



Memorandum

Subject <u>In re Assicurazioni Generali,</u> <u>No. 05-5602 (2d Cir.)</u>	Date September 25, 2008
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To: The Solicitor General

From: *DHD*
Douglas Hallward-Driemeier

TIME

In a letter dated August 1, 2008, the Second Circuit invited the United States to file a submission amicus curiae informing the court whether the foreign policy interests of the United States would be undermined by adjudication of the plaintiffs' claims against defendant Generali relating to Holocaust-era insurance policies. The court of appeals asked the government to inform the court by August 31 whether the government intends to file a brief and to file any such brief sixty days thereafter, by October 30. The Civil Division requested an additional 30 days, until September 30, to inform the court whether the United States would make an amicus filing. *We received Civil's memorandum on September 25.*

RECOMMENDATIONS

The Department of State, United States Attorney's Office, and Civil Division recommend amicus participation on issue 1. I recommend AMICUS PARTICIPATION ON ISSUE 1.

I recommend AMICUS PARTICIPATION, subject to approval of the chief brief.

We must reply CAZ by September 30 whether the US will file an amicus brief. If the government intends to file, a brief would then be due October 30.

There is a general consensus that the United States should at least file an amicus brief informing CAZ that it continues to be the foreign policy of the United States that insurance claims should be subject to voluntary resolution, such as through ICHEIC. CAZ asked whether it is; State confirms that that is the U.S. policy; and there have been many pronouncements supporting that proposition. It therefore is the right thing to do to inform CAZ of that position.

There remains the question of what is the legal consequence of that foreign policy. In the Statement of Interest filed in the German Foundation case, the

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QUESTIONS PRESENTED

(1) Whether it is the foreign policy of the United States that Nazi-era claims for unpaid insurance policies brought against an Italian company that voluntarily participated in the International Commission on Holocaust Era Insurance Claims (ICHEIC) should be resolved exclusively by voluntary means such as ICHEIC rather than through litigation in the courts of the United States.

(2) Whether, assuming the United States foreign policy is as stated in question (1), that foreign policy preempts plaintiffs' state law claims relating to unpaid Holocaust-era insurance policies or whether that policy supports dismissal on other grounds, such as international comity.

STATEMENT

1. In the late 1990s, after numerous suits were filed in the United States asserting claims arising out of the Holocaust era, the United States facilitated discussions between the representatives of the plaintiffs and defendants, the governments of Germany, numerous Eastern European countries, and Israel, and other groups representing Holocaust survivors and the heirs of Holocaust victims regarding non-litigation resolution of claims from the Holocaust era. These discussions culminated in the issuance of a Joint Statement by the participants in the discussions and the July 2000 signing of an Executive Agreement between the United States and Germany establishing a foundation funded with 10 billion DM, contributed jointly by the German Government and German companies, to be used to compensate individuals who suffered at the hands of German companies during the Nazi era. Agreement Concerning the Foundation 'Remembrance, Responsibility and the Future,' (Foundation Agreement), 39 Int'l Legal Materials 1298, 1303 (2000). A similar Executive Agreement was signed by the United States and Austria, see Agreement between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation" (Reconciliation Fund Agreement), 40 Int'l Legal Materials 523 (2001), and another agreement addressing Holocaust-era claims was signed between the United States and France, and a Joint Statement was issued by the United States and Switzerland. See American Ins. Ass'n v. Garamendi, 539 U.S. 396, 406-408 & nn. 2-3 (2003).

