Attorneys' offices around the country is permitted under Modification 12 and other provisions of the contract.[58] Since we were unable to identify any credible evidence that the Department has distributed Enhanced PROMIS beyond those offices, we do not believe INSLAW is entitled to

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[58] Modification 12 provides:

> The Government shall limit and restrict the dissemination of the said PROMIS computer software to the Executive Office for United States Attorneys, and to the 94 United States Attorneys' Offices covered by the contract, and, under no circumstances shall the Government permit dissemination of such software beyond those designated offices pending the resolution of the issues extant between the Contractor and the Government under the terms and conditions of Contract No. JVUSA-82-C-0074.

additional compensation.

We believe it important to note that the House Report is erroneous in its repeated assertions that then-Deputy Attorney General Arnold Burns acknowledged to Office of Professional Responsibility investigators that "the Department had already determined [in 1986] that INSLAW's claim was probably justified and that the Department would lose in court." House Report 111; see also House Report 7, 33-34, 86. In fact, our review uncovered no evidence that Department officials took any positions during the litigation in bad faith or believed that INSLAW deserved to recover moneys in addition to those provided for under the contract.

The House Report misinterprets testimony given by Mr. Burns on March 30, 1988, to OPR investigators by totally ignoring the context in which that testimony was given. As noted in the dissenting statement to the House Report, once the context of Mr. Burns' statement that Department lawyers were "satisfied that INSLAW could sustain the claim in court" is taken into account, it is clear that he was referring to the strength of INSLAW's defense to a particular crossclaim by the Department and not to the merits of INSLAW's affirmative claims against the government. See Dissenting views of Hon. Hamilton Fish, Jr., et al., House Report 116-117. The text of the relevant portion of Mr. Burns' testimony follows:

> Because as it was explained to me, the PROMIS system had been developed by INSLAW pursuant to a grant by the United States government, pursuant to a grant by us, the Department of Justice, the United States Government to

> INSLAW of a big sock of dough. And they, in effect, were developing this for the Department of Justice with Department of Justice money, working hand-in-glove as we sometimes do untold [sic] with other vendors or contractors.
>
> Under circumstances which, it struck me as a lawyer at the time, hearing this as a new room [sic], as a very peculiar notion. It struck me that in those circumstances, that the proprietary rights to this belonged to the Department of Justice and that if anything, the tables were turned the other way and that INSLAW should pay the Department of Justice royalties to the extent they were vending or selling or leasing or whatever they do to outsiders, to third parties.
>
> Now I should also tell you that in talking to my lawyers, I became sort of a little aggressive on this issue, as a lawyer, aggressing an issue, not aggressing people but addressing and aggressing an issue. And I wanted to know, as a lawyer, why we didn't make a claim against INSLAW for the royalties on the theory that we were the proprietary owners. And I got an answer.
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> And the answer that I got, which I wasn't terribly happy with but which I accepted, was that there had been a series of old correspondence and back and forthing and stuff, that in all of that, our lawyers were satisfied that INSLAW could sustain the claim in court, that we had waived those rights, not that I was wrong that we didn't have them but that somebody in the Department of Justice, in a letter or letters, as I say in this back and forthing, had, in effect, waived those rights.

(In the Matter of: Office of Professional Responsibility Investigation No. 86-0170, Interview of Arnold I. Burns, 11-12.) When read in context, Mr. Burns' statement fails, totally and quite clearly, to "raise the specter that the Department actions taken against INSLAW in this matter represent an abuse of power of shameful proportions." The statement is indicative of neither duplicity nor any other impropriety.

We are aware that many of these conclusions are at odds with some conclusions reached by Judge Bason after trial in his court. We cannot explain why Judge Bason reached such very different

conclusions from those that we and the Special Counsel have reached.[59] However, after carefully reviewing Judge Bason's opinions, it is clear that the decisions rest in large part on Judge Bason's determinations as to the credibility of the witnesses who testified during trial. The following was Judge Bason's first finding regarding the credibility of the witnesses that appeared before him:

> The testimony of William Hamilton was accurate in all or almost all respects, even taking into account the natural human tendency to emphasize those things favorable to one's own cause. Mr. Hamilton was an impressive witness with an exceptionally good memory and an extraordinary ability to remember with precision details of events that occurred years ago.

In re Inslaw, 83 B.R. at 156. He went on to find that virtually none of the testimony given by Department of Justice employees or by others (including INSLAW employees) supporting the Department's position was credible. Id. at 156-158. The importance of those credibility determinations is apparent from a close reading of the decision as the testimony of Mr. Hamilton and a few other INSLAW officials appears to be the only support for the vast majority of Judge Bason's findings.

We disagree with Judge Bason's credibility determinations. As detailed throughout the Special Counsel's report and this report, the information provided to us by Mr. Hamilton has often been unreliable and is always self-serving. Numerous witnesses

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[59] The House Committee Report reached the same conclusions as Judge Bason regarding the underlying contract dispute between INSLAW and the government. However, it appears that the report relies heavily on the findings of Judge Bason in reaching those conclusions.

have denied making statements attributed to them by Mr. Hamilton. Others have claimed that Mr. Hamilton badly mischaracterized their comments in order to make them fit into his conspiracy theories. These problems are not unique to our efforts. The House Committee report noted:

> Other witnesses directly contradicted the statements attributed to them by the Hamiltons and were clearly distressed that their names had been drawn into the web of the INSLAW conspiracy theory.

(House Report 50.) The Special Counsel concluded:

> We cannot fail to note also the degree to which William Hamilton's statements and assertions do not withstand scrutiny. We repeatedly encountered witnesses who, in a very credible way, denied making the statements attributed to them by Hamilton. The witnesses who contradicted Hamilton were both friend and foe of INSLAW, and we could not explain the constant contradictions as simply the efforts of Hamilton's enemies.

(Bua Report 266.) According to the DOTBCA, even INSLAW's counsel were concerned about Mr. Hamilton's credibility:

> The record contains statements by one of INSLAW's various attorneys indicating that Mr. Hamilton may be given to exaggeration. There was testimony in the Bankruptcy Court on December 7, 1988 by appellant's counsel that Mr. Hamilton's credibility was a real problem and would be a key issue in the case.

After spending a substantial period of time reviewing Mr. Hamilton's statements and allegations, we believe that he is not a credible source of information. Furthermore, he appears willing to repeat and publish any rumor or conjecture that he hears without regard to the truth of those rumors or the effect his statements may have on the reputations of innocent individuals.