U.S. set forth a similar foreign policy but said that the Statement of Interest did not itself furnish a basis for dismissal, although the US urged dismissal on any valid legal ground. By e-mail this afternoon, State says it would go along with that approach. There is no need to decide at this point whether or how to express that view, although my position, at least on the basis of what I know thus far, is that we should say at least that -- both because it would be consistent with what the U.S. said in Statement filed pursuant to the Executive Agreement, and because I think we should get that record now so that we

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As part of the Foundation Agreement, the United States agreed to inform its courts that "it would be in [its] foreign policy interests * * * for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies." The United States also agreed to "use its best efforts" to promote the objectives of the agreement, including the achievement of an "all-embracing and enduring legal peace" with respect to such claims. The Reconciliation Fund Agreement and accompanying Joint Statement similarly establishes that the United States believes Austria's General Settlement Fund (GSF) should be the exclusive remedy for all Holocaust-era claims against Austrian companies and that the United States' foreign policy supports an "all-embracing and enduring legal peace" for Austria and Austrian companies in favor of the remedy provided by the GSF. The United States did not maintain in the Foundation Agreement or Reconciliation Fund Agreement that its foreign policy interests would "in themselves provide an independent legal basis for dismissal," but the United States ~~did~~ undertook to file statements of interest informing United States courts "that U.S. policy interests favor dismissal on any valid legal ground." Garamendi, 539 U.S. at 406 (quoting Foundation Agreement).

With respect to insurance claims, the Foundation Agreement specified that such claims against German insurance companies were to be handled according to the procedures established by the International Commission on Holocaust Era Insurance Claims (ICHEIC), with a total of DM650 million allocated to paying approved claims as well as a "humanitarian fund" to be administered by ICHEIC. The Austrian GSF also covered insurance claims. See Garamendi, 539 U.S. at 408 n.3. Although the German and Austrian agreements expressed the United States' foreign policy that the ICHEIC process should be the exclusive remedy for Holocaust-era insurance claims against German and Austrian companies, those agreements did not create ICHEIC. Rather, ICHEIC was "a voluntary organization formed in 1998 by several European insurance companies, the State of Israel, Jewish and Holocaust survivor associations, and the National Association of Insurance Commissioners, the organization of American state insurance commissioners," and was chaired by former Secretary of State Lawrence Eagleburger. Id. at 406-407. ICHEIC was set up "to provide information about unpaid insurance policies issued to Holocaust victims and settlement of claims brought under them," and the organization established "procedures for handling demands against participating insurers," including a system for researching and publishing unpaid policies, investigating the current status of

would not appear to have been hiding the ball if this case later goes to the Supreme Court.

For now, I recommended that you authorize notification to CAZ that the U.S. will file an amicus brief, subject to approval of the brief.

ESK.

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policies for which claims were made, a valuation process for paying claims, and "relaxed standards of proof." Id. at 407.

Generali, an Italian insurance company that is the defendant in this litigation, was one of the founding participants in the ICHEIC process. Generali committed \$100 million to pay Holocaust-era claims through ICHEIC, and, through ICHEIC, Generali published information relating to 43,000 unpaid policies of Holocaust victims. Generali's participation in ICHEIC was voluntary, and no executive agreement was entered into between the United States and Italy. Nonetheless, Deputy Secretary of the Treasury Stuart Eizenstat and other high-ranking government officials have repeatedly stated that the United States' policy that ICHEIC "should be considered the exclusive remedy for resolving insurance claims from the World War II era." In re Assicurazioni Generali, 340 F. Supp. 2d 494, 504 (S.D.N.Y. 2004) (Generali II) (quoting Eizenstat statement to House Committee on Banking and Financial Services); ibid. (Eizenstat testimony to Senate Committee on Foreign Relations that a company's participation in ICHEIC should give it "'safe haven' from sanctions subpoenas, and hearing relative to the Holocaust period"); ibid. (Letter of Deputy Secretary of State Richard Armitage that the U.S. "continues to support the ICHEIC and believes it should be viewed as the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II").

2. This appeal involves the individual claims of some 27 individuals who brought suit against Generali in United States courts (some of which were filed in state court and removed on the basis of diversity jurisdiction), which were consolidated before then-Judge Mukasey in the Southern District of New York. The consolidated litigation initially also included several class actions that have subsequently been settled. The complaints allege a variety of causes of action, including under state laws that create causes of action and extend statutes of limitation for claims on Holocaust insurance policies in particular, state unfair business practices statutes, international law, and common law principles of contract, unjust enrichment, and the duty of good faith and fair dealing. See Generali II, 340 F. Supp. 2d at 508 (Appendix).

In 2002, Judge Mukasey considered and denied Generali's motion to dismiss on forum non conveniens grounds. In Re Assicurazioni Generali, 228 F. Supp.2d 348 (S.D.N.Y. 2002) (Generali I). He held that ICHEIC was not an adequate alternative forum because it was a "private, nongovernmental form that [the defendants] both created and control," id. at 355, 356, and because "there are questions about ICHEIC's continued viability as a forum," id. at 357.

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In 2003, the Supreme Court issued its opinion in Garamendi. In that decision, the Court held that California's Holocaust Victims Insurance Relief Act was preempted because it conflicted with the foreign policy of the Federal Government as demonstrated in the Executive Agreements. 539 U.S. 420-425. The Court reasoned that its recounting of "negotiations toward the three settlement agreements is enough to illustrate that the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." Id. at 420. The Court relied on the Executive Agreements as "exemplars" of the government's position, but cited as well the more general statements of Deputy Secretary Eizenstat quoted above that "[t]he U.S. Government has supported [the ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." Id. at 422. The majority specifically took issue with the dissent, which criticized the majority for relying on "Executive Branch expressions of the Government's policy" other than formal Executive Agreements or statements by the President. Id. at 423 n.13.

Following the Garamendi decision, the Judge Mukasey ruled on Generali's motion to dismiss on preemption grounds. The district court ruled that "the laws supporting litigation of plaintiffs' benefits claims are preempted by a federal Executive Branch policy favoring voluntary resolution of Holocaust-era insurance claims through ICHEIC" and because "[p]laintiffs' ancillary claims, in turn, are not actionable because it appears that they do not allege any cognizable injury other than that caused by Generali's non-payment of benefits, redress for which is committed to ICHEIC." Generali II, 340 F. Supp.2d. at 497. The court held that the Executive's stated policy not only preempted state laws specific to Holocaust claims, but also to "the benefits claims arising under generally applicable state statutes and common law as well as customary international law. Litigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims through ICHEIC." Id. at 501. The court also held that the Executive's policy and Garamendi decision extended to Generali, despite the fact that there was no Executive Agreement with Italy. The court noted that Generali was one of the petitioners in Garamendi, that the Supreme Court had frequently referred to "European insurers," rather than German and Austrian insurers, and that senior Executive Branch officials, including Deputy Secretary Eizenstat and State Department officials had stated the United States' policy in terms of support for ICHEIC as the exclusive remedy for unresolved

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insurance claims, not just for companies covered by the Foundation Agreement or Reconciliation Fund Agreement. Id. at 503-504. The court noted that the United States had not filed a statement of interest in the case, but attributed that fact to "an unwillingness to act on behalf of a private company absent a government-to-government agreement encompassing claims against the company in question." Id. at 506-507. The court observed that Executive Branch officials had said that "the U.S. government could not be expected to intervene in the U.S. courts on behalf of Generali, since there was not governmental connection." Id. at 507.

3. While the case was pending on appeal, ICHEIC discontinued its operations, because its claims date had long passed and the filed claims were resolved. While the appeal was pending, Generali reached a settlement agreement with counsel in the class actions under which Generali agreed to reopen the period for filing claims, which would be resolved under the same terms as ICHEIC processed claims, but with ultimate supervision by the district court, and that Generali would pay an additional \$35 million to compensate the new claimants. The district court, after a remand from the court of appeals, approved the settlement, and the court of appeals affirmed. As a consequence of the class settlement, only twenty-seven individual claimants' cases remain pending (in addition to an approximate 200 individuals who opted-out of the class action settlement and who may now seek to file individual claims, especially if the court of appeals reverses the district court's order).

At oral argument, the members of the panel asked counsel for Generali what the United States' foreign policy actually was, and whether the United States shouldn't be asked to furnish its views. See Civil Mem. 8. On August 1, 2008, the Clerk of Court sent a letter to the Secretary of State asking for the Executive Branch's advice on "whether court adjudication of these Holocaust era claims against Generali would conflict with the foreign policy of the United States." 8/1/2008 Letter of Catherine O'Hagan Wolfe 1; see id. at 2 ("whether adjudication of these suits by a court of the United States would conflict with the foreign policy of the United States"). The court acknowledged the United States' statement in its Garamendi amicus brief that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era," but questioned "whether this continues to be Government policy, whether Government policy on this question is influenced by the fact that ICHEIC is no longer accepting claims, and whether that policy today encompasses insurers from countries (like Italy) not covered by executive agreements, as against companies from countries (like Germany and Austria) that are." Ibid.

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DISCUSSION

I agree with the unanimous recommendations that the United States should file a response to the inquiry from the court of appeals informing it of the foreign policy of the United States as it relates to the questions the court raised in its letter. I also agree that the United States' response should not take a position on the further question of the legal consequences of the United States' foreign policy.

1. As the Civil Division memorandum thoroughly discusses, the United States has repeatedly stated that it is the policy of the Executive Branch that ICHEIC should be the exclusive remedy for Holocaust-era insurance claims, including for companies that participated in ICHEIC voluntarily, without the compulsion of an Executive Agreement entered into by its national government. The Supreme Court relied on those statements in Garamendi, in which Generali was one of the petitioners, and the State Department informs us that the government's policy remains the same.

As explained in the Statements of Interest that the United States filed in cases against German and Austrian companies, the government's policy favoring resolution of Holocaust-era claims through negotiation and cooperation was based on many factors, including our foreign relations with the governments of Western Europe, where most of the defendant companies were located, and with the governments of Israel and Central and Eastern Europe, where most of the potential claimants lived. The policy also reflected the reality that litigation would be long and costly, with very uncertain prospects for claimants in light of the numerous defenses that the defendants might raise, and the conviction that only a negotiated resolution, with relaxed standards of proof and waiver of defenses was likely to result in some measure of justice on behalf of aging Holocaust victims. (A copy of the Statement of Interest filed in Whiteman v. Federal Republic of Austria, No. 00-8006 (S.D.N.Y.), is attached.) Although the United States did not take the step of espousing and settling individuals' claims (that was not the nature of the role the United States played in the negotiations, and, in any event, many of the claimants the United States sought to benefit were not United States nationals), the Executive Branch did recognize that, in order to achieve its policy goals, the government had to embrace as part of its policy a preference for dismissal of even those claims brought by plaintiffs who did not wish to take advantage of the negotiated processes, but wanted instead to litigate their claims in the courts of the United States. Thus, in the Executive Agreements with Germany and Austria, the United States agreed to file statements of interest that would inform the courts "that U.S.

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policy interests favor dismissal on any valid legal ground." Garamendi, 539 U.S. at 406. Although the United States made no undertaking to make similar filings on behalf of companies who were not covered by an Executive Agreement, the government's policy with respect to companies that participated in ICHEIC was the same, whether they did so voluntarily or under compulsion of their governments. As we stated in our amicus brief in Garamendi, the United States' policy was that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era." U.S. Br. at 2. Id. at 13 ("with respect to unresolved claims against foreign enterprises arising out of the Holocaust, the United States has determined that those claims should be pursued through voluntary, non-adversarial processes rather than through coercive regulations and litigation"). That policy did not distinguish Generali, which was a voluntary founding member of ICHEIC and petitioner in Garamendi, from the German companies covered by the Executive Agreement. Rather, the United States' brief explained that the Executive Agreement "reflected" the "United States' approach to resolving Holocaust victims' claims, including insurance claims." Id. at 3.

As the Civil Division explains (Mem. 9-10), the policy stated in our Garamendi brief remains the policy of the United States and is not altered by the fact that ICHEIC is no longer accepting claims.

The court of appeals has made a reasonable request, that the United States confirm its policy in light of developments that might have altered that policy (though they have not). Although the government was not obligated to file a statement of interest in this case, there is little reason why the government should refuse to clarify its foreign policy for the court when the court believes that foreign policy is relevant to the legal issues presented in the case and understandably wishes to ensure that it acts on a correct understanding of that policy. Moreover, the State Department has requested that we inform the court of its views, and has explained (as summarized in the Civil Division memorandum at 10) that a failure to respond would be construed as a retreat from the government's commitment to cooperative negotiated resolution of Holocaust-era claims, which would undermine present efforts by the State Department to expand the scope of the existing compensation program in Germany and create new programs along similar lines in Central and Eastern Europe. Thus, I concur with the recommendation of the Civil Division and Department of State that we respond to the court of appeals' inquiry and inform the court that the policy stated in our amicus brief in Garamendi remains the policy of the United States, that it applies to companies that voluntarily participated in the ICHEIC process although they were not covered

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by an Executive Agreement, and is not affected by the fact that ICHEIC is no longer accepting claims. (We can state that our policy does not oppose reopening an ICHEIC-type process to additional claims, as Generali has voluntarily agreed to do as part of the class action settlement agreement.)

I note that you have received two letters from Members of Congress that urge you not to make a filing in this case suggesting that the foreign policy of the United States would be interfered with by litigation of claims against a company that is not covered by an Executive Agreement. See 9/23/08 Letter of Representative John Conyers, Jr.; 9/24/08 Letter of Representatives Ileana Ros-Lehtinen, Robert Wexler, Steve Chabot, and Ron Klein. Although it is clear that the Members disagree with the foreign policy that the Executive Branch has adopted with respect to claims against companies that voluntarily participated in ICHEIC, I do not believe that is an appropriate basis to refrain from responding to the court of appeals' inquiring and providing it with correct and current information about the foreign policy views of the Executive Branch.¹ To the extent that the Members' letters can be construed as urging you not to go farther, and not to take a position on the legal merits of the defendants' preemption argument, that question is addressed below.

2. I agree with the Civil Division that the United States' submission should not take a position on what the legal consequences of the government's foreign policy are for the viability of plaintiffs' claims. Most significantly, the court of appeals does not appear to have requested a brief addressing legal arguments, but rather a statement of the government's foreign policy views. While it would not be unreasonable to view the letter, which sets forth the district court's preemption rationale, as an implicit invitation to comment on whether the United States agrees that that is the legal consequence of the government's policy views, the particular question that the court has asked of the government is to explain what its present foreign policy is.

¹ The Letter of Members Ros-Lehtinen, Wexler, Chabot, and Klein refer to a bill pending in the House of Representatives that would provide Holocaust victims a cause of action in United States courts with respect to Holocaust-era insurance policies. See Civil Mem. 10 n.6 (discussing bill). Although that bill, if passed by Congress and signed by the President, would establish a new policy with respect to Holocaust-era claims, the State Department opposes the bill precisely because it is inconsistent with the foreign policy articulated by the Executive Branch.

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Moreover, it would seem somewhat incongruous for the government to take a position on the legal merits at this late date. The government has filed numerous statements of interest in the past eight years pursuant to the Executive Agreements with Germany and Austria, but it has almost never taken a position on the merits of the legal defenses raised by defendants in support of the dismissal of individual Holocaust victims' claims.² Instead, the governments' statements of interest have stuck to the language of the Executive Agreements, encouraging the courts to dismiss on any valid legal basis. That decision was based on numerous considerations, including a sense that the government's role in the negotiations had been that of an intermediary and that it was inappropriate to take sides between the plaintiffs and defendants on their legal disputes. Moreover, the government did not always agree with some of the defendants' legal arguments, but worried that it would be seen as subverting the Executive Agreements if we took a position adverse to dismissal on one or another ground. In the end, that approach has perhaps led the courts to give the Executive's foreign policy broader legal force than the government might itself have urged. The district court's decision in this case is a good example. Although the government would probably not have argued at the time the motion to dismiss was briefed that the individual plaintiffs' common law claims were preempted by the government's foreign policy, that argument by defendants ultimately found support in the Supreme Court's Garamendi decision, which was decided after the motion was briefed. Indeed, in Garamendi itself, the United States did not urge the theory of preemption that the

² The sole exception of which I am aware is Deutch v. Turner, 317 F.3d 1005, amended on rehearing, 324 F.3d 692 (9th Cir. 2003). In that case, the United States did take a position that California's World War II forced labor statute, which created a statutory cause of action and established a unique statute of limitations for common law causes of action related to World War II forced labor claims was unconstitutional because it was an impermissible attempt by the State to legislate with respect to foreign war claims that were the exclusive province of the federal government, which had adopted a policy that opposed litigation of such claims. The reasons for that filing were unique, however. Deutch was pending along with numerous claims brought by victims of Japanese slave labor practices in World War II. A treaty with Japan had expressly settled such claims of signatory states, including Japan and the United States, or relegated them to government-to-government resolution. We were concerned that Deutch could be heard and decided first, and felt the need to make the same arguments against the state statute in that case that we were advancing in the Japanese cases.

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majority adopted, but instead argued that the California law constituted an unconstitutional intrusion by the State into matters of foreign relations and impermissible extraterritorial legislation.

On the merits, I have some reservations about the legal theory on which the district court dismissed the plaintiffs' common law claims. To begin, the district court holds that the Executive Branch's foreign policy can preempt state law claims even when that policy is not embodied in some formal action that carries the force of federal law. As a general matter, "Executive Branch actions" that "express federal policy but lack the force of law" do not preempt state law. Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 329-330 (1994) (dormant Foreign Commerce Clause). While Garamendi may reflect an exception to that general rule, that principle is still subject to some doubt. Moreover, Garamendi involved preemption of State laws that imposed peculiar burdens with respect to Holocaust claims, and in the Executive Agreements, the United States had expressly undertaken to work to eliminate such state burdens. In contrast, the district court here held preempted the claims of individuals to enforce their common law contract rights. Yet, the Executive Agreements expressly stated that the United States' statements of interest would "not suggest that its foreign policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal" of individual claims. 39 I.L.M. at 1304.

For the foregoing reasons, I recommend against taking a position on the legal merits of the particular defenses Generali has raised in this litigation.

ACTION SHEET

TO: OFFICE OF THE SOLICITOR GENERAL - RM 5259

FROM: CIVIL DIVISION

___ Mr. Garre Civil Rights Division *Agencies:* EEOC, FEC, FLRA, MSPB *Special Subjects:* Bivens & Section 1983, Employment Discrimination, Federal Employees, Governmental Immunity, Prison Litigation Reform Act, Religious Freedom Restoration Act, Title VII

___ Mr. Hungar Antitrust, Civil Division (Commercial Branch - includes bankruptcy, Gov't contracts) (except False Claims), Environment Division (pollution control), Tax Division *Agencies:* CFTC, CPSC, EPA, FCC, FDIC, Federal Reserve Board, FMC, FTC, IRS, NLRB, NRC, OCC, SEC, STB *Special Subjects:* Attorneys Fees (including EAJA), Banking, Customs & International Trade, Patent, Copyright & Trademark, Taxation

✓ ___ Mr. Kneedler Civil Division (Federal Programs, Office of Immigration Litigation, Office of Consumer Litigation, Torts), Environment Division (except pollution control) *Agencies:* FDA, FERC, Forest Service, HHS, Interior Department, Labor Department (ERISA), PBGC, SSA, TVA *Special Subjects:* Civil/False Claims Act (including Qui Tam), Federal Programs, Federal Tort Claims Act, FOIA, Immigration, Indian Law, Original Actions, Privacy & Sunshine Acts

___ Mr. Dreeben Criminal Division *Special Subjects:* Criminal matters from Antitrust, Civil Division (FDA cases - as well as some other consumer protection matters), Civil Rights, Environment, Tax Divisions, Forfeiture, Habeas Corpus (except immigration)

Note: Consult with Mr. Kneedler on Supreme Court original actions.

Mr. Feldman, Ms. Blatt, & Mr. Himmelfarb will review Sentencing Guidelines recommendations.

Mr. Stewart will review whether to waive or respond to certiorari petitions in Criminal matters involving litigating Divisions other than the Criminal Division.

Comments:
