

For Use of Administrative Officer

District: USAM staff

Copy No.: \_\_\_\_\_

# UNITED STATES ATTORNEYS' MANUAL

CRIMINAL DIVISION

This Manual is issued by, and remains  
the property of, the United States Department of Justice

## **DISCLAIM**

The Table of Contents of Title 9 does not match with the contents. For example, the Table of Contents indicates that the section 9-111 is [Reserved], however there is section 9-111 updated as of 1986.

There might be some filing errors.

Digital Services, DOJ Libraries, July 8, 2014

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

SUMMARY  
TABLE OF CONTENTS

GENERAL

- ✓ 9-1.000 THE CRIMINAL DIVISION
- 9-2.000 UNITED STATES ATTORNEY AND CRIMINAL MATTERS 9d.142
- ✓ 9-3.000 [RESERVED]
- ✓ 9-4.000 OBTAINING EVIDENCE
- 9-5.000 [RESERVED]
- 9-6.000 RELEASE OF DETAINED PERSONS
- 9-7.000 ELECTRONIC SURVEILLANCE
- 9-8.000 JUVENILES
- 9-9.000 MENTAL COMPETENCY OF AN ACCUSED
- 9-10.000 CAPITAL CRIMES
- 9-11.000 THE GRAND JURY
- 9-12.000 INDICTMENTS AND INFORMATIONS
- 9-13.000 [RESERVED: GUIDES FOR DRAFTING INDICTMENTS]
- 9-14.000 REMOVALS AND TRANSFERS
- 9-15.000 EXTRADITION
- 9-16.000 PLEAS
- 9-17.000 SPEEDY TRIAL
- 9-18.000 DEFENSES
- 9-19.000 [RESERVED: MISDEMEANOR AND PETTY OFFENSES]
- 9-20.000 SPECIAL MARITIME AND TERRITORIAL JURISDICTION

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-21.000 WITNESS PROTECTION

9-22.000 [RESERVED]

9-23.000 [RESERVED]

9-24.000 [RESERVED]

9-25.000 [RESERVED]

9-26.000 [RESERVED]

9-27.000 PRINCIPLES OF FEDERAL PROSECUTION

9-28.000 [RESERVED]

9-29.000 [RESERVED]

9-30.000 [RESERVED]

9-31.000 [RESERVED]

9-32.000 [RESERVED]

9-33.000 [RESERVED]

9-34.000 PROBATION, PAROLE AND PARDON

9-35.000 [RESERVED]

9-36.000 [RESERVED]

9-37.000 HABEAS CORPUS

9-38.000 OFFERS IN COMPROMISE; REMISSIONS OF FORFEITURES

9-39.000 CONTEMPT OF COURT

PARTICULAR OFFENSES

9-40.000 BANKING FRAUDS

9-41.000 BANKRUPTCY FRAUDS

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 9-42.000 FRAUD AGAINST THE GOVERNMENT
- 9-43.000 MAIL FRAUD
- 9-44.000 FRAUD: WIRE, RADIO, TV
- 9-45.000 [RESERVED: SECURITIES FRAUD]
- 9-46.000 PROGRAM FRAUD AND BRIBERY
- 9-47.000 FOREIGN CORRUPT PRACTICES ACT
- 9-48.000 COMPUTER FRAUD
- 9-49.000 CREDIT CARD FRAUD
- 9-50.000 [RESERVED]
- 9-51.000 [RESERVED]
- 9-52.000 [RESERVED]
- 9-53.000 [RESERVED]
- 9-54.000 [RESERVED]
- 9-55.000 [RESERVED]
- 9-56.000 [RESERVED]
- 9-57.000 [RESERVED]
- 9-58.000 [RESERVED]
- 9-59.000 [RESERVED]
- 9-60.000 PROTECTION OF THE INDIVIDUAL
- 9-61.000 CRIMES INVOLVING PROPERTY
- 9-62.000 [RESERVED]
- 9-63.000 PROTECTION OF PUBLIC ORDER, SAFETY, HEALTH, AND WELFARE
- 9-64.000 PROTECTION OF GOVERNMENT FUNCTIONS

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 9-65.000 PROTECTION OF GOVERNMENT OFFICIALS
- 9-66.000 PROTECTION OF GOVERNMENT PROPERTY
- 9-67.000 [RESERVED]
- 9-68.000 [RESERVED]
- 9-69.00 PROTECTION OF GOVERNMENT PROCESSES
- 9-70.000 AGRICULTURE AND MINING
- 9-71.000 COPYRIGHT VIOLATIONS
- 9-72.000 CUSTOMS
- 9-73.000 IMMIGRATION AND NATURALIZATION
- 9-74.000 [RESERVED]
- 9-75.000 OBSCENITY
- 9-76.000 TRANSPORTATION
- 9-77.000 [RESERVED]
- 9-78.000 WORKER PROTECTION STATUTES
- 9-79.000 WHITE SLAVE TRAFFIC AND CURRENCY AND FOREIGN TRANSACTIONS ACT
- 9-80.000 [RESERVED]
- 9-81.000 [RESERVED]
- 9-82.000 [RESERVED]
- 9-83.000 [RESERVED]
- 9-84.000 [RESERVED]
- 9-85.000 PROTECTION OF GOVERNMENT INTEGRITY
- 9-86.000 [RESERVED]
- 9-87.000 [RESERVED]

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 9-88.000 [RESERVED]
- 9-89.000 [RESERVED]
- 9-90.000 INTERNAL SECURITY AND NATIONAL DEFENSE
- 9-91.000 [RESERVED]
- 9-92.000 [RESERVED]
- 9-93.000 [RESERVED]
- 9-94.000 [RESERVED]
- 9-95.000 [RESERVED]
- 9-96.000 [RESERVED]
- 9-97.000 [RESERVED]
- 9-98.000 [RESERVED]
- 9-99.000 [RESERVED]
- 9-100.000 THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF  
1970 - I
- 9-101.000 THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF  
1970 - II
- 9-102.000 THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF  
1970 - III: FORMS OF INDICTMENTS
- 9-103.000 DRUG RELATED LEGISLATION OF 1984
- 9-104.000 NARCOTIC ADDICTION REHABILITATION ACT OF 1966
- 9-105.000 [RESERVED]
- 9-106.000 [RESERVED]
- 9-107.000 [RESERVED]
- 9-108.000 [RESERVED]

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 9-109.000 [RESERVED]
- 9-110.000 ORGANIZED CRIME AND RACKETEERING
- 9-111.000 [RESERVED]
- 9-112.000 [RESERVED]
- 9-113.000 [RESERVED]
- 9-114.000 [RESERVED]
- 9-115.000 [RESERVED]
- 9-116.000 [RESERVED]
- 9-117.000 [RESERVED]
- 9-118.000 [RESERVED]
- 9-119.000 [RESERVED]
- 9-120.000 COLLECTIONS I - CRIMINAL COLLECTION SYSTEM
- 9-121.000 COLLECTIONS II - CRIMINAL COLLECTION POLICY
- 9-122.000 COLLECTIONS III - SAMPLE FORMS AND PLEADINGS
- 9-123.000 COSTS OF PROSECUTION
- 9-124.000 [RESERVED]
- 9-125.000 [RESERVED]
- 9-126.000 [RESERVED]
- 9-127.000 [RESERVED]
- 9-128.000 [RESERVED]
- 9-129.000 [RESERVED]
- 9-130.000 LABOR STATUTES GENERALLY

UNITED STATES ATTORNEY'S MANUAL  
TITLE 9—CRIMINAL DIVISION

- 9-131.000 THE HOBBS ACT
- 9-132.000 LABOR MANAGEMENT RELATIONS ACT (TAFT-HARTLEY ACT)
- 9-133.000 EMBEZZLEMENT OF UNION ASSETS; EMBEZZLEMENT OF EMPLOYEE BENEFIT PLAN ASSETS
- 9-134.000 EMPLOYEE BENEFIT PLAN KICKBACKS
- 9-135.000 EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA)
- 9-136.000 LABOR REPORTING AND RECORD KEEPING
- 9-137.000 DEPRIVATION OF RIGHTS BY VIOLENCE
- 9-138.000 PROHIBITION AGAINST CERTAIN PERSONS HOLDING OFFICE AND EMPLOYMENT
- 9-139.000 MISCELLANEOUS LABOR STATUTES



U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

December 31, 1985  
(Expires May 31, 1986)

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Authorization for Negotiated Concessions in Organized  
Crime Cases

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-1.177

PURPOSE: Bluesheet USAM 9-1.177 changes the prior approval re-  
quirement to cover negotiations which take place prior  
to an indictment in Organized Crime Cases.

The following material should be substituted for the third  
paragraph in USAM 9-1.177.

9-1.177 Authorization to Proceed With Prosecutions

Either before or after initiation of a prosecution, any  
reduction or forbearance of charges or any other negotiated  
concessions, specifically including agreements under Rule 11,  
Federal Rules of Procedure, and any agreements involving  
sentencing, custody, parole recommendations or any other  
consideration to a defendant in an organized crime case must be  
approved by the Assistant Attorney General, Criminal Division.  
This power may be exercised by the Chief of the Organized Crime  
and Racketeering Section and by Deputy Chiefs of that Section in  
routine cases. In cases which factually are of major  
significance, which present substantial policy considerations, or  
which are foreseeably controversial, the Chief of the Organized  
Crime and Racketeering Section shall refer proposed dispositions  
to the Assistant Attorney General or his/her Deputy.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 1

	<u>Page</u>
9-1.000 <u>THE CRIMINAL DIVISION</u>	1
9-1.100 ORGANIZATION	1
9-1.101 Organization Chart	3
9-1.102 Organizational Units/Addresses and Telephone Numbers	4
9-1.103 Description of Sections and Offices	8
A. Appellate Section	8
B. Fraud Section	8
C. General Litigation and Legal Advice Section	9
D. Internal Security Section	11
E. Narcotic and Dangerous Drug Section	12
F. Organized Crime and Racketeering Section	13
G. Public Integrity Section	14
H. Office of Administration	15
I. Asset Forfeiture Office	16
J. Office of Enforcement Operations	17
K. Office of International Affairs	20
L. Office of Legislation	21
M. Office of Policy and Management Analysis	21
N. Office of Special Investigations	22
9-1.110 <u>Assistant Attorney General</u>	23
9-1.111 Authority	27
9-1.112 Special Responsibilities	27
9-1.120 <u>Deputy Assistant Attorneys General</u>	36
9-1.121 Authority	36
9-1.122 Special Responsibilities	37
9-1.130 <u>Section Chiefs</u>	39
9-1.131 Authority	40
9-1.132 Special Responsibilities	41
9-1.140 <u>Special Assistants</u>	44
9-1.150 <u>Senior Counsel</u>	44

*March 7, 1986*  
~~AUGUST 31, 1984~~  
Ch. 1, p. i

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

		<u>Page</u>
9-1.160	<u>Division Attorneys</u>	44
9-1.161	Requests for Grand Jury Authorization Letters for Division Attorneys	45
9-1.170	<u>Strike Forces</u>	46
9-1.171	Purpose	46
9-1.172	Definition of Organized Crime	47
9-1.173	General Responsibilities--Executive Committee--Personnel	47
9-1.174	Investigative Matters	48
9-1.175	Case Initiation Reports	49
9-1.176	Requests for Authorization for Electronic Surveillance Applications	51
9-1.177	Authorizations to Proceed With Prosecutions	52
9-1.178	Litigation	53
9-1.179	Files and Exhibits	53
9-1.180	<u>Strike Forces (cont.)</u>	54
9-1.181	Sentence Recommendations	54
9-1.182	Publicity Releases and Public Statements	54
9-1.183	Supplementary Procedures	54
9-1.200	STATUTES ASSIGNED BY CITATION	55
9-1.210	<u>1-9 U.S.C.</u>	57
9-1.211	1 U.S.C.: General Provisions	57
9-1.212	2 U.S.C.: The Congress	57
9-1.213	3 U.S.C.: The President	58
9-1.214	4 U.S.C.: Flag and Seal	58
9-1.215	5 U.S.C.: Executive Departments	58
9-1.216	6 U.S.C.: Official and Penal Bonds	58
9-1.217	7 U.S.C.: Agriculture	58
9-1.218	8 U.S.C.: Aliens and Nationality	63
9-1.219	9 U.S.C.: Arbitration	63
9-1.220	<u>10-18 U.S.C.</u>	63
9-1.221	10 U.S.C.: Armed Forces	63
9-1.222	11 U.S.C.: Bankruptcy	64
9-1.223	12 U.S.C.: Banks and Banking	64
9-1.224	13 U.S.C.: Census	65
9-1.225	14 U.S.C.: Coast Guard	65
9-1.226	15 U.S.C.: Commerce and Trade	66
9-1.227	16 U.S.C.: Conservation	68
9-1.228	17 U.S.C.: Copyrights	75
9-1.229	18 U.S.C.: Crimes and Criminal Procedure	76

March 7, 1986  
AUGUST 31, 1984  
Ch. 1, p. ii

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-1.230	<u>18-26 U.S.C.</u>	94
9-1.231	18 U.S.C.: Appendix	95
9-1.232	19 U.S.C.: Customs Duties	95
9-1.233	20 U.S.C.: Education	97
9-1.234	21 U.S.C.: Food and Drug	98
9-1.235	22 U.S.C.: Foreign Relations and Intercourse	99
9-1.236	23 U.S.C.: Highways	100
9-1.237	24 U.S.C.: Hospitals, Asylums, and Cemeteries	100
9-1.238	25 U.S.C.: Indians	101
9-1.239	26 U.S.C.: Internal Revenue Code	101
9-1.240	<u>27-34 U.S.C.</u>	103
9-1.241	27 U.S.C.: Intoxicating Liquors	103
9-1.242	28 U.S.C.: Judiciary and Judicial Procedure	103
9-1.243	28 U.S.C.: Appendix	104
9-1.244	29 U.S.C.: Labor	104
9-1.245	30 U.S.C.: Mineral Lands and Mining	106
9-1.246	31 U.S.C.: Money and Finance	106
9-1.247	32 U.S.C.: National Guard	107
9-1.248	33 U.S.C.: Navigation and Navigable Waters	107
9-1.249	34 U.S.C.: Navy	108
9-1.250	<u>35-42 U.S.C.</u>	108
9-1.251	35 U.S.C.: Patents	108
9-1.252	36 U.S.C.: Patriotic Societies and Observances	109
9-1.253	37 U.S.C.: Postal Allowances of the Uniformed Services	109
9-1.254	38 U.S.C.: Post Office, Bonuses, and Veterans Relief	109
9-1.255	39 U.S.C.: Postal Service	109
9-1.256	40 U.S.C.: Postal Buildings, Property, and Works	110
9-1.257	40 U.S.C.: Agriculture	110
9-1.258	41 U.S.C.: Postal Contracts	111
9-1.259	42 U.S.C.: Public Health and Welfare	111
9-1.260	<u>43-50 U.S.C.</u>	113
9-1.261	43 U.S.C.: Public Lands	113
9-1.262	44 U.S.C.: Printing and Documents	113
9-1.263	45 U.S.C.: Railroads	113

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-1.264	46 U.S.C.: Shipping	115
9-1.265	47 U.S.C.: Telegraphs, Telephones, and Radiotelegraphs	118
9-1.266	48 U.S.C.: Territories and Insular Possessions	118
9-1.267	49 U.S.C.: Transportation	118
9-1.268	50 U.S.C.: War and National Defense	120
9-1.269	50 U.S.C.: Appendix	120a
9-1.270	<u>50 U.S.C. Appendix</u>	120b
9-1.271	Uncodified	121
9-1.300	[RESERVED: STATUTES ASSIGNED BY SUBJECT MATTER]	121
9-1.400	CIVIL RESPONSIBILITIES	121
9-1.401	Asset Forfeiture Office	121
9-1.402	Fraud Section	122
9-1.403	General Litigation and Legal Advice Section	122
9-1.404	Internal Security Section	124
9-1.405	Narcotic and Dangerous Drug Section	125
9-1.406	Organized Crime and Racketeering Section	125
9-1.500	RESOURCES AVAILABLE IN CRIMINAL DIVISION	125
9-1.501	Criminal Division Brief/Memo Bank	126
9-1.502	Case Citations	127
9-1.503	Legislative Histories	127

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-1.000 THE CRIMINAL DIVISION

The United States Department of Justice, from its inception in 1870 until the post-World War I period, was organized into Offices of Assistant Attorneys General on a non-specialized basis. Responsibility for supervising the enforcement of federal criminal laws was entrusted to the several Assistant Attorneys General on an ad hoc basis. An examination of the Department's Register for the years 1915, 1917, and 1918 reveals that the names of the attorneys handling criminal matters were listed under the Offices of four Assistant Attorneys General. This procedure continued until the Criminal Division, referred to as early as 1919, was formally established in June, 1933.

The jurisdiction of the Criminal Division has been altered since 1933 by the establishment or dissolution of other Divisions or by transfers of jurisdiction between divisions. Tax matters were within the jurisdiction of the Criminal Division until the Tax Division was created in December, 1933. Enforcement of civil rights statutes was transferred from the Criminal Division to the Civil Rights Division in December, 1957. The internal security functions of the Criminal Division were removed to the Internal Security Division in July, 1954, but were returned to the Criminal Division in March, 1973.

Today the Criminal Division supervises the enforcement of all federal criminal laws except those that are specifically assigned to other divisions. However, the scope of the Criminal Division's jurisdiction is not limited to criminal matters but extends to civil matters as well. The statutes currently administered by the Criminal Division are set forth at USAM 9-1.200 et seq. A summary of civil responsibilities within the Division may be located at USAM 9-1.400 et seq.

The Criminal Division will provide assistance to a U.S. Attorney in any matter within the jurisdiction of the Division. The Division will also attempt to assist a U.S. Attorney in any matter related to the Federal Rules of Criminal Procedure (see USAM 9-1.231), or Speedy Trial problems (see USAM 9-1.200). Finally, the Division will serve as a conduit for a U.S. Attorney to a higher authority within or without the Department on matters within its jurisdiction.

9-1.100 ORGANIZATION

The Criminal Division is presently organized into seven Sections and seven Offices (see USAM 9-1.103) which specialize in the enforcement of

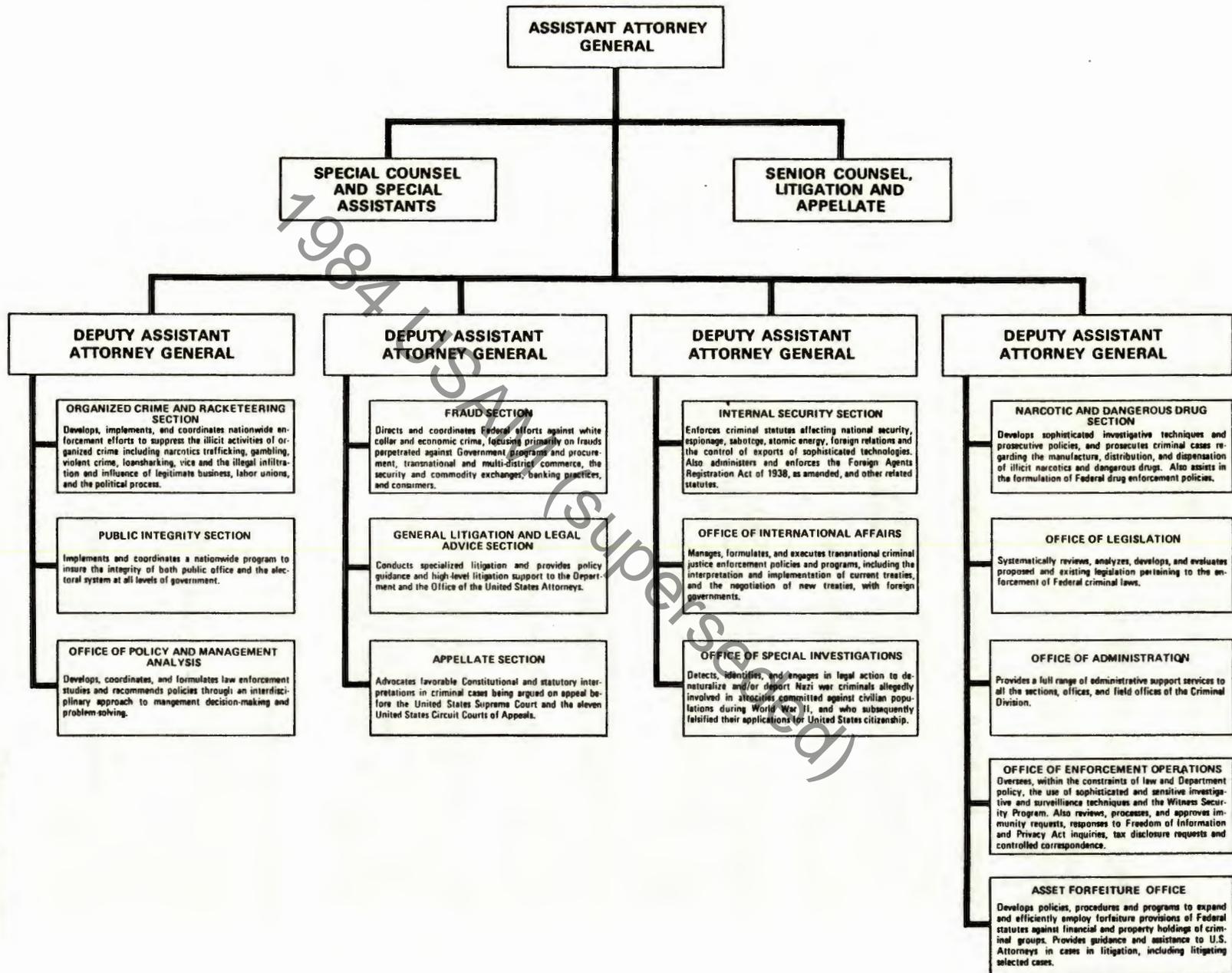
UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

particular statutes (see USAM 9-1.200 et seq.), the resolution of particular problems, or the management of particular projects. The organizational structure is altered to respond to changing needs and priorities. An organizational chart is located at USAM 9-1.101.

The Division is headed by an Assistant Attorney General. See USAM 9-1.110. Each Section is headed by a Section Chief, and each Office is headed by an Office Director. See USAM 9-1.130. The Division is staffed by attorneys, and the Associate Attorney General exercises the power and authority vested in the Attorney General to take final action in matters pertaining to their employment, separation, and general administration. (Order No. 998-83).

1984 USAM (superseded)

# CRIMINAL DIVISION



AUGUST 31, 1984  
Ch. 1, p. 3

9-1.102 Organizational Units/Addresses and Telephone Numbers

Assistant Attorney General

Assistant Attorney General  
Main Justice Building--Room 2107  
633-2601

Deputy Assistant Attorneys General

Deputy Assistant Attorney General  
(Organized Crime and Racketeering,  
Public Integrity, Policy and Management  
Analysis)  
Main Justice Building--Room 2107  
633-2621

Deputy Assistant Attorney General  
(Internal Security, General Litigation  
and Legal Advice, Special Investigations)  
Main Justice Building--Room 2113  
633-2333

Deputy Assistant Attorney General  
(Fraud, Appellate, International  
Affairs)  
Main Justice Building--Room 2112  
633-3729

Deputy Assistant Attorney General  
(Narcotic and Dangerous Drug,  
Legislation, Administration, Enforcement  
Operations, Asset Forfeiture)  
Main Justice Building--Room 2113  
633-2636

Sections and Offices

Appellate Section  
Main Justice Building--Room 2710  
633-2611

Fraud Section  
Federal Triangle Building--Room 832  
724-7038

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Defense Procurement Fraud Unit  
206 North Washington Street  
Suite 100  
Alexandria, Virginia 22314  
557-5171

General Litigation and Legal Advice Section  
Federal Triangle Building—Room 504  
724-6948

Crimes Against Government Operations  
Federal Triangle Building—Room 623  
724-7144

Crimes Against the Public  
Federal Triangle Building—Room 510  
724-6971

Regulatory Enforcement  
Federal Triangle Building—Room 636  
724-6893

Special Civil Matters  
Federal Triangle Building—Room 620  
724-7144

Prison/Parole Matters  
Federal Triangle Building—Room 508  
724-6898

Internal Security Section  
Federal Triangle Building—Room 200  
724-6913

Registration Unit  
Federal Triangle Building—Room 216  
724-7109

Statutory Unit  
Federal Triangle Building—Room 200  
724-7075

Export Control Enforcement Unit  
Federal Triangle Building—Room 203A  
724-7103

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Narcotic and Dangerous Drug Section  
Federal Triangle Building—Room 956  
724-7045

Organized Crime and Racketeering Section  
Main Justice Building—Room 2515  
633-3516

Labor-Management Unit  
Main Justice Building—Room 2537  
633-3666

RICO Unit  
Main Justice Building—Room 2730  
633-1214

Public Integrity Section  
Federal Triangle Building—Room 414  
724-6963

Election Crimes Branch  
Federal Triangle Building—Room 410  
724-7112

Conflicts of Interest Crimes Branch  
Federal Triangle Building—Room 428  
724-7137

Office of Administration  
Main Justice Building—Room 2119  
633-5749

Office of Asset Forfeiture  
Federal Triangle Building—Room 916  
272-6420

Office of Enforcement Operations  
Main Justice Building—Room 2229  
633-3684

Correspondence Unit  
Federal Triangle Building—Room 300  
724-6656

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Electronic Surveillance Unit  
Main Justice Building--Room 2229  
633-3684

FOI/PA Unit  
Federal Triangle Building--Room 312  
724-7026

Legal Reference Unit  
Federal Triangle Building--Room 302  
724-7184

Legal Support Unit  
Federal Triangle Building--Room 319  
724-6672

Legislative Reference Unit  
Federal Triangle Building--Room 300A  
724-6657

Witness Records Unit  
Federal Triangle Building--Room 306  
724-7050

Witness Security Unit  
Main Justice Building--Room 2229  
633-3684

Office of International Affairs  
Federal Triangle Building--Room 606  
724-7600

Office of Law Enforcement Coordination  
Main Justice Building--Room 2207  
633-2286

Office of Legislation  
Main Justice Building--Room 2244-A  
633-3202

Office of Policy and Management Analysis  
Main Justice Building--Room 2218  
633-2661

Office of Special Investigations  
Hamilton Building--Room 200  
633-2502

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.103 Description of Sections and Offices

A. Appellate Section

The function of the Appellate Section is to secure judicial decisions favorable to the government in cases on review in the courts of appeals and the Supreme Court. The primary duties of the Section attorneys are to:

1. Prepare draft briefs, certiorari petitions and jurisdictional statements for the Solicitor General for filing in the Supreme Court;
2. Review adverse decisions in the district courts and courts of appeals and recommend to the Solicitor General whether further review is warranted;
3. Prepare briefs and argue cases in the courts of appeals;
4. Assist the U.S. Attorneys and other sections and offices in the Criminal Division in preparing briefs in the courts of appeals;
5. Give advice on legal questions to the Assistant Attorney General, to other sections and offices in the Criminal Division, and to the U.S. Attorneys;
6. Give advice on Speedy Trial Act problems; and
7. Give advice on issues generally within the jurisdiction of the Criminal Division to other components of the Department of Justice.

B. Fraud Section

The Fraud Section is charged with leading the federal law enforcement effort against fraud and white collar crime. It fashions and implements white collar crime policy and provides support to the Criminal Division, the Department, and other federal agencies on white collar crime issues. It supports the U.S. Attorneys with legal and investigative guidance, and, when required, because of local lack of expertise or resources, provides staffing for U.S. Attorney-originated criminal fraud cases. It initiates, staffs, and conducts grand jury investigations and trials involving types of criminal activity which require centralized treatment because of the complexity of the scheme, the multi-district nature of the criminal activity, the sensitivity of the issues, or the necessity of demonstrating with model prosecutions the viability of a particular statute, theory, or technique. The Section also provides training to and sharing of information with other members of the federal, state, and local law enforcement

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

community in order to enhance the federal government's overall effort to combat white collar crime.

Organizationally, the work of the Section is divided by substantive subject matter into four major areas:

1. Government Program and Procurement Fraud--Focused exclusively on fraud, waste, and abuse in connection with federal government programs and contracts;
2. Consumer and Institutional Fraud--Directed at fraud committed against individuals, businesses, and private institutions;
3. Government Regulatory Fraud--Focused on criminal cases arising within the jurisdiction of various federal regulatory agencies, e.g., the Securities and Exchange Commission, Federal Trade Commission, and Department of Energy; and
4. Multinational Fraud--Focused on cases involving significant overseas and off-shore connections.

On policy and case-related matters, the Section works closely with the Federal Bureau of Investigation, the Offices of the Inspectors General in federal departments and agencies and with other major federal investigative agencies having jurisdiction over fraud-related matters. The Section actively supports efforts to identify emerging or recurring problems and to devise new practices and procedures to reduce the incidence of white collar crimes. The Section's management participates in numerous Department and interagency groups affecting law enforcement policy and operations. These groups include but are not limited to: the Department's Undercover Review Committee, the Department's Economic Crime Council, the Department's Executive Working Group of federal, state, and local prosecutors, the Criminal Division's Law Enforcement Coordinating Committee Review Panel, the President's Council on Integrity and Efficiency, and a large number of interagency task forces on government fraud, waste, and abuse. In addition, the Section's management team and the senior prosecution staff are actively involved in providing training and in arranging opportunities for program attorneys to give and receive training. The Section also assists the Criminal Division's Office of Legislation in evaluating pending legislation and making appropriate comment on adverse court opinions.

C. General Litigation and Legal Advice Section

The General Litigation and Legal Advice Section has broad criminal jurisdiction which encompasses approximately 75% of all federal criminal statutes. It also has a variety of civil responsibilities. The Section's jurisdiction is divisible into five major areas:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. Crimes Against Government Operations--This includes the following statutory areas: attacks on federal officials (including the President, Vice President, Members of Congress, Cabinet Officers, Supreme Court justices, designated federal agency personnel, and candidates for federal office), attacks on foreign officials and official guests of the United States, violations of the Selective Service Act, theft or destruction of government property, counterfeiting, postal depredations, obstruction of justice, perjury, prison offenses, false personation, escape, and customs and immigration offenses;

2. Crimes Against the Public--This includes the following statutory areas: kidnapping, extortion, bank robbery, riot, explosives and weapons violations, fugitive felons, arson, copyright, obscenity, illegal electronic surveillance, false identification, motor vehicle theft, interstate transportation of stolen property, aircraft piracy, and offenses on federal or Indian reservations or the high seas;

3. Regulatory Enforcement--This area relates to violations of statutes and regulations which pertain to the protection of health, safety, and welfare in mining and other occupations, nuclear materials handling, marketing of agricultural products, and disposition of hazardous and toxic wastes;

4. Special Civil Matters--This area includes the defense of civil actions to obtain information on or to interfere with criminal justice and national security operations;

5. Prison/Parole Matters--This area includes the defense of suits challenging actions by or procedures of the Bureau of Prisons or the United States Parole Commission. It also encompasses the administering of federal statutes pertaining to juveniles, youth offenders, mental competence, sentencing, prisoner transfer treaties, and detainees.

The Section's functions are equally broad as indicated by the following summary of discrete responsibilities:

a. It serves as an enforcement section in certain key areas where special requirements dictate centralization. In these areas, the Section is directly involved in case development and litigation;

b. The Section performs a general litigation function, handling litigation under any of its vast range of statutes when appropriate due to recusal, lack of resources, or pertinent expertise in a particular U.S. Attorney's office, etc.; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. It provides legal advice on any of its statutes, or issues emanating from action taken thereunder, to U.S. Attorneys' offices as well as to investigative and client agencies.

Further, attorneys in the Section provide coordination of prosecutions on both policy and operational levels with other divisions, departments, and agencies, respond to Congressional and private inquiries, and initiate or review recommendations for proposed legislation relating to the assigned areas of statutory responsibility. They also advise and assist U.S. Attorneys and other federal attorneys on Departmental policy matters and make prosecutive determinations.

D. Internal Security Section

The Internal Security Section handles matters relating to the Nation's internal security, including the prosecution of cases involving treason, espionage, sedition, sabotage, and violations of the Neutrality, Trading With the Enemy, Export Administration, Arms Export Control, and Atomic Energy Acts. The Section also administers and enforces the following statutes:

1. The Foreign Agents Registration Act of 1938, as amended (22 U.S.C. §611 et seq.);
2. Registration of certain persons trained in foreign espionage systems (see 50 U.S.C. §851);
3. The Voorhis Act (see 18 U.S.C. §2386);
4. The Federal Regulation of Lobbying Act (see 2 U.S.C. §261);
5. Employment of persons to appear before Congress or governmental agency (see 46 U.S.C. §1225); and
6. Prohibition against government employees acting as agents of foreign principals (see 18 U.S.C. §219); and prohibition against political contributions by a foreign national (see 2 U.S.C. §441(e)).

The Section also provides the Executive Secretary and staff of the Interdepartmental Committee on Internal Security (ICIS).

Organizationally, the work of the Internal Security Section is divided into three units, the Statutory Unit, the Export Control Unit, and the Registration Unit. Statutory Unit attorneys supervise the investigation and

prosecution of violations involving treason, sabotage, espionage, and neutrality statutes. Export Control Unit attorneys supervise the investigation and prosecution of violations of the Arms Export Control Act (see 22 U.S.C. §2778), the Export Administration Act (See 50 U.S.C. Appellate §2401 *et seq.*), and other statutes that contain export control provisions. Both units work closely with the U.S. Attorneys in all such cases. Section attorneys involved in these and other internal security cases may be called upon to take part directly in grand jury, trial, or appellate work. Criminal violations and the civil aspects of the registration statutes are handled by personnel of the Registration Unit, who also conduct inspections and field conferences designed to facilitate the effective enforcement of the Foreign Agents Registration Act of 1938, as amended.

#### E. Narcotic and Dangerous Drug Section

The Narcotic and Dangerous Drug Section supervises cases and matters relating to the Controlled Substance Act (21 U.S.C. §801 *et seq.*), the Controlled Substance Import and Export Act (21 U.S.C. §951 *et seq.*), and certain other statutes such as the Narcotic Addict Rehabilitation Act of 1966. The Section's mission can generally be described as supervision of litigation, both criminal and civil, arising under federal laws relating to narcotics and controlled substances.

The Section primarily services the U.S. Attorneys and the Drug Enforcement Administration, and also maintains a close working relationship with the United States Customs Service, United States Coast Guard, Federal Bureau of Investigation, Internal Revenue Service, Immigration and Naturalization Service, and the Departments of State and Treasury.

The Section also supervises the implementation of Department policies in the area of drug prosecution.

In addition to maintaining a litigation support capability to assist U.S. Attorneys' offices, the Section assumes direct litigation responsibilities in major multi-district and international conspiracy cases, reviews electronic surveillance requests, secures witnesses from foreign jurisdictions, and publishes a monthly Narcotic Newsletter. It also maintains task force operations in the Southern District of Florida, San Juan, Puerto Rico, and the Northern District of Illinois to conduct grand jury investigations and prosecute money launderers facilitating major drug trafficking organizations.

The Section reviews all adverse decisions to the government in the drug area and makes recommendations on whether the cases should be reviewed by higher courts. The Section also reviews proposed legislation on drug abuse and makes recommendations as to its effectiveness and prepares proposals for new legislation in areas appropriate to effective drug law enforcement.

F. Organized Crime and Racketeering Section

The Organized Crime and Racketeering Section supervises the Department's prosecutive efforts against racketeers and syndicated criminal operations, and approves all indictments under the Racketeer Influenced and Corrupt Organizations statutes. The Section also supervises all violations involving organized crime figures. In addition, the Section has supervisory responsibility for enforcement of the extortionate credit transaction provisions of the Consumers Credit Protection Act of 1968, the Gambling Devices Act of 1962, and laws pertaining to gambling, extortion, infiltration of legitimate business, prostitution, and liquor and cigarette violations.

Most of the attorneys in the Section are assigned to one of the Organized Crime Strike Forces or Field Offices that are maintained in major metropolitan areas throughout the country. Since 1967, when it was first initiated, the Strike Force concept has been used to bring together the efforts of various federal investigative agencies under the legal guidance of U.S. Attorneys and Section attorneys. The result is a team approach to the challenge of organized crime in a particular area. (See USAM 9-1.170, infra.)

The Section supervises and directly participates in the enforcement of federal criminal statutes relating to employee-employer relationships and the internal operations of labor unions, including statutes prohibiting interference with interstate commerce by extortion, embezzlement of union assets, improper payments by employers to union officials, embezzlement of the assets of pension and welfare funds, and the payment of kickbacks to influence the acts of trustees or agents of pension or welfare funds. The Section also has jurisdiction of offenses involving the use of explosives in connection with labor disputes and violations of the reporting requirements of the Welfare and Pension Plans Disclosure Act and the Labor Management Reporting and Disclosure Act. Labor activities are coordinated by the Labor Management Unit of the Strike Force in Washington, D.C.

Section attorneys work closely with the Federal Bureau of Investigation; Drug Enforcement Administration; Bureau of Alcohol, Tobacco, and Firearms; United States Secret Service; United States Customs Service; Internal Revenue Service; the Strike Force Unit of the U.S. Attorney's office in the Southern District of New York; and with state and local law enforcement officers. The attorneys prepare for and conduct grand jury proceedings, give continuing legal advice to agents working organized crime cases, prepare for and conduct Title III electronic surveillance, and litigate cases resulting from these activities. The Section maintains close liaison with both the Bureau of Prisons and the United States Parole Commission in matters concerning organized crime inmates.

G. Public Integrity Section

The Public Integrity Section is responsible for overseeing the investigation and prosecution of federal crimes involving abuse of the public trust by elected or appointed public officials at all levels of government and election crimes. Included within the Section are two formally established units, the Election Crimes Branch and the Conflicts of Interest Crimes Branch. The Section prosecutes selected cases against federal, state, and local officials and is available as a source of advice and expertise to law enforcement officials and prosecutors at all levels of government. It provides the resources both of a team of litigators trained to prosecute cases under the criminal statutes that govern the conduct of public officials, and of a center for planning, coordination, and implementation of nationwide programs focused against public corruption.

The Section is responsible for reviewing and processing all matters arising under the Special Prosecutor's Act, see 28 U.S.C. §591 et seq. Because of the sensitivity of many of these cases and the extremely strict time limitations built into the legislation, the Section should be notified immediately should an allegation against an individual covered by the Act be received.

Most of the Section's resources are devoted to operational responsibility for litigation and providing support, advice, and assistance to the U.S. Attorneys. The Section may be called upon for assistance in the following situations:

1. Recusals--Most government corruption cases are both sensitive and of intense public interest. It is particularly important that the appearance of fairness and impartiality always be present in the conduct of such investigations. In situations where the local U.S. Attorney has had a significant business, social, political, or other relationship with any subject or principal witness in a corruption case, it is generally inappropriate for that U.S. Attorney to conduct the investigation and prosecution. Where the conflict is substantial, such cases are frequently transferred to the Public Integrity Section for prosecution or direct supervision. For example, all cases involving federal judges pose obvious conflict of interest problems for the U.S. Attorney, and should be referred to the Public Integrity Section for investigation;

2. Provision of Manpower and Expertise--In situations where the available manpower or expertise in a U.S. Attorney's office is insufficient to undertake a significant corruption case, the Public Integrity Section often provides attorneys to serve as either lead

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

counsel or co-counsel. Section attorneys are also available to provide advice on substantive questions, investigatory methods, indictment drafting, and motions;

3. Sensitive or Multi-District Cases--In addition to formal recusals and cases where manpower is requested or needed, the Public Integrity Section will become involved in sensitive matters and in matters which extend over district lines. Sensitive cases would include those which, because of their importance, require close coordination with high Departmental officials, require a significant amount of coordination with other federal agencies in Washington, D.C., involve classified materials, or are so politically controversial on a local level that they are more appropriately handled from Washington, D.C. The Section also is involved when an investigation crosses district lines. In such cases, the Public Integrity Section can provide coordination among various U.S. Attorneys' offices, or, where appropriate, can assume operational responsibility for the entire investigation; and

4. Authorization for Election and Corruption Cases Under the Hobbs Act—Statutory schemes governing the conduct of public officials and candidates for public office are often complex and sometimes very broad. In order to achieve some degree of national control and uniformity, the Section reviews investigations and indictments in such cases as directed by the Assistant Attorney General. At present, authorization from the Section is required in all election-related cases and in corruption cases brought under the Hobbs Act.

#### H. Office of Administration

The mission of the Office of Administration is to provide effective and efficient administrative and management support services to the Division's senior officials, sections, offices, and field offices. Coordinated through the Office of the Director, the following operational units perform the delivery of those services: Personnel Unit; Fiscal Unit; Mail, File and Records Service Unit; Procurement, Security, Safety and Space Unit; and the Statistical Unit.

This office provides the following services, among others:

1. Develops administrative policies;
2. Formulates annual and supplemental appropriation budget estimates and authorization requests;
3. Establishes and executes fiscal operating plans;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

4. Manages and controls funds;
5. Administers programs regarding federal records, files, and correspondence;
6. Coordinates personnel actions;
7. Operates ADP systems for caseload/resource management and for direct support to investigations and litigation;
8. Maintains and procures supplies and equipment;
9. Processes requests for office space, renovations, modifications, repairs, and telephones;
10. Administers travel support services including authorizations, funds obligation, advances, vouchers, reimbursements, and relocations;
11. Administers programs for parking permits, credentials, and identification cards;
12. Administers duplicating services, and printing and distributing of handbooks and manuals;
13. Administers security programs for documents, files, work space, and personnel;
14. Inspects workspace for OSHA compliance;
15. Approves and processes requests for litigation support services such as court reporters, interpreters, physician witnesses, etc.; and
16. Approves and implements word processing services.

The variety of administrative support services handled by this office requires close liaison with all of the Division's components, the Justice Management Division, the General Services Administration, and contractor personnel associated with the Criminal Division.

#### I. Asset Forfeiture Office

The Asset Forfeiture Office is a focal point of the Department's efforts to make more effective use of civil and criminal forfeiture proceedings to deprive criminals of the proceeds of their crimes.

The office participates directly in major forfeiture cases, either alone or with attorneys from a U.S. Attorney's office or from another section or office of the Criminal Division.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

The office provides legal advice and training to Department attorneys and law enforcement agents on such questions as how to determine when to pursue a forfeiture case, how to identify and locate forfeitable property, how to protect the government's interest in forfeitable property pending completion of forfeiture proceedings, what litigation strategy might be most effective, and what steps should be taken to improve management of seized property and disposition of forfeited property. These questions are handled through responses to individual legal questions, preparation of manuals concerning forfeiture issues, and dissemination of model briefs and pleadings and of information concerning important forfeiture decisions and effective innovative case strategies.

The office is also responsible for deciding petitions for remission or litigation of judicial forfeitures pursuant to Part 9 of Title 28, Code of Federal Regulations.

The office coordinates the collection of criminal fines and bond forfeiture judgments by the U.S. Attorneys' offices, including assisting in the location of judgment debtors for such fines and forfeitures. See USAM 9-120.000, 9-121.000, and 9-122.000.

Finally, the U.S. Attorneys are required to consult with the office before accepting an offer in compromise in a forfeiture case in which the difference between the amount of the offer and the amount of the original claim is between \$60,000 and \$750,000 and before closing or dismissing a forfeiture case in which the amount of the original claim is between \$60,000 and \$750,000.

#### J. Office of Enforcement Operations

The Office of Enforcement Operations oversees, within the constraints of law and Departmental policy, the effective use of the most sophisticated investigative tools at the Department's disposal - including electronic surveillance, the witness immunity statute, hypnosis in the interrogation of federal witnesses, and witness relocation. The office continuously monitors each of these, and serves as liaison to investigative agencies, prosecutors, the United States Marshals Service, the Bureau of Prisons, and others involved in the implementation of these investigative tools. It also provides various components of the Criminal Division with a wide range of services related to litigative assistance and prosecutive support which entails close liaison with all of the federal investigative agencies, the U.S. Attorneys' offices, the Executive Office for U.S. Attorneys and the administrative staff of the Division and the Department.

The duties and responsibilities of the Office are as follows:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

1. Supervises all aspects of the Witness Security Program for the Criminal Division and responds to Congressional, White House, press, and public inquiries regarding the Witness Security Program. See USAM 9-21.000;

2. Receives and adjudicates all applications for electronic surveillance under Chapter 119 of Title 18 of the United States Code, and oversees all electronic and consensual monitoring efforts being pursued within the federal justice system and the loan of Federal Bureau of Investigation electronic surveillance equipment, and prepares special analyses and evaluation reports relating to such activities. See USAM 9-7.000;

3. Receives and approves requests for authorization to use hypnosis. See USAM 9-4.000;

4. Reviews and processes all requests for authorization to compel testimony (immunities) in federal prosecutions and Congressional inquiries or to prosecute formerly immunized witnesses, and makes the final recommendations to the Assistant Attorney General on granting or denying such requests. See USAM 1-11.000;

5. Reviews and approves requests to resubpoena contumacious witnesses before a successive grand jury. See USAM 9-11.255;

6. Reviews and processes certain requests made to the Internal Revenue Service for access to tax returns or taxpayer return information pursuant to 26 U.S.C. §6103(i), and makes final recommendations to the Assistant Attorney General on whether such requests to the Internal Revenue Service should be made, or where required, whether court orders should be authorized. See USAM 9-4-900;

7. Receives and processes all requests to interrogate, arrest, indict, or subpoena members of the news media. See USAM 9-2.164 and USAM 1-5.410;

8. Responds to requests made pursuant to 28 C.F.R. §16.21 for authorization of Departmental personnel to testify at federal, state, and local civil and criminal proceedings, and makes final recommendations, where appropriate, to the Assistant Attorney General on granting or denying such requests. See USAM 1-7.000;

9. Reviews and processes requests for searches for documentary materials held by third parties, pursuant to 28 C.F.R. §59.1 et seq. See USAM 1-15.000;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

10. Reviews and processes requests for authorization to close judicial proceedings to members of the press and public pursuant to 28 C.F.R. §50.9. See USAM 1-5.600;

11. Receives, processes, and adjudicates all requests received from the public for access to Criminal Division records pursuant to the Freedom of Information Act and the Privacy Act, and other matters relating to these Acts within the Criminal Division. See USAM 1-5.000;

12. Processes requests for, and conducts, all inquiries made to the several federal investigative agencies on the occurrence of electronic surveillance of specific defendants and their attorneys pursuant to 18 U.S.C. §3504. See USAM 9-7.000;

13. Processes requests from U.S. Attorneys for access to information filed with the Secretary of the Treasury under the Currency and Foreign Transactions Act, pursuant to 31 U.S.C. §1061. See USAM 9-79.260;

14. Compiles, indexes, and maintains the Criminal Division Brief/Memo Bank containing Division legal briefs and memoranda and other related materials that involve policy matters or extensive legal research, making these resources available to Division and other Department attorneys, as well as U.S. Attorneys, for research purposes. See USAM 9-1.501;

15. Prepares a complete legislative history of all legislation enacted by Congress that affects the responsibilities of the Criminal Division, maintains the existing legislative history library, and makes these resources available to Division and Department attorneys for research purposes. See USAM 9-1.503;

16. Responds to all correspondence submitted on general criminal matters, whether sent by individual citizens to the Department or referred to the Department by the White House or by members of Congress;

17. Coordinates, in conjunction with other Division components, the preparation of the Criminal Division's portion of the United States Attorneys' Manual, including periodic revisions and updates;

18. Coordinates the Criminal Division's contributions to the United States Attorneys' Bulletin and prepares notes on significant cases dealing with the Federal Rules of Criminal Procedure and Evidence for publication therein;

19. Prepares grand jury authorization letters authorizing Division attorneys to conduct and attend grand jury sessions. See USAM 9-1.171;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

20. Prepares letters authorizing attorneys outside of the Department to assist Department attorneys in the conduct of grand jury or trial proceedings as special attorneys. See USAM 9-2.162;

21. Collects and prepares the monthly report of significant criminal cases and matters of the Division components and the U.S. Attorneys, collects briefing matters and reports of significant criminal matters for the Attorney General, and prepares the Division's portion of the annual report submitted by the Attorney General;

22. Receives and reviews reports filed pursuant to the Pre-Trial Diversion Program and handles inquiries relating to that Program. See USAM 9-2.022 and 1-12.000;

23. Implements the registration provisions of the Gambling Devices Act, 15 U.S.C. §1171 et seq.;

24. Responds to questions that arise with respect to the Privacy Protection Act of 1980. See USAM 1-15.000; and

25. Supervises and enforces the Right to Financial Privacy Act of 1978, 92 Stat. 3697 (12 U.S.C. §§3401-3422). See USAM 9-4.800.

K. Office of International Affairs

The Office of International Affairs supports the Division in the formulation and execution of international criminal justice enforcement policies and procedures. Its functions include: participating in the negotiation of international agreements and treaties on subjects relating to criminal law enforcement such as extradition, mutual assistance in criminal matters, and the transfer of prisoners; representing the Division in Executive Branch policy planning sessions in the consideration of issues of international criminal justice; implementing, and overseeing the implementation of extradition, judicial assistance, and prisoner transfer treaties and agreements, processing and litigating, or supervising the litigation of, requests for extradition by foreign countries before federal courts; preparing requests for international extradition and obtaining evidence from foreign countries in criminal matters; providing advice to U.S. Attorneys, state attorneys general; and district attorneys on preparing extradition requests and on foreign criminal practice and procedure; coordinating and reviewing requests to and from foreign countries to obtain evidence in connection with criminal investigations and prosecutions in the United States and foreign countries, drafting legislation in its areas of responsibility; and developing Division policy on those aspects of federal criminal law enforcement having transnational aspects.

L. Office of Legislation

The Office of Legislation is responsible for development and support of the Criminal Division's legislative program. In fulfilling its mission, the Office of Legislation develops legislative proposals, legal memorandum, and testimony to be presented to the Congress and drafts responses to requests from Congressional committees and government agencies for Division comment upon pending and proposed legislation. The office also maintains liaison with members of Congress and Congressional staff to track legislative activities and to provide the Congress with information relating to criminal justice issues.

The office provides legal support to the Assistant Attorney General in the discharge of his/her duties as a member of the Advisory Committee on Criminal Rules of the Judicial Conference which develops proposed amendments to the Federal Rules of Criminal Procedure. The office also prepares legal memoranda and assists in development of guidelines and operating manuals relating to the implementation of recently enacted statutes.

Because of its activities, the Office of Legislation is able to furnish information to U.S. Attorneys' offices regarding the status and substance of legislation affecting the federal criminal justice system and can respond to questions that arise with respect to the Federal Rules of Criminal Procedure and grand jury matters.

M. Office of Policy and Management Analysis

The Office of Policy and Management Analysis is responsible for analyzing and recommending positions on policy and management issues of concern to top-level decision makers in the Division and the Department. It also assists Division managers in dealing with various management issues, including budget policy, personnel development, and information systems. Most of the office's work is concentrated in the areas of organized crime, government program fraud, and drug trafficking.

The major functions performed by this office are as follows:

1. Analyzes and develops responses to significant policy issues affecting the roles, functions, and missions of the Division;
2. Advises the Assistant Attorney General on the establishment of priorities and objectives for the Division and for federal law enforcement generally;
3. Develops plans for enforcement programs in conjunction with the Division's litigating sections;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

4. Conducts systematic evaluations of existing law enforcement programs and policies;
5. Advises the Assistant Attorney General on issues of budget policy and resource allocation;
6. Evaluates and develops improvements in the Division's management systems and practices; and
7. Provides for the exchange of information and the coordination of policies, programs, and research with other public agencies and private institutions in the field of law enforcement.

The office uses an interdisciplinary approach to decision making and problem solving. Its professional staff includes attorneys, program analysts, and management analysts with expertise in public administration, economics, organization behavior, program evaluation, data processing, financial analysis, and operations research.

Examples of projects in which the office has played a major role include the preparation of a major study of law enforcement-related asset seizure and forfeiture operations, the development of essays on strategy for the Department's priority enforcement areas for use by the U.S. Attorneys in developing their law enforcement plans, the design of a review process to assist Organized Crime and Racketeering Section managers in assessing the nature and extent of organized crime and the impact of Strike Force offices, the implementation of a case management information system for the Division's cases, the development of national priorities for the investigation and prosecution of white collar crime, and the development of a government-wide information system to track referrals made to the Department by the Inspectors General.

N. Office of Special Investigations

The mission of the Office of Special Investigations is to investigate and prosecute cases seeking denaturalization, deportation, or other legal action against alleged Nazi war criminals in the United States. The office investigates allegations against Nazi war criminals--more accurately defined as those who took part in, assisted, incited, or encouraged persecution of innocent people based on race, religion, national origin, or political belief in collaboration with the Nazi regimes of Europe from 1933 to 1945--to determine if the allegations are well-founded and if the individuals entered the United States (or obtained United States citizenship) illegally or fraudulently. Upon approval by the Assistant Attorney General, the Office of Special Investigations files a denaturalization action in district court (see 8 U.S.C. §1451(a)), deportation proceedings before an immigration judge, or other proceedings as necessary.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-1.110 Assistant Attorney General

The Assistant Attorney General is appointed by the President by and with the advice and consent of the Senate to assist the Attorney General in the performance of his/her duties. 28 U.S.C. §506. Subject to the general supervision of the Attorney General and under the direction of the Associate Attorney General, the Assistant Attorney General is assigned the responsibility of conducting, handling, or supervising the following:

A. Prosecutions for federal crimes not otherwise specifically assigned. See 28 C.F.R. §0.55(a).

B. Cases involving criminal frauds against the United States except cases assigned to the Antitrust Division (28 C.F.R. §0.40(a)) involving conspiracy to defraud the federal government by violation of the antitrust laws, and tax fraud cases assigned to the Tax Division (28 C.F.R. §§0.70 and 0.71). See 28 C.F.R. §0.55(b).

C. All criminal and civil litigation under the Controlled Substances Act, 84 Stat. 1242, and the Controlled Substances Import and Export Act, 84 Stat. 1285 (Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970). See 28 C.F.R. §0.55(c).

D. Civil or criminal forfeiture or civil penalty actions (including petitions for remission or mitigation of forfeitures and civil penalties, offers in compromise, and related proceedings) under the Federal Aviation Act of 1958, the Contraband Transportation Act, the Copyrights Act, the customs laws (except those assigned to the Civil Division which involve sections 592, 704(i)(2) or 734(i)(2) of the Tarriff Act of 1930), the Export Control Act of 1949, the Federal Alcohol Administration Act, the Federal Seed Act, the Gold Reserve Act of 1934, the Hours of Service Act, the Animal Welfare Act, the Immigration and Nationality Act (except civil penalty actions and petitions and offers related thereto), the neutrality laws, laws relating to cigarettes, liquor, narcotics and dangerous drugs, other controlled substances, gambling, war materials, pre-Colombian artifacts, coinage, and firearms, locomotive inspection (45 U.S.C. §§22, 23, 28-34), the Organized Crime Control Act of 1970, prison-made goods (18 U.S.C. §§1761-1762), the Safety Appliance Act, standard barrels (15 U.S.C. §§231-242), the Sugar Act of 1948, and the Twenty-Eight Hour Law. See 28 C.F.R. §0.55(d). Order No. 1034-83.

E. Subject to the provisions of 28 C.F.R. §0.160 and §0.172, consideration, acceptance, or rejection of offers in compromise of criminal and tax liability under the laws relating to liquor, narcotics

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

and dangerous drugs, gambling, and firearms, in cases in which the criminal liability remains unresolved. See 28 C.F.R. §0.55(e).

F. All criminal litigation and related investigations and inquiries pursuant to all the power and authority of the Attorney General to enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens; all advice to the Attorney General with respect to the exercise of his/her parole authority under 8 U.S.C. §1182(d)(5) concerning aliens who are excludable under 8 U.S.C. §1182(a)(23), (28), (29), or (33); and all civil litigation with respect to the individuals identified in 8 U.S.C. §§1182(a)(33), 1251(a)(19). See 28 C.F.R. §0.55(f).

G. Coordination of enforcement activities directed against organized crime and racketeering. See 28 C.F.R. §0.55(g).

H. Enforcement of the Act of January 2, 1951, 64 Stat. 1134, as amended by the Gambling Devices Act of 1962, 76 Stat. 1075, 15 U.S.C. §1171 et seq., including registration thereunder. (See also 28 C.F.R. §3.2). 28 C.F.R. §0.55(h).

I. All civil proceedings seeking exclusively equitable relief against Criminal Division activities including criminal investigations, prosecutions, and other criminal justice activities (including without limitation, applications for writs of habeas corpus not challenging exclusion, deportation or detention under the immigration laws and coram nobis), except that any such proceeding may be conducted, handled, or supervised by another division by agreement between the head of such division and the Assistant Attorney General in charge of the Criminal Division. See 28 C.F.R. §0.55(i).

J. International extradition proceedings. See 28 C.F.R. §0.55(j).

K. Relation of military to civil authority with respect to criminal matters affecting both. See 28 C.F.R. §0.55(k).

L. All criminal matters arising under the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519). See 28 C.F.R. §0.55(l).

M. Enforcement of the following described provisions of the United States Code:

1. 18 U.S.C. §§591-593 and §§595-612, relating to elections and political activities;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

2. 18 U.S.C. §§241, 242 and 594 and 42 U.S.C. §§1973i and 1973j, insofar as they relate to voting and election matters not involving discrimination or intimidation on grounds of race or color, and 18 U.S.C. §245(b)(1), insofar as it relates to matters not involving discrimination or intimidation on grounds of race, color, religion, or national origin;

3. 18 U.S.C. § 245(b)(3), pertaining to forcible interference with persons engaged in business during a riot or civil disorder; and

4. 2 U.S.C. §§241-256 (Federal Corrupt Practices Act). (See 28 C.F.R. §0.50(a)). See 28 C.F.R. §0.55(m).

N. Civil actions arising under 39 U.S.C. §§3010, 3011 (Postal Reorganization Act). See 28 C.F.R. §0.55(n).

O. Resolving questions that arise as to federal prisoners held in custody by federal officers or in federal prisons, commitments of mentally defective defendants and juvenile delinquents, validity and construction of sentences, probation, and parole. See 28 C.F.R. §0.55(o).

P. Supervision of matters arising under the Escape and Rescue Act (18 U.S.C. §§751, 752), the Fugitive Felon Act (18 U.S.C. §§1072, 1073), and the Obstruction of Justice Statute (18 U.S.C. §1503). See 28 C.F.R. §0.55(p).

Q. Supervision of matters arising under the Bail Reform Act of 1966 (28 U.S.C. §§3041-3143, 3146-3152, 3568). See 28 C.F.R. §0.55(q).

R. Supervision of matters arising under the Narcotic Addict Rehabilitation Act of 1966 (18 U.S.C. §§4251-4255; 28 U.S.C. §§2901-2906; 42 U.S.C. §§3411-3426, 3441, 3442). See 28 C.F.R. §0.55(r).

S. Civil proceedings in which the United States is the plaintiff filed under the Organized Crime Control Act of 1970, 18 U.S.C. §§1963-1968. See 28 C.F.R. §0.55(s).

T. Enforcement of all criminal laws relating to subversive activities and kindred offenses directed against the internal security of the United States, including the laws relating to treason, sabotage, espionage, and sedition; enforcement of the Foreign Assets Control Regulations issued under the Trading With the Enemy Act (31 C.F.R. §500.101 et seq.); criminal prosecutions under the Atomic Energy Act of 1954, the Smith Act, the neutrality laws, the Arms Export Control Act, the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Federal Aviation Act of 1958 (49 U.S.C. §1523) relating to offenses involving the security control of air traffic, and 18 U.S.C. §799; and criminal prosecutions for offenses, such as perjury and false statements, arising out of offenses relating to national security. See 28 C.F.R. §0.61(a).

U. Administration and enforcement of the Foreign Agents Registration Act of 1938, as amended; the act of August 1, 1956, 70 Stat. 899 (50 U.S.C. §851-857), including the determination in writing that the registration of any person coming within the purview of the act would not be in the interest of national security; and the Voorhis Act. See 28 C.F.R. §0.61(b).

V. Administration and enforcement of the Internal Security Act of 1950, as amended. See 28 C.F.R. §0.61(c).

W. Civil proceedings seeking exclusively equitable relief against laws, investigations or administrative actions designed to protect the national security (including without limitation personnel security programs and the foreign assets control program). See 28 C.F.R. §0.61(d).

X. Interpretation of Executive Order No. 10450 of April 27, 1953, as amended, and advising other departments and agencies in connection with the administration of the federal employees security program, including the designation of organizations as required by the order; the interpretation of Executive Order No. 10501 of November 5, 1953, as amended, and of regulations issued thereunder in accordance with section 11 of that order; and the interpretation of Executive Order No. 10865 of February 20, 1960. See 28 C.F.R. §0.61(e).

Y. Libels and civil penalty actions (including petitions for remission or mitigation of civil penalties and forfeitures, offers in compromise and related proceedings) arising out of violations of the Trading With the Enemy Act, the neutrality statutes and the Arms Export Control Act. See 28 C.F.R. §0.61(f).

Z. Enforcement and administration of the provisions of 2 U.S.C. §441e relating to contributions by foreign nationals. See 28 C.F.R. §0.61(g).

AA. Enforcement and administration of the provisions of 18 U.S.C. §219, relating to officers and employees of the United States acting as agents of foreign principals. See 28 C.F.R. §0.61(h).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

BB. Criminal matters arising under the Military Selective Service Act of 1967. See 28 C.F.R. §0.61(i).

9-1.111 Authority

The Assistant Attorney General acts in the stead of the Attorney General in all matters assigned to him/her and in such matters exercises all the powers of the Attorney General which are expressly delegated where express delegation is required by law or which are delegated by implication where express delegation is not required by law and delegation has not been specifically withheld. As head of the Criminal Division, the Assistant Attorney General has the authority to structure the Division to enable him/her to best conduct, handle, or supervise matters for which he/she is responsible. See 28 C.F.R. §0.190.

The Assistant Attorney General's authority to act is delegable in part and non-delegable in part. Delegability may depend on the availability of the Assistant Attorney General or on the statutory terminology granting authority. See United States v. Giordano, 416 U.S. 505, 512-514 (1973); United States v. Agrusa, 520 F.2d 370 (8th Cir. 1975); United States v. Cuomo, 525 F.2d 1285 (5th Cir. 1976). Delegability may be distinguished from devolution of authority, and it may be that non-delegable authority can be exercised by an official properly acting in the place of the Assistant Attorney General. Cf. United States v. Bledsoe, 674 F.2d 647, 669-70 (8th Cir. 1982) (holding that an Acting Assistant Attorney General can properly make applications under 26 U.S.C. §6103(i)(1)).

Under certain conditions the authority of the Assistant Attorney General can be exercised by a deputy designated to act in his/her stead. Thus, 28 C.F.R. §0.132(e) provides that:

The [Assistant Attorney General] is authorized, in case of absence from office or disability, to designate the ranking deputy (or an equivalent official) in the [Criminal Division] who is available to act as head. If there is no deputy available to act, any other official in [the Criminal Division] may be so designated.

9-1.112 Special Responsibilities

The Assistant Attorney General is authorized to do the following:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

A. To exercise the authority of the Attorney General under 28 U.S.C. §515(a) to designate Department attorneys to conduct any legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, in cases assigned to, conducted, handled, or supervised by the Assistant Attorney General, and to redelegate to Section Chiefs [or Office Directors] this authority, except designation of Department attorneys to conduct grand jury proceedings. See 28 C.F.R. §0.13(a) and (b).

B. To determine administratively whether the federal government has exclusive or concurrent jurisdiction over offenses committed upon lands acquired by the United States, and to consider problems arising therefrom. See 28 C.F.R. §0.56.

C. To exercise the power and authority vested in the Attorney General by 18 U.S.C. §5032 and §5036 relating to criminal proceedings against juveniles, and to redelegate any function delegated to him/her under this section to U.S. Attorneys and to the Chief of the Section which supervises the implementation of the Juvenile Justice and Delinquency Prevention Act (18 U.S.C. §5031 et seq.). See 28 C.F.R. §0.57.

D. To exercise or perform any of the functions or duties conferred upon the Attorney General by the Act to Compensate Law Enforcement Officers not Employed by the United States Killed or Injured While Apprehending Persons Suspected of Committing Federal Crimes (5 U.S.C. §§8191-8193), and to redelegate any function delegated to him/her under this section to the Chief of the Section which supervises the implementation of this Act. See 28 C.F.R. §0.58.

E. To exercise or perform the functions or duties conferred upon the Attorney General by 18 U.S.C. §3331 to certify that in his/her judgment a special grand jury is necessary in any judicial district of the United States because of criminal activity within such district. See 28 C.F.R. §0.59(a).

F. To exercise or perform the functions or duties conferred upon the Attorney General by 18 U.S.C. §3503 to certify that the legal proceeding, in which a motion to take testimony by deposition is made, is against a person who is believed to have participated in an organized criminal activity, where the subject matter is within the cognizance of the Criminal Division pursuant to 28 C.F.R. §0.55, or is not within the cognizance of the Civil Rights Division. See 28 C.F.R. §0.59(b).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

G. To be a member and serve as Chairman of the committee which represents the Department of Justice in the development and implementation of plans for exchanging visits between the Iron Curtain countries and the United States and to designate an alternate to serve on such committee. See 28 C.F.R. §0.62(a).

H. To provide Department of Justice representation on the Interdepartmental Committee on Internal Security. See 28 C.F.R. §0.62(b).

I. To exercise the power and authority vested in the Attorney General by section 7 of the Central Intelligence Agency Act of 1949, as amended (50 U.S.C. §403h), with respect to entry of certain aliens into the United States for permanent residence. See 28 C.F.R. §0.63.

J. To exercise or perform the functions or duties conferred upon the Attorney General by 18 U.S.C. §3503 to certify that the legal proceeding, in which a motion to take testimony by deposition is made, is against a person who is believed to have participated in an organized criminal activity, where the subject matter of the case or proceeding is within the cognizance of the Criminal Division pursuant to 28 C.F.R. §0.61. See 28 C.F.R. §0.64.

K. To have the authority and perform the functions of the "Central Authority" or "Competent Authority" (or like designation) under treaties between the United States of America and other countries on mutual assistance in criminal matters which designate the Attorney General or the Department of Justice as such authority, and to redelegate this authority to his/her Deputy Assistant Attorneys General and to the Director, Office of International Affairs. See 28 C.F.R. §0.64-1.

L. To exercise all of the power and authority vested in the Attorney General under 18 U.S.C. §4102, which has not been delegated to the Director of the Bureau of Prisons under 28 C.F.R. §0.96b, including specifically the authority to find the transfer of offenders to or from a foreign country under a treaty as referred to in Pub. L. 95-44 appropriate or inappropriate, and to redelegate this authority to his/her Deputy Assistant Attorneys General and appropriate Office Directors and Section Chiefs. See 28 C.F.R. §0.64-2.

M. To accept offers in compromise of claims on behalf of the United States in all cases in which the difference between the gross amount of the original claim and the proposed settlement does not exceed \$750,000 or 10 percent of the original claim, whichever is greater; accept offers in compromise of, or settle administratively, claims against the United States in all cases where the principal amount of the proposed

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

settlement does not exceed \$750,000, with respect to matters assigned to the Criminal Division, except those which must be referred to the Deputy Attorney General pursuant to 28 C.F.R. §0.160(c)(1) and (2), and to redelegate to subordinate division officials and U.S. Attorneys any of this authority, except that when a disagreement between a U.S. Attorney or other Department Attorney and a client agency over the terms of a proposed settlement cannot be resolved below the Assistant Attorney General level, the settlement must be presented to the Assistant Attorney General for approval. See 28 C.F.R. §0.160(a); 28 C.F.R. §0.168; Order No. 1034-83.

N. To reject offers in compromise of any claims in behalf of the United States, or, in compromises or administrative actions to settle, against the United States, with respect to matters assigned to the Criminal Division, except in those cases which come under 28 C.F.R. §0.160(c)(2), and to redelegate to subordinate division officials and U.S. Attorneys any of this authority, except that when a disagreement between a U.S. Attorney or other Department attorney and a client agency over the terms of a proposed settlement cannot be resolved below the Assistant Attorney General level, the settlement must be presented to the Assistant Attorney General for approval. See 28 C.F.R. §0.162; 28 C.F.R. §0.168; Order No. 1034-83.

O. To close (other than by compromise or by entry of judgment) civil claims asserted by the government in all cases in which the gross amount of the original claim does not exceed \$750,000, except when for any reason, the closing will control or adversely influence the disposition of other claims, the total gross amounts of which exceed \$750,000, or except when the Assistant Attorney General is of the opinion the proposed closing should receive the personal attention of the Deputy Attorney General or the Attorney General, with respect to matters assigned to the Criminal Division, and to redelegate to subordinate division officials and U.S. Attorneys any of this authority, except that when a disagreement between a U.S. Attorney or other Department attorney and a client agency over the terms of a proposed settlement cannot be resolved below the Assistant Attorney General level, the settlement must be presented to the Assistant Attorney General for approval. See 28 C.F.R. §0.164; 28 C.F.R. §0.168; Order No. 1034-83.

P. To conduct, handle, or supervise such litigation or other actions as may be appropriate to accomplish the satisfaction, collection, or recovery, as the case may be, of judgments, fines, penalties, and forfeitures (including bailbond forfeitures) arising in connection with cases under his/her jurisdiction, and to designate an individual or unit in the Criminal Division to be responsible for the performance of each of those functions. See 28 C.F.R. §0.171(a); Order No. 1034-83.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Q. To exercise the authority vested in the Attorney General by 18 U.S.C. §6003, to approve the application of a U.S. Attorney to a federal court for an order compelling testimony or the production of information by a witness in any proceeding before or ancillary to a court or grand jury of the United States, and the authority vested in the Attorney General by 18 U.S.C. §6004, to approve the issuance by an agency of the United States of an order compelling testimony or the production of information by a witness in a proceeding before the agency, when the subject matter of the case or proceeding is either within the cognizance of the Criminal Division or is not within the cognizance of the Antitrust, Civil, Civil Rights, Land and Natural Resources, and Tax Division, or the Drug Enforcement Administration, and to redelegate this authority to his/her respective Deputy Assistant Attorneys General to be exercised solely during his/her absence from the City of Washington. See 28 C.F.R. §0.175(a); and 28 C.F.R. §0.178(a). (The practice in the Criminal Division is to have the ranking available Deputy Assistant Attorney General, in the capacity of Acting Assistant Attorney General pursuant to 28 C.F.R. §0.132(d), exercise this authority.)

R. To exercise the power and authority vested in the Attorney General by 18 U.S.C. §6005 to apply to a district court of the United States to defer the issuance of an order compelling the testimony of a witness or the production of information in a proceeding before either House of Congress, or any committee or subcommittee of either House, or any joint committee of the two Houses, and to redelegate this authority to his/her respective Deputy Assistant Attorneys General to be exercised solely during his/her absence from the City of Washington. See 28 C.F.R. §0.176(b); and 28 C.F.R. §0.178(a).

S. To exercise the authority vested in the Attorney General by section 514 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1276, to approve the application of a U.S. Attorney to a federal court for an order compelling testimony or the production of information in any proceeding before a court or grand jury of the United States, and to indicate his/her concurrence in agency proceedings under that Act, and to redelegate this authority to his/her respective Deputy Assistant Attorneys General to be exercised solely during his/her absence from the City of Washington. See 28 C.F.R. §0.177; and 28 C.F.R. §0.178(a).

T. To conduct prosecution of obstruction of justice, perjury, fraud or false statement charges, as described in 28 C.F.R §0.179, including the appointment of special attorneys to present evidence to grand juries, in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

matters under the supervisory jurisdiction of the Criminal Division, and to determine appropriate supervisory jurisdiction in such matters. See 28 C.F.R. §0.179a. (Insofar as such "special attorneys" are not Department of Justice employees and are to appear before a grand jury, the normal appointment process requires the approval of the Deputy Attorney General or his/her designee.)

U. To exercise the power and authority of and to perform the functions vested in the Attorney General by the Act of January 2, 1951, 64 Stat. 1134, as amended by the Gambling Devices Act of 1962, 76 Stat. 1075, 15 U.S.C. §1171 et seq. See 28 C.F.R. §3.2.

V. To authorize remission or mitigation of seizure or forfeiture of gambling devices under the Act of January 2, 1951, 64 Stat. 1134, as amended by the Gambling Devices Act of 1962, 76 Stat. 1075, 15 U.S.C. §1171 et seq. See 28 C.F.R. §3.6. Order No. 1034-83.

W. To prescribe forms, in addition to or in lieu of those specified in 28 C.F.R. §5.1-5.801 as may be necessary to carry out the purposes of those sections, which relate to the administration and enforcement of the Foreign Agents Registration Act of 1938, as amended. See 28 C.F.R. §5.1(b).

X. To take final action under 18 U.S.C. §2513 on claims for award of compensation to an informer. See 28 C.F.R. §8.2. Order No. 1034-83.

Y. To assign petitions for remission or mitigation of forfeiture and the report thereon, which are forwarded to him/her by U.S. Attorneys, to the Asset Forfeiture Office of the Criminal Division for preparation of a report based upon the allegations of the petition and the report of the seizing agency. See 28 C.F.R. §9.3(c). Order No. 1034-83.

Z. To reject a petition for remission or mitigation of forfeiture in any case in which a similar petition has been administratively denied by the seizing agency prior to the referral of the case to the U.S. Attorney for the institution of forfeiture proceedings. See 28 C.F.R. §9.3(g).

AA. To accept, for consideration by the Director, Asset Forfeiture Office, petitions submitted in judicial forfeiture proceedings under the Internal Revenue liquor laws only prior to the time a decree of forfeiture is entered. See 28 C.F.R. §9.3(h). Order No. 1034-83.

BB. To accept, for consideration by the Director, Asset Forfeiture Office, petitions in all other forfeiture cases not specified in 28 C.F.R. §9.3(g) and (h), until the property is sold or placed in official use or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

otherwise disposed of according to law. See 28 C.F.R. §9.3(i). Order No. 1034-83.

CC. To receive, within 20 days from the date of the notice of the denial of a petition for remission or mitigation of forfeiture, a request for reconsideration of the denial, based on evidence recently developed or not previously considered, and to refer to the Director, Asset Forfeiture Office. See 28 C.F.R. §9.3(j). Order No. 1034-83.

DD. To advise the U.S. Attorney of action taken on a request for reconsideration of the denial of a petition for remission or mitigation of forfeiture by the Director, Asset Forfeiture Office. See 28 C.F.R. §9.3(k). Order No. 1034-83.

EE. To take final action under 18 U.S.C. §1955(d) on claims for award of compensation to informers, offers in compromise, and matters relating to bonds or other security. See 28 C.F.R. §9a.2.

FF. To perform the duties comparable to those of the Administrator of the Drug Enforcement Administration imposed under 28 C.F.R. §9.4 with respect to petitions for the remission or mitigation of administrative forfeiture of property of an appraised value of \$10,000 or less resulting from the application of 18 U.S.C. §1955(d). See 28 C.F.R. §9a.7. Order No. 1034-83.

GG. To grant or deny any request for a record of the Criminal Division under the Freedom of Information Act, 5 U.S.C. §552, and to name a designee to perform certain functions. See 28 C.F.R. §16.4(b) et seq. Order No. 1055-84.

HH. To approve requests for production or disclosure of information in federal and state proceedings pursuant to 28 C.F.R. §16.21 et seq., and to delegate certain authority to subordinate division officials or U.S. Attorneys. See 28 C.F.R. §16.23 et seq. 28 C.F.R. §16.29.

II. To grant or deny a request for access to a record of the Criminal Division under the Privacy Act of 1974, 5 U.S.C. §552a, and to name a designee to perform certain functions. See 28 C.F.R. §16.42(b) et seq. Order No. 1055-84.

JJ. To exercise responsibility with respect to national security information pursuant to 28 C.F.R. §17.1 et seq., and to delegate a lesser level of classification authority. See 28 C.F.R. §17.1 et seq.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

KK. To determine, after investigation, that a former official or employee is believed to have violated 18 U.S.C. §207(j), and to designate one or more officers or employees to present the evidence and perform other functions incident to the proceedings. See 28 C.F.R. §45.735-7a(a) and (e).

LL. To review financial statements required by his/her subordinates pursuant to 28 C.F.R. §45.735-22 and §45.735-23 and to issue supplemental and implementing regulations. See 28 C.F.R. §45.735-24 and §45.735-25.

MM. To nominate an individual to be designated by the Designated Agency Ethics Official as a Deputy Designated Agency Ethics Official for the Criminal Division. See 28 C.F.R. §45.735-26. Order No. 1045-84.

NN. To review public financial disclosure reports required by Title II of the Ethics in Government Act of 1978 by certain persons pursuant to 28 C.F.R. §45.735-27(a), and to delegate this function to an assistant head of a division. See 28 C.F.R. §45.735-27(1)(vi) and (2).

OO. To designate officials to issue requests for financial records pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. §3408. See 28 C.F.R. §47.3(c).

PP. To authorize subpoenas to a member of the news media, if the member of the news media agrees to provide the material sought and if that material has already been published or broadcast. See 28 C.F.R. §50.10(e).

QQ. To sign Foreign Corrupt Practices Act review letters, and to delegate this authority. See 28 C.F.R. §50.18(j).

RR. To approve or deny motions for recusal or disqualification, and to delegate this authority to Deputy Assistant Attorneys General or officials in equivalent positions. See 28 C.F.R. §50.19.

SS. To determine whether disposition of a matter before a magistrate is appropriate. See 28 C.F.R. §52.01 and §52.02.

TT. To authorize application for a search warrant to obtain documentary material held by third parties pursuant to 28 C.F.R. §59.1 et seq. See 28 C.F.R. §59.5.

UU. To sign the certificate required by section 1103(b) of the Right to Financial Privacy Act of 1978, and to submit required statements to a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

court, in instances where requests are to be made, and to designate supervisory officials to do so. See Order No. 821-79.

WV. To authorize the monitoring of private conversations with the consent of a party. See Order No. 824-79 and Memorandum entitled "Procedures for Lawful, Warrantless Interception of Verbal Communications" dated November 7, 1983.

WW. To enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens as they relate to individuals who allegedly, during March 23, 1933, through May 8, 1945, ordered, incited, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion. See Order No. 851-79.

XX. To make loans of electronic surveillance equipment to state and local law enforcement agencies in exceptional circumstances pursuant to 5 U.S.C. §301. See Order No. 890-80.

YY. To authorize applications for orders authorizing interception of wire or oral communications under 18 U.S.C. §2516. See Order No. 931-81 and Order No. 934-81.

ZZ. To authorize emergency interception of wire or oral communications pursuant to 18 U.S.C. §2518(7) in accordance with statutory requirements, when the Attorney General is not in the District of Columbia or otherwise available. See Order No. 931-81 and Order No. 934-81.

AAA. To exercise or perform the functions and duties conferred upon the Attorney General by the Classified Information Procedures Act. See Order No. 961-81.

BBB. To review and evaluate requests to conduct television surveillance. See Order No. 985-82.

CCC. To be a member of the Economic Crime Council and perform functions related thereto. See Order No. 1015-83.

DDD. To authorize applications for court orders for disclosure of tax returns or tax return information, or to request disclosure of return information other than taxpayer return information directly from the Internal Revenue Service. See 26 U.S.C. §6103.

EEE. To approve plea agreements when the defendant maintains his/her innocence with respect to the charge or charges to which he/she offers to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

plead guilty. See USAM 9-27.000 et seq. (Principles of Federal Prosecution).

FFF. To determine which persons meet the criteria for witness protection, to approve requests, to request protection and maintenance in emergencies. The Assistant Attorney General's designee is also authorized to perform these functions. See OBD 2110.2, January 10, 1975.

9-1.120 Deputy Assistant Attorneys General

Deputy Assistant Attorneys General are selected by the Assistant Attorney General to assist him/her in the performance of his/her duties. Aside from special assignments, the Assistant Attorney General assigns to each Deputy Assistant Attorney General the responsibility for supervising certain Sections and Offices of the Division. Current Section and Office assignments are as follows:

John C. Keeney	Organized Crime and Racketeering Section Public Integrity Section Office of Policy and Management Analysis
James Knapp	Narcotic and Dangerous Drug Section Office of Administration Office of Enforcement Operations Office of Legislation Asset Forfeiture Office
Mark M. Richard	Internal Security Section Office of International Affairs Office of Special Investigations
Victoria Toensing	Appellate Section Fraud Section General Litigation and Legal Advice Section

(Directive No. 126).

9-1.121 Authority

Each Deputy Assistant Attorney General acts in the stead of the Assistant Attorney General in all matters assigned to him/her and exercises all the powers of the Assistant Attorney General which are expressly delegated where express delegation is required by law or which

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

are delegated by implication where express delegation is not required by law and delegation has not been specifically withheld. See USAM 9-1.111; 28 C.F.R. §0.132(e).

9-1.122 Special Responsibilities

A Deputy Assistant Attorney General is authorized to do the following:

A. To exercise the authority of the Attorney General under 28 U.S.C. §515(a) to designate Department attorneys to conduct any legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, in cases assigned to, conducted, handled, or supervised by the Deputy Assistant Attorney General. See 28 C.F.R. §0.13(a).

B. To exercise the power and authority vested in the Attorney General by 18 U.S.C. §5032 and §5036 relating to criminal proceedings against juveniles. See 28 C.F.R. §0.57.

C. To exercise or perform any of the functions or duties conferred upon the Attorney General by the Act to Compensate Law Enforcement Officers not Employed by the United States Killed or Injured While Apprehending Persons Suspected of Committing Federal Crimes (5 U.S.C. §§8191-8193). See 28 C.F.R. §0.58.

D. To exercise or perform the functions or duties conferred upon the Attorney General by 18 U.S.C. §3503 to certify that the legal proceeding, in which a motion to take testimony by deposition is made, is against a person who is believed to have participated in an organized criminal activity, where the subject matter is within the cognizance of the Criminal Division pursuant to 28 C.F.R. §0.55, or is not within the cognizance of the Civil Rights Division. See 28 C.F.R. §0.59(b).

E. To exercise or perform the functions or duties conferred upon the Attorney General by 18 U.S.C. §3503 to certify that the legal proceeding, in which a motion to take testimony by deposition is made, is against a person who is believed to have participated in an organized criminal activity, where the subject matter of the case or proceeding is within the cognizance of the Criminal Division pursuant to 28 C.F.R. §0.61. See 28 C.F.R. §0.64.

F. To have the authority and perform the functions of the "Central Authority" or "Competent Authority" (or like designation) under treaties

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

between the United States of America and other countries on mutual assistance in criminal matters which designate the Attorney General or the Department of Justice as such authority. See 28 C.F.R. §0.64-1. Directive No. 81.

G. To exercise all of the power and authority vested in the Attorney General under 18 U.S.C. §4102, which has not been delegated to the Director of the Bureau of Prisons under 28 C.F.R. §0.96b, including specifically the authority to find the transfer of offenders to or from a foreign country under a treaty as referred to in Pub. L. No. 95-44 appropriate or inappropriate. See 28 C.F.R. §0.64-2. Directive No. 73.

H. To review matters referred by the Director, Asset Forfeiture Office, which involve questions of law or policy, or for other reasons, under 28 C.F.R. §§0.160, 0.162, 0.164, and 0.171. See Order No. 1034-83. Directive No. 116.

I. To approve applications for immunity as provided under 18 U.S.C. §6003 and §6004 and 21 U.S.C. §884 during the absence of the Assistant Attorney General. See 28 C.F.R. §0.132(e).

J. To authorize remission or mitigation of seizure or forfeiture of gambling devices under the Act of January 2, 1951, 64 Stat. 1134, as amended by the Gambling Devices Act of 1962, 76 Stat. 1075, 15 U.S.C. §1171 et seq. See 28 C.F.R. §3.6. Order No. 1034-83.

K. To deny a request for information under 5 U.S.C. §552 or 5 U.S.C. §552a. See 28 C.F.R. §16.4(b) et seq. and §§16.42(b) et seq. Order No. 1055-84. Directive No. 58 (only the DAAG who supervises OEO).

L. To authorize demanded testimony or other disclosure of information, in a case in which the United States is not a party, when requested by a U.S. Attorney, when in his/her judgment disclosure is consistent with the factors specified in 28 C.F.R. §16.26(a) and none of the factors specified in 28 C.F.R. §16.26(b) exist. See 28 C.F.R. §16.24(d)(1)(i).

M. To refer matters for final resolution when, after steps have been taken to limit the scope or obtain the withdrawal of a demand for testimony or disclosure of information in a case in which the United States is not a party, he/she does not authorize the demanded testimony or other disclosure. See 28 C.F.R. §16.24(d)(1)(iii).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

N. To issue formal written requests for financial records pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. §3408. See 28 C.F.R. §47.3. Directive No. 59.

O. To authorize application for a search warrant to obtain documentary material held by third parties pursuant to 28 C.F.R. §59.1 et seq. See 28 C.F.R. §59.4(b)(2).

P. To obtain emergency access to financial records pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. §3414(b). See Order No. 821-79. Directive No. 60.

Q. To authorize the monitoring of private conversations with the consent of a party. See Order No. 824-79 and Memorandum entitled "Procedures for Lawful, Warrantless Interceptions of Verbal Communications" dated November 7, 1983.

R. To enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens as they relate to individuals who allegedly, during March 23, 1933, through May 8, 1945, ordered, incited, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion. See Order No. 851-79.

S. To review and evaluate requests to conduct television surveillance for law enforcement purposes within the Department of Justice. See Order No. 985-82.

9-1.130 Section Chiefs

Section Chiefs and Office Directors are selected by an Assistant Attorney General to assist him/her in the performance of his/her duties. See 5 C.F.R. §9.1-9.5. The Assistant Attorney General assigns to each Section Chief and Office Director the responsibility of conducting, handling or supervising the Division's business in an area designated by the Assistant Attorney General. Current statutory assignments are listed at USAM 9-1.200 et seq. Each Section Chief and Office Director operates under the general supervision of a Deputy Assistant Attorney General. See USAM 9-1.120. Section Chiefs and Office Directors are subject to removal pursuant to the provisions of 5 C.F.R. Part 752 and DOJ Order 1752.1a and supplements thereto.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-1.131 Authority

Each Section Chief and Office Director acts in the stead of the Assistant Attorney General in all matters assigned to him/her and exercises all the powers of the Assistant Attorney General which are expressly delegated where express delegation is required by law or which are delegated by implication where express delegation is not required by law and delegation has not been specifically withheld. See USAM 9-1.111; 28 C.F.R. §0.132(e).

The following responsibilities have been delegated to Section Chiefs and Office Directors:

A. Authorization of investigations and prosecutions by Departmental attorneys.

B. Authority to perform functions set forth in 28 C.F.R. §§0.160, 0.162, 0.164, and 0.171 not falling within the limitations of paragraph (a) of Directive 116, except that relating to conducting, handling, or supervising civil and criminal forfeiture litigation (other than bail bond forfeiture) including acceptance or denial of petitions for remission or mitigation of forfeiture, and matters described in paragraph (c) of Directive 116 which should receive the personal attention of a Deputy Assistant Attorney General or the Assistant Attorney General because they involve questions of law or policy, and matters which must be resolved by the Assistant Attorney General because the agency or agencies involved have objected in writing to proposed closing or dismissal of a case or acceptance or rejection of an offer in compromise, when the matter cannot be resolved below that level. See Order No. 1034-83. Directive No. 116.

C. Authority to issue formal written requests for financial records pursuant to 12 U.S.C. §3408. See 28 C.F.R. §47.3(c). Directive No. 59.

D. Authority to approve application for a search warrant in an emergency situation in a case not being handled by a U.S. Attorney's office when the immediacy of the need to seize material does not permit an opportunity to secure the authorization of a Deputy Assistant Attorney General, to obtain documentary material held by third parties pursuant to 28 C.F.R. §59.1 et seq. See 28 C.F.R. §59.4(b)(2).

E. Authority to obtain emergency access to financial records pursuant to Section 1114(b) of the Right To Financial Privacy Act of 1978, 12 U.S.C. §3414(b). See Order No. 821-79. Directive No. 60.

F. Authorization to respond to Congressional inquiries of a non-controversial nature.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

G. Authorization to respond to routine correspondence dealing with matters not exclusively reserved to the Assistant Attorney General.

H. Authorization to respond to inquiries from U.S. Attorneys on matters within their assigned jurisdiction.

I. Authorization to answer inquiries concerning prior oral and wire interceptions relating to motions under 18 U.S.C. §3504.

J. Authorization to transmit to the Bureau of Prisons and United States Parole Commission information concerning the background of convicted felons.

9-1.132 Special Responsibilities

A Section Chief or Office Director assigned responsibility for an area hereinafter referred to is authorized to do the following:

A. To authorize U.S. Attorneys to petition the appropriate United States District Court for a motion to transfer juvenile offenders to adult prosecution. See 28 C.F.R. §0.57. Memorandum of Assistant Attorney General dated June 6, 1980 (Chief of the General Litigation and Legal Advice Section).

B. To exercise all of the power and authority vested in the Attorney General under mutual assistance treaties in criminal matters. See 28 C.F.R. §0.64-1. Directive No. 81 (Director of the Office of International Affairs).

C. To exercise all of the power and authority vested in the Attorney General under 18 U.S.C. §4102, which has not been delegated to the Director of the Bureau of Prisons, including specifically the authority to find the transfer of offenders to or from a foreign country under a treaty as referred to in Pub. L. No. 95-44 appropriate or inappropriate. See 28 C.F.R. §0.64-2. Directive No. 73 (Director of the Office of International Affairs).

D. To conduct, handle, or supervise civil and criminal forfeiture litigation (other than bail bond forfeiture), including acceptance or denial of petitions for remission or mitigation of forfeiture, which are assigned to the Criminal Division. See 28 C.F.R. §§0.160, 0.162, 0.164, and 0.171. Order No. 1034-84. Directive No. 116 (Director of the Asset Forfeiture Office).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

E. To authorize remission or mitigation of seizure or forfeiture of gambling devices under the Act of January 2, 1951, 64 Stat. 1134, as amended by the Gambling Devices Act of 1962, 76 Stat. 1075, 15 U.S.C. §1171 et seq. See 28 C.F.R. §3.6. Order No. 1034-83. (Director of Asset Forfeiture Office).

F. To handle inquiries under the Foreign Agents Registration Act of 1938, as amended. See 28 C.F.R. §5.1 et seq. (Registration Unit of the Internal Security Section).

G. To take final action under 18 U.S.C. §2513 on claims for remission or mitigation of forfeitures, offers of payment for release of property, offers in compromise, and matters relating to bonds or other security. See 28 C.F.R. §8.2. Order No. 1034-83 (Director of the Asset Forfeiture Office).

H. To grant or deny petitions for remission or mitigation of forfeiture of certain property as set out in 19 U.S.C. §1618, and applicable only to those civil and criminal forfeitures which arise under statutes in relation to which the Attorney General has assigned the remission or mitigation function to the Criminal Division, the Federal Bureau of Investigation, or the Drug Enforcement Administration. See 28 C.F.R. §§9.1, 9.3. Order No. 1034-83 (Director of the Asset Forfeiture Office).

I. To perform duties comparable to those of the Chief Counsel or Deputy Chief Counsel, Drug Enforcement Administration, imposed under 28 C.F.R. §9.4 with respect to petitions for the remission or mitigation of administrative forfeiture of property of an appraised value of \$10,000 or less resulting from the application of 18 U.S.C. §1955(d). See 28 C.F.R. §9a.7. Order No. 1034-83 (Director of the Asset Forfeiture Office).

J. To deny a request for information under 5 U.S.C. §552(a) or 5 U.S.C. §552a, see 28 C.F.R. §16.4(b) et seq.; 28 C.F.R. §16.42(b) et seq.; Order No. 1055-84. Directive No. 58 (Director of the Office of Enforcement Operations).

K. To approve production of material and disclosure of information contained in the Department of Justice files in response to a subpoena, order, or other demand of a court or other authority. See 28 C.F.R. §16.29. Directive No. 71 (Director of the Office of Enforcement Operations).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

L. To authorize the monitoring of private conversations with the consent of a party. See Order No. 824-79 and Memorandum entitled "Procedures for Lawful, Warrantless Interceptions of Verbal Communications" dated November 7, 1983 (Director of the Office of Enforcement Operations).

M. To enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens as they relate to individuals who allegedly, during March 23, 1933, to May 8, 1945, ordered, incited, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion. See Order No. 851-79 (Director of the Office of Special Investigations).

N. To review and evaluate all requests to conduct television surveillance for law enforcement purposes within the Department of Justice. See Order No. 985-82 (Director of the Office of Enforcement Operations).

O. To serve as Executive Director of the Economic Crime Council and be a member thereof. See Order No. 1015-83 (Chief of the Fraud Section).

P. To certify that any action authorized by subparagraphs (A), (B), (C) and (D) of paragraph (b)(1) of Section 205 of Pub. L. No. 98-166, is necessary for the conduct of an undercover operation by the Federal Bureau of Investigation, and to be a member of the Undercover Operations Review Committee. See Order No. 1046-84 (Chief of the Public Integrity Section).

Q. To give any advice and assistance to the Secretary of Labor which may be needed in resolving any questions arising out of claims filed under 5 U.S.C. §§8191-8193, the Act to Compensate Law Enforcement Officers not Employed by the United States Who Are Killed or Injured While in the Process of Apprehending Persons Suspected of Committing Federal Crimes. See 28 C.F.R. §0.58. Memorandum of Assistant Attorney General dated April 21, 1983 (Chief of the General Litigation and Legal Advice Section).

R. To determine which persons meet the criteria for witness protection, to approve requests, and to request protection and maintenance in emergencies (Director of the Office of Enforcement Operations). See USAM 9-21.200 et seq.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-1.140 Special Assistants

Special Assistants are selected by the Assistant Attorney General to assist him/her personally in the performance of his/her duties.

9-1.150 Senior Counsel

Senior Counsel are selected by the Assistant Attorney General to perform functions in the areas assigned to them. The Criminal Division has four Senior Counsel: two Senior Counsel for Litigation; a Senior Appellate Counsel; and a Senior Counsel, Office of Law Enforcement Coordination.

9-1.160 Division Attorneys

Attorneys of the Division assist the Assistant Attorney General by conducting, handling, or supervising the Division's routine business under the direction and general supervision of a particular Section Chief or Office Director or his/her designate (e.g., Deputy Chief, Associate Director, or Unit Chief). With the exception of Strike Force attorneys, see USAM 9-1.170, infra, Division attorneys are primarily responsible for providing litigation support to U.S. Attorneys by rendering advice and counsel with reference to questions of law and procedure concerning investigations, grand jury proceedings, and the preparation of indictments and other pleadings. Division attorneys may participate directly in case litigation in the following instances:

A. Where the U.S. Attorney has requested assistance in litigating a case for which his/her office will maintain primary responsibility;

B. Where the U.S. Attorney has requested that the Division assume primary litigation responsibility for a case;

C. Where the U.S. Attorney has requested that the Division assume sole litigation responsibility for a case;

D. Where the Assistant Attorney General has assigned primary litigation responsibility for a certain category of cases to a particular Section or Office; and

E. Where the Assistant Attorney General has removed litigation responsibility for a particular case from the U.S. Attorney and assigned that responsibility to a Division attorney.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In all cases where a Division attorney will appear before a grand jury, that attorney must obtain a grand jury authorization letter from the Assistant Attorney General or a Deputy Assistant Attorney General, see 28 C.F.R. §0.13(a), prior to such appearance, see USAM 9-1.161, infra. In all cases where a Division attorney will assume primary litigation responsibility, that attorney will obtain specific authorization from the Assistant Attorney General prior to assuming that responsibility.

9-1.161 Requests for Grand Jury Authorization Letters for Division Attorneys

Requests for grand jury authorization letters for Division attorneys should be in the form of a memorandum from the Section Chief or Office Director to the Assistant Attorney General.

To promote uniformity in the format of requests for grand jury authorizations, and to ensure that all such requests contain the necessary information, it is requested that the following formats be used in making requests for grand jury authorizations.

For authorizations needed in connection with specific cases or matters:

It is requested that (full name of attorney), an attorney with the (name of Section or Office) of the Criminal Division, be authorized to conduct grand jury proceedings in the \_\_\_\_\_ District of \_\_\_\_\_. This authorization is required in connection with an investigation of (subject matter, case name, or names of prospective defendants), focusing primarily on, but not limited to, alleged violations of (statutory citations). This authorization is needed by (date).

The United States Attorney for the above district [(has requested) or (concur in)] the granting of this grand jury authorization.

For authorizations required in connection with new assignments to Strike Forces:

It is requested that (full name of attorney) be authorized to conduct grand jury proceedings in the \_\_\_\_\_ District of \_\_\_\_\_. [(Mr.) (Ms.)] (last name of attorney) is [(newly assigned) (temporarily assigned) (being reassigned)] to the \_\_\_\_\_ Strike Force, and will require this authorization in connection with investigations [(he) (she)] has been assigned in the above district. This authorization is needed by (date).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The United States Attorney for the above district [(has requested) (concur in)] the granting of this grand jury authorization.

Requests should be addressed to the Assistant Attorney General, but sent to the Office of Enforcement Operations, Federal Triangle Building, Room 303, for processing, and should be made as soon as the need is known to allow adequate time for approval. Failure to provide necessary information may result in a delay. The Office of Enforcement Operations will prepare a grand jury authorization letter to the attorney from the Assistant Attorney General, Criminal Division. Letters of authorization are usually signed by Deputy Assistant Attorneys General pursuant to Order No. 725-77, dated May 12, 1977.

9-1.170 Strike Forces

Strike Forces from the Criminal Division have been established in various districts to combat organized crime. The interrelationship between Strike Forces and U.S. Attorneys' Offices is regulated by the Guidelines established by the Attorney General in Orders No. 672-76 and 754-77. The Guidelines provide:

9-1.171 Purpose

Organized crime is a serious national problem requiring special concentration and coordination of federal investigative and prosecutive activities in geographic areas where the problem is most severe. Federal efforts against organized crime are supervised and directed by the Criminal Division and carried out by Strike Forces. The major purpose of the Strike Force is to conduct extensive investigations of organized crime activities within their areas.

Strike Forces, being task oriented, are organized and deployed as organized crime conditions in an area require. To the extent possible, the configuration and operation of a Strike Force shall be adapted to the particular conditions, needs, and priorities in the districts it serves. As the need in an area subsides or ends, the Strike Force's activity may be appropriately altered, including the recall or redeployment of the Strike Force for other tasks or duties.

AUGUST 31, 1984

Ch. 1, p. 46

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-1.172 Definition of Organized Crime

The term "organized crime," for purposes of the USAM, includes all illegal activities engaged in by members of the criminal syndicates operative within the United States.

9-1.173 General Responsibilities--Executive Committee--Personnel

The Strike Force assigned to a particular geographic area by the Criminal Division shall be responsible for supervising all federal investigations of organized crime matters within such area, and for coordinating such investigations with state and local efforts against organized crime. However, the U.S. Attorney shall supervise federal investigations of illegal drug enterprises, in coordination with the Narcotic and Dangerous Drug Section of the Criminal Division, unless there is direct and substantial control of the illegal drug operation by major organized crime figures, or the operation is integrally interrelated to other criminal conduct under investigation by a Strike Force pursuant to these guidelines. The Chief of the Strike Force and the U.S. Attorney in such area shall have the responsibility of keeping each other fully advised of all organized criminal matters. See USAM 9-1.175, *infra*. The Chief of the Strike Force shall on a continuing basis advise the U.S. Attorney of all investigations being conducted of which he/she has knowledge.

Where the area assigned to the Strike Force encompasses more than one judicial district, the Chief of the Strike Force shall work with each U.S. Attorney having jurisdiction of a portion of such assigned area.

An attorney shall be appointed as Chief of each Strike Force by the Assistant Attorney General in charge of the Criminal Division with the advice of the U.S. Attorney of the district where the Strike Force is located.

There shall be established at each Strike Force an Executive Committee composed of the following persons or representatives:

- A. The U.S. Attorney for the district where the Strike Force is headquartered, who shall serve as Chairperson;
- B. The Attorney-in-Charge of the Strike Force;
- C. The Special-Agent-in-Charge, Federal Bureau of Investigation, local Field Office;
- D. District Chief of Intelligence, Internal Revenue Service;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- E. District Chief of Audit, Internal Revenue Service;
- F. District Senior ATF Enforcement Officer (either Area Supervisor or Chief Special Investigator), Bureau of Alcohol, Tobacco and Firearms; and
- G. The principal enforcement officer (Resident Special Agent, Special Agent-in-Charge, or Director of the New York Metro Region) of the Office of Inspector General, Department of Labor.

The Executive Committee shall meet at least semi-annually. The meetings shall be called and chaired by the U.S. Attorney. The members of the Committee shall review the progress of the organized crime program in the District and at the request of any member address any problems in cooperation or coordination which have arisen among the agencies involved in that program. In addition, the Committee may propose local organized crime problems which the members believe of sufficient impact for inclusion in the organized crime program in that District as a local priority. Such proposals shall be made in writing to the Assistant Attorney General, Criminal Division, or his/her designee. Nothing in this paragraph shall relieve the Attorney-in-Charge of the Strike Force of his/her obligation to keep the U.S. Attorney fully advised of organized crime matters and investigations.

#### 9-1.174 Investigative Matters

The federal investigative agencies operating within the judicial district shall submit to the U.S. Attorney all cases concerning violations of federal law except those concerning an organized crime subject or activity which require extensive investigation or utilization of significant resources and facilities of the Strike Force. In cases of the latter sort, the investigative agency, including the Tax Division of the Department of Justice, shall submit the matter in the first instance to the Strike Force. However, supervisory jurisdiction of tax cases will remain in the Tax Division. In the event that either the U.S. Attorneys' Office or the Strike Force receives an investigative report of a matter of primary concern to the other, a prompt referral shall be made so that the case may proceed without delay.

In the case of a difference of opinion between the U.S. Attorney and the Chief of the Strike Force as to the assignment of an investigative matter, the U.S. Attorney shall make the initial assignment, but the Chief of the Strike Force may refer the matter to the Chief of the Organized Crime and Racketeering Section (OCRS) of the Criminal Division who will

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

review the decision of the U.S. Attorney. In the event the Chief, OCRS, disagrees with the determination of the U.S. Attorney, the matter shall be referred to the Assistant Attorney General, Criminal Division, to make a determination which shall be final. All concerned investigative agencies shall be advised of the assignment made with regard to an investigative matter.

The chain of command for pre-indictment investigative efforts within the field of organized crime shall be from the Attorney General, to the Assistant Attorney General, Criminal Division, to the Chief of the Strike Force, to the investigatory personnel assigned to the Strike Force. U.S. Attorneys shall be kept fully advised of organized crime developments within their districts. When a specific investigation has progressed to the point where there is to be a presentation for an indictment or any court proceeding, the Chief of the Strike Force shall then for this purpose operate under the direction of the U.S. Attorney who shall oversee the judicial phase of the development of the case. The matter shall be handled by an attorney or attorneys designated by the U.S. Attorney, at least one of whom shall be a Strike Force attorney. In the event of a difference of opinion between the U.S. Attorney and the Chief of the Strike Force as to the assignment of an attorney to handle litigation, the Chief of the Strike Force may refer the matter to the Chief, OCRS, for determination. If the Chief, OCRS, disagrees with the determination of the U.S. Attorney, the matter shall be referred to the Assistant Attorney General, Criminal Division, for final determination.

Arrest warrants and search warrants sought in connection with a matter assigned to the Strike Force shall be sought with the concurrence of the U.S. Attorney.

#### 9-1.175 Case Initiation Reports

No investigation shall be opened by a Strike Force without the submission of a case initiation report. Moreover, within a reasonable time, a report should be completed and forwarded as to each pending investigation which was opened prior to the issuance of the requirement to submit case initiation reports.

The form of the report is as follows:

To:

\_\_\_\_\_  
Chief, OCRS  
Criminal Division

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

From: Attorney-in-Charge  
Strike Force

Subject: Name:

Identification (e.g., DOB., F.B.I.#, S.S.#, P.D.#):

We have this date opened an investigation of the above subject and the following individuals:

<u>Name</u>	<u>Identification</u>
1.	1.
2.	2.
3.	3.
4.	4.
5.	5.

Attorney assigned: \_\_\_\_\_ Agency \_\_\_\_\_ Agent \_\_\_\_\_

Possible violations:

Summary of facts:

Organized crime connection:

Source of information establishing connection:

Objective:

Profile open:

\_\_\_\_\_ District of \_\_\_\_\_.

cc: \_\_\_\_\_, United States Attorney

The Case Initiation Report is designed to be a one-page description of an investigative or prosecutive matter which, in the judgment of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Attorney-in-Charge, merits the attention of the Strike Force and the assignment of attorney personnel resources. Investigations which are being conducted by agencies without any participation by Strike Force attorneys need not be reported thereon.

The subject of the report should be the name of the principal prospective defendant and should set forth that person's identifying information in the form of date of birth, FBI, Social Security, and police department numbers. Additional possible subjects may be listed in the space provided and should be listed in subsequent supplemental reports if they become known thereafter. Possible violations may be listed by name and, preferably, title and section of the United States Code. The summary of facts should be brief but sufficient for the reader to determine the basis upon which the investigation is being undertaken. The organized crime connection should reflect the careful judgment of the Attorney-in-Charge as to why the Strike Force is concerned with the investigation. The source of the information establishing the connection is, of course, related to the preceding item, but is intended to set out somewhat more precisely the actual source (without identifying particular informants). The objective could also be called the investigative or prosecutive goal and is not normally to be answered "Conviction of Defendant." Rather, it should set forth what goal is intended to be achieved by this particular investigative or prosecutive effort. The last item is designed to be a key to open the appropriate Profile or, if already open, to record the additional data, e.g., attorney assignment. It should be answered by a yes and a date or no.

Upon completion, a copy of this report should be sent immediately to the Organized Crime and Racketeering Section and the appropriate U.S. Attorney, as indicated. The routing of this report in the Organized Crime and Racketeering Section will be to the Chief and the appropriate Deputy Chief.

9-1.176 Requests for Authorization for Electronic Surveillance  
Applications

Requests to the Criminal Division for authorization to apply to a court for an electronic surveillance order pursuant to 18 U.S.C. Chapter 119, Title III of Pub. L. 90-351, June 19, 1968, in the course of an investigation assigned to the Strike Force, shall be made by the Chief of the Strike Force with the concurrence of the U.S. Attorney. If the U.S. Attorney concurs in the request initiated by the Chief of the Strike Force, the request shall be forwarded to the Criminal Division for a final decision as to whether the request should be submitted to the Assistant

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Attorney General for his/her approval. If the U.S. Attorney does not concur in the request of the Chief of the Strike Force, the Chief of the Strike Force shall be advised of the reasons for not concurring. The Chief of the Strike Force, upon receipt of the U.S. Attorney's reasons for not concurring, may elect either to accede to the views of the U.S. Attorney or to submit the question to the Chief, OCRS, Criminal Division, who shall review the matter and make a decision as to whether the request should be submitted to the Assistant Attorney General for his/her approval. Any difference between the Chief, OCRS, and the U.S. Attorney shall be submitted to the Assistant Attorney General for final resolution.

A Strike Force attorney whose request for an electronic surveillance application has been approved by the Assistant Attorney General shall be authorized to present the application to the appropriate court. The Strike Force attorneys shall advise the U.S. Attorney when the application will be presented to the court in order that the U.S. Attorney may be present if so desired.

9-1.177 Authorizations to Proceed With Prosecutions

Where the Chief of the Strike Force concludes that indictment is warranted on a matter assigned to the Strike Force, he/she shall set forth his/her recommendation in a prosecution memorandum to the U.S. Attorney. If the U.S. Attorney agrees with the recommendation, the matter shall be submitted to the Criminal Division for review prior to indictment. If the U.S. Attorney disagrees with the recommendation, the Chief of the Strike Force shall be advised of the reasons for disagreement. The Chief of the Strike Force, upon receipt of the U.S. Attorney's reasons for disagreement, may elect either to accede to the views of the U.S. Attorney or to submit the question to the Chief, OCRS, who shall review the matter and make a determination.

All indictments and informations shall be signed by the U.S. Attorney.

After indictment, any reduction of charges or other negotiated concessions to a defendant in an organized crime case must be approved by the Assistant Attorney General, Criminal Division.

If at any time during the pendency of a criminal matter it appears that an organized crime figure is involved as a subject or a potential subject, but the potential charge does not and will not require extensive investigation or utilization of significant resources and facilities of the Strike Force, the matter shall be promptly transferred to the U.S.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Attorney for processing by the U.S. Attorney, the U.S. Attorney to keep the Strike Force informed of the progress of the case or matter.

9-1.178 Litigation

The chain of command in all proceedings shall be from the Attorney General to the Associate Attorney General to the Assistant Attorney General, Criminal Division, to the U.S. Attorney, to the Chief of the Strike Force. The composition and duties of the litigation team shall be the responsibility of the U.S. Attorney.

The U.S. Attorney shall compile, supervise, and dispose of all court calendar listings of Strike Force cases, including hearings, arraignments, trials, sentences, arguments, convenings of the grand jury, and any other proceeding or hearing, directed by the court. The U.S. Attorney shall consult with the Chief of the Strike Force for the purpose of assigning appropriate priority in the scheduling of such Strike Force cases as are mutually agreed upon between them.

In all Strike Force cases, documents which are to be filed with a clerk of a court, with a court, or with a United States Magistrate or Commissioner--including subpoenas, briefs, motions, legal memoranda, points for charge, stipulations, and petitions -- shall be signed by both the U.S. Attorney and a Strike Force attorney in the following manner:

(Signature)  
\_\_\_\_\_  
(Typed Name)  
United States Attorney

(Signature)  
\_\_\_\_\_  
(Typed Name)  
Special Attorney

9-1.179 Files And Exhibits

The principal files and exhibits involving Strike Force matters shall be maintained by the Strike Force in its offices. The function of maintaining traditional status cards, mark-sense cards, and cards on organized crime cases, shall remain with the U.S. Attorney. The U.S. Attorney and the Chief of the Strike Force shall adopt appropriate administrative procedures to maintain records of organized crime matters

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

in keeping with normal Department of Justice practices applicable to matters other than organized crime matters.

9-1.180 Strike Forces (cont.)

9-1.181 Sentence Recommendations

If the Chief of a Strike Force believes that a recommendation should be made to a court in regard to a sentence for an organized crime offender, he/she shall submit his/her views in a memorandum to the U.S. Attorney. If the U.S. Attorney disagrees with those views, the Chief of the Strike Force shall be advised of the reasons for disagreement. The Chief of the Strike Force, upon receipt of the U.S. Attorney's reasons for disagreement, may elect either to accede to the views of the U.S. Attorney or to submit the question to the Chief, OCRS, who shall review the matter and make a determination. If the Chief, OCRS, disagrees with the determination of the U.S. Attorney, the matter shall be referred to the Assistant Attorney General, Criminal Division, for final determination.

9-1.182 Publicity Releases and Public Statements

Because the efforts against organized crime are national in scope and require national support, and because premature publicity releases or public statements can severely damage enforcement efforts, all publicity releases and public statements on the subject of organized crime by persons assigned to the Strike Force shall first be submitted for clearance to the Department's Office of Public Information and shall in all respects conform to the requirements of 28 C.F.R. §50.2. See USAM 9-2.211. In these matters, as in other matters involving public relations, the U.S. Attorney shall act as principal representative of the Department of Justice in the district, and publicity releases authorized by the Office of Public Information to be issued locally shall generally be issued in the name of the U.S. Attorney. The Office of Public Information has been directed to make special effort to give appropriate credit in approved releases to the individuals or agencies involved.

9-1.183 Supplementary Procedures

Supplementary procedures which are not inconsistent with those contained herein may be adopted in any district upon the mutual agreement of the Chief of the Strike Force and the U.S. Attorney.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.200 STATUTES ASSIGNED BY CITATION

The statutes currently administered by the Criminal Division have been assigned to the following Sections and Offices:

Asset Forfeiture Office	AFO
Fraud	Fraud
General Litigation and Legal Advice	GenL
Public Integrity	PInt
Internal Security	ISec
Organized Crime and Racketeering	OC&R
Organized Crime and Racketeering (Labor Unit)	OC&R(L)
Narcotic and Dangerous Drug	N&DD
Office of Enforcement Operations	OEO
Office of International Affairs	OIA
Office of Legislation	Leg

The Statutes are arranged by the United States Code titles. Listed under each title is: (1) the statutory designation in the left column, (2) the administering Section, as abbreviated above, with a telephone number in the center column, and (3) the investigating agency in the right column. Where no particular Section has primary responsibility for a statute, the designation "All" will appear. Whenever a single asterisk (\*) appears after the statutory designation, consultation with the Criminal Division is required in accordance with USAM 9-2.120, 9-2.133, and 9-2.134. Whenever a double asterisk (\*\*) appears after the statutory designation, special approval from the Criminal Division must be obtained in accordance with USAM 9-2.132, 9-2.135.

A. The Section to be contacted with respect to the violation of a particular statute will be that Section listed except in the following cases:

1. Whenever it is determined that known organized crime figures are involved in any case, supervision of such case is assigned to the Organized Crime and Racketeering Section regardless of the statute involved.

2. Whenever it is determined that a public official is involved in any case, involving misuse of office, supervision of such case is assigned to the Public Integrity Section regardless of the statute involved.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

3. Whenever any case involves a criminal activity affecting national defense or foreign relations, the Internal Security Section must be consulted regardless of the statute involved.

4. Whenever any case involves a statute in the jurisdiction of the Criminal Division that authorizes civil or criminal forfeiture, questions concerning forfeiture should be referred to the Asset Forfeiture Office (272-6420), while questions concerning the underlying substantive offense should be referred to the Section with responsibility for the criminal statute.

B. The Appellate Section should be contacted with respect to questions or problems concerning the Speedy Trial Act (633-2611).

C. The Office of Legislation should be contacted with respect to questions or problems concerning the following:

1. Bail (633-3949);
2. The grand jury (633-3119).

D. The Office of Enforcement Operations should be contacted with respect to questions or problems concerning the following:

1. Grand jury and special attorney authorizations (724-7184);
2. Pre-trial diversion (633-5541);
3. Witness immunity (633-5541);
4. Subpoenas issued to Department of Justice employees under 28 C.F.R. §16.21 (724-6672);
5. Closure of judicial proceedings under 28 C.F.R. §509;
6. Subpoenas issued to members of the news media under 28 C.F.R. §50.10 (724-6672);
7. Processing of tax disclosure requests under 26 U.S.C. §6103 (724-6672);
8. Authorization of electronic surveillance (633-3684);
9. Witness protection (633-3684);
10. Rule 6(e)(3)(C)(iv) disclosures (724-6672);

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

11. Right to Financial Privacy under 12 U.S.C. §3401-3422 (724-6672);

12. Searches for documentary evidence held by disinterested third parties, e.g., lawyers, doctors, clergymen, under 28 C.F.R. part 59 (724-6672); and

13. Electronic surveillance checks under 18 U.S.C. §3504 (724-6672).

E. The Office of International Affairs (724-7600) must be contacted:

1. Before contacting any foreign or State Department official in matters relating to criminal investigations or prosecutions;

a. Except when notifying a foreign consul of the arrest of a national of the consul's country;

2. Before any proposed contact with persons, other than United States investigative agents, in a foreign country;

3. Before attempting to do any act in Switzerland or other continental European countries relating to a criminal investigation or prosecution, including contacting a witness by telephone or mail;

4. Before issuing any subpoena to obtain records located in a foreign country, and before seeking the enforcement of any such subpoena; and

5. Before serving a subpoena on an officer of, or attorney for, a foreign bank or corporation, who is temporarily in, or passing through the United States, when the testimony sought relates to the officers or attorney's duties in connection with the operation of the bank or corporation.

9-1.210 1-9 U.S.C.

9-1.211 1 U.S.C.: General Provisions

9-1.212 2 U.S.C.: The Congress

§167a-g

GenL

724-7144

F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.212 2 U.S.C.: The Congress (cont.)

§192	GenL*	724-7144	F.B.I.
§§193-194	All		None
§261 <u>et seq.</u>	ISec*	724-6913	F.B.I.
§§381-396	PInt	724-6963	F.B.I.
§§431-455	PInt*	724-7062	F.B.I.
<u>Except</u> §441e	ISec*	724-6913	F.B.I.
	(Only in cases involving foreign agents or those who should be registered as foreign agents)		

9-1.213 3 U.S.C.: The President

9-1.214 4 U.S.C.: Flag and Seal

§3	GenL	724-7144	F.B.I.
----	------	----------	--------

9-1.215 5 U.S.C.: Executive Departments

§552	All		
§552(a)(1)	PInt	724-6963	F.B.I.
§3333	GenL**	724-7144	F.B.I.
§7311	GenL**	724-7144	F.B.I.
§8193(d)	GenL	724-7144	Labor

9-1.216 6 U.S.C.: Official and Penal Bonds

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.217 7 U.S.C.: Agriculture

§2	Fraud	724-7034	Agriculture (Off. of Investigations)
§6	Fraud	724-7034	Agriculture (Off. of Investigations)
§§13-13C(a)	Fraud	724-7034	Agriculture (Off. of Investigations)
§§51-65	GenL	724-6893	Agriculture (Off. of Investigations)
§§71-85	GenL	724-6893	Agriculture (Off. of Investigations)
§86	GenL	724-7144	F.B.I.
§87b(a)(1)- (5), (10), (11)	GenL	724-6893	Agriculture (Off. of Investigations)
§87b(a)(8)	GenL	724-6893	Agriculture (Off. of Investigations)
§87c	GenL	724-6893	Agriculture (Off. of Investigations)
§87f(e)	GenL	724-6893	Agriculture (Off. of Investigations)
§87f(g)	PInt	724-6963	F.B.I.
§§95-96	GenL	724-6893	Agriculture (Off. of Investigations)
§149	GenL	724-6893	Agriculture (Off. of Investigations)
§§150bb, ee, gg	GenL	724-6893	Agriculture (Off. of Investigations)
§154	GenL	724-6893	Agriculture (Off. of Investigations)

JULY 31, 1986  
Sec. 9-1.217  
Ch. 1, p. 59

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.217 7 U.S.C.: Agriculture (cont.)

§§156-163	GenL	724-6893	Agriculture (Off. of Investigations)
§164a	GenL	724-6893	Agriculture (Off. of Investigations)
§166	GenL	724-6893	Agriculture (Off. of Investigations)
§167	GenL	724-6893	Agriculture (Off. of Investigations)
§§181-231	GenL	724-6893	Agriculture (Off. of Investigations)
§250	GenL	724-6893	Agriculture (Off. of Investigations)
§270	GenL	724-6893	Agriculture (Off. of Investigations)
§§281-282	GenL	724-6893	Agriculture (Off. of Investigations)
§472	PInt	724-6963	F.B.I.
§473	GenL	724-6893	Agriculture (Off. of Investigations)
§473-1 to c-2	GenL	724-6893	Agriculture (Off. of Investigations)
§491	GenL	724-6893	Agriculture (Off. of Investigations)
§499a-r	GenL	724-6893	Agriculture (Off. of Investigations)
§503	GenL	724-6893	Agriculture (Off. of Investigations)
§5111, k	GenL	724-6893	Agriculture (Off. of Investigations)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.217 7 U.S.C.: Agriculture (cont.)

§§516-517	GenL	724-6893	Agriculture (Off. of Investigations)
§581	GenL	724-6893	Agriculture (Off. of Investigations)
§586	GenL	724-6893	Agriculture (Off. of Investigations)
§591	GenL	724-6893	Agriculture (Off. of Investigations)
§596	GenL	724-6893	Agriculture (Off. of Investigations)
§§607-608a	GenL	724-6893	Agriculture (Off. of Investigations)
§608c(14)	GenL	724-6893	Agriculture (Off. of Investigations)
§§608d-624	GenL	724-6893	Agriculture (Off. of Investigations)
§855	GenL	724-6893	Agriculture (Off. of Investigations)
§§952-953	GenL	724-6893	Agriculture (Off. of Investigations)
§§1010-1011	GenL	724-6893	Agriculture (Off. of Investigations)
§§1153-1157	GenL	724-6893	Agriculture (Off. of Investigations)
§1373	Fraud	724-7029	Agriculture (Off. of Investigations)
§13791(b), (d)	Fraud	724-7029	Agriculture (Off. of Investigations)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.217 7 U.S.C.: Agriculture (cont.)

§1380o	Fraud	724-7029	Agriculture (Off. of Investigations)
§1427 note	Fraud	724-7034	Agriculture (Off. of Investigations)
§1433	Fraud	724-7029	Agriculture (Off. of Investigations)
§§1551-1611	GenL	724-6893	Agriculture (Off. of Investigations)
§1622(h)	GenL	724-6893	Agriculture (Off. of Investigations)
§1642(c)	GenL	724-6893	Agriculture (Off. of Investigations)
§1986	PInt	724-6963	F.B.I.
§2023(a)-(c)	Fraud	724-7029	Agriculture (Off. of Investigations)
§2023(d)	GenL	724-6893	Treasury (Secret Service)
§2024(b)-(c)	Fraud	724-7038	Agriculture (Off. of Investigations)
§2024(d)	GenL	724-7144	Treasury (Secret Service)
§2024(g)	AFO*	272-6420	Agriculture (Off. of Investigations)
§§2041-2055	GenL	724-6893	Agriculture (Off. of Investigations)
§§2114-2115	GenL	724-6893	Agriculture (Off. of Investigations)
§§2131-2147	GenL	724-6893	Agriculture (Off. of Investigations)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.217 7 U.S.C.: Agriculture (cont.)

§2149	GenL	724-6893	Agriculture (Off. of Investigations)
§§2151-2156	GenL	724-6893	Agriculture (Off. of Investigations)
§2270	GenL	724-6893	Agriculture (Off. of Investigations)
§2274	GenL	724-7144	None
§2619(c)	PInt	724-6963	F.B.I.
§2621(b)	GenL	724-6893	Agriculture (Off. of Investigations)
§2623	PInt	724-6963	F.B.I.
§2706	PInt	724-6963	F.B.I.
§2807	GenL	724-6893	Agriculture (Off. of Investigations)
§3806	GenL	724-6893	Agriculture (Animal and Plant Health Inspection Service)

9-1.218 8 U.S.C.: Aliens and Nationality

§1101-1503	GenL	724-6891	I.N.S.
<u>Except</u> §1185(b)	ISec**	724-6913	I.N.S.
§1324(b)(1)	AFO*	272-6430	I.N.S.
§1357(b)	GenL	724-7144	I.N.S.

9-1.219 9 U.S.C.: Arbitration

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.220 10-18 U.S.C.

9-1.221 10 U.S.C.: Armed Forces

§§331-336	GenL	724-7144	None
§§371-378	NDD	724-7045	Defense
§808	GenL	724-7144	None
§847	GenL	724-7144	F.B.I.
§975	GenL	724-7144	Defense
§2397(f)	PInt	724-7137	F.B.I.
§7678	GenL	724-7144	F.B.I.

9-1.222 11 U.S.C.: Bankruptcy

9-1.223 12 U.S.C.: Banks and Banking

§25a	OC&R	633-3758	F.B.I.
§92a(h)	Fraud	724-7127	F.B.I.
§§95-95b	GenL	724-7144	Treasury
§209	All		
§211	All		
§324	All		
§339	OC&R	633-3758	F.B.I.
§374a	Fraud	724-7127	F.B.I.
§378	GenL	724-7144	F.B.I.
§582	GenL	724-7144	F.B.I.
§617	GenL	724-7144	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.223 12 U.S.C.: Banks and Banking (cont.)

§630	Fraud	724-7032	F.B.I.
§631	GenL	724-7144	F.B.I.
§1141j(b)-(d)	Fraud	724-7127	F.B.I.
§1457(a)	GenL	724-7144	F.B.I.
§1464d(12)	Fraud	724-7127	F.B.I.
§1709-2	Fraud	724-7029	F.B.I.
§1715z-4	Fraud	724-7127	F.B.I.
§1723a(e)	GenL	724-7144	F.B.I.
§1725(g)	GenL	724-7144	F.B.I.
§1730(p)	Fraud	724-7127	F.B.I.
§1730a(d), (i)-(j)	Fraud	724-7127	F.B.I.
§1730c	OC&R	633-3758	F.B.I.
§1738(a)	Fraud	724-7127	F.B.I.
§1750b(a)	Fraud	724-7127	F.B.I.
§1786(k)	Fraud	724-7127	F.B.I.
§1818(j)	Fraud	724-7127	F.B.I.
§1829a	OC&R	633-3758	F.B.I.
§1829b	Fraud	724-7127	None
§1832	Fraud	724-7127	F.B.I.
§1847	Fraud	724-7127	F.B.I.
§§1881-1884	GenL	724-7144	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.223 12 U.S.C.: Banks and Banking (cont.)

§1909	Fraud	724-7127	F.B.I.
§§1956-1957	Fraud	724-7127	F.B.I.
§2607	Fraud	724-7127	F.B.I.
§§3401-3422(d)	OEO	724-6672	Agency Involved

9-1.224 13 U.S.C.: Census

§§211-214	PInt	724-6963	F.B.I.
§§211-225	GenL	724-7144	F.B.I.
§§304-305	GenL	724-6893	F.B.I.

9-1.225 14 U.S.C.: Coast Guard

§§83-85	GenL	724-6893	Transportation (Coast Guard)
§431(c)	Fraud	724-7029	F.B.I.
§638(b)	GenL	724-7144	Transportation (Coast Guard)
§639	GenL	724-7144	Transportation (Coast Guard)
§892	GenL	724-7144	Transportation (Coast Guard)

9-1.226 15 U.S.C.: Commerce and Trade

§50 (last #)	PInt	724-6963	F.B.I.
§§77a <u>et seq.</u>	Fraud	724-7034	S.E.C.
§§78a <u>et seq.</u>	Fraud	724-7034	S.E.C.
§78m(b)	Fraud**	724-7032	S.E.C.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.226 15 U.S.C.: Commerce and Trade (cont.)

§78dd-1 to -2	Fraud**	724-7032	S.E.C.
§§78aaa <u>et seq.</u>	Fraud	724-7034	S.E.C.
§§79 <u>et seq.</u>	Fraud	724-7034	S.E.C.
§80a-1	Fraud	724-7034	S.E.C.
§80b-1	Fraud	724-7034	S.E.C.
§158	GenL	724-6893	Commerce (China Trade Act Registrar)
§§231-235	GenL	724-6893	Commerce (National Bureau of Standards)
§241	GenL	724-6893	Commerce (National Bureau of Standards)
§§291-300	GenL	724-6971	F.B.I.; U.S.P.S. (Postal Inspection Service); Treasury (Customs)
§330d	GenL	724-6893	Commerce (National Oceanic and Atmospheric Administration)
§§375-378	GenL	724-6893	F.B.I.
§645(a)-(c)	Fraud	724-7029	F.B.I.
§714m(a)-(f)	Fraud	724-7034	Agriculture (Off. of Investigations)
§§715a-m	GenL	724-6893	Interior
§§717-717w	GenL	724-6893	Fed. Power Comm.
§1004	Fraud	724-7029	F.B.I.
§1007	Fraud	724-7029	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.226 15 U.S.C.: Commerce and Trade (cont.)

§§1171-1178	OC&R	633-3758	F.B.I.
<u>Except</u> §1173	OEO (Registration only)	724-6657	None
§1177	AFO*	272-6420	F.B.I.
§§1242-1244	GenL	724-6971	F.B.I.
§§1281-1282	GenL OC&R (L) (If labor dispute)	724-6971 633-3666	F.B.I. F.B.I.
§1644	Fraud	724-7127	U.S.P.S. (Postal Inspection Service)
§1681b(1)	Leg (Only re: treatment of grand jury subpoenas)	633-3949	None
§1693(n)	GenL	724-6893	F.B.I.
§1717	Fraud	724-7029	HUD (Office of Interstate Land Sales)
§§1823-1825	GenL	724-6893	Agriculture (Off. of Investigations)
§2615	GenL	724-6893	E.P.A.--F.B.I. if major investigation is required
§3414(c)	GenL	724-6893	Federal Regulatory Commission

9-1.227 16 U.S.C.: Conservation

§3	GenL	724-7144	Interior--F.B.I. if major investigation is required
§§9a-10	GenL	724-7144	Interior--F.B.I. if major investigation is required

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.227 16 U.S.C.: Conservation (cont.)

§26	GenL 724-7144 (Hunting and fishing violations) (Injury 724-7144 to property)	Interior  Interior--F.B.I. if major investigation is required
§45(e)	GenL 724-7144 (Hunting and fishing violations) (Injury 724-7144 to property)	Interior  Interior--F.B.I. if major investigation is required
§60	GenL 724-7144	Interior
§63	GenL 724-7144 (Hunting and fishing violations) (Injury 724-7144 to property)	Interior  Interior--F.B.I. if major investigation is required
§65	GenL 724-7144	Interior
§92	GenL 724-7144 (Hunting and fishing violations) (Injury 724-7144 to property)	Interior  Interior--F.B.I. if major investigation is required
§98	GenL 724-7144 (Hunting and fishing violations) (Injury 724-7144 to property)	Interior  Interior--F.B.I. if major investigation is required
§99	GenL 724-7144	Interior
§114	GenL 724-7144	Interior--F.B.I. if major investigation is required
§117	GenL 724-7144 (Hunting and fishing violations) (Injury 724-7144 to property)	Interior  Interior--F.B.I. if major investigation is required

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.227 16 U.S.C.: Conservation (cont.)

§117d	GenL	724-7144	Interior
§123	GenL	724-7144	Interior--F.B.I. if major investigation is required
§127	GenL	724-7144	Interior
	(Hunting and fishing violations)		
	(Injury to property)	724-7144	Interior--F.B.I. if major investigation is required
§128	GenL	724-7144	Interior
§146	GenL	724-7144	Interior--F.B.I. if major investigation is required
§152	GenL	724-7144	Interior--F.B.I. if major investigation is required
§170	GenL	724-7144	Interior
	(Hunting and fishing violations)		
	(Injury to property)	724-7144	Interior--F.B.I. if major investigation is required
§171	GenL	724-7144	Interior
§198	GenL	724-7144	Interior
	(Hunting and fishing violations)		
	(Injury to property)	724-7144	Interior--F.B.I. if major investigation is required
§198d	GenL	724-7144	Interior
§240c	GenL	724-7144	Interior
	(Hunting and fishing violations)		
	(Injury to property)	724-7144	Interior--F.B.I. if major investigation is required
§240d	GenL	724-7144	Interior

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.227 16 U.S.C.: Conservation (cont.)

§256b	GenL (Hunting and fishing violations) (Injury to property)	724-7144	Interior  Interior--F.B.I. if major investigation is required
§256c	GenL	724-7144	Interior
§351	GenL (Hunting and fishing violations) (Injury to property)	724-7144	Interior  Interior-F.B.I. if major investigation is required
§§352-353	GenL	724-7144	Interior
§354	GenL (Hunting and fishing violations) (Injury to property)	724-7144	Interior  Interior--F.B.I. if major investigation is required
§364	GenL	724-7144	Interior--F.B.I. if major investigation is required
§371	GenL	724-7144	Interior--F.B.I. if major investigation is required
§373	GenL	724-7144	Interior--F.B.I. if major investigation is required
§374	GenL	724-7144	Interior--F.B.I. if major investigation is required
§395c	GenL (Hunting and fishing violations) (Injury to property)	724-7144	Interior  Interior--F.B.I. if major investigation is required
§395d	GenL	724-7144	Interior

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.227 16 U.S.C.: Conservation (cont.)

§403c-3	GenL (Hunting and fishing violations) (Injury to property)	724-7144 724-7144	Interior  Interior--F.B.I. if major investigation is required
§403c-4	GenL	724-7144	Interior
§403h-3	GenL (Hunting and fishing violations) (Injury to property)	724-7144 724-7144	Interior  Interior-F.B.I. if major investigation is required
§403h-4	GenL	724-7144	Interior
§404c-3	GenL (Hunting and fishing violations) (Injury to property)	724-7144 724-7144	Interior  Interior--F.B.I. if major investigation is required
§404c-4	GenL	724-7144	Interior
§408k	GenL (Hunting and fishing violations) (Injury to property)	724-7144 724-7144	Interior  Interior--F.B.I. if major investigation is required
§4081	GenL	724-7144	Interior
§413	GenL	724-7144	Interior--F.B.I. if major investigation is required
§414	GenL	724-7144	Defense (Superintendent of Military Park)
§422d	GenL	724-7144	Interior--F.B.I. if major investigation is required
§423f	GenL	724-7144	Interior-F.B.I. if major investigation is required

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.227 16 U.S.C.: Conservation (cont.)

§423g	GenL	724-7144	Interior--F.B.I. if major investigation is required
§425g	GenL	724-7144	Interior--F.B.I. if major investigation is required
§4261	GenL	724-7144	Interior--F.B.I. if major investigation is required
§4281	GenL	724-7144	Interior--F.B.I. if major investigation is required
§§403h-1, q	GenL	724-7144	Interior--F.B.I. if major investigation is required
§403v	GenL	724-7144	Interior--F.B.I. if major investigation is required
§433	GenL	724-7144	Interior--F.B.I. if major investigation is required
§460d	GenL	724-7144	Interior--F.B.I. if major investigation is required
§460k-3	GenL	724-7144	Interior
§§4601-6a	GenL	724-7144	Interior
§460n-5	GenL	724-7144	Interior
	(Hunting and fishing violations)		
	(Injury to property)	724-7144	Interior--F.B.I. if major investigation is required
§462(k)	GenL	724-7144	Interior--F.B.I. if major investigation is required
§470ee	GenL	724-7144	Interior--F.B.I. if major investigation is required
§470gg	AFO*	272-6420	Treasury--Customs

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.227 16 U.S.C.: Conservation (cont.)

§551	GenL	724-7144	Interior--F.B.I. if major investigation is required
§552a-d	GenL	724-7144	Interior--F.B.I. if major investigation is required
§559	GenL	724-7144	Interior--F.B.I. if major investigation is required
§§604-606	GenL	724-7144	Interior-F.B.I. if major investigation is required
§668dd(c), (e)-(f)	GenL	724-7144	Interior
§670j	GenL	724-7144	Agriculture (Off. of Investigations); Interior
§676	GenL	724-7144	Interior
§683	GenL	724-7144	Interior
§685	GenL	724-7144	Interior
§689b	GenL	724-7144	Interior
§690d-g	GenL	724-7144	Interior
	(Hunting and fishing violations)		
	(Injury to property)	724-7144	Interior--F.B.I. if major investigation is required
§692a	GenL	724-7144	Interior
§693a	GenL	724-7144	Interior
§694a	GenL	724-7144	Interior
§718e-g	GenL	724-7144	Interior
	(Misuse of stamps)		
	(Alteration or counterfeiting of stamps)	724-7144	Interior--F.B.I. if major investigation is required

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.227 16 U.S.C.: Conservation (cont.)

§§726-727	GenL (Hunting and fishing violations) (Injury to property	724-7144 724-7144	Interior  Interior--F.B.I. if major investigation is required
§730	GenL (Hunting and fishing violations) (Injury to property)	724-7144 724-7144	Interior  Interior--F.B.I. if major investigation is required
§§791-825(e)	GenL	724-7144	Transportation (Coast Guard)
§825(f)	GenL	724-7144	Interior--F.B.I. if major investigation is required
§825o	GenL	724-6893	Fed. Power Comm.; Defense
§831t	GenL (Larceny and embezzlement) Fraud (Other offenses)	724-7144 724-7029	F.B.I.  F.B.I.
§957	GenL	724-7144	Commerce; Interior; Transportation (Coast Guard)
§959	GenL	724-7144	Commerce; Interior; Transportation (Coast Guard)
§§988-990	GenL	724-7144	Commerce; Interior; Transportation (Coast Guard)
§§1029-1030	GenL	724-7144	Commerce; Interior; Transportation (Coast Guard)
§1167	GenL	724-7144	Interior
§§1181-1182	GenL	724-7144	Interior

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.227 16 U.S.C.: Conservation (cont.)

§1184	GenL	724-7144	Interior
§1246(i)	GenL	724-7144	Agriculture (Off. of Investigations); Interior
§1372	GenL	724-7144	Interior
§1540	GenL	724-7144	Commerce (National Oceanic and Atmospheric Admin.); Interior; Transportation (Coast Guard); Treasury (Customs)
§§2438-2439	GenL	724-6893	Transportation (Coast Guard)
§§3372-3373	GenL	724-7144	Interior

9-1.228 17 U.S.C.: Copyrights

§116(d)	GenL	724-6971	F.B.I.
§§506(a)-507	GenL	724-6971	F.B.I.
<u>Except</u> §506(b)	AFO*	272-6420	F.B.I.
§509	AFO*	272-6420	F.B.I.
§603	GenL	724-6971	F.B.I.
§603(c)	AFO*	272-6420	Treasury (Customs)

9-1.229 18 U.S.C.: Crimes and Criminal Procedure

§§1-6	All		
§7	GenL	724-6971	F.B.I.
§8	GenL	724-7144	Treasury (Secret Service)
§9	GenL	724-6971	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§10	All		None
§11	GenL	724-7144	F.B.I.
§12	GenL	724-7144	U.S.P.S.
§13	GenL	724-6971	F.B.I.
§14	All		None
§15	GenL	724-7144	Treasury (Secret Service)
§20	GenL	724-6899	None
§§31-34	GenL	724-6971	F.B.I.
<u>Except</u> §32(b)	GenL*	724-6971	F.B.I.
§33	OC & R(L) (Labor dispute)	633-3666	F.B.I.
§35(a)-(b)	GenL	724-6971	F.B.I.
§45	ISec**	724-6913	F.B.I.
§46	GenL	724-6893	Interior; Agriculture (Off. of Investigations)
§81	GenL	724-6971	F.B.I.
§§111-112	GenL	724-7144	F.B.I.
§§113-114	GenL	724-6971	F.B.I.
§115	GenL	724-7144	F.B.I.
§§152-155	Fraud	724-7127	F.B.I.
§§201-213	PInt*	724-6963	F.B.I.
<u>Except</u> §201(d)-(e), (h)-(i)	GenL	724-7144	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§§214-216	Fraud	724-7127	F.B.I.
§217	PInt	724-6963	F.B.I.
§219	ISec**	724-6913	F.B.I.
§224	OC&R	633-3758	F.B.I.
§§231-233	GenL*	724-6971	F.B.I.
§§241-242	PInt* (Only federal election issue, and then only if no racial or religious issue involved; all other issues assigned to Civil Rights Division)	724-7062	F.B.I.
§245(b)(1)	GenL** (Only if no racial or religious issue)	724-6971	F.B.I.
§245(b)(1)(A)	PInt** (attempts by force or threat to interfere with the electoral process) GenL** (all other attempts or threats directed at public officials at any level or candidates for public office)	724-7112  724-6971	Federal Election Commission  F.B.I.; Treasury (Secret Service)
§245(b)(3)	GenL**	724-6971	F.B.I.
§246	PInt*	724-6963	F.B.I.
§281	PInt	724-6963	F.B.I.
§283	PInt	724-6963	F.B.I.
§285	GenL	724-7144	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§§286-287	Fraud	724-7029	F.B.I.
§288	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§§289-290	Fraud	724-7029	F.B.I.
§291	PInt	724-6963	F.B.I.
§292	Fraud	724-7029	F.B.I.
§331	GenL	724-7144	Treasury (Secret Service)
§332	PInt	724-6963	F.B.I.
§333	GenL	724-7144	Treasury (Secret Service)
§334	PInt	724-6963	F.B.I.
§§335-337	GenL	724-7144	Federal Reserve
§351	GenL	724-7144	F.B.I.
§371	All		
§372	GenL	724-7144	F.B.I.
§§401-402	All		None
§§431-433	PInt	724-6963	F.B.I.
§§435-437	PInt	724-6963	F.B.I.
§§438-439	GenL	724-7144	F.B.I.
§§440-442	PInt	724-6963	F.B.I.
§443	Fraud	724-7029	F.B.I.
§§471-491	GenL	724-7144	Treasury (Secret Service)
§492	AFO* (Forfeiture only)	272-6420	Treasury (Secret Service)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§§492-495	GenL	724-7144	Treasury (Secret Service)
§496	GenL	724-7144	Treasury (Customs)
§§497-499	GenL	724-7144	Agency involved; F.B.I. or Secret Service if major investigation involved
§500	GenL	724-7144	U.S.P.S.
§§501-502	GenL	724-7144	Treasury (Secret Service)
§503	GenL	724-7144	U.S.P.S.
§504	GenL	724-7144	Treasury (Secret Service)
§505	GenL	724-7144	F.B.I.
§506	GenL	724-7144	F.B.I.
§507	GenL	724-7144	F.B.I.
§§508-509	GenL	724-7144	F.B.I.
§510	GenL	724-7144	Treasury (Secret Service)
§511	GenL	724-7526	F.B.I.
§§541-548	GenL	724-7144	Treasury (Customs)
<u>Except</u> §§544, 545, 548	AFO*	272-6420	Treasury (Customs) (Forfeiture only)
§549	GenL	724-7144	F.B.I.
§§550-552	GenL	724-7144	Treasury (Customs)
<u>Except</u> §550	AFO*	272-6420	Treasury (Customs) (Forfeiture only)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§553	GenL	724-7526	Treasury (Customs)
§§591-617	PInt*	724-7062	F.B.I.
§§641-642	GenL	724-7144	F.B.I.
§§643-655	PInt	724-6963	F.B.I.
§§656-658	Fraud	724-7127	F.B.I.
§§659-660	GenL	724-7526	F.B.I.
§§661-662	GenL	724-6971	F.B.I.
§663	GenL	724-6971	F.B.I.
§664	OC&R(L)	633-3666	F.B.I.
§665(a)-(b)	Fraud	724-7029	F.B.I.
§665(c)	GenL	724-7144	F.B.I.
§666(a)-(b)	Fraud	724-7029	F.B.I.
§666(c)	PInt*	724-6896	F.B.I.
§667	GenL	724-7526	F.B.I.
§§700-712	GenL	724-7144	F.B.I.
§713(a)	PInt	724-6896	F.B.I.
	(Matters involving fundraising and/or public officials)		
	GenL	724-7144	F.B.I.
	(All others)		
§713(b)	GenL	724-7144	F.B.I.
§§714-715	GenL	724-7144	F.B.I.
§§751-755	GenL	724-7144	F.B.I.
§§756-757	ISec**	724-6913	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§792	ISec	724-6913	F.B.I.
§§793-799	ISec**	724-6913	F.B.I.
§831	GenL	724-7144	F.B.I.
§836	GenL	724-6893	Transportation (Federal Highway Administration)
§§841-843	GenL	724-6971	Treasury (AT&F)
§844(a)-(b), (d)-(h), (j)	GenL	724-6971	Treasury (AT&F); F.B.I.; U.S.P.S. (Postal Inspection Service)
§844(c)	AFO*	272-6420	Treasury (AT&F); F.B.I.; U.S.P.S. (Postal Inspection Service)
§844(i)	OC&R(L) (if labor dispute)	633-3666	Treasury (AT&F)
§§845-848	GenL	724-6971	Treasury (AT&F)
§§853-854	AFO	272-6423	Related agency; D.E.A.
§871	GenL	724-7144	Treasury (Secret Service)
§872	PInt	724-6963	F.B.I.
§873	GenL	724-6971	F.B.I.
§874	Fraud	724-7029	G.S.A.; F.B.I.
§875	GenL	724-6971	F.B.I.
§876(a)-(c)	GenL	724-6971	F.B.I.
§876(d)	GenL	724-6971	F.B.I.; U.S.P.S. (Postal Inspection Service)
§877(a)-(c)	GenL	724-6971	F.B.I.
§877(d)	GenL	724-6971	F.B.I.; U.S.P.S.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§879	GenL	724-7144	F.B.I.
§§891-894	OC&R	633-3758	Secret Service
§911	GenL	724-6891	I.N.S.
	PInt	724-7122	I.N.S.
	(Election Matters)		
§§912-917	GenL	724-7144	F.B.I.
§§921-928	GenL	724-6971	Treasury (AT&F)
<u>Except</u>			
§924(d)	AFO*	272-6420	Treasury (AT&F)
	(Forfeiture only)		
§929	GenL	724-6971	F.B.I.
§§951-969	I Sec**	724-6913	F.B.I.
	GenL	724-7144	Treasury (AT&F)
<u>Except</u>			
§§962-969	AFO*	272-6423	F.B.I.
	(Forfeiture only)		
§970	GenL	724-6971	F.B.I.
§§1001-1014	Fraud	724-7029	F.B.I.
§1015	GenL	724-7144	I.N.S.
§1016	Fraud	724-7029	F.B.I.
§1017	GenL	724-7144	F.B.I.
§§1018-1026	Fraud	724-7029	F.B.I.
§1027	OC&R(L)	633-3666	F.B.I.
§1028	GenL	724-6971	F.B.I.
§1029	Fraud	724-7038	Secret Service

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§1030(a)(1)	I Sec**	724-6913	F.B.I.; Secret Service
§1030(a)(2)-(c)	Fraud	724-7038	Secret Service
§§1071-1072	GenL*	724-7144	F.B.I.
§§1073-1074	GenL	724-7144	F.B.I.
§§1081-1083	OC&R	633-3758	Treasury (Customs)
<u>Except</u> §1082(c)	AFO*	272-6420 (Forfeiture only)	Treasury (Customs)
§1084	OC&R	633-3758	F.B.I.
§§1111-1113	GenL	724-6971	F.B.I.
§1114	GenL	724-7144	F.B.I.
§1115	GenL	724-6893	F.B.I.
§§1116-1117	GenL	724-6893	F.B.I.
§§1151-1153	GenL	724-6971	F.B.I.
§§1154-1156	OC&R	633-3758	Interior
§1158	GenL	724-7144	F.B.I.
§§1159-1160	GenL	724-6971	F.B.I.
§1161	GenL	724-6971	No Offense
§§1162-1165	GenL	724-6971	F.B.I.; Interior (BIA)
<u>Except</u> §1165	AFO*	272-6420 (Forfeiture only)	F.B.I.; Interior (BIA)
§1201(a)(1)			
-(a)(4)	GenL	724-6971	F.B.I.
§1201(b)-(c)	GenL	724-6971	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§1202	GenL	724-6971	F.B.I.
§1203	GenL	724-7526	F.B.I.
§1231	OC&R(L)	633-3666	F.B.I.
§§1262-1265	OC&R	633-3758	Treasury (AT&F)
§1301	OC&R	633-3758	Treasury (Customs)
§§1302-1303	OC&R	633-3758	U.S.P.S. (Postal Inspection Service)
§1304	OC&R	633-3758	F.B.I.
§1305	OC&R	633-3758	Treasury (Customs)
§1306	OC&R	633-3758	F.B.I.
§1307	OC&R	633-3758	No Offense
§§1341-1343	Fraud PInt* (Election law fraud)	724-7127 724-6963	U.S.P.S. (Postal Inspection Service)
§§1344-1345	Fraud	724-7038	F.B.I.
§§1361-1363	GenL	724-7144	F.B.I.
§§1364-1365	GenL	724-6893	F.B.I.
§§1381-1383	GenL	724-7144	F.B.I.
§§1384-1385	GenL	724-6971	F.B.I.
§§1421-1429	GenL	724-7144	I.N.S.
§§1461-1465	GenL*	724-6971	U.S.P.S. (Postal Inspection Service); F.B.I.
<u>Except</u> §1465	AFO*	272-6420 (Forfeiture only)	U.S.P.S. (Postal Inspection Service); F.B.I.

JULY 31, 1986  
Sec. 9-1.229  
Ch. 1, p. 85

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§1483	GenL	724-6893	Transportation (Coast Guard)
§1501	GenL	724-7144	F.B.I.
§1502	GenL	724-7144	None
§§1503-1510	GenL	724-7144	F.B.I.
§1511	OC&R	633-3758	F.B.I.
§§1512-1515	GenL	724-7144	F.B.I.
§§1541-1546	GenL	724-6891	F.B.I.
§§1621-1623	GenL	724-7144	F.B.I.
§§1651-1661	GenL	724-6971	F.B.I.
§§1691-1699	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§1700	PInt	724-6963	None
§§1701-1702	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§1703	PInt	724-6963	None
§§1704-1708	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§§1709-1713	PInt	724-6963	F.B.I.
§§1714-1715	GenL	724-6971	U.S.P.S. (Postal Inspection Service)
§1716	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§1717	ISec**	724-6913	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§1718	GenL	724-6971	U.S.P.S. (Postal Inspection Service)
§§1719-1720	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§1721	PInt	724-6963	F.B.I.
§§1722-1725	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§1726	PInt	724-6963	F.B.I.
§§1728-1731	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§1732	PInt	724-6963	F.B.I.
§§1733-1734	GenL	724-7144	U.S.P.S. (Postal Inspection Service)
§§1735-1737	GenL	724-6971	U.S.P.S. (Postal Inspection Service)
§1738	GenL	724-6971	F.B.I.
§§1751-1752	GenL	724-7144	F.B.I.
§§1761-1762	GenL	724-6971	F.B.I.
<u>Except</u> §1762(b)	AFO*	272-6420 (Forfeiture only)	F.B.I.
§§1791-1792	GenL	724-7144	F.B.I.
§1821	GenL	724-6971	F.B.I.
§§1851-1863	GenL	724-7144	F.B.I.
§§1901-1902	PInt	724-6963	F.B.I.

JULY 31, 1986  
Sec. 9-1.229  
Ch. 1, p. 87

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§1903	Fraud	724-7034	F.B.I.
§1904	PInt	724-6963	F.B.I.
§1905	PInt*	724-6963	F.B.I.
§§1906-1910	PInt	724-6963	F.B.I.
§1911	GenL	724-7144	F.B.I.
§§1912-1913	PInt	724-6963	F.B.I.
§§1915-1917	PInt	724-6963	F.B.I.
§1918(1)-(2)	ISec**	724-6913	F.B.I.
§1918(3)-(4)	GenL	724-7144	F.B.I.
§§1919-1923	Fraud	724-7029	F.B.I.
§1951	PInt*	724-6963	F.B.I.
	(Extortion under color of official right)		
	GenL*	724-6971	F.B.I.
	(Kidnapping; extortion directed at airlines; labor disputes; extortion of banks; robbery**)		
	OC&R(L)*	633-3666	F.B.I.
§§1952-1953	OC&R	633-3758	F.B.I.
<u>Except</u> §1952(b)(2)	PInt	724-6963	F.B.I.
	(Bribery involving public servants)		
§1952A-B	OC&R**	633-3594	F.B.I.
§1954	OC&R(L)	633-3666	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§1955	OC&R	633-3758	F.B.I.
<u>Except</u> §1955(d)	AFO* (Forfeiture only)	272-6420	F.B.I.
§§1961-1968	OC&R	633-1214	F.B.I.
<u>Except</u> §1963	AFO* (Forfeiture only)	272-6423	F.B.I.
§§1991-1992	GenL	724-6971	F.B.I.
§§2031-2032	GenL	724-6971	F.B.I.
§2071(a)	GenL	724-7144	F.B.I.
§§2071(b)-2073	PInt	724-6963	F.B.I.
§2074	Fraud	724-7029	F.B.I.
§§2075-2076	PInt	724-6963	F.B.I.
§§2101-2102	GenL*	724-6971	F.B.I.
§2111	GenL	724-6971	F.B.I.
§2112	GenL	724-7144	F.B.I.
§2113	GenL	724-6971	F.B.I.
§§2114-2116	GenL	724-7144	F.B.I.
§2117	GenL	724-6971	F.B.I.
§2118	N&DD	724-7045	F.B.I.
§§2151-2157	ISec**	724-6913	F.B.I.
§§2197-2198	GenL	724-7144	F.B.I.
§2199	GenL	724-6971	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§§2231-2232	GenL	724-7144	F.B.I.
§§2251-2255	GenL*	724-6971	F.B.I.; U.S.P.S. (Postal Inspection Service); Treasury (Customs)
§§2271-2279	GenL	724-6971	F.B.I.
<u>Except</u> §2274	AFO*	272-6420	F.B.I. (Forfeiture only)
§§2311-2319	GenL	724-6971	F.B.I.
<u>Except</u> §2318(d)	AFO*	272-6420	F.B.I. (Forfeiture only)
§2320	GenL	724-7035	F.B.I.
	OC&R	633-3599	F.B.I. (Motor vehicle parts only)
§§2341-2346	OC&R	633-3758	F.B.I.; Treasury (AT&F)
<u>Except</u> §2344(c)	AFO*	272-6420	F.B.I.; Treasury (AT&F) (Forfeiture only)
§2381	ISec**	724-6913	F.B.I.
§2382	ISec	724-6913	F.B.I.
§2383	ISec**	724-6913	F.B.I.
§2384	ISec	724-6913	F.B.I.
§§2385-2386	ISec**	724-6913	F.B.I.
§§2387-2391	ISec	724-6913	F.B.I.
§§2421 <u>et seq.</u>	GenL*	724-6971	F.B.I.
§§2510-2512	GenL	724-6971	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§2513	AFO*	272-6420	F.B.I.
§2515	GenL	724-6971	F.B.I.
§§2516-2518	Off. of Asst. Atty. General	633-3684	No Offense
§3013	AFO	272-6423	None
§§3041-3044	All		None
§3045	OC&R	633-3758	None
§§3046-3050	All		None
§§3052-3053	All		None
§3055	GenL	724-6971	None
§3056	All		None
§3056(b)	GenL	724-7144	None
§3057	Fraud	724-7127	F.B.I.
§3058	ISec**	724-6913	I.N.S.; F.B.I.
§§3059-3061	All		None
§§3071-3077	GenL	724-7526	None
§3103a	All		None
§3105	All		None
§3107	All		None
§3113	AFO*	272-6420	None
§§3146-3152	All		None

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§§3161-3173	App	633-2611	None
§§3181-3195	OIA	724-7600	None
§3236	GenL	724-6971	None
§§3237-3238	All		None
§§3242-3243	GenL	724-6971	None
§§3281-3282	All		None
§3283	GenL	724-7144	None
§3284	Fraud	724-7127	None
§3285	All		None
§3286	GenL	724-7144	None
§§3287-3290	All		None
§3291	GenL	724-7144	None
§3292	OIA	724-7600	None
§§3401-3402	GenL	724-6971	None
§3432	All		None
§3435	GenL	724-6971	F.B.I.
§3481	All		None
§3487	PInt	724-6963	F.B.I.
§3488	OC&R	633-3758	None
§§3491-3495	OIA	724-7600	None
§3497	PInt	724-6963	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§§3500-3502	All		None
§3504	ISec**	724-6913	F.B.I.
§§3505-3506	OIA	724-7600	None
§3507	OIA*	724-7600	None
§§3521-3528	OEO	633-3684	U.S. Marshals Service
§3565	AFO	272-6423	None
§§3566-3570	GenL	724-6898	Bureau of Prisons
§3575	OEO**	633-5541	None
§§3576-3578	All		None
§§3606-3607	GenL	724-6893	Commerce; Transportation (Coast Guard)
§3611	All		None
§3612	PInt	724-6963	F.B.I.
§§3613-3614	GenL	724-7144	F.B.I.
§3615	AFO*	272-6420	Treasury (AT&F)
§3617	GenL	724-7144	Treasury (AT&F)
§3618	AFO*	272-6420	Treasury (AT&F)
§3619	GenL	724-7144	Treasury (AT&F)
§§3621-3624	AFO	272-6423	None
§3651	GenL	724-6898	F.B.I.
§3653	GenL	724-6898	F.B.I.
§§3671-3672	GenL	724-7035	F.B.I.
	AFO	272-6423	F.B.I.
	(Forfeiture only)		

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.229 18 U.S.C.: Crimes and Criminal Procedure (cont.)

§§3691-3692	All		None
§3731	App	633-2641	None
§4004	GenL	724-6898	Bureau of Prisons
§4021	GenL	724-7144	Bureau of Prisons
§§4081-4086	GenL	724-6898	Bureau of Prisons
§§4100-4115	OIA	724-7600	Bureau of Prisons
§§4161-4166	GenL	724-6898	Bureau of Prisons
§§4201-4208	GenL	724-6898	Bureau of Prisons; Parole Commission
§§4241-4248	GenL	724-6898	Bureau of Prisons
§§4251-4255	N&DD	724-7045	Bureau of Prisons; Parole Commission
§§4281-4284	GenL	724-6898	Bureau of Prisons; U.S. Marshals Service
§5001	GenL	724-6898	F.B.I.; U.S. Marshals Service
§5003	GenL	724-6898	Bureau of Prisons
§§5005-5026	GenL	724-6898	Bureau of Prisons; Parole Commission
§§5031-5042	GenL	724-6898	Bureau of Prisons; F.B.I.
§§6002-6003	All		None

9-1.230 18 Appendix-26 U.S.C.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.231 18 U.S.C.: Appendix

§§1202-1203      GenL            724-6971          F.B.I.

Interstate      GenL            724-6898          F.B.I.  
Agreement on  
Detainers

Federal          App            633-2641          None  
Rules of  
Criminal Procedure

III                ISec            724-7111          None

Except  
Fed. R.

Crim. P. 6      Leg            633-3119          None

Fed. R.  
Crim. P. 41    Leg            633-2640          None

9-1.232 19 U.S.C.: Customs Duties

§60                PInt            724-6963          F.B.I.

§70                GenL            724-7144          Treasury (Customs)

§81s              GenL            724-7144          Treasury

§482              GenL            724-7144          None

§507              GenL            724-7144          Treasury (Customs)

§§1304-1305    ISec            724-6913          F.B.I.; Treasury (Customs)  
(Treasonous Literature)  
GenL            724-7144          F.B.I.; Treasury (Customs)  
(All other material)  
AFO\*            272-6420          F.B.I.; Treasury (Customs)  
(Forfeiture only)

§1341             GenL            724-7144          F.B.I.

§1436             GenL            724-7144          Treasury (Customs)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.232 19 U.S.C.: Customs Duties (cont.)

§1438	GenL	724-7144	Treasury (Customs)
§§1449-1455	GenL	724-7144	Treasury (Customs)
<u>Except</u> §1453	AFO*	272-6420 (Forfeiture only)	Treasury (Customs)
§1460	GenL	724-7144	Treasury (Customs)
	AFO*	272-6420 (Forfeiture only)	Treasury (Customs)
§1462	GenL	724-7144	Treasury (Customs)
	AFO*	272-6420 (Forfeiture only)	Treasury (Customs)
§§1464-1465	GenL	724-7144	Treasury (Customs)
<u>Except</u> §1464	AFO*	272-6420 (Forfeiture only)	Treasury (Customs)
§1497	GenL	724-7144	Treasury (Customs)
	AFO*	272-6420 (Forfeiture only)	Treasury (Customs)
§1510	GenL	724-7144	Treasury (Customs)
§1526	AFO*	272-6420 (Forfeiture only)	Treasury (Customs)
§1527	GenL	724-7144	Treasury (Customs)
§§1581-1582	GenL	724-7144	Treasury (Customs)
§§1584-1587	GenL	724-7144	Treasury (Customs)
	AFO*	272-6420 (Forfeiture only)	Treasury (Customs)
§1588	AFO*	272-6420	Treasury (Customs)
§1589	GenL	724-7144	Treasury (Customs)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.232 19 U.S.C.: Customs Duties (cont.)

§1594	AFO*	272-6420	Treasury (Customs)
§1595a	GenL	724-7144	Treasury (Customs)
<u>Except</u> §1595(a)	AFO*	272-6420	Treasury (Customs)
§1599	PInt	724-6963	Treasury (Customs)
§§1602-1615	GenL	724-7144	Treasury (Customs)
§§1617-1618	GenL	724-7144	Treasury (Customs)
§1620	PInt	724-6963	F.B.I.
§1621	GenL	724-7144	Treasury (Customs)
§1627	GenL	724-7526	Treasury (Customs)
§1703	GenL	724-7144	Treasury (Customs)
<u>Except</u> §1703(a)	AFO*	272-6420	Treasury (Customs)
§§1706-1708	GenL	724-7144	Treasury (Customs)
	AFO*	272-6420	Treasury (Customs) (Forfeiture only)
§1919	Fraud	724-7029	F.B.I.
§2093	GenL	724-7029	Treasury (Customs)
<u>Except</u> §2093(a)	AFO*	272-6420	Treasury (Customs)
§2316	Fraud	724-7029	F.B.I.
§2349	Fraud	724-7029	F.B.I.

9-1.233 20 U.S.C.: Education

§581(f)-(g) Fraud 724-7029 F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.234 21 U.S.C.: Food and Drug

§§101-105	GenL	724-6893	Agriculture (Off. of Investigations)
§§111-131	GenL	724-6893	Agriculture (Off. of Investigations)
§134a-e	GenL	724-6893	Agriculture (Off. of Investigations)
§135a	GenL	724-6893	Agriculture (Off. of Investigations)
§§151-158	GenL	724-6893	Agriculture (Off. of Investigations)
§§458-461(b)	GenL	724-6893	Agriculture (Off. of Investigations)
§461(c)	GenL	724-6893	F.B.I.
§§463-467	GenL	724-6893	Agriculture (Off. of Investigations)
§467(b)	AFO*	272-6420 (Forfeiture only)	Agriculture (Off. of Investigations)
§§606-676	GenL	724-6893	Agriculture (Off. of Investigations); F.B.I.
<u>Except</u> §673	AFO*	272-6420 (Forfeiture only)	Agriculture (Off. of Investigations); F.B.I.
§§801-966	N&DD AFO*	724-7045 272-6423 (Forfeiture only)	D.E.A.; F.B.I. D.E.A.; F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.234 20 U.S.C.: Education (cont.)

§§848-849	N&DD* AFO* (Forfeiture only)	724-7045 272-6420	D.E.A.; F.B.I. D.E.A.; F.B.I.
§967	AFO	272-6423	Related agency; D.E.A.
§1037	GenL	724-6893	Agriculture (Off. of Investigations)
§1041	GenL	724-6893	Agriculture (Off. of Investigations)
§1049	GenL	724-6893	Agriculture (Off. of Investigations)
§1175	N&DD	724-7045	National Institute on Drug Abuse

9-1.235 22 U.S.C.: Foreign Relations and Intercourse

§253	GenL	724-6971	F.B.I.
§268f(b)	GenL	724-7144	F.B.I.
§286f(c)	PInt	724-6963	F.B.I.
§287c	ISec**	724-6913	F.B.I.
§401	GenL (Civil penalties) AFO* (Forfeiture only) ISec	724-7144 272-6420 724-6913	Treasury (Customs); State Treasury (Customs); State Treasury (Customs); State
§455	ISec**	724-6913	F.B.I.
§§611-621	ISec**	724-6913	F.B.I.
§§622-624	ISec	724-6913	F.B.I.
§1179	PInt	724-6963	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.235 22 U.S.C.: Foreign Relations and Intercourse (cont.)

§1182	PInt	724-6963	F.B.I.
§§1198-1200	PInt	724-6963	F.B.I.
§1203	GenL	724-7144	F.B.I.
§1623(e)-(f)	GenL	724-6893	Foreign Claims Settlement Comm.
§1631j-n	GenL	724-6893	F.B.I.
§1641p	GenL	724-6893	Foreign Claims Settlement Comm.
§1642m	GenL	724-6893	Foreign Claims Settlement Comm.
§1643k	GenL	724-6893	Foreign Claims Settlement Comm.
§§1731-1732	GenL	724-6891	State
§2518	GenL	724-7144	F.B.I.
§2667	All		None
§2778	ISec**	724-6913	Treasury (Customs); State
	GenL	724-7144	Treasury (Customs); State
	(Civil penalties)		State
	AFO*	272-6420	Treasury (Customs); State
	(Forfeiture only)		State

9-1.236 23 U.S.C.: Highways

9-1.237 24 U.S.C.: Hospitals, Asylums, and Cemeteries

§154	GenL	724-7144	F.B.I.
------	------	----------	--------

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.238 25 U.S.C.: Indians

§68	PInt	724-6893	F.B.I.
§202	GenL	724-6971	F.B.I.
§251	GenL	724-6971	Interior
§399	GenL	724-7144	F.B.I.
§450d	Fraud	724-7029	F.B.I.
§452	Fraud	724-7029	F.B.I.

9-1.239 26 U.S.C.: Internal Revenue Code

§3121(b)17	ISec	724-6913	Treasury
§§4181-4182	GenL	724-6971	Treasury (AT&F)
§§4401-4405	OC&R	633-3758	Treasury (AT&F)
§§4411-4414	OC&R	633-3758	Treasury (AT&F)
§§4421-4423	OC&R	633-3758	Treasury (AT&F)
§§4461-4463	OC&R	633-3758	Treasury (AT&F)
§§5001-5687	OC&R	633-3758	Treasury (AT&F)
§5688	GenL	724-6893	Treasury (AT&F)
§§5690-5691	OC&R	633-3758	Treasury (AT&F)
§5723(c)-(d)	GenL	724-6893	Treasury (AT&F)
§§5801-5803	GenL	724-6971	Treasury (AT&F)
§§5811-5814	GenL	724-6971	Treasury (AT&F)
§§5821-5822	GenL	724-6971	Treasury (AT&F)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.239 26 U.S.C.: Internal Revenue Code (cont.)

§§5841-5848	GenL	724-6971	Treasury (AT&F)
§§5851-5854	GenL	724-6971	Treasury (AT&F)
§5861	GenL	724-6971	Treasury (AT&F)
§5871	GenL	724-6971	Treasury (AT&F)
§5872	GenL	724-7144	Treasury (AT&F)
<u>Except</u> §5872(a)	AFO*	272-6420	Treasury (AT&F)
§6103	OEO**	724-6672	Treasury (IRS)
§7122	GenL (Statutes administered by Criminal Division)	724-7144	Treasury (AT&F, Customs, Secret Service)
§§7201-7203	All		None
§§7206-7209	All		None
§7212	GenL	724-7144	F.B.I.
§7213	PInt	724-6963	Treasury (IRS)
§7214	PInt	724-6963	F.B.I.
§7262	OC&R	633-3758	Treasury (AT&F)
§7272	GenL	724-7144	Treasury (IRS)
§7301	GenL	724-7144	Treasury (AT&F)
§7302	AFO	272-6420	Treasury (AT&F)
§7303	GenL	724-7144	Treasury (AT&F)
§§7321-7327	GenL	724-7144	Treasury (AT&F)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.239 26 U.S.C.: Internal Revenue Code (cont.)

§7601	GenL	724-7144	Treasury (IRS)
§7607(2)	N&DD	724-7045	Treasury (Customs)
§9012	PInt	724-7062	F.B.I.; Federal Election Commission
§9042	PInt	724-7062	F.B.I.; Federal Election Commission

9-1.240 27-34 U.S.C.

9-1.241 27 U.S.C.: Intoxicating Liquors

§203	OC&R	633-3758	Treasury (AT&F)
§205(e)	OC&R	633-3758	Treasury (AT&F)
§§206-207	OC&R	633-3758	Treasury (AT&F)

9-1.242 28 U.S.C.: Judiciary and Judicial Procedure

§455	GenL	724-6891	None
§522nt	GenL	724-7144	F.B.I.
	(Child pornography)		
	N&DD	724-7123	F.B.I.
	(Drug violations)		
§524	AFO	272-6423	Related agency; D.E.A.; F.B.I.; I.N.S.; and U.S. Marshals Service
§§591-592	PInt	724-6963	F.B.I. or other agency involved
§1746	GenL	724-7144	F.B.I.
§§1781-1784	OIA	724-7600	None
§1822	GenL	724-7144	None
§1826	GenL	724-7144	U.S. Marshals Service

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.242 28 U.S.C.: Judiciary and Judicial Procedure (cont.)

§§2241-2250	GenL (Aliens) (All others)	724-6891	I.N.S.; Bureau of Prisons
§2253	GenL (Aliens) (All others)	724-6891	I.N.S.; Bureau of Prisons
§2255	All		None
§2678	Fraud	724-7029	F.B.I.
§§2901-2906	N&DD	724-7045	Nat'l Inst. of Mental Health

9-1.243 28 U.S.C.: Appendix

Federal Rules of Evidence	App	633-2641	None
---------------------------------	-----	----------	------

9-1.244 29 U.S.C.: Labor

§162	OC&R(L)	633-3666	F.B.I.
§186	OC&R(L)	633-3666	F.B.I.
§§206-207	OC&R(L)	633-3666	Labor (Wage & Hour Div.)
§212	OC&R(L)	633-3666	Labor (Wage & Hour Div.)
§§215-216	OC&R(L)	633-3666	Labor (Wage & Hour Div.)
§308	OC&R(L)	633-3666	Labor (Pension Welfare Benefit Programs)
§§431-439	OC&R(L)	633-3666	Labor (Labor Management Services Administration)
§§461-463	OC&R(L)	633-3666	Labor (Labor Management Services Administration)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.244 29 U.S.C.: Labor (cont.)

§501	OC&R(L)	633-3666	F.B.I.
§§502-503	OC&R(L)	633-3666	Labor (Labor Management Services Administration)
§503(b)	OC&R(L)	633-3666	F.B.I.
§504	OC&R(L)*	633-3666	Labor
§521	GenL	724-7144	F.B.I.
§522	OC&R(L)	633-3666	F.B.I.
§528	OC&R(L)	633-3666	F.B.I.
§530	OC&R(L)	633-3666	F.B.I.
§629	GenL	724-7144	F.B.I.
§666(e)-(f)	GenL	724-6893	Occupational Safety and Health Administration
§666(g)	Fraud GenL (When accompanying violation of (a)-(f))	724-7029 724-6893	F.B.I.
§666(h)	GenL	724-6893	Labor
§928	PInt	724-6963	F.B.I.
§1111	OC&R(L)*	633-3666	F.B.I.
§1131	OC&R(L)	633-3666	Labor (Pension Welfare Benefit Programs)
§1141	OC&R(L)	633-3666	F.B.I.
§1851	GenL	724-7144	Labor

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.245 30 U.S.C.: Mineral Lands and Mining

§689	Fraud	724-7029	F.B.I.
§733	GenL	724-6893	Interior (MESA)
§§801-878	GenL	724-6893	Interior (MESA)
§933	GenL	724-6893	Interior (MESA)
§942	GenL	724-6893	Interior (MESA)
§1211(f)	PInt	724-6963	F.B.I.
§1267(g)	PInt	724-6963	F.B.I.
§1294	GenL	724-7146	F.B.I.
§1463	GenL	724-7146	Commerce (National Oceanic and Atmospheric Administration)
§1720	GenL	724-6893	Interior

9-1.246 31 U.S.C.: Money and Finance

§243	GenL	724-6893	Defense; Transportation
§§391-396	GenL	724-7144	Treasury (Secret Service)
§665(a)-(b), (h)-(i)	PInt	724-6963	F.B.I.
§§1034-1036	GenL	724-7144	None
§§1341-1342	PInt	724-6963	F.B.I.
§1350	PInt	724-6963	F.B.I.
§1517	PInt	724-6963	F.B.I.
§1519	PInt	724-6963	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.246 31 U.S.C.: Money and Finance (cont.)

§5111(d)(1)	AFO*	272-6420	Treasury (Secret Service)
§§5311-5322	N&DD (Drug violations only)	724-7045	Treasury
§§5313-5315	Fraud	724-7032	Treasury (Customs)
§§5316-5317	GenL OC&R (RICO prosecution only)	724-7144 633-3594	Treasury (Customs) F.B.I.
§5317(b)	AFO* (Forfeiture only)	272-6420	Treasury
§5318(2)	Fraud	724-7032	Treasury (Customs)
§5321(a)(1), (a)(3)	Fraud	724-7029	F.B.I.
§5321(a)(2)	GenL	724-7144	Treasury (Customs)
§5322	Fraud	724-7032	Treasury (Customs)
§5323	N&DD	724-7045	Treasury

9-1.247 32 U.S.C.: National Guard

9-1.248 33 U.S.C.: Navigation and Navigable Waters

§§1-3	GenL	724-6893	Defense (Army Corps of Engineers)
§368	GenL	724-6893	Transportation (Coast Guard)
§§401-533	GenL	724-6893	Transportation; Defense (Army Corps of Engineers)
§§554-555	GenL	724-6893	Defense (Army Corps of Engineers)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.248 33 U.S.C.: Navigation and Navigable Waters (cont.)

§601	GenL	724-6893	Defense (Army Corps of Engineers)
§682	GenL	724-6893	Interior (Solicitor's Office--Energy & Resources Division)
§928	Fraud	724-7029	F.B.I.
§931	Fraud	724-7029	F.B.I.
§937	GenL	724-6893	Labor (Solicitor's Office-- Employees' Benefit Division)
§938	Fraud	724-7029	F.B.I.
§941	GenL	724-6893	Labor
§990(a)-(c)	Fraud	724-7029	F.B.I.
§1127	GenL	724-6893	Transportation (Coast Guard)
§1319(c)	GenL	724-6893	Agency Involved; F.B.I. if major investigation is required
§1908	GenL	724-6893	Transportation (Coast Guard--contact local Coast Guard District Commander)

9-1.249 34 U.S.C.: Navy

9-1.250 35-42 U.S.C.

9-1.251 35 U.S.C.: Patents

§33	GenL	724-7144	F.B.I.
§§181-185	ISec**	724-6913	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.251	35 U.S.C.:	Patents (cont.)		
§186	GenL	724-7144	F.B.I.	
§§187-188	ISec**	724-6913	F.B.I.	
§289	GenL	724-7144	F.B.I.	
§292	Fraud	724-7029	F.B.I.	
9-1.252	36 U.S.C.:	Patriotic Societies and Observances		
§§179-181	GenL	724-7144	F.B.I.	
§379	GenL	724-7144	F.B.I.	
§728	GenL	724-7144	F.B.I.	
9-1.253	37 U.S.C.:	Pay and Allowances of the Uniformed Services		
9-1.254	38 U.S.C.:	Pensions, Bonuses, and Veterans Relief		
§218	GenL	724-7144	VA Special Police; F.B.I.	
§787	Fraud	724-7029	F.B.I.	
§1790	Fraud	724-7029	F.B.I.	
§3301	PInt	724-6963	F.B.I.	
§3313	Fraud	724-7029	F.B.I.	
§3405	Fraud	724-7029	F.B.I.	
§§3501-3502	Fraud	724-7029	F.B.I.	
9-1.255	39 U.S.C.:	Postal Service		
§3001	GenL	724-7144	U.S.P.S. (Postal Inspection Service)	
§3005	Fraud	724-7127	U.S.P.S. (Postal Inspection Service)	

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.255 39 U.S.C.: Postal Service (cont.)

§3008	GenL	724-6971	U.S.P.S. (Postal Inspection Service)
§§3010-3011	GenL	724-6971	U.S.P.S. (Postal Inspection Service)

9-1.256 40 U.S.C.: Public Buildings, Property, and Works

§13f-p	GenL	724-6971	Marshal of S.Ct.
§56	GenL	724-7144	F.B.I.
§101	GenL	724-7144	Federal Police Forces
§193b-h, n-s	GenL	724-6971	Capitol Police; Special Police; U.S. Park Police
§212a	GenL	724-7144	Capitol Police
§212b	GenL	724-6971	Capitol Police
§255	GenL	724-6971	None
§276a	Fraud	724-7029	Labor; F.B.I.
§318a-c	GenL	724-7144	F.B.I.
§328	Fraud	724-7029	Labor; F.B.I.
§332	Fraud	724-7029	Labor; F.B.I.
§883	GenL	724-7144	Labor; F.B.I.

9-1.257 40 U.S.C.: Appendix

§108	PInt	724-6963	F.B.I.
§402	Fraud	724-7029	Labor; F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.258 41 U.S.C.: Public Contracts

§§35-36	Fraud	724-7029	F.B.I.
§51	Fraud	724-7029	F.B.I.
§54	Fraud	724-7029	F.B.I.
§119	Fraud	724-7029	F.B.I.

9-1.259 42 U.S.C.: The Public Health and Welfare

§261(b)-(c)	GenL	724-7144	F.B.I.
§262	GenL	724-6893	H.H.S.
§263a	GenL	724-6893	H.H.S.
§§264-265	GenL	724-6893	H.H.S.
§§269-272	GenL	724-6893	H.H.S.
§274e	GenL	724-7144	F.B.I.
§406	Fraud	724-7029	H.H.S.
§408	Fraud	724-7029	H.H.S.
§410(a)(17)	ISec	724-7103	H.H.S.
§§1306-1307	Fraud	724-7029	H.H.S.
§1320c-15	PInt	724-6963	F.B.I.
§1395nn	Fraud	724-7029	H.H.S.
§1396h	Fraud	724-7029	H.H.S.
§1973i(c)	PInt*	724-7062	F.B.I.
§1973i(e)	PInt*	724-7062	F.B.I.
§§2011-2273	GenL**	724-6893	F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.259 42 U.S.C.: The Public Health and Welfare (cont.)

§§2274-2278	ISec**	724-7111	F.B.I.
§2280	GenL**	724-7144	F.B.I.
§2283	GenL**	724-7144	F.B.I.
§2284	ISec**	724-7075	F.B.I.
§§2285-2293	GenL	724-6895	F.B.I.
§2971f	PInt	724-6963	F.B.I.
§3188	PInt	724-6963	F.B.I.
§3220(a)-(b)	Fraud	724-7029	F.B.I.
§3222	Fraud	724-7029	Labor
§§3411-3423	N&DD	724-7045	Nat'l Inst. of Mental Health
§3425	GenL	724-7144	F.B.I.
§3426	N&DD	724-7045	Nat'l Inst. of Mental Health
§3524	PInt	724-6963	None
§3771	PInt	724-6963	F.B.I.
§§3791-3793	Fraud	724-7028	F.B.I.
§§3795-3795b	Fraud	724-7028	F.B.I.
§5157	Fraud	724-7029	F.B.I.
§§5410(b)-5420	Fraud	724-7029	F.B.I.
§7413	GenL	724-6893	F.B.I.
§§8431-8435	GenL	724-6893	F.B.I.
§8611	Fraud	724-7028	H.H.S.; F.B.I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.260 43-50 U.S.C.

9-1.261 43 U.S.C.: Public Lands

§104	GenL	724-7144	F.B.I.
§245	GenL	724-7144	F.B.I.
§254	GenL	724-7144	F.B.I.
§315a	GenL	724-7144	F.B.I.
§316k	GenL	724-7144	F.B.I.
§362	GenL	724-7144	F.B.I.
§§1061-1064	GenL	724-7144	F.B.I.
§1212	Fraud	724-7029	F.B.I.
§§1331-1343	GenL	724-6893	Labor (MSHA)
§1605(b)	PInt	724-6963	F.B.I.
§1619(f)(20)	Fraud	724-7029	F.B.I.

9-1.262 44 U.S.C.: Public Printing and Documents

9-1.263 45 U.S.C.: Railroads

§§1-18	GenL	724-6893	Transportation (Federal Railway Admin.)
§23	GenL	724-6893	Transportation (Federal Railway Admin.)
§§28-29	GenL	724-6893	Transportation (Federal Railway Admin.)
§32	GenL	724-6893	Transportation (Federal Railway Admin.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.263 45 U.S.C.: Railroads (cont.)

§34	GenL	724-6893	Transportation
§§38-39	GenL	724-6893	Transportation (Federal Railway Admin.)
§60	GenL	724-6893	F.B.I.
§§62-63	GenL	724-6893	Transportation (Federal Railway Admin.)
§64a(a)	GenL	724-6893	Transportation (Federal Railway Admin.)
§§65-66	GenL	724-6893	Transportation (Federal Railway Admin.)
§§71-73	GenL	724-6893	Agriculture (Off. of Investigations)
§81	GenL	724-6893	Treasury (Fiscal Service)
§83	GenL	724-6893	None
§152, Tenth	OC&R(L)*	633-3666	F.B.I.
§180	OC&R(L)*	633-3666	F.B.I.
§§181-182	OC&R(L)	633-3666	F.B.I.
§2311	Fraud	724-7029	F.B.I.
§355(1)	Fraud	724-7029	F.B.I.
§359	Fraud	724-7029	F.B.I.
§438	GenL	724-6893	Transportation (Federal Railway Admin.)
§546(b)	GenL	724-6893	Transportation (Federal Railway Admin.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.264 46 U.S.C.: Shipping

§22	GenL	724-7144	F.B.I.
§§58-59	GenL	724-6893	Transportation (Coast Guard)
§86i(d)-(e)	GenL	724-6893	Transportation (Coast Guard)
§88g(d)-(e)	GenL	724-6893	Transportation (Coast Guard)
§§142-143	GenL	724-6893	Treasury (Customs)
§154	GenL	724-6893	Treasury (Customs)
§156a	GenL	724-6893	Treasury (Customs)
§§157-158	GenL	724-6893	Treasury (Customs)
§161	GenL	724-6893	Treasury (Customs)
§163	GenL	724-6893	Treasury (Customs)
§170	GenL	724-6893	Transportation
§170(13)	GenL	724-7144	F.B.I.
§170(15)	GenL	724-6893	Transportation
§§191-194	GenL	724-6893	Transportation (Coast Guard)
§229e	GenL	724-7144	F.B.I.
§229f	GenL	724-6893	Transportation (Coast Guard)
§231	GenL	724-7144	F.B.I.
§232	GenL	724-6893	Transportation (Coast Guard)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.264 46 U.S.C.: Shipping (cont.)

§§245-246	GenL	724-7144	Transportation (Coast Guard)
§249c	GenL	724-7144	F.B.I.
§277	GenL	724-7144	Treasury (Customs)
§316	GenL	724-6893	Transportation (Coast Guard)
§319	GenL	724-6893	Treasury
§452	GenL	724-6893	Transportation
§471	GenL	724-6893	Transportation (Coast Guard)
§599	GenL	724-6893	Transportation (Coast Guard)
§676	GenL	724-6893	Transportation (Coast Guard)
§709	GenL	724-6893	Transportation (Coast Guard)
§728	GenL	724-6893	F.B.I.
§738	GenL	724-6893	Transportation (Coast Guard)
§§801-842	GenL	724-6893	Federal Maritime Comm.
§941	GenL	724-6893	Transportation
§1132(e)	GenL	724-6893	Transportation (Coast Guard)
§1171(b)	GenL	724-6893	Transportation (Coast Guard)
§1223	GenL	724-6893	Transportation (Coast Guard)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.264 46 U.S.C.: Shipping (cont.)

§1224	GenL	724-6893	Commerce; Federal Maritime Comm.
§1225	ISec*	724-6913	F.B.I.
§1226	GenL	724-6893	Federal Maritime Comm.
§1228	GenL	724-6893	Federal Maritime Comm.; Commerce
§1276	GenL	724-6893	F.B.I.
§1295f(d)	GenL	724-6893	Transportation (Maritime Admin.)
§1333(e)	GenL	724-6893	Transportation (Coast Guard)
§1463	PInt	724-6963	F.B.I.
§2302	GenL	724-6893	Transportation
§3318	GenL	724-6893	F.B.I.
§3713	GenL	724-6893	Transportation (Coast Guard)
§3718	GenL	724-6893	Transportation
§4307	GenL	724-6893	Transportation
§4311	GenL	724-6893	Transportation
§6306	GenL	724-7144	F.B.I.
§11501	GenL	724-6893	Transportation
§11504	AFO*	272-6420	Transportation
§12309	GenL	724-6893	Transportation

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.265 47 U.S.C.: Telegraphs, Telephones, and Radiotelegraphs

§13	GenL	724-6893	F.C.C.
§§21-34	GenL	724-6893	F.C.C.
§37	GenL	724-6893	F.C.C.
§220(e)	GenL	724-6893	F.C.C.
§223	GenL	724-6971	F.B.I.
§§301-416	GenL	724-6893	F.C.C.
§§501-503	GenL	724-6893	F.C.C.
§§507-508	GenL	724-6893	F.C.C.
§605	GenL	724-6971	F.B.I.
§606	GenL	724-6893	F.C.C.; Defense; G.S.A.

9-1.266 48 U.S.C.: Territories and Insular Possessions

9-1.267 49 U.S.C.: Transportation

§§521-523	GenL	724-6893	Transportation
§§525-526	GenL	724-6893	Transportation
§10381	GenL	724-6893	Transportation (Federal Railway Admin.)
§10388	GenL	724-6893	Transportation (Federal Railway Admin.)
§10503	GenL	724-6893	Transportation (Federal Railway Admin.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.267 49 U.S.C.: Transportation (cont.)

§10706	GenL	724-6893	I.C.C.
§§10721-10722	GenL	724-6893	I.C.C.
§10726	GenL	724-6893	I.C.C.
§10741	GenL	724-6893	I.C.C.
§10743	GenL	724-6893	I.C.C.
§§10745-10746	GenL	724-6893	I.C.C.
§§10762-10763	GenL	724-6893	I.C.C.
§10765	GenL	724-6893	I.C.C.
§11121	GenL	724-6893	I.C.C.
§11128	GenL	724-6893	I.C.C.
§11301	GenL	724-6893	I.C.C.
§11321	GenL	724-6893	I.C.C.
§11341	GenL	724-6893	I.C.C.
§§11343-11348	GenL	724-6893	I.C.C.
§11350	GenL	724-6893	I.C.C.
§§11503-11504	GenL	724-6893	Transportation (Federal Railway Admin.)
§§11701-11703	GenL	724-6893	I.C.C.
§11710	GenL	724-6893	I.C.C.
§§11761-11762	GenL	724-6893	I.C.C.
§§11764-11765	GenL	724-6893	I.C.C.
§§11901-11904	GenL	724-6893	I.C.C.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.267 49 U.S.C.: Transportation (cont.)

<u>Except</u> §11902a	GenL	724-7526	I.C.C.
	OC&R	633-1567	I.C.C.
	(If labor dispute)		
§§11906-11907	GenL	724-6893	I.C.C.
§§11909-11910	GenL	724-6893	I.C.C.
§§11912-11916	GenL	724-6893	I.C.C.

9-1.268 49 U.S.C.: Appendix

§§781-784	GenL	724-7144	DEA; Treasury (Forfeiture only)
<u>Except</u> §782	AFO*	272-6420	DEA; Treasury (Customs, AT&F)
§1159(a)	GenL	724-6893	Transportation
§1471	GenL	724-6893	Transportation (CAB)
§1472(a)-(h)	GenL	724-6893	Transportation (CAB)
§1472(i)	GenL*	724-6971	F.B.I.
§1472(j)-(m)	GenL	724-6971	F.B.I.
§1472(n)	GenL*	724-6971	F.B.I.
§1472(o)	GenL	724-6971	F.B.I.
§1472(p)	GenL	724-6893	F.B.I.
§1472(q)	N&DD	724-7123	None
§1474	GenL	724-6893	Treasury; F.B.I.
	AFO*	272-6420	Treasury; F.B.I.
	(Forfeiture only)		

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.268 49 U.S.C.: Appendix (cont.)

§1484(d)	GenL	724-6893	Treasury; F.B.I.
§1509	AFO*	272-6420	Treasury; F.B.I.
§§1522-1523	ISec	724-6913	F.A.A.
§1809	GenL	724-6893	Transportation
§2007	GenL	724-6893	Transportation
§2214	Fraud	724-7029	F.B.I.
§2216	Fraud	724-7029	F.B.I.

9-1.269 50 U.S.C.: War and National Defense

§§21-24	ISec**	724-6913	F.B.I.
§167k	GenL	724-6893	Interior
§§191-192	ISec**	724-6913	Transportation (Coast Guard)
§217	PInt	724-6963	F.B.I.
§§421-426	ISec**	724-6913	F.B.I.
§§781-782	ISec	724-6913	F.B.I.
§783	ISec**	724-6913	F.B.I.
§§784-798	ISec	724-6913	F.B.I.
§§841-844	ISec**	724-6913	F.B.I.
§§851-857	ISec**	724-6913	F.B.I.
§857	ISec	724-6913	F.B.I.
§1436(g)	Fraud	724-7029	F.B.I.
§§1701-1706	ISec**	724-6913	Treasury (Customs)
§1809	GenL	724-7144	None

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.270 50 U.S.C.: Appendix

§3	ISec**	724-6913	Treasury
§5	GenL	724-7144	Treasury (Customs)
§5(b)	ISec**	724-6913	Treasury
§16	ISec**	724-6913	Treasury
	AFO*	272-6420	Treasury
		(Forfeiture only)	
§403f, m	GenL	724-7144	F.B.I.
§462	GenL*	724-7144	F.B.I.
§462(a)	GenL*	724-7144	F.B.I.
§473	OC&R	633-3758	Treasury (AT&F)
§510	GenL	724-6971	Defense; F.B.I.
§513	GenL	724-6971	Defense
§520	GenL	724-6971	Defense
§§530-532	GenL	724-6971	Defense
§§534-535	GenL	724-6971	Defense
§§781-785	ISec**	724-6913	F.B.I.
§1191(c)(5)(A)	Fraud	724-7029	F.B.I.
§1193(h)	Fraud	724-7029	F.B.I.
§1215(e)(1)	Fraud	724-7029	F.B.I.
§1941d(b)	PInt	724-6963	F.B.I.
§1985	GenL	724-6893	None
§2009	GenL	724-6893	None
§2017m	GenL	724-6893	None

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.270 50 U.S.C.: Appendix (cont.)

§2071	GenL	724-6893	Commerce
§2155(d)	GenL	724-6893	F.B.I.
§2155(e)	PInt	724-6963	F.B.I.
§2166	GenL	724-6893	None
§2284	GenL	724-7144	F.B.I.
§§2401-2420	ISec**	724-7103	F.B.I.

9-1.271 Uncodified

76 Stat. 907	GenL	724-7144	F.B.I.
5 Canal	GenL	724-6971	F.B.I.
22 D.C.	GenL	724-6971	Metropolitan P.D.

9-1.300 [RESERVED: STATUTES ASSIGNED BY SUBJECT MATTER]

9-1.400 CIVIL RESPONSIBILITIES

The Criminal Division, in addition to supervising the enforcement of federal criminal laws, has the following civil responsibilities, listed by section in USAM 9-1.401 through 9-1.406, infra.

9-1.401 Asset Forfeiture Office

The Asset Forfeiture Office has responsibility for all civil forfeiture proceedings assigned to the Criminal Division. See Criminal Division Directive No. 116 (1983). This responsibility includes advice and assistance in the handling of forfeiture cases and deciding petitions for remission or mitigation of forfeiture. In addition, U.S. Attorneys are required to consult with the Asset Forfeiture Office before accepting an offer in compromise in a forfeiture case in which the difference between the amount offered and the original amount claimed is between \$60,000 and \$750,000. Similarly, U.S. Attorneys are required to consult

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

with the Asset Forfeiture Office before closing or dismissing a forfeiture case in which the amount of the original claim is between \$60,000 and \$750,000. See id. Acceptance of offers in compromise and decisions to close or dismiss larger forfeiture cases are in the jurisdiction of the Associate Attorney General. 28 CFR §0.161(b), as amended in 1983.

The civil forfeiture statutes assigned to the Asset Forfeiture Office are listed in USAM 9-1.200, supra.

9-1.402 Fraud Section

The Fraud Section is responsible for all civil injunction actions against domestic concerns as defined in the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §78dd-2(c) to (d).

9-1.403 General Litigation and Legal Advice Section

The General Litigation and Legal Advice Section is responsible for miscellaneous motions and civil litigation in eighteen areas:

A. Suits primarily seeking to enjoin government officers and employees from engaging in criminal investigative or national security intelligence gathering activity taken by them in connection with their employment, which acts are alleged to be in violation of the United States Constitution or prohibited by statute or regulation (e.g., allegedly illegal searches, seizures, physical surveillance, photographing, and monitoring of the activities of organizations and individuals; improper use of informants; wrongful maintenance of files and reports; unlawful inspection of records; harassment by investigating agents; abuse of the grand jury process; malicious prosecution; improper communications to unauthorized personnel of the results of investigations; improper dissemination to other investigative agencies of information from government files and records; and violations of the postal laws in the course of a criminal investigation).

B. Suits primarily seeking injunctive relief to test the constitutionality of an established federal security program, either facially or as applied to a particular applicant for government employment, etc. These suits usually involve the denial of security clearances for access to classified defense information or atomic secrets; the denial of appointment to sensitive federal or federally funded positions; the denial of access to restricted areas, such as military or naval bases, the White House, or port areas; the denial of passports and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

visas; and the denial of Treasury licenses for the transfer of blocked funds. Among the programs involved in this area are the Department of Defense Industrial Security Clearance Program (ISCRO), the Federal Employees Loyalty and Security Program administered by the United States Office of Personnel Management, the Coast Guard Port Security Program, the protective activities of the United States Secret Service, and the Foreign Assets Control Program.

C. Suits seeking to quash grand jury subpoenas or to enjoin grand jury proceedings, or which appear to have been filed in an attempt to use the broader and more liberal civil discovery rules during a criminal trial to obtain information denied criminal defendants under the more restrictive rules of criminal discovery. These suits are limited to those directly related to pending criminal proceedings and involve substantially the same matters as those contained in motions normally filed in a criminal proceeding.

D. Suits primarily seeking to enjoin prosecutions involving statutes assigned to the Criminal Division.

E. Suits primarily seeking declaratory or mandamus relief in connection with law enforcement or national security activity under the jurisdiction of the Criminal Division.

F. Suits seeking coram nobis relief.

G. All motions under 18 U.S.C. §3504 for the disclosure and suppression of allegedly illegally intercepted wire and oral communications obtained from national security electronic surveillances.

H. All requests under Rule 6(e), Federal Rules of Criminal Procedure, for disclosure of grand jury matters or materials.

I. All motions or actions seeking the expungement or sealing of arrest and conviction records.

J. All motions under Rule 41(e), Federal Rules of Criminal Procedure, or civil suits seeking the return of property seized as evidence.

K. The coordination of all litigation in which Criminal Division personnel are involved as witnesses or defendants.

L. Suits to stay discovery to prevent interference with ongoing law enforcement or national security investigations or prosecutions under the jurisdiction of the Criminal Division.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

M. The coordination of all Freedom of Information Act/Privacy Act litigation involving the files and records of the Criminal Division.

N. Suits to enforce compliance with administrative subpoenas or other orders of administrative officials in matters under the jurisdiction of the Criminal Division (such as compliance with an administrative order requiring the respondent to allow inspection of his/her books and records).

O. Civil contempt.

P. Coordinating and supporting the activities of U.S. Attorneys in the defense of civil actions brought against Bureau of Prisons or Parole Commission officials which attack the Bureau's or Commission's rules, policies, administrative decisions, or conditions of confinement. (Some of the actions involving money damages for constitutional deprivations are defended by the Civil Division).

Q. Injunction actions under the Jenkins Tobacco Act, 15 U.S.C. §378, and the postal laws relating to sexually oriented advertisements, 39 U.S.C. §3011.

R. Civil penalties under all Criminal Division statutes not assigned to other components of the Criminal Division.

#### 9-1.404 Internal Security Section

The Internal Security Section is responsible for the Foreign Agents Registration Act, 22 U.S.C. §611 et seq., and the regulations thereunder, 28 C.F.R. §§5.1-5.801. As a result of certain amendments to the Act in 1966, the civil injunctive remedy was added to what had been a purely criminal statute. This remedy is available whenever, in the judgment of the Attorney General, any person is engaged in or about to engage in any acts which constitute or will constitute a violation of any provision of the Act or regulations thereunder. The district court shall have jurisdiction and authorization to issue a temporary or permanent injunction, restraining order, or other order which it may deem proper. The proceedings shall be made a preferred cause and expedited in every way.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-1.405 Narcotic and Dangerous Drug Section

The following areas are those in which the Narcotic and Dangerous Drug Section exercises civil responsibility. When private persons under Section 507 of the Controlled Substances Act, 21 U.S.C. §877, seek judicial review of various administrative actions taken by the Drug Enforcement Administration, see 28 C.F.R. §0.100, the Section is responsible for representing the government's interests, e.g., responding to motions, writing briefs. The types of Drug Enforcement Administration action in which judicial review is ordinarily sought are: placement of drugs in controlled substance schedules, 21 U.S.C. §811; denial, revocation, or suspension of registrations, 21 U.S.C. §824; and establishment of production quotas, 21 U.S.C. §826. The Section also acts in a civil capacity when it seeks civil penalties for minor violations of the Controlled Substances Act, e.g., negligent record keeping by pharmacists, 21 U.S.C. §842(c). The Section also has jurisdiction over injunctive actions to restrain violations of the Controlled Substances Act, e.g., improper distribution of controlled substances by pharmacists, 21 U.S.C. §882. Jurisdiction over forfeiture litigation under 21 U.S.C. §881 has been formally transferred to the Asset Forfeiture Office.

9-1.406 Organized Crime and Racketeering Section

The Organized Crime and Racketeering Section has responsibility for the following civil statutes, except that the Asset Forfeiture Office has responsibility for the remission and mitigation of any forfeitures adjudicated under these statutes:

A. 18 U.S.C. §1083(b) (Transportation of passengers between shore and gambling ships);

B. 18 U.S.C. §1964 (Civil remedies in relation to racketeer influenced and corrupt organizations);

C. Penalties under 26 U.S.C. Subtitle F, relative to the collection of taxes related to gambling or liquor; and

D. Penalties under 26 U.S.C. Subtitle E, Chapter 51, Subchapter J, relating to taxes on liquor, wine, and beer.

9-1.500 RESOURCES AVAILABLE IN CRIMINAL DIVISION

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-1.501 Criminal Division Brief/Memo Bank

The Criminal Division Brief/Memo Bank is a document storage and retrieval system which is designed to offer convenient access to a valuable body of previously prepared legal memoranda and briefs to Division personnel, U.S. Attorneys and their staffs, and other Department personnel dealing with criminal matters. These materials can be of great help in avoiding needless duplication of work efforts, and in permitting legal research to be performed more thoroughly and expeditiously. The types of materials which are collected, indexed, and filed in this system include:

- A. Supreme Court and Court of Appeals briefs;
- B. Legal memoranda or letters to U.S. Attorneys and others prepared by Division attorneys bearing on statutory interpretations, criminal procedural and constitutional issues, or Division policy;
- C. Department and Division orders and directives;
- D. Speeches or Congressional testimony;
- E. Solicitor General appeal memoranda;
- F. Division communications or agreements with other government agencies; and
- G. Miscellaneous materials prepared by U.S. Attorneys and attorneys in other agencies.

A topical indexing system specially developed for the Criminal Division Brief/Memo Bank is currently in use. In addition to this topical index, separate indices maintained by statutory (U.S.C.) citation, regulatory (C.F.R.) citation, and Federal Rule numbers permit access to documents bearing on these subjects. Finally, a separate index is maintained to cover statements of internal policies and procedures.

The Brief/Memo Bank is maintained by the Legal Reference Unit of the Office of Enforcement Operations, FTS 724-7184. All requests for information contained in this system should be directed to that office. The requester should define as clearly and specifically as possible the legal question or issue to be addressed, so as to enable the personnel in the Legal Reference Unit to check all possible index locations for the information.

Whenever a U.S. Attorney, or other attorney in the Department, prepares a definitive memorandum on a novel legal question or issue in the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

area of criminal law, it would be appreciated if a copy of the memorandum is forwarded to the Office of Enforcement Operations, Room 302, Federal Triangle Building, 315 9th Street, N.W., Washington, D.C. 20530. With full cooperation from all U.S. Attorneys, Division personnel, and other Department attorneys, the Brief/Memo Bank will be of more assistance to all who wish to use it.

The Legal Reference Unit also maintains a partial list of Department numbered memoranda, which were issued prior to the 1977 version of the USAM. This list indicates memoranda which have been cancelled, and includes references to the superseding USAM provisions, as well as those that are obsolete and not contained in the USAM. Memoranda not contained on this list remain effective. See USAM 1-1.200.

#### 9-1.502 Case Citations

Personnel of the Legal Reference Unit, Office of Enforcement Operations, will check case citations through JURIS for those U.S. Attorneys' offices not having their own JURIS facilities. For this service, contact the Legal Reference Unit at FTS 724-7184.

#### 9-1.503 Legislative Histories

Legislative histories of statutes assigned to the Criminal Division are maintained by the Legislative Reference Unit, Office of Enforcement Operations. Information concerning legislative histories may be obtained by writing to the Office of Enforcement Operations or by calling FTS 724-6657. When requesting a specific legislative history, considerable time will be saved by referring to the Public Law as it is set forth in the following list which includes the legislative history of each statute assigned to the Criminal Division since 1946 and many enacted prior thereto.

##### 1st Congress

Public Law of September 24, 1789—Courts

Public Law of April 15, 1790—Treason

Public Law of April 30, 1790—Statute of Limitations

##### 8th Congress

Public Law of March 26, 1804—Statute of Limitations

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

14th Congress

Public Law of March 3, 1817—Neutrality—Chapter 58

15th Congress

Public Law of April 20, 1818—Neutrality

18th Congress

Public Law of March 3, 1825—Assimilative Crimes Act

21st Congress

Public Law of March 2, 1831—Contempt of Court

32nd Congress

Public Law of February 26, 1853—Frauds upon Treasury of U.S.

34th Congress

Public Law of January 24, 1857—Immunity of Witnesses

37th Congress

Public Law of January 24, 1862—Immunity of Witnesses

Public Law of July 17, 1862—Treason

Public Law of March 2, 1863—Frauds upon the Government

Public Law of March 2, 1863—Conflict of Interest

Public Law of March 3, 1863—Frauds upon the Revenue

38th Congress

Public Law of June 11, 1864—Officers

39th Congress

Public Law of April 5, 1866—Assimilative Crimes Act

Public Law of April 5, 1866—Forging and Uttering of Bonds, etc.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Public Law of July 18, 1866—Smuggling

40th Congress

Public Law of February 25, 1868—Immunity of Witnesses

41st Congress

Public Law of June 22, 1870—Department of Justice

Public Law of February 25, 1871—Saving Clause

42nd Congress

Public Law of May 23, 1872—Indictment and Information—Demurrer

Public Law of June 1, 1872—Fines—Nonpayment of Indigent Convicts

Public Law of June 8, 1872—Mail Fraud Act

43rd Congress

Public Law of March 3, 1875—Larceny

46th Congress

Public Law of May 17, 1879—Conspiracy Statute

48th Congress

Public Law of April 18, 1884—False Impersonation of a Government Officer

50th Congress

Public Law of February 9, 1889—Assimilative Crimes Act

Public Law of March 2, 1889—Mail Fraud Act

52nd Congress

Public Law of February 11, 1893—Immunity of Witnesses

53rd Congress

Public Law of March 2, 1895—Lotteries

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

54th Congress

54-12 Trial--Verdict

Public Law of May 25, 1896—District of Columbia Physicians' Testimony

55th Congress

Public Law of July 7, 1898—Assimilative Crimes Act

56th Congress

Public Law of June 6, 1900—Extradition—Cuba

56-159 District of Columbia Code

59th Congress

59-36 Corrupt Practices Act, Federal

59-66 District of Columbia Non-Support Statute

59-223 Criminal Appeals Act

59-294 Puerto Rico--Qualifications of Jurors

59-338 Immigration and Naturalizations--Bureau to Establish

59-340 Live Stock Transportation Act

59-389 Immunity of Witnesses

59-403 China--United States Court

59-404 Department of Justice

60th Congress

60-221 Narcotics

60-350 Penal Code

61st Congress

61-269 Parole Act

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 61-274 Corrupt Practices Act, Federal
- 61-277 White Slave Traffic Act
- 61-470 Defense Secrets Act of 1911
- 61-475 Judicial Code

62nd Congress

- 62-32 Corrupt Practices Act, Federal
- 62-298 Corrupt Practices Act, Federal
- 62-377 Theft from Interstate Shipment
- 62-430 Officers--Expenses of Lectures

63rd Congress

- 63-43 Federal Reserve Act
- 63-223 Narcotic Act

64th Congress

- 64-57 Officers--Prohibiting Use of Name of Members of Congress
- 64-68 House of Service--Railroads
- 64-239 Bills of Lading Act
- 64-301 Immigration Act of 1917
- 64-305 Flag Desecration--D.C.
- 64-368 Puerto Rico--Organic Act

65th Congress

- 65-24 Espionage Act
- 65-68 Explosives Act of 1917
- 65-222 Corrupt Practices Act, Federal

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

65-228 False Claims Against the Government

65-281 Judicial Code, to Amend

66th Congress

66-5 Officers--Members of Congress--Influence

66-47 American Legion, to Incorporate

66-70 Motor Vehicle Theft Act

67th Congress

67-92 Statute of Limitations

68th Congress

68-341 Thefts from Interstate Shipment, Amendment

68-415 Judicial Code, to Amend

68-506 Corrupt Practices Act, Federal

68-544 Helium Gas Act

68-596 Probation Act

69th Congress

69-254 Air Commerce Act of 1926 (REPEALED)

69-525 Sale of Public Office

69-658 Jurors--Qualifications D.C.

69-758 Helium Gas Act, as Amended

70th Congress

70-3 Statute of Limitations

70-10 Criminal Appeals Act, Amendment

71st Congress

AUGUST 31, 1984

Ch. 1, p. 132

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 71-133 Department of Justice—Appointment of Special Attorneys
- 71-202 Parole Act, to Amend
- 71-218 Prisons—to Reorganize the Administration of Federal Prisons
- 71-310 Probation Act, to Amend
- 71-548 Criminal Code, to Amend

72nd Congress

- 72-20 Puerto Rico—Changing Name
- 72-96 Logan Act
- 72-154 Statute of Limitations
- 72-189 Kidnapping Statute
- 72-275 Firearms D.C.
- 72-316 Thefts from Interstate Shipment, Amendment

73rd Congress

- 73-1 Bank Conservation Act
- 73-22 Securities Act of 1933
- 73-62 Assimilative Crimes Act
- 73-74 Probation Act, to Amend
- 73-126 Extradition
- 73-151 Foreign Governments—Financial Transactions with
- 73-180 Statute of Limitations
- 73-217 Statute of Limitations
- 73-230 Killing or Assaulting Federal Officers
- 73-232 Kidnapping Statute, to Amend

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 73-233 Fugitive Felon Act
- 73-235 Bank Robbery Act of 1934
- 73-246 Stolen Property Act, National
- 73-291 Securities Exchange Act of 1934
- 73-324 Kickback Act
- 73-376 Anti-Racketeering Act
- 73-394 Frauds Against the Government
- 73-402 Arrests
- 73-416 Communications Act of 1934
- 73-474 Firearms Act, National

74th Congress

- 74-14 Hot Oil Act (Connally Act)
- 74-34 Assimilative Crimes Act
- 74-215 Convicts—Disposition of Products of Convict Labor
- 74-347 Liquor Law Repeal and Enforcement Act
- 74-424 Kidnapping Act, to Amend
- 74-729 Swiss Confederation Coat of Arms—Prohibiting Commercial Use
- 74-734 Evidence Bill
- 74-779 Strikebreakers Act
- 74-807 Liquor Enforcement Act of 1936

75th Congress

- 75-79 Officers—Diplomatic and Consular
- 75-123 Officers—Relating to Congressional Investigations

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 75-145 Hot Oil Act, as Extended
- 75-238 Marihuana Tax Act of 1937
- 75-268 District of Columbia--Offenses Against Property
- 75-352 Appeal and Error
- 75-418 Photographs, Sketches or Maps
- 75-571 Juvenile Court Act of the District of Columbia, as Amended
- 75-583 Foreign Agents Registration Act of 1938
- 75-666 Juvenile Delinquency Act, Federal
- 75-717 Food, Drug, and Cosmetic Act
- 75-718 Fair Labor Standards Act
- 75-779 Strikebreakers Act, Amendment
- 75-785 Firearms Act, Federal

76th Congress

- 76-54 Neutrality Act of 1939
- 76-76 Extortion, Amendment
- 76-158 Hot Oil Act, as Extended
- 76-252 Hatch Act
- 75-255 Stolen Property Act, as Amended
- 76-319 Foreign Agents Registration Act of 1938, as Amended
- 76-357 Seizure and Forfeiture of Carriers
- 76-366 Foreign Divorces--Prohibition of Solicitation by Mail
- 76-379 Social Security Act Amendments of 1939
- 76-401 Obstructing Justice

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 76-443 Espionage Act, to Amend
- 76-484 Motor Boat Act of 1940
- 76-548 Assimilative Crimes Act
- 76-575 Sabotage--Train Wrecking
- 76-598 Assimilative Crimes Act
- 76-607 District of Columbia--Murder in the First Degree
- 76-663 Veterans' Organizations Insignia--Unauthorized Use of
- 76-670 Alien Registration Act of 1940
- 76-675 Supreme Court--Proscribe Rules
- 76-703 Export Control
- 76-736 Statute of Limitations
- 76-753 Hatch Act, Amendment
- 76-762 Jurisdiction--U.S. District Court--Hawaii
- 76-783 Selective Training and Service Act of 1940
- 76-805 Officers--Retired Officers of Army, Navy, etc.
- 76-817 United States Commissioners--Jurisdiction--Petty Offenses
- 76-851 Convicts--Disposition of Products of Convict Labor
- 76-853 Nationality Act of 1940
- 76-861 Soldiers and Sailors Civil Relief Act of 1940
- 76-870 Voorhis Anti-Propaganda Act

77th Congress

- 77-5 Appropriation--Emergency Cargo Ship Construction

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 77-75 Export Control
- 77-89 War—Priorities and Allocation of Materiel
- 77-112 Confinement of Persons Convicted of Federal Offenses
- 77-160 Convicts—Disposition of Products of Convict Labor
- 77-163 May Act
- 77-217 Cattle Theft Act
- 77-354 War—First War Powers Act, 1941
- 77-366 Food, Drug and Cosmetic Act, as Amended (Insulin)
- 77-381 Explosives Act, to Amend
- 77-390 Explosives on Board Certain Vessels
- 77-414 Neutrality Act of 1939, to Amend
- 77-421 Price Control (Original Act)
- 77-507 War—Second War Powers Act, 1942
- 77-532 Foreign Agents Registration Act of 1938, to Amend
- 77-543 Criminal Appeals Act, Amendment
- 77-624 Hot Oil Act, as Made Permanent
- 77-627 Photographs, Sketches, or Maps
- 77-638 Export Control
- 77-706 Statute of Limitations
- 77-729 Price Control, to Amend
- 77-732 Soldiers and Sailors Civil Relief Act of 1940, to Amend
- 77-750 Seal, Arms, Flag, and Other Insignia—Standard Service Flag
- 77-775 Explosives Act, to Amend

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

77-797 Opium Poppy Control Act of 1942

77-843 Denture Act

78th Congress

78-2 Department of Justice--Additional Assistant Attorney General

78-52 Seal, Arms, Flag, and Other Insignia--Merchant Sailors

78-89 War--Labor Disputes Act

78-89 Corrupt Practices Act, Federal

78-127 Naval Zone and Waterfront Act

78-141 Alien Seaman Deportation Act

78-188 Sabotage--Amendment of Criminal Code

78-197 Selective Training and Service Act of 1940, to Amend

78-213 Informers Act

78-222 Court Reporters Bill

78-244 Skimmed Milk Act

78-247 Stowaway on Aircraft

78-261 Saving Clause Statute

78-278 Currency and Coinage--Illegal Manufacture

78-286 Stowaway on Vessels

78-287 Officers--Exempting Officers of OPA

78-383 Price Control--to Amend Stabilization Extension Act of 1944

78-395 Contract Settlement Act of 1944--Statute of Limitations

78-397 Export Control

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 78-410 Public Health Service Act
- 78-431 Nationality Act of 1940, to Amend
- 78-457 Surplus Property Act of 1944
- 78-458 War Mobilization and Reconversion Act
- 78-471 Pensions--Widows of Civil War Veterans
- 78-483 Pensions--Widows of World War I Veterans
- 78-503 Immigration Act of 1917, as Amended
- 78-509 War--Second War Powers Act, 1942, to Amend and Extend
- 79th Congress
- 79-47 Escapes of Prisoners of War and Interned Enemy Aliens
- 79-54 Selective Training and Service Act of 1940, to Extend
- 79-58 May Act, to Amend
- 79-79 Obstructing Justice, to Amend
- 79-80 Officers--Exemption of Advisory Board WMR
- 79-99 Export Control
- 79-104 Renegotiation Act, Extension of Termination Date
- 79-108 Price Control, Extension
- 79-130 Tariff Act of 1930, as Amended
- 79-139 Food, Drug and Cosmetic Act, as Amended--Penicillin Drugs
- 79-169 Seal, Arms, Flag, and Other Insignia, Amendment--for Recognition of Services of Merchant Sailors
- 79-184 Motor Vehicle Theft Act, Amendment
- 79-193 Nationality Act of 1940, to Amend

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 79-208 D.C.-Virginia Line to Establish a Boundary Line Between the D.C. and the Commonwealth of Virginia
- 79-245 Army and Navy--Courts Martial
- 79-264 United Nations Organization--Appointment of Representatives
- 79-270 War--Second War Powers Act of 1942, to Amend
- 79-271 Aliens--Admission to U.S. of Alien Spouses and Alien Minor Children of Citizen Members of U.S. Armed Forces
- 79-291 United Nations Organization--Extending Privileges
- 79-319 Kickback Act
- 79-322 War--First War Powers Act of 1941, to Amend
- 79-339 Army and Navy--Property Loss--Fire Damages
- 79-344 Communications Act of 1934, to Amend (Petrillo Bill)
- 79-354 Army and Navy--Property Loss--Water Damages
- 79-379 Selective Training and Service Act of 1940, to Extend
- 79-388 Veterans' Emergency Housing Act of 1946
- 79-394 Indians--Devils Lake Indian Reservation
- 79-404 Administrative Procedures Act
- 79-419 Appropriations Act of 1946--Third Urgent Deficiency
- 79-427 Food--Renovated Butter Act
- 79-442 Atomic Energy--Weapons
- 79-473 Selective Training and Service Act of 1940, to Extend
- 79-475 War--Second War Powers Act of 1942, to Amend
- 79-480 Housing Act, to Amend
- 79-486 Anti-Racketeering Act (Hobbs Bill)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 79-487 Mental Health Act, National
- 79-496 Fines--Discharge of Indigent Convicts for Nonpayment
- 79-534 Larceny
- 79-548 Price Control, Extension
- 79-570 Capitol Grounds
- 79-575 Overtime, Leave, and Holiday Compensation
- 79-585 Atomic Energy Act of 1946
- 79-591 Fugitive Felon Act, Amendment
- 79-601 Legislative Reorganization Act of 1946
- 79-631 Seal, Arms, Flag, and Other Insignia, Amendment--Merchant Sailors
- 79-657 War Contract Hardship Claims
- 79-704 Armed Forces Leave Act of 1946
- 79-719 Social Security Act, to Amend
- 79-731 Farmers' Home Administration Act of 1946
- 79-732 Fish and Game

80th Congress

- 80-15 Firearms Act, to Amend
- 80-16 Food, Drug, and Cosmetic Act, to Amend--Streptomycin
- 80-24 Rubber Industry
- 80-26 Selective Service Records--Office
- 80-29 Decontrol Act, First of 1947
- 80-30 Sugar Control Extension Act of 1947

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 80-37 Larceny
- 80-49 Portal-To-Portal Act of 1947
- 80-59 Arrest--Power of Arrest--Washington National Airport
- 80-86 Officers--Counsel Employed
- 80-93 Officers--Extending Time for Service
- 80-97 Escapes of Prisoners--Liability of Prison Guards
- 80-101 Labor Management Relations Act, 1947
- 80-101 Corrupt Practices Act, to Amend (Sec. 304)
- 80-104 Insecticide, Fungicide, and Rodenticide Act
- 80-120 Housing Act, National, as Amended
- 80-129 Housing and Rent Act of 1947
- 80-130 Commodity Credit Corporation
- 80-132 Reconstruction Finance Corporation Act, as Amended
- 80-145 War--Second War Powers Act of 1942, to Extend
- 80-179 Bribery--D.C.
- 80-181 Army and Navy--Property Loss--Navy Personnel
- 80-188 Decontrol Act, Second, of 1947
- 80-198 District of Columbia--Parole--Reorganization
- 80-199 Presidential Succession
- 80-239 War--Terminating Certain Emergency War Powers
- 80-253 Security Act, National, of 1947
- 80-254 Armed Forces Leave Act of 1946, to Amend

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 80-255 Sockeye Salmon Fishery Act of 1947
- 80-257 Game--Game Refuge in South Carolina
- 80-258 Fish--Black Bass
- 80-271 Appropriations, Supplemental, 1948 (OPA Liquidation)
- 80-278 General Provision--Title I, United States Code
- 80-279 Seal--Flag Seal of Government and the States
- 80-280 Bonds--Official and Penal
- 80-281 Copyrights
- 80-306 Seal, Arms, Flag, and Other Insignia--Widows
- 80-328 Mines and Minerals--Safety Regulations in Coal Mines
- 80-344 Firearms--D.C.
- 80-350 Armed Forces Leave Act of 1946, to Amend
- 80-389 Foreign Aid Act of 1947
- 80-391 Officers--Contract Settlement Act of 1944
- 80-394 Housing Act, National, as Amended, to Amend
- 80-395 Inflationary Control
- 80-410 Woods and Forest
- 80-422 Housing and Rent Act of 1947, to Extend
- 80-426 Civil Service Retirement Act, to Amend
- 80-427 Second Decontrol Act of 1947, to Amend
- 80-447 Arrests--Park Police
- 80-464 Housing and Rent Act of 1948
- 80-468 Housing Act, National, as Amended, to Extend

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 80-469 Rubber Act of 1948
- 80-484 Army and Navy—Unauthorized Wearing of Uniform
- 80-491 Appropriation Act of 1949, Independent Offices
- 80-500 Gambling Ships
- 80-505 Jurisdiction—U.S. District Court—Hawaii
- 80-538 Immigration Act of 1924, as Amended, to Amend
- 80-547 Renegotiation Act of 1948
- 80-552 Aliens—Exclusion—Public Safety
- 80-562 Airports—Alaska
- 80-566 Arrest—FWA
- 80-567 Nationality Act of 1940, to Amend
- 80-606 Decontrol Act of 1947, Second, to Amend
- 80-615 District of Columbia Sex Psychopaths
- 80-616 Surplus Property Act of 1944, as Amended, to Amend
- 80-637 Port Chicago, California
- 80-647 Air Commerce—International Aviation Facilities Act
- 80-710 Armed Forces Leave Act of 1946, as Amended, to Amend
- 80-737 Insanity—St. Elizabeths
- 80-749 Food, Drug, and Cosmetic Act, to Amend
- 80-759 Selective Service Act of 1948
- 80-772 Criminal Code, Revision of
- 80-773 Judicial Code and Judiciary, Revision of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 80-774 Displaced Persons Act of 1948
- 80-775 Army, Navy, Air Force--Military Justice
- 80-780 Probation Act, to Amend
- 80-783 Nationality Act of 1940, to Amend
- 80-806 Commodity Credit Corporation Charter Act
- 80-808 Canal Zone Code, to Amend
- 80-818 Animals--Humane Conditions
- 80-863 Immigration Act of 1917, to Amend
- 80-881 Indians
- 80-905 Inflation Controls--Consumer Credit Controls

81st Congress

- 81-8 Legislative Reorganization Act of 1946, to Amend
- 81-11 Export Control Act of 1949
- 81-31 Housing and Rent Act of 1949
- 81-72 Criminal and Judicial Codes, to Amend
- 81-85 Commodity Credit Corporation Charter Act, to Amend
- 81-137 Officers--18 U.S.C. §283
- 81-155 Decontrol Act of 1947, Second, to Extend
- 81-164 Food, Drug and Cosmetic Act, to Amend--Aueromycin
- 81-171 Housing Act of 1949
- 81-186 Civil Aeronautics Act of 1938, to Amend--Explosives
- 81-207 Coast Guard
- 81-250 Supreme Court--Policing of Building and Grounds

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 81-285 Insanity, Insane Persons--Provide Care and Custody
- 81-329 Mutual Defense Assistance Act of 1949
- 81-346 Insanity--Federal Reservations in Va. and Md.
- 81-360 Food, Drug, and Cosmetic Act, to Amend
- 81-363 Tobacco Tax Act
- 81-393 Fair Labor Standards Amendments of 1949
- 81-421 International Wheat Agreement Act of 1949
- 81-442 Firearms Act, Federal, to Amend Sec. 5
- 81-459 Oleomargarine--to Regulate
- 81-506 Uniform Code of Military Justice
- 81-507 National Science Foundation Act of 1950
- 81-510 Criminal Code and Judicial Code, to Amend
- 81-513 Records--Preventing Disclosure--Cryptographic Systems, etc.
- 81-531 Obscenity
- 81-553 Jurisdiction--U.S. District Court--Hawaii
- 81-555 Displaced Persons Act of 1948, to Amend
- 81-572 Selective Service Act of 1948, to Extend
- 81-599 Selective Service Extension Act of 1950
- 81-630 Guam--Civil Government
- 81-634 Bank Robbery--18 U.S.C. §2113
- 81-635 Civil Aeronautics Act of 1938, to Amend
- 81-642 Foreign Agents Registration Act of 1938

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 81-659 Library of Congress--Policing of Building and Grounds
- 81-661 Veterans' Organizations--Auxiliaries--Insignia--Unauthorized Use of
- 81-676 Whaling Convention Act of 1949
- 81-678 Narcotics--Contraband Article
- 81-679 Port Security Act
- 81-699 Obscenity--Mail
- 81-700 Lotteries--Fishing Contests
- 81-732 Hatch Act, to Amend
- 81-733 Officers and Employees of Government--National Security
- 81-734 Social Security Act Amendments of 1950
- 81-762 Airport--District of Columbia--Authority to Arrest
- 81-764 Tuna Conventions Act of 1950
- 81-774 Defense Production Act of 1950
- 81-778 Civil Aeronautics Act of 1938, to Amend
- 81-779 Selective Service Act of 1948, to Amend
- 81-797 Federal Deposit Insurance Act
- 81-804 Narcotics--Interstate Transportation
- 81-831 Internal Security Act of 1950
- 81-845 Northwest Atlantic Fisheries Act of 1950
- 81-855 Cremation Urns Designed for Military Use
- 81-865 Youth Corrections Act
- 81-906 Gambling--Interstate Transportation of Slot Machines

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

81-915 Arrest--Authority of FBI Agents to Arrest without Warrant

81-921 War--First War Powers Act, to Amend and Extend Title II

82nd Congress

82-8 Housing and Rent Act of 1947, as Amended

82-14 Aliens--Immigration

82-33 Export Control Act of 1949, as Amended

82-51 Universal Military Training and Service Act

82-60 Displaced Persons Act of 1948, as Amended

82-62 Parole

82-65 Statute of Limitations

82-69 Defense Production Act of 1950, as Amended

82-79 Counterfeiting--Coins

82-96 Defense Production Act Amendments of 1951

82-98 Parole

82-99 District of Columbia--Insanity Act, as Amended

82-110 Fur Products Labeling Act

82-121 Seal, Arms, Flag, and Other Insignia--Widows

82-129 Records--Photographic Reproduction of Business Records

82-141 Sale of Public Office

82-153 Post Office

82-183 Revenue Act of 1951

82-197 Forfeiture--Indian Liquor Laws

82-200 Communications Act of 1934, as Amended

AUGUST 31, 1984

Ch. 1, p. 148

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 82-206 Smithsonian Institution--Policing of Building and Grounds
- 82-215 Food, Drug, and Cosmetic Act, as Amended
- 82-235 Atomic Energy Act of 1946, as Amended
- 82-248 United States Code--Amendment of Certain Titles
- 82-255 Narcotics--Penalties
- 82-256 Invention Secrecy Act
- 82-260 Firearms--D.C.--Disposition of Dangerous Weapons
- 82-272 District of Columbia Uniform Act--to Secure Attendance of Witnesses
- 82-283 Aliens--Illegal Entry
- 82-289 Hawaiian Organic Act, as Amended--Jurors
- 82-298 Civil Service Investigations
- 82-300 Youth Corrections Act, as Amended--D.C.
- 82-301 Bank Robbery
- 82-313 Emergency Powers Interim Continuation Act
- 82-330 Post Office--Poisons in Mails
- 82-333 Prisons, Federal
- 82-342 Prisons, Federal--Rehabilitation
- 82-359 Seal, Arms, Flag and Other Insignia--Smokey Bear
- 82-368 Emergency Powers Interim Continuation Act
- 82-393 Emergency Powers Interim Continuation Act
- 82-401 Soldiers and Sailors Civil Relief Act of 1940, as Amended
- 82-404 Rubber Act of 1948, as Amended

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 82-414 Immigration and Nationality Act
- 82-426 War—First War Powers Act, 1941, as Amended
- 82-428 Emergency Powers Interim Continuation Act
- 82-429 Defense Production Act Amendments of 1952
- 82-432 Post Office—Stolen Mail
- 82-438 Seal, Arms, Flag, and Other Insignia
- 82-444 Post Office—Unloading of Mail from Vessels
- 82-450 Emergency Powers Continuation Act
- 82-455 Appropriation Act, Independent Offices, 1953
- 82-461 Universal Military Training and Service Act, as Amended
- 82-473 Prisons, Federal—Rehabilitation
- 82-514 Air Commerce—Jurisdiction
- 82-531 Housing Act of 1952
- 82-538 Civil Aeronautics Act of 1938, as Amended
- 82-550 Veterans' Readjustment Assistance Act of 1952
- 82-552 Coal Mine Safety Act
- 82-554 Communications Act Amendments, 1952
- 82-562 Explosives—Loading and Discharging on Vessels

83rd Congress

- 83-36 Seal, Arms, Flag, and Other Insignia
- 83-46 Photographs, Sketches, or Maps, Amendment
- 83-62 Export Control Act, as Amended

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 83-76 Narcotics--D.C.
- 83-84 Universal Military Training and Service Act, as Amended
- 83-85 District of Columbia Law Enforcement Act of 1953
- 83-86 Immigration and Nationality Act, as Amended
- 83-88 Flammable Fabrics Act
- 83-95 Defense Production Act Amendments of 1953
- 83-96 Emergency Powers Continuation Act, Extension
- 83-97 War--First War Powers Act of 1941, as Amended
- 83-99 Emergency Powers--Espionage, Sabotage, Subversive Activities
- 83-104 Seal, Arms, Flag, and Other Insignia--Armed Forces Uniform
- 83-107 Seal, Arms, Flag, and Other Insignia--Flags, Display
- 83-163 R.F.C. Liquidation Act and Small Business Act of 1953
- 83-164 Atomic Energy Act of 1946, as Amended
- 83-192 Canal Zone--Communications Systems--Injury or Destruction
- 83-203 Refugee Relief Act of 1953
- 83-205 Rubber Producing Facilities Disposal Act of 1953
- 83-212 Outer Continental Shelf Lands Act
- 83-217 Food, Drug, and Cosmetic Act, as Amended--Factory Inspection
- 83-229 Pacific Islands Trust Territory--Civil Government Continuance
- 83-238 Pacific Islands Trust Territory--Narcotics
- 83-240 Narcotics--Production by Chemical Synthesis
- 83-252 Waterfront Commission Compact--N.Y. and N.J.
- 83-256 Weather Modification Experiments--Committee to Study

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 83-264 Espionage Act, as Amended
- 83-277 Indians--Liquor Laws
- 83-280 Indians--Jurisdiction
- 83-281 Indians--Personal Property
- 83-287 Technical Changes Act of 1953
- 83-314 Communications Act of 1934, as Amended--Penalty
- 83-335 Food, Drug, and Cosmetic Act, as Amended--Food Standards Reg.
- 83-350 Federal-Aid Highway Act of 1954
- 83-355 Narcotics--D.C.--Treatment of Users
- 83-358 St. Lawrence Seaway Development Corporation
- 83-365 Motor Vehicle Safety Responsibility Act--D.C.
- 83-385 Fireworks--Transportation
- 83-389 D.C. Business Corporation Act
- 83-400 Docket Fees
- 83-424 Healing Arts Practice Act--D.C., 1928, as Amended--Penalty
- 83-427 D.C.--Employment of Parolees
- 83-431 Contract Settlement Act of 1944, as Amended
- 83-443 First War Powers Act of 1941, as Amended--War Contracts
- 83-451 Pacific Island Trust Territory--Civil Government Continuance
- 83-515 Immigration and Nationality Act, as Amended--Japanese Elections--Citizenship of Voters
- 83-517 Virgin Islands--Revised Organic Act
- 83-518 Food, Drug, and Cosmetic Act, as Amended--Pesticide Chemical Residues

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 83-557 Internal Security Act of 1950, as Amended (Sec. 7(d))
- 83-560 Housing Act of 1954
- 83-557 Securities Act, etc., Amendments
- 83-579 North Pacific Fisheries Act of 1954
- 83-584 Communications Act of 1934, as Amended--Sea Safety by Radio
- 83-590 Communications Act of 1934, as Amended--Great Lakes--Safety by Radio
- 83-591 Internal Revenue Code of 1954
- 83-600 Immunity of Witnesses
- 83-602 Fugitives From Justice--Concealing
- 83-603 Bail Jumping--Penalties
- 83-629 Flammable Fabrics Act, as Amended
- 83-637 Communist Control Act of 1954
- 83-641 Smuggling--Penalties
- 83-670 F.B.I.--Use of Name
- 83-679 Guam Organic Act, as Amended--Jury Trial
- 83-703 Atomic Energy Act of 1954
- 83-725 F.B.I.--Investigative Jurisdiction
- 83-729 Internal Revenue Code, to Amend--Oral Prescriptions, etc.
- 83-740 Census--Title 13, Codification and Enactment into Law
- 83-751 Refugee Relief Act, as Amended
- 83-766 Federal Property and Administrative Service Act of 1954, as amended--Motor Vehicle Pools

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 83-767 Unemployment Compensation to Extend and Improve
- 83-768 Customs Simplification Act of 1954
- 83-769 Pensions--Denial of Annuities after Criminal Conviction
- 83-770 Alien Shepherders--Visas
- 83-772 Expatriation Act of 1954
- 83-777 Espionage and Sabotage Act of 1954
- 83-779 United States Code, Amendments
- 83-781 Merchant Marine Act of 1936, as Amended--Ship Construction, etc.

84th Congress

- 84-1 Internal Revenue Code of 1954, as Amended
- 84-9 Judicial and Congressional Salaries--Adjustment
- 84-12 Fish--Regulation of Nets in Alaskan Waters
- 84-53 Threats Against the President
- 84-58 First War Powers Act, 1941, Amendment
- 84-95 Obscenity
- 84-105 Canal Zone Code, as Amended--Fireworks
- 84-108 Scorpions--Mailing of Live Scorpions
- 84-118 Universal Military Training and Service Act Amendments of 1955
- 84-126 Customs--Importation of Personal Effects
- 84-165 Atomic Weapons Reward Act of 1955
- 84-173 Subversive Activities Control Act of 1950, to Amend
- 84-254 Subversive Activities Control Act of 1950, to Amend
- 84-267 Courts--Nebraska--District Court--Eliminating Divisions, etc.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 84-272 Agriculture Marketing Act of 1946, as Amended
- 84-285 International Claims Settlement Act of 1949, as Amended
- 84-295 Defense Production Act Amendments of 1955
- 84-296 Federal Voting Assistance Act of 1955
- 84-304 Commission on Government Security
- 84-313 District of Columbia--Insane Criminals
- 84-330 Officers--Government Employment--Disloyalty Prohibition
- 84-335 Tobacco Tax Act, as Amended
- 84-345 Housing Amendments of 1955
- 84-362 Narcotics--Enforcement of Narcotic Laws
- 84-376 District of Columbia--Delegates to Political Conventions--Regulation of Election
- 84-378 Texas City Disaster--Claims Settlement
- 84-430 Immigration and Nationality Act, as Amended
- 84-474 Fugitive Felon Act, as Amended
- 84-511 Bank Holding Company Act of 1956
- 84-544 Escape Act, as Amended
- 84-557 Great Lakes Fishery Act of 1956
- 84-634 War Orphans' Educational Assistance Act of 1956
- 84-650 District of Columbia--Arrests
- 84-661 Stolen Property Act, as Amended--Confidence Game Swindles
- 84-662 Seed Act, Federal, as Amended
- 84-672 Food, Drug, and Cosmetic Act, as Amended--Coloring of Oranges

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 84-674 Canal Zone Code, as Amended
- 84-688 Fraud by Wire, Radio or Television
- 84-709 Aircraft and Motor Vehicles--Destruction
- 84-714 Merchant Marine Act of 1920, as Amended
- 84-728 Narcotic Control Act of 1956
- 84-759 Seal, Arms, Flag, and Other Insignia--U.S. Merchant Marine
- 84-764 District of Columbia--Dangerous Drug Control Act
- 84-766 Increase Penalties for Sedition and Conspiracy
- 84-785 Dependents' Assistance Act of 1950, as Amended
- 84-830 Alaska Mental Health Enabling Act
- 84-831 Banks and Banking--Savings and Loan Association--Embezzlement
- 84-854 Pay Act of 1956--Federal Executive
- 84-856 Morocco--Relinquishment of Consular Jurisdiction
- 84-861 Grain Standards Act, as Amended--Penalty for Violation
- 84-864 Commodity Credit Corporation Charter Act, as Amended
- 84-867 Post Office--Sale or Pledge of Postage Stamps
- 84-870 Renegotiation Amendments Act of 1956
- 84-871 Indians--Theft of Tribal Property
- 84-874 Plants--Prohibit Transportation of Water Hyacinths
- 84-880 Social Security Act of 1956
- 84-896 Guam Organic Act--Application of Federal Laws
- 84-898 Servicemen's Readjustment Act of 1944, as Amended--Loans

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 84-905 Food, Drug, and Cosmetic Act, as Amended--Regulations
- 84-907 Wold-Chamberlain Air Field Claims
- 84-914 Communications Act of 1934, as Amended--Interlocking Directorates
- 84-919 Juries--Recording Proceedings of Grand and Petit Juries
- 84-925 Virgin Islands National Park
- 84-930 Refrigerators--Safety Devices
- 84-953 District of Columbia--Wages--Payment and Collection
- 84-970 States--Interstate Compacts
- 84-982 District of Columbia--Pawnbrokers
- 84-983 Kidnapping Act, as Amended
- 84-985 Communications Act of 1934, as Amended
- 84-1023 American Samoa Labor Standards Amendments of 1956
- 84-1028 Armed Forces and National Guard

85th Congress

- 85-36 Plant Pest Act, Federal
- 85-56 Veterans' Benefits Act of 1957
- 85-62 Universal Military Training and Service Act
- 85-87 District of Columbia Charitable Solicitation Act
- 85-94 District of Columbia Uniform Reciprocal Enforcement of Support Act
- 85-135 Interstate Commerce Commission Acts-Penalties
- 85-172 Poultry Products Inspection Act
- 85-209 Veterans' Benefits Act of 1957, Amendments

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 85-250 Food, Drug, and Cosmetic Act--Reexportation of Articles
- 85-254 D.C. Business Corporation Act, as Amended
- 85-268 Post Office--Injurious Nonmailable Matter
- 85-269 Privilege--Protection of Investigative Reports--Jencks Act
- 85-316 Immigration and Nationality Act, as Amended
- 85-334 District of Columbia Insurance Acts, Amendments
- 85-350 Great Lakes--Navigation Rules
- 85-375 Power or Train Brakes Safety Appliance Act of 1958
- 85-419 Canal Zone Code, as Amended--Destruction of Property--Penalties
- 85-441 Temporary Unemployment Compensation Act of 1958
- 85-444 Guam Organic Act, as Amended
- 85-506 Automobile Information Disclosure Act
- 85-508 Alaska--Admission into Union
- 85-510 National Science Foundation Act of 1950, as Amended
- 85-531 Immigration Act of 1924, as Amended
- 85-536 Small Business Act
- 85-577 Firearms--Civilian Personnel--Department of Defense
- 85-581 Seed Act, Federal, as Amended
- 85-604 International Claims Settlement Act of 1949, as Amended
- 85-615 Alaska--Indian Country
- 85-616 Immigration and Nationality Act, as Amended
- 85-619 Privilege--Records and Information

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 85-623 Switchblade Knives--Interstate Commerce
- 85-656 Vessels--Day Signals
- 85-688 Guam Organic Act, as Amended Sec. 31
- 85-699 Small Business Investment Act of 1958
- 85-700 Immigration and Nationality Act, as Amended
- 85-726 Federal Aviation Act of 1958
- 85-741 Sentencing Procedures--Split Sentences
- 85-742 Longshoremen's and Harbor Workers' Compensation Act, as Amended
- 85-752 Sentencing Procedures--Institutes, etc.
- 85-765 Animal--Humane Slaughter of Livestock
- 85-796 Obscenity--Obscene and Crime--Inciting Matter
- 85-836 Labor Welfare and Pension Plan Disclosure Act
- 85-839 Commodity Exchanges--Onion Futures
- 85-851 Virgin Islands--Revised Organic Act, as Amended
- 85-857 Veterans' Benefits
- 85-859 Excise Tax Technical Changes Act of 1958
- 85-897 Textile Fiber Products Identification Act
- 85-911 Boating Act, Federal, of 1958
- 85-919 Appeals--Interlocutory Orders
- 85-921 Counterfeiting
- 85-929 Food Additives Amendments of 1958
- 85-930 Renegotiation Act of 1951, as Amended

86th Congress

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 86-3 Hawaii--Statehood
- 86-129 Immigration and Nationality Act, as Amended
- 86-138 Judges--Allowances
- 86-139 Nematocide, Plant Regulator, Defoliant, and Desiccant  
Amendment
- 86-207 Fish--Black Bass Act, as Amended
- 86-219 District of Columbia--Fire and Closing-Out Sales
- 86-222 Veteran--Forfeiture of Benefits
- 86-230 Banks and Banking--National Banking Laws--Revision
- 86-234 Animals--Horses and Burros--Methods of Hunting
- 86-244 Coast Guard--Lifesaving Equipment--Regulation
- 86-256 Penitentiary Imprisonment--Consent
- 86-257 Labor-Management Report and Disclosure Act of 1959
- 86-258 United States Commissioners--Jurisdiction
- 86-259 Good Time Allowances
- 86-286 Penal Institutions--Acquisition of Land
- 86-291 Seal, Arms, Flag, and Other Insignia--Misuse by Collecting  
Agencies
- 86-299 Agriculture--Livestock Feed
- 86-320 Costs--Proceedings In Forma Pauperis
- 86-354 Credit Union Act, Federal, to Amend
- 86-429 Narcotics Manufacturing Act of 1960
- 86-513 Post Office--Disclosure on Circulation

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 86-519 Bankruptcy—Claims
- 86-531 District of Columbia Legal Aid Act
- 86-537 Food, Drug, and Cosmetic Act, as Amended
- 86-547 Animals—Humane Slaughter of Livestock
- 86-588 Cotton Statistics and Estimates Act, as Amended—Cotton Sampling
- 86-613 Hazardous Substances Labeling Act
- 86-618 Food—Color Additive Amendments of 1960
- 86-634 Indians—Destroying Indian Boundary Markers and Trespassing
- 86-648 Refugees—Resettlement
- 86-687 Agriculture—Grapes and Plums
- 86-691 Sentencing—Credit for Time in Custody Prior to the Imposition
- 86-695 Kickback Act, as Amended
- 86-701 Bankruptcy—Concealment of Assets
- 86-702 Fish and Game
- 86-708 D.C. Practical Nurses' Licensing Act
- 86-710 Explosives—Transportation, as Amended
- 86-715 D.C. Home Improvement Business Bonds
- 86-721 Soldiers and Sailors Civil Relief Act of 1940, as Amended
- 86-732 Migratory Bird Treaty Act, as Amended—Penalties
- 86-750 Investment Advisers Act of 1940, as Amended
- 86-752 Communications Act Amendments of 1960
- 86-777 Helium Act Amendments of 1960

87th Congress

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 87-6 Temporary Extended Unemployment Compensation Act of 1961
- 87-10 Nematocide, Plant Regulator, Defoliant, and Desiccant Amendment
- 87-19 Food Additives Transitions Provisions Amendment of 1961
- 87-27 Area Redevelopment Act
- 87-128 Agricultural Act of 1961
- 87-197 Federal Aviation Act of 1958, as Amended
- 87-216 Gambling—Transmission of Bets by Wire Communications
- 87-218 Gambling—Interstate Transportation of Wagering Paraphernalia
- 87-221 Commerce—Property Moving in Interstate Commerce
- 87-228 Anti-Racketeering—Enterprises
- 87-275 Arrest—Authority of GSA Special Policemen to Arrest
- 87-299 Pensions
- 87-301 Immigration and Nationality Act, as Amended
- 87-306 Malicious Mischief—Communications Facilities
- 87-318 D.C. Clergy—Privileged Communication
- 87-338 Aircraft and Motor Vehicles—Destruction—False Bomb Information
- 87-342 Firearms Act, Federal, to Amend
- 87-347 Mines and Minerals—Lead and Zinc Mining—Stabilization
- 87-354 Gold Labeling Act, as Amended
- 87-368 Fugitive Felon Act, as Amended
- 87-371 Stolen Property Act, as Amended—Counterfeiting—Tax Stamps
- 87-406 Guam—Interstate Compacts Relating to Enforcement of Criminal Laws.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 87-420 Labor—Welfare and Pension Plans Disclosure Act Amendments of 1962
- 87-423 D.C. Abolition of Mandatory Capital Punishment
- 87-444 Communications Act of 1934, as Amended—Oath Requirement
- 87-498 Poultry Products Inspection Act, as Amended
- 87-515 Export Control Act of 1949, as Amended
- 87-518 Animal Quarantine Act, as Amended—Livestock and Poultry Diseases
- 87-528 Federal Aviation Act of 1953, as Amended
- 87-562 Courts—Additional Judicial District of Florida
- 87-569 District of Columbia Nonprofit Corporation Act
- 87-581 Work Hours Act of 1962
- 87-637 Commerce—Hydraulic Brake Fluid—Safety Standards
- 87-667 Counterfeiting—Tokens, Slugs
- 87-669 Appeals—Supreme Court
- 87-703 Food and Agriculture Act of 1962
- 87-714 Fish and Game—National Fish and Wildlife Areas
- 87-722 Banks and Banking—Trust Powers
- 87-773 Stolen Property—Phonograph Records—Counterfeit Labels
- 87-781 Drug Amendments of 1962
- 87-797 U.S. Park Police—Disciplinary Action
- 87-807 D.C. Public Assistance Act of 1962
- 87-810 Federal Aviation Act of 1958, Amendment—Aircraft Accidents

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 87-814 Tuna Conventions Act of 1950, as Amended
- 87-829 Threats—Against Presidential Successors
- 87-835 National Science Foundation—Scholarships
- 87-837 District of Columbia—Insignia of Detective and Collection Agencies
- 87-840 Gambling Devices Act of 1962—Slot Machine Act, as Amended
- 87-849 Officers—Bribery, Graft, and Conflicts of Interest
- 87-869 Woods and Forests—Forest Service—Administration of Lands
- 87-877 Merchant Marine Act, as Amended
- 87-884 Birds—Protection of Golden Eagle
- 87-885 Immigration—Alien Skilled Specialists—Relatives
- 88th Congress
- 88-27 Venue—Offenses not Committed in any District
- 88-38 Equal Pay Act of 1963
- 88-57 District of Columbia—Insurance Licenses—False Statements
- 88-94 Foreign Service Building Act of 1926, as Amended
- 88-111 District of Columbia Business Corporation Act Amendments of 1963
- 88-139 Courts—District Courts—Terms—Sessions
- 88-183 Submerged Lands—Guam—Virgin Islands—American Samoa
- 88-200 Peace Corps Act, as Amended
- 88-201 Automobile—Seat Belts
- 88-202 Commission—Assassination Investigation—Authorizing Commission to Compel Attendance and Testimony of Witnesses, etc.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 88-264 Small Business Act, as Amended--Loans
- 88-305 Insecticide, Fungicide, and Rodenticide Act, as Amended--Economic Poisons--Labeling
- 88-308 Fish--Fishing in Territorial Waters of U.S.
- 88-316 Bribery in Sporting Contests
- 88-353 Credit Union Act, Federal, as Amended--Organization and Operations
- 88-391 Smithsonian Institution--Policing of Buildings and Grounds
- 88-452 Economic Opportunity Act of 1964
- 88-455 Criminal Justice Act of 1964
- 88-467 Securities Acts Amendments of 1964
- 88-493 Killing or Assaulting Federal Officers--Protecting Heads of Foreign States and Other Designated Officials
- 88-503 District of Columbia Securities Act
- 88-516 Standard Container Act of 1928, as Amended
- 88-520 Statute of Limitations--Reindictment
- 88-525 Food Stamp Act of 1964
- 88-537 Woods and Forests--National Forests and Grasslands--Enforcement of Regulations
- 88-563 Interest Equalization Tax Act
- 88-578 Land and Water Conservation Fund Act of 1965
- 88-582 Farm Labor Contractor Registration Act of 1963
- 88-585 Agriculture--Livestock Feed Program
- 88-597 District of Columbia Hospitalization of the Mentally Ill Act

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 88-619 Procedure--Judicial Procedure--Litigation with International Aspects
- 88-625 Food Additives Transitional Provisions Amendment of 1964
- 88-639 Public Lands--Lake Mead National Recreation Area--Administration
- 88-666 International Claims Settlement Act of 1949, as Amended--Claims Against Cuba

89th Congress

- 89-4 Appalachian Regional Development Act of 1965
- 89-24 District of Columbia--Parolees Under Supervision--Discharge
- 89-63 Export Control Act of 1949, as Amended
- 89-64 Aircraft and Motor Vehicles--Destruction--False Bomb Information
- 89-68 Anti-Racketeering--Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises--to Include Arson
- 89-74 Drug Abuse Control Amendments of 1965
- 89-81 Coinage Act of 1965
- 89-92 Cigarette, Federal, Labeling and Advertising Act
- 89-95 Explosives--Regulation of Pipelines
- 89-136 Public Works and Economic Development Act of 1965
- 89-141 Presidential Assassination--Penalties
- 89-152 Universal Military Training and Service Act of 1951, as Amended--Draft Cards--Destruction
- 89-163 Courts--Court Reporters--Recording of Proceedings
- 89-167 Courts--Court Reporters--Transcript Fees
- 89-176 Prisons--Rehabilitation of Federal Prisoners
- 89-184 Firearms Act, Federal, as Amended--Relief from Provisions of the Act

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 89-186 Presidents--Protection of Former Presidents and their Wives or Widows
- 89-197 Law Enforcement Assistance Act of 1965
- 89-216 Labor-Management Reporting and Disclosure Act of 1959, as Amended--Bonding Provisions
- 89-218 Arrests--Authority of Secret Service Agents
- 89-236 Immigration and Nationality Act, as Amended
- 89-242 Courts--Judicial Districts--South Carolina--Consolidation
- 89-267 Prisons--Transfer of Certain Canal Zone Prisoners
- 89-272 Clean Air Act, as Amended
- 89-277 District of Columbia Correctional Officers--Assault Penalty
- 89-318 President--John F. Kennedy Assassination--Preservation of Evidence
- 89-347 District of Columbia--Amending and Clarifying Certain Criminal Laws
- 89-372 Judges--Additional Circuit and District Judges
- 89-402 District of Columbia--Superintendent of Insurance--Domestic Stock Insurance Company--Rules and Regulations
- 89-465 Bail Reform Act of 1966
- 89-487 Administrative Procedure Act, as Amended--Public Information Availability
- 89-519 District of Columbia Bail Agency Act
- 89-544 Animals--Transportation of Dogs, Cats, etc., for Research Purposes
- 89-551 Oil Pollution Act, as Amended

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 89-554 Government Organization and Employees--Enactment of 5 U.S.C.
- 89-577 Federal Metal and Nonmetallic Mine Safety Act
- 89-578 District of Columbia Certified Public Accountancy of 1966
- 89-590 Habeas Corpus--Jurisdiction and Venue
- 89-654 Thefts from Pipelines
- 89-669 Fish and Wildlife--Conservation and Protection
- 89-684 District of Columbia Minimum Wage Amendments Act of 1966
- 89-689 Public Works Appropriation Act of 1967
- 89-695 Financial Institutions Supervisory Act of 1966
- 89-702 Fur Seal Act of 1966
- 89-707 Indians--Offenses Committed in Indian Country
- 89-711 Habeas Corpus--State Custody
- 89-732 Immigration and Nationality Act, as Amended--Cuban Refugees--  
Adjustment of Status
- 89-753 Clean Water Restoration Act of 1966
- 89-775 District of Columbia--Child Abuse--Reporting Requirement
- 89-776 District of Columbia--Reporting of Injuries Caused by Firearms
- 89-793 Narcotic Addict Rehabilitation Act of 1966
- 89-798 Law Enforcement Assistance Act of 1965, as Amended
- 89-801 National Commission on Reform of Federal Criminal Laws
- 89-803 District of Columbia Work Release Act
- 89-807 Seal, Arms, Flag, and Other Insignia--Great Seal of United  
States--Use of Likenesses Prohibited
- 89-809 Foreign Investors Tax Act of 1966 and Presidential Election  
Campaign Fund Act of 1966

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

90th Congress

- 90-19 Housing Laws, Amendments--Nomenclature Changes Reflecting Creation of HUD
- 90-23 Administrative Procedure Act--Public Information--Codification of Pub. L. No. 89-487
- 90-40 Military Selective Service Act of 1967
- 90-16 National Advisory Commission on Civil Disorders--Subpoena Power
- 90-83 Government Organization and Employees--Amendment of 5, 14, 37 U.S.C.
- 90-100 Commission on Obscenity and Pornography
- 90-108 Capitol Buildings and Grounds--Security
- 90-123 Obstruction of Criminal Investigations
- 90-148 Air Quality Act of 1967
- 90-174 Partnership for Health Amendments of 1967
- 90-201 Wholesome Meat Act
- 90-203 Banks and Banking--to Prohibit Participation in Certain Gambling Activities
- 90-219 Judicial Center--Establishment
- 90-222 Economic Opportunity Amendments of 1967
- 90-226 D.C. Crime and Criminal Procedure
- 90-255 Savings and Loan Company Amendments of 1967
- 90-258 Commodity Exchange Act, Amendment
- 90-274 Jury Selection and Service Act of 1968
- 90-284 Civil Rights Act

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 90-291 Law Enforcement Officers--Injury or Death Benefits--Eligibility
- 90-299 Communications Act of 1934, Amendment--Obscene or Harassing Telephone Calls--Prohibition
- 90-321 Consumer Credit Protection Act
- 90-331 Presidential Candidates--Secret Service Protection
- 90-350 Appropriations Act of 1969--Treasury, P.O., and Exec. Off.
- 90-351 Omnibus Crime Control and Safe Streets Act of 1968
- 90-353 Post Office--Postage Stamps--Reproductions
- 90-357 Canal Zone Code, Amendments
- 90-381 Seal, Arms, Flag, and Other Insignia--Flag Desecration
- 90-384 Post Office--Employees--Prosecution for Embezzlement
- 90-389 Bank Protection Act of 1968
- 90-399 Animal Drug Amendments of 1968
- 90-413 Post Office--Letter-Carrier Uniforms
- 90-421 International Claims Settlement Act of 1949, Amendment
- 90-439 Securities Exchange Act of 1934, Amendment
- 90-440 District of Columbia Air Pollution Control Act
- 90-441 District of Columbia--Disorderly and Obscene Acts--Prosecution
- 90-448 Housing and Urban Development Act of 1968--Title XIV, Interstate Land Sales Full Disclosure Act
- 90-449 Post Office--Employees--Disciplinary Action
- 90-452 District of Columbia Alcoholic Rehabilitation Act of 1967
- 90-481 Natural Gas Pipeline Safety Act of 1968

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 90-487 Grain Standards Act
- 90-492 Wholesome Poultry Products Act
- 90-496 Virgin Island Elector Governor Act
- 90-518 Intoxicating Liquors—Interstate Shipments—Bill of Lading Requirements
- 90-535 Forgery—Forged Traveler's Checks—Transportation
- 90-543 National Trails System Act
- 90-560 Motor Vehicle Master Keys—Mailing—Regulation
- 90-578 Federal Magistrates Act
- 90-587 D.C. Government—Police Mutual Aid Agreements
- 90-618 Gun Control Act of 1968
- 90-632 Military Justice Act of 1968
- 90-639 Food, Drug, and Cosmetic Act, as Amended—LSD and Other Depressant and Stimulant Drugs—Possession, Restriction

91st Congress

- 91-128 Interest Equalization Tax Extension Act of 1969
- 91-135 Endangered Species Conservation Act of 1969
- 91-138 Federal Contested Election Act
- 91-173 Federal Coal Mine Health and Safety Act of 1969
- 91-184 Export Administration Act of 1969
- 91-222 Public Health Cigarette Smoking Act of 1969
- 91-224 Water Quality Improvement Act of 1970
- 91-232 District of Columbia Bail Agency Act, Amendment
- 91-258 Airport and Airway Development and Revenue Acts of 1970

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 91-266 District of Columbia--Debt Adjusting--Prohibition
- 91-281 Library of Congress--Buildings and Grounds, Amendment
- 91-300 Defense Production Act Amendment of 1970
- 91-303 National Aeronautics and Space Administration Authorization Act of 1971
- 91-316 Clean Air Act and Solid Waste Disposal Act, Amendments
- 91-339 Federal Youth Corrections Act, Amendment
- 91-342 Federal Meat Inspection Act, Amendment
- 91-351 Emergency Home Finance Act of 1970
- 91-358 District of Columbia--Court Reform and Criminal Procedure Act of 1970
- 91-359 Government Printing Office--Special Policemen--Designation
- 91-366 Gold Labeling Act, Amendment
- 91-375 Postal Reorganization Act
- 91-379 Defense Production Act of 1950, Amendment
- 91-383 National Park System--Administration
- 91-419 United States--Protection of Insignia--Johnny Horizon
- 91-439 Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act of 1971
- 91-447 United States Courts--Defendant Representation
- 91-448 United States Postage Meter Stamps--Counterfeiting--Prohibition
- 91-449 Federal Aviation Act of 1958, Amendment--Implementation of Convention on Offense and Certain Other Acts Committed on Board Aircraft
- 91-452 Organized Crime Control Act of 1970

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 91-468 Federal and State Credit Unions--Insurance
- 91-492 Residential Community Treatment Centers
- 91-497 District of Columbia--Offenses Against Hotels, Motels, and Commercial Lodgings
- 91-508 Federal Deposit Insurance Act, to Amend
- 91-513 Comprehensive Drug Abuse Prevention and Control Act of 1970
- 91-523 State Jurisdiction in Indian Country
- 91-528 American Revolution Bicentennial Commission, Amendment
- 91-538 Interstate Agreement on Detainers Act
- 91-540 Horse Protection Act of 1970
- 91-543 Federal Jurors--Duty, Service of Summons
- 91-545 United States District Courts--Transcript Fees
- 91-577 Plant Variety Protection Act
- 91-579 Animal Welfare Act of 1970
- 91-596 Occupational Safety and Health Act of 1970
- 91-597 Egg Products Inspection Act
- 91-598 Securities Investor Protection Act of 1970
- 91-609 Housing and Urban Development Act of 1970
- 91-644 Omnibus Crime Control Act of 1970
- 91-650 District of Columbia Revenue Act of 1970
- 91-651 Seals of the U.S., President, Vice President--Certain Uses Prohibited
- 91-657 District of Columbia--Practice of Psychology Act

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 91-662 Contraceptives--Importation, Transportation, Mailing--Prohibition  
Removed
- 91-670 Agricultural Adjustment Act, Amendment
- 91-671 Food Stamp Act of 1964, Amendment
- 91-679 Internal Revenue Code of 1954, Amendment--Joint Returns--  
Liability

92nd Congress

- 92-24 Additional Assistant U.S. Attorney for the Virgin Islands
- 92-67 Egg Products Inspection Act, to Amend
- 92-75 Boating Safety Act
- 92-128 Detention Camps--Prohibition
- 92-129 Selective Service Act, to Amend
- 92-140 Piracy of Recordings--Prohibition
- 92-159 Hunting from Aircraft--Prohibition
- 92-178 Revenue Act of 1971
- 92-184 Supplemental Appropriations Act of 1972, Section 902--Dissemina-  
tion of Records
- 92-191 Dangerous Materials in the Mails--Prohibition
- 92-195 Wild Horse Protection Act
- 92-196 District of Columbia Revenue Act
- 92-203 Alaska Land Claims
- 92-205 Weather Modification Act
- 92-219 Atlantic Salmon
- 92-220 District of Columbia--Elections

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 92-225 Federal Election Campaign Act of 1971
- 92-255 Drug Abuse Office and Treatment Act of 1971
- 92-293 Narcotic Addicts—Care—Probation, Parole, or Release
- 92-340 Ports and Waterways Safety Act of 1972
- 92-347 Golden Eagle Passport Program
- 92-359 Automobile Information Disclosure Act, to Amend
- 92-416 Shipping Act of 1916 and Intercoastal Shipping Act of 1933, to Amend
- 92-420 Narcotic Addict Rehabilitation Amendments of 1971
- 92-430 Postal Money Orders—Counterfeiting and Forgery
- 92-471 North Pacific Fisheries Act, to Amend
- 92-502 Hunting from Aircraft—Prohibition, to Amend
- 92-507 Federal Ship Financing Act of 1972
- 92-513 Motor Vehicle Information and Cost Savings Act
- 92-516 Federal Environmental Pesticide Control Act of 1972
- 92-522 Marine Mammal Protection Act of 1972
- 92-535 Bald Eagle Protection Act, to Amend
- 92-539 Act for the Protection of Foreign Officials and Official Guests of the United States
- 92-576 Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972
- 92-578 Pennsylvania Avenue Development Corporation Act of 1972
- 92-587 Imports—Pre-Columbian Art
- 92-603 Social Security Amendments of 1972

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

93rd Congress

- 93-12 Federal Rules of Evidence, Civil Procedure, and Criminal Procedure--Effectiveness Suspended
- 93-43 National Cemeteries Act of 1973
- 93-83 Crime Control Act of 1973
- 93-95 Labor Management Relations Act of 1947, Amendment
- 93-115 International Voyage Load Line Act of 1973
- 93-147 Debt Collection--Use of Federal Symbols--Prohibition
- 93-172 U.S. District Court for the District of Columbia--Grand Jury--Extension
- 93-179 American Revolution Bicentennial Administration-- Establishment
- 93-203 Comprehensive Employment and Training Act of 1973
- 93-205 Endangered Species Act of 1973
- 93-209 Federal Prisoners--Confinement Limits--Extension
- 93-253 Federal Law Enforcement Officers--Tort Claims [Reorganization Plan No. 2 of 1973, Amendments]
- 93-288 Disaster Relief Act of 1974
- 93-300 Migratory Bird Treaty Act, Amendments
- 93-318 Seal, Arms, Flag, and Other Insignia--Woodsey Owl and Smokey Bear
- 93-366 Federal Aviation Act of 1958, Amendments--Antihijacking Act of 1974
- 93-376 District of Columbia--Campaign Finance Reform and Conflict of Interest Act
- 93-387 Council on Wage and Price Stability Act
- 93-388 District of Columbia--Holding Company System Regulatory Act

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 93-406 Employee Retirement Income Security Act of 1974
- 93-412 District of Columbia--Criminal Justice Act
- 93-415 Juvenile Justice and Delinquency Prevention Act of 1974
- 93-443 Federal Election Campaign Amendments of 1974
- 93-452 Military and Public Lands--Conservation and Rehabilitation Program
- 93-463 Commodity Futures Trading Commission Act of 1974
- 93-479 Foreign Investment Study Act of 1974
- 93-481 Controlled Substances Act, Amendment
- 93-495 Federal Deposit Insurance Act, Amendment
- 93-499 Wagering Tax, Amendment
- 93-502 Freedom of Information Act, Amendment
- 93-512 Judges--Disqualification
- 93-573 Sound Recordings--Copyrights--Piracy, Amendments
- 93-579 Privacy Act of 1974
- 93-583 Lotteries, Amendment--State Conducted Lotteries
- 93-595 Federal Rules of Evidence--Establishment
- 93-609 Omnibus Crime Control and Safe Street Act of 1968, Amendments--National Commission for the Review of Federal and State Laws on Wiretapping and Electronic Surveillance--Extended
- 93-611 Striking of Medals
- 93-618 Trade Act of 1974
- 93-619 Speedy Trial Act of 1974
- 93-629 Federal Noxious Weed Act of 1974

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 93-638 Indian Self-Determination and Education Assistance Act
- 93-639 Organized Crime Control Act of 1970, Amendment--Explosives
- 93-644 Headstart, Economic Opportunity, and Community Partnership Act of 1974

94th Congress

- 94-64 Federal Rules of Criminal Procedure Amendments Act of 1975
- 94-73 Voting Rights Act Amendments of 1975
- 94-113 Federal Rules of Evidence, to Amend
- 94-149 Federal Rules of Evidence and Criminal Procedure, to Amend
- 94-163 Energy Policy and Conservation Act
- 94-233 Parole Commission and Reorganization Act
- 94-265 Fishery Conservation and Management Act
- 94-279 Animals Welfare Act Amendments of 1967
- 94-283 Federal Election Campaign Act Amendments of 1967
- 94-297 Indian Crimes Act of 1976
- 94-310 Federal Employees--Court Leave
- 94-319 Honeybees--Importation--Limitation
- 94-321 Armed Forces--Members and Dependents--Release of Information
- 94-339 Emergency Food Stamp Vendor Accountability Act of 1976
- 94-344 United States Flag--Display and Use--No Criminal Penalties
- 94-345 Canal Zone--Alcoholic Beverages--Regulations
- 94-349 Federal Rules of Procedure, Amendments--Delay of Effective Date
- 94-359 Endangered Species Act of 1973, to Amend

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 94-360 Horse Protection Act Amendments of 1970
- 94-408 Protection of Spouses of Presidential and Vice Presidential Nominees
- 94-426 Federal Rules of Procedure, Amendment
- 94-429 National Park System--Mining Activity--Regulation
- 94-450 Gold Labeling Act of 1976
- 94-453 Political Contributions--Employment Deprivation--Prohibition
- 94-455 Tax Reform Act of 1976
- 94-458 National Park System--Administration
- 94-467 Prevention and Punishment of Crimes Against Internationally-Protected Persons
- 94-469 Toxic Substances Control Act
- 94-472 International Investment Survey Act of 1976
- 94-482 Education Amendments of 1976
- 94-521 Mid-Decade Census Population
- 94-525 Lottery Prohibitions--Media
- 94-526 District of Columbia--Unauthorized Use of Motor Vehicle
- 94-550 Federal Proceedings--Use of Unsworn Declaration
- 94-553 Copyrights
- 94-577 United States Magistrates--Jurisdiction
- 94-582 United States Grain Standards Act of 1976

95th Congress

- 95-78 Federal Rules of Criminal Procedure
- 95-87 Surface Mining Control and Reclamation Act of 1977

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 95-91 Department of Energy Organization Act
- 95-142 Medicare-Medicaid Anti-Fraud and Abuse, Amendment
- 95-144 Treaties for the Transfer of Offenders to or from Foreign Countries
- 95-157 District Court for the Northern Mariana Islands
- 95-164 Federal Mine Safety and Health Amendment Act of 1977
- 95-213 Foreign Corrupt Practices Act of 1977
- 95-225 Sexual Exploitation of Children
- 95-239 Black Lung Benefits Reform Act of 1977
- 95-283 Securities Investor Protection Amendments of 1978
- 95-360 Fraudulent Solicitations Through the Mails
- 95-396 Federal Pesticide Act of 1978
- 95-405 Futures Trading Act of 1978
- 95-410 Customs Procedural Reform and Simplification Act of 1978
- 95-439 Animal and Plant Quarantines Act
- 95-445 Humane Methods of Slaughter Act of 1978
- 95-452 Inspector General Act of 1978
- 95-458 Internal Revenue Code of 1954, Amendments--Home Production of Beer and Wine
- 95-474 Port and Tanker Safety Act of 1978
- 95-511 Foreign Intelligence Surveillance Act of 1978
- 95-521 Ethics in Government Act of 1978--Special Prosecutor
- 95-535 United States Courts--Fees, Per Diem, and Mileage Expenses for Witnesses

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 95-540 Privacy Protection for Rape Victims Act of 1978
- 95-549 Immigration and Nationality Act, Amendment
- 95-559 Health Maintenance Organization Amendment of 1978
- 95-574 Federal Railroad Safety Authorized Act of 1978
- 95-575 Cigarettes Sale and Distribution Racketeering Elimination
- 95-579 Immigration and Nationality Act, Amendment
- 95-610 Armed Forces--Union Organizations Prohibitions
- 95-616 Fish and Wildlife Improvement Act of 1978
- 95-620 Powerplant and Industrial Fuel Use Act of 1978
- 95-630 Financial Institutions Regulatory and Interest Rate Control Act of 1978
- 95-633 Psychotropic Substance Act of 1978

96th Congress

- 96-3 Repeal a Section of Pub. L. No. 95-630
- 96-19 Ethics in Government Act of 1978, Amendment
- 96-28 Ethics in Government Act of 1978, Amendment
- 96-42 Federal Rules of Procedure and Evidence—Delay of Effective Date
- 96-43 Speedy Trial Act Amendments of 1979
- 96-70 Panama Canal Act of 1979
- 96-72 Export Administration Act of 1979
- 96-82 Federal Magistrate Act of 1979
- 96-90 Lottery Material Transportation or Mailing to a Foreign Country
- 96-95 Archaeological Resources Protection Act of 1979

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 96-129 Pipeline Safety Act of 1979
- 96-157 Justice System Improvement Act of 1979
- 96-174 White House Fellows and Executive Exchange Program
- 96-187 Federal Election Campaign Act Amendments of 1979
- 96-193 Aviation Safety and Noise Abatement Act of 1979
- 96-212 Refugee Act of 1980
- 96-223 Crude Oil Windfall Profit Tax Act of 1980
- 96-226 General Accounting Office Act of 1980
- 96-227 Trade Between Indians and Certain Federal Employees
- 96-283 Deep Seabed Hard Mineral Resources Act
- 96-294 Energy Security Act
- 96-295 Nuclear Regulatory Commission Appropriation Authorization
- 96-296 Motor Carrier Act of 1980
- 96-320 Ocean Thermal Energy Conversion Act of 1980
- 96-329 Presidential and Vice Presidential Spouses
- 96-350 Coast Guard Enforcement of Importation Laws
- 96-359 Infant Formula Act of 1980
- 96-374 Education Amendments of 1980
- 96-420 Maine Indian Claims Settlement Act of 1980
- 96-423 Federal Railroad Safety Authorization Act of 1980
- 96-433 Brokers and Dealers' Customers--Increased Protection--Financial Privacy--Applicability to SEC
- 96-440 Privacy Protection Act of 1980

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 96-453 Maritime Education and Training Act of 1980
- 96-456 Classified Information Procedure Act
- 96-466 Veteran's Rehabilitation and Education Amendments of 1980
- 96-468 Swine Health Protection Act
- 96-478 Act to Prevent Pollution from Ships
- 96-482 Solid Waste Disposal Act Amendments of 1980
- 96-507 Communications Act of 1934, Amendment, Repeal
- 96-509 Juvenile Justice Amendments of 1980
- 96-611 Social Security Act, Amendment--Parental Kidnapping Prevention

97th Congress

- 97-79 Lacey Act Amendments of 1981
- 97-86 Department of Defense Authorization Act, 1982—Posse Comitatus
- 97-89 Intelligence Authorization Act for Fiscal Year 1982
- 97-96 National Aeronautics and Space Administration Authorization Act, 1982
- 97-98 Agriculture and Food Act of 1981
- 97-116 Immigration and Nationality Act Amendments of 1981
- 97-123 Social Security Act, Amendment
- 97-143 United States Capitol Police—Authority
- 97-145 Export Administration Amendments Act of 1981
- 97-171 U.S. Government Officer or Employee Injured During an Assassination Attempt—Contributions
- 97-180 Piracy and Counterfeiting Amendments Act of 1982

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- 97-200 Intelligence Identities Protection Act of 1982
- 97-248 Tax Equity and Fiscal Responsibility Act of 1982
- 97-258 Money and Finance
- 97-259 Communications Act of 1934, Amendment
- 97-267 Pretrial Services Act of 1982
- 97-271 Virgin Islands Nonimmigrant Alien Adjustment Act of 1981
- 97-285 Cabinet Officers' Assault
- 97-291 Victim and Witness Protection Act of 1982
- 97-295 10, 14, 37, 38 U.S.C.
- 97-297 Threats Against Former Presidents and Certain Other Persons
- 97-298 Anti-Arson Act of 1982
- 97-300 Job Training Partnership Act
- 97-303 Securities and Exchange Commission—Jurisdiction
- 97-308 Certain Persons Protected by U.S. Secret Service
- 97-312 Department of Agriculture—Certain Employees' Firearm Authority
- 97-322 Coast Guard Authorization Act for Fiscal Year 1982
- 97-351 Convention on Physical Protection of Nuclear Material  
Implementation Act of 1982
- 97-352 Perishable Agricultural Commodities Act of 1930, Amendment
- 97-359 Immigration and Nationality Act, Amendment—Certain Children of  
U.S. Citizens—Admission
- 97-364 Alcohol Traffic Safety Programs and National Drive Register
- 97-377 Continuing Appropriations for Fiscal Year 1983
- 97-389 Fisheries Amendments of 1982

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 97-390 Supreme Court Police--Appointment and Authority
- 97-396 Conservation Programs on Military Reservations and Public Lands--  
Fiscal Years 1983-1985
- 97-398 False Identification Crime Control Act of 1982
- 97-404 Job Training Partnership Act, Amendment
- 97-409 Ethics in Government Act Amendments of 1982
- 97-415 Nuclear Regulatory Commission Appropriations Authorization
- 97-424 Surface Transportation Assistance Act of 1982
- 97-432 Plant Quarantine Act, Amendment
- 97-439 Federal Seed Act Amendments of 1982
- 97-444 Futures Trading Act of 1982
- 97-449 Department of Transportation and Motor Carrier Safety
- 97-451 Federal Oil and Gas Royalty Management Act of 1982
- 97-453 Fishery Conservation and Management--Improvement
- 97-457 Certain Banking and Related Statutes--Technical Corrections
- 97-461 Plant, Livestock, and Poultry Diseases--Civil Penalties for  
Introduction and Dissemination
- 97-470 Migrant and Seasonal Agricultural Workers Protection Act

98th Congress

- 98-38 Securities Exchange Act of 1934, Amendment
- 98-63 Supplemental Appropriations Act, 1983
- 98-89 Shipping, Enactment as Subtitle II of Title 46, United States Code
- 98-127 Federal Anti-Tampering Act

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 98-150 Ethics in Government Act of 1978, Amendment
- 98-151 Further Continuing Appropriations for Fiscal Year 1984
- 98-186 Mail Order Consumer Protection Act of 1983
- 98-214 Federal Communications Commission Authorization Act of 1983
- 98-292 Child Protection Act of 1984
- 98-305 Controlled Substance Registrant Protection Act of 1984
- 98-329 Drug and Drug Abuse
- 98-368 Amendment to the President's Commission on Organized Crime
- 98-375 Christopher Columbus Quincentenary Jubilee Act
- 98-376 Insider Trading Sanctions Act of 1984
- 98-378 Child Support Enforcement Amendments of 1984
- 98-426 Longshore and Harbor Workers' Compensation Act Amendments of 1984
- 98-445 Eastern Tuna Licensing Act of 1984
- 98-473 Comprehensive Crime Control Act of 1984
- 98-499 Aviation Drug-Trafficking Control Act
- 98-507 National Organ Transplant Act
- 98-533 1984 Act to Combat International Terrorism
- 98-547 Motor Vehicle Theft Law Enforcement Act of 1984
- 98-549 Cable Communications Policy Act of 1984
- 98-554 Tandem Truck Safety Act of 1984
- 98-557 Coast Guard Authorization Act of 1984
- 98-567 Cigarette Safety Act of 1984
- 98-587 Amendment of Title 18 of the United States Code
- 98-596 Criminal Fine Enforcement Act of 1984



B49

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

December 31, 1985  
(Expires May 31, 1986)

TO: Holders of United States Attorneys' Manual Title 9  
FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Policy Limitations on Institutions of Proceedings-  
Internal Security Matters

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.  
4. Remove bluesheet dated March 21, 1984, affecting  
USAM 9-2.132.

AFFECTS: USAM 9-2.132

PURPOSE: This bluesheet is an extension of the policy that cases involving internal security, the national security, or foreign relations shall not be instituted without the express authorization of the Criminal Division or higher authority.

The following should be substituted for the material at USAM 9-2.132:

9-2.132 Internal Security Matters

A. Statutory Violations - Consultation Requirements

Prosecution of a case involving internal security, the national security or foreign relations shall not be instituted without the express authorization of the Criminal Division or higher authority.

Such authorization is required if the offense involves a violation of the following:

1. Advocacy of Violent Overthrow of Government (18 U.S.C. §2385); and related statutes (18 U.S.C. Chapter 115), see USAM 9-90.910;
2. Atomic Energy Act (42 U.S.C. §§2274-2278 and §2284, and certain violations of 42 U.S.C. §§2011-2273 and §§2280-2283) [AG approval is required for prosecutions brought pursuant to 42 U.S.C. §§2273-2276], see USAM 9-90.100 et seq.;
3. Espionage (18 U.S.C. §§792-799, and 50 U.S.C. §783), see USAM 9-90.300 et seq.;
4. Foreign Relations and Neutrality (18 U.S.C. §§951-969), see USAM 9-90.830;
5. Arms Export Control Act (22 U.S.C. §2778), see USAM 9-90.500 et seq.;
6. Export Administration Act (50 U.S.C. App. §§2401-2420), see USAM 9-90.500 et seq.;
7. Travel control of citizens during war or national emergency (8 U.S.C. §1185(b), 18 U.S.C. §§1542-1544), see USAM 9-90.840;
8. Rebellion or Insurrection (18 U.S.C. §2383), see USAM 9-90.820;
9. Registration of Certain Organizations (Voorhis Act, 18 U.S.C. §2386), see USAM 9-90.600 et seq.;
10. Registration of Foreign Agents (22 U.S.C. §§611 et seq., 18 U.S.C. §219), see USAM 9-90.600 et seq.;
11. Registration of Person Who has Knowledge, Received Training in Espionage, etc. (50 U.S.C. §§851-857), see USAM 9-90.600 et seq.;
12. Sabotage (18 U.S.C. §§2151-2157), see USAM 9-90.810;
13. Trading with Enemy Act (50 U.S.C. App. §5(b)), see USAM 9-90.500 et seq.;
14. Treason (18 U.S.C. §2381), see USAM 9-90.920;
15. International Emergency Economic Powers Act (50 U.S.C. §§1701-1706), see USAM 9-90.500 et seq.;

16. Disclosure of Identities of Covert Agents (Intelligence Identities Protection Act, 50 U.S.C. §§421-426), see USAM 9-90.700;

17. Computer Espionage (18 U.S.C. §1030(a)(1)), see USAM 9-90.330;

18. Contempt of Congress (2 U.S.C. §192), see USAM 9-90.200;

19. Seditious Conspiracy (18 U.S.C. §2384), see USAM 9-90.860.

Prior authorization is required if any of the above statutes are incidentally involved as, for example, where the violation is being an accessory after the fact, harboring, jumping bail, or obstructing justice.

B. Classified Information Procedures Act (CIPA)

The Internal Security Section is responsible for the implementation of the Classified Information Procedures Act (18 U.S.C. App. (Supp. V. 1981)), and is to be consulted in any case in which there is a possibility that classified information will be disclosed in litigation or will play a role in any prosecutive decision. See generally, USAM 9-90.940 et seq.

C. Foreign Intelligence Surveillance Act (FISA)

See USAM 9-60.400 et seq.

D. Discovery of Electronic Surveillance Involving National Security Information (18 U.S.C. §3504)

See USAM 9-7.570.

E. Pre-Indictment Use of Classified Information

See USAM 9-90.942.



U.S. Department of Justice

Executive Office for United States Attorneys

---

Washington, D.C. 20530

June 4, 1986

(Expires November 4, 1986)

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

*sw* Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Investigative and Prosecutive Policy for  
Acts of International Terrorism

NOTE: 1. This is issued pursuant to 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert after USAM 9-2.135.

AFFECTS: USAM 9-2.136

PURPOSE: This bluesheet implements a new investigative and prosecutive policy regarding violations of federal criminal law outside of the United States by terrorists.

---

The following is a new section:

9-2.136 Investigative and Prosecutive Policy for International  
Terrorism Matters

Faced with the growing threat of international terrorism and in order to implement this nation's obligations under various international conventions designed to prevent and punish acts of terrorism, Congress has enacted significant new legislation to expand the jurisdiction of the United States to investigate and prosecute terrorist activities occurring outside the territorial jurisdiction of the United States. In view of the greatly expanding federal criminal jurisdiction over international terrorist incidents and the obvious need to ensure a well-coordinated federal response to such incidents, the following policy is established in regard to terrorist acts committed outside the territorial jurisdiction of the United States over which federal criminal jurisdiction exists. No United States Attorney is to initiate a criminal investigation,

commence grand jury proceedings, file an information or complaint, or seek the return of an indictment in matters involving overseas terrorism without the express authorization of the Assistant Attorney General of the Criminal Division. Overseas terrorist situations will undoubtedly entail coordination with one or more foreign governments and such coordination is best accomplished by and through the Department in consultation with the Department of State. Moreover, the uncertainty of venue for federal crimes committed overseas (see 18 U.S.C. 3238) requires a coordinated prosecutive response.

Communications from the U.S. Attorney requesting the necessary authorization for international terrorism matters shall be directed to the General Litigation and Legal Advice Section (FTS 724-6948 or 724-7083). After business hours, the Chief of the Section, Lawrence Lippe, can be reached by calling the main Department of Justice operator at FTS 633-2000 and asking that he be paged. If there is any question about whether the matter involves international terrorism, all doubt should be resolved in favor of consultation with the General Litigation and Legal Advice Section. If the substantive offense is within the area of responsibility of another Section of the Criminal Division (e.g., Murder for Hire - Organized Crime Section; Arms Export Control Act - Internal Security Section), the General Litigation and Legal Advice Section will coordinate the matter with that Section.

Listed below are the key statutes which represent the intent of Congress to expand the jurisdiction of the United States to investigate and prosecute terrorist activities outside the territory of the United States and describe the various federal criminal offenses (including conspiracy, 18 U.S.C. 371, 1117) that overseas terrorists may commit:

1. Aircraft Piracy and Related Offenses (49 U.S.C. App. 1472 (i-n)): Pursuant to The Hague Convention, the Federal Aviation Act of 1958 prohibits the seizure, by force or violence, of any aircraft within the special aircraft jurisdiction of the United States, 1/ interference with

---

1/ The definition of "special aircraft jurisdiction of the United States" is found at 49 U.S.C. App. 1301 (38). To be within the "special aircraft jurisdiction of the United States" the aircraft must be "in flight." Among the aircraft covered are all United States civilian and military aircraft (anywhere in the world as long as they are "in flight"), foreign aircraft within the territorial jurisdiction of the United States, and certain foreign civil aircraft that land in the United States after certain crimes have been committed aboard the aircraft while it was in flight outside of the United States.

flight crew members while aboard such aircraft, the carrying of concealed weapons or explosives aboard such aircraft, and the commission of certain crimes, including murder (18 U.S.C. 1111), manslaughter (18 U.S.C. 1112), maiming (18 U.S.C. 114), rape (18 U.S.C. 2031), assault (18 U.S.C. 113) and robbery (18 U.S.C. 2111), while aboard such aircraft. The Act also empowers the United States to prosecute aircraft piracy outside the special aircraft jurisdiction of the United States if the foreign civil aircraft was in flight at the time of its hijacking and if the hijacker is subsequently found in the United States after the air piracy. The Federal Aviation Act authorizes the Government to seek the death penalty if the death of another person results from aircraft piracy as defined in this statute. Aircraft piracy is currently the only federal offense for which there is a constitutional mechanism for imposing the death penalty. See 49 U.S.C. App. 1473(c). See also, USAM 9-63.100, infra.

2. Aircraft Sabotage (18 U.S.C. 32): Amendments to 18 U.S.C. 32 enacted in 1984 expand United States jurisdiction over aircraft sabotage to include destruction of any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated or employed in interstate, overseas, or foreign air commerce. This statute now also makes it a federal offense to commit an act of violence against any person on the aircraft, not simply crew members, if the act is likely to endanger the safety of the aircraft. In addition, the United States is now obliged under the statute to prosecute any person who destroys a foreign civil aircraft outside of the United States if the offender is later found in the United States. See USAM 9-63.200, infra.
3. Crimes Against Immediate Family of a High Ranking Federal Official (18 U.S.C. 115): The United States now has jurisdiction to prosecute the murder, kidnaping or assault of a member of the immediate family of certain federal officials where such crimes are committed with the intent to interfere with those federal officials in the performance of their duties or are committed to retaliate against those officials for the performance of their duties. The immediate family members of the President, Vice President, Members of Congress, all federal judges, the heads of Executive agencies, the Director of the CIA and federal law enforcement officials are covered by this statute. See USAM 9-65.900, infra.
4. Crimes Against Internationally Protected Persons (18 U.S.C. 112, 878, 1116, 1201(a)(4)): Enacted to implement United States treaty obligations under two international

conventions concerning terrorist acts that threaten the maintenance of normal international relations, federal statutes specifically protect any Chief of State, head of government or Foreign Minister and their families when they are out of their own country. As a general rule, they also protect diplomatic personnel protected by the Vienna Conventions while they are out of their own country. Whoever murders, kidnaps, assaults or threatens internationally protected persons can be prosecuted by the United States, whether or not the offense was committed in the United States and regardless of the nationality of either the victim or the offender, if the United States is able to obtain personal jurisdiction over the offender. See USAM 9-65.800, infra.

5. Crimes Against Select United States Officials (18 U.S.C. 111, 351, 1114, 1201(a)(5), 1751): The United States has jurisdiction to prosecute the murder, kidnaping or assault of its major Government officials: the President and his staff, the Vice President and his staff (§ 1751), Members of Congress, Supreme Court Justices, the heads of Executive Departments and their second in command, the Director and Deputy Director of the CIA (§ 351), and designated law enforcement officials (§§ 111, 1114, 1201). In 1984, 18 U.S.C. 1114 was amended to expand the group of protected federal officials to include intelligence officials and additional law enforcement personnel. The Attorney General was also empowered by this amendment to promulgate regulations to add other federal employees to the group of protected employees. See USAM 9-65.100, .300, .600, and .700, infra.
6. Crimes Committed Within the Special Maritime Jurisdiction of the United States (18 U.S.C. 7, 113, 114, 1111, 1112, 1201, 2031, 2111): The "special maritime and territorial jurisdiction of the United States" has been expanded to include any place outside the jurisdiction of any nation when the offense is committed by or against a national of the United States (see 18 U.S.C. 7(7)). Among the offenses within the special maritime and territorial jurisdiction of the United States are the crimes of murder, manslaughter, maiming, kidnapping, rape, assault, and robbery. Pursuant to 18 U.S.C. 7(1) there is also jurisdiction over such offenses when they are committed on the high seas or any other waters within the admiralty and maritime jurisdiction of the United States that is out of the jurisdiction of any particular state. Arguably, this prosecutive authority exists regardless of the nationality of the person committing the enumerated crimes on the high seas if the crimes are committed against United States citizens or are committed on United States civil or military vessels. See USAM 9-200.100, infra.

7. Hostage Taking (18 U.S.C. 1203): In 1984, Congress enacted the hostage taking statute to implement the International Convention Against the Taking of Hostages. The statute became effective on January 6, 1985. Hostage taking is defined as the seizing or detention of an individual coupled with a threat to kill, injure or continue to detain such individual in order to compel a third person or governmental organization to take some action. The United States has jurisdiction over the taking of hostages outside the United States (a) if the perpetrator or a hostage is a United States national, (b) if the perpetrator is found in the United States regardless of his nationality, or (c) if the United States is the Government coerced by the hostage taker. See USAM 9-60.700, infra.
8. International Traffic in Arms Regulations: Under the authority of the Arms Export Control Act (22 U.S.C. 2778), the United States has long required under the International Traffic in Arms Regulations (ITAR) (22 C.F.R. Part 120 - Part 130) that a license be obtained from the Department of State to export any item on the Munitions List (22 C.F.R. 121.1 - .15) (i.e., certain firearms, military aircraft, military explosives, etc.). Since January 1, 1985, however, the ITAR has been modified to require a license for anyone in the United States to train any foreign national (who is not a permanent resident alien of the United States) in the use, maintenance, repair or construction of an item on the Munitions List. Moreover, if the service relating to an item on the Munitions List is to be provided overseas, an American national is likewise required to obtain a license before providing any training to foreign nationals regarding such item or before actually operating, repairing, or constructing such item on behalf of any foreign entity. See USAM 9-90.520, infra.
9. Murder for Hire (18 U.S.C. 1952A): The United States may now prosecute anyone who travels or uses facilities in foreign commerce with the intent to murder for pecuniary compensation. See USAM 9-110.800, infra.
10. Piracy (18 U.S.C. 1651): Since 1819, the United States has had jurisdiction to prosecute anyone who commits the crime of piracy, as defined by the law of nations, on the high seas and is later brought to or found in the United States.



U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

October 24, 1986

(Expires March 24, 1987)

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

William F. Weld  
Assistant Attorney General  
Criminal Division

RE: Investigative and Prosecutive Policy for  
Acts of International Terrorism

NOTE: 1. This is issued pursuant to 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at the end of USAM 9-2.136.

AFFECTS: USAM 9-2.136

PURPOSE: This bluesheet adds a new statute (18 U.S.C. § 2331) to the list of federal offenses likely to be committed by terrorists outside of the United States.

The following is to be added at the end of section 9-2.136.

(11) Terrorist Acts Abroad Against United States Nationals  
(18 U.S.C. § 2331):

On August <sup>27</sup>28, 1986, the President signed Pub.L. 99-399, the Omnibus Diplomatic Security and Antiterrorism Act of 1986. Section 1202 of the Act created a new section 2331 of title 18, U.S.C. that makes it a federal crime for a terrorist overseas to kill a United States national, attempt to murder a United States national, conspire to murder a United States national, or to engage in physical violence with the intent to cause serious bodily injury to a United States national or with the result that serious bodily injury is caused to a United States national. Prosecution for any offense under section 2331 requires the written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions.



APP  
2/12/86  
1350

U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

December 31, 1985

(Expires May 31, 1986)

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Policy Limitations-Prosecutorial and Other  
Matters, International Matters

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-2.151

PURPOSE: This bluesheet establishes the policy of requiring Assistant United States Attorneys and Departmental Attorneys working on matters within the jurisdiction of the offices of International Affairs to notify and consult with that office before contacting foreign authorities.

The following should replace the material at USAM 9-2.151:

9-2.151 International Matters

The Criminal Division's Office of International Affairs (724-7600) should be consulted before contacting any foreign or State Department official in matters relating to extradition of a fugitive or the obtaining of evidence in a criminal investigation or prosecution.

Any proposed contact with persons, other than United States investigative agents, in a foreign country for the purpose of obtaining the extradition of a fugitive or evidence should first be discussed with the Office of International Affairs, Criminal Division. See USAM 9-4.540.

Before attempting to do any act in Switzerland or other continental European countries relating to a criminal investigation or prosecution, including contacting a witness by telephone or mail, prior approval should be obtained from the Office of International Affairs. See USAM 9-4.541.

Before issuing any subpoena to obtain records located in a foreign country, and before seeking the enforcement of any such subpoena, approval must be obtained from the Office of International Affairs. See USAM 9-4.543. Similarly, prior approval from the Office of International Affairs must be obtained with respect to serving a subpoena on an officer of, or attorney for, a foreign bank or corporation, who is temporarily in, or passing through the United States, when the testimony sought relates to the officer's or attorney's duties in connection with the operation of the bank or corporation.

USAM (superseded)



U.S. Department of Justice

Executive Office for United States Attorneys

---

Washington, D.C. 20530

JUL 18 1985

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Policy With Regard to the Issuance of  
Subpoenas to Attorneys for Information  
Relating to the Representation of Clients.

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-2.160

PURPOSE: This bluesheet implements guidelines concerning  
Issuance of Subpoenas to Attorneys for Information  
Relating to the Representation of Clients.

---

The following is a new section to follow 9-2.161:

9-2.161(a) Policy With Regard to the Issuance of  
Grand Jury or Trial Subpoenas to Attorneys  
for Information Relating to the Representation  
of Clients.

Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the representation of a client, it is important that the Department exercise close control over the issuance of such subpoenas. Therefore, the

following guidelines shall be adhered to by all members of the Department in any matter involving a grand jury or trial subpoena:

A. In determining whether to issue a subpoena in any matter to an attorney for information relating to the representation of a client, the approach must be to strike the proper balance between the public's interest in the fair administration of justice and effective law enforcement and individual's right to the effective assistance of counsel.

B. All reasonable attempts shall be made to obtain information from alternative sources before issuing a subpoena to an attorney for information relating to the representation of a client, unless such efforts would compromise a criminal investigation or prosecution or would impair the ability to obtain such information from an attorney if such attempts prove unsuccessful.

C. All reasonable attempts shall be made to voluntarily obtain information from an attorney before issuing a subpoena to an attorney for information relating to the representation of a client, unless such efforts would compromise a criminal investigation or prosecution or would impair the ability to subpoena such information from the attorney if such attempts prove unsuccessful.

D. No subpoena may be issued in any matter to an attorney for information relating to the representation of a client without the express authorization of the Assistant Attorney General of the Criminal Division.

<sup>E</sup> F. In approving the issuance of a subpoena in any matter to an attorney for information relating to the representation of a client, the Assistant Attorney General of the Criminal Division shall apply the following principles:

- (1) In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information;
- (2) In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.

- (3) All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful;
- (4) The reasonable need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney will be disqualified from representation of the client as a result of having to testify against the client;
- (5) Subpoenas shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonably limited period of time; and
- (6) The information sought shall not be protected by a valid claim of privilege.

These guidelines on the issuance of grand jury or trial subpoenas to attorneys for information relating to the representation of clients are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 2

	<u>Page</u>
9-2.000 <u>AUTHORITY OF THE U.S. ATTORNEY IN CRIMINAL DIVISION MATTERS</u>	1
9-2.010 <u>Investigations</u>	1
9-2.020 <u>Declining Prosecution</u>	2
9-2.021 Armed Forces Enlistment as an Alternative to Federal Prosecution	2
9-2.022 Pre-trial Diversion as an Alternative to Federal Prosecution	3
9-2.023 Controlled Substance Prosecution-- Referral to State or Local Prosecutors	3
9-2.024 Prosecution Under 18 U.S.C. §641 for Theft of Government Information	3
9-2.025 Prosecution Under 18 U.S.C. §1905-- Trade Secrets Act	4
9-2.030 <u>Authorizing Prosecution</u>	5
9-2.031 Prosecution of Phencyclidine (PCP) Users	5
9-2.040 <u>Dismissal of Complaints</u>	5
9-2.041 Cancellation of Unexecuted Arrest Warrants	6
9-2.050 <u>Dismissal of Indictments and Informations</u>	6
9-2.051 Motion to Dismiss Form	7
9-2.060 <u>Appeals</u>	9
9-2.100 LIMITATIONS ON U.S. ATTORNEYS	9
9-2.101 American Bar Association Standards for Criminal Justice	9
9-2.102 Omnibus and Other Pre-trial Standards	9
9-2.103 Appendix	11
9-2.110 <u>Statutory Limitations</u>	13
9-2.111 Declinations	13
9-2.112 Prosecutions	14

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-2.120	<u>Policy Limitations Generally</u>	15
9-2.130	<u>Policy Limitations on Institution of Proceedings</u>	16
9-2.131	Matters Assumed by Criminal Division or Higher Authority	16
9-2.132	Internal Security Matters	16
9-2.133	Other	17
9-2.134	Consultation in Other Situations	19
9-2.135	Foreign Corrupt Practices Act Matters	20
9-2.140	<u>Policy Limitations--Prosecutorial and Other Matters</u>	20
9-2.141	Addition of Counts to Superseding Indictment	20
9-2.142	Dual Prosecution and Successive Federal Prosecution Policies	21
9-2.143	Juvenile Prosecutions	31
9-2.144	Interstate Agreement on Detainers	31
9-2.145	Dismissals	35
9-2.146	Pleas by Corporations	36
9-2.147	Extradition and Deportation	36
9-2.148	Recommendation of Death Penalty	36
9-2.149	Revocation of Naturalization	36
9-2.150	<u>Policy Limitations--Prosecutorial and Other Matters (cont.)</u>	36
9-2.151	International Contacts	36
9-2.152	Special Instructions--General Litigation and Legal Advice Section Matters	36a
9-2.153	Report by Grand Jury	37
9-2.154	Legislative Proposals by U.S. Attorneys	37
9-2.155	Sensitive Matters	38
9-2.156	Compromises of Civil or Tax Liability	38
9-2.157	Investigation of Jury Panels	38
9-2.158	Participation of Attorneys Not Employed by the Department of Justice in Litigation	39
9-2.159	Refusal of Government Departments and Agencies to Produce Evidence	39

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-2.160	<u>Policy Limitations--Prosecutorial and Other Matters (cont.)</u>	40
9-2.161	Policy with Regard to the Issuance of Subpoenas to Members of the News Media, Subpoenas for Telephone Toll Records of Members of the News Media, and the Interrogations, Indictment, or Arrest of Members of the News Media	40
9-2.162	Grand Jury Subpoenas for Financial Records	41
9-2.163	Grand Jury Subpoenas for Telephone Toll Records: Certifications	42
9-2.164	Number of Counts in Indictments	44
9-2.165	State and Territorial Prisoners Incarcerated in Federal Institutions	45
9-2.166	Testimony of FBI Laboratory Examiners	45
9-2.170	<u>Policy Limitations--Miscellaneous</u>	45
9-2.171	Decision to Appeal or Not to Appeal	45
9-2.172	Appearance Bond Forfeiture Judgments	46
9-2.173	Arrest of Foreign Nationals	47
9-2.200	RELEASE OF INFORMATION	47
9-2.210	<u>Press Information and Privacy</u>	47
9-2.211	Press Information Guidelines for Criminal Cases	47

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-2.000 AUTHORITY OF U.S. ATTORNEY IN CRIMINAL DIVISION MATTERS

The U.S. Attorney, within his/her district, has plenary authority with regard to federal criminal matters. This authority is exercised under the supervision and direction of the Attorney General and his/her delegates.

The statutory duty to prosecute for all offenses against the United States carries with it the authority necessary to perform this duty. The U.S. Attorney is invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority.

The authority, discretionary power, and responsibilities of the U.S. Attorney with relation to criminal matters encompass without limitation by enumeration the following:

A. Investigating suspected or alleged offenses against the United States, see USAM 9-2.010, infra;

B. Causing investigations to be conducted by the appropriate federal law enforcement agencies, see id.;

C. Declining prosecution, see USAM 9-2.020, infra;

D. Authorizing prosecution, see USAM 9-2.030, infra;

E. Determining the manner of prosecuting and deciding trial related questions;

F. Recommending to appeal or not to appeal from an adverse ruling or decision, see USAM 9-2.171, infra;

G. Dismissing prosecutions, see USAM 9-2.050, infra; and

H. Handling civil matters related thereto which are under the supervision of the Criminal Division. See also USAM 9-27.000.

9-2.010 Investigations

The U.S. Attorney, as the chief federal law enforcement officer in his/her district, is authorized to request the appropriate federal investigative agency to investigate alleged or suspected violations of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

federal law. The federal investigators operate under the hierarchical supervision of their bureau or agency and consequently are not ordinarily subject to direct supervision by the U.S. Attorney. If the U.S. Attorney requests an investigation and does not receive a timely preliminary report, he/she may wish to consider requesting the assistance of the Criminal Division.

In certain matters the U.S. Attorney may wish to request the formation of a team of agents representing the agencies having investigative jurisdiction of the suspected violations.

The grand jury may be utilized by the U.S. Attorney to investigate alleged or suspected violations of federal law. Unless circumstances dictate otherwise, a grand jury investigation should not be opened without consultation with the investigative agency or agencies having investigative jurisdiction of the alleged or suspected offense. See also USAM 9-17.200.

9-2.020 Declining Prosecution

The U.S. Attorney is authorized to decline prosecution in any case referred directly to him/her by an agency unless a statute provides otherwise. See USAM 9-2.111, *infra*. Whenever a case is closed without prosecution, the U.S. Attorney's files should reflect the action taken and the reason for it. See also USAM 9-27.000.

9-2.021 Armed Forces Enlistment as an Alternative to Federal Prosecution

Present regulations of the Armed Services prohibit the enlistment of an individual against whom criminal or juvenile charges are pending or against whom the charges have been dismissed to facilitate the individual's enlistment. This policy is based, in part, on the premise that the individual who enlists under such conditions is not properly motivated to become an effective member of the Armed Forces.

Determination as to whether prosecution should be instituted or pending criminal charges dismissed in any case should be made on the basis of whether the public interest would thereby best be served and without reference to possible military service on the part of the subject. The Armed Forces are not to be regarded as correctional institutions and U.S. Attorneys are urged to give full cooperation to the Department of Defense in the latter's efforts to ensure a highly motivated all-volunteer Armed Forces and to bolster public confidence in military service as a respectable and honorable profession.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

There may be exceptional cases in which imminent military service, together with other factors, may be considered in deciding to decline prosecution if the offense is trivial or insubstantial, the offender is generally of good character, has no record or habits of anti-social behavior, and does not require rehabilitation through existing criminal institutional methods, and failure to prosecute will not seriously impair observance of the law in question or respect for law generally. In no case, however, should the U.S. Attorney be a party to, or encourage, an agreement respecting foregoing criminal prosecution in exchange for enlistment in the Armed Services.

9-2.022 Pre-trial Diversion as an Alternative to Federal Prosecution

A U.S. Attorney may consider Pre-trial Diversion as an alternative to federal criminal prosecution. Details of the operation of the Pre-trial Diversion program are set forth at USAM 1-12.000. Authorization from the Criminal Division is required to utilize Pre-trial Diversion if the offense is one listed in USAM 1-12.100.

9-2.023 Controlled Substance Prosecution--Referral to State or Local Prosecutors

General guidelines for prosecuting Controlled Substance violations have been established. See USAM 9-101.400.

9-2.024 Prosecution Under 18 U.S.C. §641 for Theft of Government Information

18 U.S.C. §641 prohibits theft of government information as well as theft of the documents which contain the information. See United States v. Girard, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979); United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Nevertheless, for the reasons set forth below, the Criminal Division believes that it is inappropriate to bring a prosecution under 18 U.S.C. §641 when:

A. The subject of the theft is intangible property, i.e., government information owned by, or under the care, custody, or control of the United States;

B. The defendant obtained or used the property primarily for the purpose of disseminating it to the public; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. The property was not obtained as a result of wiretapping, 18 U.S.C. §2511, interception of correspondence, 18 U.S.C. §§1702, 1708, criminal entry, or criminal or civil trespass.

There are two reasons for the policy. First, it protects "whistle-blowers." Thus, under this policy, a government employee who, for the primary purpose of public exposure of the material, reveals a government document to which he/she gained access lawfully or by non-trespassory means would not be subject to criminal prosecution for the theft. Second, the policy is designed to protect members of the press from the threat of being prosecuted for theft or receipt of stolen property when, motivated primarily by the interest in public dissemination thereof, they publish information owned by or under the custody of the government after they obtained such information by other than trespassory means.

The Criminal Division does not intend, in promulgating this policy, to prevent or discourage prosecutions under any other applicable statutes, such as those prohibiting the unauthorized dissemination or possession of government information, e.g., 18 U.S.C. §§793, 794, 1905, or 50 U.S.C. §783. Instead, the Division's purpose is to require that, in the circumstances enumerated above, such cases are prosecuted under these other applicable statutes rather than under 18 U.S.C. §641.

The adoption of this policy does not alter the responsibility of government employees to maintain the confidentiality of sensitive government information disclosed to them in the course of their employment.

9-2.025 Prosecution Under 18 U.S.C. §1905--Trade Secrets Act

18 U.S.C. §1905 prohibits the disclosure of various forms of confidential information. There are no reported annotations dealing with prosecution under this statute and a wide divergence of views exist as to the proper scope of this section and its interface with the Freedom of Information Act. The problems have been exacerbated by the decision of the Supreme Court in Chrysler Corporation v. Brown, 441 U.S. 281 (1979), and the confusion engendered as to the propriety of releases made pursuant to the Freedom of Information Act of material that arguably could fall within the meaning of 18 U.S.C. §1905. Accordingly, it is the policy of the Criminal Division not to prosecute government employees for a violation of 18 U.S.C. §1905 if the release of information in question was made in a good faith effort to comply with the Freedom of Information Act and the appropriate applicable regulations. Prior to initiating an action involving a potential violation of 18 U.S.C. §1905, the U.S. Attorney shall consult with the Public Integrity Section as set forth in USAM 9-2.133, infra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-2.030 Authorizing Prosecution

The U.S. Attorney is authorized to initiate prosecution by filing a complaint, requesting an indictment from the grand jury, and, when permitted by law, by filing an information in any case which, in his/her judgment, warrants such action, other than those instances enumerated in USAM 9-2.120, infra. See also USAM 9-27.200.

In arriving at his/her decision, the U.S. Attorney should consider the recommendations for prosecution of the specific offense involved set forth in the chapters discussing substantive offenses. See USAM 9-40.000. The recommendations are instructive only and not mandatory. Consult the index under the particular offense to locate any prosecutive recommendations.

9-2.031 Prosecution of Phencyclidine (PCP) Users

U.S. Attorneys should consider prosecuting any significant cases of illicit PCP manufacture to the full extent of available resources. Medical evidence indicates that for certain users, PCP can cause a schizophrenia-like psychosis characterized by violent behavior. The effect can last for two to three weeks and during that period patients require isolation and treatment by mental health professionals.

The problem of PCP is compounded by the ease with which it can be illicitly manufactured using the most elementary chemical processes. There is no approved human use of PCP; rather, its sole legitimate use is as a tranquilizer for large animals. There is very little diversion from this licit use; the problem is predominantly illicit manufacture. PCP is clearly dangerous to anyone who uses it and those who manufacture and sell this drug for easy profit should be prosecuted.

9-2.040 Dismissal of Complaints

The U.S. Attorney may dismiss a criminal complaint without prior authorization from the Criminal Division except in the instances enumerated in USAM 9-2.134, infra, and 9-2.145, infra. However, Rule 48(a), Federal Rules of Criminal Procedure, requires leave of court for dismissal of a complaint, as discussed infra. See also USAM 9-27.000.

If the person charged in a complaint has been bound over for grand jury action, the complaint may be dismissed by the U.S. Attorney only by

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

leave of court. Leave of court may be given by a blanket authorization to dismiss complaints. If such authorization has not been given, leave of court must be obtained in each particular case.

Whether leave of court is required to dismiss a complaint prior to the defendant being bound over for grand jury action has not been judicially settled. The U.S. Attorney must be governed by the interpretation of Fed. R. Crim. P. 48(a) by the court in his/her district. The view that leave of court is not required to dismiss a complaint prior to the person charged being bound over is supported by the control over complaints given to judicial officers by Rules 4 and 5, Federal Rules of Criminal Procedure. Under those rules, a judicial officer may issue a warrant, may discharge a defendant, and may cancel an unexecuted warrant of arrest. It would seem, therefore, that the judicial officer can exercise a like control over a complaint prior to his/her decision to bind over the defendant and that leave of the court is not required.

9-2.041 Cancellation of Unexecuted Arrest Warrants

Care should be taken that the Marshal of the district is promptly informed by the U.S. Attorney of the dismissal of a complaint, whether by the court or a judicial officer, in order to facilitate cancellations of unexecuted arrest warrants as provided in Rule 4(d)(4), Federal Rules of Criminal Procedure. Such notification is also important when a warrant of arrest is outstanding in connection with a detainer lodged against a defendant who is confined in another district. Since the warrant will have been forwarded by the Marshal of the district where it was issued to the Marshal in the district of detention, the warrant will have to be returned to the Marshal of the issuing district for cancellation by the judicial officer after the complaint has been dismissed.

9-2.050 Dismissal of Indictments and Informations

The U.S. Attorney may move for leave of court to dismiss an indictment or information, in whole or in part, without prior authorization from the Criminal Division except in the instances enumerated in USAM 9-2.134, infra, and 9-2.145, infra. The U.S. Attorney may in any case request the views of the Criminal Division as to the dismissal of any indictment or information. Prior to dismissing an indictment the U.S. Attorney should consult with the referring department or agency, and also seek to obtain the views of the investigative agency involved in the matter.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Whenever the U.S. Attorney concludes that dismissal is warranted, he/she should take prompt action to dismiss. However, an indictment should not be dismissed merely because the defendant is a fugitive.

Rule 48(a), Federal Rules of Criminal Procedure, requires leave of court for dismissal of an indictment or information by the U.S. Attorney. A dismissal by the U.S. Attorney may not be filed during the trial without the consent of the defendant. See Fed. R. Crim. P. 48(a). The court may decline leave to dismiss if the manifest public interest requires it. See Rinaldi v. United States, 434 U.S. 22 (1977); United States v. Hamm, 659 F.2d 624 (5th Cir. 1981) (and cases cited therein).

In moving for leave to dismiss, the local practice should be followed. However, in cases of considerable public interest or importance where dismissal of the entire indictment or information is sought because of an inability to establish a prima facie case, a written motion for leave to dismiss should be filed explaining fully the reason for the request. The importance of the case is not to be measured simply by the punishment prescribed for the offense. If the case involves fraud against the government, bribery, or a similarly important matter, or if any other department or branch of the government is specially interested, it is recommended that the written form of motion be used. See USAM 9-2.051, infra.

Often it is desirable to dismiss actions against defendants committed to federal custody either for psychiatric examination, 18 U.S.C. §4244, or until mental competency is restored for trial, 18 U.S.C. §4246, when it appears unlikely that competency will be regained. Dismissal in such cases is made contingent upon commitment to a state mental hospital. The Bureau of Prisons and the Medical Center for Federal Prisoners, Springfield, Missouri, should be given notice well in advance of dismissal, since authority to hold the defendant in custody is based on the complaint or indictment. In cases involving dismissals of prosecution under 18 U.S.C. §871, the Secret Service should be notified.

In every case of a dismissal, the file should reflect the reasons for the dismissal.

See also USAM 9-27.000.

9-2.051 Motion to Dismiss Form

MOTION TO DISMISS INDICTMENT [OR INFORMATION]

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In the United States District Court For the \_\_\_\_\_  
District of \_\_\_\_\_

United States of America

vs. Criminal No. \_\_\_\_\_

John Doe, Defendant

Comes now the United States of America by and through its counsel and respectfully moves the Court for leave to dismiss the indictment [or information] in the above-entitled case, and in support of this motion avers as follows:

On or about \_\_\_\_\_, the grand jury for the \_\_\_\_\_ District of \_\_\_\_\_, returned an indictment [or the United States Attorney filed an information] against the defendant in the above-entitled case, charging that the defendant did [simple statement of the crime] in violation of Section \_\_\_\_\_, Title \_\_\_\_\_ of the United States Code.

The reasons for dismissal are:

[If applicable, an attribution to the authority authorizing the dismissal in accord with the facts, should be included as follows:]

On \_\_\_\_\_, 19\_\_\_\_, [the Attorney General of the United States, Deputy Attorney General, or Assistant Attorney General of Criminal Division] authorized the dismissal of said indictment [or information].

\_\_\_\_\_  
United States Attorney

Presented by:

\_\_\_\_\_  
Assistant United States Attorney

ORDER

And now, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in open court, the within motion is granted;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

and it is hereby ordered and decreed that Indictment [or Information]  
No. \_\_\_\_\_ against \_\_\_\_\_ be and the same is hereby dismissed.

\_\_\_\_\_  
United States District Judge

9-2.060 Appeals

The authority of the U.S. Attorney with relation to appeals is set forth at USAM 9-2.171, infra. See also USAM Title 2.

9-2.100 LIMITATIONS ON U.S. ATTORNEYS

Limitations on actions of the U.S. Attorney in criminal matters assigned to the Criminal Division are imposed by statutes and by policies of the Department. The statutory limitations are listed at USAM 9-2.110, infra. The policy limitations are listed at USAM 9-2.120, infra. See also USAM 9-27.000.

9-2.101 American Bar Association Standards for Criminal Justice

The American Bar Association Standards for Criminal Justice have not been adopted as official policy by the Department; however, since the courts utilize the Standards in determining issues covered by them, it is recommended that all U.S. Attorneys familiarize themselves with them. A Table of Standards cited appears in each issue of the Advance Sheets of the Federal Reporter, Second Series.

9-2.102 Omnibus and Other Pre-trial Standards

The Justice Department is committed to the nationwide and uniform procedure for the disposition of criminal cases as is provided for in the Federal Rules of Criminal Procedure and applicable federal statutes. In view of this commitment, it necessarily follows that we have been and continue to be opposed to local rules, or the establishment of standards such as the ABA Omnibus Standards and other pre-trial standards, which are inconsistent with, or contrary to, the provisions of the Federal Rules of Criminal Procedure and applicable federal law, e.g., 18 U.S.C. §3500.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Reasons for the Department's position in these matters have been stated from time to time, most notably during the 1974-75 Congressional Hearings on the amendments to the Federal Rules of Criminal Procedure, and have resulted in our position being sustained. See USAM 9-2.103, *infra*.

Any disclosures by the executive branch in excess of those required by the Federal Rules of Criminal Procedure and law are within the sole discretion of the executive. Such disclosures are exercised on a case-by-case, or individual, basis after giving due consideration to the interests of the United States protected by the Federal Rules of Criminal Procedure, statutes, regulations, and to the policies of the Department of Justice. In our opinion, judicial supervision of the executive branch in the exercise of such discretionary discovery is improper, not only as a legal proposition, but as a needless and impractical burden upon the already overtaxed judiciary.

In the goal of achieving speedy disposition of criminal cases in the federal system, the 1975 amendments to the Federal Rules of Criminal Procedure, and enactment of the 1976 amendments recently forwarded to Congress, should prove most beneficial. Rule 16, Federal Rules of Criminal Procedure, was amended to eliminate or reduce the necessity of motions. Rule 11, Federal Rules of Criminal Procedure, establishes for the first time a plea agreement procedure and requires an extensive record to insure the voluntariness of pleas of guilty. This procedure should significantly reduce the probability of successful habeas corpus attacks. Rule 12, Federal Rules of Criminal Procedure, in providing that motions may be written or oral and in making provision for pre-trial notice of intention to use evidence, should assist in the speedy disposition of cases. The provisions for notice of alibi, Rule 12.1, Federal Rules of Criminal Procedure, and notice of defense based on mental condition, Rule 12.2, Federal Rules of Criminal Procedure, likewise should expedite the trial of criminal cases. In some cases the provisions of Rule 15, Federal Rules of Criminal Procedure, providing for depositions in exceptional circumstances, should prove beneficial. Finally, Rule 32, Federal Rules of Criminal Procedure, as amended, provides for disclosure to defendant, and reciprocal discovery to the government, of specified information contained in the presentence report, and also accords to the attorney for the government an equal opportunity for allocation.

We believe that adherence to the Federal Rules of Criminal Procedure and applicable statutes provides for the balanced, expeditious, fair, orderly, and proper means for disposition of criminal cases in the federal system. Proposals for changes in the federal criminal system should be made in accordance with the federal statutory rule-making process, 18 U.S.C. §§3771-3772, and not by adoption of standards or local rules

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

inconsistent with, or contrary to, the Federal Rules of Criminal Procedure and applicable federal statutes. The Department cannot accept as appropriate or helpful a local rule establishing omnibus pre-trial procedures.

9-2.103 Appendix

For example, the Department opposed pre-trial disclosure of witnesses. Senator McClellan, in explaining the Judiciary Committee's rejection of a proposed rule that would have required disclosure of witness lists, stated:

During the hearings, the committee heard vigorous testimony on both sides of this....Our proposed amendment reflects a conviction that the rules concerning the disclosure of witnesses should be stricken. Although their purpose is to enhance fairness, any minor enhancement of fairness in the criminal trial process that might flow from compulsory pretrial exchange of witness lists should not be at the expense of witnesses and victims of crime. It should be emphasized that criminal trials today are not unfair. Defendants enjoy more rights under our federal criminal justice system than defendants under the laws of any other nation. As examples, our law requires defendants to be given ample pretrial notice. The indictment itself must contain a statement of all the essential facts. Defendants may then be given bills of particulars elaborating the facts charged. Defendants can use present rule 16 to obtain their own statements and grand jury testimony, if any, as well as copies of reports of examinations and tests, and of other books, papers, documents, and tangible objects material to the case. Additional discovery is given informally by Federal prosecutors in many cases, in an effort to induce a guilty plea by acquainting the defendant and his counsel with the strength of the Government's evidence. Moreover, in the very rare situation where a defendant may properly claim unfair surprise from the calling of a particular Government witness, a continuance may be granted by the court.

In short, the case has not been made for pretrial disclosure of witnesses in the face of potential harm.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Indeed, pretrial disclosure of witness could weaken the search for truth in the criminal trial. Unscrupulous defendants would use the information obtained with respect to the identity of the government's witnesses to tailor their defenses and fabricate alibis....

The exposure of witness to intimidation and reprisals, moreover, has another aspect in terms of its predictably chilling effect on the willingness of people to come forward and testify in serious felony cases. Obtaining the public's cooperation with law enforcement is a serious problem. Anyone who has been a witness knows that it is a real sacrifice and often a terrifying experience to cooperate and testify in our criminal system, although it is a burden many witnesses are more than willing to assume.

121 Cong. Rec. S1286, 1287 (daily ed. July 17, 1975).

Finally, in presenting the conference report on the issue involving pre-trial disclosure of witnesses, Senator McClellan explained:

Mr. President, one of those issues involves pre-trial disclosures of witness lists. The conferees adopted the Senate version which deleted provisions for discovery of witness lists (rules 16(a)(1)(E) and (b)(1)(C)). As stated in the joint explanation statement of the committee of conference:

A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy.

Although it should be obvious, I want to emphasize that the policy choice was directly presented and positively resolved in favor of affording all possible protection and encouragement to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

witnesses in Federal criminal cases. This includes the ability of the prosecutor to assure a reluctant or fearful witness that his identity will not be divulged to the defendant prior to appearance at trial. Although there may be unusual cases involving fundamental fairness, the congressional decision on this issue should be taken as clear disapproval of the exercise of so-called inherent power by the courts to fashion local rules or individual orders calling for discovery of witnesses, see, for example, United States v. Jackson, 508 F.2d 1001, 1006 (7th Cir. 1975) and cases cited therein, except insofar as such discovery may be required to effectuate a party's right to constitutional due process of law.

121 Cong. Rec. S14301 (daily ed. July 30, 1975).

9-2.110 Statutory Limitations

Certain statutes impose limitations on the authority of the U.S. Attorney to decline prosecution, to prosecute, and to take certain actions relating to the prosecution of criminal cases. These are identified at USAM 9-2.111, infra.

9-2.111 Declinations

If a judge, receiver, or trustee in a case under Title 11, United States Code, has reported to the U.S. Attorney that he/she believes a violation of Chapter 9, Title 11, United States Code, or other laws of the United States relating to insolvent debtors, receiverships, or reorganization plans has been committed, or that an investigation should be had in connection therewith, 18 U.S.C. §3057(a), the U.S. Attorney, if he/she decides upon inquiry and examination that the ends of public justice do not require investigation or prosecution, must report the facts to the Attorney General for his/her direction, 18 U.S.C. §3057(b). The report of the U.S. Attorney should be sent to the Criminal Division, Fraud Section.

Although 18 U.S.C. §2101 (Riots) does not impose a limitation on the authority to decline prosecution, it does provide that, if it is the opinion of the Attorney General or of the appropriate officer of the Department of Justice charged by law or under the instructions of the Attorney General with authority to act, that a person has violated 18 U.S.C. §2101 and if prosecution is not instituted, a report in writing

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

must be submitted to both Houses of Congress setting forth the Department's reason for not proceeding. See 18 U.S.C. §2101(d).

Only the Assistant Attorney General, Criminal Division, the Deputy Attorney General, or the Attorney General can authorize a declination of a prosecution for national security reasons. Classified Information Procedures Act, 18 U.S.C. app. (Supp. V 1981). Accordingly, the Internal Security Section, Criminal Division, is to be consulted in any case in which there is a possibility that prosecution may be declined for national security reasons.

9-2.112 Prosecutions

No prosecution of an offense described in 18 U.S.C. §245 (Federally Protected Activities) may be undertaken by the United States except upon the certification of the Attorney General or Deputy Attorney General that in his/her judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice. The function of certification may not be delegated. See 18 U.S.C. §245(a)(1). The anti-riot provision, 18 U.S.C. §245(b)(3), and violations of 18 U.S.C. §245(b)(1), insofar as it relates to matters not involving discrimination or intimidation on grounds of race, color, religion, or national origin, are assigned to the Criminal Division and requests for certification relating to them should be sent to the Criminal Division.

Prosecutions under 42 U.S.C. §§2272-2276 (Atomic Energy Act) may be brought only on the express direction of the Attorney General. See 42 U.S.C. §2271(c).

Violations of 18 U.S.C. §1073 (Flight to Avoid Prosecution or Giving Testimony) may be prosecuted only upon formal approval in writing by the Attorney General or an Assistant Attorney General. Accordingly, under no circumstances should an indictment under the Act be sought, nor an information be filed, nor should criminal proceedings under Rule 40, Federal Rules of Criminal Procedure, be instituted without the written approval of the Assistant Attorney General, Criminal Division. See USAM 9-69.450. No complaint should be authorized in cases involving custody disputes without the express prior approval of the Criminal Division. See USAM 9-69.421.

Prosecution for violations of 18 U.S.C. §659 (Theft from Interstate Shipments) and of 18 U.S.C. §2101 (Riots) are barred if there has been a judgment of conviction or acquittal on the merits under the law of any state for the same act or acts. See 18 U.S.C. §§659, 2101(c). That a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

federal prosecution for violation of 18 U.S.C. §659 was initiated prior to the commencement of the state prosecution did not prevent dismissal of the federal indictment where state trial on larceny charge resulted in acquittal before defendant was retried on the federal indictment following a remand from the Court of Appeals. See United States v. Evans (D. N.J. November 19, 1968) (D.J. 15-48-368). Solicitor General decided no appeal should be taken not because of 18 U.S.C. §659 but because of the policy against dual prosecution. See USAM 9-2.142, infra.

9-2.120 Policy Limitations Generally

Department and Division policies impose limitations on the authority of the U.S. Attorney to decline prosecution, to prosecute, and to take certain actions relating to the prosecution of criminal cases. These are identified at USAM 9-2.131, infra.

With regard to policy limitations, if in the opinion of the U.S. Attorney the exigencies of the situation prevent compliance with a policy, he/she shall take the action deemed appropriate. He/she shall promptly report to the Criminal Division the deviation from policy, or if the policy is established by a higher authority, report to that authority and be guided by the instructions furnished him/her. A written report of the deviation should be promptly made. Approval of the action of the U.S. Attorney or his/her taking action as instructed shall be deemed, for all purposes, to be compliance with the policy. Among the purposes of this language is to ensure that criminals do not escape prosecution by inaction on the part of a U.S. Attorney immobilized by policy; to require a report of deviation from policy in order that the policy may be evaluated; and to express confidence in the judgment, and to reaffirm the authority, of the U.S. Attorney in such a situation.

If the U.S. Attorney discovers that a policy of the Criminal Division or of a higher authority has not been followed because of inadvertance, he/she shall promptly notify the Criminal Division or higher authority of the deviation from policy by the most expeditious means and subsequently in writing. He/she shall be guided by the instructions furnished him/her. Approval of the action of the U.S. Attorney, or his/her taking action as instructed shall be deemed, for all purposes, to be compliance with the policy.

In the instances when the U.S. Attorney is directed to consult with the Criminal Division prior to taking an action, such consultation will typically be by an Assistant U.S. Attorney with an attorney of the section assigned responsibility for the statute or matter involved. See USAM

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-1.200. If there is a disagreement at this level, the matter should be resolved by appropriate higher authority before the disputed action is taken.

See also USAM 9-27.000.

9-2.130 Policy Limitations on Institution of Proceedings

9-2.131 Matters Assumed by Criminal Division or Higher Authority

If primary prosecutorial responsibility for a matter has been assumed by the Criminal Division or higher authority, the U.S. Attorney shall consult with the persons having primary responsibility before conducting grand jury proceedings, seeking indictment, or filing an information.

9-2.132 Internal Security Matters *New*

Prosecution of a case involving subversive activities shall not be instituted without the express authorization of the Criminal Division or higher authority.

Such authorization is required if the offense involves a violation of the following:

A. Advocacy of Violent Overthrow of Government, 18 U.S.C. §2385, and related statutes, 18 U.S.C. Chapter 115;

B. Atomic Energy Act, 42 U.S.C. §§2274-2277;

C. Espionage, 18 U.S.C. §793 et seq., 50 U.S.C. §783;

D. Fishing in Fishery Conservation Zone by Foreign Fishing Vessels, 16 U.S.C. §1801, et seq.;

E. Foreign Relations and Neutrality, 18 U.S.C. §§951-969;

F. Munitions Control Act, 22 U.S.C. §1934;

G. Passport matters if the individual has a subversive connection or travel to a restricted country is involved, 18 U.S.C. §§1542-1544; 8 U.S.C. §1185(b);

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- H. Rebellion or Insurrection, 18 U.S.C. §2383;
- I. Registration of Certain Organizations (Voorhis Act), 18 U.S.C. §2386;
- J. Registration of Foreign Agents, 22 U.S.C. §§611-621; 18 U.S.C. §219;
- K. Registration of Person Who Has Knowledge, Received Training in Espionage, etc., 50 U.S.C. §§851-857;
- L. Sabotage, 18 U.S.C. §2151 et seq., and if subversive activities involved, 18 U.S.C. §1362;
- M. Trading with the Enemy Act, 50 U.S.C. App. 5(b); and
- N. Treason, 18 U.S.C. §2381.

Prior authorization is required if any of the above listed statutes are ancillary involved as, for example, where the violation is being an accessory after the fact, harboring, jumping bail, or obstructing justice.

Witnesses subpoenaed in any case involving internal security matters shall not be released without the prior approval of the Division until the proceeding in which the witnesses have been subpoenaed has been concluded. In any procedure relating to internal security matters, U.S. Attorneys and their assistants are cautioned that they are not to interview or subpoena confidential informants of the FBI without consultation and consent of the Division.

9-2.133 Other

The U.S. Attorney shall consult, as set forth at USAM 9-2.120, supra, with the appropriate section of the Criminal Division prior to instituting grand jury proceedings, filing an information, or seeking an indictment if the violation to be charged involves any of the statutes or situations listed below.

A. Acts of Air Piracy Outside the Special Aircraft Jurisdiction of the United States, 49 U.S.C. §1472(n). See USAM 9-63.180;

B. Commodity Futures Trading Commission Act of 1974, 7 U.S.C. §2 et seq.;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- C. Contempt of Congress, 2 U.S.C. §192;
- D. Counterfeit Substance and Continuing Criminal Enterprise Violations Under the Controlled Substance Act, 21 U.S.C. §§841(a)(2), 848;
- E. Desecration of the Flag, 18 U.S.C. §700;
- F. Draft Board Depredations and Aiding, Abetting, and Counseling Draft Evasion, 50 U.S.C. App. 462;
- G. False Statements to Federal Criminal Investigators, 18 U.S.C. §1001;
- H. Federal Election Laws, 18 U.S.C. §§241-242, 591-617; 42 U.S.C. §19731(c); 2 U.S.C. §§431-455;
- I. Federal Regulation of Lobbying Act, 2 U.S.C. §§261-270;
- J. Hobbs Act cases, 18 U.S.C. §1951, brought with respect to extortion "under color of official right" by public official's misuse of his/her office; cases not involving the actual or threatened use of force or violence; cases arising out of labor disputes; cases involving kidnapping; cases involving robbery; and cases involving extortion directed at airlines and banks;
- K. Imitation of Coins, 18 U.S.C. §489, or Obligations or Securities of the United States, 18 U.S.C. §475;
- L. An immunized person who has been given "use immunity" if prosecuted for crime as to which he/she has testified;
- M. Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §504 (Willful Violations of Bonding Requirements), 1111;
- N. Lobbying with Appropriated Funds, 18 U.S.C. §1913;
- O. Mail Fraud, 18 U.S.C. §1343, or Fraud by Wire Statute, 18 U.S.C. §1343, if the fraud to be charged involves election law frauds;
- P. Obscenity;
- Q. Perjury (committed during a trial resulting in an acquittal);
- R. Purchase and Sale of Public Office, 18 U.S.C. §§210-211;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

S. Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§1961-1968;

T. Railway Labor Act, 45 U.S.C. §§152, Tenth, 180;

U. Riots, 18 U.S.C. §§231-233, 2101-2102;

V. Security Act, Securities Exchange Act, Investment Advisers Act of 1840, 15 U.S.C. §§77a et seq., 78a et seq., 80b-1 et seq.;

W. Strikebreakers Statute, 18 U.S.C. §1231;

X. White Slave Traffic Act, 18 U.S.C. §2421 et seq., in personal escapade cases;

Y. Tax Reform Act of 1976 (Disclosure Violations), 26 U.S.C. §7213;

Z. Harboring, 18 U.S.C. §§1071-1072, 1381; and

AA. Trade Secrets Act, 18 U.S.C. §1905.

9-2.134 Consultation in Other Situations

The U.S. Attorney shall consult (as set forth in USAM 9-2.120, supra) the designated section or office of the Criminal Division in any of the following additional situations:

A. Regarding all offers in compromise in an asset forfeiture proceeding (criminal or civil) where the difference between the offer and the value of the property exceeds \$60,000 (Criminal Division Directive No. 116, 1983). (Settlements in cases involving differences exceeding \$750,000 must be approved by the Deputy Attorney General (28 C.F.R. 0.161, as amended in 1983) but requests for approval must be processed through the Asset Forfeiture Office.) (See USAM 9-38.000) (Asset Forfeiture Office);

B. Regarding pre-trial diversion of certain individuals and cases involving certain statutes (see USAM 1-12.100) (Office of Enforcement Operations--Witness Records Unit);

C. Prior to dismissing a count involving, or entering into any sentence commitment or other case settlement in a case involving, one or more counts of:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. A Federal Regulation of Lobbying Act violation (2 U.S.C. §§261-70) (see USAM 9-90.660) (Internal Security Section);

2. Any Act of Air Piracy violation (49 U.S.C. §1472(i) or (n)) (see USAM 9-63.134 and 9-63.180) (General Litigation and Legal Advice Section);

3. A Contempt of Congress violation (2 U.S.C. §192) (General Litigation and Legal Advice Section);

4. Any violation set forth at USAM 9-2.132--Internal Security matters (Internal Security Section);

5. A Threat Against the President violation (18 U.S.C. §871) (USAM 9-65.200) (General Litigation and Legal Advice Section); and

6. A Failure to Register with the Selective Service System violation (50 U.S.C. App. 462(a)) (General Litigation and Legal Advice Section);

(See also USAM 9-2.146);

D. Filing of a Motion to Transfer (Motion to Proceed Against a Juvenile as an Adult) under 18 U.S.C. §5032 (see USAM 9-8.000 et seq.) (General Litigation and Legal Advice Section).

9-2.135 Foreign Corrupt Practices Act Matters

No investigation or prosecution of cases involving alleged violations of Sections 103 and 104, and related violations of Section 102, of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§78m(b), 78dd-1, and 78dd-2) shall be instituted without the express authorization of the Criminal Division. See USAM 9-47.120.

9-2.140 Policy Limitations--Prosecutorial and Other Matters

9-2.141 Addition of Counts to Superseding Indictment

When a conviction is vacated (e.g. guilty plea is set aside) and the defendant is thereafter reindicted, the superseding indictment ordinarily should not contain more counts than the original indictment without consultation with the Criminal Division. (See USAM 9-2.120, supra). See United States v. Robison, 307 F. Supp. 403, 408 (N.D. Cal. 1968).

9-2.142 Dual Prosecution and Successive Federal Prosecution Policies

The scope of the Department of Justice's dual and successive federal prosecution policies is discussed separately, *infra*. Following the specific substantive provisions of these two policies, procedural provisions applicable to both policies are set forth.

A. Dual Prosecution Policy

The Department of Justice's dual prosecution policy precludes the initiation or continuation of a federal prosecution following a state prosecution based on substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecution. The policy is intended to regulate prosecutorial discretion in order to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions and multiple punishments for substantially the same act or acts. See Rinaldi v. United States, 434 U.S. 22, 27 (1977).<sup>1/</sup>

In order to prevent unwarranted dual prosecutions, the policy requires that authorization be obtained from the appropriate Assistant Attorney General prior to initiating or continuing the federal prosecution. A failure to obtain prior authorization of a dual prosecution will result in a loss of any conviction through a dismissal of the charges unless it is later determined that there was in fact a compelling federal interest supporting the prosecution and a compelling reason to explain the failure to obtain prior authorization.

1. Types of Prior State Proceedings Resulting in Application of the Dual Prosecution Policy

The policy applies and authorization must be obtained from the appropriate Assistant Attorney General whenever there has been a

---

<sup>1/</sup> Although there is no general statutory bar to a federal prosecution where the defendant's conduct has already formed the basis for a state prosecution, Congress has expressly provided that, as to certain specific offenses, a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts. See 18 U.S.C. §§659, 660, 1992, 2101, 2117; 15 U.S.C. §§80a-36, 1282.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prior state proceeding (including a plea bargain) resulting in (1) an acquittal, (2) a conviction, or (3) a dismissal or other termination of the case on the merits.2/

Whenever a state proceeding reaches one of the aforementioned stages, whether before or after the return of a federal indictment or the filing of a federal information, authorization from the appropriate Assistant Attorney General must be obtained before a trial may be commenced or a guilty plea accepted on federal charges based on substantially the same act or acts.3/

In order to avoid the unnecessary expenditure of federal resources whenever the initiation of a state proceeding is anticipated in a matter involving overlapping federal jurisdiction, federal prosecutors should not only coordinate their activities with their state counterparts, but also carefully consider whether there is a federal interest warranting a separate federal prosecution.

2. Relationship Between the Act(s) on Which the State Prosecution was Based and the Act(s) on Which the Proposed Prosecution Would Rest

The dual prosecution policy is intended to reach federal prosecutions based on substantially the same act or acts that were

---

2/ The dual prosecution policy does not apply--and thus authorization is not required--where the state proceeding did not progress to the stage at which jeopardy attached or was terminated in a manner that would not, under the Double Jeopardy Clause, preclude a further state prosecution for the same offense.

3/ Once a trial on the federal charges has commenced, however, the policy does not apply, and authorization need not be sought, even if the state proceeding terminates prior to the completion of the federal proceeding. Where the federal trial results in a mistrial, a dismissal, or a reversal on appeal, the policy applies to prevent a further federal trial after an intervening state proceeding has reached one of the three stages delineated above unless authorization is obtained from the appropriate Assistant Attorney General. Where authorization is not sought or is not granted by the appropriate Assistant Attorney General, the federal prosecutor should seek a voluntary dismissal of the charges.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

involved in a prior state prosecution.<sup>4/</sup> The application of the dual prosecution policy has posed difficult questions in cases where the proposed federal charges encompass, but are not limited to, acts that have previously been prosecuted by the states. Consistent with the Department's common sense, non-technical approach to the scope of the policy, it has been concluded that the policy does not apply where the prior state prosecution involved only a minor part of the federal offense charged. This limitation on the scope of the policy is particularly important for conspiracy prosecutions and for prosecutions under substantive statutes focusing on a continuing course or pattern of criminal conduct, such as 18 U.S.C. §1961 *et seq.* (Racketeer Influenced and Corrupt Organizations) and 21 U.S.C. §848 (Continuing Criminal Enterprise). A federal conspiracy indictment, for example, may allege that a defendant engaged in a number of overt acts in furtherance of the conspiracy and may set forth a number of objectives of the conspiracy. The fact that one, or even several, of the acts or objectives of the conspiracy have been the subject of previous state prosecution does not necessarily render the dual prosecution policy applicable.<sup>5/</sup> The dual prosecution policy would apply and authorization would be required where the prior state substantive prosecution(s) covered most or all of the acts of a defendant in furtherance of the conspiracy alleged in the federal indictment. Similarly, the policy does not apply and authorization would not be required for a RICO prosecution involving a single previously prosecuted extortion as one of a number of alleged acts of racketeering. However, where there would be an insufficient number of acts of racketeering to sustain the RICO charge if the previously prosecuted acts were excluded or where the proposed federal prosecution rests substantially on acts previously prosecuted by the state, the dual prosecution policy applies and authorization must be obtained.

---

<sup>4/</sup> The policy applies even where a prospective federal prosecution requires proof of different elements than the state offense. Thus, although a state prosecution for a substantive offense would not--under strict Double Jeopardy principles--bar a subsequent state prosecution for conspiracy to commit the offense, the policy requires prior authorization before a federal conspiracy prosecution successive to such a related state proceeding may be initiated.

<sup>5/</sup> The nature of the conduct involved in the state prosecution(s) and the state sentence(s) imposed would, of course, constitute important factors in determining whether, as a matter of prosecutorial discretion, a federal prosecution based in part on the previously prosecuted conduct should be brought.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

3. Factors Governing the Authorization of Dual Prosecutions

Requests for the authorization of dual prosecutions will be evaluated on a case-by-case basis by the appropriate Assistant Attorney General. Applications for authority to undertake dual prosecutions should be addressed to the factors set forth and their relative weight. The application will be analyzed to determine whether the overall factors favoring authorization of a dual prosecution outweigh the general policy against multiple prosecutions based on substantially the same act or acts.6/

A federal prosecution will not be authorized unless the state proceeding left substantial federal interests demonstrably unvindicated.7/ Even so, a dual prosecution is not warranted unless a conviction is anticipated and--if the state proceeding resulted in a conviction--normally will not be authorized unless an enhanced sentence in the federal prosecution is anticipated.8/

Where the prior state proceedings result in a conviction, a subsequent prosecution may be warranted if the defendant in the state proceeding was charged with a state offense carrying a maximum penalty substantially below the maximum penalty of the federal offense(s) with which the defendant may be charged.

---

6/ Where a defendant who has previously been prosecuted in a state proceeding based on the same or substantially the same criminal acts consents to a federal prosecution after being informed of the Department's policy against dual prosecutions, a subsequent federal prosecution may be warranted even if the factors set forth are not satisfied.

7/ The reference in the policy to a "compelling federal interest" or "substantial federal interests" is intended to indicate that a significant federal prosecutorial interest must be present to justify authorization of a dual prosecution. Whether such an interest is present must be evaluated on the basis of the facts and circumstances of each case. However, cases coming within priority areas of the Department--such as civil rights cases, organized crime cases, tax cases, and cases involving crimes against federal officials, witnesses or informants--are, of course, more likely to meet the compelling federal interest requirement. Any determination whether such an interest exists should include the consideration given in the previous proceeding to victim restitution. The inadequate attention to this factor is inconsistent with the rationale of the restitution provisions of the Victim and Witness Protection Act of 1982.

8/ This factor may be satisfied where the state prosecution resulted in a conviction for a misdemeanor and a conviction for a federal felony is anticipated.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A subsequent prosecution may also be warranted where there is a substantial basis for believing that the choice by either the prosecutor or grand jury of the state charges which were filed or the state determination regarding guilt or severity of sentence was affected by any of the following factors:

- a. Infection of the state proceeding by incompetence, corruption, intimidation, or undue influence;
- b. Court or jury nullification involving an important federal interest, in blatant disregard of the evidence;
- c. The failure of the state to prove an element of the state offense which is not an element of the federal offense; or
- d. The unavailability of significant evidence in the state proceeding either because it was not timely discovered or because it was suppressed on state law grounds or on an erroneous view of the federal law.

**B. Successive Federal Prosecution Policy**

The Department of Justice's successive federal prosecution policy precludes the initiation or continuation of a federal prosecution following a prior federal prosecution based on the same transaction unless there is a compelling interest supporting the subsequent prosecution.

The successive federal prosecution policy is intended to regulate prosecutorial discretion in order to promote efficient utilization of the Department's resources and to protect persons charged with criminal conduct from the unfairness associated with multiple prosecutions based on the same transaction. See Rinaldi v. United States, 434 U.S. 22, 27 (1977); Petite v. United States, 361 U.S. 529 (1960).

In order to prevent unwarranted successive prosecutions, the policy requires that authorization be obtained from the appropriate Assistant Attorney General prior to initiating a subsequent prosecution. A failure to obtain prior authorization of a successive prosecution will result in a loss of any conviction through a dismissal of the charges unless it is later determined that there was in fact a compelling interest supporting the prosecution and a compelling reason to explain the failure to obtain prior authorization.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. Types of Prior Federal Proceedings Resulting in Application of the Successive Federal Prosecution Policy

The policy applies and authorization must be obtained from the appropriate Assistant Attorney General whenever there has been a prior proceeding (including a plea bargain) resulting in (1) an acquittal, (2) a conviction, or (3) other post-jeopardy termination of the case prior to the commencement of the second trial or the entry of a guilty plea on charges based on the same transaction.<sup>9/</sup> Thus, whenever jeopardy attached in a federal proceeding, authorization from the appropriate Assistant Attorney General must be obtained before a trial may be commenced or a guilty plea accepted on another federal indictment or information based on the same transaction.

In order to avoid the unnecessary expenditure of prosecutorial resources, federal prosecutors should make a reasonable effort to determine whether there are related federal proceedings pending before initiating criminal proceedings. Similarly, whenever a federal criminal case proceeds to trial or results in the entry of a guilty plea after another federal indictment or information has been filed, a voluntary dismissal should be entered on the indictment or information unless authorization is obtained for a successive federal prosecution. Whenever possible, prosecutorial efforts should be coordinated to alleviate the problems posed by successive federal prosecutions relating to the same transaction.

2. Relationship Between the Act(s) on Which the Prior Prosecution was Based and the Act(s) on Which the Proposed Prosecution Would Rest

The successive federal prosecution policy is intended to reach prosecutions based on an act, acts, or series of acts which were part of the same transaction. The Department has sought to apply the policy in a common sense, non-technical fashion in order to effectuate its salutary objectives. Hence, even where a prospective prosecution is, technically speaking, for an act different from the prior prosecution or requires proof of different elements, the subsequent prosecution will not generally be authorized if, as a practical matter, the two acts were part of the same transaction and there is not compelling interest supporting a subsequent federal

---

<sup>9/</sup> The successive federal prosecution policy does not apply--and thus authorization is not required--where the prior proceeding did not progress to the stage at which jeopardy attached.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prosecution.<sup>10/</sup> In sum, the successive federal prosecution policy does not generally permit the dividing of a single criminal transaction for separate prosecution within the same or different judicial districts.

The successive federal prosecution policy does not apply and authorization need not be obtained where the second or subsequent prosecution could not have been brought together with the initial federal prosecution of the defendant. For example, where venue restrictions preclude joining two or more offenses for trial in any single federal judicial district, the policy is not triggered even if the offenses were part of the same transaction. Similarly, the policy does not apply where the defendant opposes a single trial on charges arising out of a single transaction.<sup>11/</sup> Practical rather than legal constraints may also render the policy inapplicable. Thus, the policy does not apply if the evidence of another crime that is part of the same transaction is not obtained until after commencement of the initial federal prosecution.<sup>12/</sup>

3. Factors Governing the Authorization of Successive Federal Prosecutions

Requests for the authorization of successive federal prosecutions will be evaluated on a case-by-case basis by the

---

<sup>10/</sup> Thus, where multiple violations are involved, it is incumbent that prosecutorial efforts be coordinated to assure prosecutive consideration in the district where the interests of justice will best be served notwithstanding that many offenses, prosecutable in more than one district, *i.e.*, kidnapping, or transportation of stolen motor vehicles, are usually first presented for prosecutive consideration where the body or property comes to rest.

<sup>11/</sup> The motion of the defendant for a separate trial upon the counts of an indictment or information or his/her successful opposition to a motion of the government for joint trial of pending indictments or informations based on the same transaction is encompassed by this aspect of the policy.

<sup>12/</sup> The nature of the conduct involved in the initial federal prosecution and the sentence imposed would, of course, constitute important factors in determining whether, as a matter of prosecutorial discretion, an additional federal prosecution based on the previously prosecuted transaction should be brought.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

appropriate Assistant Attorney General based upon the following factors. Applications for authority to undertake successive federal prosecutions should address the factors set forth and their relative weight. The application will be analyzed to determine whether the overall factors favoring authorization of a successive federal prosecution outweigh the general policy against multiple prosecutions based on the same underlying transaction.<sup>13/</sup>

A successive federal prosecution will not be authorized unless the prior proceeding left substantial federal interests demonstrably unvindicated.<sup>14/</sup> Even so, a successive prosecution is not warranted unless a conviction is anticipated and, if the earlier proceedings resulted in a conviction, normally will not be authorized unless an enhanced sentence in the subsequent prosecution is anticipated.<sup>15/</sup>

A subsequent prosecution may be warranted under any of the following circumstances:

- a. There is a substantial basis for believing that either the choice by the prosecutor or grand jury of the earlier charges or the prior determination regarding guilt or severity of sentence was affected by:

---

<sup>13/</sup> Where a defendant who has previously been prosecuted in a proceeding based on the same transaction consents to a subsequent prosecution after being informed of the Department's policy against successive federal prosecution, a subsequent federal prosecution may be warranted even if the factors set forth are not satisfied.

<sup>14/</sup> The reference in the policy to a "compelling federal interest" or "substantial federal interests" is intended to indicate that a significant federal prosecutorial interest must be present to justify authorization of a successive prosecution. Whether such an interest is present must be evaluated on the basis of the facts and circumstances of each case. It is assumed that prosecutions involving offenses coming within priority areas of the Department--such as civil rights, organized crime, tax cases, and crimes against federal officials, witnesses, or informants--will normally be brought prior to or in conjunction with other possible federal charges arising out of the same transaction.

<sup>15/</sup> This factor may be satisfied where the first prosecution resulted in a misdemeanor conviction and a conviction for a felony is anticipated in the successive prosecution. Any determination whether such an interest exists should include the consideration given in the previous proceeding to victim restitution. The inadequate attention to this factor is inconsistent with the rationale of the restitution provisions of the Victim and Witness Protection Act of 1982.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(1) Incompetence, corruption, intimidation, or undue influence; or

(2) The unavailability of significant evidence because it was not timely discovered or because it was erroneously excluded as a result of an unreviewable judicial determination;

b. Fairness to other defendants or significant resource considerations favor separate prosecutions;

c. The original indictment was held insufficient as a matter of law or there was a fatal variance between the offense charged and the proof at trial.

C. General Provisions

1. Application for Authorization

The initial determination whether a proposed prosecution comes within the dual prosecution policy or the successive federal prosecution policy is the responsibility of the U.S. Attorney in those cases under his/her control. Whenever the U.S. Attorney concludes that the policy is applicable, an authorization request should be submitted to the appropriate Assistant Attorney General. In cases where there is a substantial question as to the applicability of the policy and the U.S. Attorney concludes that the policy does not apply, the U.S. Attorney shall provide the appropriate Assistant Attorney General with a brief written statement summarizing the underlying facts and the reasons for the determination. These statements are to be forwarded within ten working days after the determination has been made.

In cases handled by other Department attorneys, an authorization request should be submitted to the appropriate Assistant Attorney General whenever there is a question as to whether the dual or successive federal prosecution policy applies. These authorization requests and statements from U.S. Attorneys explaining their decisions that the policy is inapplicable shall be brought to the attention of the Deputy Attorney General. The Deputy Attorney General shall be responsible for supervising the review of these authorization requests and statements in order to promote uniformity in the Department's determinations regarding the scope of the policy.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

2. Enforcement of the Policies

In the event of violations of the dual prosecution policy or successive federal prosecution policy, the appropriate Assistant Attorney General shall either authorize the prosecution retroactively, if such authorization is warranted, or direct that the prosecutors move for the dismissal of the indictment or information. Absent unusual circumstances, an Assistant Attorney General will be reluctant to issue authorization retroactively and will direct that charges be dismissed when necessary to correct a violation of the policy. In addition, appropriate administrative action may be initiated against prosecutors who violate the policy.

3. Reservation

The dual prosecution and successive federal prosecution policy statements are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.<sup>16/</sup>

4. Prior Guidelines and Policy Statements

These general procedural provisions and the dual prosecution and successive federal prosecution policy statements supersede all prior Department of Justice guidelines and policy statements on this subject.

---

<sup>16/</sup> All of the Courts of Appeals that have considered the question have held that a criminal defendant cannot invoke the Department's policy as a bar to federal prosecution. See, e.g., United States v. Snell, 592 F.2d 1083 (9th Cir. 1979); United States v. Howard, 590 F.2d 564 (4th Cir. 1979); United States v. Frederick, 583 F.2d 273 (6th Cir. 1978); United States v. Thompson, 579 F.2d 1184 (10th Cir. 1978) (en banc); United States v. Wallace, 578 F.2d 735 (8th Cir. 1978); United States v. Nelligan, 573 F.2d 251 (5th Cir. 1978); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969). The Supreme Court, in analogous contexts, has concluded that Department policies governing its internal operations do not create rights which may be enforced by defendants against the Department. See United States v. Caceres, 440 U.S. 741 (1979); Sullivan v. United States, 348 U.S. 170 (1954).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-2.143 Juvenile Prosecutions

Prior approval from the Criminal Division is required before the U.S. Attorney may file a Motion to Transfer, *i.e.*, a Motion to Proceed Against a Juvenile as an Adult under 18 U.S.C. §5032. See USAM 9-2.134, supra.

9-2.144 Interstate Agreement on Detainers

By virtue of the Interstate Agreement on Detainers Act, Pub. L. No. 91-538, 84 Stat. 1397-1403 (1970), the United States (and the District of Columbia) entered into the Interstate Agreement on Detainers, 18 U.S.C. App., hereinafter referred to as the Agreement.

The Agreement applies to interstate transfers of prisoners for trial and to transfers from the federal government to the states and from the states to the federal government. It does not apply to transfers of federal prisoners between the several judicial districts for trial on federal charges. See United States v. Krohn, 558 F.2d 390 (8th Cir.), cert. denied, 434 U.S. 868 (1977).

Article III of the Agreement permits a prisoner to initiate final disposition of any untried indictment, information, or complaint against him/her in another state on the basis of which a detainer has been lodged against him/her. Article IV permits the prosecuting authority of a state in which an untried indictment, information, or complaint is pending to obtain temporary custody of a prisoner against whom it has lodged a detainer by filing a "written request" for custody with the incarcerating state. Accordingly, both prisoners and prosecutors have the power to initiate trials under the Agreement. Article V provides a detailed procedure for obtaining temporary custody.

The Agreement applies only to "a person who has entered upon a term of imprisonment in a penal or correctional institution," Articles III(a), IV(a), and is therefore inapplicable to one incarcerated awaiting trial, See United States v. Reed, 620 F.2d 709, 711-12 (9th Cir.), cert. denied, 449 U.S. 880 (1980); United States v. Milhollan, 599 F.2d 518 (3d Cir.), cert. denied, 444 U.S. 909 (1979); United States v. Harris, 566 F.2d 610 (8th Cir. 1977); United States v. Roberts, 548 F.2d 665, 670-71 (6th Cir.), cert. denied, 431 U.S. 931 (1977); United States v. Evans, 423 F. Supp. 528, 531 (S.D.N.Y. 1976), aff'd, 556 F.2d 561 (2d Cir. 1977). Since the Agreement applies only to a detainer based upon a pending "indictment,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

information, or complaint" which requires a "trial," Articles III(a), IV(a), the Agreement does not apply to a detainer based upon a parole violator warrant, see United States v. Reed, *supra*; United States v. Dobson, 585 F.2d 55 (3d Cir.), *cert. denied*, 439 U.S. 899 (1978). The procedure for disposition of parole violation detainers is set out in 18 U.S.C. §4214(b). The majority of state courts that have addressed the issue have, for the same reason, held the Agreement inapplicable to probation violation detainers as well. See Clipper v. State, 295 Md. 303, 455 A.2d 973 (1983); *contra* Gaddy v. Turner, 376 So. 2d 1225 (Fla. Ct. App. 2d Dist. 1979).

Article III(d) and Article IV(e) contain similar provisions that should be noted:

If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Article IV(e) (emphasis added).

It has been held that "trial" in this context includes sentencing. See Walker v. King, 448 F. Supp. 580 (S.D.N.Y. 1978). The Department has not yet determined whether to accept this decision as a correct interpretation of the Act. Nevertheless, in order to avoid litigation and the risk of invalidating prosecutions, the return of prisoners should be deferred until after the imposition of sentence. Where, however, dismissal of an indictment is sought on the basis of this ruling it should be resisted.

Courts are divided on whether shuttling within the confines of the same state and district for a brief period violates the Agreement. Compare United States v. Schrum, 504 F. Supp. 23 (D. Kan. 1980), *aff'd on opinion below*, 638 F.2d 214 (10th Cir. 1981), with Sassoon v. Stynchcombe, 654 F.2d 371 (5th Cir. 1981). The return of a federal defendant to a state facility where he/she is to be held under contract as a federal prisoner may not violate the "anti-shuttling" provisions. See United States v. Sorrell, 562 F.2d 227, 229 n.3 (3d Cir. 1977) (en banc), *cert. denied*, 436 U.S. 949 (1978); United States v. Thompson, 562 F.2d 232, 234 (3d Cir. 1977) (en banc), *cert. denied*, 436 U.S. 949 (1978).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In addition, Article IV(c) provides that, subject to continuances granted for good cause in open court in the presence of the prisoner or his/her attorney, "trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving state," otherwise the indictment shall be dismissed with prejudice, Article V(c). "[D]elay that is lawful under the Speedy Trial Act generally will comply with the mandate of the Detainer Act." See United States v. Odom, 674 F.2d 228, 231 (4th Cir.), 457 U.S. 1125 (1982). See also Article III(a) (trial must commence within 180 days of receipt by prosecuting state of prisoner's request for final disposition of charges underlying detainer). A writ of habeas corpus ad testificandum, however, does not constitute a "written request" with respect to, and has no effect upon, pending charges, even when a detainer has been previously lodged. See Carmona v. Warden, 549 F. Supp. 621 (S.D.N.Y. 1982); Adams v. United States, 423 F. Supp. 578 (E.D.N.Y. 1976), aff'd, 559 F.2d 1202 (2d Cir. 1977).

A writ of habeas corpus ad prosequendum authorized by 28 U.S.C. §2241(c)(5) is not a "detainer" for purposes of the Act and does not trigger application of the Agreement. Once a detainer has been filed, however, use of a writ of habeas corpus ad prosequendum to obtain custody does constitute a "written request" within the meaning of the Agreement, activating its provisions. See United States v. Mauro, 436 U.S. 340 (1978).

The Agreement also provides that when a prisoner requests disposition of one matter upon which a detainer has been filed it constitutes a request for disposition of all matters on which detainers have been filed by the same "state." Article III(d). The several federal districts have been held to constitute separate "states" in this context. See United States v. Bryant, 612 F.2d 806 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980). Prosecution on other charges upon which detainers have not been lodged is not authorized by the Agreement unless they arise from the same transaction. Article V(d). Whether trial of the latter is compulsory is not clear.

When the U.S. Attorney initiates the request under Article IV, the charge upon which the request is based must be disposed of prior to returning the prisoner. Article IV(e). The several federal districts have also been treated as separate states in this context. See United States v. Woods, 621 F.2d 844 (6th Cir.), cert. denied, 449 U.S. 877 (1980). Other charges may not be prosecuted unless they arise from the same transaction. Article V(d). Again, whether trial of the latter is compulsory or only permissible is not clear.

In Cuyler v. Adams, 449 U.S. 433 (1981), the Supreme Court held that Article IV(d) preserved a prisoner's extradition rights under the laws of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the state of incarceration, so that he was entitled to a hearing before he could be transferred from the custody of the State of Pennsylvania to the State of New Jersey. This ruling has no application to prisoners serving federal sentences because the United States has neither adopted the Uniform Extradition Act nor enacted any other statute providing the right of a hearing. See Sorenson v. United States, 539 F. Supp. 865 (S.D.N.Y. 1982); Thomas v. Levi, 422 F. Supp. 1027 (E.D. Pa. 1976). It is the Criminal Division's position that state prisoners serving sentence in federal facilities under contracts pursuant to 18 U.S.C. §5003 are also not entitled to pretransfer hearings even if the state whose sentence they are serving provides for such hearings under its extradition laws.

Section IV(a) allows a governor 30 days in which to disapprove a request for transfer on his/her own motion or that of the prisoner. It has been held, however, that a state governor does not have the right to disapprove a request in the form of a writ of habeas corpus ad prosequendum issued by a federal court even when a detainer has been previously lodged. See United States v. Graham, 622 F.2d 57 (3d Cir.), cert. denied, 449 U.S. 904 (1980). The Attorney General has delegated his authority to pass upon state requests under the Agreement to the Bureau of Prisons. See 28 C.F.R. §0.96(n); see also, 29 C.F.R. §527.31(a).

The Speedy Trial Act of 1974, 18 U.S.C. §3161(j), requires that a U.S. Attorney who knows that a defendant is serving a sentence in a penal institution must promptly obtain the defendant's presence for trial or cause a detainer to be lodged. If the prisoner demands trial and is made available for prosecution, the time limits of the Speedy Trial Act apply, but do not commence to run "until the defendant is actually present for purposes of pleading." See H.R. Rep. No. 93-1508, 93d Cong., 2d Sess. 36. In the event of conflict between the time limitation prescribed by the Agreement and the Speedy Trial Act, the more stringent should be applied. United States v. Mauro, *supra*, at 356-57 n. 24. See United States v. Odom, *supra*, at 231 ("The Detainer Act and the Speedy Trial Act deal with the same subject matter.... Whenever possible, the interpretation of the Acts should not be discordant").

The protection of the Agreement's "anti-shuttling" provisions may be waived by the defendant's request for a retransfer prior to disposition of the outstanding charges. See United States v. Black, 609 F.2d 1330, 1334 (9th Cir. 1979), cert. denied, 449 U.S. 847 (1980); United States v. Eaddy, 595 F.2d 341 (6th Cir. 1979); United States v. Ford, 550 F.2d 732, 735, 742 (2d Cir.), *aff'd sub nom. United States v. Mauro*, 436 U.S. 340 (1978); United States v. Scallion, 548 F.2d 1168, 1170 (5th Cir.), cert. denied, 436 U.S. 943 (1978). As these rights are not guaranteed by the Constitution to preserve a fair criminal trial, there is no requirement

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

that such a waiver be "knowingly and intelligently made." See United States v. Black, *supra*, at 1334; United States v. Eaddy, *supra*, at 344. Upon like reasoning, it is generally held that the rights will be waived or forfeited through "procedural default" by failure to make timely objection in the trial court so that violations cannot be complained of for the first time on appeal, *id.* at 346; United States v. Scallion, *supra*, at 1174, or in collateral proceedings under 28 U.S.C. §2255, *id.* at 707; United States v. Boniface, 601 F.2d 390,394 (9th Cir. 1979); Huff v. United States, 599 F.2d 860, 863 (8th Cir.), *cert. denied*, 444 U.S. 952 (1979); Hitchcock v. United States, 580 F.2d 964 (9th Cir. 1978); Edwards v. United States, 564 F.2d 652, 653-54 (2d Cir. 1977) or under 28 U.S.C. §2254, Fasano v. Hall, 615 F.2d 555 (1st Cir.), *cert. denied*, 449 U.S. 867 (1980); Bush v. Muncy, 659 F.2d 402 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); Williams v. Maryland, 445 F. Supp. 1216, 1220-22 (D. Md. 1978). See, however, Cody v. Morris, 623 F. 2d 101 (9th Cir. 1980); United States v. Williams, 615 F.2d 585 (3d Cir. 1980). Because violation of the Agreement is not a "jurisdictional" defect, an unconditional plea of guilty forecloses direct appeal and collateral review of alleged violations. See United States v. Palmer, 574 F.2d 164 (3d Cir.), *cert. denied*, 437 U.S. 907 (1978); United States v. Hach, 615 F.2d 1203, 1204 (8th Cir.), *cert. denied*, 446 U.S. 912 (1980); United States v. Camp, 587 F.2d 397, 399-400 (8th Cir. 1978).

9-2.145 Dismissals

Criminal Division approval is required before dismissing, in whole or in part, an indictment, information, or complaint as set forth in USAM 9-2.134, *supra*.

The above-mentioned approval is not a direction but rather an authorization to dismiss if, in the opinion of the U.S. Attorney, this course is advisable. U.S. Attorneys must satisfy themselves that the conditions upon which dismissals are authorized have been complied with.

In the instances in which Division approval is required for dismissal, the U.S. Attorney should submit a Form No. USA 900 (Authorization for Dismissal of Indictment and Information) setting forth the reasons for recommending dismissal. If the exigencies of the situation require immediate action, telephonic approval to dismiss may be obtained and the Form 900 thereafter sent to the appropriate section of the Division.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-2.146 Pleas by Corporations

Charges against an individual defendant should not be dismissed on the basis of a plea of guilty by a corporate defendant unless there are special circumstances justifying the dismissal.

9-2.147 Extradition and Deportation

No agreement shall be made by a U.S. Attorney that an individual will not be extradited or deported or that his/her extradition or deportation will be delayed, altered, or restricted to certain nations without the prior approval of the Criminal Division in criminal cases and in cases involving extradition or the Civil Division in civil cases.

9-2.148 Recommendation of Death Penalty

The death penalty shall not be recommended without the approval of the Attorney General. Requests for such approval should be processed through the Criminal Division section or office having jurisdiction over the violation for which defendant is being prosecuted.

9-2.149 Revocation of Naturalization

No suit to revoke naturalization under 8 U.S.C. §1451 shall be instituted by the U.S. Attorney without prior consultation with the Office of Immigration Litigation in the Civil Division.

9-2.150 Policy Limitations--Prosecutorial and Other Matters (cont.)

9-2.151 International Contacts

Other than when notifying a foreign consul of the arrest of a national of his/her country, see USAM 9-2.173, infra, the U.S. Attorney shall consult with the Division before making any contact concerning a criminal case with, and upon receiving any communication concerning a criminal case from:

A. The Department of State, a United States embassy or consular post;  
or,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Any ministry, embassy, consulate, representative, officer, or agency of a foreign government, international organization, or agency.

Any proposed contact with other persons in a foreign country should first be discussed with the Criminal Division. Contact attorneys in the Office of International Affairs (FTS 724-7600) regarding international contacts. See USAM 9-4.540. Before attempting to do any act in Switzerland, even the making of a telephone call to that country, related to any present or possible future criminal prosecution, approval of the Criminal Division should be obtained. See USAM 9-4.541.

9-2.152 Special Instructions--General Litigation and Legal Advice Section Matters

Upon being served with the summons and complaint in a case within the General Litigation and Legal Advice Section's jurisdiction, see USAM 9-1.403, the U.S. Attorney should immediately send two copies of the pleadings and other papers to the Section with a letter of transmittal setting out any background information known to him/her about the action. Pending instructions from the Section, he/she should take all action appropriate to protect the interests of the government. Because of the sensitive nature of these cases and the necessity of a uniform response to the issues presented, it is important that the U.S. Attorney take no action going to the merits of the case until after advice from or consultation with the Section. If the U.S. Attorney has any doubt whether a particular case is within the Section's jurisdiction, he/she should

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

promptly inquire of the Section. No case within the Section's jurisdiction may be compromised or settled without prior approval by the Section.

U.S. Attorneys should also immediately advise the Section of the filing in any court, state or federal, in their districts of any case in which the issues relate to the Section's jurisdiction, so that the Section may advise him/her of whatever action the Attorney General desires to take under 28 U.S.C. §517.

9-2.153 Report by Grand Jury

The U.S. Attorney should consult with the Criminal Division prior to requesting a grand jury to make a report. When a U.S. Attorney learns that a grand jury is preparing a report which he/she has not requested, he/she should advise the Criminal Division.

9-2.154 Legislative Proposals by U.S. Attorneys

Please refer to USAM 1-8.000 (Relations with the Congress).

The Criminal Division is interested in obtaining the benefit of any suggestions by U.S. Attorneys or their Assistants for changes in federal statutory law, or rules, affecting criminal prosecutions. Accordingly, U.S. Attorneys and Assistants are encouraged to develop such proposals and to forward them for initial consideration to the Office of Legislation, Room 2244-A, Main Justice Building. The suggestions for changes in rules and legislation may also be submitted concurrently to the Legislation and Court Rules Subcommittee of the Attorney General's Advisory Committee of U.S. Attorneys. Suggested legislative changes should be submitted concurrently to the Office of Legislative Affairs.

U.S. Attorneys and their staffs are reminded that all suggestions for changes in federal criminal statutes must be communicated to the Department of Justice and not to Congress directly. Unsolicited communication to Congress of individual proposals for legislation, outside proper official channels, has the potential to cause grave embarrassment to the Department and, however well motivated, is contrary to Department policy. See also 18 U.S.C. §1913.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-2.155 Sensitive Matters

The U.S. Attorney should keep the Criminal Division apprised of all developments in sensitive criminal matters, particularly those which may generate questions to the Criminal Division or higher authority.

9-2.156 Compromises of Civil or Tax Liability

No agreement shall be made by a U.S. Attorney, by plea bargain with a defendant or in discussion designed to secure a witness's testimony or otherwise, which may prejudice or foreclose an action by the United States to impose civil or tax liability upon that party without prior approval of the appropriate Division of the Department except as expressly authorized by USAM 4-2.000. See especially USAM 4-2.12, 4-2.14. Any release, settlement, or other disposition contrary to those provisions is not binding on the United States.

In computing the amount of a claim which may be compromised without prior authorization pursuant to USAM 4-2.12 (c), supra, the U.S. Attorney must consider the entire amount of civil damages, not merely that amount to which the criminal case relates. See USAM 4-2.14 (c), supra. Where the U.S. Attorney is not authorized to compromise the claim, he/she must exercise extreme care to avoid giving a false impression or making any representation suggesting that, as a result of any plea agreement or commitment to cooperate, a civil or tax suit will be compromised, foreclosed, or somehow merged into the disposition of the criminal case.

Questions concerning the foregoing may be referred to the Commercial Litigation Branch of the Civil Division (ETS 724-7179) or the Criminal Section of the Tax Division (FTS 633-2973).

9-2.157 Investigation of Jury Panels

When it is deemed essential, the Federal Bureau of Investigation may be requested to investigate prospective petit jurors in federal criminal cases. However, an investigation should not be requested or undertaken unless there are exceptional circumstances involved in the case and then only with the approval of the Assistant Attorney General. Such investigations as may be authorized shall be limited to examining any criminal records, including arrest records, and checking field office indices.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Requests for such investigations should be submitted to the Assistant Attorney General sufficiently in advance of trial so as not to place an unnecessary time burden on the FBI.

9-2.158 Participation of Attorneys not Employed by the Department of Justice in Litigation

Special approval and appointment must be obtained for the participation in court proceedings by attorneys not employed by the Department of Justice. Requests for appointments for such attorneys to assist U.S. Attorneys should be directed to the Executive Office for U.S. Attorneys. Requests for appointments for such attorneys to assist Criminal Division attorneys should be directed to the Criminal Division's Office of Enforcement Operations.

It has long been the policy of the Department that only in rare cases will requests for special appointment be granted. The substantial assistance we receive from the attorneys of the investigative and referring agencies is appreciated and required. However, the responsibility for the conduct of the trial rests on the Department of Justice and should not be delegated.

Special circumstances may require that a blanket approval for the participation in litigation of attorneys employed by a federal agency or department other than the Department of Justice be obtained; if so, the U.S. Attorney in his/her request for the issuance of a blanket approval should explain fully the necessity for it. In such instances, the control and responsibility for the litigation remain with the U.S. Attorney.

9-2.159 Refusal of Government Departments and Agencies to Produce Evidence

It is the responsibility of the Department of Justice to enforce the law vigorously and it cannot abdicate this duty because of possible embarrassment to other agencies of the government. Situations may arise where substantial reasons of national security, foreign policy or the like may require the Department to abandon an investigation, forego litigation, or seek dismissal of a case. However, such action should be taken only after the most careful consideration of all of the relevant facts and then only with the personal approval of the Assistant Attorney General in charge of the Division having responsibility for the case.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Accordingly, all U.S. Attorneys handling cases in which another government agency refuses to produce records or witnesses necessary for successful litigation of the case are directed to proceed in the following manner:

A. In no event should the U.S. Attorney accept the opinion or representation of the agency that such records or witnesses cannot be made available without determining all of the specific facts upon which the agency relies to support its refusal.

B. If the U.S. Attorney is not satisfied that the facts justify the refusal, he/she should so advise the agency and seek to procure the evidence requested of the agency.

C. If the U.S. Attorney concurs that there are sufficient and valid reasons to support the agency's refusal to produce the necessary evidence, he/she should advise the Assistant Attorney General in charge of the division having jurisdiction over the subject matter of the case of his/her conclusion. That Assistant Attorney General, after consultation with the Deputy Attorney General, will authorize the U.S. Attorney, if necessary and appropriate, to terminate the investigation, forego the litigation, or dismiss the case. A full statement of the facts supporting the conclusion of the U.S. Attorney should be set forth in the correspondence to the appropriate Assistant Attorney General.

The U.S. Attorney should also apprise the appropriate Assistant Attorney General of any incidents coming to his/her attention where he/she believes any agency of the federal government is not cooperating in his/her efforts to obtain the full disclosure of the facts to enable him/her to make an intelligent judgment as to whether the agency's refusal to produce requested evidence is justified.

9-2.160 Policy Limitations-- Prosecutorial and Other Matters (cont.)

9-2.161 Policy with Regard to the Issuance of Subpoenas to Members of the News Media, Subpoenas for Telephone Toll Records of Members of the News Media, and the Interrogation, Indictment, or Arrest of Members of the News Media

Procedures and standards regarding the issuance of subpoenas to members of the news media, subpoenas for the telephone toll records of members of the news media, and the interrogation, indictment, or arrest of members of the news media are set forth in 28 C.F.R. §50.10. See also

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

USAM 1-5.410. In view of the Department's policy to protect freedom of the press, news gathering function, and news media sources, all attorneys contemplating the issuance of such subpoenas or the initiation of criminal proceedings against a member of the news media should be aware of the requirements of 28 C.F.R. §50.10. See also USAM 1-5.410.

Except in cases involving exigent circumstances, the express approval of the Attorney General is necessary prior to the interrogation, indictment, or arrest of a member of the news media. The Attorney General's authorization is also required before the issuance of a subpoena to a member of the news media except in those cases where a media representative agrees to provide the material sought and that material has already been published or broadcast. In addition, the Attorney General's permission is required before the issuance of a subpoena for the telephone toll records of a member of the news media. Failure to obtain the prior approval of the Attorney General, where required, may constitute grounds for disciplinary action.

Whenever the Attorney General's authorization is sought pursuant to 28 C.F.R. §50.10 in a case or matter under the supervision of the Criminal Division, the Office of Enforcement Operations should be contacted at FTS 724-6672. In cases or matters under the supervision of other divisions of the Department of Justice, the appropriate division should be contacted.

9-2.162 Grand Jury Subpoenas for Financial Records

The Supreme Court held in United States v. Miller, 425 U.S. 435 (1976), that a bank depositor lacks the necessary Fourth Amendment interest to challenge a subpoena duces tecum issued to a bank for its records of its depositor's transactions. It is important, nevertheless, that U.S. Attorneys exercise a close control over the obtaining for law enforcement purposes of the business records of banks and other financial institutions. There is a danger that the Congress will curtail the government's access to such financial records unless past abuses and putative abuses of grand jury process are completely avoided.

It is required that:

A. U.S. Attorney or Assistant U.S. Attorney shall personally authorize the issuance of a subpoena duces tecum to obtain financial records in such a way as to avoid any appearance that the matter was left to the discretion of an investigative agent serving the subpoena;

B. Every such subpoena shall be returnable only on a date when the grand jury is in session and the subpoenaed records shall be produced

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

before the grand jury unless the grand jury itself has previously agreed upon some different course, see United States v. Hilton, 534 F.2d 556, 564-65 (3d Cir. 1976); and

C. If, for the sake of convenience and economy, the subpoenaed party is permitted voluntarily to relinquish the records to the government agent serving the subpoena, a report shall be made in due course to the grand jury as to the nature and contents of the records.

While these three requirements may seem to involve simply an observance of the fundamentals of grand jury practice, there is the broader intention of avoiding any semblance of abuse of the grand jury.

9-2.163 Grand Jury Subpoenas for Telephone Toll Records: Certifications

A. Telephone Company Policy

As a matter of corporate policy, the American Telephone and Telegraph Company and its affiliates will not release telephone toll records to any federal, state, or local law enforcement official except pursuant to legal process. Within twenty-four hours of service of a subpoena or summons, the company will notify its subscriber thereof, unless the government attorney certifies that notification to the subscriber would interfere with law enforcement. Such a certification will protect against notification for a period of 90 days only, but the company will honor requests for additional periods of 90 days as the needs of law enforcement may require. When the time lapses under a certification or re-certification, the company will notify its subscriber that his/her toll records were released. This notification will be given automatically, whether or not the subscriber requested the information.

This corporate policy went into effect on March 1, 1974 under the following public announcement:

Bell System Policy for Release of Toll Information  
Upon Request of a Law Enforcement Agency

The toll billing records of a subscriber shall be released to a law enforcement agency only upon receipt of a valid civil or criminal subpoena or administrative summons.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Automatic notification will be given by the telephone company to the subscriber within twenty-four hours after the receipt of the subpoena or summons unless, in cases where unusual and compelling circumstances so dictate, a certification is included in the body of the criminal subpoena or summons, or an accompanying letter referring thereto, signed by the individual who procured the issuance of the subpoena or summons, to the following effect:

'Pursuant to an official criminal investigation of a suspected felony being conducted by the (agency), it is requested that your company furnish on (date) toll record information pertaining to (name and/or telephone number) for the date/s \_\_\_\_\_, through \_\_\_\_\_ inclusive.

You are not to disclose the existence of this request for a period of 90 days from the date of this request. Any such disclosure could impede the investigation being conducted and thereby interfere with the enforcement of the law.'

It is anticipated that such certification will only be provided in bona fide factual situations of compelling character.

B. Departmental Policy of Use of Subpoenas

It is the responsibility of the U.S. Attorney to make certifications and re-certifications in all appropriate situations in accordance with Criminal Division policy.

The policy is to have toll records subpoenaed in aid of criminal investigations whenever practicable. If speedy action is required but there is no grand jury in session to issue the necessary subpoena, the U.S. Attorney should give prompt consideration to the possibility of causing the investigation to be taken up in another district which has a grand jury in session and in which there exists possible venue for the offense. See 18 U.S.C. §3237 and USAM 9-11.221.

Since grand jury process may be utilized only with a view toward possible federal indictment, it would not be proper to subpoena telephone toll records to assist federal officials seeking to apprehend military

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

deserters. See USAM 9-11.223. A subpoena could be used, however, in an investigation of a person suspected of harboring a deserter in violation of 18 U.S.C. §1381, or in an investigation looking toward a possible indictment of the military deserter.

C. Certifications

So long as the grand jury investigation involves ongoing criminal activity, the Criminal Division considers it appropriate, as a matter of course, to request the telephone company not to notify the subscriber of the subpoena. On the other hand, if the investigation involves completed criminal activity only, it will generally be inappropriate to make a certification or re-certification. Certification for nondisclosure should be made in cases of completed criminal activity only if special circumstances exist to indicate that disclosure would impede or prejudice an investigation or prosecution.

Certification should be made, not in the body of a subpoena, but in an accompanying letter signed by the U.S. Attorney, an Assistant U.S. Attorney, or other attorney for the government handling the grand jury presentation.

It is imperative that the certification and re-certification procedures be implemented and monitored with great care in order to safeguard investigations as much as possible.

No further reference to Memorandum No. 796 is necessary.

D. Subpoenas for Telephone Toll Records of Members of the News Media

The policy regarding subpoenas for telephone toll records of members of the news media is discussed at USAM 9-2.161, supra, and USAM 1-5.410.

9-2.164 Number of Counts in Indictments

In order to promote the fair administration of justice, as well as the perception of justice, all U.S. Attorneys should charge in indictments and informations as few separate counts as are reasonably necessary to prosecute fully and successfully and to provide for a fair sentence on conviction. To the extent reasonable, indictments and informations should be limited to fifteen counts or less, so long as such a limitation does not jeopardize successful prosecution or preclude a sentence appropriate to the nature and extent of the offenses involved.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-2.165 State and Territorial Prisoners Incarcerated in Federal Institutions

18 U.S.C. §5003(a) authorizes the United States Bureau of Prisons to incarcerate persons who have been convicted in state and territorial courts. In 1978, the United States Court of Appeals for the Seventh Circuit held that a state prisoner could be held in a federal penal facility pursuant to 18 U.S.C. §5003 only where "specialized treatment" was available to the state prisoner which was not available in a state facility. See Lono v. Fenton, 581 F.2d 645 (7th Cir. 1978) (en banc). This decision generated a number of suits by state prisoners incarcerated in federal facilities which sought to compel their return to the states in which they were convicted.

In 1981, the Supreme Court settled a circuit split on this issue, holding that 18 U.S.C. §5003 does not restrict the use of federal prison facilities to those state prisoners who are in need of some particular treatment available in the federal prison system. See Howe v. Smith, 452 U.S. 473 (1981). In the event that state or territorial prisoners confined in federal penal institutions initiate actions seeking to compel their transfers to the states or territories in which they were convicted on the basis of Lono v. Fenton, 581 F.2d 645 (7th Cir. 1978) (en banc), such efforts should be resisted on the grounds that Lono has been overruled by Howe v. Smith, 452 U.S. 473 (1981).

9-2.166 Testimony of FBI Laboratory Examiners

In situations where FBI laboratory examinations have resulted in findings having no apparent probative value, yet defense counsel intends to subpoena the examiner to testify the U.S. Attorney should inform defense counsel of the FBI's policy requiring payment of the examiner's travel expenses by defense counsel. The U.S. Attorney should also attempt to secure a stipulation concerning this testimony. This will avoid needless expenditures of time and money attendant to the appearance of the examiner in court.

9-2.170 Policy Limitations--Miscellaneous

9-2.171 Decision to Appeal or Not to Appeal

The decision to seek or not to seek a review by the Supreme Court of an adverse decision, the decision to appeal or not to appeal to all

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

appellate courts (including petitions for rehearing en banc), and the decision to file or not to file petitions to such courts for the issuance of extraordinary writs are reserved to the Solicitor General.

The circumstances in which the government may appeal from a district court decision in a criminal case are described in 18 U.S.C. §3731. Until recently, that section permitted, to the extent not barred by the double jeopardy clause, appeal by the government from a decision suppressing evidence or ordering return of seized property, and from a decision dismissing any count of an indictment or information. 18 U.S.C. §3731 was amended by section 1206 of the Comprehensive Crime Control Act of 1984 to permit the government to appeal an order granting a new trial after conviction. The amendment applies to a notice of appeal filed after the Act was signed on October 12, 1984.

Prior authorization of the Solicitor General (through the Appellate Section of the Criminal Division) must be obtained for all appeals by the government to all appellate courts (including petitions for rehearing en banc, but not for rehearing by the panel) and for all petitions to such courts for the issuance of extraordinary writs. All review in the Supreme Court is handled by the Department. Two copies of all briefs and printed records on appeal should be forwarded to the Department as soon as possible. The Appellate Section of the Criminal Division should be notified immediately (within a day or two) of all decisions which may be adverse to the government and should be sent copies of all adverse district court rulings and all adverse and favorable court of appeals rulings.

Notices of appeal should not be filed prior to Solicitor General authorization unless it is absolutely necessary to preserve the government's right to appeal.

The time to petition for rehearing should be protected in those instances in which the Department has not been advised of an adverse decision of the court of appeals in a timely fashion by the filing of a motion for extension of 15 to 30 days to petition for rehearing.

See USAM Title 2 dealing with Appeals.

#### 9-2.172 Appearance Bond Forfeiture Judgments

The U.S. Attorney may compromise or close appearance bond forfeiture judgments that are for \$100,000 or less. Authorization from the Criminal Division must be secured prior to entering into negotiations for

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

compromising or closing as uncollectible such a judgment which is for more than \$100,000.

9-2.173 Arrest of Foreign Nationals

Where nationals of foreign countries are arrested on charges of federal criminal violations, the U.S. Attorney has the responsibility to ensure that the treaty obligations of the United States concerning notification of the consular officer of the country of which the arrested person is a national are observed. The procedure to be followed when the arrest is by an officer of the Department of Justice is specified in 28 C.F.R. §50.5.

Certain treaties require that the consular official be notified of the arrest of one of his/her nationals only upon the demand or request of the foreign national. Other treaties require notifying the consul of the arrest of a national of his/her country whether or not the arrested person requests such notification. If the foreign national arrested on federal criminal charges is a member of the consular staff or the consul himself/herself, special obligations are imposed by certain treaties.

Information concerning the treaty obligations of the United States in the event of the arrest of a foreign national, a consul, or member of the consular staff may be obtained from the Criminal Division by calling (724-7600).

9-2.200 RELEASE OF INFORMATION

Please refer to USAM 1-5.000.

9-2.210 Press Information and Privacy

See USAM 1-5.510 dealing with release of information to the news media or public relating to criminal or civil proceedings.

9-2.211 Press Information Guidelines for Criminal Cases

The guidelines for release of information to the media by press release or in any other way are found in 28 C.F.R. §50.2. The criminal guidelines are reprinted in USAM 1-5.540.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The instructions concerning release of information apply from the time "a person is the subject of a criminal investigation;" accordingly, no statements should be made concerning the subject matter of a grand jury nor should prospective defendants be identified.

No information concerning cases relating to internal security should be given to the news media or to anyone else not officially participating in the matter except through the Department's Office of Public Affairs.

1984 USAM (superseded)

JULY 1, 1985  
Ch. 2, p. 48

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 4

	<u>Page</u>
9-4.000 <u>OBTAINING EVIDENCE</u>	1
9-4.100 SEARCH AND SEIZURE	1
9-4.110 <u>Search Warrants</u>	3
9-4.111 Exceptions to Warrant Requirements	4
9-4.112 Warrant Requirements	5
9-4.113 Probable Cause	12
9-4.114 Particularity	14
9-4.115 Execution	18
9-4.116 Manner of Entry	20
9-4.117 Scope and Intensity of the Search	23
9-4.118 Receipt, Return of Inventory	25
9-4.119 Seizure Pending a Warrant	25
9-4.120 <u>Search and Seizure of Persons and Effects</u>	25
9-4.121 Seizure of the Person	26
9-4.122 Arrest	26
9-4.123 Search Incident to Arrest	28
9-4.124 Stop and Frisk	33
9-4.125 Detention During Search of Home	35
9-4.126 Containers	35
9-4.127 Searches and Seizures at Airports	37
9-4.128 Destruction or Removal of Property to Prevent Seizure; Warning the Subject of a Search	41
9-4.130 <u>Searches of Premises and Real Property</u>	42
9-4.131 Entry of Premises	42
9-4.132 Plain View Doctrine	47
9-4.133 Open Fields and Curtilage	49
9-4.140 <u>Search and Seizure of Automobiles, Boats and Airplanes</u>	51
9-4.141 Automobiles	51
9-4.142 Regulatory Stops	52
9-4.143 Warrantless Searches and Seizures of Vehicles Based on Probable Cause	53
9-4.144 The Permissible Scope of an Automobile Search Based Upon Probable Cause or Following Arrest or Detention of Its Occupants (Inventory)	55

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-4.145	Airplane Searches	56
9-4.146	Searches of Vessels Within and Without the Border	57
9-4.150	<u>Limited Intrusions; Abandonment; Consent Searches</u>	59
9-4.151	Limited Intrusions: Beepers and Pen Registers	59
9-4.152	Abandonment	61
9-4.153	Consent Searches	61
9-4.154	The Effect of a Person's Consent to a Search	62
9-4.155	Third Party Consent	67
9-4.156	Scope of Consent	72
9-4.157	Revocation of Consent	73
9-4.160	<u>Administrative Searches</u>	74
9-4.161	Administrative Warrant for Regulatory Inspections	74
9-4.162	Exceptions to the Warrant Requirement in Administrative Searches	75
9-4.163	Emergencies	75
9-4.164	Regulated Industries	75
9-4.165	Consent to an Administrative Search	76
9-4.166	Fire and Arson Investigations	77
9-4.167	Prisons	77
9-4.168	Miscellaneous Administrative Searches	78
9-4.170	<u>Border Searches</u>	78
9-4.171	Functional Equivalents of the Border	80
9-4.172	Extended Border Searches	82
9-4.173	Routine Searches	83
9-4.174	More Extensive Intrusions	84
9-4.175	International Mail	85
9-4.180	<u>Suppression of Evidence and Return of Property</u>	86
9-4.181	Standing	88
9-4.182	Fruit of the Poisonous Tree	90
9-4.183	The Exclusionary Rule	91
9-4.184	Retroactivity	95
9-4.190	<u>Custody and Disposition of Evidence and Seized Property</u>	96
9-4.191	Return of Seized Property to the Lawful Owner	97

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-4.192	Vesting of Unclaimed Property	97
9-4.193	Forfeiture of Seized Property	98
9-4.194	Destruction of Seized Property	98
9-4.195	Disposition of Contraband	98
9-4.196	Disposition of Hazardous Chemicals and Bulk Contraband Property	99
9-4.197	Forms	102
9-4.198	Summary List of Forfeiture Statutes and Regulations	106
9-4.200	MAIL COVERS	108
9-4.201	Defined	108
9-4.202	Regulations	108
9-4.203	Mail Cover--Prohibitions and Limitations	109
9-4.204	Mail Cover--Excludability of Evidence Obtained in Violation of Regulation	109
9-4.205	Insufficient Grounds for Mail Cover-- Excludability of Evidence Obtained	110
9-4.206	Objections to Mail Cover Evidence-- Notice to Division	110
9-4.207	Inquiries or Problems Concerning Mail Covers--Whom to Contact	110
9-4.300	POLYGRAPHS	111
9-4.310	<u>In General</u>	111
9-4.320	<u>Technique</u>	111
9-4.330	<u>Introduction at Trial</u>	112
9-4.340	<u>Opposition to Admission</u>	116
9-4.341	Accuracy	117
9-4.342	Examination Variables	117
9-4.343	Role of Examiner	118
9-4.344	Other Reasons for Exclusion	118
9-4.350	<u>Department Policy Towards Polygraph Use</u>	119
9-4.400	OUT-OF-COURT IDENTIFICATION PROCEDURES	120
9-4.410	<u>Lineups and Showups</u>	120
9-4.411	Power to Order Lineup, Right to Counsel	120

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-4.412	Self-Incrimination	121
9-4.413	Due Process	122
9-4.414	Admissibility of Lineup and Showup Identifications	122
9-4.420	<u>Photographic Identifications</u>	122
9-4.421	Right to Counsel	122
9-4.422	Due Process	123
9-4.430	<u>Physical Evidence</u>	123
9-4.431	Right to Counsel	123
9-4.432	Self-Incrimination	124
9-4.433	Search and Seizure	124
9-4.440	<u>Fingerprinting</u>	125
9-4.441	Right to Counsel	125
9-4.442	Self-Incrimination	125
9-4.443	Search and Seizure	126
9-4.450	<u>Handwriting Exemplars</u>	126
9-4.451	Right to Counsel	126
9-4.452	Self-Incrimination	126
9-4.453	Search and Seizure	126
9-4.460	<u>Voice Exemplars</u>	126
9-4.461	Self-Incrimination	127
9-4.462	Search and Seizure	127
9-4.463	Admissibility of Spectrograms (Voice Prints)	127
9-4.500	INTERNATIONAL CONTACTS AND JUDICIAL ASSISTANCE	127
9-4.510	<u>Judicial Assistance</u>	128
9-4.511	Request for Judicial Assistance	129
9-4.512	Drafting a Request for Judicial Assistance	129
9-4.520	<u>Request Package</u>	130
9-4.521	The Court's Request	130
9-4.522	Application for the Court's Request	131
9-4.523	Description of Assistance Requested	131
9-4.524	Statement of Facts	134
9-4.525	List of Elements	135
9-4.526	Need for Assistance Requested	136

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-4.527	Concluding Prayer	136
9-4.528	Supporting Memorandum	136
9-4.530	<u>Procedure After Drafting</u>	139
9-4.540	<u>International Contacts</u>	139
9-4.541	Contacts in Switzerland	140
9-4.542	Investigative Agencies in Foreign Countries	154
9-4.543	Subpoenas to Obtain Records Located in Foreign Countries	155
9-4.600	USE OF HYPNOSIS	156
9-4.601	Purpose and Scope	156
9-4.610	<u>Admissibility in Trial</u>	156
9-4.611	Prosecution Witness	156
9-4.612	Defendant	159
9-4.613	Disclosure of Use of Hypnosis	160
9-4.614	Expert Witness	160
9-4.620	<u>Authorization</u>	160
9-4.621	Additional References	162
9-4.700	[RESERVED]	162
9-4.800	ACCESS TO AND DISCLOSURE OF FINANCIAL RECORDS	162
9-4.801	Introduction	162
9-4.802	Office to be Contacted	163
9-4.810	<u>Right to Financial Privacy Act--General</u>	163
9-4.811	Financial Institutions Covered	163
9-4.812	Customers Covered	164
9-4.813	Records Covered	164
9-4.814	General Restrictions Upon Government Access	167
9-4.815	Certification of Compliance Requirement	167
9-4.816	Customer Authorization	168
9-4.817	Search Warrant Procedures	169
9-4.818	Definitions of Judicial Subpoena, Administrative Summons and Formal Written Request	169
9-4.819	Customer Notice Requirements for Judicial Subpoenas, Administrative Process and Formal Written Request	170

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-4.820	<u>Right to Financial Privacy Act--General</u>	
	<u>(Continued)</u>	171
9-4.821	Venue for Customer Challenge Suits	171
9-4.822	Substance of Customer Notice	172
9-4.823	Timing of Access Following Customer Notice	172
9-4.824	Court-Ordered Delay of Notice Procedure	173
9-4.825	Post-Delay Procedures	174
9-4.826	Customer Challenge Proceedings	174
9-4.827	Government Response to Customer Challenge	175
9-4.828	In Camera Review of Government Response	176
9-4.829	Appeals and Other Post-Challenge Matters	176
9-4.830	<u>Right to Financial Privacy Act--General</u>	
	<u>(Continued)</u>	177
9-4.831	Rights and Duties of Financial Institutions	177
9-4.832	Interagency Transfers of Financial Records	177
9-4.840	<u>Exceptions</u>	179
9-4.841	Litigation Exception	179
9-4.842	Grand Jury Subpoena Exception	179
9-4.843	Procedure for Grand Jury Subpoena of Financial Records	181
9-4.844	Procedures for Handling Financial Records Subpoenaed by the Grand Jury	182
9-4.845	Prohibiting Banks from Notifying Customers of Grand Jury Subpoenas	183
9-4.846	Account Identification Information Exception	184
9-4.847	Foreign Intelligence and Secret Service Protective Function Exceptions	185
9-4.848	Emergency Access Exception	186
9-4.849	Exceptions Permitting Disclosures by Financial Institutions	186
9-4.850	<u>Exceptions (Continued)</u>	190
9-4.851	Non-Target Exception	190
9-4.852	Bank Supervisory Agency Exception	191
9-4.843	General Accounting Office Exception	191
9-4.854	Internal Revenue Service Exception	191
9-4.855	Required Report Exception	192
9-4.856	Exception for Financial Records Pertinent to Federally Insured or Guaranteed Loans	192
9-4.857	Securities and Exchange Commission Exception	192

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-4.860	<u>Reimbursement of Financial Institutions</u>	192
9-4.870	<u>Customer Civil Actions for Violations of the Act</u>	195
9-4.880	<u>Reporting Requirements</u>	196
9-4.890	<u>Compliance Checklist</u>	196
9-4.891	Forms	201
9-4.900	ACCESS TO AND DISCLOSURE OF TAX RETURNS IN A NONTAX CRIMINAL CASE	243
9-4.901	Definitions	243
9-4.902	Disclosure	244
9-4.903	Consent to Disclosure	245
9-4.910	<u>Access to Returns and Return Information</u>	245
9-4.911	Disclosure Under 26 U.S.C. §6103(1)(1)	247
9-4.912	Disclosure Under 26 U.S.C. §6103(1)(2)	253
9-4.913	Disclosure Under 26 U.S.C. §6103(1)(3)	255
9-4.914	Use of Certain Disclosed Returns and Return Information in Judicial or Administrative Proceedings, 26 U.S.C. §6103(1)(4)	256
9-4.915	Disclosure to Locate Fugitives from Justice, 26 U.S.C. §6103(1)(5)	257
9-4.916	Restrictions on Disclosures, 26 U.S.C. §6103(1)(6)	262
9-4.917	Communication with IRS Personnel	262
9-4.918	Utilization of IRS Personnel	263

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.000 OBTAINING EVIDENCE

9-4.100 SEARCH AND SEIZURE

A. Introduction. It is recommended that USAM 9-4.100 et seq. be used in conjunction with: (1) the definitive three volume treatise, W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment (1978) and its annual pocket part (hereinafter LaFave); (2) a review of recent cases, most particularly: United States v. Leon, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3405 (1984), and Massachusetts v. Sheppard, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3424 (1984), the decisions modifying the Fourth Amendment exclusionary rule so as not to bar the use in the prosecution's case-in-chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate; (3) Segura v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3380 (1984) (holding that the Fourth Amendment does not require suppression of evidence seized from a private residence pursuant to a valid search warrant even though the police have made an earlier illegal entry into the residence) and INS v. Lopez-Mendoza, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3479 (1984) (holding that the exclusionary rule does not apply in deportation proceedings); and (4) JURIS, to obtain copies of current briefs filed by the Solicitor General in the Supreme Court. Wright, Federal Practice and Procedure: Criminal 2d, §§661-678; Cissell, Federal Criminal Trials, Chapter 2, and the Departmental publication, Proving Federal Crimes (1980), also are useful. Finally, the Appellate Section of the Criminal Division is available to furnish assistance.

The aim in considering the Fourth Amendment, the subject of more recent litigation than any other provision of the Bill of Rights, is not to be definitive but to point the reader in the right direction. While cases from the courts of appeals are cited herein, the focus is on recent Supreme Court cases which will, in turn, lead the reader to current circuit law. We also provide references to the LaFave treatise. Interceptions of communications pursuant to 18 U.S.C. §2510 et seq. ("Title IIIs"), are covered in USAM 9-7.000 et seq., and the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1801 et seq., is assigned to the Office of Intelligence Policy and Review.

B. The Fourth Amendment to the Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

1. Expectation of Privacy. The fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances. See United States v. Chadwick, 433 U.S. 1, 9 (1977). This in turn requires a determination whether a person has an expectation of privacy against a government intrusion in those situations that society is prepared to recognize as "reasonable." See Katz v. United States, 389 U.S. 347, 360 (Harland, J. concurring); Oliver v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 1735, 1740 (1984); United States v. Jacobson, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 1652, 1656 (1984); Rakas v. Illinois, 439 U.S. 128, 143 (1978); LaFave §2.1. In order to establish "standing" to raise the Fourth Amendment claim, the defendant must have the reasonable expectation of privacy; if such a reasonable expectation exists, but not with respect to the charged defendant, he/she may not complain about the search. See, e.g., Rawlings v. Kentucky, 448 U.S. 98, 104-105 (1980); Rakas v. Illinois, *supra*, at 128, 140-149; United States v. Payner, 447 U.S. 727 (1980).

2. Probable Cause and Particularized Suspicion. The most significant intrusions into privacy by law enforcement officials permitted by the Fourth Amendment require probable cause. Its often quoted definition is set forth in Binegar v. United States, 338 U.S. 160, 175 (1949): "In dealing with probable cause, ... as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." See Illinois v. Gates, 462 U.S. 213, 224, (1983); LaFave §3.1. Lesser intrusions such as brief investigatory stops may rest on a lesser standard, a "particularized suspicion"--a term explained in United States v. Cortez, 449 U.S. 411, 417-418 (1981), that allows a trained law officer to draw inferences and make deductions that might elude untrained persons. See LaFave §9.3. Some encounters between an individual and law officers do not implicate the Fourth Amendment. INS v. Delgado, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 1758 (1984); Florida v. Royer, 460 U.S. 491, 496 (1983) (plurality opinion). Finally, a routine search at the border is a reasonable intrusion without any antecedent justification. See United States v. Ramsey, 431 U.S. 606, 619 (1977).

3. Difference Between Search and Seizure. The intrusion resulting from a search is different from the interference with

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

property resulting from a seizure. A search affects a person's privacy interests; a seizure affects only a person's possessory interests. A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs when there is some meaningful interference with an individual's necessary interests in that property. A "seizure" of the person is a meaningful interference, however brief, with an individual's freedom of movement. Segura v. United States, *supra*; United States v. Jacobsen, *supra*, at 1652, 1656 and n.5; United States v. Karo, U.S. , 104 S. Ct. 3296 (1984). See also INS v. Delgado, *supra*, at 1758, 1762.

Accordingly, the justification for a seizure may be reasonable in circumstances where a search would be unreasonable. It is thus well settled that it is "constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband." Segura v. United States, *supra*; United States v. Jacobsen, *supra*. The risk of disappearance or use before a warrant may be obtained outweighs the interest in possession. See, e.g., United States v. Place, 462 U.S. 696 (1983). A warrant still may be required for the search, however, because warrantless searches are presumptively unreasonable subject to exceptions. See, e.g., United States v. Karo, *supra*.

4. Governmental Action. Finally the Fourth Amendment only proscribes governmental action; "it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" United States v. Jacobsen, *supra*, at 1656, quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting). See Burdeau v. McDowell, 256 U.S. 465, 475 (1921). See also United States v. Gumerlock, 590 F.2d 794 (9th Cir. 1979) (en banc).

9-4.110 Search Warrants

The issuance and execution of a federal search warrant should comply with the requirements of Rule 41 of the Federal Rules of Criminal Procedure and the Fourth Amendment. See 2 LaFave, Chapter 4.

It is obviously desirable for law enforcement officials to apply for a search warrant before a neutral and detached magistrate with sufficient and accurate information to satisfy the "totality of the circumstances"

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

test set forth in Illinois v. Gates, 462 U.S. 213 (1983), and to execute the warrant properly. First, the Fourth Amendment has been interpreted to include the requirement that normally searches of private property be performed pursuant to a search warrant issued in compliance with the Warrant Clause. See, e.g., Arkansas v. Sanders, 442 U.S. 753, 758 (1979). Second, and most significantly, under United States v. Leon, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3405 (1984), and Massachusetts v. Sheppard, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3424 (1984), the exclusionary rule will not be applied to suppress evidence obtained by officers acting in objectively reasonable reliance on a search warrant, issued by a neutral and detached magistrate, that is subsequently determined to be invalid.

The modification of the exclusionary rule, however, should not be interpreted to diminish the importance of compliance with any warrant requirements. The Leon decision has been described by Justice Blackmun as "provisional" and "subject to change in light of changing judicial understanding about the effects of the rule outside the confines of the courtroom." Compliance will insure that Leon will not be overruled.

9-4.111 Exceptions to Warrant Requirements

The Supreme Court has said that it is preferable to obtain a search warrant, although in a wide range of diverse situations it and lower courts have recognized "flexible common-sense exceptions to this requirement." Texas v. Brown, 460 U.S. 730, 734 (1983) (plurality opinion); United States v. Karo, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3296 (1984); Mincey v. Arizona, 437 U.S. 385, 390 (1978); United States v. Jeffers, 342 U.S. 48, 51-52 (1951). Full scale searches or seizures have been found to be permissible upon probable cause without a warrant. See, e.g., New York v. Belton, 453 U.S. 454 (1981), and United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969) (search of person and surrounding area incident to arrest); United States v. Ross, 456 U.S. 798 (1982), and United States v. Nigro, 727 F.2d 100 (6th Cir. 1984) (en banc) (search of automobile or airplane believed to contain contraband); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent); United States v. Mendenhall, 446 U.S. 544, 557-558 (1980), and Zap v. United States, 328 U.S. 624 (1946) (consent); Warden v. Hyden, 387 U.S. 294 (1967) (hot pursuit); United States v. Pappas, 613 F.2d 324 (1st Cir. 1979) (en banc). Lesser intrusions may be permissible upon particularized suspicion. See, e.g., Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); United States v. Cortez, 449 U.S. 411 (1981), and Brown v. Texas, 443 U.S. 47, 50-53 (1979) (seizure for questioning); Michigan v. Summers, 452 U.S. 692 (1981) (detention during execution of a search warrant). Other intrusions are legal without

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

any suspicion. See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266 (1973), and United States v. Ramsey, 431 U.S. 606, 616-619 (1977); Oliver v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 1735 (1984) (open fields); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (roadblock); INS v. Delgado, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 1758, 1762-1763 (1984) (police questioning by itself without any form of detention); Illinois v. Andreas, \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S. Ct. 3319 (1983) (controlled delivery); United States v. Villamonte-Marquez, 462 U.S. 579 (1983); South Dakota v. Opperman, 428 U.S. 364 (1976), and Illinois v. LaFayette, 462 U.S. 640 (1983) (standardized inventory procedure); Abel v. United States, 362 U.S. 217, 241 (1960), United States v. Colbert, 474 F.2d 174 (5th Cir. 1973) (en banc), and LaFave §2.6(b) and §2.6(c) (abandonment). One of the most frequently litigated exceptions to the warrant requirement--consent--is discussed at USAM 9-4.153, infra. Another exception--border searches--is discussed at USAM 9-4.170, infra.

Significantly, a seizure without a warrant that initially may be legal on probable cause or may be legal as a lesser intrusion on a particularized suspicion may become unreasonable because of delay or other reasons. See, e.g., Segura v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3424 (1984); Florida v. Royer, 460 U.S. 491 (1983) (plurality opinion).

9-4.112 Warrant Requirements

A. Neutral and Detached Magistrate

Under Rule 41(a) of the Federal Rules of Criminal Procedure, a federal search warrant may be issued by either a federal magistrate, a federal judge, or a judge of a state court of record for the district where the property is located upon request by a "federal law enforcement officer, or an attorney for the government." See 3 Wright, Federal Practice and Procedure; Criminal 2d §670.

The magistrate must be neutral and detached. United States v. Leon, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3405 (1984). He/she must not be a rubber stamp for the police and must make an independent evaluation of probable cause without having any personal or professional stake in the outcome. See Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 327 (1979) (town justice who issued warrant and participated in general search acted not as detached judicial officer but as quasi-law enforcement officer); Connally v. Georgia, 429 U.S. 245, 250 (1977) (per curiam) (justice of peace who received fee only if warrants were issued not neutral and detached). 2 LaFave §4.2.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Oath or Affirmation (Written Application)

The Fourth Amendment mandates that oath or affirmation support the facts and circumstances relied upon to establish probable cause. Rule 41 (c)(1) of the Federal Rules of Criminal Procedure generally requires that a search warrant be issued by a magistrate upon a written affidavit which sets forth evidence demonstrating the existence of probable cause. The magistrate may, however, require the affiant to appear personally and may examine him/her and any witnesses he/she may produce, provided that such proceeding shall be recorded and made part of the affidavit.

C. Oral Application

1. Since 1977, Rule 41(c)(2) of the Federal Rules of Criminal Procedure has provided a procedure for the issuance by a federal magistrate of a search warrant upon sworn oral testimony communicated by telephone "or other appropriate means." See 3 Wright, Federal Practice and Procedure; Criminal 2d §670.1; LaFave §4.3(c). The rule mandates that the magistrate be satisfied that "the circumstances are such as to make it reasonable to dispense with a written affidavit." The guidelines approved by the magistrates' committee of the Judicial Conference for the implementation of the Rule, incorporated in Chapter 4 of the Legal Manual for United States Magistrates, provide that the telephonic procedure should be used "sparingly" and "[u]nder no circumstances should it be allowed to become a substitute for the normal appearance requirement of Rule 41(c)(1) to meet the convenience of law enforcement personnel." Significantly, Rule 41(c)(2)(G) of the Federal Rules of Criminal Procedure provides that, absent a finding of bad faith, evidence obtained upon an oral application is not subject to suppression "on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit."

Obviously, under United States v. Leon, *supra*, an oral application, if the circumstances are appropriate, should be used to avoid the application of the exclusionary rule. Special care should be taken to insure that the application complies with both the Fourth Amendment and the Rule. Significantly, courts have considered the availability of the telephonic warrant in determining whether exigent circumstances existed for a warrantless search. See United States v. McEachin, 670 F.2d 1139, 1146-1148 (D.C. Cir. 1981); United States v. Cuaron, 700 F.2d 582, 589 (10th Cir. 1983); United States v. Manfredi, 722 F.2d 519, 522 (9th Cir. 1983).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Under the rule, the finding of probable cause may be based upon the same kind of evidence as is sufficient for a written affidavit. When a warrant on oral testimony is requested, the federal magistrate is required immediately to place under oath each applicant and each person upon whose testimony forms a basis for the warrant. A record of the entire conversation is required, either by a voice recording device or a stenographic or longhand verbatim record. If a voice recording device is used or a stenographic record made, the magistrate is required to have the record transcribed, to certify the accuracy of the transcription, and to file a copy of the original recording and transcription with the court. If a longhand verbatim record is made, the magistrate is required to file a signed copy with the court.

The applicant also is required to prepare and read a document known as the "duplicate original warrant" verbatim to the federal magistrate who in turn prepares the "original warrant" verbatim except as to modifications that he/she directs. In addition, the person who executes the warrant is required to enter the exact time of execution on the face of the duplicate original warrant.

There have been few cases interpreting this rule. In United States v. Shorter, 600 F.2d 585 (6th Cir. 1979), the court invalidated a telephonic search warrant because the affiant seeking the warrant was not immediately placed under oath as required by Rule 41(c)(2)(D) of the Federal Rules of Criminal Procedure, but gave an oath after he testified. In United States v. Loyd, 721 F.2d 331 (11th Cir. 1983), the court held that the magistrate's failure to certify the accuracy of the transcript of a taped oral search warrant after the search had occurred did not warrant suppression because there was no intentional disregard of the Rule.

2. The guidelines for oral search warrants contained in Chapter 4 of the Legal Manual for United States Magistrates provide as follows:

a. Applicability of the New Procedure

The new telephonic procedure for obtaining a search warrant from a magistrate should be used sparingly. Under no circumstances should it be allowed to become a substitute for the normal personal appearance requirement of Rule 41(c)(1) of the Federal Rules of Criminal Procedure to meet the convenience of law enforcement personnel. The magistrate must be "satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit . . . ."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

b. District Arrangements

In order for each district to be prepared to implement the new telephone procedure it is suggested that court officials confer with the U.S. Attorney and law enforcement personnel to establish local guidelines and procedures. A district should provide for at least one magistrate to be "on call" at all times to entertain applications for search warrants, such as through a rotation system. A district, for example, may provide--if feasible--that applications for telephonic warrants should normally be made to full-time magistrates only. As part of its program, the court may wish to explore with the telephone company the possibility of establishing conference calls on short notice in order to enable the magistrate to speak with the applicant(s) and an Assistant U.S. Attorney at the same time. The court should also make arrangements through the Administrative Office to provide suitable recording equipment for a magistrate's home or office to record pertinent telephone conversations between the magistrate and law enforcement personnel. The Magistrates Division can advise the court in determining the number and type of services needed.

c. Initial Showing

Upon receipt of a telephone request for a search warrant, the magistrate should require a showing of an emergency need for the warrant. If practicable, an Assistant U.S. Attorney should be included in the telephone conversation. The burden is on the agency and/or the U.S. Attorney to establish that the circumstances are such that it is unreasonable for the agent to present a written affidavit to the magistrate in person.

d. Demonstrating Need for Dispensing With a Written Affidavit

Criteria should be developed in each court to determine when and under what circumstances the telephonic procedure is acceptable. While conditions will vary from court to court, examples of such criteria could include the following:

- (1) The agent cannot reach the magistrate in his/her office during regular court hours.
- (2) The agent making the search is a significant distance from the magistrate.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(3) The factual situation is such that it would be unreasonable for a substitute agent, who is located near the magistrate, to present a written affidavit in person to the magistrate in lieu of proceeding with a telephonic application.

(4) The need for a search is such that without the telephonic procedure a search warrant could not be obtained and there would be a significant risk that evidence would be destroyed.

e. Procedures to be Used in Considering Issuance of Warrant

The following procedures should be followed by a magistrate in considering a telephonic application for a search warrant:

(1) The magistrate should record the entire conversation with the affiant (or affiants) after the caller informs the magistrate that the purpose of the call is to request a warrant.

(2) If recording equipment is not available, the magistrate shall make a stenographic or longhand verbatim record.

(3) If feasible, an Assistant U.S. Attorney should be included in the telephone conversation at the same time as the agent and the magistrate.

(4) The magistrate must place under oath each person whose testimony will form a basis for the application in accordance with Rule 41 of the Federal Rules of Criminal Procedure. Adequate identification of the agent should be secured.

(5) The magistrate may wish to complete a log sheet such as AO Form 269 that includes essential data such as:

(a) The date and precise time of the telephone call;

(b) The name or names of the agents involved and their official titles and agency affiliations;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(c) The names and addresses of any other affiants;

(d) The name of any Assistant U.S. Attorneys who may have spoken with the magistrate regarding the search warrant application;

(e) The "emergency" circumstances giving rise to the telephonic warrant request;

(f) Any additional facts deemed particularly necessary or useful that do not already appear on the original warrant; and

(g) The magistrate's determination of the application.

(6) Whenever feasible, the agent's sworn oral testimony should already be reduced to written form by the time the magistrate is contacted, just as if a written affidavit were being presented in person to the magistrate. (AO Form 106). This will enable the magistrate to determine probable cause more easily and clearly. The agent or the attorney for the government should read the contents of the prepared statement to the magistrate. The magistrate may ask questions and solicit additional information necessary to establish all the elements needed for probable cause.

(7) The grounds for issuance and the contents of the warrant are those required by Rule 41(c)(1) of the Federal Rules of Criminal Procedure.

(8) The applicant for the warrant should prepare a "duplicate original warrant" and read it, verbatim, to the magistrate. At the same time the magistrate should enter, verbatim, what is read to him/her by the applicant on the "original warrant." The magistrate may direct that modifications be made in the warrant.

(9) Once the magistrate is satisfied that the contents of the warrant are proper and that issuance of the warrant is justified, he/she should direct the agent or the attorney for the government to sign the magistrate's name on the "duplicate original" warrant.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(10) The magistrate and the applicant(s) should synchronize their watches to assure that times placed on the warrants correlate with each other.

(11) The magistrate should simultaneously sign the original warrant and enter the exact date and time of issuance in accordance with Rule 41(c)(2)(C) of the Federal Rules of Criminal Procedure. The agent must place the exact time of execution on the duplicate original warrant in accordance with Rule 41(c)(2)(F) of the Federal Rules of Criminal Procedure.

(12) The agent and magistrate should use the newly adopted oral search warrant form (AO Form 93A).

f. Procedures Following Issuance of Warrant

The following procedures should be followed by a magistrate after issuing a search warrant under the telephonic procedure:

(1) On the first court day following the issuance of the telephonic warrant the magistrate should direct that a duplicate tape be made of his/her conversation with the law enforcement agent. The duplicate tape should be turned over to the agent or U.S. Attorney's office for preparation of a transcript of the telephonic conversation. (In accordance with Judicial Conference policy, neither magistrates nor their staff should prepare documents for law enforcement officers.)

(2) The agent or Assistant U.S. Attorney should subsequently present to the magistrate's office a transcript of the conversation with the applicant. The magistrate should verify the accuracy of the transcript against his/her own recording and log sheet and certify it, if in order. At this time the magistrate may also wish to have the agent sign and swear to the veracity of the transcribed conversation, although this requirement, which had been contained in the rule approved by the Supreme Court, was specifically deleted by the Congress. If neither a sound recording nor a stenographic record were made, the magistrate should file a signed copy of a long-hand verbatim record with the court.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(3) Rule 41(c)(1) of the Federal Rules of Criminal Procedure specifies that up to 10 days may be granted to execute and return a warrant issued upon written affidavit. Rule 41(c)(2)(1) of the Federal Rules of Criminal Procedure states that the contents of the warrant issued upon oral testimony are to be the same as those contained in Rule 41(c)(1) of the Federal Rules of Criminal Procedure for a warrant issued upon an affidavit. This provision appears to apply the 10-day limit to warrants issued under Rule 41(c)(2) of the Federal Rules of Criminal Procedure. The magistrate should specify, on the face of the warrant, the amount of time granted to execute the warrant. Presumably, only a relatively short period of time is required, as the agent would otherwise have sufficient opportunity to apply in person to the magistrate for a warrant upon written affidavit. (The return must still conform to the requirements of Rule 41(d) of the Federal Rules of Criminal Procedure.)

(4) In accordance with normal arrangements devised in cooperation with the clerk of the court, the magistrate should eventually send his/her log, the original tape (or the stenographic or longhand record), the certified transcript, and the warrants to the clerk for permanent filing, together with appropriate docket or minute notations.

9-4.113 Probable Cause

Rule 41 of the Federal Rules of Criminal Procedure provides that a warrant may issue upon probable cause

To search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

"In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prudent men, not legal technicians, act," Brinegar v. United States, 338 U.S. 160, 175 (1949); Illinois v. Gates, 462 U.S. 213, 224 (1983).

The information communicated to the magistrate must contain sufficient information to satisfy the "totality of the circumstances" test announced in Illinois v. Gates, *supra*. See also Massachusetts v. Upton, \_\_\_ U.S. \_\_\_, 104 S. Ct. 2085 (1984). "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Illinois v. Gates, *supra*, at 2332; United States v. Leon, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3405 (1984). He/she must be given adequate information

To make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found.

Illinois v. Gates, *supra*, at 238.

While deference to a magistrate's determination is accorded, his/her finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination is made. See Franks v. Delaware, 438 U.S. 154 (1978). Under United States v. Leon, *supra*, suppression of evidence remains an appropriate remedy if the magistrate was "misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth." Accordingly, the restrictions upon suppression of evidence adopted by Leon will likely result in an increase of motions bottomed on Franks v. Delaware, *supra*.

To invalidate a warrant and exclude the fruits of the search, a defendant bears the burden of establishing by a preponderance of the evidence that the affiant included perjured statements or recklessly disregarded the truth in making the statements, and that without the affidavit's false material the remainder of the affidavit lacks probable cause to support the warrant. Franks v. Delaware, *supra*, at 155-156, 171-172; United States v. Karo, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3296 (1984); United States v. Reed, 726 F.2d 339, 341 (7th Cir. 1984); United States v. Foster, 711 F.2d 871, 879 (9th Cir. 1983). "The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." Franks v. Delaware, *supra*, at 171 (emphasis added). See LaFave §4.4(b).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A defendant cannot routinely obtain a Franks hearing by merely challenging the affidavit supporting a warrant.

There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

Franks, supra, at 171. The presumption of validity of the warrant cannot be overcome by a defendant's self-serving statement which purports to refute the affidavit. See United States v. McDonald, 723 F.2d 1288, 1293 (7th Cir. 1983); United States v. Reed, supra, at 341-342.

#### 9-4.114 Particularity

A federal warrant must describe with particularity the place to be searched and the persons or things to be seized. See LaFare §§4.5 and 4.6. The particularity and probable cause requirements are closely interconnected. See United States v. Hershenow, 680 F.2d 847, 851 (1st Cir. 1982). The particularity requirement is designed to prevent general warrants. See Andresen v. Maryland, 427 U.S. 463, 480 (1976); Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); Marron v. United States, 275 U.S. 192, 196 (1927). This requirement is accorded "the most scrupulous exactitude where the seizure impinges upon First Amendment freedoms." See Stanford v. Texas, 379 U.S. 476, 485 (1965); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 (1979). See also Sequoia Books, Inc. v. McDonald, 725 F.2d 1091, 1093-1094 (7th Cir. 1984). A search conducted pursuant to a warrant that fails to conform to the particularity requirements of the Fourth Amendment is unconstitutional. See Massachusetts v. Sheppard, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3424 (1984). In that case the Supreme Court ruled, however, that a technical mistake in particularity did not merit suppression of the evidence. The affidavit

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

for the warrant stated that the police wanted to search for certain described items, including clothing of a murder victim and a blunt instrument that might have been used on the victim. By mistake, the warrant form that was signed authorized a search for controlled substances even though the judge authorizing the warrant informed the affiant that the warrant was sufficient in form and content to carry out the requested search. See also United States v. Loyd, 721 F.2d 331, 333 (11th Cir. 1983) (no suppression required for a non-intentional Rule 41, Federal Rules of Criminal Procedure, violation).

A. The Place to be Searched

While Massachusetts v. Sheppard, supra, may afford relief from reasonable mistakes in particularity, a flawed warrant should be avoided. The description of the premises to be searched should be sufficiently specific so that an "officer with a search warrant can, with reasonable effort, ascertain and identify the place intended." Steele v. United States, 267 U.S. 498, 503 (1925). As it has been noted, "the primary purpose of this limitation is to minimize the risk that officers executing search warrants will by mistake search a place other than the place intended by the magistrate." 2 LaFave, §4.5 at 72. See United States v. Prout, 526 F.2d 380, 387-388 (5th Cir.), cert. denied, 429 U.S. 840 (1976); United States v. Darenbourg, 520 F.2d 985, 987 (5th Cir. 1975); and United States v. Melancon, 462 F.2d 82, 94 (5th Cir.), cert. denied, 409 U.S. 1038 (1972).

When a particular dwelling is described as the place to be searched, the warrant permits a search of the surrounding property as well. For example, the backyard of a house or a trash can in the rear of a house may be searched pursuant to a search warrant for the premises even though not specifically identified in the warrant since courts have construed the term "premises" to include more than the residence itself. See United States v. Anderson, 485 F.2d 239 (5th Cir. 1973), cert. denied, 415 U.S. 958 (1974); United States v. Wright, 468 F.2d 1184 (6th Cir. 1972), cert. denied, 412 U.S. 938 (1973); United States v. Meyer, 417 F.2d 1020 (8th Cir. 1969). See also United States v. Tabor, 722 F.2d 596 (10th Cir. 1983) (barn not covered by warrant to search house but circumstances justified protective sweep). With respect to multiple-occupancy premises, a search warrant which fails to particularize the apartment or limit the dwelling to be searched may be invalid. See United States v. Votteller, 544 F.2d 1355 (6th Cir. 1976) (warrant struck down when building in question was multiple dwelling and warrant listed only a telephone number located in the building). However, minor errors in the description will not be fatal to warrant if the executing officers are able to identify the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

place to be searched without difficulty. See United States v. Bedford, 519 F.2d 650, 655 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).

In a variety of situations, courts have found that imprecise and faulty descriptions of premises in warrants did not result in violations of the Fourth Amendment. A review of these cases is set forth in United States v. Gitcho, 601 F.2d 369 (8th Cir.), cert. denied, 444 U.S. 871 (1979), upholding a search where the address stated in the warrant, although incorrect, was reasonable for the location intended. The court emphasized that the premises which were intended to be searched were, in fact, those actually searched. Searches of the entire premises have been upheld when police arrive to execute a warrant and unexpectedly find the building is broken down into subunits. See, e.g., National City Trading Corp. v. United States, 635 F.2d 1020 (2d Cir. 1980); United States v. Dorsey, 591 F.2d 922 (D.C. Cir. 1978); United States v. Whitney, 633 F.2d 902, 907-908 (9th Cir. 1980). Other searches comply with the constitutional mandate despite flaws in description, when the warrant has stated that the premises are occupied or controlled by a particular person who in fact is the occupant or in control. See, e.g., Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946); United States v. Campanile, 516 F.2d 288, 291 (2d Cir. 1975); 2 LaFare, §4.5 at 75.

Finally, ambiguities and defects in the description in the warrant are cured by the specificity in the affidavit when the affidavit accompanies the warrant. See United States v. Gill, 623 F.2d 540, 543-544 (8th Cir.), cert. denied, 449 U.S. 873 (1980); Moore v. United States, 461 F.2d 1236 (D.C. Cir. 1972). In short, so long as there is no reasonable probability that the wrong premises might be searched, a vague or erroneous description of premises in a warrant has been found to be constitutionally sufficient.

B. The Things to be Seized

It has often been said that the Fourth Amendment requirement of particularity makes general searches impossible "and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196 (1927); Stanford v. Texas, 379 U.S. 476, 485 (1965); Andresen v. Maryland, 427 U.S. 463, 480 (1976). But as Professor LaFare has remarked (2 LaFare, §4.6(a) at 96):

If read literally, that would mean no description would pass muster unless it was so detailed that there was no chance of there being present upon the premises some other object which the description might

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

encompass. Quite obviously, few warrants could pass such a test, and it is more accurate to say that 'the warrant must be sufficiently definite so that the officer executing it can identify the property sought with reasonable certainty.'

Rule 41(b) of the Federal Rules of Criminal Procedure allows a warrant to be issued for property described in three ways:

(1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense.

Since the rule allows all kinds of objects to be the subject of a warrant "it is not possible to discuss the Fourth Amendment particularity situation that may arise." 2 LaFave, §4.6(a) at 95. We again refer the reader to Professor LaFave, who separately discusses contraband; stolen goods; instrumentalities and evidence; and literature, pictures, films and recordings. 2 LaFave §4.6(b), (c), (d) & (e).

It has been frequently recognized in discussions of warrants for business records that the particularity requirement must be applied with a practical degree of flexibility depending on the type of property to be seized, and that a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit. See United States v. Truglio, 731 F.2d 1123, 1127 (4th Cir. 1984); United States v. Wuagneux, 683 F.2d 1343, 1348-1351 (11th Cir. 1982); United States v. Offices Known as 50 State Distributing Co., 708 F.2d 1371, 1374-1375 (9th Cir. 1983); National City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2d Cir. 1980); United States v. Hershenow, 680 F.2d 847, 850-854 (1st Cir. 1982).

The seizure of obscene material involves difficult problems because particularity is accorded "the most scrupulous exactitude" where the seizure impinges upon First Amendment freedoms. See Stanford v. Texas, 379 U.S. 476, 485 (1965); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 (1979). A warrant to seize "obscene publications" is overbroad; it does not contain adequate safeguards to assure nonobscene material the constitutional protection to which it is entitled. See Marcus v. Search Warrant, 367 U.S. 717, 731 (1961). A court of appeals has upheld, however, the seizure from a book store of "materials that contain depictions (in context, photographic) of sexual intercourse and variants

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

thereof described in the warrant" issued on "a detailed affidavit from a police investigator which described in minute and indeed rather disgusting detail nine magazines that the investigator had read in the store." Sequoia Books, Inc. v. McDonald, 725 F.2d 1091 (7th Cir. 1984). But see United States v. Guarino, 729 F.2d 864, 866-869 (1st Cir. 1984) (en banc) (invalidating a warrant authorizing the stop and search of a truck to look for "obscene materials . . . of the same tenor and description as Turkish Delight, Sex Photo Fiction No. 1, and Sex Photo Fiction No. 2").

But even a search for stolen property or other objects may present problems in description. See 2 LaFave §4.6(c). The particularity guarantee, however, does not preclude use of generic language where officers are unable to specify in advance all seizable evidence on the premises to be searched. See, e.g., United States v. Hillyard, 677 F.2d 1336, 1339, 1340 (9th Cir. 1982); United States v. Scharfman, 448 F.2d 1352 (2d Cir. 1971), cert. denied, 405 U.S. 19 (1972). "Courts are least demanding when the objects described are contraband" and descriptions such as "narcotic drugs" have been upheld. 2 LaFave §4.6(b).

Finally, if portions of a search warrant fail to describe the object of a search with sufficient particularity, the other portions of the warrant which meet the particularity requirement are valid and severable from the overbroad portion. See, e.g., United States v. Fitzgerald, 724 F.2d 633 (8th Cir. 1983), cert. denied, \_\_\_ U.S. \_\_\_, 104 S. Ct. 2151 (1984); United States v. Riggs, 690 F.2d 298 (1st Cir. 1982); United States v. Christine, 687 F.2d 749 (3d Cir. 1982); United States v. Cook, 657 F.2d 730 (5th Cir. 1981); United States v. Thompson, 612 F.2d 233, 234 (6th Cir. 1979).

In short, careful draftsmanship should be employed and, hopefully, good faith mistakes will be saved by Massachusetts v. Sheppard \_\_\_ U.S. \_\_\_, 104 S. Ct. 3424 (1984), or by severability.

#### 9-4.115 Execution

The principal statutory provisions covering the execution of a search warrant are set forth in Rule 41(d) of the Federal Rules of Criminal Procedure, 18 U.S.C. §3105 and 18 U.S.C. §3109. Execution of the warrant is discussed in 2 LaFave §4.7 (Time of Execution), §4.8 (Entry Without Notice or by Force), §4.9 (Detention and Search of Persons), §4.10 (Scope and Intensity of the Search), §4.11.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. Persons Authorized to Serve a Search Warrant

A search warrant can be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such a warrant. Under 18 U.S.C. §3105, persons without authority to execute a warrant cannot be present or assist in the search unless an authorized officer has asked for assistance and is present to supervise the search. See United States v. Clouston, 623 F.2d 485 (6th Cir. 1980).

B. Timing of Execution

Normally a search warrant can only be executed in the daytime. See Fed. R. Crim. P. 41(c)(1). Daytime is defined as 6:00 a.m. to 10:00 p.m., local time. See Fed. R. Crim. P. 41(h). If the search begins during the daytime, it may extend into the nighttime, provided the agents executing the warrant act reasonably and do not continue the search beyond the time necessary for proper completion. See United States v. Burgard, 551 F.2d 190, 193 (8th Cir. 1977).

A nighttime warrant may be obtained if the issuing authority, for reasonable cause shown in the warrant, authorizes its execution at a time other than daytime; Fed. R. Crim. P. 41(c)(1); see United States v. Stefanson, 648 F.2d 1231, 1236 (9th Cir. 1981) (required affiant to show "sufficient facts" in affidavit to support authorization for nighttime search); see also United States v. Searp, 586 F.2d 1117, 1121 (6th Cir. 1978), cert. denied, 440 U.S. 921 (1979); United States v. Curry, 530 F.2d 636 (5th Cir. 1976), cert. denied, 429 U.S. 829 (1977). In contrast, searches for drugs, undertaken under 21 U.S.C. §879, require no special showing for a nighttime search. See Gooding v. United States, 416 U.S. 430 (1974) (merely showing that contraband is likely to be on the property or person to be searched at that time is sufficient for nighttime search under 21 U.S.C. §879); United States v. Gibbons, 607 F.2d 1320, 1326-1327 (10th Cir. 1979) (nighttime search of truck reasonable because it involved no intrusion into home or disturbance of its owner).

The search warrant authorizes the officer to search within a specified period of time, not to exceed 10 days, the person or place named for the specified property. See Fed. R. Crim. P. 41(c)(1). If the warrant is not executed within the specified time it is void and cannot be renewed. To conduct a search of the same person or place, a new affidavit must be filed and a new search warrant issued. See Sgro v. United States, 287 U.S. 206 (1932).

C. Protective Sweeps and Other Measures

An officer has the right to carry firearms and protect himself/herself while conducting a search. See, e.g., 21 U.S.C. §878(1).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Furthermore, an officer can take measures to assure that the search will not be interfered with, including detention of the occupants where the warrant authorizes a search for contraband. See Michigan v. Summers, 452 U.S. 692 (1981). Likewise, if an officer has reasonable grounds to believe there may be other persons on the premises who might reasonably be expected either to interfere with the arrest by force or attempt the destruction of evidence, a "protective sweep" or a cursory examination of the surrounding area may be made. See United States v. Hill, 730 F.2d 1163, 1169 (8th Cir. 1984); United States v. Martino, 664 F.2d 860, 869 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982) (officers lawfully on premises to effect arrest are entitled to make limited search for third persons who might destroy evidence or pose safety threat). Such protective sweeps have been upheld in a variety of contexts. See United States v. Sheikh, 654 F.2d 1057, 1072 (5th Cir. 1981), cert. denied, 455 U.S. 991 (1982) (police may conduct security check of motel room when occupant arrested outside room and reasonable suspicion others remained inside). See United States v. Bruton, 647 F.2d 818, 822-23 (8th Cir.), cert. denied, 454 U.S. 868 (1981) (sweep search of locked mobile home after shootout with defendant outside the structure); United States v. Young, 553 F.2d 1132, 1134 (8th Cir.), cert. denied, 431 U.S. 959 (1977) (search of house for accomplices after shootout with defendant); United States v. Baker, 577 F.2d 1147, 1152 (4th Cir.), cert. denied, 439 U.S. 850 (1978) (protective sweep of house after arrest of owner and confederate in front of it); United States v. Tabor, 722 F.2d 596, 597-99 (10th Cir. 1983) (protective sweep of barn during execution of search warrant covering house).

Nevertheless, the scope of the search cannot exceed its justification--namely, to protect the officers. Compare United States v. Hatcher, 680 F.2d 438, 444 (6th Cir. 1982) (sweep search of entire house after arrest of defendant on drug charges found unreasonable on facts there), with United States v. Hill, *supra*, at 1170 (observation, including that a gun was visible in the living room, justified the entry into that room for a protective sweep even though the warrant did not authorize entry into the house). And mere presence at the scene of a search is not, standing alone, adequate justification for a search of persons not named in a warrant. See Ybarra v. Illinois, 444 U.S. 85 (1979). See also USAM 9-4.119; 9-4.125, *infra*.

9-4.116 Manner of Entry

A. Knock-and-Announce Requirements

Except in exigent circumstances, 18 U.S.C. §3109 requires that an officer knock, announce his/her identity and purpose, and be refused

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

admittance before breaking into a residence to execute a search or an arrest warrant. See Sabbath v. United States, 391 U.S. 585 (1968); United States v. Miller, 357 U.S. 301 (1958) (interests such as protection of owner's privacy; prevention of unnecessary violence; and preservation of property are served by the 18 U.S.C. §3109 notice requirement). See 2 LaFave §4.8.

An officer who either makes an unannounced entry into a dwelling, breaks down a door, forces open a chain lock on a partially opened door, opens a locked door with a key, or opens a closed but unlocked door violates the statute. See Sabbath v. United States, *supra*; see also United States v. Tolliver, 665 F.2d 1005, 1008 (11th Cir.) (per curiam), cert. denied, 456 U.S. 935 (1982) (18 U.S.C. §3109 applicable because door not freely opened by occupant); but see United States v. Crawford, 657 F.2d 1041, 1045 (9th Cir. 1981) (18 U.S.C. §3109 not applicable at inner bedroom door when officers gave proper announcement at front door; repeat notice not required). The issue whether the statute is applicable to an outer ornamental iron gate rather than the wooden front door of the apartment itself is presented in a certiorari petition pending before the Supreme Court in United States v. Moreno, No. 83-396 (1984).

There is no right to refuse entry to police executing a warrant. Thus, where officers have reasonable grounds for concluding that they are being refused admittance following proper announcement, they may use reasonable force to obtain entry. An occupant's refusal can be express or implied. 21 A.L.R. Fed. 820; see, e.g., In re Search Warrant Dated July 4, 1977, 677 F.2d 117, 136 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982) (office officials denied admittance by refusing to provide file keys to agents who had announced their identity and purpose and showed warrant to employees at office); United States v. Singleton, 439 F.2d 381 (3d Cir. 1971) (officers' announcement of authority and purpose followed by a refusal to open door and a shuffling of feet inside justified forcible entry).

Each case turns on its own particular facts. Nonetheless, officers should observe the knock-and-announce procedures and minimize the risk that the search will be held invalid.

This is not to say, however, that failure to knock-and-announce is unreasonable *per se*. No-knock entries are generally allowed when compliance with 18 U.S.C. §3109 becomes unreasonable due to exigent circumstances. See Ker v. California, 374 U.S. 23 (1963); see also United States v. McShane, 462 F.2d 5, 6 (9th Cir. 1972) (compliance would endanger officers' lives); United States v. Nolan, 718 F.2d 589, 596-602

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(3d Cir. 1983), and Rodriguez v. Jones, 473 F.2d 599 (5th Cir.), cert. denied, 412 U.S. 953 (1973) (compliance might have resulted in occupant's escape); United States v. Tolliver, 665 F.2d 1005, 1008 (11th Cir. 1982) (per curiam), cert. denied, 456 U.S. 935 (1982) (compliance might result in destruction of evidence). Exigent circumstances must be found based on facts known to the officers at the time of entry, and not on speculation. See United States v. Artieri, 491 F.2d 440 (2d Cir.), cert. denied, 417 U.S. 949 (1974).

In addition to the exigency exception, a "useless gesture" exception exists when officers are virtually certain that the occupants already know their identity and purpose. See Miller v. United States, 357 U.S. 301 (1958); see also United States v. Eddy, 660 F.2d 381, 385 (8th Cir. 1981) (noncompliance justified when officers waiting outside door at time defendant opened it were "justifiably and virtually certain" that occupants already knew of their purpose).

18 U.S.C. §3109 does not, however, extend to unoccupied premises. See United States v. Brown, 556 F.2d 304 (5th Cir. 1977); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977); Payne v. United States, 508 F.2d 1391 (5th Cir.), cert. denied, 423 U.S. 933 (1975) (useless gesture to knock and announce when officers are virtually certain premises are unoccupied). Neither the Fourth Amendment nor federal law bases the power to search on the presence of the possessor or occupant; therefore, as long as the requirements of 18 §3109 and Rule 41 of the Federal Rules of Criminal Procedure have been satisfied, a search can be conducted despite the occupant's absence. See United States v. Agrusa, supra; 2 LaFave §4.7(c).

B. Entry After a Ruse Announcement

While an officer executing a warrant must announce his/her authority and purpose, the courts have generally held that entrance following a ruse announcement at the door is not a "breaking" within the meaning of the statute. See United States v. Beale, 445 F.2d 977 (5th Cir. 1971), cert. denied, 404 U.S. 1026 (1971); Leahy v. United States, 272 F.2d 487 (9th Cir. 1959), cert. denied, 364 U.S. 945 (1960); 2 LaFave §4.8(b). See also United States v. Harris, 713 F.2d 623 (11th Cir. 1983) (reentry by undercover agent with uniformed officer did not violate statute or Fourth Amendment). Compare Lewis v. United States, 385 U.S. 206 (1966) (government agent may pose as a willing buyer to gain consensual entry into a private home to purchase narcotics); Gouled v. United States, 255 U.S. 298 (1921) (surreptitious search under guise of social visit was illegal). See also Jones v. Berry, 722 F.2d 443 (9th Cir. 1983); United States v. Schuster, 684 F.2d 744 (11th Cir. 1982); United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Baldwin, 621 F.2d 251 (6th Cir. 1980) (misplaced confidence in undercover agent did not invalidate search).

9-4.117 Scope and Intensity of the Search

The scope and intensity, including the duration, of a search under a warrant are discussed in 2 LaFave §4.10.

A. The particularity of the warrant defines the scope and intensity of the search.

A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search. Thus, a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search. When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.

United States v. Ross, 456 U.S. 798, 820-821 (1982) (footnote omitted).

Moreover "[p]laces within the described premises are not excluded merely because some additional act of entry or opening may be required. 'In countless cases in which warrants described only the land and the buildings, a search of desks, cabinets, closets and similar items has been permitted.'" Id. n.27, quoting 2 LaFave 152.

Where the officers have exceeded the scope of their search, those items uncovered during the impermissible search may be suppressed. However, their suppression does not, ipso facto, require suppression of the entire search. See Waller v. Georgia, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 2210, 2214 (1984); Andresen v. Maryland, 427 U.S. 463, 482, n.11 (1976);

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

see also United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981) (per curiam), cert. denied, 456 U.S. 926 (1982) (absent bad faith of executing officer, seizure of some items outside scope of valid warrant will not by itself affect admissibility of other contemporaneously seized items that do fall within warrant). If, however, the officers acted in bad faith or otherwise acted unreasonably, it may be possible to suppress the whole search. See United States v. Rettig, 589 F.2d 418 (9th Cir. 1978).

An exception to this restriction is seizures made under the plain view doctrine. See In re Search Warrant Dated July 4, 1977, 667 F.2d 117, 145 (D.C. Cir. 1981) (per curiam) (documentary evidence not listed in search warrant for specified documents may be seized if incriminating character immediately apparent). See Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion); Texas v. Brown, 460 U.S. 730 (1983) (plurality opinion). If all the requirements of the plain view doctrine are satisfied, the evidence uncovered will be deemed lawfully seized even where those items were not particularized in the warrant. See United States v. Wright, 641 F.2d 602 (8th Cir.), cert. denied, 451 U.S. 1021 (1981) (court upheld admission of shotgun discovered in closet while police were conducting a "protective sweep" of motel room pursuant to execution of a warrant for controlled substances).

B. An individual cannot be searched simply because he/she is present with others suspected of criminal activity or at a location where such activity is occurring. See Ybarra v. Illinois, 444 U.S. 85 (1979) (under warrant authorizing only search of tavern and employer, heroin uncovered during pat-down of patron suppressed); United States v. Di Re, 332 U.S. 581 (1948). A search of a person can be linked to the reason for the search. United States v. Peep, 490 F.2d 903 (8th Cir. 1974) (circumstances established probable cause to search defendant who arrived at apartment while it was being searched for narcotics). Officers are generally permitted to frisk individuals present on the premises when the warrant is executed even though they are not named in the warrant, providing the officers can demonstrate that their frisk was "supported by a reasonable belief that the defendant was armed and presently dangerous." Ybarra v. Illinois, supra.

C. In Michigan v. Summers, 452 U.S. 692 (1981), the Court approved a limited form of custodial detention that permits officers executing a search warrant for premises to detain any persons found there for whom they have some "articulable and individualized" suspicion of wrongdoing. Once a search has been justified, then any incidental detention of the occupants is considered less intrusive than either the search itself or an arrest. For a discussion of measures which may be reasonably undertaken

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

for the protection of the searching officers, including protective sweeps, see USAM 9-4.115C, supra. See also USAM 9-4.125, infra, dealing with detention of occupants at the place to be searched.

9-4.118 Receipt, Return of Inventory

Although officers are not required to exhibit a search warrant before conducting the search, they are required by rule to leave a copy of the warrant and a receipt for property taken with the occupant, or at the premises, after the search is completed. After conducting the search, an agent must promptly file a return to the designated magistrate accompanied by an inventory of the items seized. See Fed. R. Crim. P. 41(d). Failure to provide the return is curable after the fact, United States v. McKenzie, 446 F.2d 949, 954 (6th Cir. 1971), and will not warrant suppression of the evidence without a showing of prejudice. See United States v. Marx, 635 F.2d 436, 441 (5th Cir. 1981).

9-4.119 Seizure Pending a Warrant

Officers will on occasion seize or obtain custody of property such as suitcases, briefcases, or pieces of mail which they have probable cause to search. Unless exigent circumstances or some other exception to the warrant requirement exists, such property cannot be searched absent a warrant. Nevertheless, officers may hold the property for a reasonable time in order to obtain a search warrant. See Segura v. United States, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3380 (1984); Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Chadwick, 433 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979). See also United States v. Place, 462 U.S. 696 (1983). Cf. United States v. Van Leeuwen, 397 U.S. 249 (1970).

In Segura v. United States, supra, the Chief Justice, in a part of an opinion in which only Justice O'Connor joined, said that "securing a dwelling, on the basis of probable cause, to prevent the description or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." See USAM 9-4.125, infra, dealing with detention of occupants pursuant to a search of a home.

9-4.120 Search and Seizure of Persons and Effects

It is true that the "'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred," INS v. Lopez-Mendoza, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3479 (1984); United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975). Nevertheless, suppression of evidence obtained as a result of the arrest may still remain a remedy for constitutional violations, making it imperative that any arrest comply with recent decisions. These and other cases are discussed in LaFave, §§5.1, 9.1 et seq.

9-4.121 Seizure of the Person

See USAM 9-4.122; 9-4.123; 9-4.124; 9-4.125, infra.

9-4.122 Arrest

The subject of arrest and the searches that may legally occur as a result of an arrest are discussed in LaFave, Chapter 5 and the departmental publication Proving Federal Crimes, 1-11 through 1-16; parts of the latter publication are herein utilized.

As Professor LaFave points out "It is often important to determine whether or not the police have made an arrest and, if they have, precisely when the arrest occurs." This question is more difficult in light of the less intrusive stop and frisk permitted by Terry v. Ohio, 392 U.S. 1 (1968). See INS v. Delgado, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 1753 (1984); Dunaway v. New York, 442 U.S. 200, 212-216 (1979). Compare California v. Beheler, \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S. Ct. 3517 (1983) and Berkemer v. McCarty, \_\_\_\_\_ U.S. \_\_\_\_\_, 52 U.S.L.W. 5023 (1984) (Miranda warnings required where a person has been taken into custody or otherwise deprived of his/her freedom in any significant way).

An arrest is not determined by the subjective intent of the officers. See Taylor v. Arizona, 471 F.2d 848 (9th Cir. 1972). United States v. Glover, 725 F.2d 120, 122 (D.C. Cir. 1984). More than a restriction of liberty is required, and courts will also consider the degree of force used in the detention. See United States v. Beck, 598 F.2d at 500-502. Whether there is an arrest depends upon an evaluation of all the circumstances. See United States v. Richard, 500 F.2d 1025 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975). Cooperation with agents to allay suspicions does not constitute an arrest. See Oregon v. Mathiason, 429 U.S. 492 (1977); United States v. Chaffen, 587 F.2d 920 (8th Cir. 1978); United States v. Canales, 572 F.2d 1182 (6th Cir. 1978). Where the defendant, "incapacitated by alcohol," was placed under temporary

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

detention that was not an "arrest" under state law, there could be no search incident to an arrest; but police could make a routine inventory of defendant's belongings. See United States v. Gallop, 606 F.2d 836 (9th Cir. 1979).

When a search is made incident to an arrest, the validity of the search depends upon the lawfulness of the arrest. If the arrest is illegal, the search or any subsequent inculpatory statements pursuant to it may also be illegal. See Brown v. Illinois, 422 U.S. 590 (1975); United States v. Bonds, 422 F.2d 660 (8th Cir. 1970); Riccardi v. Perini, 417 F.2d 645 (6th Cir. 1969); Jones v. Peyton, 411 F.2d 857 (4th Cir.), cert. denied, 396 U.S. 942 (1969). An arrest based on assumptions later found to be erroneous may be valid if at the time of the arrest the officer had probable cause to believe a crime had been committed and that the person arrested committed it. See United States v. Allen, 629 F.2d 51 (D.C. Cir. 1980); United States v. McEachern, 675 F.2d 618, 621 (4th Cir. 1982). The reasonableness of the arresting officer's conduct in apprehending the wrong person is determined by the totality of the circumstances surrounding the arrest. See United States v. Glover, supra, at 122; United States v. Allen, supra.

If an arrest is lawful under a presumptively valid ordinance, the search which follows is valid even though the ordinance is later declared unconstitutional. See Michigan v. DeFillippo, 443 U.S. 31 (1979). If, however, the statute itself authorizes searches under circumstances which do not satisfy traditional warrant and probable cause requirements of the Fourth Amendment, evidence obtained pursuant to such searches will be suppressed. Thus, warrantless entry of a home to effect an arrest under authority of a statute authorizing officers to enter a private residence without a warrant to make a routine felony arrest is unconstitutional. See Payton v. New York, 445 U.S. 573 (1980). See also Torres v. Puerto Rico, 442 U.S. 465 (1979) (Puerto Rico statute authorizing baggage search of anyone arriving from the United States); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (statute authorized border patrol to search any vehicle within a "reasonable distance" of the border plus a regulation fixing 100 miles as "reasonable distance").

There may be a question whether state or federal law is controlling where an arrest by state officials is to be used in federal court. While in United States v. Di Re, 332 U.S. 581, 589 (1948), it was held that in the absence of an applicable federal statute, the validity of an arrest for a federal offense without a warrant depends on the law of the state where the arrest takes place, the Court in Elkins v. United States, 364 U.S. 206, 224 (1960), held that searches and seizures are to be tested under federal law. At least two circuits have concluded from this that,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Di Re notwithstanding, the validity of state arrests for purposes of federal trials is to be governed by federal law. See United States v. Miller, 452 F.2d 731, 733 (10th Cir. 1971), cert. denied, 407 U.S. 926 (1972); United States v. Alberty, 448 F.2d 706 (10th Cir. 1971); United States v. Porter, 701 F.2d 1158, 1165 (6th Cir. 1983). It is clear, however, that state law determines the validity of an arrest without a warrant for violation of state law, subject to minimum standards required by the Constitution. See United States ex rel. LaBelle v. LaVallee, 517 F.2d 750 (2d Cir. 1975), cert. denied, 423 U.S. 1062 (1976); Burks v. United States, 287 F.2d 117 (9th Cir. 1961), cert. denied, 369 U.S. 841 (1962). See Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968); United States v. Lewis, 362 F.2d 759, 761 (2d Cir. 1966). A search conducted incident to the valid arrest of a citizen comes within this exception to the warrant requirement. See United States v. Rosse, 418 F.2d 38 (2d Cir. 1969), cert. denied, 397 U.S. 998 (1970); United States v. Viale, 312 F.2d 595, 599-601 (2d Cir.), cert. denied, 373 U.S. 903 (1963).

The arrest may not be justified by what is disclosed upon a subsequent search. If the arrest is unlawful at its inception, it remains so. If there is no probable cause for the arrest, the search is invalid. See Dunaway v. New York, 442 U.S. 200 (1979); Beck v. Ohio, 379 U.S. 89 (1964); Wong Sun v. United States, 371 U.S. 471, 484 (1963); United States v. Coker, 599 F.2d 950 (10th Cir. 1979). Even if the arrest is lawful, there is authority for the proposition that the government cannot rely upon the arrest to seize evidence without a warrant if it long had probable cause to know that the evidence would be there and could easily have obtained a search warrant. See Niro v. United States, 388 F.2d 535 (1st Cir. 1968). This problem of law enforcement officials using the arrest as a pretext to search remains. See LaFare §35.2(e) at 281.

9-4.123 Search Incident to Arrest

For a search incident to arrest to come within the exception to the warrant requirement, two factors must be present. First, the arresting officer must have the authority to make a valid arrest. Second, the arrest must be based on probable cause, see, e.g., Sibron v. New York, 392 U.S. 40, 62-63 (1968); Aguilar v. Texas, 378 U.S. 108 (1964); Brinegar v. United States, 338 U.S. 160 (1949); United States v. Garrett, 627 F.2d 14 (6th Cir. 1980); United States v. Fernandez-Guzman, 577 F.2d 1093 (7th Cir.), cert. denied, 439 U.S. 954 (1978), although probable cause is not required for the accompanying search itself. Thus, the lawful arrest provides the justification for a search. See Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Robinson, 414 U.S. 218 (1973); Chimel v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

California, 395 U.S. 752 (1967). As the Court stated in United States v. Robinson, supra, "[t]he justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect. . . as it does on the need to preserve evidence. . ." Even when law enforcement officials apprehend the wrong person, they may search the arrestee and inspect articles found on his/her person at the place of arrest and at the place of detention. See United States v. McEachern, 675 F.2d 618, 622 (4th Cir. 1982).

A. The Search Must be Contemporaneous with Arrest

A search is incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. See Shipley v. California, 395 U.S. 818, 819 (1969); Von Cleef v. New Jersey, 395 U.S. 814 (1969). The permitted purposes of the search are (1) to seize weapons to protect the arresting agents, (2) to prevent destruction of evidence, and (3) to prevent escape. See Chimel v. California, supra; United States v. Chadwick, 433 U.S. 1 (1977).

A warrantless search may occur before the actual arrest, so long as there was probable cause for the arrest. See United States v. Costello, 604 F.2d 589 (8th Cir. 1979); United States v. Chatman, 573 F.2d 565 (9th Cir. 1977); United States v. Jenkins, 496 F.2d 57, 73 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975); Busby v. United States, 296 F.2d 328 (9th Cir. 1961), cert. denied, 369 U.S. 876 (1962). However, the search may not be remote in time from the arrest. See United States v. Wyatt, 561 F.2d 1388 (4th Cir. 1977).

A search "contemporaneous" with an arrest does not necessarily mean "simultaneous." A search of a defendant's person and the property in his/her immediate possession, which could be made on the spot at the time of arrest, may be conducted legally later as a normal incident of incarceration when the accused arrived at the place of detention. See United States v. Castro, 596 F.2d 674 (5th Cir.), cert. denied, 444 U.S. 963 (1979). A warrantless seizure of the jailed arrestee's clothing when substitute clothing first became available on the morning after an 11 p.m. arrest was held part of normal administrative process incident to an arrest. See United States v. Edwards, 415 U.S. 800 (1974). Seizure of a jailed defendant's shoes six weeks after arrest was held proper as the defendant and his shoes were in custody from arrest until the shoes were taken for use as evidence. To require a warrant, it was said, "would be to require a useless and meaningless formality." See United States v. Oaxaca, 569 F.2d 518, 524 (9th Cir.), cert. denied, 439 U.S. 926 (1978).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Other instances where courts have held that a search was not contemporaneous with an arrest include: a search of defendant's apartment four days after he was arrested, Mincey v. Arizona, 437 U.S. 385 (1978); the search of a hotel room in California two days before an arrest in Nevada, Stoner v. California, 376 U.S. 483 (1964); the search of an office one hour after an arrest in a nearby elevator, United States ex rel. Nickens v. LaVallee, 391 F.2d 123 (2d Cir. 1968); a search of living quarters three hours after the related arrest, United States ex rel. Clark v. Maroney, 339 F.2d 710, 713-14 (3d Cir. 1965); a search of a car made several days after arrest, Williams v. United States, 323 F.2d 90, 94 (10th Cir. 1963), cert. denied, 376 U.S. 906 (1964); a search of defendant's hotel room to which the officers had taken defendant after he was arrested in the hotel's hallway wearing only a bathing suit, United States v. Anthon, 648 F.2d 669 (10th Cir. 1981).

B. The Scope of the Search Cannot Exceed that Which is Required

Searches incident to arrest are for the purpose of protecting the arresting officers and preventing the destruction of evidence. As such, the scope of such a search is limited to the arrestee's person and the area from within his/her immediate control, meaning "the area from within which he might gain possession of a weapon or destructible evidence." Chimel v. California, supra, at 752, 763; United States v. Chadwick, supra; United States v. Edwards, 415 U.S. 800, 802-803 (1974).

1. Search of the Person

When there is a lawful arrest, the arrestee and everything worn by him/her may be searched. See United States v. Robinson, supra. This includes clothing, removal of which may be required for the search, United States v. Edwards, supra, at 800, items in coat pockets, United States v. Campbell, 575 F.2d 505 (5th Cir. 1978); United States v. Smith, 565 F.2d 292 (4th Cir. 1977), and in pockets of pants after they have been removed, United States v. Chatman, supra.

A brief strip search, conducted without abuse and in a professional manner for a visual inspection of body surfaces to detect hidden evidence or objects which could be used to harm, is not unlawful. See United States v. Klein, 522 F.2d 296 (1st Cir. 1975).

Body cavity searches have been found to be lawful, with circuits in disagreement over the precise standard which must be met. There must be, according to one circuit, a "clear indication" that contraband is present in the cavity. See United States v. Rodriguez, 592 F.2d 553 (9th Cir. 1979); United States v. Mastberg, 503 F.2d 465

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(9th Cir. 1974). See also United States v. Himmelwright, 551 F.2d 991, 995 (5th Cir. 1975) (applying a "reasonable suspicion" test to body cavity searches). See also USAM 9-4.187, *infra*, dealing with searches of persons in border contexts. A body cavity search, which was performed twice by two policewomen rather than skilled medical technicians on a defendant seven months pregnant, was held to violate due process, United States ex rel. Guy v. McCauley, 385 F. Supp. 193 (E.D. Wis. 1974). X-ray examination and the use of force to prevent a defendant from swallowing evidence have been held lawful. See United States v. Caldera, 421 F.2d 152 (9th Cir. 1970).

2. Articles Carried by Arrestee

Articles carried by an arrestee may be searched incident to a lawful arrest. These have included a purse, United States v. Morano, 569 F.2d 1049 (9th Cir.), *cert. denied*, 435 U.S. 972 (1978); a wallet, United States v. Castro, *supra*; a camera and money, United States v. Matthews, 603 F.2d 48 (8th Cir. 1979), *cert. denied*, 444 U.S. 1019 (1980); a briefcase, United States v. Hayes, 553 F.2d 824 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977); a bag, even though the arrestee is handcuffed and removed to the street, United States v. Fleming, 677 F.2d 602 (7th Cir. 1982); and hand-carried luggage, United States v. Garcia, 605 F.2d 349 (7th Cir. 1979), *cert. denied*, 446 U.S. 984 (1980).

3. Areas Within Arrestee's Immediate Control

A search incident to a lawful arrest may be made of the arrestee's person and areas within arrestee's immediate control. See Chimel v. California, *supra*, at 752, 763. These include the passenger compartment and any containers found in the passenger compartment of an automobile whose occupant is subjected to a lawful custodial arrest, New York v. Belton, 453 U.S. 454 (1981); inside a cigarette package found in arrestee's coat pocket, United States v. Robinson, *supra*; the area under a mattress in a room where defendant was taken to get a shirt, Watkins v. United States, 564 F.2d 201 (6th Cir. 1977), *cert. denied*, 435 U.S. 976 (1978); a cabinet two to four feet from where a codefendant was lying on the floor, United States v. Weaklem, 517 F.2d 70 (9th Cir. 1975); a table in front of the defendants at the time they were arrested, United States v. Artieri, 491 F.2d 440 (2d Cir.), *cert. denied*, 419 U.S. 878 (1974); a bed and purse within reach of a companion of defendant who was arrested in a hotel room doorway, United States v. Simmons, 567 F.2d 314 (7th Cir. 1977); a motel room, United States v. Savage, 564 F.2d 728 (5th Cir. 1977); and a search of arrestee's personal effects at the station house. See Illinois v. Lafayette, 462 U.S. 640 (1983).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

If an area is not within an arrestee's control or reach, or if he/she is handicapped or otherwise unable to retrieve weapons or evidence therein, the area may not be searched incident to the arrest without a warrant. See United States v. Neumann, 585 F.2d 355 (8th Cir. 1978). Thus, the fruits of the search of a billfold in defendant's bedroom were suppressed where the defendant was shackled to a bed and the billfold was out of his reach; United States v. Berenguer, 562 F.2d 206 (2d Cir. 1977). Search of a closet when defendant is handcuffed to a chair at the far end of the room is not incident to arrest. See United States v. Lyons, 706 F.2d 321, 330-331 (D.C. Cir. 1983). See also United States v. Jackson, 576 F.2d 749 (8th Cir.), cert. denied, 439 U.S. 858 (1978). The area of search may be extended, however, if the police suspect that a confederate of the arrestee is hiding in the room or house where the arrest takes place. See USAM 9-4.115C, supra (Protective Sweeps).

Officers may not allow a defendant to wander about an apartment and then search every room that he/she enters as a search incident to an arrest. See United States v. Erwin, 507 F.2d 937 (5th Cir. 1975). Arresting officers may not order the accused to dress and then not bring the accused his/her clothes, requiring him/her to move about the room as a pretext for searching beyond the area of defendant's immediate control. See United States v. Griffith, 537 F.2d 900 (7th Cir. 1976). There is no justification for searching "all the desk drawers" in that room. Chimel v. California, supra, at 752, 763. Nor may a search of luggage be justified where the agent places it within the arrestee's reach at arrest. See United States v. Wright, 577 F.2d 378 (6th Cir. 1978).

Normally, the passage of articles from the arrestee to the police will remove any danger that weapons will be seized or items destroyed. See United States v. Chadwick, supra, at 15; United States v. Benson, 631 F.2d 1336 (8th Cir. 1980). Nevertheless, even though an item may be removed from the arrestee, it still may be inventoried, as where the arrestee is being taken into custody, and his/her valuables must be stored by police. See Illinois v. Lafayette, supra. This inventory procedure extends to any container or article in the arrestee's possession. Id. at 2611. The scope of this station house search may be more extensive than a search incident to arrest on the scene as there is a strong governmental interest in prevention of theft and false claims. Id. at 2609.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.124 Stop and Frisk

Conduct which restrains the movement of a suspect may constitute a "search" or "seizure" within the meaning of the Fourth Amendment, even though it does not rise to the level of an "arrest." On the one hand, relying on previous holdings in Florida v. Royer, 460 U.S. 491 (1983), and Brown v. Texas, 443 U.S. 47 (1979), the Court held in INS v. Delgado, supra, that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation." The Court held that absent some facts leading the person to reasonably believe "he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." On the other hand, the Court added that "if the person refused to answer and the police take additional steps--such as those taken in Brown--to obtain an answer, then the Fourth Amendment imposes some minimum level of justification to validate the detention or seizure." See also United States v. Mendenhall, 446 U.S. 544 (1980), discussed infra. This section deals with those cases wherein more than mere voluntary questioning is involved. See also USAM 9-4.127, infra, discussing investigatory detentions in the airport context.

In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court held that a "stop and frisk" is within the purview of the Fourth Amendment. A person who is stopped for questioning by a police officer and who is denied the right to walk away is a seized person. Such a stop, however, does not require probable cause; rather the officer must be able to articulate specific facts and inferences that lead to a reasonable suspicion of criminal activity. Id. at 21. In United States v. Cortez, 449 U.S. 411 (1981), the Supreme Court discussed the degree of reasonable suspicion necessary to justify an investigatory stop. The Court stated that "[b]ased upon [the] whole picture the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." Id. at 417-418.

Thus in Reid v. Georgia, 448 U.S. 438 (1980) (per curiam), the Supreme Court held an investigatory stop at an airport unlawful where it was based on the fact that the defendant fit a "drug courier profile." The Court reasoned that the circumstances relied upon in making the stop "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures [if such stops were lawful]." Id. at 441. In Brown v. Texas, supra, the court held that an individual in a high drug traffic area who merely looked suspicious to the officers could not be stopped without the existence of objective facts suggesting he was involved in unusual activity. See United States v. Burnette, 698 F.2d 1038, 1047 (9th Cir.), cert. denied, 461 U.S. 936 (1983) (reasonable suspicion for stop when police observe suspect at motel

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

with vehicle used in robbery); United States v. Martinez-Gonzalez, 686 F.2d 93, 99 (2d Cir. 1982) (reasonable suspicion for stop of persons exiting apartment used for drug trafficking); United States v. LeFevre, 685 F.2d 897, 899-900 (4th Cir. 1982) (reasonable suspicion for stop when officer observes suspect licking rolling papers while sitting beside packages of commercial cigarettes).

In addition, if an officer reasonably believes a suspect is armed and dangerous and nothing in the initial stages of the encounter dispels that suspicion, the officer may conduct a carefully limited protective search of the suspect's outer clothing. In Terry, the Court upheld such a protective search, balancing the individual's privacy interest against the state's interests in effective crime prevention and detection and law enforcement agents' more immediate interest in protecting themselves and other potential victims of violence. Terry, *supra*, at 22-25. In Michigan v. Long, 463 U.S. 1032 (1983), the Court extended Terry principles to permit the warrantless search of an automobile interior incident to an investigatory detention because the officer had a reasonable belief that the suspect was dangerous and might have gained access to a weapon.

Similarly, during the course of a protective search, officers may take reasonable steps to insure their own safety, such as handcuffing the defendant, without necessitating a finding that the suspect was in custody. See United States v. Booth, 669 F.2d 1231, 1236 (9th Cir. 1982); United States v. Purry, 545 F.2d 217, 220 (D.C. Cir. 1976). Nor does the use of a gun "automatically convert an investigatory stop into an arrest." United States v. Roper, 702 F.2d 984, 987 (11th Cir. 1983); United States v. Merritt, 695 F.2d 1263, 1272-74 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983); United States v. Harley, 682 F.2d 398, 402 (2d Cir. 1982); United States v. Bull, 565 F.2d 869, 870 (4th Cir. 1977), *cert. denied*, 435 U.S. 946 (1978).

Because of the intrusive nature of the seizure and the severity of its consequences, the Supreme Court has refused to extend the reasonable suspicion standard for a stop and frisk to seizures of suspects for the purpose of subsequent stationhouse interrogations. See Dunaway v. New York, 442 U.S. 200 (1979). The Court explained that "[t]he mere facts that [defendant] was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, \* \* \* obviously do not make [his] seizure even roughly analogous to the narrowly defined intrusions involved in Terry and its progeny." *Id.* at 212-213.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.125 Detention During Search of Home

A person may be detained by the police without probable cause when they are searching his/her home under authority of a search warrant. See Michigan v. Summers, 452 U.S. 692 (1981). The detention of the occupant is less intrusive than the search itself and adds only minimally to the stigma associated with the search. Id. at 701. Detention is justified because a judicial officer has determined that there is probably criminal activity in the house to which the occupant is connected and because it minimizes the risk of harm to the officers and prevents flight in the event incriminating evidence is found. Id. at 701-702. A 45-minute detention has been held to be reasonable. See United States v. Timpani, 665 F.2d 1 (1st Cir. 1981).

However, a person's mere presence in a tavern being searched pursuant to a search warrant gives the police no right to pat down or search him/her absent any particularized suspicion that he/she is armed or dangerous. See Ybarra v. Illinois, 444 U.S. 85 (1979). See also USAM 9-4.119, supra, dealing with seizure of items generally pending procurement of a warrant; and USAM 9-4.115C, supra, dealing with protective sweeps during execution of a warrant.

9-4.126 Containers

In United States v. Ross, 456 U.S. 798 (1982), the Supreme Court rejected the government's argument that for purposes of the Fourth Amendment it is not permissible to distinguish between "worthy" and "unworthy" containers. Id. at 822. Therefore the government cannot claim that by virtue of a particular container's insubstantial nature, e.g., a paper sack, the owner lacks a sufficient privacy interest for Fourth Amendment protections to attach. The following principles governing seizures and searches of containers are therefore applicable without regard to the container's character.

A. Seizures of Containers

Where there is probable cause to believe that a container contains contraband, it may be seized and detained until a warrant can be obtained to effect a search of its contents. See United States v. Ross, supra, at 807 n.9; Arkansas v. Sanders, 442 U.S. 753, 761-762 (1979); United States v. Chadwick, 433 U.S. 1 (1977). Even absent probable cause, it is permissible for the police acting on the basis of reasonable suspicion to seize and briefly detain luggage believed to contain contraband for investigatory purposes. In United States v. Place, 462 U.S. 696 (1983),

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the court, analogized, however, the duration of such investigative detentions to that of a Terry-type stop and held that because the detention of luggage in that case approximated 90 minutes it was unlawful.

B. Searches of Containers

As a general principle, closed packages and containers cannot be searched without a warrant. See, e.g., United States v. Ross, *supra*, at 812; Arkansas v. Sanders, *supra*, at 764-765; United States v. Chadwick, *supra*, at 11. The reason for this principle is that, like dwelling places, persons have reasonable expectations of privacy in such containers, expectations that clause was designed to protect. United States v. Chadwick, *supra*, at 7. As in every other class of cases involving the warrant clause, there are, however, exceptions to this general principle.

1. Exigent circumstances such as probable cause to believe that a package contains explosives permit an immediate search of its contents. See, e.g., Arkansas v. Sanders, 442 U.S. at 759-760; United States v. Chadwick, *supra*, at 15 n.9.

2. When a custodial arrest is made the police may conduct a prompt warrantless search of not only the arrestee's person but of containers within his/her immediate control--the area from which he/she might gain possession of a weapon or destructible evidence--in order to safeguard themselves and prevent the loss of evidence. United States v. Chadwick, *supra*, at 14.

3. Where the police have probable cause to conduct a warrantless vehicle search, they may, incident to the search, investigate any container that might conceal the item for which they are looking. See United States v. Ross, *supra*, at 824. However, it is of vital importance to understand that when the focus of the probable cause is not on the vehicle but upon the container itself, its incidental connection with the vehicle does not justify a warrantless search. *Id.* See Arkansas v. Sanders, *supra*, at 762-763. In such cases, the proper course of action is to secure the container and obtain a search warrant.

4. At least one form of investigation concerning the contents of a container does not implicate Fourth Amendment interests at all. A sniff by a drug detection dog does not constitute a search because it is "so limited both in the manner in which the information is obtained and in the content of the information revealed by the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

procedure." See United States v. Place, 462 U.S. 696 (1983). Accord United States v. Jacobson, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1652, 1662 n.24 (1984). We emphasize, however, that in light of United States v. Leon, *supra*, the more prudent course would be to obtain a warrant if time permits.

C. Controlled Delivery

No protected privacy interest remains in a container once government officers lawfully have opened the container and identified its contents as contraband even if the container is subsequently reopened after it has traveled to its intended destination. See Illinois v. Andreas, \_\_\_ U.S. \_\_\_, 103 S. Ct. 3319 (1983). The lawful discovery of contraband often provides an opportunity to identify the persons responsible by allowing the container to continue upon its journey to its intended destination. The typical pattern is described in Illinois v. Andreas, *supra*, at 3323, where the Court observed that usually a carrier, such as an airline, unexpectedly discovers contraband while inspecting luggage or after a parcel has broken open; upon being advised of the discovery, law enforcement officers then restore the contraband in the parcel, which is sent on its way until it can be seized along with its owner or recipient upon reaching the destination.

9-4.127 Searches and Seizures at Airports

In researching any airport search and seizure question, an excellent place to begin is 3 LaFave, §10.6. Usually these questions involve one of the following two subjects: (1) a confrontation between suspected narcotics traffickers and law enforcement officers, resulting in a search or seizure of the suspect's luggage, or (2) a search of luggage by airport security personnel pursuant to federal anti-hijacking regulations. We will discuss each in turn. Although the frequency with which these fact patterns arise in the course of airport searches makes it appropriate to discuss them in this context, the principles expounded herein are generally applicable. Similarly, although border searches and related problems are discussed separately USAM 9-4.170, *infra*, there is an overlap of issues and holdings in these two areas.

A. The Airport Drug Detection Program

The Supreme Court has decided four cases involving confrontations between suspected narcotics traffickers and law enforcement officers: United States v. Place, *supra*; Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980); and United States v. Mendenhall, 446 U.S.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

544 (1980). Essentially, an encounter between an officer and a suspect can be classified in one of three ways: (1) a consensual encounter between the officer and suspect; (2) a brief, minimally intrusive investigatory stop; (3) a detention that is lengthy enough to be considered an arrest. See United States v. Ilazi, 730 F.2d 1120, 1123 (8th Cir. 1984); United States v. Waksal, 709 F.2d 653, 657-658 (11th Cir. 1983). Frequently, the encounter will begin as a voluntary communication and progress to an arrest. As the suspect's freedom diminishes, the officer's justification for holding the suspect must increase.

1. The Consensual Encounter. The Fourth Amendment is not implicated every time an officer speaks to a citizen. The Fourth Amendment only comes into play where a "seizure" of the citizen has occurred. See INS v. Delgado, supra. And, in the absence of a seizure, the officer needs no suspicion to speak to the citizen. The Supreme Court fashioned a test for determining when a seizure has taken place in Florida v. Royer, supra, at 498, and United States v. Mendenhall, supra, at 554 (opinion of Stewart, J.): the inquiry focuses on whether "a reasonable person would have believed that he was not free to leave." A person is seized "only when, by means of physical force or show of authority, his freedom of movement is restrained." See United States v. Mendenhall, supra, at 553. As stated in Royer, supra, at 496:

Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if he is willing to listen \* \* \*. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.

In Mendenhall, supra, Justice Stewart found no seizure where the suspect was approached by two DEA agents, who identified themselves and asked to see her airline ticket and identification. After Mendenhall answered a few questions, the officers returned the ticket to her. She then agreed to accompany the agents to an office for further questioning and a search. Justice Stewart found that the consent was freely given, and hence there was no Fourth Amendment violation. In the following cases the courts of appeals have likewise found that the initial contact between the agent and the suspect was not a seizure: United States v. Notorianni, 729 F.2d 520 (7th Cir. 1984); United States v. Morgan, 725 F.2d 56, 58-59 (7th

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Cir. 1984); United States v. Puglisi, 723 F.2d 779, 783-786 (11th Cir. 1984); United States v. Berryman, 717 F.2d 651, 660-661 (1st Cir. 1983) (Breyer, J., dissenting), adopted by the majority en banc, Berryman, supra at 650.

2. The Investigatory Detention. If the suspect is not free to leave, he/she has been seized. A seizure that is of limited duration is an investigatory detention rather than an arrest. In Florida v. Royer, the Supreme Court found that Royer had been detained against his will. The critical facts that lead to this determination were that the agents told Royer that he was suspected of transporting narcotics and that they retained Royer's ticket and identification when they asked him to accompany them to an office. Royer, supra, at 498. Further, they did not tell Royer that he was free to depart. Id. Without his ticket, Royer could not board the airplane, and accordingly, he had been seized. For examples of other cases that have found investigatory detentions in the airport context, see United States v. Cordell, 723 F.2d 1283, 1284-1285 (7th Cir. 1983); United States v. Saperstein, 723 F.2d 1221, 1226 (6th Cir. 1983); United States v. Manchester, 711 F.2d 458 (1st Cir. 1983); United States v. Waksal, supra, at 660-662. Investigatory detentions generally are also discussed at USAM 9-4.124, 9-4.125, supra.

To satisfy the Fourth Amendment, an investigatory detention must be supported by a reasonable, articulable suspicion of criminal activity. See Florida v. Royer, supra; Reid v. Georgia, 448 U.S. 438, 440 (1980); Terry v. Ohio, 392 U.S. 1 (1968). Reasonable suspicion is determined by the totality of the circumstances. See United States v. Cortez, 449 U.S. 411 (1981). A variety of factors can contribute to a finding of reasonable suspicion. Some of the factors that arise frequently in the airport context are (1) the suspect is traveling to or from a source city for narcotics (see, e.g., United States v. Ilazi, 730 F.2d 1120 (8th Cir. 1984); United States v. Cordell, supra, at 1285; United States v. Puglisi, supra, at 789); (2) the traveler has little or no luggage and the duration of his/her journey was one day or less (see, e.g., United States v. Ilazi, supra; United States v. Manchester, supra); (3) the traveler is the first or last to deplane (United States v. Ilazi, supra); (4) the traveler appears nervous or looks around for surveilling officers (United States v. Cordell, supra; United States v. Puglisi, supra; United States v. Manchester, supra); (5) the passenger attempts to conceal the fact that he/she is traveling with or meeting someone else; (6) the passenger pays for his/her ticket with cash (United States v. Cordell, supra; United States v. Puglisi, supra; United States v. Berryman, supra, at 665); or (7) the passenger travels

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

under an assumed name (see, e.g., United States v. Cordell, supra; United States v. Puglisi, supra). On the other hand, in Reid v. Georgia, supra, the Supreme Court found no reasonable suspicion where the defendants arrived from a source city early in the morning carrying only shoulder bags and where they appeared to be trying to conceal the fact that they were traveling together. Reid v. Georgia, supra, at 438.

3. Arrest. Frequently, an investigatory detention will escalate into an arrest. To comport with the Fourth Amendment an arrest must be supported by probable cause. In United States v. Place, supra, the Supreme Court held that by detaining the suspect's luggage for 90 minutes, the DEA agents had effectively detained or seized the suspect. The Court ruled that a detention of that length normally must be supported by probable cause, especially where the agents could have taken steps to reduce the length of the detention. In Place, the Court refused to fix a precise time limit, however, for when an investigatory detention ripens into an arrest.

Even a brief detention can escalate into an arrest for Fourth Amendment purposes if the circumstances are sufficiently coercive. It is not necessary that the agents formally charge the defendant, however. For instance, if the agents hold the suspect's identification, luggage and ticket while questioning him/her, thereby curtailing his/her ability to travel, and remove him/her from the public concourse of the terminal to an enclosed office, an arrest has probably occurred. See Florida v. Royer, supra, at 499. But holding the tickets alone should not be dispositive of the arrest question, especially if the suspect has already completed his/her journey and no longer needs them. And if the suspect freely consents to continue the conversation in an enclosed room and out of the public eye, an arrest probably has not occurred. See United States v. Mendenhall, supra. One must look at all the facts to determine whether a consensual encounter has escalated to an investigatory stop and ultimately to an arrest.

B. The Anti-Hijacking Program

Private airport security personnel frequently discover narcotics, guns, and contraband while screening passengers and luggage to look for hijackers, bombs and other devices that pose a threat to the safety of air travel. The question then arises whether the discovery of the contraband implicates the Fourth Amendment. If the search is a private one, it does not. If it is deemed a governmental search, the Fourth Amendment applies. Generally, because airport security personnel are commanded by federal regulation to carry out these searches to ensure air safety, the searches

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

are characterized as government searches. See LaFave, §10.6 (a-e), and cases cited therein. Nevertheless, these searches are often upheld on a consent rationale: as a condition to this travel, the passenger consents to submit his/her luggage and his/her person to the x-ray scanner and in some cases, to a closer examination by the security officer. See United States v. DeAngelo, 584 F.2d 46 (4th Cir. 1978). If he/she does not want to be searched, the passenger can choose a different mode of transportation. But see, LaFave, supra, at §10.6(g) (criticizing the consent rationale).

9-4.128 Destruction or Removal of Property to Prevent Seizure; Warning the Subject of a Search

Prior to enactment of the Comprehensive Crime Control Act of 1984, 18 U.S.C. §2232 made it a misdemeanor to impair an authorized search by a law enforcement officer by removing, concealing, or destroying the property to prevent its seizure. However, the section did not prohibit a person from warning another of an impending search so that the second person could remove, conceal, or destroy the evidence. Moreover, such warnings were held not to constitute an obstruction of justice. See United States v. Brown, 688 F.2d 596 (9th Cir. 1982). To remedy the omission, the Comprehensive Crime Control Act of 1984 added a new paragraph proscribing the warning of another person of an impending search in order to prevent the seizure or securing of the objects of the search. The Act also raised the penalty for violating section 2232 to make such a violation a 5-year felony.

18 U.S.C. §2232 has been construed to cover such activities as igniting gambling documents upon the entry of FBI agents, United States v. Todars, 550 F.2d 1300 (2d Cir.), cert. denied, 433 U.S. 909 (1977); destroying loansharking records after the defendant spotted FBI agents outside his home, even though the agents had no search warrant, United States v. Delguyd, 542 F.2d 346 (6th Cir. 1976); and refusing to "heave to" when ordered to do so by Customs officers who intended to seize the boat, United States v. Woodring, 536 F.2d 598 (5th Cir.), cert. denied, 429 U.S. 1003 (1976).

The United States Court of Appeals for the Third Circuit has held that section 2232 is not void for vagueness, United States v. Gibbons, 463 F.2d 1201 (3d Cir. 1972), and it is likely that the phrase "by any person authorized to make searches and seizures" in section 2232 is satisfied if the person had merely a colorable authority to engage in such activity, United States v. Bernstein, 287 F. Supp. 84 (S.D. Fla. 1968).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.130 Searches of Premises and Real Property

This area is covered generally in LaFave, supra, chapter 6. Essentially, the analysis to be applied in dealing with premises and/or property varies according to: (1) the place where the intrusion occurs; and (2) the justification existing for the intrusion.

9-4.131 Entry of Premises

In the past, the Supreme Court occasionally described the protection of the Fourth Amendment as extending to "constitutionally protected areas." But in Katz v. United States, 389 U.S. 347, 351 n.9 (1967), the Court held that the Fourth Amendment protects people, not places. While Katz and its progeny reject property law based criteria for determining the scope of Fourth Amendment protection, that law still retains some value as to the bounds of protected privacy rights. See Fixel v. Wainwright, 492 F.2d 480, 483 n.3 (5th Cir. 1974).

A person's expectation of privacy is at its greatest in the home or other premises in which he/she has a legitimate privacy interest. See Katz v. United States, supra, at 357, n.18; Payton v. New York, 445 U.S. at 586 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."). See Johnson v. United States, 333 U.S. 10, 16 (1948) (holding that "exceptional circumstances" were required to justify a warrantless search of a suspect's hotel room). The court recently reaffirmed this precept in United States v. Karo, \_\_\_ U.S. \_\_\_, 104 S. Ct. 3296 (1984), calling it "obvious" that "private residences are places in which the individual normally expects privacy from governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable."

The Court has, however, allowed the warrantless entry of a home where certain narrowly defined exigencies are present which do not directly involve the search for evidence of a crime. Calling these "emergency conditions," see Welsh v. Wisconsin, \_\_\_ U.S. \_\_\_, 104 S. Ct. 2091, 2097 (1984), the Court permits entry into residences where the officers are in "hot pursuit" of a fleeing felon, see, e.g., United States v. Santana, 427 U.S. 38, 42-43 (1976); Warden v. Hayden, 387 U.S. 294, 298-299 (1967); destruction of evidence is imminent, see, e.g., Ker v. California, 374 U.S. 23 (1963); Michigan v. Tyler, 436 U.S. 499, 510 (1978); or the entry is necessary to effectuate a felony arrest and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

exigent circumstances are present. See Payton v. New York, 445 U.S. 573 (1980). The government has the burden to show the need to justify warrantless searches by demonstrating that one of the exceptions applies. See, e.g., Payton v. New York, *supra*, 445 U.S. at 587; Mincey v. Arizona, 437 U.S. 385, 394 (1978); Vale v. Louisiana, 399 U.S. 30, 34 (1970).

A. To Effectuate an Arrest

While authority exists allowing entry into a home for purpose of effectuating an arrest, courts consider among other factors: (1) whether the entry is into the arrestee's home, or that of a third person, (2) the existence of an arrest warrant and/or exigent circumstances, and (3) the seriousness of the offense. The preferences for warrants, which the Court has so frequently recognized, is not applicable only to searches, but to arrests as well.

1. Pursuant to Arrest Warrant

In Payton v. New York, *supra*, the Court held that entry into a home for the purposes of effecting a routine felony arrest could be based upon an arrest warrant, with a search warrant being unnecessary. The Court conditioned its holdings, however, by adding that entry was appropriate where it was made into "a dwelling in which the suspect lives when there is reason to believe the suspect is within." The use of this "reason to believe" standard was consistent with cases prior to this decision, holding that less than probable cause was required. See United States v. Manley, 632 F.2d 978 (2d Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977). *But cf.* LaFave, *supra*, §6.1 at 123-24. This standard has been met by checking the suspect's address in phone books or directories, see Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980), or questioning neighbors. See United States v. Manley, *supra*.

The decision in Payton, *supra*, left open whether entry was permissible where the home was owned by a third person. Reaching this question in Steagald v. United States, 451 U.S. 204 (1981), the Court held that absent a search warrant and/or exigent circumstances, evidence seized in the home could not be used against the resident. The Court noted, however, that the rights of the individual named in the warrant were not at issue, but rather only those of the resident--for whom no warrant was issued. At least one circuit has found this distinction critical, holding that an individual arrested in the home of a third person, pursuant to an arrest warrant, had no cause to complain under Steagald, *supra*. See United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Underwood, 717 F.2d 482 (9th Cir. 1983) (en banc), cert. denied,  
\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 1309 (1984).

While Payton, supra, is applicable even where residence is based solely on rental for a short time, such as in a motel, see, e.g., United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982), cert. denied, 456 U.S. 1010 (1982), it is not where entry is made into premises opened to the public. See United States v. Blalock, 578 F.2d 245 (9th Cir. 1978).

B. Hot Pursuit

When the police enter premises in continuous "hot pursuit" of a suspect for whom probable cause to arrest exists, such entry is justified by the exigencies of the pursuit. See Warden v. Hayden, supra, at 298-299 (warrantless search of a house entered by a suspect minutes before arrival of police permissible as hot pursuit); United States v. Santana, supra, (same). Cf. United States v. Stubblefield, 621 F.2d 980, 982 (9th Cir. 1980) (hot pursuit and possibility that known, unapprehended suspect remains in house sufficient to support officer's warrantless entry).

Courts generally require that the pursuit be "hot," that is, immediately and directly related to the report of crime, in order to insure that the suspect is actually present in the premises entered. See United States v. Young, 553 F.2d 1132 (8th Cir.), cert. denied, 431 U.S. 959 (1977); United States v. Scott, 520 F.2d 697 (9th Cir. 1975), cert. denied, 423 U.S. 1056 (1976). Accordingly, in Welsh v. Wisconsin, supra, the court found a "hot pursuit" argument unconvincing where there was "no immediate or continuous pursuit of the petitioner from the scene of a crime." See Welsh v. Wisconsin, supra, at 2099.

This does not mean, however, that the suspect must remain in the officer's view at all times. Rather, it is commonly held that actual, personal knowledge that the accused is in the house is not required. See United States v. Haynie, 637 F.2d 227 (4th Cir. 1980), cert. denied, 451 U.S. 972 (1981) (warrantless search justified under hot pursuit even though police did not have actual knowledge of the suspect's entrance into the building). See also Scott v. Maggio, 695 F.2d 916 (5th Cir. 1983), cert. denied, \_\_\_\_ U.S. \_\_\_\_\_, 103 S. Ct. 3544 (1983) (entry minutes after receiving description by victim and path of flight by bystanders); Archibald v. Mosel, 677 F.2d 5 (1st Cir. 1982) (entry no more than 20-25 minutes after robbery); United States v. Stubblefield, supra (information obtained within minutes of bank robbery included names and address of owner of getaway car).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The exigency of the situation "must be assessed at the point immediately before the search." See Arkansas v. Sanders, 442 U.S. 753, 763 (1979). Courts, in evaluating the asserted exigency, generally rely on the totality of circumstances test. See United States v. Bruton, 647 F.2d 818, 823 (8th Cir.), cert. denied, 454 U.S. 868 (1981). See also Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (where the District of Columbia Circuit identified several factors to be used in determining the presence of exigent circumstances: (1) the gravity of the offense involved; (2) the reasonableness of the arresting officer's belief that the suspect is armed; (3) the strength of the showing of probable cause; (4) the strength of the arresting officer's belief that the suspect is on the premises; (5) the likelihood that the suspect would escape if not immediately apprehended; (6) the character of the officer's entry; (7) the time of day.) See also LaFave, *supra*, §6.1 at 390 (stating that while these factors are widely utilized it may not be "sound" to impose such a standard upon police).

C. Prevention of Destruction of Evidence

Warrantless searches of persons may be made when the nature of the evidence is such that it could be destroyed or otherwise disappear before a warrant can be obtained. See Cupp v. Murphy, 412 U.S. 291 (1973) (evidence would be lost if suspect washed his hands); Schmerber v. California, 384 U.S. 757 (1966) (warrantless taking of blood sample to determine whether driver intoxicated was permissible).

To justify a warrantless search to preserve evidence, an officer must make a strong showing that he/she had reason to suspect the imminent destruction of evidence and therefore lacked sufficient time to obtain a warrant. See United States v. Crozier, 674 F.2d 1293, 1298-99 (9th Cir. 1982); United States v. Tolliver, 665 F.2d 1005, 1008 (11th Cir.) (per curiam), cert. denied, 456 U.S. 935 (1982); United States v. Martino, 664 F.2d 860, 870 (2d Cir. 1981), cert. denied, 458 U.S. 1110 (1982). Nevertheless, even where immediate action is necessary to save evidence, that ground cannot provide the sole justification for a warrantless entry into a dwelling to make an arrest. Where, for example, the crime was not sufficiently serious, such as drunk driving, the Court has held that a warrantless entry cannot be justified on the theory that alcohol levels in the body would dissipate. See Welsh v. Wisconsin, *supra*, at 2099-2100.

By contrast, where entry was only to secure the premises until a search warrant could be obtained, Segura v. United States, *supra* at 3380, two members of the Court said that "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

either the dwelling or its contents." The Court held that the "initial entry--legal or not--does not affect the reasonableness of the seizure ...," but that nevertheless, "absent exigent circumstances, the entry may have constituted an illegal search, or interference with petitioners' privacy interests, requiring suppression of all evidence obtained during the entry."

D. Emergency Searches

In near-crisis situations where there is no time to obtain a warrant and where immediate action is required, the police may effect a warrantless entry and search. See Michigan v. Tyler, 436 U.S. 499 (1978) (upheld warrantless entry into still-smoldering premises to determine cause of fire). The "need to protect or preserve life or avoid serious injury is justification for what would otherwise be illegal" absent an emergency. See Wayne v. United States, 318 F.2d 205 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963). See also United States v. Jones, 635 F.2d 1357 (8th Cir. 1980) (report of gunshots and information that an individual in an apartment was dangerous, plus suspect's failure to respond to police knocking, and a burning odor created an emergency situation justifying the warrantless entry). Alternatively, the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. See Satchell v. Cardwell, 653 F.2d 408, 411-13 (9th Cir. 1981), cert. denied, 454 U.S. 1154 (1982) (informant's tip and officer's observation of reported kidnap victim justified warrantless entry to protect victim). See also United States v. Brand, 556 F.2d 1312 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978) (drug overdose victim); United States v. Farra, 725 F.2d 197, 199 (2d Cir. 1984) (cases collected).

As with all warrantless searches, the scope of an emergency search is limited to that level of intrusion which is reasonably necessary to render assistance to a person in need or to prevent the commission of a crime. A search which exceeds the permissible bounds created by the emergency may result in the suppression of any evidence recovered during the search. See Cupp v. Murphy, 412 U.S. 291 (1973). Moreover, once the emergency passes, the right to effect a warrantless search ceases. See Root v. Gauper, 438 F.2d 361 (8th Cir. 1971). See also Mincey v. Arizona, 437 U.S. 385 (1978) (once exigency has terminated, a warrant must be obtained for a further search of premises). In addition, the emergency giving rise to the warrantless search may not be one created by the action or inaction of the police. See United States v. Jones, *supra*; United States v. Picariello, 568 F.2d 222 (1st Cir. 1978). An exception is made for a delay caused by the police in order to confirm the emergency. Id.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Finally, with respect to the manner by which entry is gained into the premises, see LaFave, supra, §6.2, 395-406, and USAM 9-4.116, supra, "Protective sweeps" of premises is similarly discussed at USAM 9-4.115C, supra.

9-4.132 Plain View Doctrine

The plain view doctrine permits the warrantless seizure of evidence or contraband discovered by police during an otherwise lawful search. See Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion). This doctrine is not without limitations, however. The Coolidge court carefully limited the scope of the doctrine in an attempt to bar exploratory searches under the guise of plain view. Thus, plain view may only be used as a basis for a warrantless seizure of evidence when both the intrusion and observation meet constitutional guarantees.

Plain view, without more, may not justify the seizure of an object. Id. Because the doctrine involves a search and seizure of an object situated in a place where there is normally a reasonable expectation of privacy, an officer must have a prior independent justification for his/her presence at the point of observation. See Texas v. Brown 460 U.S. 730 (1983) (plurality). Police presence might be justified by a warrant for another object, see Warden v. Hayden, 387 U.S. 294 (1967); United States v. Wright, 667 F.2d 793, 797 (9th Cir. 1982); United States v. Crouch, 648 F.2d 932, 933 (4th Cir.) (per curiam), cert. denied, 454 U.S. 952 (1981); United States v. Helldt, 668 F.2d 1238, 1268 (D.C. Cir. 1981) (per curiam), cert. denied, 456 U.S. 926 (1982); hot pursuit, United States v. Haynie, 637 F.2d 227, 232 (4th Cir. 1980), cert. denied, 451 U.S. 988 (1981); search incident to a lawful arrest; United States v. Wiga, 662 F.2d 1325, 1331 (9th Cir. 1981), cert. denied, 456 U.S. 918 (1982); United States v. Eddy, 660 F.2d 381, 385 (8th Cir. 1981); United States v. Irizarry, 673 F.2d 554, 558 (1st Cir. 1982); some other legitimate reason; see, e.g., United States v. Strahan, 674 F.2d 96, 100 (1st Cir.), cert. denied, 456 U.S. 1010 (1982) (inventory search); United States v. Alonso, 673 F.2d 334, 337 (11th Cir. 1982) (per curiam) (customs search); United States v. Travelman, 650 F.2d 1133, 1138 (9th Cir. 1981), cert. denied, 455 U.S. 939 (1982) (consent search); United States v. Ocampo, 650 F.2d 421, 427 (2d Cir. 1981) (automobile search); or because the observation occurred in a public place. See Payton v. New York, supra, at 587.

Law enforcement officers are not entitled to seize an object simply because they have observed it. Rather, the court in Coolidge required that the evidentiary nature of the item must be "immediately apparent," a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

test later called an "unhappy choice of words" in Texas v. Brown, *supra*, at 1542. Courts have reached varying conclusions on whether the probable cause standard must be met. Some courts interpreted the "immediately apparent" requirement strictly, so as not to condone exploratory searches; see United States v. Hinckley, 672 F.2d 115, 131 (D.C. Cir. 1982) (*per curiam*); while other courts interpreted the requirement broadly thereby allowing police to examine items, at least in a brief perusal before determining their evidentiary significance. See United States v. McDonald, 723 F.2d 1288, 1295 (7th Cir. 1983); United States v. Chesher, 678 F.2d 1353, 1357, n.2 (9th Cir. 1982); United States v. Ochs, 595 F.2d 1247, 1257, n.8 (2d Cir.), *cert. denied*, 444 U.S. 955 (1979); United States v. Heldt, *supra*, at 1267-68; United States v. Crouch, 648 F.2d 932 (4th Cir.) (*per curiam*), *cert. denied*, 454 U.S. 952 (1981).

Then, in Texas v. Brown, *supra*, the Supreme Court itself cautioned against insisting on an unduly high standard of probable cause. Suggesting that the standard be one of a "practical, non-technical" probability that certain items are associated with criminal activity, Texas v. Brown, *supra*, at 1543, quoting, Brinegar v. United States, 338 U.S. 160, 176 (1949), the Court found in prior cases the standard that the police must have "probable cause to associate the property with criminal activity." Texas v. Brown, *supra*, at 1542, emphasis in original; quoting from Payton v. New York, *supra*, at 587. The plurality opinion in Texas v. Brown, observed that the probable cause standard is met as long as the facts would "warrant a man of reasonable action in the belief . . . , that certain items may be contraband or stolen property or useful as evidence of a crime . . . , " or that a "particularized suspicion" exists. See Texas v. Brown, *supra*, at 1545. The Court added that it was not addressing whether "a degree of suspicion lower than probable cause would be sufficient basis for a seizure in certain cases." *Id.*, n.7.

The plain view doctrine had been interpreted to require also that the discovery of incriminating evidence be "inadvertent." What Coolidge proscribed was the use of the plain view doctrine as a pretext by law enforcement officials in order to circumvent the general warrant requirement. Therefore, where probable cause was developed sufficiently in advance to support the issuance of a search warrant, and the officers had failed to obtain one, they were not authorized to rely upon plain view as a basis for the seizure. See United States v. Barry, 673 F.2d 912, 917-918 (6th Cir. 1982), *cert. denied*, 459 U.S. 927 (1983); United States v. Crouch, *supra*. It should be noted that some circuits viewed the inadvertency requirement as unnecessary when the seized evidence is contraband. See United States v. Vargas, 621 F.2d 54, 56 (2d Cir.), *cert. denied*, 449 U.S. 854 (1980); United States v. Cutts, 535 F.2d 1083, 1084 (8th Cir. 1976); United States v. Bellina, 665 F.2d 1335, 1346 (4th Cir.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1981); United States v. Liberti, 616 F.2d 34, 38 (2d Cir.), cert. denied, 446 U.S. 952 (1980). In Texas v. Brown, *supra*, Justice White indicated he would not require that "inadvertence" be shown, while the plurality simply concluded that "[w]hatever may be the final disposition of the 'inadvertence' element of 'plain view,' [this element] clearly was no bar to the seizure [there]." See Texas v. Brown, *supra*, at 1543 [footnote omitted].

Furthermore, a seizure of an object in plain view is still reasonable even if the officer used a visual aid such as a flashlight or headlight to illuminate an area. See Texas v. Brown, *supra*; United States v. Lee, 274 U.S. 559 (1927). See also United States v. Knotts, 460 U.S. 276, 280-81 (1983).

Some courts have distinguished between a seizure of an object in "plain view" and one subsequent to an "open view" of an object. A plain view search and seizure occurs when there is no infringement of an individual's reasonable expectation of privacy. See Katz v. United States, 389 U.S. 347 (1967). The seizure is presumptively reasonable assuming that there is probable cause to associate the property with criminal activity. See Payton v. New York, 445 U.S. 473 (1980). On the other hand, property in "open view" is situated on premises to which access is not otherwise available for the seizing officer. See Texas v. Brown, *supra*. The "open view" situation occurs, for example, when an officer is walking on the sidewalk and sees, through an open window in a house, incriminating evidence. Absent exigent circumstances, the officer would have to obtain a warrant before he/she could enter the house and seize the evidence. Thus, "[t]he plain view doctrine. . . does not authorize an officer to enter a dwelling without a warrant to seize contraband merely because the contraband is visible from outside the dwelling." See Washington v. Chrisman, 455 U.S. 1, 11 (1982) (dissenting opinion) citing Coolidge v. New Hampshire, *supra*, at 468.

#### 9-4.133 Open Fields and Curtilage

Although the recent holding in Oliver v. United States, U.S. \_\_\_, 104 S. Ct. 1735 (1984), deals with "open fields," the opinion is also helpful in ascertaining the limits of a permissible search and/or seizure within the area known as the "curtilage."

##### A. The "Open Fields" Doctrine

In Hester v. United States, 265 U.S. 57 (1924), the court first enunciated the "open fields" doctrine. That case held that the entry onto

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

defendant's property, and observation of illegal activities within 50-100 yards of his home, did not warrant suppression of evidence. The Court, in Oliver v. United States, *supra*, reaffirmed that doctrine, declining to adopt either a case-by-case approach or a rule of law which would depend upon whether the officers violated defendants' property rights and engaged in a technical trespass in coming onto defendant's property.

Accordingly, the Court held that no legitimate expectation of privacy could be found even though trespassing signs and/or a fence had been erected. Similarly, no distinction could be drawn between areas which were truly "open fields," and those which were "thickly wooded." See Oliver v. United States, *supra*, n.11. Absent any evidence that the intrusion took place within the curtilage, see *infra*, the Court indicated that Fourth Amendment concerns were not violated.

B. The Curtilage

A difficult question, even after Oliver v. United States, *supra*, is what constitutes the "curtilage." This is a necessary inquiry in many cases inasmuch as the Court in Oliver v. United States, *supra*, held that "only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home."

A starting point in defining the "curtilage" is found in Oliver v. United States, *supra*, wherein the Court noted that courts of appeals have defined the "curtilage" by "reference to factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." An additional factor is whether the area surrounding the house is habitually used for family purposes. While the fence surrounding rural fields mentioned in Oliver v. United States, *supra*, may not have given rise to a legitimate expectation of privacy, a fenced yard appurtenant to a house in any urban setting, and excluding outsiders, may be within the "curtilage." See, e.g., United States v. Martino, 664 F.2d 860, 879 (2d Cir. 1981) (Oakes, J., concurring); Hobson v. United States, 226 F.2d 890, 894 (8th Cir. 1955). Thus, the court in Oliver v. United States, *supra*, observed that "for most homes, the boundaries of the curtilage will be clearly marked. . . ." *Id.*, n.12.

Although some cases have searched for a simple answer to whether an area was within the "curtilage," such as the 75 foot boundary used in United States v. Bensinger, 546 F.2d 1292, 1297 (7th Cir. 1976), other cases have treated distance from the house as only one factor to be considered. See, e.g., United States v. Van Dyke, 643 F.2d 992, 994 (4th Cir. 1981); Care v. United States, 231 F.2d 22, 25 (10th Cir. 1956). Two other factors often mentioned are: (1) the existence of enclosures

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

rendering the area private; see, e.g., Janney v. United States, 206 F.2d 601, 602 (4th Cir. 1953); Hodges v. United States, 243 F.2d 281 (5th Cir. 1957); Brock v. United States, 256 F.2d 55 (5th Cir. 1958); Fullbright v. United States, 392 F.2d 432 (10th Cir. 1968); and (2) the use to which the area was put, i.e., whether it was "an adjunct to the domestic economy of the family." See Care v. United States, *supra*, at 25. Examples of such cases include Walker v. United States, 225 F.2d 447, 449 (5th Cir. 1955), involving a barn which was "an integral part of that group of structures making up the farm home;" United States v. Dunn, 674 F.2d 1093 (5th Cir. 1982), appeal after remand, 706 F.2d 153, reh'g denied, 712 F.2d 1416 (1982); Taylor v. United States, 286 U.S. 1 (1932), involving a metal garage adjacent to the house; Roberson v. United States, 165 F.2d 752 (6th Cir. 1948), involving a smokehouse which was in a liveable condition and being used as a residence; Walker v. United States, 125 F.2d 395, 396 (5th Cir. 1942), involving a distillery in an enclosure; and United States v. Capps, 435 F.2d 637, 640, n.5 (9th Cir. 1970), involving an area between a house and a nearby cottage.

Conversely, where an area is sufficiently close to the dwelling, but nevertheless intended to be used by, or at least exposed to the public, it has been held that the Fourth Amendment was not violated. Such places included driveways, see, e.g., United States v. Ventling, 678 F.2d 63 (8th Cir. 1982); United States v. Humphries, 636 F.2d 1172 (9th Cir. 1980), cert. denied, 451 U.S. 988 (1981); porches exposed to the public or housing an entranceway, and walkways. See LaFave, *supra*, §2.3 at 323.

9-4.140 Search and Seizure of Automobiles, Boats and Airplanes

9-4.141 Automobiles

The concept of the investigatory stop based upon reasonable suspicion extends to investigatory stops of motor vehicles as well as to persons. Applying the principles of Terry v. Ohio, 392 U.S. 1 (1968) to stops of motor vehicles, the Supreme Court in United States v. Cortez, 449 U.S. 411 (1981), held that the controlling test is whether "[b]ased upon th[e] whole picture the detaining officers [had] a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Id.* at 417-418. The Cortez Court emphasized that, in reviewing the propriety of the stop, the courts should address the issue from the perspective of whether the police, as experienced police officers, "could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." *Id.* at 421-422. The subject of automobile searches and seizures is covered generally in LaFave, §7.1 *et seq.*

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.142 Regulatory Stops

The Fourth Amendment requirement of reasonableness is also flexible enough to allow government authorities some latitude in stopping vehicles for purely regulatory purposes related to the objective of promoting public safety. For example, in Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977), the Supreme Court held that it was proper for the police to stop a motorist for further investigation after observing that his/her automobile had expired license plates. The Court also held that, following the investigatory stop, the police may properly direct the driver to get out of the vehicle in order to protect their safety, and, where further observation engenders reasonable suspicion to believe that he/she is armed, to conduct a pat-down search of his/her person. Id. at 110-111.

Where, however, the police have no reason to believe that the operator of a vehicle has violated state laws governing licensing, operation, or inspection, their ability to stop the vehicle is more limited. In Delaware v. Prouse, 440 U.S. 648 (1979), the Court held that, except in cases where there is "at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his/her driver's license and the registration of the automobile are unreasonable under the Fourth Amendment." Id. at 663. However, advertent to the practice of establishing border checkpoints for the purpose of detecting illegal aliens (see United States v. Martinez-Fuerte, 428 U.S. 543 (1976)), it held that it was perfectly permissible to conduct regulatory spot checks by requiring all on-coming traffic to stop to enable the police to examine documents or the vehicles' road worthiness. Such techniques, the Court reasoned, do not involve the "unrestrained exercise of discretion" by the police.

Cases governing the permissibility of conducting stops of motor vehicles at or near an international border to regulate entry into the United States follow a similar analytical framework. As indicated above, in United States v. Martinez-Fuerte, supra, the Court held that it was permissible for the Border Patrol to stop all vehicles passing a border checkpoint for the purpose of detecting illegal entry even when the checkpoints were located 25 or more miles from the international border and there was no individualized suspicion of wrongdoing. Id. at 558-559. It also afforded the Border Patrol "wide discretion" in determining when to divert to secondary inspection even for the purpose of responding to questions concerning immigration status. Id. at 560, 563.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

By contrast, in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), the court held that except at the border or its functional equivalents--such as inland checkpoints--Border Patrol Officers on roving patrol may stop a motor vehicle for investigation only "when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country \* \* \*." Id. at 881. See also Almeida-Sanchez v. United States, 413 U.S. 266 (1973), where the Court held that the Fourth Amendment prohibits the use of roving patrols to search vehicles without a warrant or probable cause at points removed from the border or its functional equivalents. Border searches generally are discussed at USAM 9-4.170, infra.

9-4.143 Warrantless Searches and Seizures of Vehicles Based on Probable Cause

As a general rule, the Fourth Amendment does not require procurement of a search warrant as a predicate to stopping and searching an automobile where the police have probable cause to believe that it is carrying contraband or evidence of crime. Nevertheless, while neither a warrant nor exigent circumstances may be required, a warrant may, of course, provide a safer course, time permitting. As explained in United States v. Ross, 456 U.S. 798, 808 (1982), it is sufficient that the officers have probable cause, based on "objective facts that could justify the issuance of a warrant by a magistrate" that the vehicle contains contraband. The so-called automobile exception to the warrant requirement rests on two bases. First, the impracticability of obtaining a warrant because of the ready mobility of vehicles provides a basis for permitting warrantless searches of vehicles stopped along the highway. As the Supreme Court explained in Chambers v. Maroney, 399 U.S. 42, 51 (1970), "the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence, an immediate search is constitutionally permissible." See United States v. Ross, supra, at 805; Arkansas v. Sanders 442 U.S. 753, 761 (1979); United States v. Chadwick, 433 U.S. 1, 12 (1977). The Court emphasized this rationale in Coolidge v. New Hampshire, 403 U.S. 443, 460 (1971), in holding that the warrantless search of an automobile in the owner's driveway following his removal from the premises was not permissible under the Fourth Amendment. It reasoned that "the opportunity for a search was \* \* \* hardly 'fleeting'" as there was "no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

this be made into a case where 'it is not practicable to secure a warrant'". Id. at 462.

More recently, however, the Supreme Court has identified a second justification for an automobile exception, namely the owner's diminished expectation of privacy in a motor vehicle even "in cases in which the possibilities of the vehicles being removed or evidence in it destroyed were remote, if non-existing." See United States v. Chadwick, supra, at 12, quoting Cady v. Dombrowski, 413 U.S. 433, 441-442 (1973). As the Court explained in Chadwick, supra, quoting Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion):

One has a lesser expectation of privacy in an motor vehicle because its function is transportation and it seldom serves as one's residence or as a repository for personal effects \* \* \*. It travels public thoroughfares where both its occupants and its contents are in plain view.

See also Arkansas v. Sanders, 442 U.S. at 761; Rakas v. Illinois, 439 U.S. 128, 155 (1978).

As a result, owner's privacy interests in the vehicles' interior are thought to be adequately protected by the requirement that any search be supported by probable cause or other reasonable justification, and by allowing the determination as to reasonableness to be made in the first instance--subject to later judicial review--by the searching officers. See, e.g., Cady v. Dombrowski, supra, at 448.

While the diminished expectation of privacy rationale articulated in these cases would suggest that the Court's holding in Coolidge v. New Hampshire, supra, lacks continuing vitality, the court has never expressly so held. Cf. Delaware v. Prouse, supra, at 662-663 (individual does not lose all expectation of privacy simply because an automobile is subject to government regulation). In the absence of an authoritative repudiation of the result in Coolidge, the most prudent course is therefore to procure a search warrant in any case where the circumstances suggest that the vehicle is unlikely to be removed.

It should be noted that, in any event, the impoundment of the car or vehicle does not define the scope of the officers' authority to conduct a warrantless search. Thus in Chambers, supra, the Court held that, where exigent circumstances permit an immediate search of a vehicle, a warrantless search may also be conducted even after the vehicle has been immobilized or impounded. It reasoned that, "[f]or constitutional

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." Id. at 52; see United States v. Ross, supra, at 807 n.9; Texas v. White, 423 U.S. 67, 68 (1975).

9-4.144 The Permissible Scope of an Automobile Search Based Upon  
Probable Cause or Following Arrest or Detention of Its  
Occupants (Inventory)

In United States v. Ross, supra, the Court addressed the question whether, in conducting a warrantless vehicle search on the basis of probable cause, the police could open containers found in the vehicle. It held that the scope of a warrantless vehicle search based on probable cause is no narrower and no broader than the scope of a search authorized by a warrant and supported by probable cause. Id. at 823. It is therefore "defined by the object of the search and the places in which there is probable cause to believe that it may be found." Id. at 824. Although the Ross Court concluded that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search" (Id. at 825), it was careful to emphasize that where the probable cause is focused upon a particular container placed in the vehicle itself, a search of the entire vehicle is not justified. Id. at 824. In such cases, the proper course is to secure the container and procure a warrant to search it. See Arkansas v. Sanders, 442 U.S. 753, 762, 766 (1979); United States v. Chadwick, 433 U.S. 1, 13 (1977).

Where the owners or occupants of the car have been arrested, it may be necessary to impound the vehicle. This will allow law enforcement officials to inventory the contents of the car without obtaining a warrant, even if probable cause does not exist. See South Dakota v. Opperman, 428 U.S. 364 (1976). The justification for such a rule is that the inventory protects both the owner's property as well as the police against claims of lost or stolen property. Id. at 369. The authority to conduct a valid inventory does not depend upon the time when it is conducted, but rather, can be conducted any time after the vehicle is impounded. See Cooper v. California, 386 U.S. 58, 61 (1967). The inventory cannot, however, be a mere pretext for an investigatory search. See United States v. Bush, 647 F.2d 357, 370 (3d Cir. 1981).

A. Vehicle Searches Incident to the Arrest of Its Occupant

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In New York v. Belton, 453 U.S. 454 (1981), the Court articulated a "bright line" rule governing the permissible scope of a search incident to the arrest of its occupants. Viewing the passenger compartments as "the areas into which an arrestee might reach in order to grab a weapon or evidentiary item," it held that when a policeman/policewoman has arrested the occupant of an automobile, he/she may, as a contemporaneous incident of the arrest, search the entire passenger compartment of the vehicle. It also emphasized that such a search may properly include "any container found within the passenger compartment" including "closed or open glove compartment, consoles or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing and the like." The Court made it equally clear, however, that its holding "encompass[ed] only the interior of the passenger compartment and [did] not encompass the trunk." Id., n. 4.

B. Vehicle Searches Incident to the Investigatory Stop of a Suspicious Vehicle

In Michigan v. Long, 463 U.S. 1032 (1983), the Supreme Court extended the principles of Terry v. Ohio, supra, to permit "frisks" of motor vehicles. The Long court held that, where the police suspect that an occupant of a stopped vehicle poses a danger to them, it is permissible for them to conduct a search of the passenger compartment of the vehicle "limited to those areas in which a weapon may be placed or hidden." Reiterating the requirements of Terry, it explained that such frisks of vehicles are only permissible where the police "possess[es] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.'" Michigan v. Long, supra, at 3480, citing Terry v. Ohio, supra, at 21. The Court also explained that if, in the course of such a properly limited search, the police discover contraband other than weapons it may properly be seized for evidentiary purposes.

9-4.145 Airplane Searches

A warrantless search of an airplane may be conducted, pursuant to the automobile exception of the warrant requirement, but the search must be based on probable cause. See United States v. Rollins, 699 F.2d 530 (11th Cir. 1983), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 335 (1983). Officials can search the plane immediately, due to the inherent mobility of the plane, or they can secure it until a warrant is obtained. See United States v. Nigro, 727 F.2d 100 (6th Cir. 1984).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The installation of an electronic tracking device (beeper) in an airplane with the owner's permission, and the monitoring of its signal from the plane are not searches within the meaning of the Fourth Amendment. See United States v. Miroyan, 577 F.2d 489 (9th Cir. 1978), cert. denied, 439 U.S. 896 (1978). Nor does the monitoring become illegal under the amendment if the terms of a warrant authorizing its installation required it to be removed before its signal was heard and recorded. Without the owner's permission, the installation of the device in the airplane cabin requires a warrant based on probable cause. See United States v. Butts, 729 F.2d 1514 (5th Cir. 1984) (en banc). With respect to beepers and pen registers generally, see USAM 9-4.151, infra.

9-4.146 Searches of Vessels Within and Without the Border

Both the Coast Guard and Customs Service board, inspect and search vessels. The boardings, inspections and searches may occur in territorial waters, customs waters, the contiguous zone, the high seas, or international waters. Territorial waters are defined as extending three miles from the coast; customs waters are defined as extending four leagues, approximately twelve nautical miles from the coastline; the contiguous zone is defined as extending nine miles from the three mile boundary, in other words, twelve miles from the coastline; the high seas are defined as extending seaward from the territorial waters encompassing the area known as the contiguous zone; and international waters are defined as that area beyond the contiguous zone in which these waters are freely accessible to all nations and are not subject to the sovereignty of any nation. See United States v. Hidalgo-Gato, 703 F.2d 1267, 1269-1271 nn. 4, 6 (11th Cir. 1983). For a discussion of border searches generally, see USAM 9-4.170, infra.

Under 14 U.S.C. §89(a) the Coast Guard has statutory authority to conduct searches and seizures "upon the high seas and waters over which the United States has jurisdiction," which can include customs waters. Under 19 U.S.C. §1581(a) both the Coast Guard and the Customs Service are empowered to board vessels and conduct customs searches but only in customs waters--within the twelve-mile limit. See United States v. Williams, 617 F.2d 1063, 1074-1077 (5th Cir. 1980) (en banc); Maul v. United States, 274 U.S. 501 (1972).

The Coast Guard may board any vessel subject to the jurisdiction of the United States to make a document and inspection search. See United States v. Thompson, 710 F.2d 1500, 1505 (11th Cir. 1983). This express statutory authority, as interpreted, allows the boardings and searches to include examinations for obvious customs and drug violations. See United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States v. Espinosa-Cerpa, 630 F.2d 328 (5th Cir. 1980). No suspicion need accompany any such boarding. And, the location of such may be not only the high seas, but also internal waters providing ready access to the open sea. See United States v. Villamonte-Marques, 462 U.S. 979 (1983).

Boardings by the Coast Guard can take place hundreds of miles from shore. All that is necessary is that the vessel boarded be subject to the jurisdiction of the United States. See United States v. Thompson, *supra*, at 1504. That includes any vessel of American registry. See United States v. Luis-Gonzalez, 719 F.2d 1539 (11th Cir. 1983); United States v. Freeman, 660 F.2d 1030 (5th Cir. 1981). It also covers stateless vessels; i.e., vessels that are unregistered or that claim registration in more than one nation. See United States v. Pinto-Mejia, 720 F.2d 248 (2d Cir. 1983); United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982); United States v. Dominguez, 604 F.2d 304 (4th Cir. 1979).

Customs officers are empowered to conduct limited "investigative stops" of vessels in customs waters if the officers are aware of "articulable facts which justify a reasonable suspicion of illegal activity" aboard those vessels. See United States v. Albano, 722 F.2d 690, 692, n.2 (11th Cir. 1984) (cases collected). This includes the waters in the contiguous zone. See United States v. Hidalgo-Gato, *supra*. Whether boardings on the high seas are permissible by customs officers is an issue pending on appeal. See United States v. Sarmiento, appeal pending, Crim. No. 84-25-CR-EBD (S.D. Fla. 1984).

Although the Coast Guard has no regular authority to search foreign vessels not within the customs waters of the United States or within a designated "customs enforcement area," see 19 U.S.C. §1701, the Coast Guard (and other government agents) may search or seize a foreign vessel "upon the high seas" if "enabled or permitted under special arrangement with [the] foreign government." See 19 U.S.C. §1581(h). See United States v. Marsh, No. 82-1888 (1st Cir. 1984). See generally United States v. Hensel, 699 F.2d 18, 26-30 (1st Cir. 1983) (discussing the validity of searches of foreign ships in international waters under 14 U.S.C. §89(a) and international law).

Other foreign vessels may be approached for the purpose of confirming their registry. If a vessel so approached does not provide a satisfactory response, it may be boarded if there is reason to believe that the vessel is American. See United States v. Postal, 589 F.2d 862 (5th Cir. 1979); United States v. Cortes, 588 F.2d 106 (5th Cir. 1979). Foreign vessels also may be boarded with the consent of the nation of registry or with reasonable suspicion that the vessel is involved in a violation of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

American criminal laws. See United States v. Williams, 617 F.2d 1063 (5th Cir. 1980) (en banc).

The only limitation imposed by case law upon the Coast Guard's plenary authority to board American registered vessels is found in United States v. Piner, 608 F.2d 358 (9th Cir. 1979), where the court deplored the warrantless random stopping and boarding of a vessel in the nighttime. The decision relies heavily upon case law applicable to random stops of automobiles. No other circuit has endorsed Piner; one court has implicitly rejected its holding. See United States v. Marino-Garcia, 679 F.2d 1373, 1384-1385 (11th Cir. 1982), and the Ninth Circuit has in later cases limited Piner to its unique factual context. See United States v. Eagon, 707 F.2d 362 (9th Cir. 1982); United States v. Watson, 678 F.2d 765 (9th Cir. 1982).

Once having boarded a vessel, the officers may conduct a search, the scope of which must be consistent with the purpose for the boarding. Where, for example, boarding is for a document and safety inspection, entry into a locked cabin may be permissible, at least where it is the only cabin on board and likely to house documents. See United States v. Thompson, *supra* at 1506-07. But see United States v. Kents, 691 F.2d 1376, 1383-1384 (11th Cir. 1982). If an inspection to examine documents results in the observation of evidence giving the officers probable cause to believe that the vessel contains illegal contraband, the search may be expanded. See United States v. Bain, No. 82-6008 (11th Cir. 1984).

When such searches are challenged, a critical question is whether the claimant had standing to object to the search. After all, in most instances, the contraband forming the subject matter of the prosecution has been discovered in an area in which no expectation of privacy exists, such as the ship's hold. See United States v. Bent, 707 F.2d 1190 (11th Cir. 1983); United States v. Freeman, 660 F.2d 1030 (5th Cir. 1981). Yet, all too frequently prosecutors have failed to demand that the claimant meet his/her threshold burden of showing standing to challenge the search. E.g., United States v. Hernandez, 668 F.2d 824 (5th Cir. 1982); United States v. d'Antignac, 628 F.2d 428, 432 n. 5 (5th Cir. 1980).

9-4.150 Limited Intrusions; Abandonment; Consent Searches

9-4.151 Limited Intrusions: Beepers and Pen Registers

A. Beepers

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The use of an electronic tracking device, commonly called a beeper, as a law enforcement surveillance technique involves Fourth Amendment issues, both in its installation and monitoring.

Courts have approved warrantless installation of beepers in varying circumstances. No Fourth Amendment rights have been found to be infringed by the warrantless attachment of a beeper on property by an invitee (United States v. Arredondo-Morales, 624 F.2d 681, 684-685 (5th Cir. 1980); United States v. Conroy, 589 F.2d 1258, 1264 (5th Cir.), cert. denied, 444 U.S. 831 (1979), or by the installation of a beeper on the exterior of a car or airplane parked in a location accessible to the public (United States v. Michael, 645 F.2d 252, 258 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981); United States v. Shovea, 580 F.2d 1382, 1388 (10th Cir. 1978), cert. denied, 440 U.S. 908 (1979); United States v. Moore, 562 F.2d 106, 111-112 (1st Cir. 1977), cert. denied, sub nom; Bubisink v. United States, 435 U.S. 926 (1978). See United States v. Knotts, 460 U.S. 276 (1983) (collecting cases in a footnote). Recently, in United States v. Karo, U.S. \_\_\_\_\_, 104 S. Ct. 3296 (1984), the Court held that the Fourth Amendment is not implicated where officers installed a beeper in a container with the consent of its owner and then transferred the beeper-laden container to an unsuspecting third party.

The monitoring of a beeper is, of course, less intrusive than a full-scale search. A beeper may be monitored without a warrant after it has been placed inside a container of chemicals as long as it does not reveal any information that could not have been obtained through visual surveillance. See United States v. Knotts, supra. But the warrantless monitoring of a beeper that has been taken into a private residence--"a location not open to visual surveillance"--violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence. See United States v. Karo, supra. Finally in United States v. Butts, 729 F.2d 1514 (5th Cir. 1984), the court ruled that the monitoring of a beeper in public airspace did not violate the Fourth Amendment even though the terms of the warrant which authorized its installation required it to be removed before its signal was heard and recorded. As to airplane searches generally, see USAM 9-4.145, supra.

In light of Karo, if agents have probable cause, it would be advisable for them to obtain a warrant whenever they seek to use a beeper (absent exigent circumstances) because of the possibility that monitoring may occur when the beeper is inside private premises. The warrant application need not identify the premises into which the beeper might be taken--we may not have any way of knowing that in advance--but the application should "describe the object into which the beeper is placed, the circumstances that led agents to wish to install the beeper, and the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

length of time for which beeper surveillance is requested." The issue, whether a showing of reasonable suspicion or probable cause is necessary for the minimal intrusion involved in the monitoring of a beeper in a home, was left open in Karo.

B. Pen Registers.

"A pen register is a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released. It does not overhear oral communications and does not indicate whether calls are actually completed." See United States v. New York Telephone Co., 434 U.S. 159, 161 n.1 (1977). The provisions of the federal wiretap statute, 18 U.S.C. §2510 et seq., do not apply to the use of pen registers. Id. Likewise, the installation and use of a pen register is not a search within the meaning of the Fourth Amendment and therefore does not require a warrant. See Smith v. Maryland, 442 U.S. 735 (1979).

9-4.152 Abandonment

In determining whether property is abandoned, "[t]he fundamental question is whether the relinquishment occurred under circumstances which indicate [the owner] retained no justified expectation of privacy in the object." 1 LaFave, §2.6.

Law enforcement officials do not need a warrant to search or seize abandoned articles. See Abel v. United States, 362 U.S. 217, 241 (1960); United States v. Colbert, 474 F.2d 174 (5th Cir. 1973) (en banc). Courts have also held that a previous 'owner' no longer has a reasonable expectation of privacy in an object which he/she has disclaimed. See United States v. Tolbert, 692 F.2d 1041 (6th Cir. 1982), cert. denied, \_\_\_ U.S. \_\_\_, 104 S. Ct. 337 (1983). There is no constitutional violation as long as the disclaimer was not precipitated by officials' improper conduct. Id. at 1048. For a discussion of whether or not garbage is abandoned property, see 1 LaFave, §2.6(c).

9-4.153 Consent Searches

See USAM 9-4.154, 9-4.155, 9-4.156, 9-4.157, infra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.154 The Effect of a Person's Consent to a Search

A. In General

A search conducted pursuant to valid consent constitutes a well recognized exception to both the warrant and the probable cause requirements of the Fourth Amendment. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Katz v. United States, 389 U.S. 347, 358 (1967); Zap v. United States, 328 U.S. 624, 630 (1946). The requirements for invoking this exception are exhaustively catalogued in 2 W. LaFare., Search and Seizure, §§8.1-8.6 (1978). In light of Leon, it may be prudent to obtain a warrant and avoid having to determine whether consent was voluntary.

Briefly stated, evidence seized during a consensual search is admissible once the prosecutor proves that the consent was freely and voluntarily given. See Bumper v. North Carolina, 391 U.S. 543, 548 (1968). As the Court recognized in Schneckloth v. Bustamonte, supra, the question "whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Id. at 227. Factors relevant to this determination include the claim of authority to search; the lawfulness of the defendant's custody; the consenting party's knowledge of the right to refuse; the existence of any promises, threats, deception or trickery; and the capacity of the consenting party. No one factor is per se determinative as to the voluntariness of consent. See United States v. Hearn, 496 F.2d 236 (6th Cir.), cert. denied, 419 U.S. 1048 (1974). Under this totality of circumstances approach, courts generally find a lack of consent only where there has been a finding that explicit or implicit coercion was brought to bear on the consenting party. See Schneckloth v. Bustamonte, supra, at 228.

Effective consent to a search can only be given by the accused or by a third party with right to equal access to the property. See United States v. Matlock, 415 U.S. 164 (1974). Moreover, the scope of a consent search may not exceed the limitation or purposes agreed to by the person giving consent. See Gouled v. United States, 255 U.S. 298, 306 (1921); United States v. Weber, 668 F.2d 552, 559-560 (1st Cir. 1981), cert. denied, 457 U.S. 1105 (1982).

B. Determining Whether Consent is Voluntary

1. Knowledge of the Right to Refuse Consent

Knowledge of the right to withhold consent is not a prerequisite to voluntary consent. Schneckloth v. Bustamonte, supra, at 234. Nevertheless, the fact that a consenting party was advised of his/her right to refuse a consent search is highly relevant in evaluating

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

whether the consent was freely and voluntarily given. See United States v. Mendenhall, 446 U.S. 544, 558-559 (1980) (defendant twice told that she had the right to refuse to consent to a strip search); United States v. Berry, 670 F.2d 583, 605 (5th Cir. 1982) (en banc) (consent voluntary when suspects informed of right to refuse, offered telephone to use to consult an attorney, and allowed to consult with each other); United States v. Vasquez, 612 F.2d 1338 (2d Cir. 1979), cert. denied, 447 U.S. 907 (1980) (fact that suspect was twice advised of right to refuse consent is significant in evaluating voluntariness of consent).

Thus, when a law enforcement officer seeks consent to search, he/she need not warn the consenting party of his/her right to refuse. See Schneckloth v. Bustamonte, supra. This is true regardless of whether the party is in custody. United States v. Garcia, 496 F.2d 670 (5th Cir. 1974), reh'g denied, 420 U.S. 1009 (1975). In fact, in a custodial situation, Miranda warnings need not be given prior to seeking consent to search. See United States v. Lemon, 550 F.2d 467 (9th Cir. 1977) (consent not testimonial or communicative within the Fifth Amendment sense); United States v. Garcia, supra; United States v. Heimforth, 493 F.2d 970 (9th Cir.), cert. denied, 416 U.S. 908 (1974). See also Washington v. Chrisman, 455 U.S. 1, 6 n.3 (1982); 2 LaFave, Search and Seizure, §8.2(j). There is similarly no requirement that officers seeking consent advise a party not yet in custody that he/she is the focus of their investigation (United States v. Turpin, 707 F.2d 332, 334-335 (8th Cir. 1983) or that evidence obtained may lead to criminal prosecution (United States v. Wuagneux, 683 F.2d 1343, 1347 (11th Cir. 1982), cert. denied, \_\_\_ U.S. \_\_\_, 104 S. Ct. 69 (1983)).

## 2. Custody

Although Schneckloth, supra, involved consent in a non-custodial situation, courts have applied the totality of the surrounding circumstances test to custodial consent as well. In United States v. Watson, 423 U.S. 411, 424-425 (1976), the Court specifically concluded that custody alone was insufficient to indicate that consent was coerced. Thus, custody is merely another factor to be considered in evaluating the circumstances bearing on the voluntariness of a consent. Id. See also United States v. Wasserteil, 641 F.2d 704 (9th Cir. 1981). However, a strict scrutiny standard will be applied to such a consent. See United States v. Wiener, 534 F.2d 15 (2d Cir.), cert. denied, 429 U.S. 820 (1976); Hayes v. Cady, 500 F.2d 1212 (7th Cir.), cert. denied, 419 U.S. 1058 (1974). Where a defendant was taken into custody unlawfully, the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prosecution bears an even heavier burden of showing that a subsequent consent was voluntarily given. See United States v. Sanchez-Jaramillo, 637 F.2d 1094, 1099 (7th Cir. 1978), cert. denied, 449 U.S. 862 (1980); United States v. Jones, 475 F.2d 723 (5th Cir. 1973), cert. denied, 414 U.S. 841 (1973); Bretti v. Wainwright, 439 F.2d 1042 (5th Cir. 1971), cert. denied, 404 U.S. 943 (1971).

3. Claim of Authority to Search

An officer's claim of authority to search also bears heavily on voluntariness. Consent to search will be held invalid when an officer who has no grounds to obtain a warrant, threatens to hold a person or his/her property until he/she agrees to the search. See United States v. Jefferson, 650 F.2d 854, 858 (6th Cir. 1981) (consent invalid where prompted by threat of illegal detention). Likewise, if a law enforcement officer represents that he/she possesses a search warrant when in fact he/she does not, or if he/she possesses a warrant which is in fact invalid, a subsequent consent to search will be involuntary. See Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Thompson, 612 F.2d 233, 234 (6th Cir. 1979); Holloway v. Wolff, 482 F.2d 110 (8th Cir. 1973). But a mere threat by police to obtain a warrant if consent is withheld is not sufficient to constitute coercion because the police are only informing the defendant of a course of action they are entitled to take. See United States v. Calvente, 722 F.2d 1019, 1023 (2d Cir. 1983); United States v. Dennis, 625 F.2d 782, 793 (8th Cir. 1980); United States v. Tortorello, 533 F.2d 809 (2d Cir.), cert. denied, 429 U.S. 894 (1976); United States v. Faruolo, 506 F.2d 490 (2d Cir. 1974); United States v. Hall, 565 F.2d 917 (5th Cir. 1978); United States v. Gavic, 520 F.2d 1346 (8th Cir. 1975). See generally, 2 LaFave, Search and Seizure, §8.2(c).

Consent also will be deemed voluntary where the consenting party is unaware of the fact that the officer possesses a valid search warrant. See Comeaux v. Henderson, 462 F.2d 1345, 1346 (5th Cir. 1972); Hoover v. Beto, 467 F.2d 516 (5th Cir.), cert. denied, 409 U.S. 1086 (1972). However, passive conduct in a confrontation with police who desire to search the premises does not constitute consent. See Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921); United States v. Lindsay, 506 F.2d 166 (D.C. Cir. 1974). Such conduct is merely submitting to the apparent authority of the officer, rather than manifesting consent.

4. Promise of Leniency

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A consent is not rendered involuntary by reason of its being given in exchange for promise of immunity from prosecution, United States v. Dowdy, 479 F.2d 213 (4th Cir. 1973), cert. denied, 414 U.S. 823 (1973); a suspended sentence, United States v. Silva, 449 F.2d 145 (1st Cir. 1971), cert. denied, 405 U.S. 918 (1972); a lighter sentence, United States v. Lippman, 492 F.2d 314 (6th Cir. 1974), cert. denied 419 U.S. 1107 (1975); or leniency for the defendant's wife. See United States v. Culp, 472 F.2d 459 (8th Cir. 1973), cert. denied, 411 U.S. 970 (1973). Of course, promises must be made in good faith and must not be implied threats. See United States v. Bolin, 514 F.2d 554 (7th Cir. 1975).

5. Capacity

The age, education, intelligence, physical and psychological condition of the consenting party must be considered in determining voluntariness. See, e.g., United States v. Mendenhall, 446 U.S. 544, 558 (1980) (age, sex, race, and level of education relevant to determination of consent: 22 year-old with eleventh grade education plainly capable of knowing consent); United States v. Janik, 723 F.2d 537, 548 (7th Cir. 1983) (valid consent by deputy sheriff who knew rights and was unlikely to be intimidated by number of officers present or by handcuffing); United States v. Green, 678 F.2d 81, 84 (8th Cir.), cert. denied, 459 U.S. 1016 (1982) (consent voluntary despite claim that consenting party was under the influence of drugs); United States v. Wellins, 654 F.2d 550, 555 (9th Cir. 1981) (age, experience, intelligence, and emotional state relevant to determination of consent); United States v. Elrod, 441 F.2d 353 (5th Cir. 1971) (mentally incompetent person); United States v. Wallace, 160 F. Supp. 859 (D.D.C. 1958) (inarticulate person).

6. Prior Illegal Police Conduct: Fruit of the Poisonous Tree

Any illegal search or arrest of an individual may trigger the exclusionary rule. A consent following an illegal arrest or search may be automatically suppressed under the "fruit of the poisonous tree" doctrine, unless the government can show that sufficient cause has occurred to free the consent from any taint. See Nardone v. United States, 308 U.S. 338 (1939). Factors relevant to the determination of whether there has been sufficient attenuation include the length of time between arrest and consent and the opportunity of the defendant to consult with third parties. See Brown v. Illinois, 422 U.S. 590 (1975); see also Florida v. Royer, 460 U.S. 49 (1983) (consent tainted by unlawful detention); United States v. Wellins, 654 F.2d 550, 555 (9th Cir. 1981) (significant

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

intervening events; taint was sufficiently attenuated when defendant talked with lawyer, was twice read his rights, talked with friend on telephone, cooperated and appeared relaxed during consent search); but see United States v. Willis, 473 F.2d 450 (6th Cir. 1973), cert. denied, 412 U.S. 908 (1973) (prior unlawful search which led officers to seek consent search did not render evidence derived from subsequent consensual search inadmissible).

C. Balancing the Factors

The factors enumerated above are not inclusive. Every factor which bears upon the voluntariness of the consent must be considered. Courts generally balance those factors which suggest that consent was coerced, against those that suggest it was voluntary. See United States v. Race, 529 F.2d 12 (1st Cir. 1976); United States v. Hearn, 496 F.2d 236 (6th Cir. 1974), cert. denied, 419 U.S. 1048 (1974); United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973).

D. Burden of Proof

When relying upon a consent theory to justify the lawfulness of a search, the government has the burden of proving that the consent was given freely and voluntarily. See United States v. Mendenhall, supra, at 544, 547; United States v. Matlock, 415 U.S. 164, 177 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968). The Supreme Court has held in Bumper v. North Carolina, supra, at 548, and United States v. Matlock, supra, at 177, that the government need only prove the consent voluntary by a preponderance of the evidence. Accord United States v. Ramey, 711 F.2d 104, 107 (8th Cir. 1983); United States v. Buettner-Janusch, 464 F.2d 759, 764 (2d Cir. 1981), cert. denied, 454 U.S. 830 (1981); United States v. Selberg, 630 F.2d 1292, 1294 n.1 (8th Cir. 1980); United States v. Miley, 513 F.2d 1191 (2d Cir. 1975), cert. denied, 423 U.S. 842 (1975); United States v. Boston, 508 F.2d 1171 (2d Cir. 1974), cert. denied, 421 U.S. 1001 (1975). Nonetheless, a number of circuit courts use a higher standard of proof such as "clear and positive proof" or "clear and convincing evidence." See United States v. Parker, 722 F.2d 179 (5th Cir. 1983); United States v. Hearn 496 F.2d 236 (6th Cir. 1974), cert. denied, 419 U.S. 1048 (1974); United States v. Jones, 475 F.2d 723 (5th Cir.), cert. denied, 414 U.S. 841 (1973); United States v. Page, 302 F.2d 81 (9th Cir. 1962). The refusal of a consenting party to sign a written consent form does not preclude the government from establishing that an oral consent was voluntarily given. See United States v. Gomez-Diaz, 712 F.2d 949, 951 (5th Cir. 1983).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.155 Third Party Consent

In Frazier v. Cupp, 394 U.S. 731 (1969), the Supreme Court held that either user of jointly held property can consent to a search of that property, since they both assume the risk that the other will grant such consent. This justification for third party consent, which stems from the "expectation of privacy" reasoning of Katz v. United States, supra, has been adopted by many courts. More recently, however, the Supreme Court in United States v. Matlock, supra, favored an objective "common authority" test for third party consent, over the subjective "expectation of privacy" standard. See United States v. Gradowski, 502 F.2d 563 (2d Cir. 1974); United States v. Heisman, 503 F.2d 1284 (8th Cir. 1974). Consent may be obtained from a third party who possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected." Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965); see, e.g., Riley v. Gray, 674 F.2d 522, 528 (6th Cir. 1982) (search unreasonable when person who consented has no right to access, use, or control of apartment); United States v. Sellers, 667 F.2d 1123, 1126 (4th Cir. 1981) (consent reasonably given by person who removed and stored neighbor's belongings); United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532, 542-543 (8th Cir. 1981), cert. denied, 455 U.S. 1016 (1982) (search reasonable when business associate who consented had unlimited access); accord United States v. Buettner-Janusch, 646 F.2d 759, 765 (2d Cir. 1981), cert. denied, 454 U.S. 830 (1981).

Under a "common authority" test, a third party need not have a possessory interest in the property. See United States v. Matlock, supra. The authority which justifies a third party's consent rests not upon property law but on the mutual use of property by persons having joint interest over it. Id. Thus, one who satisfies the "common authority" test may consent to a search of premises even against a person who has a legal interest in the property. As Matlock makes clear, law enforcement officers are not required to seek out consent of persons under suspicion when a third party having common authority over the property is available to give consent. See 2 LaFare, §8.3(e), at 710-712. Similarly, under the Matlock rationale, "the prior refusal of an absent occupant to give consent would not present a bar to the police seeking consent from a co-occupant." Id., §8.3(d), at 704. Nor does an absent occupant's instruction that consent not be given invalidate a third party occupant's subsequent consent. Id., §8.3(c), at 702-703. If two people have standing to consent to a search, the consent of one of them may be rescinded through the objection of the others. See United States v. Matlock, supra, at 171. Thus, when two occupants are present and take contrary positions as to whether consent should be given, the position of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the person with the superior interest takes precedence (i.e., a parent over a child, a homeowner over a house guest); however, if both parties have an equal interest in a place in which both are present, the better view is that the consent of both is required. Id., §8.3(d), at 707-709. However, even if both parties share an equal interest, greater recognition should be accorded the interest of the third party when the defendant has victimized the third party. Id., §8.3(d), at 709. See United States v. Hendrix, 595 F.2d 883, 886 (D.C. Cir. 1979) (wife beaten and threatened by gun-wielding husband may validly consent to a search of residence for gun despite husband's objection).

A. Husband-Wife

A suspect's spouse can consent to the search of a residence shared with the other spouse where they both have an equal right to its possession and occupancy. See United States v. Walker, 638 F.2d 1147, 1149 (8th Cir. 1981) (suspect's wife may consent to search of family home); United States v. Hendrix, 595 F.2d 883 (D.C. Cir. 1979) (wife could give consent to search of marital premises despite husband's refusal. Animosity between the spouses at the time of consent will not render such consent invalid, since the authority to consent is not based upon principles of agency or the waiver of another person's Fourth Amendment rights. See McCravy v. Moore, 476 F.2d 281 (6th Cir. 1973); United States v. Robinson, 479 F.2d 300 (7th Cir. 1973)). However, where the two are estranged, the courts must look closely to whether the consenting spouse still retains "common authority" over the premises. See United States v. Long, 524 F.2d 660 (9th Cir. 1975). But see United States v. Crouthers, 669 F.2d 635, 643 (10th Cir. 1982) (consent by wife who had moved out of house valid when wife had not yet abandoned marriage and retained key to house).

The "common authority" test is applicable to consent searches of personal property as well. See United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981) (per curiam) (consent valid when given by suspect's wife who has joint control over automobile).

B. Paramours

A man and woman who hold themselves out to be husband and wife, although unmarried in fact, have the same authority to consent to a search of common property as would have existed if they were in fact married. See White v. United States, 444 F.2d 724 (10th Cir. 1971).

C. Parent-Child

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The validity of parent-child consensual searches is discussed in 2 LaFave, §8.4(b) & (c). Under the Matlock "common authority" formulation, parents have clear authority to consent to a search of commonly shared areas of a house. Even with respect to areas within a house designated primarily for a child's use, a parent may generally consent to searches of those areas because of a parent's superior authority over the premises arising from the familial relationship. See United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976) (mother could consent to search of room in her house used by adult son); United States v. Mix, 446 F.2d 615 (5th Cir. 1971); United States v. Stone, 401 F.2d 32 (7th Cir. 1968). See also United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978) (although mother could validly consent to search of adult son's room, consent did not extend to son's locked trunk found in room).

Courts have only infrequently addressed the converse situation of a search of premises based on the consent of a child. Professor LaFave has noted "that under the Matlock 'common authority' formula it cannot be said that a child has authority equivalent to that of his parents to permit a full police search of the family home. . . . That is, it cannot be said that the parents have assumed the risk of such an occurrence, for this is contrary to the common understanding of the parent-child relationship." 2 LaFave, §8.4(c), at 736-737. The question of whether a child has effectively consented to a search of premises belonging to a parent must be resolved on an ad hoc basis, with particular emphasis on the age of the child and the scope of the consent given. Id. See also United States v. Miller, 688 F.2d 652, 658 (9th Cir. 1982) (defendant's son had sufficient control over father's shop area to consent to search). The effectiveness of a child's consent to the search of a residence is more likely to be recognized if a parent has committed a crime against the child. 2 LaFave, §8.4(c), Supp. 1984, at 263.

D. Landlord-Tenant

A landlord cannot consent to a search of the tenant's premises because he/she lacks sufficient common authority during the period of tenancy. See United States v. Matlock, supra, at 164, 171 n.7; United States v. Bellina, 665 F.2d 1335, 1336 (4th Cir. 1981); Chapman v. United States, 365 U.S. 610 (1961); United States v. Parizo, 514 F.2d 52 (2d Cir. 1975); United States v. Savage, 564 F.2d 728 (5th Cir. 1977). An exception exists, however, where the tenant has abandoned the premises or property, see United States v. Sellers, 667 F.2d 1123, 1125-1126 (4th Cir. 1981) (consent of landlord valid when departing lessee left all possessions with landlord); United States v. Sledge, 650 F.2d 1075, 1077-1078 (9th Cir. 1981); United States v. Haynie, 637 F.2d 227, 237 (4th

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Cir. 1980), cert. denied, 451 U.S. 972 (1981), or has been evicted. See United States v. Roberts, 465 F.2d 1373 (6th Cir. 1972).

E. Hotel-Guest

A hotel clerk cannot consent to the search of a room which is registered to a guest. See Stoner v. California, 376 U.S. 483 (1964). Authorization for hotel personnel to enter rooms for purposes of cleaning and repair does not authorize entry for unrelated purposes. Id. at 489. Once the term of occupancy expires or the room is vacated, however, hotel management can consent to a search. See United States v. Parizo, 514 F.2d 52 (2d Cir. 1975); see also United States v. Costa, 356 F. Supp. 606 (D.D.C. 1973), aff'd, 479 F.2d 921 (D.C. Cir. 1973) (hotel manager may not consent to search of room occurring several hours after check-out time but before hotel has removed the occupant's belongings).

F. Joint Tenants

Consent may always be given by anyone who has common authority over the place or thing to be searched. See United States v. Matlock, 415 U.S. 164 (1974); Frazier v. Cupp, 394 F.2d 731, 740 (1969). However, a co-tenant may not consent to a search of an area or personal effects over which the suspect retains exclusive control. See United States v. Bussey, 507 F.2d 1096 (9th Cir. 1974); United States v. Heisman, 503 F.2d 1284 (8th Cir. 1974). See generally 2 LaFare, §8.3(f) (noting that although a joint tenant has no authority to consent to search of personal effects that defendant has taken steps to secure from scrutiny of other, validity of third party consent ought not turn "upon subtle distinctions in individual living arrangements").

G. House Guest

A host can generally consent to the search of the premises occupied by a guest because the host has a superior right to the premises and the guest's expectation of privacy is not as great. See United States v. Miroff, 606 F.2d 777, 779 (7th Cir. 1979); United States v. Buckles, 495 F.2d 1377 (8th Cir. 1974). However, a host's authority to consent to a search of the guest's room does not extend to a search of any closed containers or other personal property in which the guest has a reasonable expectation of privacy. See United States v. Isom, 588 F.2d 858, 861 (2d Cir. 1978); United States v. Poole, 307 F. Supp. 1185 (E.D. La 1969) (consent search of guest's suitcase in closet invalid).

H. Partners

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A partner's consent to a search of the business premises is binding upon the other partners since he/she has common authority over the commonly held place. See United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532 (8th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Sferas, 210 F.2d 69 (7th Cir. 1954).

I. Employer-Employee

Employer consent searches are also governed by the common authority test. See generally, 2 LaFave, §8.6(c) & (d). As Professor LaFave points out, the effectiveness of an employer's consent for the search of an employee's work will turn on (1) the extent to which the particular area searched may be said to have been set aside for the personal use of the employee; and (2) the extent to which the search was prompted by a unique or special need of the employer to maintain close scrutiny of employees. Id. at §8.6(d), p. 770. It is clear that an employer or supervisor may consent to a search of those areas which are not set aside for exclusive use by a particular employee. See United States v. Gargiso, 456 F.2d 584 (2d Cir. 1972) (corporate officer can consent to search of wired-off storage area for stolen property). By contrast, an employer cannot consent to a search of the personal belongings of an employee or areas assigned to the employee for his/her exclusive use. See United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951) (invalidating employer's consent to search employee's desk).

An employee can consent to a search of his/her employer's business premises when the premises are placed under his/her immediate control so as to give him/her apparent authority to consent. See United States v. Buettner-Janusch, 646 F.2d 759 (2d Cir. 1981), cert. denied, 454 U.S. 803 (1981) (research assistant properly consented to search of professor's laboratory).

J. Bailor-Bailee

A person with custody of personal property belonging to another may consent to its search if he/she has been given sufficient control over it so that he/she has a right to equal access or use. See Frazier v. Cupp, 394 U.S. 731 (1969); see also United States v. Cepulonis, 530 F.2d 238 (1st Cir.), cert. denied, 426 U.S. 908 (1976). (Authority to release footlocker to anyone who spoke code words was sufficient control to allow third party to consent to search of footlocker); United States v. Neville, 516 F.2d 1302 (8th Cir.), cert. denied, 423 U.S. 925 (1975); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966); but see United States v. Presler, 610 F.2d 1206 (4th Cir. 1979) (when defendant did not give acquaintance the key or combination to locked briefcases but entrusted

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

them to acquaintances solely for safekeeping, no common authority existed giving third party right to consent). Cf. Rawlings v. Kentucky, 448 U.S. 98, 104-106 (1978) (owner of bailed property who lacks a legitimate expectation of privacy in the place stored may not object to search). Where possession of the property may implicate the bailee in a crime, he/she can consent to a search of the bailment. See United States v. Diggs, 544 F.2d 116 (3d Cir. 1976), aff'd, 569 F.2d 1264 (1977). A bailor, who either possesses or is entitled to possess the property, can consent to its search since his/her property right in the item is superior to that of the bailee. See Anderson v. United States, 399 F.2d 753 (10th Cir. 1968).

K. Personal Effects

Generally, a third party consent to a search of the premises, whether authorized by a spouse, paramour, parent, joint occupant, host, employer, or bailee, does not extend to the defendant's enclosed personal effects within the premises. See United States v. Blok, supra; United States v. Robinson, 479 F.2d 300 (7th Cir. 1973); Corngold v. United States, 367 F.2d 1 (9th Cir. 1966); Maxwell v. Stephens, 348 F.2d 325 (8th Cir. 1965), cert. denied, 382 U.S. 944 (1965); Roberts v. United States, 332 F.2d 892 (8th Cir. 1964).

L. Eavesdropping

A person can consent to the tape recording or monitoring of his/her conversation with another person. See United States v. White, 401 U.S. 745 (1971); United States v. Neville, 516 F.2d 1302 (8th Cir.), cert. denied, 423 U.S. 925 (1975); United States v. Kippman, 492 F.2d 314 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); United States v. Dowdy, 479 F.2d 213 (4th Cir.), cert. denied, 414 U.S. 823 (1973); United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973). Furthermore, the extent of proof necessary to show consent to the monitoring of a conversation may be less than required to show consent to a physical search. Id.

9-4.156 Scope of Consent

"Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search. A consent search is reasonable only if kept within the bounds of the actual consent;" see United States v. Dichiarinte, 445 F.2d 126, 129 (7th Cir. 1971) (consent to search for drugs did not permit a documents search). See also Gouled v. United States, 255 U.S. 298, 306

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(1921) (consent for informant to enter office did not validate search of private papers). If the defendant's response to the officer's request for consent is general and unqualified, "then the police may proceed to conduct a general search of that place." 2 LaFave, §8.1(c), at 624. And, the permissible scope of the search encompasses closed containers found on the premises. See United States v. Covello, 657 F.2d 151 (7th Cir. 1981) (consent for "complete" search of automobile permitted officers to search luggage found in the truck). Evidence observed in plain view may also be seized during a consensual search. See Washington v. Chrisman, 455 U.S. 1 (1982); United States v. Dichiarinte, *supra*; Davis v. United States, 327 F.2d 301 (9th Cir. 1964) (limited consent to enter; marijuana seen in plain view just inside the door). The authority to conduct a consensual search terminates when the police find the items for which the consent to search was solicited. See 2 LaFave, §8.1(c), 1984 Supp., at 234.

A law enforcement officer can properly misrepresent his/her identity in order to gain entry to the defendant's premises through consent. See Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); United States v. Pozos, 697 F.2d 1238, 1244 (5th Cir. 1983); United States v. Ruiz-Altschiller, 694 F.2d 1104, 1107, (8th Cir. 1982); United States v. Shigemura, 682 F.2d 699, 706, (8th Cir. 1982); *cert. denied*, 459 U.S. 1111 (1983); United States v. Enstam, 622 F.2d 857 (5th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *cf.* United States v. Wuagneux, 683 F.2d 1343, 1348 (11th Cir. 1982), *cert. denied*, U.S. \_\_\_\_\_, 104 S. Ct. 69 (1983) (consent valid when IRS agent disclosed identity and intent to conduct audit without disclosing risk of future criminal proceedings). That does not mean, however, that officers may simply dispense with a warrant, and rely upon misrepresentations to gain entry. Misrepresentations concerning the crime under investigation or the true object of the search (assuming that the item could be found during a search of the same intensity as that consented to) are factors to be considered in assessing the voluntariness of the search. See 2 LaFave, §8.2(n), at 686-690.

9-4.157 Revocation of Consent

Consent to search may be withdrawn or limited prior to the completion of the search. See Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977). Consent may be revoked by either the party who gave the original consent (United States v. Bracer, 342 F.2d 522 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965)) or by a party who possesses an equal right to consent to search of the property in question. Jones v. Berry, 722 F.2d 443, 449 (9th Cir. 1983) (husband may revoke consent previously given by wife); United States v. Green, 523 F.2d 968 (9th Cir. 1975); Lucero v. Donovan,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

354 F.2d 16 (9th Cir. 1965). But if the consent is revoked prior to the completion of the search, all items seized before the limitation is imposed may be held for evidence. Id.; see also United States v. Black, 675 F.2d 129, 138 (7th Cir. 1982), cert. denied, 460 U.S. 1068 (1983).

A notable exception to a person's ability to withdraw consent arises in the context of airport searches. Once a boarding passenger has voluntarily submitted himself/herself and his/her carry-on luggage to pre-flight screening procedures, he/she may not revoke his/her implicit consent when preliminary screening indicates that a more detailed search is appropriate. See United States v. Herzbrun, 723 F.2d 773, 776 (11th Cir. 1984); United States v. Haynie, 637 F.2d 227, 230 (4th Cir. 1980), cert. denied, 451 U.S. 972 (1981); United States v. DeAngelo, 584 F.2d 46, 48 (4th Cir. 1978), cert. denied, 440 U.S. 935 (1979) ("having consented to the search, [the accused] could not withhold permission after the first step of the process disclosed that he was attempting to carry aboard the aircraft articles that were concealed from x-ray").

9-4.160 Administrative Searches

9-4.161 Administrative Warrant for Regulatory Inspections

Routine inspections of commercial and residential buildings made pursuant to a statute must be conducted with valid administrative search warrants. See Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978) (business premises); See v. City of Seattle, 387 U.S. 541, 546 (1967) (business premises); Camara v. Municipal Court, 387 U.S. 523, 534 (1967) (private dwelling). Administrative search warrants require a lesser degree of probable cause than searches in criminal investigations. See Camara v. Municipal Court, supra. The probable cause required to issue an area-wide warrant must be measured by a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved. See See v. City of Seattle, supra, at 545. This lesser showing of probable cause is justified given the strong governmental interest in protecting public health and safety through effective enforcement of applicable regulations and the limited invasion of the owner's privacy which is neither personal in nature nor aimed at uncovering evidence of crime. Camara v. Municipal Court, supra, at 537. See Hern Iron Works, Inc. v. Donovan, 670 F.2d 838, 840 (9th Cir. 1982), cert. denied, 459 U.S. 830 (1982) (administrative warrant to search iron works is based on more relaxed standard of probable cause than criminal warrant); In re Searches and Seizures Conducted on October 2, and 3, 1980, 665 F.2d 775, 777 (7th Cir. 1981) (administrative

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

search of registered pharmacy authorized by statute on less than criminal standard of probable cause); Marshall v. Horn Seed Co., Inc., 647 F.2d 96, 102 (10th Cir. 1981) (warrant application based on specific evidence of OSHA violation does not require probable cause in criminal sense).

In order to meet the probable cause requirement, the administrative agency must demonstrate that it has satisfied reasonable administrative or legislative standards with regard to the targets of its inspections. See Camara v. Municipal Court, *supra*, at 538; Marshall v. Barlow's, *supra*. Factors to be assessed in evaluating whether the probable cause standard has been met include the passage of time, the nature of the building, or the condition of an entire area. See Camara v. Municipal Court, *supra*, at 538. Similarly, where an intrusion has both administrative and criminal purposes, such as the survey of a factory for illegal aliens in INS v. Delgado, *supra*, the courts may be expected to apply traditional criminal search and seizure precepts. If, however, the proceeding at which evidence is to be used is civil in nature, such as the deportation hearing in INS v. Lopez-Mendoza, *supra*, the exclusionary rule will not apply.

9-4.162 Exceptions to the Warrant Requirement in Administrative Searches

See USAM 9-4.163, 9-4.164, 9-4.165, 9-4.166, 9-4.167, 9-4.168, *infra*.

9-4.163 Emergencies

An administrative search may be carried out in the absence of a search warrant during an emergency which requires prompt inspection. Emergency situations which justify foregoing the warrant requirement include: the seizure of unwholesome food, North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); compulsory vaccinations to prevent an epidemic, Jacobson v. Massachusetts, 197 U.S. 11 (1905); health quarantines, Compagnie Francaise v. Louisiana Board of Health, 186 U.S. 380 (1902); entrance to a still-smoking building by fire marshals to prevent destruction of all relevant evidence, Michigan v. Tyler, 436 U.S. 499 (1978); emergency medical aid, United States v. Dunavan, 485 F.2d 201 (6th Cir. 1973); protection of the President, Scherer v. Brennan, 379 F.2d 609 (7th Cir.), *cert. denied*, 389 U.S. 1021 (1967).

9-4.164 Regulated Industries

The Supreme Court has upheld warrantless administrative searches mandated by statute of certain regulated businesses because either the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

owner has a license and so should know if the inspection or the search is crucial to the regulation. See Donovan v. Dewey, 452 U.S. 594, 602 (1981) (regulations concerning mine safety inspections); United States v. Biswell, 406 U.S. 311, 316 (1972) (regulations concerning firearms dealers based on important government interests); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (regulations concerning liquor industry); United States v. Ray, 652 F.2d 670, 671 (6th Cir. 1981) (per curiam) (regulations concerning strip mining). In Donovan v. Dewey, supra, the Court indicated that whether warrantless searches are lawful may turn upon whether Congress has "reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."

This exception to the warrant requirement is based on the diminished expectation of privacy in pervasively regulated industries due to the tradition of close government inspection for which any person who chooses to enter such a business must be aware. See Marshall v. Barlow's Inc., supra; United States v. Gordon, 655 F.2d 478, 483 (2d Cir. 1981); United States v. Jamieson-McKames Pharmaceuticals, Inc., 651 F.2d 532, 541-42 (8th Cir. 1981), cert. denied, 455 U.S. 1016 (1982). Many courts justify warrantless inspections of these industries based on implied consent because those persons who accept operating licenses should know about statutory inspections. See United States v. New Orleans Public Service, Inc., 553 F.2d 459 (5th Cir. 1977); United States v. Biswell, supra.

The Fourth Amendment is satisfied as long as the inspection system under the statute is reasonable with respect to its time, place, and scope. See Lewis v. McMasters, 663 F.2d 954, 955 (9th Cir. 1981).

9-4.165 Consent to an Administrative Search

In actual practice, most administrative searches are conducted pursuant to the consent of the owner or occupant of the premises. See Camara v. Municipal Court, 387 U.S. 523, 539 (1967); Stephenson Enterprises, Inc. v. Marshall, 578 F.2d 1021 (5th Cir. 1978). Most courts follow the rule that consent for administrative searches need not meet the same standards of voluntariness as consent in a criminal investigation. See United States v. Thriftmart, Inc., 429 F.2d 1006 (9th Cir. 1970), cert. denied, 400 U.S. 926 (1970); United States v. Hammond Milling Co., 413 F.2d 608 (5th Cir. 1969), cert. denied, 396 U.S. 1002 (1970). If, however, the inspector improperly insists upon his/her right to search without a warrant, and the individual believes that he/she will be

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

violating the law if he/she refuses to consent, then such consent is involuntary. See United States v. Kramer Grocery, 418 F.2d 987 (8th Cir. 1969) (FDA inspector, over the owner's objections, insisted on his right to inspect and demand certain records and information, consent involuntary); United States v. Anile, 352 F. Supp. 14 (N.D.W.Va. 1973) (drugstore owner told by government agents that he had no choice regarding a notice of inspection of his store; consent involuntary).

9-4.166 Fire and Arson Investigations

Fire officials may enter a burning building without a warrant. Also, for a reasonable time after the blaze has been extinguished, they may investigate the causes of the fire. See Michigan v. Tyler, 436 U.S. 499 (1978); see also United States v. Moskow, 588 F.2d 882 (3d Cir. 1978); Steigler v. Anderson, 496 F.2d 793 (3d Cir.), cert. denied, 419 U.S. 1002 (1974). Any incriminating evidence found within the investigating officer's plain view may be seized in the course of such a search. Additional inquiries about the cause of the fire must be made with an administrative warrant. If officials suspect arson, but need more evidence, they must get a warrant based on the criminal standard of probable cause. When there is a delay in the search of premises in which the owner has a reasonable expectation of privacy, officials must obtain an administrative warrant to determine the cause of the fire. See Michigan v. Clifford, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 641 (1984).

9-4.167 Prisons

The Supreme Court has long recognized the special security problems of prisons and jails. See, e.g., Bell v. Wolfish, 441 U.S. 520, 546-47 (1979); Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119, 124 (1977); Pell v. Procunier, 417 U.S. 817, 823 (1974); Procunier v. Martinex, 416 U.S. 396, 412 (1974). There is, accordingly, no right of privacy in traditional Fourth Amendment terms. See Hudson v. Palmer, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 3194 (1984).

The need to maintain prison security and discipline provides the basis for dispensing with the warrant and probable cause requirements when searching a prisoner's cell or electronically monitoring his/her conversation with a visitor. See United States v. Palmateer, 469 F.2d 273 (9th Cir. 1972); United States v. Hitchcock, 467 F.2d 1107 (9th Cir. 1972), cert. denied, 410 U.S. 916 (1973); see also Lanza v. New York, 370 U.S. 139, 143 (1962) ("It is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

room.") Searches conducted for the safety of inmates and/or the institution may be made at random and need not be conducted according to an established plan. See Hudson v. Palmer, *supra*. Nor is the inmate entitled under the Constitution to observe "shakedowns" of his/her jail cell. Block v. Rutherford, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3227 (1984) (also holding that contact visits may be prohibited for legitimate security reasons). The warrantless monitoring of a conversation is not permitted if it involves a "special relationship" which the law has traditionally endowed with confidentiality, such as an attorney-client relationship. See Lanza, *supra*, at 144.

As part of the routine inventory procedure incident to incarceration, police may search any container or article in the arrestee's possession. See Illinois v. Lafayette, 462 U.S. 640 (1983). The justification for this procedure rests on strong governmental interests such as theft, false claims, prevention of personal harm and identification. *Id.* at 2606.

9-4.168 Miscellaneous Administrative Searches

Various types of administrative searches may be carried out in the absence of a warrant or traditional probable cause, as long as the search furthers a reasonable administrative purpose and is not directed at uncovering evidence of a crime. Such searches cannot extend beyond the administrative objective. Probable cause may be based upon general circumstances which make it likely that an inspection will serve an administrative purpose, but not upon knowledge of the particular individual. This standard for administrative searches has been applied in the inspection of packages entering a federal building for explosives or dangerous weapons, see McMorris v. Aliota, 567 F.2d 897 (9th Cir. 1978); the inspection of baggage leaving a quarantined area for diseased horticulture, United States v. Schafer, 461 F.2d 856 (9th Cir. 1972), *cert. denied*, 409 U.S. 881 (1972); and the inspection of a truck entering a restricted area on a military base for dangerous materials. Entry into the public lobby of a motel-restaurant by an agent of the Secretary of Labor in order to serve an administrative subpoena was permitted despite the fact that the subpoena did not authorize inspection of the premises. See Donovan v. Lone Steer, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 769 (1984).

9-4.170 Border Searches

A. Characteristics

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A border search may be distinguished from other official law enforcement searches in that its primary purposes are to insure the payment of import duties and to prevent the introduction of contraband or illegal aliens into the United States. See Boyd v. United States, 116 U.S. 616 (1886). Thus border searches have traditionally been recognized as an exception to the probable cause and warrant requirements of the Fourth Amendment. They need only comply with the Fourth Amendment standard of reasonableness. See Torres v. Puerto Rico, 442 U.S. 465, 472-73 (1979); United States v. Ramsey, 431 U.S. 606, 619 (1977); Almeida-Sanches v. United States, 413 U.S. 266, 272 (1973); see also United States v. Garcia, 672 F.2d 1349, 1354 (11th Cir. 1982); United States v. DeGutierrez, 667 F.2d 16, 18-19 (5th Cir. 1982); United States v. Flynn, 664 F.2d 1296, 1306 (5th Cir.), cert. denied, 456 U.S. 930, (1982); United States v. Stone, 659 F.2d 569, 572 (5th Cir. 1981). The view that border searches are not subject to the probable cause and warrant requirement of the Fourth Amendment derives from the historical fact that authority to conduct searches at the border was enacted in 1789 by the same Congress which adopted the Bill of Rights. See United States v. Ramsey, *supra*; Boyd v. United States, *supra*, at 623.

B. Elements of a Valid Border Search

A warrantless border search is lawful if the officers conducting the search have the authority to do so; the person or property searched has crossed the border; the search is conducted at the border or its functional equivalent; and the scope of the search is reasonably limited to protect the interests of the agency conducting the search. See United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967).

C. Border Search Authority

To conduct searches at the border, law enforcement officers must have border search authority. Customs officers, under 19 U.S.C. §§482, 1581(a) and 1582, and border patrol agents, under 8 U.S.C. §1357, are authorized to conduct warrantless searches of people and things at the border even in the absence of probable cause or reasonable suspicion. That authority is justified by the absolute right of the sovereign to control its borders, particularly with regard to the flow of aliens and smuggled goods. See United States v. Ramsey, *supra*; 606 (1977); Carroll v. United States, 267 U.S. 132 (1925). Authority is not limited, however, to persons or goods entering the country, but "the rationale behind this exception [to the warrant requirement] applies with equal force to persons or objects leaving the country . . ." United States v. Udofot, 711 F.2d 831, cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 245 (1983).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A search performed by a customs officer at the border or its functional equivalent may be more intrusive than a search by border patrol agents, whose object is limited to detecting illegal aliens. A customs officer can lawfully conduct a warrantless search of an automobile, its occupants, as well as its contents, including luggage. A border patrol agent can question the occupants of the vehicle regarding their citizenship, United States v. Martinez-Fuerte, 428 U.S. 543 (1976), and he/she can direct that the trunk of the car be opened to determine whether illegal aliens might be concealed there, United States v. Alvarez-Gonzalez, 561 F.2d 620 (5th Cir. 1977), but he/she cannot search luggage inside the car absent probable cause or reasonable suspicion. See United States v. Thompson, *supra*, at 1362. The limitations on the border patrol agents' authority can be removed by officially cross-designating him/her as a customs officer. See United States v. Villalon, 475 F.2d 937 (5th Cir. 1979); United States v. Thompson, *supra*, at 1363. Compare United States v. Soto-Soto, 598 F.2d 545 (9th Cir. 1979).

9-4.171 Functional Equivalents of the Border

"Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but functional equivalents as well. For example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search. See Almeida-Sanchez v. United States, 413 U.S. 266, 172-273 (1973). Problems relating specifically to searches and seizures of persons at airports are discussed at USAM 9-4.127, *supra*.

The Supreme Court has not defined functional equivalency beyond the illustrations given in Almeida-Sanchez. In United States v. Garcia, 672 F.2d 1349 (11th Cir. 1982), an appellate court made an attempt to set forth characteristics that would cause an inland geographical location to be considered the functional equivalent of the border. In that court's view, a search within the border may also be justified as a border search requiring no warrant nor any suspicion if there is reasonable certainty that the object or person searched has just crossed the border, there has been no time or opportunity for the object to have changed materially since the time of crossing, and the search is conducted at the earliest practicable point after the border was crossed. See Garcia, *supra*, at

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1363-1364. See also United States v. Hildalgo-Gato, 703 F.2d 1267, 1268 (11th Cir. 1983) (holding that the "contiguous zone" is the functional equivalent of the border).

That definition is adequate for most instances where the government, before and after Garcia, has urged that a warrantless search was lawful because it occurred at the functional equivalent of the border. See, e.g., United States v. Messersmith, 692 F.2d 1315 (11th Cir. 1982); United States v. Niver, 689 F.2d 520 (5th Cir. 1982); United States v. Carter, 592 F.2d 402 (7th Cir. 1979); United States v. Himmelwright, 551 F.2d 991 (5th Cir. 1977). Only the requirement that the location be at the "earliest practicable point" from the border could be troublesome if given a literal construction. That has not happened as yet.

Permanent checkpoints located within a reasonable distance from the border may be regarded as the functional equivalent of the border. See United States v. Dreyfus-de Campos, 698 F.2d 227 (5th Cir.); cert. denied, 461 U.S. 947 (1983); United States v. Salinas, 611 F.2d 128 (5th Cir. 1980). However, those checkpoints are staffed solely by the Border Patrol, an arm of the Immigration and Naturalization Service charged with the responsibility of preventing entry by illegal aliens. Border Patrol agents may stop cars at the permanent checkpoints and question occupants regarding their citizenship, and they may require the trunk of the car to be opened in order to determine whether aliens might be concealed there. See United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Alvarez-Gonzalez, 561 F.2d 620 (5th Cir. 1977). Moreover, if the routine questioning and inspection develops probable cause to believe that criminal activity is afoot, the border patrol agent can make a more extensive search. See United States v. Villalon, *supra*.

Because customs officers do not locate themselves at checkpoints, the courts have not been confronted with the extent to which a customs-type search can be made at a permanent checkpoint that serves as the functional equivalent of the border. Given the likelihood that searches by customs officers at the functional equivalent of the border would be regarded as constitutional, a search of similar scope by a border patrol agent could only be condemned because of a lack of statutory authority, and not because of a constitutional violation. That being so, the exclusionary rule, which was intended to prevent law enforcement officers from engaging in unconstitutional invasions of privacy as opposed to excesses of statutory authority, should not apply. See United States v. Garcia, *supra*; compare United States v. Harrington, 681 F.2d 612 (9th Cir. 1982).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Customs officers also patrol the waters surrounding the country. Their right to conduct suspicionless searches in customs waters is long recognized. A statute enacted in 1790 empowered customs officers to board ships within four leagues--twelve miles--of the coast, if bound to the United States, to demand to examine the ship's manifest, and to search the vessel. Act of Aug. 4, 1790, 1 Stat. 145. That statute is the direct ancestor of 19 U.S.C. §1581(a), which provides that customs officers may "at any time go on board of any vessel . . . at any place in the United States or within the customs waters . . . and examine . . . every part thereof . . . any person, trunk, package, or cargo on board . . ." The statute also serves as the basis for customs officers to conduct border-type searches of vessels in territorial waters, even before the vessels reach shore, if sufficient articulable facts have been shown for the conclusion that the vessel in question came from international waters and had crossed the territorial border. See United States v. Helms, 703 F.2d 759 (4th Cir. 1983). In United States v. MacPherson, 664 F.2d 69 (5th Cir. 1981), the court refused to quibble with the defendant regarding the distance from the Florida shore where the customs search occurred. The court applied the border-search plenary-authority rule to conduct a search occurring a half-mile beyond the three-mile territorial limit. A discussion of vessels generally is found at USAM 9-4.146, supra.

9-4.172 Extended Border Searches

If conditions remain essentially unchanged from the time a person or object crosses the border, a warrantless border search may be conducted at points far removed from the point of entry. Those searches are commonly known as extended border searches. See United States v. Lueck, 678 F.2d 895 (11th Cir. 1982); United States v. Jacobson, 647 F.2d 990 (9th Cir. 1981); United States v. Richards, 638 F.2d 765 (5th Cir. 1981). They generally arise in situations where officers have deliberately delayed conducting the searches for legitimate law enforcement purposes, such as the expectation that continued surveillance from the border will lead to the apprehension of others involved in illegal activities or the discovery of further evidence of a crime.

Because the delayed searches may involve a greater intrusion of privacy than searches at the border or its functional equivalent, the courts have imposed two requirements upon extended border searches. First, there must be a reasonable certainty that a border crossing has occurred and that conditions have remained unchanged from the crossing until the search. Second, the search must be supported by reasonable suspicion of criminality. See United States v. Garcia, 672 F.2d 1349, 1364 (11th Cir. 1982); United States v. Richards, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A consequence of extended border search doctrine is that it expands the application of border search law geographically. It also embraces objects that have not crossed the border, if those objects have been in direct contact with others that have been under surveillance since they crossed a border. For example, a vehicle that meets a vessel or airplane arriving from abroad can be searched to determine whether dutiable merchandise or contraband has been transferred to it. No proof is needed that the vehicle itself had contact with the border. See United States v. Lueck, 678 F.2d 895 (11th Cir. 1982); United States v. Fogelman, 586 F.2d 337 (5th Cir. 1978).

A crucial factor in extended border searches is the absence of a significant break in surveillance from the border. If there has been no break the standard of reasonable certainty of unchanged conditions has automatically been satisfied. See United States v. Fogelman, *supra*. If some break has occurred, the test is whether examining the totality of circumstances, the gap in surveillance removed the reasonable certainty that the items discovered were present at the time of the border crossing. See United States v. Martinez, 481 F.2d 214 (5th Cir. 1973) (35 minute break; 628 pounds of marijuana in secret compartment of trunk; search held reasonable despite break); Castillo-Garcia v. United States, 424 F.2d 482 (9th Cir. 1970) (165 pounds of marijuana found in car with fifteen minute break in surveillance; search held reasonable); United States v. Mejias, 452 F.2d 1190 (9th Cir. 1971) (4.6 pounds of cocaine could not have been sewn into lining of suitcase during break in surveillance). Even a break in surveillance can bar a subsequent border search where only a small quantity of contraband is seized and other persons have entered the vehicle since its entry into the United States. See United States v. Anderson, 509 F.2d 724 (9th Cir. 1974), *cert. denied*, 420 U.S. 910 (1975).

9-4.173 Routine Searches

Neither probable cause nor any amount of reasonable suspicion is required for a routine inspection at the border. See United States v. Ramsey, 431 U.S. 606 (1977); United States v. Grotke, 702 F.2d 49 (2d Cir. 1983). That inspection usually includes an examination of the entrant's visa and a search of luggage and personal effects. United States v. Himmelwright, 551 F.2d 991, 993 (5th Cir. 1977); see Carroll v. United States, 267 U.S. 132, 154 (1925). In addition, visual inspection of an individual is permissible. United States v. Rice, 635 F.2d 409 (5th Cir. 1981). The customs officer can, as a matter of routine examination, require the removal of an outer coat, hat or shoes, the emptying of pockets, or the presentation of a purse or wallet for inspection. See

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. Grotke, 702 F.2d 49, 51 (2d Cir. 1983); United States v. Carter, 592 F.2d 402 (7th Cir. 1979), cert. denied, 441 U.S. 908 (1979); United States v. Fitzgibbon, 576 F.2d 279 (10th Cir. 1978); United States v. Chase, 503 F.2d 571 (9th Cir. 1974); Henderson v. United States, 390 F.2d 805 (9th Cir. 1967). Finally, a frisk is lawful as part of a routine inspection. See United States v. Sandler, 644 F.2d 1163, 1169 (5th Cir. 1981) (en banc); United States v. Wilmot, 563 F.2d 1298 (9th Cir. 1977).

9-4.174 More Extensive Intrusions

When the search at the border moves beyond the routine inspection, some level of suspicion must exist in order for the search to be reasonable under the Fourth Amendment. The degree of suspicion required of the officer performing the search is proportional to the degree of intrusion. See United States v. Afanador, 567 F.2d 1325, 1328 (5th Cir. 1978). Because the courts are not always in agreement in deciding what level of suspicion must be proved in a particular setting, it is advisable to pay particular attention to the law of the circuit where the search in question occurred. Indeed, there is a split between the Ninth and Eleventh Circuits as to the standard to be applied in determining whether strip searches and/or x-rays of body cavities is permissible. Compare United States v. Couch, 688 F.2d 599, 604-05 (9th Cir. 1982) (applying a "clear indication" of contraband standard to body cavity searches); United States v. Quintero-Castro, 705 F.2d 1099 (9th Cir. 1983) (same standard applied to x-rays) with United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984) (applying reasonable suspicion standard to such searches).

A strip search involves the removal of sufficient garments to affect the dignity and privacy of the subject. In defining the degree of suspicion that justifies a strip search the Ninth Circuit has adopted a standard of real suspicion. In United States v. Guadalupe-Garza, 421 F.2d 876, 879 (9th Cir. 1970), that court defined real suspicion as "subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law."

Although other courts agree that a strip search cannot be performed simply as part of routine customs inspection activity, they do not uniformly accept that Ninth Circuit test of real suspicion. An alternative is the standard of reasonable suspicion. See United States v. Asbury, 586 F.2d 973 (2d Cir. 1978); United States v. Smith, 557 F.2d 1206 (5th Cir. 1977), cert. denied, 434 U.S. 1073 (1978). But however stated, the suspicion must be particularized, in that a strip search can be

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

justified only if there is adequate suspicion, based upon articulable facts, that contraband is being concealed within the suspect's interior garments. See Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982).

The issue of whether reasonable suspicion for a strip search exists is determined on a case-by-case basis. See United States v. De Gutierrez, 667 F.2d 16, 19 (5th Cir. 1982). Some factors relevant to a finding of reasonable suspicion include excessive nervousness, United States v. Holtz, 479 F.2d 89 (9th Cir. 1973); but see United States v. Price, 472 F.2d 573 (9th Cir. 1973) (nervousness alone does not justify a strip search); needle marks or other indications of drug addiction, United States v. Shields, 453 F.2d 1235 (9th Cir. 1972); or loose fitting or bulging clothes, United States v. Wardlaw, 576 F.2d 932 (1st Cir. 1978). United States v. Asbury, supra, at 976-977, contains a list of twelve possible factors. See also USAM 9-4.123, supra, dealing with searches of the person generally.

9-4.175 International Mail

The border search rationale which justified suspicionless searches at the border also applies to mail coming across the border. See United States v. Ramsey, 431 U.S. 606 (1977). Two statutes authorize mail searches. The first, 19 U.S.C. §482, provides that a customs officer may search any "envelope, wherever found, in which he may have a reasonable cause to suspect that there is merchandise which was imported contrary to law. . ." The second, 19 U.S.C. §1582, permits the Secretary of the Treasury to prescribe regulations for the search of "persons and baggage. . . ." Pursuant to this statute the Secretary has promulgated regulations permitting the opening of sealed mail arriving from abroad if there is reasonable cause to suspect that it contains "merchandise or contraband." However, no customs officer may open letters containing only correspondence or read any correspondence contained in a mailing unless he/she first obtains a warrant or receives the consent of the sender or addressee. See 19 U.S.C. §145.3. Another regulation, 19 C.F.R. §162.6, provides that all baggage and merchandise arriving from abroad are liable to search by a customs officer. That regulation makes no reference to a standard of reasonable cause.

These statutes and regulations have received generous constructions by the courts. Searches of incoming mail matter have been upheld in the absence of any suspicion. Even routine suspicionless spot-checking of packages arriving from abroad has been approved. See United States v. Emery, 541 F.2d 887 (1st Cir. 1976); United States v. Odland, 502 F.2d 148

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(7th Cir. 1974), cert. denied, 419 U.S. 1088 (1974); see also United States v. Pringle, 576 F.2d 1114, 1116-1117 (5th Cir. 1978).

It is not necessary for the customs search of international mail to take place at the port of entry of the first possible inspection point. As long as the mail remains in the same sealed condition and is moving within customary mail channels, a search by customs officers at a subsequent stop prior to delivery is permissible under the border search principles. See United States v. Lowe, 575 F.2d 1193 (6th Cir. 1978) (search at Detroit Post Office of package arriving from Thailand and routed to Detroit from Los Angeles); United States v. King 517 F.2d 350 (5th Cir. 1975) (search at Birmingham of envelopes entering the United States at San Francisco and routed to Birmingham).

When contraband is discovered in the course of a customs search of mail, the government may reseal the package or letter and conduct a controlled delivery. Following the delivery, the recipient may be detained or arrested and the package retrieved. As long as there is no substantial likelihood that the contents of the package have been changed since it left the hands of the law enforcement officers, the reopening of the package after retrieval from the recipient does not constitute a search; accordingly, no warrant is required for the reopening, even if delayed until the officers have returned from the place of delivery to the police station. See Illinois v. Andreas, 463 U.S. 765 (1983); United States v. Richards, 638 F.2d 765 (5th Cir. 1981).

9-4.180 Suppression of Evidence and Return of Property

A person who claims to have been aggrieved by an allegedly unlawful search may move for the return of the seized property. See Rule 41(e) and 41(f), Fed. R. Crim. P. The defendant is generally under the burden of establishing both that the search was illegal and that he/she has "standing" to challenge it (see generally 3 LaFare, §11.2(b) and (c)); however, the burden may sometimes shift to the government to demonstrate by a preponderance of the evidence that a warrantless search was proper or that certain evidence was not the "fruit" of an unlawful search. See, e.g., Bumper v. North Carolina, 391 U.S. 543 (1968) (prosecution bears burden of proving that a consent to a warrantless search was voluntary); Alderman v. United States, 394 U.S. 165 (1969) (although the defendant "must go forward with specific evidence demonstrating taint," the prosecution "has the ultimate burden of persuasion to show that its evidence is untainted"); Nardone v. United States, 308 U.S. 338 (1939) (prosecution has the burden of demonstrating an independent basis for the admission of presumably tainted evidence). In federal practice, motions

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

for the suppression of evidence "must be made prior to trial," and the accused's failure to do so "shall constitute waiver" of his/her evidentiary claim unless the trial court grants relief from the waiver "for cause shown." Rule 12(f), Fed. R. Crim. P. See also 3 LaFave, §11.1(a).

The government may appeal before trial an order of the district court granting a motion to suppress evidence. See 18 U.S.C. §3731. By contrast, criminal defendants may not appeal before trial the denial of motions to suppress evidence. See DiBella v. United States, 369 U.S. 121, 131-133 (1962) (order granting or denying a pre-indictment motion to suppress evidence); Cogen v. United States, 278 U.S. 221 (1929) (order denying a defendant's post-indictment motion to suppress evidence); accord United States v. Acosta, 669 F.2d 292, 293 (5th Cir. 1982); Simons v. United States, 592 F.2d 251 (5th Cir.), cert. denied, 444 U.S. 835 (1979); Application of United States, 427 F.2d 1140, 1141-1142 (5th Cir. 1970). Nor may a defendant claim pendent jurisdiction under 18 U.S.C. §3731 and take an interlocutory cross-appeal from aspects of pre-trial rulings that were unfavorable to criminal defendants. See United States v. Johnson, 690 F.2d 60, 62-63 (3d Cir. 1982), cert. denied, 459 U.S. 1214 (1983); United States v. Cahalane, 560 F.2d 601, 608 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978). Although persons aggrieved by an allegedly unlawful search may sometimes appeal prior to indictment an adverse ruling on motions for return of property, they may do so "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse \* \* \*." DiBella v. United States, supra, at 131-132. Most courts of appeals have taken a broad view of when a prosecution is in esse for DiBella purposes, holding that a pending grand jury investigation is enough to foreclose an immediate appeal. See, e.g., United States v. Furina, 707 F.2d 82, 84 (3d Cir. 1983); Standard Drywall, Inc. v. United States, 668 F.2d 156 (2d Cir.), cert. denied, 456 U.S. 927 (1982); Imperial Distributors, Inc. v. United States, 617 F.2d 892, 896 (1st Cir.), cert. denied, 449 U.S. 891 (1980); In re Grand Jury Proceedings (FMC Corporation), 604 F.2d 806, 807 (3d Cir. 1979); Simons v. United States, 592 F.2d 251 (5th Cir.), cert. denied, 444 U.S. 835 (1979); Church of Scientology of California v. United States, 591 F.2d 533 (9th Cir. 1979), cert. denied, 444 U.S. 1043 (1980). See also Consumer Credit Insurance v. United States, 599 F.2d 770, 772-773 n.2 (6th Cir. 1979) (questioning whether the denial or pre-indictment motion under Rule 41(c) of the Federal Rules of Criminal Procedure can ever be regarded as immediately appealable). But see, In re Grand Jury Proceeding (Young), 716 F.2d 493, 495-496 (8th Cir. 1983) (order denying motion for return of property immediately appealable despite pendency of a grand jury proceeding).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.181 Standing

The Supreme Court's view of standing to raise Fourth Amendment rights can be found in four key cases: Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978); and Alderman v. United States, 394 U.S. 165 (1969). Bearing in mind that since Rakas the question of standing often is inseparable from the constitutionality of the search itself, these decisions demonstrate that only those individuals who have allegedly suffered personal violations of their constitutional rights may challenge the introduction of evidence obtained as a result of the violation. See Alderman v. United States, 394 U.S. at 171, 174; Rakas v. Illinois, *supra*, at 128. In addition, the aggrieved person who is both a defendant in the criminal proceeding and one whose personal rights have been infringed may seek exclusion of the evidence at the criminal trial. See Rakas v. Illinois, *supra*, at 133-134. Thus, for example, a non-defendant witness may not avoid testifying on the ground that his/her testimony is the fruit of a Fourth Amendment violation. See United States v. Kember, 648 F.2d 1354, 1365-1368 (D.C. Cir. 1980); *cf.* United States v. Calandra, 414 U.S. 338, 348 (1974).

In line with the focus on protected "privacy" interests, the Supreme court and the circuit courts have de-emphasized property interests as an element of standing to raise Fourth Amendment challenges. The Supreme Court has stated that the Fourth Amendment is not bottomed on "arcane concepts of property law." See Rawlings v. Kentucky, *supra*, at 105. Instead, a defendant must himself/herself have a "legitimate expectation of privacy in the invaded place." See Rakas v. Illinois, *supra*, at 143. See also United States v. Bellina, 665 F.2d 1335, 1339-1340 (4th Cir. 1981). "[T]he threshold question in every suppression case is 'the existence of a reasonable expectation of privacy in the area searched.'" *Id.* at 1339, quoting United States v. Ramapuram, 632 F.2d 1149, 1154 (4th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). Justice Marshall, dissenting in Rawlings, made clear that the Supreme Court had rejected a recognition of privacy rights bottomed solely on a defendant's interest in the item seized and not in the place searched. See Rawlings v. Kentucky, *supra*, at 115-118; see also United States v. Salvucci, *supra*, at 91-93.

Moreover, the expectation of privacy must be more than "reasonable;" it must also be a legitimate interest "that society is prepared to recognize as reasonable." See United States v. Jacobsen, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1652, 1661 (1984); Oliver v. United States, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1735, 1741 (1984); Rakas v. Illinois, *supra*, at 143-144, n. 12. In that regard, some courts have held that a defendant may not claim

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

a reasonable expectation of privacy in the possession of contraband. See United States v. Parks, 684 F.2d 1078, 1083 N. 7 (5th Cir. 1982); United States v. Bailey, 628 F.2d 938, 942 (6th Cir. 1980); United States v. Washington, 586 F.2d 1147, 1154 (7th Cir. 1978); United States v. Emery, 541 F.2d 887, 889-890 (1st Cir. 1976). Cf. United States v. Jacobsen, *supra*, at 1662 and n. 23.

Several factors may be considered in evaluating whether the defendant has a sufficiently reasonable and legitimate expectation of privacy in the area searched to entitle him/her to raise the Fourth Amendment challenge. His/her possessory interest in the object is one factor. Other factors include whether he/she has taken any measures to ensure privacy; whether he/she has sole control over the area searched or item seized; whether the item is in plain view; whether the area searched is within the curtilage of a private dwelling (see Oliver v. United States, *supra*, at 1741); whether records seized were required by the government to be kept (see United States v. Katz, 705 F.2d 1237, 1242 (10th Cir. 1983)); whether he/she abandoned the items (see United States v. Gilman, 684 F.2d 616, 619-620 (9th Cir. 1982)); and whether the container from which the items are taken is sufficient to demonstrate a privacy interest in the enclosed items. See Arkansas v. Sanders, 442 U.S. 753, 764 n. 13 (1979); United States v. Ross, 456 U.S. 798 (1982). A privacy interest in the premises searched may be sufficient to establish standing, Alderman v. United States, *supra*, at 176-177, but if a defendant has no personal privacy interest in the premises searched he/she cannot complain that the search was unconstitutional. See United States v. Robinson, 698 F.2d 448, 454 (D.C. Cir. 1983); United States v. Briones-Garza, 680 F.2d 417 (5th Cir. 1982), *cert. denied*, 459 U.S. 916 (1982). Finally, if a privacy interest has been "compromised" and sufficiently diminished by private action, it may no longer be sufficient to meet the requirement that the expectation of privacy be reasonable. Cf. United States v. Jacobsen, *supra*, at 1660.

Accordingly, "automatic standing"--that is, the right of a defendant to challenge a Fourth Amendment search simply because he/she is charged with a possessory offense based upon evidence derived from the search--is no longer recognized by the Supreme Court. See United States v. Salvucci, 448 U.S. 83 (1980), specifically overruling, Jones v. United States, 362 U.S. 257 (1960); see also Rawlings v. Kentucky, *supra*, at 98.

Lastly, as a matter of practice, a defendant seeking suppression of evidence bears the burden of showing a violation of his/her personal constitutional rights. See Rakas v. Illinois, *supra*, at 130 n. 1; United States v. Savage, 701 F.2d 867, 870 (11th Cir. 1983); United States v. Nadler, 698 F.2d 995, 998 (9th Cir. 1983); United States v. Dickerson, 655 F.2d 559, 561 (4th Cir. 1981). Conversely, the government should

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

challenge standing in the district court if it wishes to preserve the issue. See Steagald v. United States, 451 U.S. 204, 211 (1981).

9-4.182 Fruit of the Poisonous Tree

A. Attenuation (Live Witnesses)

Evidence obtained as a result of an illegal act committed by law enforcement officials must be sufficiently attenuated from the illegality in order to be admissible. See Wong Sun v. United States, 371 U.S. 471, 188 (1963); Dunaway v. New York, 442 U.S. 200, 217-218 (1979); Rawlings v. Kentucky, 448 U.S. 98, 106 (1980); Taylor v. Alabama, 457 U.S. 687, 694 (1982). Factors to be considered in the analysis of attenuation include the issuance of Miranda warnings, the amount of time between the illegal act and the procurement of evidence, whether there are intervening circumstances and the nature of the official misconduct. See Brown v. Illinois, 422 U.S. 590, 603-604 (1975). Where the illegal conduct results in the testimony of a live witness, "a closer, more direct link between the illegality and that kind of testimony is required" in order for the exclusionary rule to be invoked. See United States v. Ceccolini, 435 U.S. 268, 278 (1978).

B. Independent Source

Illegally obtained evidence may be admissible if a source of information independent of the tainted act leads to its discovery. See Segura v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3380 (1984); United States v. Crews, 445 U.S. 463 (1980); Wong Sun, *supra*, at 392; United States v. Wade, 388 U.S. 218, 242 (1967); Costello v. United States, 365 U.S. 265, 280 (1961). The evidence is not excluded when the independent source sufficiently attenuates the evidence from the constitutional violation. *Id.* Nix v. Williams, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 2501, 2509 (1984).

C. Inevitable Discovery

When the government proves that evidence obtained as a result of an illegal act would have been inevitably discovered by legal measures, then it is admissible. See Nix v. Williams, *supra*, at 2509. The government must establish this form of attenuation by a preponderance of the evidence. *Id.*

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.183 The Exclusionary Rule

The Supreme Court first required the exclusion in federal criminal trials of evidence obtained in violation of the Fourth Amendment in Weeks v. United States, 232 U.S. 383 (1914), and later made this exclusionary rule applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961). Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials. See United States v. Leon, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 3405 (1984). Rather, the rule is merely a judge-made rule of evidence--constitutionally based but not specifically constitutionally required--the contours of which must be adapted to fit the circumstances. See, e.g., United States v. Calandra, 414 U.S. 338, 348 (1974); Desist v. United States, 394 U.S. 244, 254 n. 24 (1969).

The question "[w]hether the exclusionary sanction is appropriately imposed in a particular case \* \* \* is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" See United States v. Leon, *supra*. The Supreme Court has made clear that the purpose of the exclusionary rule is to deter Fourth Amendment violations by law enforcement officers by removing the incentive to commit those violations. See, e.g., Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Janis, 428 U.S. 433, 446 (1976); Elkins v. United States, 364 U.S. 206, 217 (1960). Because of the inherent trustworthiness of seized tangible evidence and the resulting societal costs from its loss through suppression, application of the exclusionary rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." See Calandra, *supra* at 348. Thus, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." See Stone v. Powell, *supra*, at 486. Although the Supreme Court has "not seriously questioned," in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the [prosecution's] case where a Fourth Amendment violation has been substantial and deliberate . . .", see United States v. Leon, *supra*, the Court has recognized a number of limitations on the reach of the rule (*id.* at 5158-5159 (collecting cases)), including a recently articulated "good faith" exception to the rule. These limitations are discussed below. The subject of the exclusionary rule is treated in LaFave, §11.1 *et seq.*

A. The Reasonable Good Faith Exception

As the Supreme Court has now held in United States v. Leon, *supra*, and Massachusetts v. Sheppard, *supra*, the Fourth Amendment exclusionary rule is inapplicable where law enforcement officers have acted in reasonable reliance on a judicially-issued warrant. While the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

exclusionary rule may be efficacious in deterring substantial and deliberate police misconduct (Leon, supra, at 5158), "it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity" (id. at 5160). This observation is particularly true:

When an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope. In most such cases, there is no police illegality and thus nothing to deter. It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." \* \* \* Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

Id. at 5161 (footnotes and citation omitted).

Accordingly, the Court refused to require the suppression in Leon of evidence seized pursuant to a search warrant that was found to be unsupported by probable cause, and in Sheppard of evidence seized pursuant to a search warrant that, although supported by probable cause, failed to particularize properly the items to be seized.

Although significant in their impact, Leon and Sheppard do not in any way lessen Fourth Amendment standards or the need of law enforcement officers to comply with them. First, the decisions affect only the circumstances in which the suppression remedy is applicable; it does not alter substantive Fourth Amendment requirements. As the Court stated: "[W]e leave untouched the probable-cause standard and the various requirements for a valid warrant;" Leon, supra. Moreover, while lower courts have applied a good faith exception in the context of warrantless searches and seizures (see United States v. Williams, 622 F.2d 830, 840-848 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1129 (1981) (suppression not required where officer made a warrantless arrest and incidental search on the reasonable, good-faith belief that his/her conduct was proper)); see also United States v. Ajlouny, 629 F.2d 830,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

840-841 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981) (even if warrantless national security wiretap was unlawful, suppression not required where agents acted in good faith and could not be charged with knowledge that their conduct was improper); United States v. Nolan, 530 F. Supp. 386, 396-399 (W.D. Pa. 1981) (suppression not required for what was, at most, a technical, good faith violation of the knock-and-announce rule); United States v. Wilson, 528 F. Supp. 1129, 1132 (S.C. Fla. 1982) (even if arrest effectuated outside of officers' territorial jurisdiction was not a lawful citizen's arrest, good faith exception bars suppression of marijuana), neither Leon nor Sheppard will directly control the numerous situations in which officers made warrantless searches and seizures.

Finally, even when warrants are obtained, the Leon court identified four situations in which the good faith exception to the exclusionary rule will be unavailable: (1) where the warrant is based upon deliberate or reckless material misrepresentations by the affiant; (2) where the issuing magistrate has wholly abandoned his/her neutral and detached judicial role; (3) where the warrant is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable;'" and (4) where the warrant's particularization of the place to be searched or the items to be seized is "so facially deficient \* \* \* that the executing officers cannot reasonably presume it to be valid."

The practical contours of litigating cases under the reasonable good faith exception have not yet been fully developed. Nonetheless, the good faith exception should routinely be asserted as an alternative argument, in every case--whether in the context of warranted or warrantless police conduct--if a credible and respectable argument can be made that the search, seizure or arrest at issue was proper under the Fourth Amendment. The Leon decision itself will, of course, directly control situations where allegedly defective warrants are at issue; however, there is dicta in Leon and an extended analysis in the government's merits brief in Leon pertaining to situations where warrantless police conduct is at issue. The extent to which prosecutors will need to present detailed arguments regarding the good faith exception will vary from case to case and court to court; however, it is essential that the issue be preserved at all levels in every appropriate case.

Moreover, in recognizing the good faith exception, the Supreme Court emphasized that the standard adopted was one of objective, rather than subjective, reasonableness. Leon, *supra*, n.20. Because of this, the Court stated that the exception "should not be difficult to apply in practice" and "should ordinarily be \* \* \* establish[ed] \* \* \* without a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

substantial expenditure of judicial time" (*id.*, at 5162). It is therefore envisioned that post-Leon suppression hearings at which the good faith exception is asserted will be no more onerous or burdensome to the government than are pre-Leon suppression hearings. And, as the Court indicated in Leon, the fact that a magistrate's probable cause determination has been affirmed by the district court is, for purposes of appeal, a strong indication that the officer's reliance on the warrant was reasonable. See also Stone v. Powell, *supra*, at 539-540 (White, J., dissenting).

B. Other Permissible Uses for Illegally Seized Evidence

The exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings \* \* \* ." See Stone v. Powell, *supra*, at 486. Nor does the rule bar the use of illegally seized evidence for all purposes at a criminal trial. Because of the inherent trustworthiness of seized tangible evidence and the resulting societal costs from its loss through suppression, the application of the exclusionary rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." See United States v. Calandra, 141 U.S. 338, 348 (1974). Thus, even with respect to defendants whose legitimate expectation of privacy have been violated by unlawful police conduct, the exclusionary rule bars the admission of illegally seized evidence only in criminal proceedings and during the prosecution's case-in-chief.

As the Supreme Court held in INS v. Lopez-Mendoza, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 3479 (1984), the exclusionary rule does not bar the admission of illegally seized evidence in civil deportation proceedings. See also United States v. Janis, 428 U.S. 433, 454 (1976) (holding that the "exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion"). Similarly, in United States v. Calandra, *supra*, the Supreme Court refused to prohibit the use of illegally seized evidence in grand jury proceedings. The lower federal courts have placed similar limitations on the kinds of proceedings in which the exclusionary rule may be invoked. See, e.g., Donovan v. Federal Clearing Die Casting Co., 695 F.2d 1020 (7th Cir. 1982) (exclusionary rule inapplicable to evidence seized by Occupational Safety and Health Administration pursuant to subsequently-invalidated search warrant); Tirado v. Commissioner, 689 F.2d 307 (2d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1982) (evidence unlawfully seized by federal narcotics agents admissible in a federal civil tax proceeding; unlikely that narcotics agents would be deterred by prospect that illegally seized

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

evidence might be unavailable in a future tax proceeding); United States v. Lee, 540 F.2d 1205, 1211 (4th Cir.), cert. denied, 429 U.S. 894 (1976) (exclusionary rule inapplicable to sentencing proceedings); United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971) (same); United States v. Bazzano, 712 F.2d 826 (3d Cir. 1983) (en banc), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 1439 (1984) (exclusionary rule inapplicable at probation revocation hearings); Accord United States v. Winsett, 518 F.2d 51, 53-55 (9th Cir. 1975); United States v. Hill, 447 F.2d 817, 818-819 (7th Cir. 1971); United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163-1164 (2d Cir. 1970).

The Supreme Court has also restricted the exclusionary rule to bar only evidence introduced in the prosecution's case-in-chief. Thus, the Court has found permissible the use of unlawfully seized evidence for impeachment purposes. See United States v. Havens, 446 U.S. 620 (1980); Walder v. United States, 347 U.S. 61 (1954); see also Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971). As the Court noted in Havens, any increase in deterrence occasioned "by forbidding impeachment of the defendant who testifies [is] deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial." Havens, *supra*, at 627.

9-4.184 Retroactivity

The Supreme Court has recognized that new and expanded Fourth Amendment standards that represent a "clear break with the past" need not be given retroactive effect to benefit criminal defendants. See United States v. Peltier, 422 U.S. 531, 538-539 (1975) (decision prohibiting automobile stop by roving patrols not given retroactive effect); Williams v. United States, 401 U.S. 646, 654-655 (1971) (decision placing limitations of searches incident to arrest not given retroactive effect); Desist v. United States, 394 U.S. 244, 249-250 (1969) (decision prohibiting warrantless, non-trespassory electronic surveillance not given retroactive effect); Linkletter v. Walker, 381 U.S. 618, 636-639 (1965) (decision applying the exclusionary rule to the states not given retroactive effect). See also 3 LaFare, §11.5(c), nn. 57-58 (collecting cases). Because law enforcement officers justifiably relied on the old standards, the deterrent purposes of the exclusionary rule will not be advanced by the suppression of relevant and unimpeachable evidence of the defendant's guilt. In United States v. Johnson, 457 U.S. 537 (1982), the Court held that a construction of the Fourth Amendment that did not constitute a "clear break with the past" is to be applied to all convictions not yet final when the decision was handed down. See United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States v. Leon, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 3405 (1984). See generally LaFave, Search and Seizure, §11.5(a)-(c). By contrast, decisions that narrow the Fourth Amendment rights of defendants are usually given retroactive effect. Id. at §11.5(d). See United States v. Burns, 684 F.2d 1066 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983) (decisions broadening police powers to conduct warrantless searches of automobiles and containers found therein are retroactive).

9-4.190 Custody and Disposition of Evidence and Seized Property

Normally, U.S. Attorneys' offices should not have custody of seized property. Properly defined, seized property is that for which the government does not have title to, but which the government has obtained custody or control of in accordance with statutory or other authority. See 41 C.F.R. §128-50.001-1. Under most circumstances, seized property should remain in the custody of the investigating agency. When such property is required in court, the agent handling the case, or other representatives of the investigating agency, should bring the property to the court and retain custody until the material is introduced as evidence; at which point, it becomes the responsibility of either the clerk of the court or the U.S. Marshal. Timely arrangements should be made with the clerk of the court or the U.S. Marshal for the storage of all such evidence.

U.S. Attorneys and Assistants should accept custody of seized property only for such short periods of time as are necessary to present the property to the court or grand jury. Except in extreme emergency situations, no seized property should be retained in the Office of the U.S. Attorney overnight. Generally, the only occasion when such property might be stored in the U.S. Attorney's office is when documentary material, secured under grand jury subpoena, is delivered into the custody of the U.S. Attorney. As long as such material is needed, it should be kept under appropriate security arrangements.

U.S. Attorneys and Assistants should always promptly notify the custodial agency when seized property will not be used as evidence, or upon case closings, in order to expedite disposition and alleviate extensive storage costs of such property by the custodial agency.

The disposition of lawfully seized property will be completed by one of four methods: the return of the property to the lawful owner; the disposition of unclaimed property; the forfeiture of the property; or the destruction or disposition of seized contraband or other types of property.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.191 Return of Seized Property to the Lawful Owner

Where it is evident that no further use will be made of property that was lawfully seized, the property should be promptly returned to the lawful owner. See United States v. Farrell, 606 F.2d 1341 (D.C. Cir. 1979); United States v. Smith, 497 F. Supp. 495 (N.D. Iowa 1980). Return of such property should occur:

- A. When it is determined that the property will not be introduced as evidence; or
- B. Subsequent to a trial with an acquittal; or
- C. Subsequent to a trial with a guilty verdict (or upon the entering of a guilty plea) and the appeal period has lapsed with no appeal filed; or
- D. Subsequent to the exhaustion of all appeal remedies where it is apparent that a re-trial will not be ordered.

Return of the property may be made without need for a court order, regardless of the method of seizure, i.e., by warrant or incident to an arrest. In such circumstances, the owner should be required to execute a Release and Hold Harmless Agreement not only to protect the United States and the seizing agent from any subsequent damage action arising from the seizure but also to protect the United States from the expense of any subsequent suit asserting that the property was released to an improper person. An example of such a form is provided in USAM 9-4.196, infra. See also Civil Division Practice Manual, 3-26.1, et seq.

9-4.192 Vesting of Unclaimed Property

If the owner of the property is not determinable, then the agency having custody of the unclaimed property should initiate administrative vesting proceedings against the property pursuant to 40 U.S.C. §§304(g), 484(m), and 41 C.F.R. §100-48 (GSA), or where the agency has regulations, pursuant to the regulations of that agency, e.g., 41 C.F.R. 28-50 (DOJ).

Normally, assistance from a U.S. Attorney is not required by an agency when it is following the administrative vesting procedures. Where, however, assistance is required (e.g., where there are multiple claims of ownership against the property), assistance should be provided as needed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

This may take the form of an interpleader action. See USAM 4-10.500 (Interpleader).

9-4.193 Forfeiture of Seized Property

Forfeiture of property may be accomplished either through administrative or judicial forfeiture proceedings. The latter is necessary, for example, when the value of the property exceeds the maximum allowed by the applicable statute for administrative forfeiture or where administrative forfeiture is contested through the filing of a claim and cost bond. See, e.g., 19 U.S.C. §§1607, 1610. In such instances, procedures for judicial forfeiture or condemnation should be followed. See also USAM 4-10.300 (non-criminal statutes). For assistance with respect to forfeitures arising in connection with the violation of criminal statutes, contact the Asset Forfeiture Office of the Criminal Division.

For a list of the most commonly used forfeiture statutes and agency regulations, see USAM 9-4.198, infra.

9-4.194 Destruction of Seized Property

Destruction of seized property should be performed only pursuant to a court order, subsequent to the forfeiture of the property, or where the property seized is contraband. The agency responsible for the custody of the property is responsible for seeing that the destruction is carried out pursuant to regulations (see, e.g., 41 C.F.R. §101-45.309-4), and actual involvement by a U.S. Attorney should not be required. Where, however, U.S. Attorney involvement is required, such assistance should be provided as needed. See USAM 9-4.196, infra.

9-4.195 Disposition of Contraband

A. Per se contraband consists of objects, the possession of which, without more, constitutes a crime. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 993, (1965). It is well settled in decisional law that a claimant has no right to have per se contraband returned. United States v. Jeffers, 342 U.S. 48 (1951); United States v. Farrell, 606 F.2d 1341 (D.C. Cir. 1979) (see, e.g., 21 U.S.C. §§812, 881(f) (heroin); 26 U.S.C. §§5685 and 7302 (moonshine whiskey); 26 U.S.C. §5861(d) (sawed-off shotguns). A determination of property as contraband per se must be founded upon a specific statute. Carpenter v. Andrus, 485 F. Supp. 320 (D. Del. 1980).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Derivative contraband consists of property which is not inherently illegal, but is used in an unlawful manner. Farrell, supra, at 1344. Forfeiture of derivative contraband pursuant to statute (e.g., 18 U.S.C. §924(d); 18 U.S.C. §3611; 21 U.S.C. §881) may be accomplished by judicial order of a court of competent jurisdiction (e.g., Fed. R. Crim. P. 32(b)(2)).

Where forfeiture of seized contraband requires an order of the court authorizing such action, the U.S. Attorney should proceed accordingly to effectuate the forfeiture. See also USAM 9-4.196, infra (Disposition of Hazardous Chemicals and Bulk Contraband Property).

9-4.196 Disposition of Hazardous Chemicals and Bulk Contraband Property

The seizure of hazardous chemicals and contraband bulk evidence pose serious storage and security problems for investigating agencies. As a general rule, all evidence seized must be preserved intact until the completion of trial. This rule, however, creates safety problems where volatile chemicals are concerned, or where an agency lacks the facilities to store large amounts of seized property. By following the steps outlined below, pre-trial disposition of such evidence may be accomplished without any adverse effect on the government's prosecution.

A. The failure of the government to take adequate steps to preserve evidence may deny a defendant due process, and thereby jeopardize otherwise viable convictions. Government of Virgin Islands v. Testamark, 570 F.2d 1162, 1165-66 (3d Cir. 1978). It is clear that the government may, however, under certain conditions destroy or otherwise dispose of evidence in its possession that would otherwise be introduced at trial without violating the defendant's right to due process. Courts have generally authorized destruction of evidence if three elements are established.

1. First, it must be shown that the evidence was disposed of in good faith. The courts will review the procedures established by an agency to preserve evidence to determine the existence of good faith. See United States v. Augenblick, 393 U.S. 348 (1968) and United States v. Harris, 543 F.2d 1247 (9th Cir. 1976). In reviewing the adequacy of the procedures followed, the existence of standard operating procedures followed by government officials, and the provision of notice to defendants, are two important elements that courts look for in determining the existence of good faith on behalf of the government. See United States v. Heiden, 508 F.2d 898, 902-03

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(9th Cir. 1974) (where government draws samples from and takes photographs of large bulk of marijuana pursuant to agency procedure, destruction of most of the marijuana does not indicate bad faith of the government); and United States v. Bryant, 439 F.2d 642, 651-52 (D.C. Cir. 1971) (government must make "earnest effort" to preserve crucial evidence pursuant to regular procedures).

In addition to following normal agency procedures, adequate notice of the proposed disposition should be given to the defendant. The courts have suggested that such notice is necessary as an element of proof of good faith by the government, and to show a lack of prejudice to the defendant. See United States v. Young, 535 F.2d 484 (9th Cir. 1976); United States v. Heiden, 508 F.2d 898 (9th Cir. 1974) (Merrill concurring), United States v. Diaz-Segovia, N-78-0307 (D. Md. 1978) (unreported decision applying the Heiden concurrence).

2. The second element essential to support the disposition of evidence prior to trial is a showing of a lack of materiality of the evidence disposed. The Supreme Court in United States v. Augurs, 427 U.S. 97 (1976) provided the standard for determining if destroyed evidence is material. "If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means an omission must be evaluated in the context of the entire record." Id. at 112.

The Fifth Circuit, in United States v. Gordon, 580 F.2d 827 (5th Cir. 1978) ruled that the complete destruction of the seized drug was not crucial, therefore not materially prejudicial, inasmuch as the defendants were charged with conspiracy to manufacture the drug. "In such a case, since no overt act is required, they could have so conspired although they had been entirely mistaken in the belief that the material they had would actually do the job." Id. at 837.

To overcome a possible, indeed, probable defense challenge regarding the improper and prejudicial destruction of material evidence, photographs of the entire lot of seized evidence should be made. In addition, samples of each kind of evidence should be taken prior to its destruction. In doing so, the government preserves the nature of the seized evidence regardless of whether it is considered material.

3. Finally, the third essential element is a showing of a lack of prejudicial effect towards the defendant. While the burden of establishing good faith is on the government, proof of materiality of the destroyed evidence and prejudice is upon the defendant. United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1980). Often, materiality and prejudice are analyzed together. See United States v. Arra, 630 F.2d 836 (1st Cir. 1980); United States v. Walkers, 629 F.2d 669 (10th Cir. 1980). Relevant factors to be considered in examining prejudice are: (1) the centrality of the evidence to the case; (2) its importance in establishing the elements, motive, or intent of the crime or the defendant; (3) the probative value and reliability of the substitute evidence; (4) the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; and (5) the probable effect on the jury from the absence of the evidence. See United States v. Tercero, 640 F.2d 190, 192 (9th Cir. 1980).

If adequate photographs are taken of the entire lot, and sufficient representative samples are also taken, then based on the above factors, the pre-trial disposition of the contraband bulk evidence should not have any substantial prejudicial effect on the defendant.

B. To insure that these three elements are adequately protected in cases where property is to be seized will pose storage or safety difficulties (thus requiring pre-trial disposition), the following steps should be taken:

1. Determine prior to the seizure if a likelihood exists of the seizure of hazardous or bulk evidence that pose serious safety or storage problems for the investigative agency.

2. Where such a likelihood does exist, include in the search warrant an application for a request for authorization for the post-seizure disposition of the property to be seized. Outline briefly the reasons for the requested disposition, the method of disposition contemplated, and the fact that adequate notice will be given to the defendant of the contemplated disposition.

3. An alternative to seeking authorization for destruction in the search warrant application is usage of the All Writs Act, 28 U.S.C. §1651. This alternative can be especially useful in an unexpected seizure of hazardous or bulky evidence. The actual procedure used, however, is discretionary and depends in large part on the specific courts' procedure.

4. Adequate notice of the proposed disposition should be given to the defendant, and include a specified time period in which notice of an intent to object to the disposition. Following the expiration

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of this time period, the agency that is to perform the disposition should be notified to proceed.

5. Insure that prior to the disposition of the seized property, that photographs and samples be taken that are adequately representative of the entire lot.

These procedures do not apply to the destruction of controlled substances. Procedures for the destruction of controlled substances are set out at USAM 9-101.500 (Controlled Dangerous Substances Storage and Destruction Procedures).

9-4.197 Forms

Sample forms have been prepared for use in obtaining post-seizure disposition of property as provided for in USAM 9-4.195, supra, and for use in obtaining the release as provided in USAM 9-4.191, supra.

A. Rider to Search Warrant Application:

I am further advised by DEA chemists that lithium aluminum hydride is an extremely volatile chemical and is very dangerous. DEA chemists recommend destruction of this chemical, as well as any other volatile chemicals, at the scene of any seizure. It is therefore also requested that this warrant contain authorization for destruction of such chemicals believed to be highly volatile and dangerous.

B. Rider to Search Warrant:

You are also further authorized to destroy any lithium aluminum hydride found on the premises, provided that you preserve a sample thereof, take photographs of said chemical, and preserve all containers in which it is contained.

C. Supplemental Search Warrant Affidavit Paragraph Re Destruction of Chemicals:

Because of the foregoing facts, the affiant has probable cause to believe that the name premises contain chemicals which either have been used or will be used in the manufacture of a controlled substance. The affiant knows of his/her own experience and training and through consultation with a forensic chemist in the Drug Enforcement Administration Laboratory in \_\_\_\_\_, that some or all of these chemicals pose a significant safety hazard because of their exposure, flammable,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

poisonous, or otherwise toxic nature. Further, the affiant knows that the handling of clandestine laboratory chemicals without proper supervision and facilities has caused, in the past, explosions, fires, and other events which have resulted in injuries and health problems. Because of these facts, and because DEA District Office presently has no adequate, safe storage facilities, the affiant requests authorization by supplemental order to dispose of these chemicals in proper facilities in the event of their discovery.

UNITED STATES DISTRICT COURT

DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA

Plaintiff,

vs.

CRIMINAL NO.

\_\_\_\_\_  
Defendant

ORDER

This Court having issued a search warrant in the above-captioned case for the seizure of, *inter alia*, chemicals which could be used in the manufacture of a controlled substance; and the government having requested, based on the facts set forth in the affidavit filed in support of the search warrant, authorization for disposal of any such chemicals;

IT IS HEREBY ORDERED that any duly authorized special agent of the Drug Enforcement Administration may, in a proper manner, dispose of any chemicals seized in connection with the execution of the search warrant in the above-captioned case.

\_\_\_\_\_  
UNITED STATES MAGISTRATE

\_\_\_\_\_  
DECEMBER 31, 1984  
Ch. 4, p. 103

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

UNITED STATES ATTORNEY  
DISTRICT OF \_\_\_\_\_

John/Jane Doe, Esquire  
283 Main Street  
Atlanta, Pennsylvania 00000

Re: United States v. (Defendant)  
Cr. No. 77-54 SD  
Seizure of P2P

Dear Mr./Ms. Doe:

On \_\_\_\_\_, 19\_\_, a quantity of phenylacetone (P2P), totaling approximately \_\_\_\_\_ grams, was seized in connection with the above case. This is to advise that on or after \_\_\_\_\_, 19\_\_, we will dispose of the seized P2P. Prior to that time, you may inspect the P2P. Should you wish to inspect or conduct any tests on the P2P, please contact me as soon as possible. For your convenience, I can be reached at the following telephone number \_\_\_\_\_.

Pursuant to routine procedures, experienced chemists from the Drug Enforcement Administration will photograph the containers of P2P and draw samples for evidentiary purposes. Since storage of the P2P seized in this case poses major health and safety problems, most of the P2P will be disposed of as soon as possible, with only a small amount being retained for evidentiary purposes.

If you object to the planned disposal of the P2P, please notify me by \_\_\_\_\_. If you advise me by that date that you have moved for a court order restraining the disposal, we will refrain from disposing of the P2P until the matter is resolved by the court.

Sincerely,

\_\_\_\_\_  
United States Attorney

By:

\_\_\_\_\_  
Assistant U.S. Attorney

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

UNITED STATES ATTORNEY  
DISTRICT OF \_\_\_\_\_

John/Jane Doe, Esquire  
283 Main Street  
Atlanta, Pennsylvania 00000

Re: United States v. (Defendant)  
Cr. No. 77-54 SD  
Marijuana Seizure

Dear Mr./Ms. Doe:

On \_\_\_\_\_, 19 \_\_\_\_, a quantity of marijuana totaling approximately \_\_\_\_\_ pounds (tons), was made in connection with the above case.

This is to advise that on or after \_\_\_\_\_, 19 \_\_\_\_, we will destroy the seized marijuana. Prior to that time, you may inspect the marijuana. If you wish to inspect or conduct any tests on the marijuana, please contact me as soon as possible. For your convenience, I can be reached at the following telephone number \_\_\_\_\_.

Pursuant to routine procedures, experienced agents from the Drug Enforcement Administration will photograph the entire marijuana seizure and draw samples from 10 of the bales chosen at random, for evidentiary purposes. Since storage of the large amount of marijuana involved in this case poses major health and security problems, most of the marijuana will be destroyed as soon as possible, with only a small amount being retained for evidentiary use.

If you object to the planned destruction of the marijuana, please notify me by \_\_\_\_\_. If you advise me by that date that you have moved for a court order restraining the destruction, we will refrain from destroying the contraband until the matter is resolved by the court.

Sincerely,

\_\_\_\_\_  
United States Attorney

By:

\_\_\_\_\_  
Assistant U.S. Attorney

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. RELEASE AND HOLD HARMLESS AGREEMENT:

WHEREAS, on (date) in (location) the (name of seizing agency) seized a (describe property) from (name of person) for (description of violation) in violation of (code title and section), and

WHEREAS, (state reason property is being returned to person signing the release and agreement)

Now, therefore, in consideration of the release of said (describe type of property) and delivery of said (describe type of property) to me, I (name of person signing the release and agreement) do hereby release, acquit and discharge the United States of America, its agents and employees, and do hereby hold them harmless from any claims arising out of the seizure of said (describe type of property) and release of the aforesaid (describe type of property) by the United States Government to me and from any and all claims, causes of action or proceedings which may hereafter or at any time be asserted or brought against the United States by any person, firm, or corporation on account of or by reason of the seizure of said (describe type of property) and the release of the above-described (describe type of property) to me, (name of person signing the release and hold harmless agreement).

Signed this \_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_.

(Notarized)

\_\_\_\_\_  
(Name of person signing release  
and hold harmless agreement)

9-4.198 Summary List of Forfeiture Statutes and Regulations

A. Set forth below is a list of certain provisions of the United States Code allowing forfeitures. While this list is not being presented as an all inclusive list of forfeiture statutes, an attempt has been made to collect those statutes that are more widely used by U.S. Attorneys' offices.

Title 7 U.S.C. §2156	Animal Fighting Ventures
Title 8 U.S.C. §1324	Immigration Violations
Title 15 U.S.C. §1177	Gambling Devices

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Title 16	U.S.C. §470, <u>et seq.</u>	Conservation Forfeiture
Title 16	U.S.C. §668, <u>et seq.</u>	Conservation Forfeiture
Title 16	U.S.C. §971, <u>et seq.</u>	Conservation Forfeiture
Title 17	U.S.C. §506, <u>et seq.</u>	Copyright Forfeiture
Title 17	U.S.C. §603	Copyright Forfeiture
Title 18	U.S.C. §924(d)	Firearms & Ammunition
Title 18	U.S.C. §492	Counterfeit Forfeiture
Title 18	U.S.C. §1955	Gambling Devices
Title 18	U.S.C. §1963	RICO
Title 18	U.S.C. §2314	Contraband Cigarettes
Title 18	U.S.C. §2318	Counterfeit Phonograph Labels
Title 18	U.S.C. §3513	Wire & Oral Communication Devices
Title 18	U.S.C. §3617(a)	Liquor Laws
Title 19	U.S.C. §1607	Customs Forfeiture Procedures
Title 21	U.S.C. §881	Drug Forfeitures
Title 22	U.S.C. §401(b)	War Materials
Title 26	U.S.C. §5610	Distillation Equipment
Title 26	U.S.C. §§5862, 72	Weapons and Explosives
Title 31	U.S.C. §396(b)	Coins
Title 31	U.S.C. §1102	Monetary Instruments
Title 49	U.S.C. §782	Vehicles, Vessels and Aircraft Contraband

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Set forth below are provisions in the Code of Federal Regulations that deal with the procedures to be followed in administrative forfeitures.

Title 9	C.F.R. §162.31, <u>et seq.</u>	Customs Forfeiture Regulations
Title 27	C.F.R. Part 72	ATF Forfeiture Regulations
Title 28	C.F.R. Part 3	Gambling Devices
Title 28	C.F.R. Part 8	Wire or Oral Communication Devices
Title 28	C.F.R. §9.4	Narcotic Forfeitures
Title 28	C.F.R. §9a	Illegal Gambling Property
Title 41	C.F.R. §101-48	GSA Forfeiture Regulations
Title 41	C.F.R. §128-102	DOJ Forfeiture Regulations

9-4.200 MAIL COVERS

9-4.201 Defined

A "mail cover" is an investigative technique by which the postal authorities copy all information on the outside of a sealed envelope or postal card and furnish such information to the authority requesting the mail cover.

9-4.202 Regulations

The Postal Service has published revised regulations on the proper procedure for initiating, processing, placing, and using mail covers. See 39 C.F.R. §233.3. The regulations establish three categories of cases in which mail covers may be requested. In subversive activity cases all requests must be made to the Chief Postal Inspector or one of his/her designees. Requests in fugitive cases may be directed to the Chief Postal Inspector, his/her designees, the Postal Inspector In Charge of the postal district in which the mail cover is to operate, or one of his/her designees. In cases where the purpose of the mail cover is to obtain information regarding the commission or attempted commission of a crime,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

requests should be addressed to the same postal officials as in fugitive cases.

All requests must be in writing except when time is of the essence. In no case will information obtained from a mail cover be released before a written request is received by the proper postal official. In addition, every written request must specify "reasonable grounds" demonstrating the necessity of the mail cover in the particular case.

9-4.203 Mail Cover--Prohibitions and Limitations

No mail cover report may include matter mailed between the mail cover subject and his/her known attorney. No mail cover may remain in force after the subject has been indicted, except when the purpose of the mail cover is to obtain information on further criminal violations or to assist in the location of a fugitive. In cases not involving national security or violation of postal law, mail covers may not last for more than 30 days unless renewed through the same procedures applicable to the original application. In no case, may a mail cover remain in effect for more than 120 days without the personal approval of the Chief Postal Inspector.

9-4.204 Mail Cover--Excludability of Evidence Obtained in Violation of Regulation

At least one court has refused to exclude evidence obtained through the use of a mail cover although it found that the procedures prescribed by the former mail cover regulations were violated. See United States v. Schwartz, 176 F. Supp. 613 (E.D. Pa. 1959) aff'd on other grounds, 283 F.2d 107 (3d Cir. 1960), cert. denied, 364 U.S. 942 (1961). In the Schwartz case, the court viewed the application of the exclusionary rule to evidence obtained in violation of the procedures prescribed by the regulations as an "accommodation of competing values" and held that the regulations were only a statement of departmental policy. The violation of this policy was not sufficiently important to warrant the exclusion of evidence. The reason behind the court's decision may have been that it did not believe that the former mail cover regulations were intended to create a substantive right for the benefit of the subjects of mail covers. See 14 Rutgers L. Rev. 450 (1960). For other cases holding that departure from internal governmental regulations gives a defendant no right to suppress, see Beverly v. United States, 468 F.2d 732, 746-747 (5th Cir. 1974); In re Tierney, 465 F.2d 806, 813 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973); United States v. Kline, 366 F. Supp. 994, 997 (D.D.C. 1973).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Defense counsel are likely to contend that the present mail cover regulations were written with the purpose of creating and protecting substantive rights of subjects of mail covers. See Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 535 (1959); Yellin v. United States, 374 U.S. 109 (1963). To support this contention they will cite the language in which the new regulations are written and the background of the Congressional inquiry in response to which they were framed. The result of such a contention is to argue that a violation of procedures prescribed by the new regulations has the legal effect of applying the exclusionary rule to evidence obtained through the use of mail covers.

9-4.205 Insufficient Grounds for Mail Cover--Excludability of Evidence Obtained

Even if the procedures established by the regulations are followed, defense counsel may raise the objection that an erroneous decision was made as to the existence of the "reasonable grounds" required before a mail cover may be ordered. Unlike the question whether the procedures established by the regulations were followed, the manner in which the Postal Service interprets the "reasonable grounds" standard is a question of policy peculiarly within its own administrative competence. It is our opinion, therefore, that courts generally will be unwilling to reverse the Postal Service's determination unless there appears to be a clear abuse of administrative discretion.

9-4.206 Objections to Mail Cover Evidence--Notice to Division

When preparing a case for trial in which evidence obtained through the use of a mail cover is to be used, the possibility that defense counsel may attack the mail cover should be kept in mind. All attacks on mail cover evidence should be brought to the attention of the appropriate division of the Department of Justice. When the Criminal Division is the appropriate division, the Fraud Section should be contacted at FTS 724-7038.

9-4.207 Inquiries or Problems Concerning Mail Covers--Whom to Contact

Any inquiries or problems concerning mail covers should be directed to the Fraud Section, at FTS 724-7038.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.300 POLYGRAPHS

9-4.310 In General

A polygraph or lie detector examination is a procedure used to determine whether a subject shows the physiological and psychological reactions which are believed to accompany intentional attempts to deceive. Despite the appeal of a mechanical technique to measure a person's veracity, the polygraph has met with rare judicial acceptance and limited use as a federal investigative tool. In light of present scientific evidence the Department of Justice agrees with the conclusion of the Committee on Governmental Operations of the House of Representatives which held after extensive hearings:

There is no "lie detector." The polygraph machine is not a "lie detector," nor does the operator who interprets the graphs detect "lies." The machine records physical responses which may or may not be connected with an emotional reaction--and that reaction may or may not be related to guilt or innocence. Many, many physical and psychological factors make it possible for an individual to "beat" the polygraph without detection by the machine or its operator.

H.R. Rep. No. 198, 89th Cong., 1st Sess. 13 (1965). Following further hearings and study the same conclusions were reached in 1976. The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings on H.R. 795 Before the House Comm. on Government Operations, 94th Cong. 2d Sess. (1976). The Department, unlike the Government Operations Committee, supports the limited use of polygraphs for investigatory purposes.

9-4.320 Technique

The basic function of a lie detection device is to record signs of internal stress which a subject is thought to undergo when falsely responding to questions. A polygraph examination begins with a present interview and study of the witness. Even the best trained and most experienced polygraphers must have a thorough understanding of the factual context of the activities under investigation in order to prepare a series of simple unambiguous questions. The pre-test interview allows the examiner to secure the confidence and cooperation of the subject, and to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

evaluate the subject's idiosyncracies which may affect the examination results. This procedure promotes the subject's belief in the infallibility of the machine and could augment his/her physical reactions by increasing his/her fear and anxiety over detection.

A polygraph examination can be administered either on location or at a specific site. The locale must have a minimum number of distractions. Today's machines generally consist of: (1) a cardiograph, monitoring pulse and changes in blood pressure; (2) a pneumograph, recording respiration rate by measuring chest expansions and contractions; (3) a galvanometer, displaying the skin's resistance to an electric current (this is normally attached to the palmar surface of the subject's hand); and sometimes include a device measuring gross muscular movements. All responses are recorded in graphic form while the subject is undergoing questioning. Examiners employ different types of test questions to measure the subject's reactions. The most popular test utilizes true and false control questions so that a standard can be created with which to compare the subjects' recorded reactions to essential questions. Examinations cannot be conducted without the voluntary cooperation of the subject.

Following the examination the results are evaluated by the polygraphist who administered the examination to determine whether the illustrated responses indicated deception. The amount of expertise the examiner possesses is extremely important in assessing the results of the examination. The examiner must not only interpret the tangible results of the test, like any forensic scientist would, but must also evaluate his/her own activities and procedures to uncover any factors which may have contributed to inaccurate test results. These factors are discussed in USAM 9-4.340, infra.

9-4.330 Introduction at Trial

Neither the United States Code nor the Federal Rules of Evidence have any specific provision concerning the admissibility of polygraph examination results. In the absence of a Supreme Court decision regarding their use, federal courts have almost uniformly prohibited the introduction of polygraph evidence. These cases, as well as numerous commentaries, present diverse rationale supporting the continued opposition to legal acceptance of lie detection devices.

In Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the first reported federal case on polygraph admissibility, the court stated the appropriate standard for the judicial determination of whether to use

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

newly developed scientific and experimental evidence should be whether the scientific principle or discovery is "sufficiently established to have gained general acceptance in the particular field in which it belongs." The polygraph was found not to possess such standing and scientific recognition among physiological and psychological authorities. The Frye standard is still often applied in discussions of the polygraph and other new scientific techniques. See, e.g., United States v. Skeens, 494 F.2d 1050 (D.C. Cir. 1974) (polygraphs); United States v. Franks, 511 F.2d 25, 33 (6th Cir.), cert. denied, 422 U.S. 1042 (1975) (spectrographic analysis); United States v. Stifel, 433 F.2d 431, 438 (6th Cir.), cert. denied, 401 U.S. 994 (1970) (neutron activation analysis); United States v. Tranowski, 659 F.2d 750, 755-756 (7th Cir. 1981) (photograph dating analysis); United States v. Hendershot, 614 F.2d 648, 654 (9th Cir. 1980) (shoe print lifting technique); Lindsey v. United States, 237 F.2d 893, 896 (9th Cir. 1950) (truth serum or sodium pentothal); United States v. Bruno, 333 F. Supp. 570, 574 (E.D. Pa. 1971) (ink identification).

In United States v. Alexander, 526 F.2d 161, 163 (8th Cir. 1975), the court indicated that reliability is one of the most important factors in determining "general acceptance." Courts such as Alexander which have considered admitting results from polygraph tests have noted their willingness to accept proven scientific techniques, but have rejected polygraphs following their hearing of expert testimony and review of the extensive body of articles and text on polygraphs. Though polygraph methodology and examiner training have substantially improved since the primitive systolic blood test employed in Frye, the polygraph has yet to attain sufficient scientific acceptance among experts in polygraphy, psychiatry, physiology, psychophysiology, neurophysiology and other related disciplines to justify admission. See United States v. Alexander, supra, at 164. Following three days of testimony, the trial judge in United States v. Urquidez, 356 F. Supp. 1363 (C.D. Cal. 1973), found the most obvious conclusion to be made about polygraphs to be that there are many variables other than the ultimate test of truth or falsity influencing results. He noted the numerous disagreements among "experts" about proper test administration and how results should be interpreted.

The "general acceptance" standard is often utilized in conjunction with considerations of the relevance, prejudice and burden on judicial time of polygraph evidence. These considerations rather than a "general acceptance" standard concerning evidential admission have been employed in Rules 401-403 of the Federal Rules of Evidence. The concepts present in the Rules strengthen the arguments against admission. See generally Abbell, Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials, 15 Am. Crim. L. Rev. 19, 54-59 (1977).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The eight Courts of Appeals which have considered the admission of unstipulated polygraph examinations have uniformly held polygraph results inadmissible. See United States v. Bando, 244 F.2d 833, 841 (2d Cir.), cert. denied, 355 U.S. 844 (1957) (dicta); United States v. Clark, 598 F.2d 994, 995 (5th Cir. 1979); order granting rehearing en banc vacated and panel opinion reinstated, 622 F.2d 917 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1128 (1981); United States v. Masri, 547 F.2d 932 (5th Cir. 1977); United States v. Cochran, 499 F.2d 380, 393 (5th Cir. 1974), cert. denied, 419 U.S. 1124 (1975); United States v. Gloria, 494 F.2d 477, 483 (5th Cir. 1974), cert. denied, 419 U.S. 995 (1975); United States v. Pacheco, 489 F.2d 554, 566 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); United States v. Frogge, 476 F.2d 969, 970 (5th Cir.), cert. denied, 414 U.S. 849 (1973); Poole v. Perini, 659 F.2d 730 (6th Cir. 1981), cert. denied, 455 U.S. 910 (1982); United States v. Fife, 573 F.2d 369, 373 (6th Cir. 1976), cert. denied, 430 U.S. 933 (1977); United States v. Mayes, 512 F.2d 637, 648 n.6 (6th Cir.), cert. denied, 422 U.S. 1008 (1975); United States v. Noel, 490 F.2d 89, 90 (6th Cir. 1974); United States v. Tremont, 351 F.2d 144, 146 (6th Cir. 1965), cert. denied, 383 U.S. 944 (1966); United States v. Black, 684 F.2d 481 (7th Cir.), cert. denied, 459 U.S. 1043 (1982); United States v. Rumell, 642 F.2d 213, 215 (7th Cir. 1981); United States v. Sweet, 548 F.2d 198 (7th Cir. 1977); United States v. Infelice, 506 F.2d 1358, 1365 (7th Cir. 1974), cert. denied, 419 U.S. 1107 (1975); United States v. Penick, 496 F.2d 1105, 1109-10 (7th Cir.), cert. denied, 419 U.S. 897 (1974); United States v. Chastain, 435 F.2d 686, 687 (7th Cir. 1970); Field v. Wyrick, 682 F.2d 154, 159 (8th Cir. 1982), rev'd. per curiam on other grounds, 459 U.S. 42 (1982); United States v. Gordon, 688 F.2d 42, 44-45 (8th Cir. 1982); United States v. Earley, 657 F.2d 195, 198 (8th Cir. 1981); United States v. Smith, 552 F.2d 257 (8th Cir. 1977); United States v. Oliver, 525 F.2d 731, 737 (8th Cir. 1975), cert. denied, 424 U.S. 973 (1976); United States v. Alexander, 526 F.2d 161 (8th Cir. 1975); United States v. Sockel, 478 F.2d 1134, 1135-36 (8th Cir. 1973); United States v. Eden, 659 F.2d 1376, 1382 (9th Cir. 1981), cert. denied, 455 U.S. 949 (1982); United States v. McIntyre, 582 F.2d 1221, 1226 (9th Cir. 1978); United States v. Benveniste, 564 F.2d 335 (9th Cir. 1977); United States v. Flores, 540 F.2d 432, 436-37 (9th Cir. 1976); United States v. Marshall, 526 F.2d 1329, 1360 (9th Cir. 1975), cert. denied, 426 U.S. 923 (1976); United States v. Demma, 523 F.2d 981, 987 (9th Cir. 1975) (en banc); United States v. Watts, 502 F.2d 726, 728 (9th Cir. 1974); United States v. Bagsby, 489 F.2d 725, 726-27 (9th Cir. 1973); United States v. Alvarez, 172 F.2d 111, 113 (9th Cir.) cert. denied, 412 U.S. 921 (1973); United States v. Jenkins, 470 F.2d 1061, 1064 (9th Cir. 1972), cert. denied, 411 U.S. 920 (1973); United States v. DeBetham, 470 F.2d 1367, 1368 (9th Cir. 1972), cert. denied, 412 U.S. 907 (1973); United States v. Salazar-Gaeta, 447 F.2d 468, 469 (9th Cir. 1971); United States v. Sadrzadeh, 440 F.2d

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

389, 390 (9th Cir.) cert. denied, 404 U.S. 850 (1971); United States v. Hunter, 672 F.2d 815, 817 (10th Cir. 1982); United States v. Wainwright, 413 F.2d 796, 803 (10th Cir. 1969), cert. denied, 396 U.S. 1009 (1970); United States v. Russo, 527 F.2d 1051, 1058-59 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976); United States v. Skeens, 494 F.2d 1050, 1053 (D.C. Cir. 1974); United States v. Zeiger, 475 F.2d 1280 (D.C. Cir. 1972); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

Some circuit courts while affirming district court denials of admission have acknowledged that there may be certain situations where admission is acceptable, and that admission is a matter within the sound discretion of the trial judge. See, e.g., United States v. Winter, 633 F.2d 1120, 1150 (1st Cir. 1981), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S. Ct. 1249, 1250 (1983) (issue of admissibility not addressed); United States v. Webster, 639 F.2d 174, 186 (4th Cir. 1981), modified on other grounds and aff'd, 669 F.2d 185 (4th Cir.), cert. denied, 454 U.S. 857 (1981); United States v. Rumell, 642 F.2d 213, 215 (7th Cir. 1981); United States v. Oliver, 525 F.2d 731, 736 (8th Cir. 1975), cert. denied, 424 U.S. 973 (1976); United States v. Eden, 659 F.2d 1376, 1382 (9th Cir. 1981), cert. denied, 455 U.S. 949 (1982). Courts willing to permit district court discretion require that proponents of polygraph evidence have the burden of laying a proper foundation for showing the underlying scientific basis and reliability of expert testimony. See United States v. DeBetham, 470 F.2d 1367 (9th Cir. 1972), cert. denied 412 U.S. 907 (1973). With the polygraph's misleading reputation as a "truthteller," the widespread debate concerning its reliability, and the critical requirement of competent examiner, and judicial problems of self-incrimination and hearsay, a trial court will rarely abuse its discretion by refusing to admit the evidence, even for limited purposes and under limited conditions. See United States v. Marshall, 526 F.2d 1349, 1360 (9th Cir. 1975), cert. denied, 426 U.S. 923 (1976).

Though the overwhelming majority of courts have rejected polygraph evidence in criminal cases, a number of state courts and a few federal district court decisions support a general policy of admission. See, e.g., Jackson v. Garrison, 495 F. Supp. 9, 10-11 (W.D. N.C. 1979), rev'd, 677 F.2d 371 (4th Cir. 1981); United States v. Zeiger, 350 F. Supp. 685, 689 (D.D.C.), rev'd, 475 F.2d 1280 (D.C. Cir. 1972) (per curiam); United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (admitted on condition court appoint examiner; decision mooted when examination proved inconclusive); United States v. DeBetham, 348 F. Supp. 1377 (S.C. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972), cert. denied, 412 U.S. 907 (1973) (viewed tests positively but refused admission on basis of precedents); States v. Sims, 369 N.E. 2d 24 (Ohio 1977); Commonwealth v. A Juvenile,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

313 N.E. 2d 120 (Mass. 1974); State v. Stanislawski, 216 N.W. 2d 8 (Wisc. 1976), overruled, State v. Dean, 307 N.W.2d 628, 653 (Wisc. 1981).

Other courts have allowed polygraph evidence in special situations. If a polygraph examination conducted on a key government witness indicates the witness is lying, then under the Brady doctrine, this may be disclosed to the jury as exculpatory evidence useful to impeach the witness' credibility. See United States v. Hart, 344 F. Supp. 522 (E.D. N.Y. 1971). But see Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975), cert. denied, 427 U.S. 911 (1976). Testimony of a government witness concerning a statement made to the defendant with respect to the results of his/her polygraph examination has been allowed where the defendant confessed after the exam and the voluntariness of the confession was at issue. See Tyler v. United States, 193 F.2d 24, 31 (D.C. Cir.), cert. denied, 343 U.S. 908 (1952). Cf. United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977) (failure of defense counsel to object to improper references to defendant's refusal to take lie detector test not ineffective assistance of counsel since plausible strategy was to show lack of voluntariness of confession). At least one federal court has permitted the introduction of polygraph results in a criminal case upon stipulation of the defense and prosecution. See United States v. Oliver, 525 F.2d 731, 736-738 (8th Cir. 1975), cert. denied, 424 U.S. 973 (1976). More than twenty states now permit admission of polygraph evidence upon stipulation of the parties. See Israel v. McMorris, 455 U.S. 967, 970 (1982) (Rehnquist, J., dissenting from denial of writ of certiorari). Polygraph results have also been admitted experimentally towards the weakest count of a four count indictment, on which the court subsequently found the defendant innocent on the basis of the results. See United States v. Penick, 496 F.2d 1105, 1109 (7th Cir.), cert. denied, 419 U.S. 897 (1974).

9-4.340 Opposition to Admission

Though certain physiological reactions such as fast heart beat, muscle contraction and sweaty palms are believed to be associated with deception attempts, by themselves, they do not indicate deceit. Lie detection results from a comparison of the answers to pertinent test questions with the responses to control questions. Given the present theoretical and practical deficiencies of polygraphs, the courts have been justified in excluding polygraph evidence from the jury's consideration.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.341 Accuracy

Arguments against admissibility are based primarily on the accuracy of the test itself since numerous variables other than the ultimate questions of truth or falsity influence the results of a polygraph. See United States v. Urgidez, 356 F. Supp. 1363, 1365 (C.D. Cal. 1973). Estimates of reliability vary substantially depending on the competency of the examiner and methodology of the exam. John Reid, one of the foremost polygraph authorities, estimates a 9% error rate under optimal conditions. See United States v. Zeiger, 350 F. Supp. 685, 689 (D.D.C.), rev'd., 475 F.2d 1280 (1972). In United States v. Wilson, 361 F. Supp. 510, 512 (D.Md. 1973), the court felt that the studies conducted by private and governmental organizations assess the validity and reliability at 70-95%. See also United States v. DeBethan, 348 F. Supp. 1377, 1385 (S.D. Cal.), aff'd per curiam, 470 F.2d 1367 (1972); (accuracy range 80-91%); United States v. Alexander, 526 F.2d 161, 165, n.11 (8th Cir. 1975) (citing commentators estimating error rate more than 25%); State v. Stanislawski, 216 N.W. 2d 8, 12, n.12 (Wisc. 1974) (citing numerous authorities). Wilner, Polygraphy: Short Circuit to Truth?, 29 U. Fla. L. Rev. 286, 290-292 (1977). It is understandably difficult to collect accuracy statistics for actual criminal suspects if no subsequent confession took place.

9-4.342 Examination Variables

The recorded differences and purported indicia of deception may be caused by numerous variables. These unassessable factors are crucial to an accurate polygraph examination. Among the proven variables are: (1) physical characteristics of the subject such as fatigue, obesity, heart disease, respiratory difficulties and abnormal blood pressure; (2) temporary or permanent mental disorders such as delusions, feeble-mindedness or insanity which result in an inability to affirmatively participate or to be unable to differentiate between right and wrong; (3) the undetected use of alcohol or drugs; (4) distractions in the examination setting; such as extraneous noises, temperature fluctuations, or unusual objects; (5) the ability of the subject to mask legitimate test question reactions by faking responses to his/her own lying; (7) a guilty party's subjective belief in his/her own innocence; (8) excessive previous interrogation; (9) prior dry run examinations leading to belief that one can beat the machine; (10) the complexity of the matters being investigated; (11) the wording of the relevant questions; (12) the extent of motivation and fear by the subject that the polygraph will detect his/her lying; and even (13) the nervousness of an innocent subject induced by fear or a guilty complex involving a different offense.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.343 Role of Examiner

Courts and commentators have indicated numerous unique aspects of the polygraph which differentiate it from other more generally acceptable scientific procedures. The foremost weakness of polygraph methodology is its inherent reliance on the procedures and subjective evaluations employed by the polygraphist. Polygraphy albeit based on scientific theory remains an art of unusual responsibility placed on examiner. See, e.g., United States v. Alexander, *supra*, at 167; United States v. Wilson, *supra*, at 512. Even the strongest proponents have indicated that only about 20% of all examiners are able to handle the variety of problems which arise. See Inbau and Reid, Lie Detector Technique: A Reliable and Valuable Investigative Aid, 50 A.B.A.J. 407, 473 (1964).

A number of courts have heard testimony in which qualified experts differed on interpreting previously recorded polygraph results. See, e.g., United States v. Urgudez, 356 F. Supp. 1363, 1364 (C.D. Cal. 1973). The individual examiner must (1) determine the threshold level indicating deception, (2) related specific questions to significant pen movement, (3) correlate the various physiological measurement readings into one result, and (4) individualize his/her examination and interpretations according to the characteristics of the individual subject. See generally Wilner, Polygraphy: Short Circuit to Truth?, 29 U. Fla. L. Rev. 286, 299-303 (1977). Additionally, an examiner during the course of the examination, must study the subject for signs of evasiveness, uncooperation, drug use, or numerous other methods employed by subjects, with some success, to trick the machine. An examiner must also formulate meaningful unambiguous substantive and control questions. Often these difficulties are compounded by the necessity to construct questions and review the subject without sufficient preparation or information. This is especially true with defense administered exams given without access to or knowledge of the government's case.

9-4.344 Other Reasons for Exclusion

Stringent standards are necessary because triers of fact place excessive weight on results of such testing. McCormick, Law of Evidence §207 at 507 (2nd ed. 1972). There is "an almost impenetrable aura of scientific infallibility surrounding the polygraph machine . . . in the minds of the jury." See Commonwealth v. A Juvenile, 313 N.E. 2d 120, 135 (1974) (dissenting opinion). Courts have expressed the fear that juries will give undue weight to polygraph results and treat them as determinate of the ultimate issue at trial. See, e.g., United States v. Wilson, 361

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

F. Supp. 510, 513, (D. Md. 1973). Undue reliance by the jury on the polygraph as an accurate determiner of the truth will transfer the juries' "historical function" as a citizen fact finder to a machine. In any case, it is certain that the introduction of polygraph results and the argument of the weight to be accorded such seemingly important evidence will distract the jury from the other evidence and testimony presented and greatly lengthen trial proceedings as opposing parties attempt to lessen the impact of prejudicial results by attacking the conduct of the test and the subjective evaluations of the examiner. See United States v. Uriquidez, 356 F. Supp. 1363, 1367 (C.D. Cal. 1973). Extensive usage of the polygraph may also lead a jury to believe that a defendant or witness who did not take a polygraph exam is afraid of the results. See, Note, Problems Remaining For the "Generally Accepted" Polygraph, 53 Boston Univ. L. Rev. 375, 396-398 (1973).

In addition to previously cited cases and materials for further discussion of problems associated with the introduction of polygraph evidence, see Timm, The Efficacy of the Psychological Stress Evaluator in Detecting Deception, 11 J. Police Sci. & Ad. 62-28 (1983); Kleinmuntz & Szucko, On the Fallibility of Lie Detectors, 17 Law & Soc'y Rev. 85 (1982); Annot, Modern Status of Rule Relating to Admission of Results of Lie Detector (Polygraph) Test in Federal Criminal Trials, 43 A.L.R. Fed. 68 (1979); Comment, The Truth About the Lie Detector in Federal Court, 51 Temple L.Q. 69 (1978); Reid & Inbau, Truth and Deception (2d ed. 1977); Abbell, Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials, 15 Am. Cr. L. Rev. 29 (1977); Tarlow, Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility in a Perjury-Plagued System, 26 Hastings L. J. 917 (1975); Note, United States v. Ridling: The Polygraph Breaks the "Twilight Zone", 23 Catholic U. L. Rev. 101 (1975); Note, The Emergence of the Polygraph at Trial, 73 Colum. L. Rev. 1120 (1973); J. Reid and F. Inbau, Truth and Deception: The Polygraph, pp. 168-219 (1966); Skolnick, Scientific Theory and Scientific Evidence: An Analysis of Lie Detection, 70 Yale L. J. 694 (1961).

9-4.350 Department Policy Towards Polygraph Use

Department policy opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Government attorneys should refrain from seeking the admission of favorable examinations which may have been conducted during the investigatory stage. The reasons supporting the government position are contained in USAM 9-4.340, supra. In respect to its use as an investigatory tool, it is recognized that in certain situations, such as to test the reliability of an informer, a polygraph

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use should be effectuated by utilizing the trained examiners of the federal investigative agencies, primarily the FBI, in accordance with internal procedures formulated by the agencies. When utilized it should be clear to the possible defendant or witness the limited purpose for which results are used and that the test results will be only one factor in making a prosecutive decision. An examination should be preceded by Miranda warnings to a subject in custody. Subsequent admissions or confessions will then be evaluated according to traditional voluntariness criteria. See Field v. Wyrick, 706 F.2d 879 (8th Cir. 1983), on remand from Supreme Court, Field v. Wyrick, 459 U.S. 42 (1982), rev'd per curiam, Field v. Wyrick, 682 F.2d 154 (8th Cir. 1982); Keiper v. Cupp, 509 F.2d 238 (9th Cir. 1975).

9-4.400 OUT-OF-COURT IDENTIFICATION PROCEDURES

See generally 71 Geo. L. J. 417-123 (Dec. 1982); Cissel, Federal Criminal Trials, §§3-1d(2) and 3-2a (1983).

9-4.410 Lineups and Showups

9-4.411 Power to Order Lineup; Right to Counsel

It is within the power of a federal grand jury to order a person suspected of a crime to participate in a lineup. The lineup in such a case will be a separate investigative procedure; it will not be physically incorporated into the grand jury proceedings. In re Melvin, 550 F.2d 674 (1st Cir. 1977).

A lineup is a well-accepted investigatory procedure carried out by law enforcement officers having a suspect in custody. It is considered preferable to an individual confrontation for identification purposes. See United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967); In re Melvin, 550 F.2d 647 (1st Cir. 1977).

There is a Sixth Amendment right to counsel at all "critical confrontations." This right extends to all post-indictment lineups and showups. It requires the government to notify both counsel and the accused as to the proposed lineup or showup, and the presence of counsel is necessary in the absence of an "intelligent waiver." See United States

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

v. Wade, supra. The presence of substitute counsel may not satisfy the Sixth Amendment right where regular counsel is not available. United States v. Smallwood, 473 F.2d 98 (D.C. Cir. 1972). But there is no right to counsel before "the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information or arraignment." See Kirby v. Illinois, 406 U.S. 682, 689 (1972). The court in In re Melvin, supra, noted that the government "wisely" intended to permit counsel to be present at the lineup ordered by the grand jury but refused to decide whether a right to counsel existed.

Where there has been a lineup or showup in which the right to counsel has been improperly denied, all testimony relating to the out-of-court identification is inadmissible. See Gilbert v. California, supra. A subsequent in-court identification will also be inadmissible unless the government can establish "by clear convincing evidence that the in-court identifications were based upon observations of the suspect other than at the lineup identification." In determining whether there is an independent source for the in-court identification, the court will consider the witness' prior opportunity to observe the criminal act, any discrepancy between a pre-lineup description and the defendant's actual appearance, any identification by picture of the defendant prior to the lineup, the failure to identify the defendant on a prior occasion, the lapse of time between the criminal act and the lineup and the circumstances surrounding the conduct of the lineup. See United States v. Wade, supra.

When a defendant challenges a lineup or showup on Sixth Amendment grounds, the court should hold a hearing in which it decides the issues of both right to counsel and independent source. See United States v. Holiday, 482 F.2d 729 (D.C. Cir. 1973). Such a procedure will avoid the need for remand if, on appeal, the lineup or showup is found to have violated the defendant's Sixth Amendment right.

9-4. 412 Self-Incrimination

Neither the lineup itself, nor requiring the accused to utter words for voice identification purposes during the lineup, violate the Fifth Amendment privilege against self-incrimination. See United States v. Wade, supra. The government may introduce into evidence the fact that the suspect refused to speak certain words during a lineup after being directed to do so, see Higgins v. Wainwright, 424 F.2d 177 (6th Cir. 1970), and may comment upon the suspect intentionally changing his/her

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

appearance prior to a lineup as some evidence of guilt, see United States v. Jackson, 476 F.2d 249 (7th Cir. 1973).

9-4.413 Due Process

Testimony concerning a lineup or showup identification is inadmissible if, considering the "totality of the circumstances," the identification procedure was so unnecessarily suggestive and conducive to mistaken identification that there was a denial of due process of law. See Stovall v. Denno, 388 U.S. 293 (1967). The procedure is suggestive when the identifying witness knows all the other participants in the lineup except the suspect, when the others are grossly dissimilar in appearance from the suspect, when only the suspect is required to wear the distinctive clothing allegedly worn by the culprit, when the police tell the witness that they have caught the suspect after which the suspect is viewed alone, when the suspect is pointed out before or during the procedure, when the participants are asked to try on clothing which only fits the suspect and when an identification is made in the presence of other identifying witnesses.

Where a lineup or showup is conducted in violation of the defendant's right to due process, an in-court identification of the defendant will not be permitted unless the government can establish an independent source. The criterion which is used to establish an independent source where a lineup or showup has been conducted in violation of the defendant's right to counsel, is also applicable here. (See USAM 9-4.311, supra.) Likewise, where there is a challenge on due process ground, the court should determine the issues of both due process and independent source at the same hearing.

9-4.414 Admissibility of Lineup and Showup Identifications

Lineup and showup identifications are admissible as non-hearsay statements under Rule 801(d)(1)(C) of the Federal Rules of Evidence.

9-4.420 Photographic Identification

9-4.421 Right to Counsel

The Supreme Court has differentiated between pre-trial lineups and pre-trial photographic identifications. Unlike post-indictment pre-trial

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

lineups, pre-trial photographic identifications, whether before or after indictment, have been held not to be a "critical stage" in the criminal proceedings requiring right to counsel. See United States v. Ash, 413 U.S. 300, 321 (1972). See also Hill v. Wyrick, 570 F.2d 748 (8th Cir.), cert. denied, 436 U.S. 921 (1978); Anderson v. Maggio, 555 F.2d 447, 450 n.5 (5th Cir. 1977).

9-4.422 Due Process

Testimony concerning a photographic identification is inadmissible if, considering the "totality of the circumstances," the identification procedure was to impermissibly suggestive as to give rise to a very substantial likelihood of misidentification. See Simmons v. United States, 390 U.S. 384 (1968). The danger of misidentification is increased where the witness views only one photograph, where the same person keeps reappearing in each of the photographic displays and when the police indicate that they have other evidence against one of the suspects shown in the display.

Where a photographic identification is conducted in violation of the defendant's right to due process, an in-court identification will not be permitted unless the government can establish an independent source. The criterion which is used to establish an independent source where a lineup or showup has been conducted in violation of the defendant's right to counsel, is also applicable here. Likewise, where there is a challenge on due process grounds, the court should determine the issues of due process and independent source at the same hearing.

9-4.430 Physical Evidence

(Blood sample, hair, hand sweat, etc.). See In Re Grand Jury Proceedings (Mills), 686 F.2d 135 (3d Cir.), (facial and scalp hair samples).

9-4.431 Right to Counsel

Obtaining physical evidence is not a critical stage of a criminal proceeding in which there exists a Sixth Amendment right to counsel.

Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the government's case at trial through the ordinary

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

processes of cross-examination of the government's expert witnesses and the presentation of the evidence of his own experts . . . they are not critical stages since there is a minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.

See United States v. Wade, *supra* at 227. United States v. Sheard, 473 F.2d 139 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 943 (1973) (administration of a benzidine test).

9-4.432 Self-Incrimination

The privilege against self-incrimination "offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." See Schmerber v. California, 384 U.S. 757, 764 (1966). United States v. Bridges, 499 F.2d 179 (7th Cir. 1974) (swabbing of defendant's hands to discover dynamite components.)

However, in some cases it becomes difficult to distinguish between testimonial and physical evidence. For example, a lie detector test, which measures changes in bodily function, may actually be directed towards eliciting responses which are essentially testimonial. "To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment." See Schmerber v. California, *supra*, at 746.

9-4.433 Search and Seizure

"Obtaining physical evidence from a person involves a potential Fourth Amendment violation at two different levels--the 'seizure' of the 'person' necessary to bring him into contact with government agents, and the subsequent search for a seizure of the evidence." See United States v. Dionisio, 410 U.S. 1, 8 (1973). Schmerber v. California, *supra*. Once there has been a lawful arrest, a subsequent seizure for physical evidence must comply with the requirements of the Fourth Amendment. Obtaining a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

blood sample may be justified as a search incident to a lawful arrest in order to prevent the destruction of evidence. See Schmerber v. California, supra. This same Fourth Amendment justification may be used when a person's hands are swabbed in order to discover the presence of certain chemicals, United States v. Bridges, supra, or where the police scrape dried blood from under a person's fingernails, see Cupp v. Murphy, 412 U.S. 291 (1973). (In Cupp v. Murphy, supra, the search was justified even though an arrest had not yet taken place. The Court noted that there was probable cause for arrest and that because the defendant knew he was under suspicion there existed the possibility that he would try to destroy the evidence.) The search must be carried out in a reasonable manner. In United States v. Owens, 475 F.2d 759 (5th Cir. 1973), the court upheld the use of a stomach pump where the defendant attempted to escape from custody and swallowed a package of heroin. He became unconscious, whereupon he was taken to a hospital for the stomach pump.

Where a search involves a very slight intrusion upon the person, such as where a few strands of hair are clipped, the court will look to see if the search was conducted "reasonable". Such a search will be upheld regardless of the fact that there are no exigent circumstances, and that a warrant has not been obtained. See United States v. D'Amico, 408 F.2d 331 (2d Cir. 1969).

9-4.440 Fingerprinting

9-4.441 Right to Counsel

The taking of fingerprints is not a critical stage at which the accused has a right to the presence of counsel. See United States v. Wade, supra. United States v. Sanders, 447 F.2d 112 (5th Cir. 1973), cert. denied, 414 U.S. 870 (1973).

9-4.442 Self-Incrimination

The taking of fingerprints does not fall within the category of either communication or testimony so as to be protected by the Fifth Amendment privilege. See Pearson v. United States, 389 F.2d 684 (5th Cir. 1968).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.443 Search and Seizure

"Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." See Davis v. Mississippi, 394 U.S. 721, 727 (1969). So long as the initial seizure of the person is reasonable, as in a lawful arrest, a subsequent fingerprint is permissible. It is also possible that the requirements of the Fourth Amendment could be met through "narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause for arrest." See Davis v. Mississippi, supra at 728.

9-4.450 Handwriting Exemplars

9-4.451 Right to Counsel

The taking of handwriting exemplars is not a critical stage of a criminal proceeding requiring the assistance of counsel. See Gilbert v. California, supra.

9-4.452 Self-Incrimination

A handwriting exemplar, in contrast to the content of what is written, is an identifying physical characteristic which falls outside the protection of the Fifth Amendment. It is not testimonial or communicative in nature. See Gilbert v. California, supra. The government may introduce into evidence the fact that the suspect refused to provide an exemplar after being directed to do so by a court, United States v. Nix, 465 F.2d 90 (5th Cir. 1972), cert. denied, 409 U.S. 1013 (1972), or that he/she intentionally distorted his/her handwriting when giving the exemplar, United States v. Stenbridge, 477 F.2d 874 (5th Cir. 1973).

9-4.453 Search and Seizure

Obtaining a handwriting exemplar is not a "seizure" within the meaning of the Fourth Amendment. A person has no expectation of privacy in his/her handwriting because it is a physical characteristic which is constantly exposed to the public. So long as the initial seizure of the person is reasonable, compelling production of a handwriting exemplar is permissible. See United States v. Mara 410 U.S. 19 (1973).

9-4.460 Voice Exemplars

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.461 Self-Incrimination

Compelling a person to give a voice exemplar violates no privilege protected by the Fifth Amendment. The exemplar is used for identification purposes, and is not testimonial or communicative in nature. See United v. Dionisio, supra.

9-4.462 Search and Seizure

Once there has been a lawful "seizure" of the "person", the taking of a voice exemplar involves no Fourth Amendment consideration. A person has no expectation of privacy in his/her voice because it is a physical characteristic which is constantly exposed to the public. See United States v. Dionisio, supra.

9-4.463 Admissibility of Spectrograms (Voice Prints)

A spectrograph transforms the energy used in the production of speech into a visual graph of acoustical energy. The spectrogram of an unidentified speaker is compared with that of an identified speaker in order to find similar patterns. This method of voice identification has been accepted by only a small number of courts, as opposed to the aural method of voice identification which is widely accepted.

As of this date, there have been three Court of Appeals decisions of the admissibility of spectrograms. In United States v. Addison, 498 F.2d 741 (D.C. Cir. 1974), the court ruled that the spectrogram was inadmissible because its use is not generally accepted as reliable by the scientific community. In Frye v. United States, 293 F.1013 (D.C. Cir. 1923), the court held that the district court improperly focused on the spectrogram's reliability, rather than on its general acceptance by the scientific community. However, in United States v. Franks, 511 F.2d 25 (6th Cir. 1975), and United States v. Baller, 519 F.2d 463 (4th Cir. 1975) cert. denied, 423 U.S. 1019 (1975), the courts admitted the use of spectrograms, permitting those who oppose the admissibility of the results of the scientific test to direct their criticism towards the weight of such evidence.

9-4.500 INTERNATIONAL CONTACTS AND JUDICIAL ASSISTANCE

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.510 Judicial Assistance

Judicial assistance is the performance of a judicial act, such as the issuance of compulsory process for real evidence or testimony, by a judicial officer of one country in response to a request from a judicial officer of another country. See generally United States v. Reagan, 453 F.2d 165 (6th Cir. 1971). Such requests are sometimes called letters rogatory. It is critical to understand that the request must be made by a court of the United States or of one of the states, in order to be honored by the foreign judiciary. Often the legal attache at a United States consular post, after unsuccessfully attempting to obtain evidence through his/her contacts with that country's law enforcement authorities, will report that those authorities state that they need "a letter from the judge." Usually this means that judiciary compulsion is required to obtain the evidence and that the judiciary will not act without a formal request for judicial assistance. In some countries, a formal request is needed even for service of process.

This section will deal only with requests for compulsory process to obtain evidence for criminal matters being investigated or prosecuted in the United States. The Office of International Affairs, Criminal Division, (see USAM 9-1.103K) has the responsibility for coordinating all such outgoing requests. Because these requests require drafting, translation, and transmission to foreign authorities before they can be executed, and because foreign authorities are often slow in execution, in any criminal case where evidence from outside the United States may be required, the Office of International Affairs should be contacted as soon as that possibility arises.

In obtaining evidence from abroad, it is critical to determine at the outset whether judicial assistance is required. Often evidence can be obtained without judicial compulsion. See USAM 9-4.540, *infra*. There is no legal requirement to exhaust all other possible means of obtaining evidence; but as a practical matter, requests for judicial assistance consume so much time that alternatives, where possible, are invariably preferable. Always explore the possibility of willing compliance with your needs and of using the influence of foreign authorities other than the judiciary. Because of the amount of work required and the time delays inherent in requests for judicial assistance, they should be considered a last resort.

For guidance regarding outgoing requests in civil matters or incoming requests in criminal or civil matters, contact the Foreign Litigation Unit, Civil Division.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.511 Request for Judicial Assistance

Although requests for judicial assistance are necessarily requests by a judicial officer, ordinarily a United States District Court judge, the request "package" is prepared by the U.S. Attorney. The request is then "endorsed" by the judge. This practice allows latitude for the use of stronger language in the request that the judge, who may eventually hear the case, would be willing to adopt as his/her own. As a consequence, the "Statement of Facts" portion of the request, discussed in USAM 9-4.524, *infra*, contains the statement "The U.S. Attorney expects to prove the following facts: . . ."

9-4.512 Drafting a Request for Judicial Assistance

Each request for judicial assistance must comply with the requirements of United States law, international law, and the domestic law of the country to which the request is directed. Although the requirements necessarily vary from country to country, the following are important common drafting considerations.

A. The United States is requesting a foreign court to perform a rather extraordinary act and, therefore, must assiduously comply with that court's every requirement.

B. The language of the request must be clear and simple. Requests are generally translated for the foreign court by non-lawyers who may not be able to render the precise meaning of the English vocabulary. The use of legalese, words of art, slang, and technical language is counterproductive because attempts to translate such terms often produce incomprehensible requests. Do not use phrases such as "return an indictment," "set bail," "Fifth Amendment privileges," or "right to confrontation." Stilted or archaic language, such as that used in obsolete forms of pleading, have no place in requests which must be translated. Avoid complicated syntax. Follow the journalistic rule of thumb that if a sentence requires more than twenty words, it should probably be simplified.

C. Foreign courts generally require more specificity in requests for documents than do United States courts. Therefore, descriptions of documents desired must be as precise as possible.

D. Requests should be brief and to the point.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.520 Request Package

- A. The request package should be assembled as follows:
1. The court's request;
  2. An application to the court; and
  3. A memorandum in support of the application to the court.
- B. The application to the court must contain the following:
1. A description of the assistance requested, which includes identification of the evidence sought;
  2. A statement of the facts of the violation;
  3. A description of the offense; and
  4. An explanation of the need for the evidence requested, including, where appropriate, an explanation of the element of the offense the requested evidence tends to prove, and how the requested evidence will prove the offense.

9-4.521 The Court's Request

The request for judicial assistance is a full-captioned court paper constituting the United States District Court's request to the foreign judicial officer. The form of the request is as follows:

IN THE UNITED STATES DISTRICT COURT

FOR THE

\_\_\_\_\_ DISTRICT OF \_\_\_\_\_

CASENAME

)

or

)

IDENTITY OF GRAND

)

JURY PROCEEDINGS

)

Docket No. \_\_\_\_\_

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

REQUEST FOR JUDICIAL ASSISTANCE

The United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_ presents its compliments to the Appropriate Judicial Authority in \_\_\_\_\_ (country) \_\_\_\_\_ and requests international judicial assistance in obtaining \_\_\_\_\_ (generally describe evidence sought) \_\_\_\_\_ from \_\_\_\_\_ (person from whom evidence is sought) \_\_\_\_\_ for use in \_\_\_\_\_ (trial/grand jury proceedings) \_\_\_\_\_ under the authority of this Court. The assistance requested, and the need for this assistance, are set forth in full in the attached Application of the United States, made to this Court by the U.S. Attorney for this Judicial District. This assistance is essential to insure that this Court is fully informed of the facts of this case and to insure that justice is done.

We offer you our assurance of reinforced judicial assistance. In this condition, the courts of the United States are authorized by Title 28, United States Code, Section 1782, to use all their powers to assist foreign and international tribunals. Attorneys of the United States government will present requests of foreign and international tribunals to the courts of the United States for execution.

\_\_\_\_\_  
United States District Judge

9-4.522 Application for the Court's Request

The application for the court's request is, like the request itself, a full-captioned court paper constituting the U.S. Attorney's request to the United States district court. The application, incorporated by reference as part of the request for judicial assistance, is the "body" of the request, and must contain all supporting material for the court's request. See USAM 9-4.523 through 9-4.527.

9-4.523 Description of Assistance Requested

A precise description of the specific judicial act requested to be performed and of the specific evidence sought is required to allow the foreign judicial officer to properly execute the request and also to avoid any inference of a "government fishing expedition." The policy against such procedures is very much alive in other countries, especially those with bank secrecy laws. If the request is not believed to be well founded, the response is likely to be inordinately slow and incomplete. Therefore, in drafting the assistance request, tailor and request to the



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

deposit and withdrawal records, and correspondence relating to such accounts and transactions.

(2) Taking the sworn, written statement of the representative of \_\_\_\_\_ (name of institution) who produces the documents referred to in paragraph (1) to the truth of the following statement:

(a) These documents are true and exact copies of original records presently in the custody of \_\_\_\_\_ (name).

(b) The originals of these copies are kept and retained in the ordinary course of business of \_\_\_\_\_ (name of institution) and it is the regular practice of this business to make records of this type.

(c) Entries on these documents were made at or near the time of the occurrence of the transactions they record.

(3) Ordering \_\_\_\_\_ (appropriate authority) to conduct a search of \_\_\_\_\_ (premises, address, description) and to seize therefrom \_\_\_\_\_ (evidence, description).

The statement requested in paragraph (2) can also be obtained through a "Certificate of Authenticity of Bank Records," the form for which is as follows:

CERTIFICATE OF AUTHENTICITY OF BANK RECORDS

I, \_\_\_\_\_ (name), state on my oath that I have supervisory authority over the custody of the business record of \_\_\_\_\_ (name of business establishment), and that, pursuant to the request of the judicial authority of \_\_\_\_\_ (country), I have supplied documents described as follows:

---

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

---

I further state that:

(1) These documents are true and exact copies of original records presently in the custody of the (name of business establishment).

(2) The originals of these copies are kept and maintained in the ordinary course of business of the (name of business establishment) and it is the regular practice of this business to make records of this kind.

(3) Entries on these documents were made at or near the time of the occurrence of the transactions they record.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Place

The search and seizure request in paragraph (3) should satisfy the minimum standard requirements of a search warrant application in the United States.

#### 9-4.524 Statement of Facts

A brief description of the case and a summary of the facts involved are required and must be sufficient to satisfy a foreign judicial officer who is to execute the request that he/she should act on behalf of the United States. The case description should identify the defendant or subject and indicate the nature of the offense involved. For example:

A United States Grand Jury in the \_\_\_\_\_ District of \_\_\_\_\_, is presently conducting an investigation into a scheme to defraud individual and institutional investors, both in this country and in Europe, through the fraudulent solicitation referred to at various

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

times as Atlantic Trust Bank, Ltd.; Atlantic Trust Bank, S.A.; or Atlantic Trust Bank, N.V.:

or:

A Federal Grand Jury in the \_\_\_\_\_ District of \_\_\_\_\_ has charged J. Hughes with transporting certain securities having a value of \$5,000.00 or greater, knowing them to have been obtained by fraud, in violation of Title 18, United States Code, Section 2314.

The summary of the facts must be sufficiently detailed to "flesh out" a violation. The summary should: describe the perpetrators and explain how they profited by their illegal acts; describe the modus operandi and explain how individual crimes were committed; describe the victims and explain exactly how each was harmed (e.g., who was deceived by what representation made by whom). When the United States possesses documentary evidence, such as cancelled checks, deposit slips, or copies thereof, which indicates the location of the evidence sought, copies of such documents should be referred to in the summary of facts and copies attached to the application for letters rogatory. The summary, which may require several paragraphs, should begin with the following statement:

The United States expects to prove the following facts:

This statement, as stated in USAM 9-4.511, supra allows the greatest possible latitude of expression in the summary.

9-4.525 List of Elements

Some countries require that "mutual criminality" exist before acting on a request. In such instances, the judicial officer examining the request must be able to determine that the conduct constituting the offense in the United States is also an offense in his/her country. He/she is aided in finding "mutual criminality" through a numerical listing of the elements of the United States offense in the application, together with the text of the statute which is attached as an appendix. Some countries may require a verbatim translation of both the appended criminal statute and the list of elements.

Call the Office of International Affairs to determine whether a list of the elements of the offense is required.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.526 Need for Assistance Requested

Give a specific explanation of the need for the requested evidence. The explanation should demonstrate how the requested evidence fits into the case, or is necessary to prove one or more elements of the offense. If it is not known exactly what the requested evidence will show, state what it is expected to show. If documentary evidence is already available (e.g., a cancelled check or other document), state how the requested evidence will corroborate, amplify, or supplement it.

9-4.527 Concluding Prayer

The following conclusion to the application is suggested:

Accordingly the United States of America applies to this Court to issue a request to the judiciary of \_\_\_\_\_ (country) \_\_\_\_\_ for the assistance described herein.

The legal principles and authorities in support of this application are set forth in the memorandum attached hereto and made a part hereof.

Respectfully submitted,

\_\_\_\_\_  
United States Attorney

by \_\_\_\_\_  
Assistant United States Attorney

9-4.528 Supporting Memorandum

The following is an example of a memorandum in support of an application for letters rogatory:

IN THE UNITED STATES DISTRICT COURT  
FOR THE  
\_\_\_\_\_ DISTRICT OF \_\_\_\_\_

NAME OF CASE )  
)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

OR ) Docket No. \_\_\_\_\_  
 )  
IDENTITY OF )  
 )  
GRAND JURY PROCEEDINGS )

MEMORANDUM IN SUPPORT OF APPLICATION FOR REQUEST FOR JUDICIAL ASSISTANCE

I. UNITED STATES DISTRICT COURTS HAVE THE INHERENT POWER TO ISSUE REQUEST FOR JUDICIAL ASSISTANCE.

Requests for judicial assistance, or "letters rogatory" are formal requests from a court of one nation to the judiciary of a foreign nation, enlisting the assistance of the latter in obtaining evidence which is beyond the jurisdiction of the requesting court. The execution of a request for judicial assistance by the foreign court is based, in the absence of a treaty, on comity between nations at peace, and as such is discretionary. See Janssen v. Belding-Corticelli, 84 F.2d 579 (3d Cir., 1936).

The power to issue such requests is inherent in the federal courts, United States v. Staples, 256 F.2d 290 (9th Cir., 1958), Re Villeneuve v. Morning Journal Association, 106 F.2d (S.D.N.Y. 1913), as in the power of United States Courts to execute the request of foreign tribunals, Ex parte Taylor, 110 Tex. 331, 220, S.E. 74 (1920). United States District Courts are empowered by statute, 28 U.S.C. §1782, to execute foreign requests.

II. THE PROCEDURE FOR THE ISSUANCE OF REQUEST FOR JUDICIAL ASSISTANCE IS BY APPLICATION TO THE REQUESTING COURT.

Although the Rules of Criminal Procedure do not provide procedures for the issuance of requests for judicial assistance, Rule 57(b), of the Federal Rules of Criminal Procedure provides:

If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Rule 28(b) of the Federal Rules of Civil Procedure provides:

In a foreign country, deposition may be taken... (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate... .

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Title 28, Section 1781, provides in part:

(a) The Department of State has power directly or through suitable channels -

\*\*\*

(2) to receive a letter rogatory issued, or request made, by a tribunal in the United States, to transmit it to the foreign or international tribunal, officer, or agency to whom it is addressed, and to receive its return after execution.

The statute recognizes no distinction between civil and criminal cases for purposes of the procedure for the State Department's handling of requests for judicial assistance. There is no reason why a federal court in a criminal case should not follow the duly prescribed procedure for issuance of such requests in civil cases. Indeed, it would appear that the best way to proceed under Rule 57(b) of the Federal Rules of Criminal Procedure is to follow Rule 28(b) of the Federal Rules of Civil Procedure. Plaintiff submits, therefore, that the attached application, which conforms to the provisions of Rule 28(b) of the Federal Rules of Civil Procedure, is the proper procedural vehicle for its request that the court issue a request for judicial assistance.

An application for a request for judicial assistance seeking only documents is similar to a request for a subpoena duces tecum, which a party may issue without leave of court and without notice to the adverse party. See Rule 17(c), Fed. R. Crim. P. Documentary evidence is properly obtainable via a request for judicial assistance in a criminal case without notice to the defendants. See United States v. Reagan, 453 F.2d 265 (6th Cir. 1971). Thus, the requirement of Rule 57(b) of the Federal Rules of Criminal Procedure that the court "proceed in any lawful manner" does not comprehend mandatory notice to the adverse party.

Respectfully submitted,

\_\_\_\_\_  
\_\_\_\_\_

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.530 Procedure After Drafting

All drafts should be submitted to the Office of International Affairs for review before they are finalized for the signature of the judge. After the judge signs, forward the original and four copies, with a full length cover letter to prevent the Department mail room from stamping any part of the request proper, to the Office of International Affairs. All such correspondence, to be accurately and promptly handled, should be captioned as follows: "Judicial Assistance in \_\_\_\_\_ (name of case) \_\_\_\_\_, File No. 182-\_\_\_\_\_. If the matter has been previously assigned a Department file number, that number should be included in brackets after the 182-\_\_\_\_ judicial assistance code number.

9-4.540 International Contacts

Although certain matters require formal requests for judicial assistance, there are many instances in which the assistance of foreign authorities can be elicited by less formal means. Where criminal cases and investigations require witnesses from overseas, official foreign government records, authentication of foreign documents, advice on foreign law, searches of official records (e.g., corporate registries), permission to interview persons in foreign countries, service of subpoenas, contact with foreign government officials, and other similar foreign activities, this purpose can often be achieved through the use of international contacts. However, since such contacts necessarily involve our foreign relations and unfamiliar provisions of foreign law, any proposed contact with persons in foreign countries concerning a criminal matter should first be discussed with Division attorneys in the Office of International Affairs and any proposed contact with the Department of State, United States embassies or other consular posts, any ministry, embassy, consulate, representative, officer, or agency of a foreign government, or any international organization or agency (e.g., NATO or UNESCO), concerning a criminal matter, other than the notification of a foreign consul in case of an arrest of a foreign national (see USAM 9-2.173), should be made only with the prior approval of the Criminal Division. Thus, those matters requiring requests for judicial assistance can be identified and appropriately handled, as discussed in USAM 9-4.510 supra, and other matters can be channeled by the Office of International Affairs along the most efficient path to maximize the benefit of established international contacts.

Utilization of the Office of International Affairs expertise in this area is imperative. Uncoordinated foreign contacts produce confusion, duplication of effort and are less efficient and effective than contacts undertaken with the cooperation of persons and agencies experienced in such matters. Certain contacts can prejudice the effectiveness of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

subsequent contacts and may constitute criminal violations of foreign law. See USAM 9-4.541, infra. Uncounseled contacts can also affect treaty negotiations in progress.

9-4.541 Contacts in Switzerland

Article 271 of the Swiss penal code provides:

Any person who, in Swiss territory, without authorization, performs acts for a foreign State that are the function of a public agency or official, or any person who performs such acts for a foreign party or some other organization abroad, or any person who aids and abets such acts shall be punished by imprisonment, and in serious cases with confinement in a penitentiary.

This statute may be violated when an Assistant U.S. Attorney acting in his/her official capacity places a telephone call or mails a letter seeking information from a person in Switzerland. It is violated when a United States District Court clerk's office mails a pro forma "Notice to Appear" to a defendant in Switzerland. Because the Swiss consider any violation of this statute to be an infringement of their national sovereignty, even an inadvertent, minor violation has an immediate, prejudicial effect on Swiss government cooperation in Department requests for assistance, several of which are usually pending. Consequently, U.S. Attorneys and Department personnel acting under their direction shall obtain approval from the Criminal Division before they make any attempt to perform any act in Switzerland related to any present or possible future criminal prosecution.

Copies of the texts of Swiss statutes, as well as advice concerning their interpretation, can be obtained from the Office of International Affairs.

A. INTRODUCTION

The United States-Swiss Treaty on Mutual Assistance in Criminal Matters, effective January 23, 1977, enables prosecutors in the United States to obtain testimony and tangible evidence from Switzerland. Although the Treaty was designed to deal primarily with the problem of the Swiss bank secrecy laws, it affords United States prosecutors a wide range of assistance from the judicial and executive authorities of Switzerland.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The treaty is reciprocal, but this practice guide is intended only to provide the basic information needed by U. S. Attorneys in obtaining from Switzerland evidence needed in the investigation or prosecution of federal crimes.

The treaty contemplates assistance being given to both federal and state investigative and prosecutive authorities in the United States. However, the emphasis in this guide is on requests for assistance by federal authorities who, we anticipate, will make principal use of the treaty.

During the negotiation of the treaty, it was the understanding of the parties that each Central Authority would exercise discretion not only with respect to the form and content of requests, but also as the number of requests to be made and the priority to be given. The Criminal Division, in exercising this discretion, may deem it necessary to deny or defer some requests. For this reason it would be well to discuss the contemplated request at an early stage with the Office of International Affairs of the Criminal Division.

The treaty is intended for the use of the government in investigating and prosecuting crimes, and not for use as a defense discovery tool. Consequently, the Attorney General will not make requests on behalf of the defense except in very unusual circumstances. In any case where the defense requests that the treaty be used in its behalf, the prosecutor should immediately consult with the Office of International Affairs of the Criminal Division.

Certain terminology which has arisen during the negotiation of the treaty should be understood. Article 40 contains definitions of terms used in the treaty, but two other essential terms are:

1. Requesting state--The government requesting the assistance of the other in obtaining evidence. For purposes of this guide, the requesting state will always be the United States.
2. Requested state--The government whose assistance is requested. In this guide, the requested state will always be Switzerland.

The basic procedure for a U.S. Attorney will be to ascertain what evidence he/she needs, ascertain whether the treaty provides for his/her needs, and prepare a request under the treaty. This procedure is quite complex because the treaty is complicated and not entirely self-explanatory. Its applicability is limited by the nature of the crime

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

and the extent (if any) to which the defendant or suspect is involved in organized crime. Some assistance is mandatory and some is discretionary. There are also limitations to the use of evidence obtained under the treaty.

B. ASSISTANCE AVAILABLE

Each party to the treaty has agreed to make available to the other many of the legal processes ordinarily available to authorities in the requested state. Pursuant to a request under the treaty, the Swiss authorities will:

1. Execute a search warrant. (Article 9:2 of the Treaty)
2. Subpoena testimony of persons in Switzerland. (Article 10)
3. Locate persons in Switzerland. (Article 11)
4. Subpoena and authenticate documents. (Article 18)
5. Supply official records. (Article 19)
6. Effect service of process. (Article 22)
7. Request persons to appear in the United States. (Article 23)

In addition, under certain specified circumstances the Swiss authorities may:

1. Permit a United States official to take testimony to authenticate documents. (Article 20)
2. Transfer prisoners needed in the United States. (Article 26)

C. APPLICABILITY

The applicability of the treaty is its most complicated feature. Generally, the treaty applies to criminal prosecutions and investigations for the offenses listed in the Schedule (following Article 41) which are "mutually criminal," that is, punishable under the law of both the United States (or a state thereof) and Switzerland (or a canton thereof). The only civil matters to which the treaty applies are actions for the return of property of the government of Switzerland or of the government of one

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the cantons of Switzerland, obtained by the commission of an offense which is covered by the treaty, and actions for damages by persons alleging unjustified detention as a result of action taken pursuant to the treaty. See Article 1:1(b) and (c).

To a large extent the applicability of the treaty is limited by Article 4, which contains the provisions for compulsory measures. Under Article 4:2, compulsory measures are available only with respect to offenses in the Schedule which are mutually criminal. Article 4:2(b) excepts gambling offenses from the requirement of mutual criminality. The requirement of listing in the Schedule can be waived if the Swiss consider the offense to be of sufficient importance to justify the use of compulsory measures. See Article 4:3. Note, however that Article 4:3 does not provide for a waiver of the requirement of mutual criminality.

Switzerland may refuse assistance if it considers that the execution of the request will prejudice its sovereignty, security, or similar essential interests. See Article 3:1(a). The fourth exchange of diplomatic notes (see the Technical Analysis of the Treaty, p. 27) concerns itself with what "similar essential interests" are contemplated. The Swiss can refuse assistance if the request is made for the purpose of prosecuting a person, other than a member of an organized crime group, for acts on the basis of which he/she has been acquitted or convicted by a final judgment of a court in the requested State for a substantially similar offense and any sentence has been or is being carried out. See Article 3:1(b).

Article 2 provides that the treaty does not apply to extradition, execution of criminal judgments, political offenses, selective service violations, military offenses which would not be a crime if committed by a civilian in Switzerland, or antitrust laws. The treaty generally does not apply to violations with respect to taxes, customs duties, governmental monopoly charges or exchange control regulations. See Article 2:1(c)(5).

Article 2 contains the provisions for special applicability in cases involving organized crime. The effect of these provisions is to waive many of the otherwise applicable requirements of the treaty. For example, under Article 2:2(a), assistance under the treaty may be available for political and antitrust offenses if they are committed by a person described in Article 6:2 who is, or is reasonably suspected 1/ to be,

---

1/ Article 8:1 requires the United States to furnish the information on which we base "reasonable suspicion" under the organized crime provisions. "Reasonable suspicion" is less than probable cause. See Technical Analysis of the Treaty, pp. 36-37.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

knowingly involved in the illegal activities of an organized crime group (as defined in Article 6:3) and who is a member or affiliate of such a group, or a public official who has knowingly violated his/her official responsibilities in order to accommodate the desires of such a group or its members.

An "organized criminal group" is tortuously defined in Article 6:3. The "elements" of such a group, without any one of which the special organized crime provisions will not apply, are:

1. An association or group of persons combined together.
2. Association for a substantial or indefinite period.
3. Purpose of association:
  - a. Monetary or commercial gains for itself or others, and
  - b. Illegal means of obtaining these gains
4. Carrying out purpose in a methodical and systematic manner, including:
  - a. Acts or threats of violence or other acts which are likely to intimidate and are mutually criminal, and
  - b. Either:
    - (1) Striving to obtain influence in politics or commerce, especially in political organizations, public administrations, the judiciary, commercial enterprises, employers' associations, labor unions or other employees' associations, or
    - (2) Association with a similar (organized crime) group which strives to obtain such influence.

Under Article 2:2(b) the treaty applies to offenses relating to tax laws, customs duties, governmental monopoly charges or exchange control regulations if the requirements of Article 7:2 are met, viz., if:

1. The offense is committed by a person reasonably suspected of being in the upper echelon of an organized crime group or of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

participating significantly in any important activity of such a group, and

2. Available evidence is insufficient to provide a reasonable prospect of successful prosecution of this person for the illegal activities of such group, and

3. You have reasonably concluded that the requested assistance will substantially facilitate the successful prosecution of such a person, and should result in his/her imprisonment for a sufficient period of time so as to have a significant adverse effect on the organized criminal group, and

4. The securing of the information or evidence without the requested assistance is impossible or unreasonably burdensome. See Article 7:3.

Under Article 7:1, the requirements of listing in the Schedule and mutual criminality are waived if the above listed requirements of Article 7:2 are met.

Article 2 apparently makes no exception to the rule that selective service violations and violations of military law are not covered by the treaty.

There is one more limitation to the applicability of the treaty in Article 2:4. If you are seeking assistance with respect to two crimes, one to which the treaty applies and one to which it does not apply, and if, under Swiss law, the former crime merges into the latter, no assistance will be rendered. (See the Technical Analysis of the Treaty, p. 39, discussing the Swiss doctrine of "consumption.") As a practical matter, the doctrine of consumption will seldom be applicable except in tax cases.

D. PROCEDURE

A prosecutor who believes that assistance under the treaty may be necessary should contact the Office of International Affairs of the Criminal Division as early as possible. There is no timetable for the execution of requests under the treaty. It provides merely, "A request shall be executed as promptly as circumstances permit;" Article 31:5. Time must be allowed for drafting the request, review of the request at the Department, translation, and transmittal to Switzerland before the Swiss authorities begin to consider and execute the request.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

On request, the Office of International Affairs will provide copies of previous requests under the treaty and will consult with the prosecutor to the extent necessary in drafting the request. The request, in draft form, must be submitted to the Office of International Affairs for review. The purpose of centralized review of requests is to maintain consistency in our practice under the treaty. Article 28 designates the Attorney General as the Central Authority, who handles requests under the treaty and whose approval is necessary for all requests. The Attorney General has delegated his/her duties and powers under Article 28 to the Assistant Attorney General for the Criminal Division. See 28 C.F.R. §0.64-1.

The approved draft is translated in Washington, D.C., and the finished request and translation are sent to the Swiss Federal Department of Justice and Police.

E. LIMITATIONS ON THE USE OF EVIDENCE OBTAINED UNDER THE TREATY

Articles 5 and 13 contain limitations on the use of evidence obtained pursuant to requests under the treaty. The general rule, stated in Article 5:1, is that anything obtained pursuant to a request under the treaty can be used only in the investigation and prosecution of the offense for which assistance has been granted. On request, the Swiss will make exceptions under Article 5:2 where assistance was previously granted for another offense and:

1. The same subjects are being prosecuted or investigated for an offense for which assistance is required to be granted, or
2. Other participants in, or accessories to, the same offense are being prosecuted, or
3. The person being investigated or prosecuted is an organized crime member as defined in Article 6:2.

Article 5:3 permits the use of the evidence in any investigation concerning the civil damages connected with an investigation or proceeding for which assistance has been granted. Information or knowledge educed from any materials obtained under the treaty can be used in continuing any investigation of an offense for which assistance may be given, if the investigation was initiated prior to the request which produced the materials; but the actual materials may not be used in evidence in a resulting prosecution unless, of course, the case qualifies for one of the exceptions in Article 5:2 listed above.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The restrictions on the use of the evidence obtained under the treaty are not intended to create grounds for suppression. (See the second exchange of diplomatic notes and the Technical Analysis of the Treaty, p. 43.) Furthermore, these restrictions do not apply where Switzerland specifically waives them.

Article 13 provides that unless a Swiss citizen has been advised of any right to refuse to testify available under both United States and Swiss law, testimony taken pursuant to the treaty cannot be introduced in evidence in any criminal proceeding against him/her in the United States except a prosecution for an offense against the administration of justice.

F. THE REQUEST

Although requests will naturally vary according to the facts of each case and the assistance needed, general requirements of the treaty militate in favor of a consistent format for requests. Make your request as brief as possible and couch it in simple, non-technical language. Since requests are translated by non-lawyers, you must take care to convey the sense of every idea without resort to legalese. Use the terms of the treaty to the extent possible.

The general format of the request will follow Article 29. Separate your responses to each requirement of Article 29 and caption each response to indicate which requirement is satisfied.

1. Introductory paragraph

The introductory paragraph should satisfy the requirements of Article 29:1. The introductory paragraph names the authority on whose behalf the request is being made, (see Article 28:2), names the offense being investigated in the terms of the Schedule of offenses, briefly states the need for the evidence, identifies the subject of the investigation or proceeding, and states concisely what assistance is requested. The reader thus has the essence of the request in a single paragraph, and needs to look further only for details. A satisfactory introductory paragraph might read:

The Central Authority 2/ of the United States requests the assistance of the appropriate authorities in Switzerland under the Treaty on Mutual Assistance in

---

2/ See Article 28

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Criminal Matters. The United States is investigating a group of persons who have induced victims to invest sums of money in an oil exploration project which does not exist. The records of these suspects' bank accounts are needed to prove that they have taken 3/ the investors' money for their own use. If necessary, compulsory measures should be used to obtain these records.

2. Subject matter of the investigation

The next paragraph (or paragraphs) of the request should satisfy Article 29:1(a). First describe the offense being investigated or prosecuted, then set forth the facts which made out the offense.

Describe the offense in concise terms. The Swiss are not interested in the elements of crimes which confer federal jurisdiction, for example the use of the mails or interstate transportation. See Article 4:4. In most cases it will be helpful to quote the code section violated except where the statute raises more questions than it answers, such as those sections which state, "Whoever willfully violates any provision of this chapter shall be fined....etc." See, e.g., 31 U.S.C. §§1058, 1059. Keep in mind that compulsory measures, which will be desired in most cases, are available only with respect to offenses in the Schedule, "which would be punishable under the law of the requested state if committed within its jurisdiction." See Article 4:2(a). You must name the offense in the terms of the Schedule and describe it sufficiently for the Swiss Central Authority to decide whether the offense would be punishable under Swiss law if committed in Switzerland. Note Article 4:2, which permits compulsory measures in exceptionally important offenses, despite the fact that the offense is not in the Schedule. An acceptable description of the offense might read:

SUBJECT MATTER OF INVESTIGATION

The Offense

The offense of fraud, in violation of 18 United States Code 1341, is committed when the offender induces another person to give up something of value in reliance upon statements which the offender makes,

---

3/ Not "converted," which is legalese.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Next, briefly state the facts of your case, showing that the offense has taken place or your reasons for believing the offense to have taken place. Keep it simple. What the Swiss want is the factual basis on which you are acting. Don't theorize; state facts on your well-founded beliefs. Be as candid as possible, but remember that the defense may be able to obtain your request through discovery. State these facts so as to lead into the next paragraph, where you will set forth the need for the assistance. An acceptable statement of facts might read:

Facts

Tex Acco and Stanley S. Derdoil have solicited and obtained money from investors by advertising that the money would be used to finance the exploration for oil in Antarctica. Although these advertisements were made over a year ago, and stated that the expedition was then forming, Acco and Derdoil have done nothing in the furtherance of forming an oil exploration expedition. A subpoena of the records of Acco's accounts in a New York bank has revealed the transfer of large amounts of funds to the Menteur Bank of Geneva, Switzerland.

3. The Need for Assistance

This paragraph should satisfy Article 29:1(b). Show why you need the assistance you are requesting. Show how the evidence you seek fits into the proof of your case, whether to prove one or more of the elements of the crime or to show a motive, such as a personal profit. An acceptable statement of the need for assistance might read:

NEED FOR ASSISTANCE

The FBI needs to obtain the records of any accounts held by Acco or Dercoil to prove that the funds they obtained have not been used for the exploration for oil. We believe the records of these accounts will show that Acco and Derdoil have spent the money for other purposes. Tracing the funds through the records of these accounts may also show disbursements to other persons who are suspected of being involved in this scheme.

4. Persons involved

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The information required by Article 29:1(c) is provided to satisfy the policies of Swiss law which protect persons accused of crimes and which, where possible, protect the identity of innocent persons whose business or personal affairs might be disclosed because of their connection with the subject of the inquiry. Swiss law has certain protections for those accused or suspected of crimes. Such persons, for example, are not required to testify under oath or affirmation. (See the Technical Analysis of Article 12.) It is important to the Swiss, therefore, to ascertain what persons are involved in the offense. You should, therefore, provide "the full name, place and date of birth, address and any other information which may aid in the identification of the investigation or proceeding." We will also state the person's citizenship. An acceptable response to Article 29:1(c) might read:

PERSONS INVOLVED

The persons who are presently the subject of this investigation are:

(1) Tex William Acco, United States citizen, born September 18, 1940, at Ertswile, Texas, U.S.A.; present address: 315 Ninth Street, N.W., Washington, D.C. 20530. Acco is married to a woman, formerly a citizen of Switzerland, named Beaucoup Acco (nee de Chair). They are believed to own a chalet near Geneva, Switzerland.

(2) Stanley S. Derdoil, U.S. citizen, born May 1, 1934, at Bayonne, New Jersey, U.S.A.; present address: 862 Mission Street, San Francisco, California 92002. Derdoil is Acco's business partner.

(3) Pierre Principe, French citizen born (date unknown) in Riems, France; present address: 1956 Kilbourne Street, Washington, D.C. 20007. Principe is the treasurer of two corporations which Acco has formed and may be a signatory party to Acco's bank account.

(4) Cynthia Rene Dobson, U.S. citizen, date and place of birth unknown; address unknown. Dobson is a joint signatory to one of Acco's New York City bank accounts, holds a Bank Americard credit card obtained

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

on the strength of this account, and may be involved in fraudulent conveyances of funds from these accounts.

5. The next paragraph should satisfy Article 29:2(a), naming witnesses or other persons who may be affected by the request, and briefly describing how they may be affected. An acceptable response to Article 29:2(a) might read:

PERSONS AFFECTED

Acco's wife Beaucoup, naturalized U.S. Citizen, formerly a Swiss citizen born December 7, 1943, at Geneva, Switzerland; present address: 315 Ninth Street, N.W., Washington, D.C. She may be a signatory to any accounts held by Acco and thus may be affected by this request.

6. To satisfy Article 29:2(b) the next paragraph should specify what, if any, particular procedure is to be followed. This would appear to be premature, since subsequent paragraphs specify the assistance which would more logically precede instructions as to procedure. Nevertheless, previous paragraphs have generally described the assistance required and requests will be more easily understood if the order set forth in Article 29 is followed. The treaty provides for most of the procedures anticipated, but it is conceivable that you might want compulsory process over documents before, or without, notice to a witness or other person involved. This paragraph is the appropriate place to give any detailed instructions in the execution of the request, such as the questions you desire to be asked of a person compelled to give testimony under Article 10, or the method of executing a search warrant (if such method is consistent with Swiss law). Note that instructions for authentication of documents are covered by a later provision, Article 29:2(e), and will be dealt with in paragraph (9) below.

7. An appropriate response to Article 29:2(c) would be merely to state that you desire the testimony to be taken (if any) under oath. If your request does not include the taking of testimony, state:

TESTIMONY

No testimony is requested.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

8. Article 29:2(d) requires a description of the information, statement, or testimony sought. Where the request is purely for documents and their authentication, this provision will not apply and you should merely state:

INFORMATION, STATEMENT, OR TESTIMONY SOUGHT

Other than the testimony required by Article 18 (or Article 20, depending on which you choose to use for authentication), no information, statement, or testimony is sought.

If your request is for the taking of testimony, an acceptable response to Article 29:2(d) might be:

TESTIMONY SOUGHT

We request that Joseph Bleau be compelled to testify, pursuant to Article 10, and answer the questions set forth in Appendix A, attached to this request.

If your request is for information which can be obtained without resort to judicial process, you might state:

INFORMATION SOUGHT

We desire to know whether John Doe was in Switzerland on December 25, 1976.

If your request is for an unsworn statement, an appropriate request might read:

STATEMENT SOUGHT

We desire Jean Deau to state how much money he gave Tex Acco for investment in the oil exploration expedition.

9. Article 29:2(e) requires a description of documents, records, or articles of evidence to be preserved, the person from whom they are to be obtained, and the desired method of reproducing or authenticating them. In describing the documents, be as specific as possible. The policy against government "fishing expeditions" is quite strong in Switzerland. The Swiss will not entertain a request

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

for "any records of accounts in the name of Tex Acco in any bank in Zurich." Do not request anything which you haven't justified in the paragraph describing the need for documents. For example, limit the time frame for which documents will be relevant. Do not ask the Swiss to give any unnecessary assistance. The description of the person from whom the documents are sought can be more general. It is not expected that you name the official of the bank who is charged with the custody of the bank's records. In most cases, where photocopying will be the desired method of reproducing documents, merely indicate that Xerox or other photographic reproduction method is desired.

There are two authentication procedures in the treaty, Articles 18 and 20. <sup>4/</sup> Article 18 applies to business records and provides that a Swiss official will interrogate the custodian under oath to establish authenticity. Where the request pertains to a pending court proceeding, the defendant has the right under Article 18 to be present at the authentication proceeding, either in person, by his/her attorney, or both. In such a case, therefore, the defense will have to be notified as to the date and place of authentication and the defendant given the opportunity to be present or represented, if he/she so desires. Note that Article 18 creates a presumption of authenticity if its provisions are followed. This provision should be viewed as an amendment to the Federal Rules of Evidence, since under Article VI of the Constitution, treaties are the law of the land equivalent to an act of the legislature. A treaty has the effect of supplanting inconsistent provisions of prior law. Article 20 provides for authentication of other documents, records, or articles of evidence by testimony taken by a United States consular official pursuant to 18 U.S.C. §§3491-3949. Although Article 20 does not specifically provide for the right of the defendant to be present at the authentication proceeding, at least one court has assumed that the Sixth Amendment requires an opportunity to be present. See United States v. Hay, 376 F. Supp. 264 (D. Colo. 1974), aff'd 527 F.2d 990 (1975). The consular official will have to be "commissioned" by a court of the United States under 18 U.S.C. §3492 to take such testimony, and the commission will require an application to the United States District Court.

---

<sup>4/</sup> Because the right of confrontation cannot be satisfied prior to a named individual being charged, authentication should not normally be requested at the investigative stage.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

An acceptable request might satisfy Article 29:2(e) by stating:

DOCUMENTS NEEDED

The documents needed are the records of any accounts held in the names of Tex William Acco, Stanley S. Derdoil, or Pierre Principe in the Menteur Bank of Geneva, between March 30, 1975, and the present. The documents should include, but should not be limited to, all ledger sheets, signature cards, powers of attorney deposited, records of currency exchanges, records of disbursements or withdrawals, correspondence and memoranda relating to such accounts. These documents are believed to be in the possession of the Menteur Bank of Geneva, located at 35 Rue des Larmes, Geneva, Switzerland. We request authentication of these documents under Article 18. We request reproduction of the documents by Xerox or some other photocopy method.

10. Article 29:2(f) requires information as to the allowances and expenses to which a person appearing in the United States will be entitled. The dollar amounts for attendance fees and per diem can be ascertained from 28 U.S.C. §1821. An acceptable response to this requirement might read:

ALLOWANCES AND EXPENSES

The United States Government will pay for the transportation of Mr. LeBeau from Zurich to Lincoln, Nebraska and back. In addition Mr. LeBeau will be paid \$\_\_ per day for his food and lodging, as well as \$\_\_ for each day he attends the trial.

11. The request should be prepared for the signature of the Assistant Attorney General of the Criminal Division.

9-4.542 Investigative Agencies In Foreign Countries

Certain investigative agencies of the United States (e.g., DEA) maintain operations in foreign countries. Although some countries require judicial authorization for providing evidence in the possession of their law enforcement agencies, such evidence can often be obtained simply by a request from the executive branch of the United States government (the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

agency) to the executive department of the foreign government, without the need to resort to the judiciary of either country. Although some countries require letters rogatory before providing evidence in the possession of their law enforcement agencies, such evidence can often be obtained simply by a request from the executive branch of the United States government (the agency) to the executive department of the foreign government, without the need to resort to the judiciary of either country. The Office of International Affairs may be contacted for assistance in making a request. In any case where, after a request, foreign officials do not give the overseas agent of a United States investigative agency such evidence, the Office of International Affairs should be contacted immediately so that appropriate steps may be taken.

Evidence in the possession of a foreign agency is not subject to exclusion because the foreign agency obtained it by means violative of the United States Constitution, provided that the United States agency had no part in obtaining it, and further provided that the conduct of the foreign agency does not shock the conscience of the courts. See United States v. Calloway, 446 F.2d 753, 755 (3d Cir. 1971), cert. denied, 404 U.S. 1021 (1971); United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975). Where the United States agency participates in obtaining the evidence, a defense motion to suppress is more likely to be granted. See United States v. Calloway, supra; United States v. Nagelberg, 434 F.2d 585, 586 (2d Cir. 1971), cert. denied, 401 U.S. 939 (1971). The "gray area" exists where the United States agency merely requests the evidence but does not participate in obtaining it. See Brulary v. United States, 383 F.2d 345, 347-348 (9th Cir. 1967), cert. denied, 389 U.S. 986 (1967); Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968), cert. denied, 395 U.S. 960 (1968).

9-4.543 Subpoenas to Obtain Records Located in Foreign Countries

Federal prosecutors, with increasing frequency, have been obtaining the issuance of grand jury and trial subpoenas duces tecum for the production of banking, financial, and commercial records which are stored within a foreign country. Typically, such subpoenas are served on a United States based entity, such as a bank or business enterprise, which maintains an office in the foreign country where the subpoenaed records are located. Typically, too, the subpoenaed records are "protected" by the bank and/or commercial secrecy laws of the foreign country.

Two recent court decisions upholding the use of such subpoenas, In Re Grand Jury Proceedings (Bank of Nova Scotia), 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983), and In Re Grand Jury Subpoena Directed to Marc Rich & Company, A.G., 707 F.2d 663 (2d Cir. 1983), cert. denied, 463 U.S. 1215 (1983), have dramatically improved the potential for law enforcement access to the records of foreign bank accounts and other

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

foreign entities used by narcotics traffickers, organized crime figures, and white collar criminals to launder the proceeds of illegal activities or to engage in tax evasion or tax fraud schemes. Another important aspect of these cases is the willingness of the courts to impose substantial daily fines--\$25,000 in Bank of Nova Scotia and \$50,000 in Marc Rich--to compel compliance with their orders to produce records located in foreign countries.

The Bank of Nova Scotia and Marc Rich decisions clearly demonstrate that use of a subpoena to obtain foreign records is a powerful weapon which the Department will vigorously support in appropriate cases. It should be borne in mind, however, that it is not the only method--or indeed in most cases the most effective, economical or timely one--for obtaining such records. Moreover, since this method involves assertion by the United States of jurisdiction which may be in conflict with the bank or commercial secrecy laws of a foreign country, its uncoordinated use raises various questions of infringement of foreign sovereignty which can seriously damage United States foreign relations and adversely affect other cases under investigation. In this regard, several foreign countries have lodged strong protests with both the State and Justice Departments against the use of such subpoenas. We have rejected these protests and do not intend to relinquish the hard fought gains we have won in this battle, but we do want to seize upon this opportunity to convert these protests into offers of assistance by the countries concerned. It is with this in mind that the following has been promulgated.

A. Any federal prosecutor who plans to seek the issuance of a subpoena for bank, business or commercial records reasonably believed to be in a foreign country is directed to obtain the concurrence of the Office of International Affairs of the Criminal Division before taking such action. The request for Office of International Affairs' concurrence must be in writing and set forth:

1. The subject matter and nature of the grand jury investigation or trial;
2. A description of the records sought including their location and identifying information such as bank account numbers;
3. The purpose for which the records are sought and their importance to the investigation or prosecution;
4. The extent of the possibility that the records might be destroyed if the person or entity maintaining them becomes aware that they are being sought; and
5. Any other information relevant to the Office of International Affairs' determination.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In emergencies, the Office of International Affairs can act on the basis of an oral request containing the above information. In such instances, if the Office of International Affairs concurs in the issuance of a subpoena, the oral request must be followed by a written request.

B. The following considerations will be taken into account in determining whether such a subpoena should be authorized:

1. The availability of alternative methods for obtaining the records in a timely manner, such as use of mutual assistance treaties, tax treaties or letters rogatory;
2. The indispensability of the records to the success of the investigation or prosecution; and
3. The need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.

The Office of International Affairs should also be consulted prior to initiating enforcement proceedings relating to such subpoenas.

C. Finally, the Office of International Affairs' concurrence must be obtained prior to serving a subpoena ad testificandum on an officer of, or attorney for, a foreign bank or corporation, who is temporarily in, or passing through, the United States, when the testimony sought relates to the officer's or attorney's duties in connection with the operation of the bank or corporation.

9-4.600 USE OF HYPNOSIS

9-4.601 Purpose and Scope

A. Supersession of Prior Policy Memorandum

This chapter supersedes DOJ Memo No. 605, dated December 11, 1968, which was entitled "The Use of Hypnosis in Interrogation of Witnesses."

B. General

Through experiments and actual practice it has been demonstrated that in certain limited cases, the use of hypnosis can be an aid in the investigative process. Witnesses of crimes have been able to recall certain facets of the crime while in a hypnotic state which they could not

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

remember in the normal state. Hypnosis has also been effectively used to restore the memory of witnesses who have experienced a mental blackout concerning the events of the crime.

Although hypnosis may be of value in the investigative process in certain cases, it is subject to serious objections and should be used only on rare occasions. The information obtained from a person while in a hypnotic trance cannot be assumed to be accurate. If a witness at the time of the crime mistakes the color of the get-away car as blue when in fact it was black, he will state the color of the car as blue when questioned under hypnosis. In addition, it has been shown that a person under hypnosis, lacking real facts, may hallucinate or otherwise contrive or invent information. Also, because of the deep seated motive of self-preservation, it is possible for a person to lie even while in a hypnotic state. Therefore, any information obtained by the use of hypnosis must be thoroughly checked as to its ultimate accuracy and corroborated if possible.

9-4.610 Admissibility in Trial

The question whether hypnotically refreshed evidence is admissible at trial is still an open one in many jurisdictions. In those jurisdictions in which the question is unsettled, a foundation concerning the reliability of hypnosis is necessary. See, e.g., Harding v. State, 5 Md. App. 230, 246 A. 2d 302 (1968), cert. denied, 395 U.S. 949 (1969). In jurisdictions where such evidence is clearly admissible, there is no need for a foundation concerning the nature and effects of hypnosis. See United States v. Awkard, 597 F.2d 667 (9th Cir.), cert. denied, 444 U.S. 885 (1979).

9-4.611 Prosecution Witness

The case of Harding v. State, supra, decided in the Maryland Court of Special Appeals, illustrates the narrow sort of situation in which hypnosis may be effectively used. In that case, defendant was charged with intent to rape and assault with intent to murder. The prosecutrix met defendant and another man and woman in a bar. During the course of the evening the defendant became angry with the prosecutrix for her refusal to have sexual relations with him and eventually shot her. Defendant forced the other man to drive to an isolated area where the defendant dumped the woman on the side of the road. The next morning the woman was found lying two or three miles from the spot where she had been left. She was in a state of shock. At the time of initial questioning, the woman was not able to say what had happened to her after she had been

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

shot. While under hypnosis, however, and without prompting, she was able to recall that the defendant had returned to the scene and assaulted her. After she was brought out of hypnosis, she continued to remember the events, and was able to testify about them at trial. The court upheld the admission of her testimony, even though her memory had been unlocked through the use of hypnosis.

In Wyller v. Fairchild Hiller Corp., 503 F.2d 506 (9th Cir. 1974), the plaintiff, a helicopter crash survivor, sued the craft's manufacturer, Fairchild Hiller. At trial, "Wyller was permitted to testify as to his recollection [of the crash] both prior and subsequent to the [hypnosis] treatments." Wyller, supra, at 509. The court could not ". . . accept Fairchild's argument that Wyller's testimony was rendered inherently untrustworthy by his having undergone hypnosis. Wyller testified from his present recollection, refreshed by the treatments. His credibility and the weight to be given such testimony were for the jury to determine." Wyller, supra at 509. The fact of hypnosis affects credibility but not admissibility. In Kline v. Ford Motor Company, Inc., 523 F.2d 1067, 1069 (9th Cir. 1975), the survivor of a car crash, who suffered amnesia as a result of injuries sustained in the accident, sued the vehicle's manufacturer, Ford. Prior to her testimony at trial, she underwent hypnosis which revived her memory. "That her present memory depends upon refreshment claimed to have been induced under hypnosis goes to the credibility of her testimony not to her competence as a witness." Id.

Testimony based upon present recollection, which recollection had been refreshed through pre-trial hypnosis, has been admitted in criminal cases other than Harding, supra.

See also United States v. Adams, 581 F.2d 193 (9th Cir. 1978), cert. denied, 439 U.S. 1006 (1978) (discussed infra); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312 (1971) (murder witness who suffered from loss of memory as a result of trauma was, inter alia, subjected to hypnosis prior to trial; refreshed recollection testimony was admitted); State v. McQueen, 295 N.C. 96, 244 S.E. 2d 414 (1978) (murder witness was hypnotized prior to trial; trial testimony, refreshed by the hypnosis, was admitted); United States v. Awkard, supra, (prison murder; "Pre-trial hypnosis of witnesses is permitted in this circuit in both criminal and civil cases. The fact of hypnosis, if disclosed to the jury, may affect credibility of evidence, but not its admissibility." Id. at 669.)

In United States v. Adams, supra, Adams and his associates robbed a mail truck of approximately \$9,600. During the course of the robbery, the mail truck driver was shot and killed. An eyewitness to the murder was hypnotized prior to trial. The defense unsuccessfully fought to suppress

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

posthypnosis statements which the prosecution used to discredit the witness. The Ninth Circuit upheld the "admissibility of testimony based on memories refreshed under hypnosis." Id. at 198. The court went on to express concern, however, "that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse. Great care must be exercised to insure that statements after hypnosis are the production of the subject's own recollection, rather than of recall tainted by suggestions received while under hypnosis." Id. at 198-199. In a footnote, the court further said "that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful." Id. at 199 n.12. Adams was cited as controlling precedent in Awkard, supra, at 669.

The generally accepted admissibility at trial of testimony which had been refreshed or unlocked by pre-trial hypnosis is to be contrasted with the generally accepted inadmissibility at trial of out-of-court statements made while under hypnosis. See State v. Harris, 241 Or. 244, 405 P.2d 492 (1965). Harris, in the hope of collecting insurance monies, burned his wife to death during a staged automobile accident and was subsequently convicted of manslaughter. At trial Harris unsuccessfully tried to admit statements he made while under hypnosis.

Cf. People v. Harper, 111 Ill. App. 2d 204, 250 N.E. 2d 5 (1969), wherein the prosecutrix, while under the influence of Amytal, was able to recall the identity of her attacker. The court upheld suppression of the identification evidence which had been obtained while the prosecutrix was under the drug's influence. The court was not persuaded by the State's citation to Harding, supra, and concluded that there was ". . . no reason to equate examination under hypnosis and examination while under the influence of a drug having the effect of a so-called 'truth serum' except to note that the scientific reliability of neither is sufficient to justify the use of test results of either in the serious business of criminal prosecution." Harper, supra, at 7.

With regard to witnesses, hypnosis should not be employed unless there is a clear need for additional information, and it appears that hypnosis can be useful in aiding the witness to recall such information, as in Harding v. State, supra. A witness should never be hypnotized unless the witness gives consent, preferably in writing, and should always be given an explanation of the nature of hypnosis before being hypnotized.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Only a person trained in the art of hypnosis should be allowed to hypnotize a witness. See United States v. Adams, supra. During the interrogation, leading questions should be avoided to insure against the possibility of suggestion to the subject.

To avoid any questions which may subsequently arise, any interrogation made when the witness is subject to hypnosis should be videotaped whenever possible. In those cases where videotaping the interview is impossible, a transcript should be prepared in addition to any sound recording. In those cases where the interview session is videotaped, the tape need not be transcribed unless it is necessary in subsequent legal proceedings to provide a transcript. However, where a videotape is made but the interview is not transcribed, a copy of the videotape should be made to guard against the loss of or damage to the original tape.

9-4.612 Defendant

Because of the difficult problems involved, hypnosis should never be used on a suspect of a crime. In most cases, a suspect will probably refuse to submit to hypnosis; however, if he/she thinks he/she is clever enough, he/she may try to fake the hypnotic state and turn the interrogation to his/her advantage. Insofar as legal problems are involved, there is serious question as to what use, if any, can be made of information obtained from a suspect while he/she was under hypnosis. In general, courts will not admit into evidence any statements made by the defendant while in a hypnotic state. See People v. Ebanks, 117 Cal. 652, 49 P. 1049 (1897); State v. Pusch, 77 N.D. 860, 46 N.W. 2d 508 (1950); State v. Harris, supra.

Furthermore, if the defendant divulges information which leads to other evidence, this latter evidence could be excluded under the "fruit of the poisonous tree" doctrine. Another legal problem might arise if the defendant confesses after he/she has been placed under hypnosis but while not in the hypnotic state at the time of the confession. Because the defendant confessed under circumstances strongly suggesting he/she had been hypnotized just prior to the confession, it was held by a Canadian court that the confession would not be admitted unless the Crown could demonstrate that the confession was not influenced by hypnosis. Rex v. Booher (1928), 4 D.L.R. 795.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.613 Disclosure of Use of Hypnosis

If a witness has been hypnotized prior to trial, this fact should be disclosed in court. There are great differences between a statement made while under hypnosis and a statement made in the normal state, and the defendant should be given such information. In many cases, of course, the government will be required under 18 U.S.C. §3500(B) to produce the witness' prior statements. "Reversals have been predicated only on the failure to disclose the fact of hypnosis" [emphasis supplied]; United States v. Miller, 411 F.2d 825 (2d Cir. 1969). See Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975) (habeas writ issued). United States v. Adams, supra, at 198.

9-4.614 Expert Witness

The prosecution should be prepared to put on the stand an expert on hypnosis who can explain to the jury the nature of hypnosis and how it works in the interrogation process in order to dispel from the jurors' minds any misconceptions and doubts they may have concerning hypnosis. The expert should particularly be prepared to meet the argument that the mere repetition of a set of facts under hypnosis will further imprint on the subject's mind a belief in those facts and make him/her less likely to disavow them. The rebuttal to this argument is that while repetition of a story always has some tendency to imprint the story on the subject's mind, the telling of it under hypnosis per se adds nothing to the likelihood of further imprinting.

9-4.620 Authorization

A. General

Prior to using hypnosis on any witness the U.S. Attorney or Strike Force Attorney-in-Charge must obtain the authorization of the Director or the Associate Director, Office of Enforcement Operations (OEO), Criminal Division.

B. Non-Exigent Circumstances

1. To obtain such authorization, a written request should be submitted to the Office of Enforcement Operations of the Criminal Division stating the following:

- a. The name(s) of the person(s) to be hypnotized;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

b. The reasons why the use of hypnosis is desired, i.e., for additional information (USAM 9-4.611, supra), and whether it appears that hypnosis can be useful in aiding the witness to recall such additional information (USAM 9-4.611, supra);

c. The fact that the person(s) to be hypnotized are not suspects or potential defendants in this or any related (federal or state) criminal investigation;

d. Whether the person(s) to be hypnotized are minors;

e. The fact that the person(s) to be hypnotized have consented to undergo hypnosis, and if the person(s) are minors, the fact that the parent(s) or legal guardian(s) have also consented for the minor(s) to undergo hypnosis;

f. The name(s) of the individual(s) who will induce hypnosis; and

g. The hypnotist's qualifications to induce hypnosis (as an example, one may indicate that Smith is licensed/certified as a psychologist and is a member of American Society of Clinical Hypnosis; attach resume; etc.).

2. "Written" requests may be sent to:

a. Director  
Office of Enforcement Operations (OEO)  
Criminal Division  
United States Department of Justice  
Box 7600  
Ben Franklin Station  
Washington, D.C. 20044

b. Telecopier location within OEO: FTS 633-3684.

c. Teletype located within OEO: OEO teletype symbol is JCOEO.

C. Exigent Circumstances

When true exigent circumstances exist (i.e., mail, telecopy, or teletype will not suffice), the OEO Director or Associate Director may verbally approve an oral request, which request must include the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

information noted at USAM 9-4.620(B)(1), supra. The OEO telephone number is FTS 633-3684.

9-4.621 Additional References

The following sources, while not exhausting the subject, may prove helpful:

A. Ault, Richard L.; "Hypnosis: The FBI's Team Approach"; FBI Law Enforcement Bulletin; Vol. 49, #1; January 1980; pp. 5-8.

B. Ault, Richard L.; "FBI Guidelines For Use of Hypnosis"; The International Journal of Clinical and Experimental Hypnosis; Vol. 27, #4; 1979; pp. 449-451.

C. 92 A.L.R. 3d 442 (1979).

D. 5 U.C.L.A.--Ala. L. Rev. 226 (1976).

E. 4 Ohio North L. Rev. 1 (1977).

F. 38 Ohio State, L.J. 567 (1977).

9-4.700 [RESERVED]

9-4.800 ACCESS TO AND DISCLOSURE OF FINANCIAL RECORDS

9-4.801 Introduction

Effective March 10, 1979, government access to and disclosure of financial records are governed by the Right to Financial Privacy Act of 1978, Title XI of Pub L. No. 95-630, 12 U.S.C. §§3401-3422, 92 Stat. 3697-3710. See also USAM 4-4.280, 4-4.530, 4-5.229, 4-11.850 and Civil Division Practice Manual, §§3.53.1--53.41.

Federal authorities may obtain access to financial records only if there is "reason to believe" (see USAM 9-4.824, infra) that the records are relevant to a legitimate "law enforcement inquiry" (12 U.S.C. §3401(7)), through means authorized and procedures established by the Act. "Law enforcement inquiry" is a broad term encompassing lawful inquiries into violations of or failures to comply with civil or criminal statutes

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

or regulations, rules or orders issued pursuant thereto. See 12 U.S.C. §3401(7).

It is important to note that only a narrow class of records is covered by the Act (i.e., "financial records" pertaining to a "customer" obtained from a "financial institution"). See USAM 9-4.811--9-4.813, infra. See USAM 9-4.890, infra, for a capsule summary of the steps required to comply with the Act.

9-4.802 Office to be Contacted

The Office of Enforcement Operations, Criminal Division, may be contacted at 724-6672, with regard to questions that arise under the Act.

9-4.810 Right to Financial Privacy Act--General

9-4.811 Financial Institutions Covered

The term "financial institution" (12 U.S.C. §3401(1)) includes all banking-type financial institutions, as well as credit card issuers and consumer finance businesses, located in the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, and the Virgin Islands.

Institutions not covered by the Act include bonding companies, credit bureaus, brokerage houses, government lending agencies, small business investment companies, the U.S. Postal Service, and Western Union. Although "credit card issuers" are covered by the Act, businesses which issue credit cards to facilitate sales (i.e., oil companies and large department stores) are "financial institutions" only with respect to records related to credit card use; cash sales or credit sales made other than pursuant to a credit card are not covered, as the business (i.e., the oil company or department store) is not a "card issuer" with respect to such transactions.

The term "card issuer" as used in the Financial Privacy Act is defined by reference to 15 U.S.C. §1602(n). Because that chapter of the United States Code is restricted to consumer credit cards, issuers of cards used for commercial, governmental, securities and other transactions excepted by 15 U.S.C. §1603 are not covered by the Financial Privacy Act.

Finally, the definition of "financial institution" at 12 U.S.C. §3401(1) focuses on "offices" of institutions located in the United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States, Puerto Rico, Guam, American Samoa and the Virgin Islands. The Act does not, therefore, protect records maintained in foreign offices of financial institutions.

9-4.812 Customers Covered

The term "customer" is a defined term (12 U.S.C. §3401(4),(5)) limited to natural persons or partnerships of five or fewer individuals. The Act does not protect corporations, associations, larger partnerships, trusts or other legal entities. Further, even though items in corporate or other noncovered accounts reflect transactions of private individuals (i.e., check endorsements or loan guarantees), such items are not covered by the Act. See H. R. Rep. No. 95-1383 at 217, 7 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., at 9347-9348.

9-4.813 Records Covered

The term "financial records" (12 U.S.C. §3401(2)) means any original, copy of, or "information known to have been derived from" a record pertaining to a customer's relationship with a financial institution; 12 U.S.C. §3413(a) excepts financial records or information not identifiable with a particular customer and 12 U.S.C. §3413(g) excepts requests for basic account identification information. (See 9-4.846, infra). The Act does not protect records of a customer that appear in the account of a third person, such as check endorsements or items drawn by an individual and deposited into the account of a corporation if the item is obtained from a corporation's records. (See H. R. Rep. No. 95-1383 at 49, 7 U.S. Code Cong. and Ad. News, 95th Cong., 2d Sess., at 9321).

The phrase "information known to have been derived from" was inserted to prevent conscious circumvention of the Act. See USAM 9-4.849, infra, for situations where some information derived from financial records may be disclosed.

Only records obtained by a government authority on or after March 10, 1979, are covered by the Act (12 U.S.C. §3403(a); 15 U.S.C. §37(b)).

Furthermore, even as to financial information relating to accounts of individuals and partnerships of five or fewer partners, not all records of these entities are protected by the Act. Specifically, to be a protected record, an item in the account of an individual or covered partnership must also meet the four following tests:

- A. It must be held by a specific financial institution; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. It must pertain to an individual's (or covered partnership's) utilization of the services of that institution; and

C. It must relate to an account maintained by that individual (or covered partnership) at that institution; and

D. It must relate to an account maintained in that individual's (or partnership's) true name.

Applying the above four tests, the following items are not covered by the Act: forged or counterfeit financial instruments; records relating to an account established under a fictitious name; financial records in the possession of an institution other than the institution at which the person maintains an account (i.e., a check or money order cashed for a non-customer; bank surveillance photographs; contents of a safe deposit box sought pursuant to search warrant or records pertaining to services that do not involve an account relationship). Services not covered by the Act include sales of stock, performance of computer services, and other activities that do not involve a debtor-creditor relationship.

The basis for the four tests set out above is the legislative history of the Financial Privacy Act which explains that the definitions of "financial records" (12 U.S.C. §3401(2)) and "customer" (12 U.S.C. §3401(5)), "taken together, are intended to preclude application of the bill to anyone other than the person to whose account information the government seeks access." H. R. Rep. No. 95-1383 at 49, 7 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., at 9321. Congressional intent to limit coverage of the Act to "account information" is further clarified by the House Report which states that a customer:

. . . is a person who uses a service of a financial institution, or for whom the institution acts as a fiduciary, but only in relation to an account maintained in the person's name. [Emphasis added.]

H. R. Rep. No. 95-1383 at 217, 7 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., at 9347.

While the word "account" is not defined in the Right to Financial Privacy Act (Title XI) of the Financial Institution Regulatory and Interest Rate Control Act of 1978, Title IX (relating to electronic fund transfers) of that omnibus measure defines "account" as follows:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(2) the term 'account' means a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 103(i) of this Act), as described in regulations of the Board, established primarily for personal, family, or household purposes, but such term does not include an account held by a financial institution pursuant to a bona fide trust agreement . . . [Emphasis added.]

Pub L. No. 95-630, §903(2), 15 U.S.C. §169a(2). This definition of "account" is consistent with the meaning normally accorded the word in general legal encyclopedias:

"Account" is a word of ordinary and common acceptance in legal terminology and may be defined as an unsettled claim or demand by one person against another, based upon a transaction creating a debtor and creditor relations between the parties . . . [Emphasis added.] 1 Am Jur 2d, "Accounts and Accounting," p. 351.

In financial and mercantile transactions, however, it has been said that the term [account] has an appropriate technical import, being invariably used in the sense of a detailed or itemized account; and the word has been generally defined as: a business relation involving a record of debits and credits. [Emphasis added.] 1 CJS §49, p. 581.

Use of the term "account" in the definition of "customer" at 12 U.S.C. §3401(5), therefore, was not intended to encompass such services as renting of a safe deposit box, sales of stock, provision of computer services, and other activities which do not of necessity involve a debtor-creditor relationship. Rather, the word "account", when used in connection with financial institutions, is properly limited to its plain meaning as encompassing only checking, savings (or share) and loan services.

In summary, application of the definitions and tests set out above limits coverage of the Act to a narrow class of records. Determining whether needed financial information is covered by the Act, therefore, is an essential threshold issue in securing access to financial records.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.814 General Restrictions Upon Government Access

The Act (12 U.S.C. §§3402-3403) prohibits any agency or department of the United States from obtaining financial records from a financial institution, and financial institutions from providing them to the government, unless access is permitted by one of the exceptions to the Act (such as the exception for grand jury subpoenas), or is accomplished by one of five methods under procedures mandated in the Act:

- A. Customer authorization (see USAM 9-4.816, infra);
- B. Administrative summons or subpoena (see USAM 9-4.818, infra);
- C. Search warrant (see USAM 9-4.817, infra);
- D. Judicial subpoena (see USAM 9-4.818, infra); or
- E. Formal written request (see USAM 9-4.818, infra). The Act requires documentation of access to covered financial records; "informal access" (oral requests) to protected records is no longer permissible.

9-4.815 Certification of Compliance Requirement

Before protected records may be obtained under any authorized method of access, a supervisory official of the government authority seeking access must submit to the financial institution a certificate stating that all applicable provisions of the Act have been complied with (12 U.S.C. §3403(b)). Good faith reliance by the employees and agents of the financial institution upon this government certification of compliance absolves the institution of civil liability for any improper disclosure of records (12 U.S.C. §3417(c)). Certification is not required when proceeding by grand jury subpoena, an excepted method of access (12 U.S.C. §3413(i)).

Note that the broad and unequivocal wording of 12 U.S.C. §3403(b) requires certification of compliance when proceeding by customer authorization or search warrant as well as in connection with judicial subpoenas, administrative subpoenas and formal written requests. Further, the certificate of compliance should be presented to the financial institution only when all requirements of the Act have been satisfied. For example, if customer notice is given in connection with a subpoena or formal written request, the certificate of compliance should be presented to the financial institution only after the challenge period has passed without a customer challenge or after the court has dismissed a customer challenge. Of course, when no customer notice is required (as when an ex

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

parte delay order has been obtained) the certificate of compliance may be delivered at the same time the subpoena or formal written request is served. Even where the Act is not applicable due to the nature of records sought or by virtue of an exception, some financial institutions may insist upon government certification as to the Act's inapplicability. Such certification can properly be given. See USAM 9-4.891, Form A (Form DOJ-461), for suggested form of certificate of compliance.

9-4.816 Customer Authorization

The Act (12 U.S.C. §3404) establishes procedures for customer-authorized disclosures. Customers may authorize access to identified records by giving approval in writing for a period of no more than three months; such authorization is effective for only 90 days and is revocable at any time before the records are disclosed. The authorization must state the customer's rights under the Act and a customer may not be required to give an authorization as a condition of doing business with a financial institution. The authorization must identify the records sought and the purposes and agencies to which the records may be disclosed. Institutions must keep records of the agencies to which customer-authorized access is granted; these records are open to inspection by customers. Although the statute may be read as implying that the customer must give authorization directly to the financial institution, practical necessity dictates that the government directly obtain the authorization and deliver it to the financial institution on behalf of the customer.

Note: For maximum efficiency, the customer authorization should specify all agencies anticipated to require access; the purpose should also be stated broadly.

While there is no legislative history on the point, it is the view of the Department that any named account holder of a joint account may authorize government access to the account (i.e., either spouse in connection with a husband-and-wife account or any partner in connection with a partnership account). Perhaps the most analogous rule of law supporting this conclusion is that either spouse can consent to a search of a premises or of an item held jointly by husband and wife (see, e.g., United States v. Stone, 471 F.2d 170 (7th Cir. 1973), cert. denied, 411 U.S. 931 (1973), and that a partner may consent to a search of partnership business premises (see, e.g., Gurleski v. United States, 405 F.2d 253 (5th Cir. 1968), cert. denied, 395 U.S. 977 (1969)). Surely, no stricter standard should apply for a statutory right than for Fourth Amendment rights. See USAM 9-4.891, Form B (Form DOJ-462), for suggested form of customer consent and authorization.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.817 Search Warrant Procedures

The Act (12 U.S.C. §3406) establishes procedures for obtaining financial records by search warrant. Current law governing the obtaining of a warrant is not changed, but under the Act the government must, within 90 days after execution of the warrant for financial records, notify the affected customer or customers of the search. Customer notice may be delayed and the bank prohibited from notifying the customer of the search if a court order is obtained pursuant to 12 U.S.C. §3409. As noted at USAM 9-4.813, *infra*, the Act does not apply to warrants for the contents of safe deposit boxes. See USAM 9-4.824, *infra*, for a discussion of the court ordered delay procedure.

9-4.818 Definitions of Judicial Subpoena, Administrative Summons and Formal Written Request

An administrative summons or subpoena is a judicially enforceable demand for records issued by a government authority which is authorized by some other provision of law to issue such process; administrative process is governed by the Act (12 U.S.C. §3405).

Judicial subpoenas are any court orders to produce records, other than a grand jury subpoena, and are governed by the Act (12 U.S.C. §3407). The most common form of judicial subpoena is the trial subpoena issued for financial records of a customer who is not a party to the legal proceeding. (See USAM 9-4.841 for a discussion of the litigation exception, 12 U.S.C. §3413(e), which covers trial subpoenas for records of a defendant.)

Although the Act is clear on the point that grand jury subpoenas are excepted (12 U.S.C. §3413(i)), one financial institution has argued that grand jury subpoenas are a form of "judicial subpoena" and therefore subject to the customer notice and challenge requirements of 12 U.S.C. §3407. The court considering this argument, however, held that grand jury subpoenas are not "judicial subpoenas" within the meaning of the Act. See In re Subpoena to Testify Before the Grand Jury Issued to the Commonwealth National Bank, Civil Action No. 79-349, Misc. 79-24 (M.D. Pa., April 6, 1979) (unpublished opinion).

A formal written request is a new form of process created by the Act. It is designed to allow government authorities, such as the FBI and U.S. Attorneys' offices which do not have authority to issue administrative summonses or subpoenas, to request records in a formal manner. This

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

procedure will replace the former practice of "informal access"--whereby government agents made oral requests to obtain bank records--with a new procedure that includes customer notice and challenge rights (except when a delay of notice court order is obtained). (See 28 C.F.R. §47.1, et seq., for regulations governing formal written requests by Department of Justice officials.)

The Act (12 U.S.C. §3408) governs formal written requests by agency officials. Unlike administrative process, a formal written request is not a coercive form of process (i.e., the financial institution may refuse to honor a request). In this respect, the formal written request is analogous to the previous informal access which could also be refused. See USAM 9-4.891, Form C (Form DOJ-463), for suggested form of formal written request.

9-4.819 Customer Notice Requirements for Judicial Subpoenas,  
Administrative Process and Formal Written Requests

All three of these forms of process require that, unless a delay of notice order is obtained, the government agency seeking protected records must notify the customer before it can obtain the records. The extent of the notice required is spelled out in the Act and requires (1) a description of the records sought, (2) a statement of the purpose of the inquiry, and (3) an explanation of the procedure by which the customer may challenge the government process in court. Along with the notice, the customer is to be provided a copy of the government process and blank motion and affidavit forms for filing in court when properly completed.

In the joint account context, notice to one joint account holder will, in the opinion of the Department, constitute notice to all due to the relationship of the joint account holders. See USAM 9-4.816. Where an investigation is directed at one spouse in a husband-wife account or at one or more partners in a partnership account, customer notice should be directed to the spouse or to the partner or partners who are the subjects of the investigation.

Further, trial subpoenas are sometimes issued simply to obtain clearer copies or originals of documents to which the government has previously obtained access. Such a "re-disclosure" does not constitute a disclosure of financial records within the meaning of the Financial Privacy Act. (See, e.g., the interpretation of "disclosure" in a Privacy Act of 1974 case, Harper v. United States, 423 F.Supp. 192, 197 (D.S.C. 1976): "[a disclosure is] . . . the imparting of information . . . which was previously unknown to the person to whom it is imparted." [Emphasis

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

added.]) Caution is required in seeking re-disclosure to insure that only records already in custody are obtained; the preferred practice is to provide the financial institution with copies of those items for which clearer copies or originals are sought. The financial institution will likely request certification of inapplicability of the Act; such certification may be given.

Finally, the provision at 12 U.S.C. §3409(a)(3)(E) was especially designed to authorize ex parte orders delaying customer notice of a trial subpoena where such notice would delay trial. See H. R. Rep. No. 95-1383, at 222, 7 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., at 9352:

In addition, subsection 1109(a)(3) is a general harm provision designed to accommodate unanticipated needs for delay of notice. It is intended to be used only where the potential harm to an investigation is of a magnitude similar to the listed jeopardizing factors, or in the case of a trial or other ongoing official proceeding, where notice would unduly delay the proceeding. The last exception is a narrow one designed, for example, to permit the use of trial subpoenas for records immediately before or during a proceeding. [Emphasis added.]

9-4.820 Right to Financial Privacy Act--General (Continued)

9-4.821 Venue for Customer Challenge Suits

The appropriate courts in which a customer challenge may be filed should be listed in the notice by the agency seeking access. In the case of judicial subpoenas, venue for the customer challenge is restricted to the court issuing the subpoena (12 U.S.C. §3410(a)). In the case of administrative process and formal written requests, venue is governed by 28 U.S.C. §1391(e). This means that the customer may challenge in any one of as many as three Districts: (1) "where a defendant (the government) resides" (usually the District of Columbia); (2) "where the cause of action arose" (the site of the financial institution); or (3) "where the plaintiff resides" (the residence of the customer).

See 124 Cong. Rec. H 11736 (daily ed. October 5, 1978) (remarks of Rep. McKinney) ("This would allow the customer the option of going to whatever district court that is the closest to him and thereby giving him the advantage of faster service and reply.").

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.822 Substance of Customer Notice

The purpose of the investigation as stated in the customer notice need not include reference to specific sections of Title 18 believed to have been violated but should include the generic classification of the offenses (i.e., fraud, bribery of a federal official, extortion, narcotic trafficking, theft of federal property). The customer notice must also state the name and business address of the government official to be served with copies of customer challenge papers; this generally should be the official who initiates the legal process seeking access.

The provisions of the Act pertinent to customer notice can be found in the sections relating to the various forms of process: 12 U.S.C. §3405 for administrative process; 12 U.S.C. §3407 for judicial subpoenas; and 12 U.S.C. §3408 for formal written requests.

See USAM 9-4.891 for suggested forms of customer notice (Form D, Form DOJ-464); motion to enjoin or quash (Form E, Form DOJ-465); and sworn statement (Form F, Form DOJ-466).

9-4.823 Timing of Access Following Customer Notice

The Act gives a customer 10 days following personal service of notice or 14 days following mailing of notice within which to file a court challenge to government access. These time requirements are interpreted as calendar days except where the last day for filing falls on a weekend or court holiday in which case the filing deadline is extended to the close of business for the next court day. See Rule 6(a) of the Federal Rules of Civil Procedure and Rule 459(a) of the Federal Rules of Criminal Procedure.

Because the Act permits customers to file and serve the government by mail and because the Act assumes that four days should be allowed for mail delivery, agencies seeking access to financial records should wait an additional four days to be certain that no challenge has been filed. In effect, therefore, the 10 or 14 day delay becomes a 14 or 18 day delay with time allowed for receipt by mail of the service copy of the customer's challenge papers. Note the agency official's obligation under 12 U.S.C. §§3405(3), 3407(3), and 3408(4)(B).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.824 Court-Ordered Delay of Notice Procedure

The Act (12 U.S.C. §3409) authorizes delayed customer notice in the case of judicial subpoenas, administrative process, and formal written requests as well as in connection with search warrants and inter-agency transfers of financial records. In certain situations the government may apply to a court for a delay of up to 90 days in customer notification (180 days for an initial search warrant delay).

To obtain an order delaying customer notice, the government agency must make a showing to a magistrate or district judge that:

A. The investigation in connection with which the records are sought is within the agency's jurisdiction;

B. There is "reason to believe" the records sought are relevant to the investigation; and

C. There is "reason to believe" that customer notice would result in:

1. Danger to the physical safety of any person;
2. Flight from prosecution;
3. Destruction of evidence;
4. Intimidation of witnesses; or
5. Some other serious jeopardy to the investigation or trial of comparable degree.

Renewals of the delay period may be granted upon the same showing of necessity.

"Reason to believe", as it is used in 12 U.S.C. §3410 and elsewhere in the Act, is a lower standard than probable cause; it would, for example, permit access where the only information available is an anonymous "tip". See 124 Cong. Rec. H 11737 (daily ed. October 5, 1978) (remarks of Rep. Pattison and Rep. La Falce) ("'Reasonable belief' and 'reason to believe' mean the same thing. 'Reasonable belief' does not mean 'probable cause.' We all agree that probable cause is far too high a standard to meet in the early stages of an investigation.")

In addition to permitting the government to postpone notification to the customer, any court order under this section will also prohibit the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

financial institution from disclosing to the customer that records are being sought.

12 U.S.C. §3409(a) provides that an application for court-ordered delay of customer notice may be filed in any "appropriate court." Since these proceedings are by definition ex parte, there is no reason why they cannot be brought in the United States district court where either the agency or the financial institution is located. It generally would be preferable, however, to obtain the order from the court which has personal jurisdiction over the financial institution.

Practice Note: Because the Act excepts grand jury subpoenas, the 12 U.S.C. §3409 delay procedure does not apply to grand jury subpoenas, but see USAM 9-4.845, infra, for guidance on obtaining a protective order to prevent financial institutions from notifying customers of the issuance of a grand jury subpoena.

See USAM 9-4.891, infra, for suggested forms of application for ex parte delay of notice (Form G, Form DOJ-467) and delay of notice order (Form H, Form DOJ-468).

#### 9-4.825 Post-Delay Procedures

Where customer notice has been delayed by court order or where access has been obtained pursuant to search warrant or the emergency exception of 12 U.S.C. §3414(b), the Act requires post-notice to the customer. (12 U.S.C. §§3409(b)(3), 3409(c), 3406(b)(c)).

See USAM 9-4.891, infra, for suggested form of post-notice of search warrant (Form I, Form DOJ-469); search warrant where post-notice is delayed by court order beyond 90 days (Form J, Form DOJ-470); formal written request, administrative process or judicial subpoena (Form K, Form DOJ-471); and emergency access (Form L, Form DOJ-472).

#### 9-4.826 Customer Challenge Proceedings

The procedures to be followed in customer challenge proceedings are set forth at 12 U.S.C. §3410. Within the prescribed time period (10 to 14 days depending upon whether notice was personally served or served by mail), the customer may file a motion to quash an administrative summons or judicial subpoena, or a motion to enjoin the government from pursuing a formal written request. To support the motion, the customer must file a "sworn statement" stating that he/she is the person whose records are

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

being sought (12 U.S.C. §3410(a)(1)) and stating reasons for believing that the records sought are not relevant to the investigation, that the Act has not been substantially complied with, or any other legal reason for denying access (12 U.S.C. §3410(a)(2)). See Hancock v. Marshall, 86 F.R.D. 209 (D.D.C. 1980) (movant must make out prima facie case of impropriety before the government is required to respond). Note that the Act clearly contemplates a dramatically simplified procedure for customer challenges including the suspension of normal service requirements. Further, mere filing of a customer challenge action precludes government access to financial records until the matter is fully adjudicated. See 12 U.S.C. §§3405(3), 3407(3) and 3408(4)(B).

One issue likely to arise in every customer challenge is the basis for the government's belief that the records sought are relevant to a legitimate law enforcement inquiry. In the first customer challenge proceeding litigated, involving records of a non-litigant sought in connection with a civil proceeding, the court granted the government's request for an opportunity to inspect the financial records in question prior to court determination of the relevancy of the records. See Romo v. United States Department of Justice, Civil No. 79-Div-1990 (MEL), (S.D.N.Y. May 15, 1979) (unpublished order).

9-4.827 Government Response to Customer Challenge

If the customer complies with the above requirements, the government then bears the burden of proving that it is entitled to access (12 U.S.C. §3410(b)). To do this, the government must show that there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry (i.e., a lawful investigation or official proceeding inquiring into a violation of any criminal or civil statute or regulation, rule or order) within the jurisdiction of the investigating agency. See McGloshen v. United States Department of Agriculture, 480 F. Supp. 247 (W.D. Ky. 1979) (to prevail against a customer challenge, the government must show only "a demonstrable reason to believe that the law enforcement inquiry is legitimate and a reasonable belief that the records sought are relevant to that inquiry.") The test of relevance is broad and should encompass anything that might be used as evidence or that might lead to evidence. The inquiry must be legitimate; it cannot be pursued to harass the subject or for political purposes. (See, e.g., 124 Cong. Rec. H11737 (daily ed. October 5, 1978) (remarks of Rep. Pattison) ("An investigation conducted solely for purposes of political harassment or intimidation or otherwise in bad faith is not legitimate . . . [but] . . . We do not want judges standing over prosecutors telling them when they have enough evidence to begin an investigation.")). If the customer meets this burden,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

a summons or subpoena will be quashed and a formal written request enjoined. Note that the court is expressly empowered to find for the customer if there has not been "substantial compliance" with the Act. See 12 U.S.C. §3410(c); but see H. R. Rep. No. 95-1383 at 224, 7 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., at 9533. ("This language is intended only to ensure that minor technical violations of the bill are not the basis for denying access.") The Act (12 U.S.C. §3410(b)) requires that customer challenges be decided by the court within seven calendar days of the filing of the government's response; through this provision, Congress has recognized the need for expeditious resolution of customer challenges. This requirement should not be read as authorizing access during the pendency of a challenge proceeding.

9-4.828 In Camera Review of Government Response

The Act provides that court review of the government's response to a challenge may be in camera (12 U.S.C. §3410(b)). Factors meriting in camera review include the same circumstances as justify delay of notice: flight from prosecution, destruction of or tampering with evidence, intimidation of potential witnesses, or other serious jeopardy to an investigation or trial. It is the view of the Department that an adversary hearing would jeopardize an investigation or trial if it might reveal the identity of an informant or result in improper discovery practices by a defendant (i.e., lead to disclosure or premature discovery of information to which a defendant would not be entitled through discovery rules, the Jencks Act, or Brady). See H. R. Rep. No. 95-1383 at 224, 7 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., at 9354; (in camera provision is "to prevent abuse of the challenge procedure as a method of pre-trial discovery . . .").

9-4.829 Appeals and Other Post-Challenge Matters

Denials of customer challenges are not appealable until after the conclusion of any legal proceedings brought against the customer based upon the financial records (12 U.S.C. §3410(d)). Because of this restriction on customer appeals, the government must notify the customer upon a determination not to proceed further with the investigation in connection with which financial records have been obtained over a customer challenge. Such notice does not preclude a later legal proceeding based in whole or in part on newly obtained evidence. Where records are obtained over a customer challenge, the Act requires the government to certify to the appropriate court if no prosecutorial decision is made within 180 days of disclosure. See 12 U.S.C. §3410(d).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The running of any applicable statute of limitations is suspended during the time that a customer challenge action is pending in court (12 U.S.C. §3419). Violations of the procedures of the Act do not affect the admissibility of the information obtained. See 12 U.S.C. §3417(d); United States v. Brown, 605 F.2d 389, 395-396 (8th Cir. 1979), cert. denied, 100 S.Ct. 466 (1979).

See USAM 9-4.891, infra, Form M (Form DOJ-473), for suggested form of notice that no legal proceeding is contemplated.

9-4.830 Right to Financial Privacy Act--General (Continued)

9-4.831 Rights and Duties of Financial Institutions

Financial institutions are obligated to assemble records requested through administrative summons/subpoena or judicial subpoena even during the pendency of customer challenge proceedings. See 12 U.S.C. §3411. Financial institutions have the right to resist a government request for records on various grounds (i.e., vagueness, undue burden); such rights remain unaffected by the Act but cannot be asserted by the customer. See 12 U.S.C. §3410(f).

9-4.832 Interagency Transfers of Financial Records

The Act (12 U.S.C. §3412) sets forth new restrictions on the transfer of financial records obtained under the Act among federal departments and agencies. These procedures are substantially different from existing restrictions found in the Privacy Act of 1974, 5 U.S.C. §552a.

Financial records may be transferred to another federal agency under 12 U.S.C. §3412 only if an official of the transferring agency certifies in writing that there is reason to believe that the records are relevant to a legitimate law enforcement inquiry of the receiving agency. In addition, within 14 days after any transfer, the customer must be notified of the transfer unless the government has obtained, in connection with its original access or at the time of the transfer, a court order delaying notice under the provisions of 12 U.S.C. §3409, as discussed at USAM 9-4.824, supra.

Transfer restrictions do not apply to intra-departmental transfers (i.e., the FBI or DEA may transfer financial records to U.S. Attorneys'

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

offices or to the Department's litigating Divisions without restriction). In addition, post-transfer-notice is only required for transfers between federal departments; the Act does not restrict transfers of financial records from state or local government agencies to federal agencies or from federal to state agencies. Neither does the Act cover transfers of financial records between a federal agency and an agency of a foreign government. Also note that 12 U.S.C. §3413(g) expressly excepts from post-notice the transfer of account identification information obtained pursuant to that subsection.

Further, the Act is interpreted as authorizing federal bank supervisory agencies to refer criminal cases to the Department of Justice without post-notice to the customer if the crime involved is closely related to the management of the financial institution and if the scope of information included in the referral is limited to those items which may be reported by a financial institution under USAM 9-4.849, infra. For additional information on the authority of federal bank supervisory agencies to report crime, see May 22, 1979, Office of Legal Counsel opinion to the Deputy Attorney General and July 17, 1979, memorandum from the Criminal Division to the Deputy Attorney General. (Transmitted to U.S. Attorneys by memorandum from the Executive Office of U.S. Attorneys dated August 9, 1979.)

Please note that the transfer restrictions of 12 U.S.C. §3412 do not apply to records obtained pursuant to any of the Act's exceptions, including 12 U.S.C. §3413(a) (records not identifiable with a particular customer); 12 U.S.C. §3413(c) (records required to be reported by statute); 12 U.S.C. §3413(e) (records obtained pursuant to the Federal Rules of Civil or Criminal procedure); 12 U.S.C. §3413(f) (records obtained pursuant to an administrative subpoena issued by an administrative law judge); 12 U.S.C. §3413(g) (account identification information) and 12 U.S.C. §3413(i) (grand jury subpoenaed records).

Practice Note: Caution is required in connection with transfers between state and federal agencies as the Congress clearly intended that state and local agencies not be used as sub-agents of federal agencies to circumvent the restrictions of the Act. Transfers that would create an appearance of impropriety should be avoided. If, for example, a state agency offers financial records to a federal agency without being requested to do so or if records previously obtained by a state agency are provided in response to a federal inquiry, the transfer does not create an appearance of impropriety. If, however, financial records obtained by a state subsequent to a federal inquiry are transferred to the requesting federal agency, there would be an appearance of abuse, if the timing and circumstances of the transfer were such as to suggest that state officials

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

were merely acting as sub-agents of federal officials for purposes of circumventing the Financial Privacy Act.

Note that the Act is interpreted not to require a second post-notice to the customer when records are re-transferred from the transferee to the original transferring agency.

See USAM 9-4.891, *infra*, Form N (Form DOJ-474), for suggested form of certification for transferring records and Form P (Form DOJ-476) for form of customer notice of transfer.

9-4.840 Exceptions

9-4.841 Litigation Exception

The Act does not apply when financial records are sought through the Federal Rules of Civil or Criminal procedure or through other rules in connection with any judicial proceeding to which the customer is a party. See 12 U.S.C. §3413(e). Upon issuance of a trial subpoena for the financial records of a criminal defendant pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, therefore, the notice, challenge, reporting and other requirements of the Act do not apply. Some financial institutions may insist upon issuance of a certificate of compliance in connection with a trial subpoena for records of a criminal defendant; such a certification that the Act is inapplicable by virtue of the litigation exception may be issued. See USAM 9-4.819, *supra*, for procedure to be followed in connection with a criminal trial subpoena for financial records of non-parties.

For the reasons set out at USAM 9-4.816, *supra*, no notice is required in connection with Rule 17(c) of the Federal Rules of Criminal Procedure trial subpoenas even though the records sought are held in a joint husband-wife or partnership account.

9-4.842 Grand Jury Subpoena Exception

The Act does not apply to subpoenas issued by federal grand juries (12 U.S.C. §3413(1)), but 12 U.S.C. §3420 does contain new restrictions upon the handling and use of financial records subpoenaed by grand juries. This section requires that financial records obtained by grand jury subpoena must be actually "returned and presented" to the grand jury and must be destroyed or returned to the financial institution if not used in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

connection with the return of an indictment, a criminal prosecution or a purpose permitted by Rule 6(e) of the Federal Rules of Criminal Procedure.

The broad wording of the grand jury exception is significant:

Nothing in this title (except sections 1115 [requiring reimbursement effective October 1, 1979] and 1120 [imposing handling restrictions once records are in federal custody] shall apply to any subpoena or court order issued in connection with proceedings before a grand jury. [Emphasis and explanatory language added.]

By virtue of the wording of the exception, grand jury subpoenas are not subject to the certification of compliance, customer notice, or civil liability provisions of the Act. In fact, aside from the new reimbursement and handling provisions, the Act leaves federal grand jury subpoenas precisely where they were before the Act.

Pre-Act case law--including United States v. Miller, 425 U.S. 435 (1976), which held that customers of financial institutions have no standing to challenge a federal grand jury subpoena directed to the institution--remains in effect.

The legislative history of the Act points out that grand jury subpoenas were excepted from the Act because:

The grand jury is the single most important investigative tool of criminal law enforcement. In addition, grand jury procedures are already subject to judicial scrutiny. Furthermore, the Supreme Court decisions indicate that the constitutional status of the grand jury protects it from burdensome delays. Finally, grand juries are protected by rules keeping their proceedings secret. Expanded notice and challenge rights might diminish grand jury secrecy and threaten the privacy of individuals being investigated.

H. R. Rep. No. 95-1383 at 228, 7 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., at 9358. The five major purposes of the rule of grand jury secrecy are set out in United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 n.6 (1958).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The "actually returned and presented" language of 12 U.S.C. §3420(1) is not interpreted by the Department as requiring either return of the records by a representative of the subpoenaed financial institution or physical production of the records before the grand jury in every case. Rather, it is the view of the Department that 12 U.S.C. §3420(1) should be interpreted in keeping with the realities of grand jury practice. For purposes of convenience and economy, therefore, the subpoenaed party may be permitted to surrender records to a federal agent so long as a report is made in due course to the grand jury. Note the handling restrictions discussed in USAM 9-4.844, infra, however.

The question has arisen as to whether the "actually returned and presented" language of the Act prohibits agents of the grand jury from inspecting grand jury subpoenaed records at the financial institution or from searching through records of financial institutions to locate items covered by the subpoena. The first court confronting these issues held that such activities are not prohibited by the Act, unpublished opinion, In re Grand Jury Proceedings, Misc. Action No. 314, Section "B," (E.D. La., June 13, 1979) (unreported opinion). More recently, the U.S. Court of Appeals for the Fifth Circuit has affirmed a district court opinion stating that the Act does not prohibit agents of a grand jury from searching for and copying bank records sought pursuant to grand jury subpoena, In re Grand Jury Proceedings, 636 F.2d 81, 84-85 (5th Cir. 1981).

9-4.843 Procedure for Grand Jury Subpoena of Financial Records

To carry out the Congressional mandate, a grand jury log of all subpoenas duces tecum for financial records issued and returned must be established and maintained. Where these requirements pose special difficulties, financial records may be sought by formal written request or other process authorized by the Act.

The grand jury log of subpoenas for financial records should contain the following information: (1) description of the grand jury subpoena, (2) date issued, (3) date returned, (4) subsequent disposition of records (disposition notes might contain entries such as "turned over to FBI Agent Jones for analysis on 7/17/79; returned to GJ by Agent Jones with summary on 7/24/79"). Entries as to disposition of records are important because the purpose of the log requirement is to establish a "paper trail" so that handling of subpoenaed records is documented for later review if necessary. The log requirement does not necessitate establishment of a separate system if the information required to be maintained therein is

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

documented in some other way (i.e., grand jury minutes or docket entries).

The Financial Privacy Act requires full compliance with previously stated Department grand jury policy as published at USAM 9-2.162:

(A) U.S. Attorney or Assistant U.S. Attorney shall personally authorize the issuance of a subpoena duces tecum to obtain financial records in such a way as to avoid any appearance that the matter was left to the discretion of an investigative agent serving the subpoena;

(B) Every such subpoena shall be returnable only on a date when the grand jury is in session, and the subpoenaed records shall be produced before the grand jury, unless the grand jury itself has previously agreed upon some different course, see United States v. Hilton, 534 F.2d 556, 564-65 (3d Cir. 1976); and

(C) If, for the sake of convenience and economy, the subpoenaed party is permitted voluntarily to relinquish the records to the government agency serving the subpoena, a report shall be made in due course to the grand jury as to the nature and contents of the records.

9-4.844 Procedures for Handling Financial Records Subpoenaed by the Grand Jury

Financial records subpoenaed by a grand jury must be accorded the same protection as other "grand jury materials," such as grand jury transcripts, and must be used only in connection with obtaining an indictment for prosecution of the indicted offense, or for purposes authorized by Rule 6(e) of the Federal Rules of Criminal Procedure or by Brady v. Maryland, 373 U.S. 83 (1963).

Because 12 U.S.C. §3420 incorporates Rule 6(e) of the Federal Rules of Criminal Procedure, FBI and DEA access to grand jury-subpoenaed financial records is the same as with respect to other Rule 6(e) material. More specifically, 12 U.S.C. §3420 permits agents, when authorized by the attorney for the government, to:

- A. Have ready access to grand jury--subpoenaed records;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Copy such records as necessary in connection with criminal investigative activities;

C. Summarize such records in FD-302's and other reports;

D. Circulate such reports to other offices as necessary to check and cross-check information; and

E. Use such reports in setting out criminal investigative leads to other offices.

9-4.845 Prohibiting Banks from Notifying Customers of Grand Jury Subpoenas

A number of financial institutions are interpreting the Act as requiring that they notify customers of grand jury subpoenas. It is the view of the Department that such notice is contrary to the intent of the Act. First, in many cases customer notice of a grand jury subpoena would frustrate an investigation or endanger the physical safety of grand jurors, witnesses, and officials working with the grand jury. Second, such notice jeopardizes grand jury secrecy. (See H. R. Rep. No. 95-1383 at 228, 7 U.S. Code Cong. & Ad. News, 95th Cong., 2d Sess., at 9358: "Expanded notice and challenge rights [in connection with grand jury subpoenas] might jeopardize grand jury secrecy and threaten the privacy of individuals being investigated.") Third, all duties of customer notification set out in the Act are imposed upon government authorities, not financial institutions. And fourth, no legitimate purpose is served by customer notification as customers have no standing to challenge government access to records pursuant to grand jury subpoena (see United States v. Miller, 425 U.S. 435 (1976)).

In addition to informal discussions with financial institutions and their counsel requesting confidentiality in connection with grand jury subpoenas for financial records, some federal prosecutors have issued letters to financial institutions documenting the need for confidentiality and the lack of any obligation on the part of the financial institution to give customer notice of grand jury subpoenas. Issuance of such letters is proper if they are appropriately drafted. See In re Vescova Special Grand Jury, 473 F. Supp. 1335 (C.D. Cal. 1979) (government attorneys cannot legally impose an obligation of secrecy upon financial institution). State laws requiring customer notice of grand jury subpoenas are not applicable to federal legal process. In re Grand Jury Subpoena (Connecticut Savings Bank), 481 F. Supp. 833 (D. Conn. 1979).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Where informal efforts to obtain agreement from financial institutions not to notify customers of grand jury subpoenas are unavailing, some federal prosecutors have sought and obtained court orders prohibiting such notice. The two major impediments to obtaining such protective orders are (1) the language of Rule 6(e) of the Federal Rules of Criminal Procedure ("No obligation of secrecy may be imposed upon any person except in accordance with this rule.") and (2) the fact that 12 U.S.C. §3409 (authorizing protective orders) would seem not to encompass grand jury subpoenas due to the wording of the grand jury exception at 12 U.S.C. §3413(i). Nevertheless, some courts have granted protective orders in connection with grand jury subpoenas.

See Forms Q1 to Q4 for the form of motion and order successfully used in District of Maryland and unpublished order in In re Grand Jury Subpoena Duces Tecum dated September 16, 1980, CR 80-93 Misc. (N.D. Cal., September 16, 1980) (unpublished opinion).

It is the position of the Department that the Financial Privacy Act, by authorizing imposition of an obligation of secrecy upon financial institutions in connection with administrative subpoenas, trial subpoenas, and formal written requests, impliedly authorizes a similar obligation in connection with grand jury subpoenas, under 12 U.S.C. §3409 and 18 U.S.C. §1651. Such orders do not conflict with Rule 6(e) of the Federal Rules of Criminal Procedure because they are limited to the fact of receipt of a grand jury subpoena rather than to matters occurring before the grand jury. In the alternative, even if Rule 6(e) of the Federal Rules of Criminal Procedure is found to embrace the fact of receipt of a grand jury subpoena, protective orders directed to financial institutions are not subject to Rule 6(e) of the Federal Rules of Criminal Procedure because such orders are based upon the institution's status as a record custodian regulated by the Financial Privacy Act rather than upon the financial institution's status as a grand jury witness. Supporting this interpretation is the fact that it would be nonsensical if courts were empowered to prohibit customer notification in connection with a formal written request but not in connection with a constitutionally contemplated form of legal process which was excepted from the Financial Privacy Act because customer notification in connection therewith would jeopardize grand jury secrecy. See In re Swearingen Aviation Corp., 486 F.Supp. 9 (D. Md. 1979), modified, per curiam, 605 F.2d 125 (4th Cir. 1979).

9-4.846 Account Identification Information Exception

The Act does not require customer notice and a challenge opportunity nor does it impose restrictions upon interagency transfers where only

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

basic account identification information is involved (i.e., name and address of customer, type of account, and account number). The government is required, however, to use some form of process to obtain such account identification information. In addition to authorizing special access to account identification information for a specific customer, 12 U.S.C. §3413(g) also permits more specific inquiries as to the account number associated with a particular financial transaction or class of transactions as well as accounts associated with a foreign country or subdivision thereof. See 12 U.S.C. §3413(g)(2) for international financial transactions covered.

This exception may be used to investigate transactions (such as check forgeries) where a crime has been committed and is necessary to trace a financial instrument through various accounts to find the wrongdoer. In addition, it will be useful to confirm that a financial institution does indeed have financial records sought in connection with a particular investigation before action is initiated to secure access to the records.

See USAM 9-4.891, Form O (Form DOJ-475), for suggested form of formal written request for account identification information. (This form includes a built-in certificate of compliance.) Other forms of process (i.e., an administrative subpoena) may be used to obtain account identification information.

9-4.847 Foreign Intelligence and Secret Service Protective Function  
Exceptions

12 U.S.C. §3414(a) excepts authorized foreign intelligence investigations and functions of the Secret Service in protecting the President and certain other federal officials and candidates. The exemption may only be used if a certificate of compliance with the Act, signed by a supervisory official of a rank designated by the head of the government authority seeking access, is submitted to the financial institution.

An annual tabulation of the use of this exception must be provided to the Congress. Financial institutions receiving certificates in foreign intelligence and protective function cases are prohibited by the Act from revealing to the customer that access to financial records was sought or has been obtained. 12 U.S.C. §3414(a)(3). Such prohibition of notice should be enforceable by court order under 12 U.S.C. §3418.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.848 Emergency Access Exception

12 U.S.C. §3414(b) excepts government access to financial records in narrowly limited emergency situations where any delay would create imminent danger of physical injury, serious property damage or flight from prosecution. No customer notice is required in such situations. To avoid abuse of this provision, records may be obtained only if the certification of compliance is made by a supervisory official of a rank designated by the head of the government authority seeking access. (The Attorney General has re-delegated to heads of Departmental units this authority to designate supervisory officials for certification.) In addition, the government must file in court within 5 days thereafter a sworn statement by the supervisory official justifying use of the emergency exception and (unless a court order delaying notice is obtained pursuant to 12 U.S.C. §3409(c)) must notify the customer as soon as practicable that his/her records were obtained. An example of a situation justifying use of the emergency exception would be a kidnapping case where financial records might lead to location of the victim or suspect.

9-4.849 Exceptions Permitting Disclosures by Financial Institutions

A. Notwithstanding the restrictions upon disclosure of financial records by financial institutions, institutions are permitted to notify government authorities of possible violations of law reflected in records within the custody of the institution (12 U.S.C. §3403(c)). This is interpreted to permit financial institutions to disclose the nature of the offense suspected, the identity of the customer involved, the identifying numbers of the accounts in which records reflecting the offense are contained, the dates of the transactions in question, and other information as is necessary to enable law enforcement authorities to initiate an investigation of the suspected offense. The 12 U.S.C. §3403(c) exception does not permit financial institutions to turn over or to verbally disclose the contents of financial records; rather, it is intended that the financial institution will provide information of the nature described above so that the law enforcement agency can then obtain access to the financial records through a form of legal process authorized by the Act (administrative process, grand jury subpoena, formal written request, etc.).

B. Financial institutions may also disclose financial records necessary to collect debts owed to the institutions (see 12 U.S.C. §3403(d)(1)) or to process and administer government loans (12 U.S.C. §3403(d)(2)).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. Because the Act contemplates that law enforcement authorities must proceed under the Act to obtain actual financial records required in the investigation and prosecution of suspected offenses reported by financial institutions, the information provided in the financial institution's report of crime must be sufficient to allow the government authority to meet the requirements that the Act sets out for access to records. Specifically, the government must be able to "reasonably describe" (12 U.S.C. §3402) the records sought and to issue a certificate of compliance with the Act (required in connection with all access mechanisms except grand jury subpoenas). Moreover, in issuing a certificate of compliance, the government authority must have "reason to believe that the records sought are relevant to a legitimate law enforcement inquiry." See 12 U.S.C. §§3405(1), 3407(1) and 3408(3). Such a description and determination can hardly be made and certified on the strength of a financial institution's unelaborated and unevaluated suspicions alone. Finally, because access to financial records may be sought by customer authorization pursuant to 12 U.S.C. §3404, particularly where access to records of victims is required, names and addresses of all protected customers whose records contain evidence of the suspected offense must be supplied so that law enforcement authorities can seek customer authorization of disclosure.

D. In reporting that a suspected criminal violation has occurred, is occurring, or will occur, a financial institution may disclose the following information to a federal law enforcement agency:

1. The name(s) and address(es) of the person(s) suspected and his/her (their) relationship with the financial institution, if any;
2. The identity of the financial institution(s) or office(s) thereof involved;
3. The specific offense(s) suspected;
4. The name(s) and address(es) of the account holder(s) and the account number(s) and type(s) of account(s) in which evidence of the suspected offense(s) is located; and
5. A general description (dates and any suspicious circumstances) of the transaction(s) involved in the suspected offense(s).

Of course, any information not derived from records protected by the Act which will assist the law enforcement agency may be freely disclosed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

To illustrate the extent of information which may be disclosed in connection with a financial institution's notification to federal law enforcement authorities of a suspected criminal offense, the following example is provided:

E. Example: The employing institution, First Financial, suspects one of its tellers, Steve Jones, of taking advantage of his position at First Financial's State Street branch office to embezzle funds from the accounts of six customers, one of which is a corporation, and of depositing the proceeds of these embezzlements in Jones' own account at the State Street office. Under the Act, First Financial may report the crime to federal law enforcement authorities providing all pertinent information not covered by the Act. In this case, such non-protected information might include records of Jones' shortages and overages as a teller, complete records relating to the corporate account which has been victimized, information from First Financial's employment records pertaining to Jones including such items as his employment application and salary level, and information obtained from interviews with other employees of First Financial [if such information is not derived from financial records pertaining to Jones' personal account] which indicates that Jones is living in a style not in keeping with his income as a teller or that Jones engages in suspicious activities while performing his job as teller.

Of course, financial records relating to Jones' personal account are protected, as are records pertaining to the five accounts of private individuals who are being victimized by Jones' embezzlement. The victims' records may, however, be obtained pursuant to the non-target exception. 12 U.S.C. §3413(h)(1)(A); (see USAM 9-4.850, infra). Even if derived from such protected records, however, the following information may be reported to federal law enforcement authorities:

1. Jones' full name and address, the fact that he is employed as a teller at the State Street office, and the fact that he is suspected of embezzlement;
2. The fact that the suspected offenses all involve transactions occurring at First Financial's State Street office;
3. The fact that the offenses appear to involve violations of federal criminal law (i.e., 18 U.S.C. §656);
4. The names and addresses of the customers who are suspected victims of the embezzlements, the fact that they are believed to be victims, the fact that they have accounts at the State Street office,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the account numbers of the victims' and Jones' accounts, and the fact that Jones is suspected of depositing embezzled funds in his account (again records pertaining to accounts of victims may be obtained pursuant to 12 U.S.C. §3413(h)(1)(A)); and

5. The dates of the suspicious transactions involving each victim's account and Jones' account together with a description of any circumstances leading to the belief that the withdrawals and deposits in question were part of an embezzlement scheme (for example, inquiries by customer victims as to specific unexplained debits to their accounts).

F. The notification of crime may also include the financial institution's analysis of the information described above together with an analysis of the significance of the suspected offense. While the general description and analysis of suspicious transactions may not be so detailed as to eliminate any need for law enforcement access to actual records, it should be sufficient to enable federal authorities (1) to reasonably describe records needed in the investigation, and (2) to determine that there is reason to believe such records are relevant to a legitimate law enforcement inquiry. Once provided with sufficient information to comply with these two requirements of the Act, federal authorities can proceed to obtain access to records pursuant to the procedures set out by the Act.

G. Finally, while reports of crime by financial institutions must be entirely voluntary, federal agents are free to advise officers and employees of financial institutions that they are authorized by 12 U.S.C. §3404(c) to report suspected crimes to federal law enforcement authorities.

H. The intent of the Congress is clear that financial institutions and their officers, employees and agents should report crimes as authorized by 12 U.S.C. §3403(c):

A bank could and should, report to the appropriate officials information pertaining to the cashing of a forged check, the passing of counterfeit currency or bonds, or the use of its services to facilitate a fraudulent scheme . . . Once information is received by government authorities, they must obtain any pertinent records that they seek in accordance with the procedures of the bill. [Emphasis added.]

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

H. R. Rep. No. 95-1383 at 218, 7 U.S. Code Cong. & Ad. News, 95th Cong.,  
2d Sess., at 9348-9349.

9-4.850 Exceptions (continued)

9-4.851 Non-Target Exception

12 U.S.C. §3413(h)(1)(A) is a particularly significant provision from the standpoint of law enforcement access. The exception provides as follows:

Nothing in this title (except sections 3403, 3417, and 3418) shall apply when financial records are sought by a government authority--

(A). In connection with a lawful proceeding, investigation, examination, or inspection directed at the financial institution in possession of such records or at a legal entity which is not a customer. [Emphasis added.]

The first portion of this exception authorizes access, limited only by certification of compliance and potential civil liability, in connection with investigations targeted against custodian financial institutions. The second portion of the exception, however, disjunctively broadens its sweep to include a far greater range of "excepted" targets, thereby permitting ready access to customer records in connection with embezzlement investigations directed against bank officers or employees, fraud investigations directed against outside swindlers, or any investigation requiring access to records of numerous customers and directed against an entity other than the customer whose records are sought.

The Department interprets the term "legal entity" as encompassing natural persons; this interpretation is grounded on three bases: (1) the term "entity" is sufficiently broad to encompass natural existence and is defined for general purposes as a "real being" (Black's Law Dictionary at 626 (4th ed. 1972)); (2) the exception does not read ". . . or another legal entity" which would have been the logical phrasing had Congress intended to denote only non-natural entities such as financial institutions; and (3) a non-natural legal entity (other than a small partnership) could never be a "customer" under the restrictive definition of the Act so that if "legal entity" was not intended to encompass natural persons there would have been no need for the added qualification of "...

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

which is not a customer." Moreover, the fact that such an investigative target (i.e., a teller) may coincidentally maintain an account of some sort at the financial institution in question does not render the target a "customer" within the meaning of 12 U.S.C. §3413(h)(1)(A). In an embezzlement case, therefore, the fact that the teller suspected of the embezzlement happens to maintain a checking account at that bank does not prevent the use of 12 U.S.C. §3413(h)(1)(A) to obtain access to records of the victims of the embezzlement. Of course, if records pertaining to the teller's checking account are sought in connection with an embezzlement investigation, they could not properly be obtained under the exception.

Note: It is the position of the Department of Justice that the non-target exception must be used if it is applicable. The Civil Division has twice declined to defend challenge actions when this exception was applicable and should have been employed.

9-4.852 Bank Supervisory Agency Exception

Agencies listed in 12 U.S.C. §3401(6) which exercise supervisory or regulatory functions with respect to financial institutions have free access to financial records to perform audits, develop regulations, monitor monetary policies and similar activities without providing customer notice or certification of compliance. Such supervisory agencies are also permitted to exchange examination reports and "other information" with other supervisory agencies without restriction under 12 U.S.C. §3412(d).

9-4.853 General Accounting Office Exception

The General Accounting Office, which is Congress' arm for performing audits of government agency operations, is allowed free access to any financial records held by the agencies it is examining (12 U.S.C. §3413(j)).

9-4.854 Internal Revenue Service Exception

The Act does not prohibit the disclosure of financial records obtained pursuant to the Internal Revenue Code. Accordingly, administrative summonses issued by the Internal Revenue Service in administering the tax laws are governed by the Internal Revenue Code, which establishes notice and challenge procedures and are, therefore, excepted from coverage by the Act (12 U.S.C. §3413(c)).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.855 Required Report Exception

Financial information that is required to be reported by statute or regulation is not subject to the Act; this includes reports on savings account interest payments and reports on certain cash and international transactions required by the Bank Secrecy Act (12 U.S.C. §3413(d)).

9-4.856 Exception for Financial Records Pertinent to Federally Insured or Guaranteed Loans

Those agencies responsible for federal loan, loan insurance, or loan guaranty programs where customers are the recipients of government assistance are excepted by 12 U.S.C. §3413(h)(1)(B) from customer notice in connection with access to financial records to be used for loan administration and collection functions. Records obtained pursuant to this exception may only be used for these purposes, however, unless customer notice and opportunity to challenge are afforded.

Federal agencies responsible for administering loan programs must advise borrowers of the agencies' access rights and must certify to the bank their compliance with the Act. Financial institutions must keep a record, open to inspection by the customer, of all instances in which access is granted pursuant to this exception.

9-4.857 Securities and Exchange Commission Exception

The Securities and Exchange Commission was expressly excluded from the Act's provisions until two years from the date of enactment (November 10, 1980). See 12 U.S.C. §3422. The SEC was brought under the provisions of the Act by Pub. L. No. 96-433 but on a somewhat different basis than other federal agencies.

9-4.860 Reimbursement of Financial Institutions

A. Generally, the government is not required to reimburse record custodians for the cost of complying with federal legal process. Rather, compliance with legal process is viewed as an incident of citizenship or, in the case of commercial entities, a cost of doing business. See, e.g., United States v. Bryan, 339 U.S. 323 (1950); Hurtado v. United States, 410 U.S. 578 (1973). But see also, In re Grand Jury No. 76-3 (MIA) Subpoena

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Duces Tecum, 555 F.2d 1306 (5th Cir. 1977), holding that a court may order reimbursement under Rule 17(c) of the Federal Rules of Criminal Procedure, if compliance with a subpoena would otherwise be "oppressive" or "unreasonable."

B. Effective October 1, 1979, 12 U.S.C. §3415 requires government authorities to reimburse financial institutions for the costs incurred in furnishing certain financial records of individuals and partnerships of five or less individuals in connection with law enforcement inquiries.

C. The costs incurred by a financial institution in supplying information pursuant to requests by the Department under 12 U.S.C. §§3403 - 3408, 3413(i), 3414 are reimbursable by the Department if the "return date" is on or after October 1, 1979. No payment shall be made unless the financial institution submits an itemized bill or invoice showing specific details concerning the search, reproduction, and transportation costs. (Witness and mileage fees will be treated in the same manner as other witness expenses.)

D. The following rates of reimbursement have been established by the Federal Reserve Board in accordance with the Right to Financial Privacy Act (12 U.S.C. §3415) and are published at 12 C.F.R. §219 (Regulation S):

1. Actual search and retrieval costs--\$2.50 per quarter hour for time spent by employees in locating, retrieving, reproducing, packaging and/or preparing documents for shipment;
2. Actual computer costs--time and necessary supplies;
3. Reproduction costs--15 cents per page; and
4. Transportation costs--to locate and retrieve records and/or to transport summoned records to the Department of Justice attorney's office.

E. Investigative agencies are responsible for costs incurred pursuant to their activities, up to the time that judicial process (a grand jury subpoena, a trial subpoena or a search warrant) is used to obtain financial information. At that point, the proper litigating component becomes responsible for costs incurred pursuant to its activities.

F. The costs other than witness expenses will be treated as administrative costs, classified under the following object classification codes (O/C):

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. O/C 2540 is used when a customer authorizes disclosure of financial data, 12 U.S.C. §3404.

2. O/C 2541 is used when financial records are obtained pursuant to an administrative subpoena or summons, 12 U.S.C. §3405.

3. O/C 2542 is used when financial records are obtained pursuant to a search warrant, 12 U.S.C. §3406.

4. O/C 2543 is used when financial records are obtained pursuant to a judicial subpoena, 12 U.S.C. §3407.

5. O/C 2544 is used when financial records are obtained pursuant to a formal written request, 12 U.S.C. §3408.

6. O/C 2545 is used when financial records are obtained pursuant to a Grand Jury subpoena, 12 U.S.C. 3413(i).

7. O/C 2546 is used when financial records are obtained pursuant to special procedures, 12 U.S.C. §3414.

G. Financial institutions shall complete Section B of the Request for Financial Information, Form OBD 211, and return the form, together with the requested information, to the Requesting Officer or designee which shall be an officer of the initiating U.S. Attorney's office or litigating division. The appropriate official shall review the invoice to determine that it is itemized, that costs are reasonable, and that the services and/or records were received. If these criteria are met, the official shall approve the invoice by signing it, indicating the appropriate Public Law Section, and forwarding it to the administrative office to assign the appropriate accounting classification code.

H. Administrative officials shall forward all approved originals to:

U.S. Department of Justice  
Accounting Operations Group  
P.O. Box 7405  
Ben Franklin Station  
Washington, D.C. 20044

Invoices received by the Accounting Operations Group which are not properly itemized or approved will be returned to the requesting officer. U.S. Marshals WILL NOT pay for these invoices unless a specific authorization is made by this office.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

I. Attached (as Form R) is a sample notice which could be submitted to financial institutions with Form S (Form OBD-211) to summarize reimbursement procedures and restrictions.

Before approving Forms OBD-211, Request for Financial Information, or payment, Administrative Officers must:

1. Ensure that the financial records requested pertain to legitimate "customers" as defined in the Act and USAM 9-4.812, supra, (i.e., individuals and partnerships of five or less individuals). Reimbursement cannot be made when the financial records relate to any other legal entities.

2. Ensure that reimbursements are authorized only for legitimate "financial institutions" as defined in the Act and USAM 9-4.811, supra. Many requests have been received to reimburse institutions which are not covered under the Act.

3. Ensure that Forms OBD-211 are properly prepared, that the appropriate "Section" in Item Number 18 is identified, and that the rates of reimbursement are in accordance with the entitlements and limitations authorized.

4. Work with attorneys or investigative agents handling cases and financial institutions, if necessary, to ensure that amounts charged are reasonable for the services actually received.

Note: The government is not required to reimburse financial institutions for records when the subject of the investigation is the financial institution in possession of the records sought. See In re Grand Jury Proceedings, 636 F.2d 81 (5th Cir. 1981).

9-4.870 Customer Civil Actions for Violations of the Act

12 U.S.C. §3417 authorizes customers to file a civil action to recover damages for violations of provisions of the Act either by the government or by a financial institution. Recovery is \$100 regardless of the volume of the records involved. Actual damages sustained as a result of the violation are recoverable. Punitive damages are recoverable if the violation was wilful or intentional. Court costs and reasonable attorney's fees are also recoverable.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A financial institution, its employees and agents, are absolved of liability for any violation of the Act if good faith reliance is placed upon a government certificate of compliance with the Act (12 U.S.C. §§3417 (c), 3403(b)).

While a civil action against the government is directed at and will be satisfied by the government agency rather than the individual government official involved, any court finding of a wilful or intentional violation of the Act requires a disciplinary proceeding by the Merit Systems Protection Board against the official involved (12 U.S.C. §3417(b)). See Civil Division Practice Manual at §3-53.1, et seq., for the defense of civil actions against federal agencies.

9-4.880 Reporting Requirements

The Act (12 U.S.C. §3421) establishes various reporting requirements including a report to be prepared by the Administrative Office of United States Courts detailing the number and outcome of government applications for delay of customer notice and of customer challenge suits. In addition, government agencies obtaining records through administrative or judicial process, search warrant, formal written request, or intelligence or emergency access provisions must report on such activities to the appropriate Congressional Committees. Such reports must include the number of requests under each applicable provision and any other relevant information. For the Department of Justice, the Office of Management and Finance will compile and coordinate data submitted by departmental units. See Order DOJ 2110.40 (April 30, 1980), Form T, for reporting procedures and format.

9-4.890 Compliance Checklist

First determine whether the records sought are covered by the Act (i.e., do they pertain to an "account" (checking, share, savings, or loan account) of a "customer" (living natural person or partnership of five or less partners) obtained from a "financial institution" (bank, savings and loan, credit union, mortgage bank, finance company, or credit card issuer) where the "customer" maintains his/her account in his/her true name?).

If the records are covered by the Act, access procedures will vary depending upon the form of process utilized. Following are the major steps to be observed for the seven access mechanisms most often employed by Department of Justice personnel to obtain covered records:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. Customer Authorization (12 U.S.C. §3404; USAM 9-4.816, supra)

1. Obtain execution by customer of authorization (Form DOJ-462) and execute certificate of compliance (Form DOJ-461).
2. Serve upon or mail to financial institution:
  - a. the authorization,
  - b. certificate of compliance, and
  - c. reimbursement materials (Form OBD 211 and Form R).
3. Obtain records within 90 days and use pursuant to general transfer restrictions.\*\*
4. Process reimbursement and maintain data necessary for annual statistical report to Congress.

B. Administrative Subpoena, Trial Subpoena and Formal Written Request (12 U.S.C. §§3405, 3407, 3408; USAM 9-4.818-9-4.819, supra) (Does not apply to trial subpoenas for records of parties to litigation.)

1. Execute subpoena or formal written request (Form DOJ-463).
2. Either:
  - a. Serve upon or mail the subpoena or request to financial institution with copy of subpoena or request plus:
    - (1) customer notice (Form DOJ-464),
    - (2) blank motion form (Form DOJ-465), and
    - (3) blank sworn statement form (Form DOJ-466) to the customer.

---

\*\* General Transfer Restrictions: May transfer records freely within Department of Justice (DEA, FBI, Crm Div, USAs, etc.) and to state, local or foreign governments (subject to Privacy Act of 1974) but must certify (Form DOJ-474) and give customer notice of transfer within 14 days (Form DOJ-476) if transfer is made to non-DOJ federal agency or department.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

b. Wait 14 days from date of personal service or 18 days from date of mailing to customer, or until court has dismissed any challenge filed by the customer.

c. Execute and serve upon or mail to financial institution a certificate of compliance (Form DOJ-461) and reimbursement materials (Form OBD 211 and Form R).

d. Obtain records and use pursuant to general transfer restrictions.

e. If records are obtained over a customer challenge, notify customer if decision is made not to prosecute (Form DOJ-473), or make necessary certification to court if no prosecutorial decision has been made within 180 days of access (see 12 U.S.C. §3410(d)).

or

a. Obtain court order delaying notice (Forms DOJ-467 and 468).

b. Serve upon or mail to financial institution:

(1) the subpoena or request,

(2) the court order,

(3) a certificate of compliance (Form DOJ-461), and

(4) reimbursement materials (Form OBD 211 and Form R).

c. Obtain records and use for the specific purposes listed in the authorization (see 12 U.S.C. §3403(4)) and/or pursuant to general transfer restrictions.

d. Upon expiration of court-ordered delay, serve upon or mail to customer the notice of access and delay (Form DOJ-471).

3. Process reimbursement and maintain data necessary for annual statistical report to Congress.

C. Search Warrant (12 U.S.C. §3406; USAM 9-4.817, supra)

1. Obtain issuance of search warrant.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

2. Serve: (a) warrant, (b) certificate of compliance (Form DOJ-461), and (c) reimbursement materials (Form OBD-211 and Form R) upon financial institution and secure records.

3. Use records pursuant to general transfer restrictions.\*\*

4. Within 90 days of execution of warrant, either secure court order delaying notice (Forms DOJ-467 and 468) or notify customer of execution of the warrant (Form DOJ-469).

If a Court order is obtained delaying notice, use Form DOJ-470 for customer notice upon expiration of period of delay.

5. Process reimbursement and maintain data necessary for annual statistical report to Congress.

D. Grand Jury Subpoena (12 U.S.C. §§3413(i), 3420; USAM 9-4.842-9-4.845, supra).

1. Obtain issuance of subpoena.

2. Serve upon or mail to financial institution with reimbursement materials (Form OBD-211 and Form R).

3. Log in subpoenaed records (see USAM 9-4.843, supra).

4. Use records per Rule 6(e), Fed. R. Crim. P.

5. Process reimbursement and maintain data necessary for annual statistical report to DOJ.

E. Basic Identifying Account Information Exception (12 U.S.C. §3413(g); USAM 9-4.846, supra).

1. Either:

a. execute formal written request for account information (Form DOJ-475) which has built-in certificate of compliance;

---

**\*\* General Transfer Restrictions:** May transfer records freely within Department of Justice (DEA, FBI, Crm Div, USAs, etc.) and to state, local or foreign governments (subject to Privacy Act of 1974) but must certify (Form DOJ-474) and give customer notice of transfer within 14 days (Form DOJ-476) if transfer is made to non-DOJ federal agency or department.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

or

b. execute subpoena or other process and certificate of compliance (Form DOJ-461).

2. Serve upon financial institution and secure information.

F. Non-Target Exception (12 U.S.C. §3413(h)(1)(A); USAM 9-4.850, supra) (if records of non-target are sought)

1. Execute certificate of compliance (Form DOJ-461) and legal process, if desired.

2. Serve on financial institution and obtain information.

3. Records may be used only for purpose for which obtained and transferred only if to be used against financial institution or target other than subject of records.

G. Emergency Access (12 U.S.C. §3414(b); USAM 9-4.848, supra)

1. Obtain execution of certificate of compliance (Form DOJ-461) by supervisory official designated by head of agency (may be accompanied by legal process if desired).

2. Serve upon financial institution, obtain records and use per general transfer restrictions.\*\*

3. Within five days of access, file sworn statement with court justifying emergency access, AND, either:

a. notify customer of access (Form DOJ-472), OR

b. obtain court order delaying notice (Forms DOJ-467 and 468)

---

\*\*General Transfer Restrictions: May transfer records freely within Department of Justice (DEA, FBI, Crm Div, USAs, etc.) and to state, local or foreign governments (subject to Privacy Act of 1974) but must certify (Form DOJ-474) and give customer notice of transfer within 14 days (Form DOJ-476) if transfer is made to non-DOJ federal agency or department.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

4. Follow up as practicable with reimbursement materials (Forms OBD-211 and Form R).

5. Process reimbursement and maintain data necessary for annual statistical report to Congress.

6. If court order is obtained delaying notice, notify customer at expiration of period of delay (Form DOJ-471).

9-4.891 Forms

Pages 201 to 241 contain Financial Privacy Act Forms A to T.

Note: Because the text of several of the notice forms is expressly set out in the Act, caution should be exercised in modifying the following forms.

1984 USAM (superseded)

Intentional Blank Page

1984 USAM (superseded)



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

CERTIFICATE OF COMPLIANCE WITH THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

TO: \_\_\_\_\_

(Name and Address of Financial Institution)

FROM: \_\_\_\_\_

(Name of Government Agency)

I hereby certify that the applicable provisions of the Right To Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422, have been complied with as to the

(Summons, Subpoena or Formal Written Request)

presented on \_\_\_\_\_, 19\_\_ for the following (Date)

financial records of \_\_\_\_\_:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_, 19\_\_ (Date) (Signature)

\_\_\_\_\_

(Address) (Name and Title of Official)

(Telephone) (Government Agency)

Pursuant to the Right To Financial Privacy Act of 1978, good faith reliance upon this certificate relieves your institution and its employees and agents of any possible liability to the customer in connection with the disclosure of these financial records.

§1103(b) of the Right To Financial Privacy Act, 12 U.S.C. §3403(b)

FORM DOJ-461 3-10-79



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

CUSTOMER CONSENT AND AUTHORIZATION FOR ACCESS TO FINANCIAL RECORDS

I, \_\_\_\_\_, having read the

(Name of Customer)

explanation of my rights which is attached to this form, hereby authorize the

(Name and Address of Financial Institution)

to disclose these financial records:

to \_\_\_\_\_,

(Names of Government Authorities Allowed Access)

\_\_\_\_\_ , for the following purpose(s):

I understand that this authorization may be revoked by me in writing at any time before my records, as described above, are disclosed, and that this authorization is valid for no more than three months from the date of my signature.

\_\_\_\_\_, 19\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature of Customer)

\_\_\_\_\_  
(Address of Customer)



## UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

### STATEMENT OF CUSTOMER RIGHTS UNDER THE RIGHT TO FINANCIAL PRIVACY ACT OF 1978

Federal law protects the privacy of your financial records. Before banks, savings and loan associations, credit unions, credit card issuers or other financial institutions may give financial information about you to a Federal agency, certain procedures must be followed.

#### Consent to Financial Records

You may be asked to consent to make your financial records available to the Government. You may withhold your consent, and your consent is not required as a condition of doing business with any financial institution. If you give your consent, it can be revoked in writing at any time before your records are disclosed. Furthermore, any consent you give is effective for only three months, and your financial institution must keep a record of the instances in which it discloses your financial information.

#### Without Your Consent

Without your consent, a Federal agency that wants to see your financial records may do so ordinarily only by means of a lawful subpoena, summons, formal written request, or search warrant for that purpose.

Generally, the Federal agency must give you advance notice of its request for your records explaining why the information is being sought and telling you how to object in court. The Federal agency must also send you copies of court documents to be prepared by you with instructions for filling them out. While these procedures will be kept as simple as possible, you may want to consult with an attorney before making a challenge to a Federal agency's request.

#### Exceptions

In some circumstances, a Federal agency may obtain financial information about you without advance notice or your consent. In most of these cases, the Federal agency

will be required to go to court to get permission to obtain your records without giving you notice beforehand. In these instances, the court will make the Government show that its investigation and request for your records are proper.

When the reason for the delay of notice no longer exists, you will usually be notified that your records were obtained.

#### Transfer of Information

Generally, a Federal agency which obtains your financial records is prohibited from transferring them to another Federal agency unless it certifies in writing that the transfer is proper and sends a notice to you that your records have been sent to another agency.

#### Penalties

If a Federal agency or financial institution violates the Right To Financial Privacy Act, you may sue for damages or to seek compliance with the law. If you win, you may be repaid your attorney's fees and costs.

#### Additional Information

If you have any questions about your rights under this law, or about how to consent to release your financial records, please call the official whose name and telephone number appear below:

\_\_\_\_\_

(Address)

\_\_\_\_\_

(Telephone)

\_\_\_\_\_

(Name)

\_\_\_\_\_

(Title)

\_\_\_\_\_

(Government Agency)



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

FORMAL WRITTEN REQUEST FOR FINANCIAL RECORDS

TO: \_\_\_\_\_

(Name and Address of Financial Institution)

FROM: \_\_\_\_\_

(Name of Government Agency)

In connection with a legitimate law enforcement inquiry, you are requested, pursuant to the Right to Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422, and 28 C.F.R., Part 47, to assemble and \_\_\_\_\_ the following financial records pertaining to \_\_\_\_\_

(reproduce/make available)

(Name of Customer or Customers)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Upon your receipt of a Certificate of Compliance with the Right To Financial Privacy Act of 1978, you will be relieved of any possible liability to the customer in connection with the disclosure of these financial records.

\_\_\_\_\_, 19\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Name and Title of Official)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Government Agency)

\_\_\_\_\_  
(Phone)

Remarks:

§1108 of the Right To Financial Privacy Act, 12 U.S.C. §3408; 28 C.F.R., Part 47

FORM DOJ-463  
4-4-79



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

CUSTOMER NOTICE

Dear \_\_\_\_\_ :  
(Customer)

Records or information concerning your transactions held by the financial institution named in the attached subpoena, summons, or formal written request are being sought by the \_\_\_\_\_

(Government Agency)

in accordance with the Right To Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422, for the following purpose(s):

\_\_\_\_\_  
\_\_\_\_\_

If you desire that such records or information not be made available, you must:

- (1) Fill out the accompanying motion paper and sworn statement (as indicated by the instructions beneath each blank space) or write one of your own, stating that you are the customer whose records are being requested by the Government, and either giving the reasons you believe that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.
- (2) File the motion and sworn statement by mailing or delivering them to the Clerk of any one of the following United States District Courts (in some cases, there will be only one appropriate court):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

The Right To Financial Privacy Act, 12 U.S.C. §§3401-3422

FORM DOJ-464  
4-4-79

(It would simplify the proceeding if you would include with your motion and sworn statement a copy of the attached summons, subpoena or formal written request, as well as a copy of this notice.)

- (3) Serve the Government authority requesting the records by mailing (by registered or certified mail) or by delivering a copy of your motion and sworn statement to \_\_\_\_\_  
\_\_\_\_\_.
- (4) Be prepared to come to court and present your position in further detail.
- (5) You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer.

Very truly yours,

\_\_\_\_\_, 19\_\_\_\_  
(Date)

\_\_\_\_\_  
(Name and Title of Official)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(Government Agency)

\_\_\_\_\_  
(Telephone)

Enclosures: Summons, Subpoena or Formal Written Request  
Motion Form  
Sworn Statement Form

FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_  
(Name of District) (State in which Court is located)

\_\_\_\_\_  
(Your Name)  
  
Movant  
  
v.  
  
UNITED STATES DEPARTMENT OF JUSTICE  
  
Respondent.

MOTION FOR ORDER  
PURSUANT TO CUSTOMER  
CHALLENGE PROVISIONS  
OF THE RIGHT TO FINANCIAL  
PRIVACY ACT OF 1978.

\_\_\_\_\_ hereby moves this  
(Your Name)

Court, pursuant to Section 1110 of the Right To Financial Privacy Act of 1978, 12 U.S.C. §3410, for an order preventing the government from obtaining access to my financial records. The agency seeking access is \_\_\_\_\_  
(Name of Government Agency)

My financial records are held by \_\_\_\_\_  
(Name of Financial Institution)

In support of this motion, the Court is respectfully referred to my sworn statement filed with this motion.

Respectfully submitted,

\_\_\_\_\_  
(Your Signature)

\_\_\_\_\_  
(Your Address)

\_\_\_\_\_  
(Your Name)

\_\_\_\_\_  
(Your Telephone #)

CERTIFICATE OF SERVICE

I have mailed or delivered a copy of this motion and the attached sworn statement to \_\_\_\_\_  
(Name of Official listed at item 3 of Customer Notice)

on \_\_\_\_\_, 19\_\_\_\_.  
(Date)

\_\_\_\_\_  
(Your Signature)

IN THE UNITED STATES DISTRICT COURT

FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_  
(Name of District) (State in which Court is located)

\_\_\_\_\_  
(Customer's Name)

Movant

v.

UNITED STATES DEPARTMENT OF JUSTICE

Respondent

Miscellaneous No. \_\_\_\_\_  
(Will be filled in by Court Clerk)

SWORN STATEMENT OF MOVANT

I, \_\_\_\_\_, (am presently/was previously)  
(Customer's Name) (Indicate One)

a customer of \_\_\_\_\_,  
(Name of Financial Institution)

and I am the customer whose records are being requested by the Government.

The financial records sought by \_\_\_\_\_  
(Name of Government Agency)

are not relevant to the legitimate law enforcement inquiry stated in the Customer Notice that was sent to me because

\_\_\_\_\_, or

should not be disclosed because there has not been substantial compliance with the Right to Financial Privacy Act of 1978 in that \_\_\_\_\_

or should not be disclosed on the following other legal basis \_\_\_\_\_

I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_, 19\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Customer's Signature)



IN THE UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN RE \_\_\_\_\_ }  
Miscellaneous No. \_\_\_\_\_

ORDER

Upon consideration of the application of the United States for an Order pursuant to Section 1109 of the Right To Financial Privacy Act of 1978, 12 U.S.C. §3409, and finding that:

- (1) the investigation being conducted is within the lawful jurisdiction of the government authority seeking access;
- (2) there is reason to believe that the records being sought are relevant to a legitimate law enforcement inquiry; and
- (3) there is reason to believe that customer notice will result in: (state specific grounds relied upon under 12 U.S.C. §3409(a)(3))

\_\_\_\_\_  
\_\_\_\_\_

it is ORDERED, that notification of \_\_\_\_\_  
(Name of Customer)  
that his/her records have been sought or obtained may be delayed for no more than \_\_\_\_\_ days, and it is further ORDERED, that \_\_\_\_\_,  
(Name of Financial Institution)

its officers, employees, and agents are prohibited, for a period of \_\_\_\_\_ days from the date of this Order from disclosing that records pertaining to \_\_\_\_\_  
(Name of Customer)

have been released or that a request for such records has been made.

DATED,  
this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_

UNITED STATES DISTRICT JUDGE  
OR UNITED STATES MAGISTRATE



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

POST-NOTICE OF SEARCH WARRANT

Dear \_\_\_\_\_:  
(Name of Customer)

Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by the \_\_\_\_\_  
(Government Agency)

on \_\_\_\_\_, 19\_\_\_\_ for the following purpose:  
(Date)

\_\_\_\_\_  
\_\_\_\_\_

You may have rights under the Right To Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422.

\_\_\_\_\_, 19\_\_\_\_  
(Date)

\_\_\_\_\_  
(Name and Title of Official)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_  
(Address)

Attachment



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

POST-NOTICE OF SEARCH WARRANT  
AFTER COURT-ORDERED DELAY

Dear \_\_\_\_\_ :  
(Name of Customer)

Records or information concerning your transactions held by the financial institution named in the attached search warrant were obtained by the \_\_\_\_\_  
(Government Agency)

on \_\_\_\_\_, 19\_\_\_\_.  
(Date)

Notification to you was delayed beyond the statutory ninety-day delay period pursuant to a determination by the court that such notice would seriously jeopardize an investigation concerning: \_\_\_\_\_.

You may have rights under the Right To Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422.

\_\_\_\_\_, 19\_\_\_\_  
(Date)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_

\_\_\_\_\_  
(Name of Official & Title)

\_\_\_\_\_  
(Government Agency)

\_\_\_\_\_  
(Address)

Attachment

§1106 of the Right To Financial Privacy Act, 12 U.S.C. §3406

FORM DOJ-470  
3-10-79



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

POST-NOTICE FOLLOWING COURT-ORDERED DELAY

Dear \_\_\_\_\_,  
(Name of Customer)

Records or information concerning your transactions which are held by the financial institution named in the attached process or request were supplied to or requested by the Government authority named in the process or request on \_\_\_\_\_, 19\_\_\_\_.  
(Date)

Notification was withheld pursuant to a determination by the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_ under the Right To Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422, that such notice might: \_\_\_\_\_

The purpose of the investigation or official proceeding was: \_\_\_\_\_

\_\_\_\_\_, 19\_\_\_\_  
(Date)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_  
(Name and Title of Official)

\_\_\_\_\_  
(Government Agency)

\_\_\_\_\_  
(Address)

Attachment

§1109(b)(3) of the Right To Financial Privacy Act, 12 U.S.C. §3409(b)(3)

FORM DOJ-471  
3-10-79



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

POST-NOTICE FOLLOWING EMERGENCY ACCESS

Dear (Name of Customer)

Records concerning your transactions held by the financial institution named in the attached request were obtained by the (Government Agency) under Section 1114(b)

of the Right To Financial Privacy Act of 1978, 12 U.S.C. §§3401-3422, on (Date), 19\_\_ for the following

purpose:

Emergency access to such records was obtained on the grounds that:

(Date), 19\_\_

(Name and Title of Official)

(Government Agency)

(Telephone)

(Address)

Attachment

§1109(c) of the Right To Financial Privacy Act, 12 U.S.C. §3409(c)

FORM DOJ-472 3-10-79

DECEMBER 31, 1984 Ch. 4, p. 217



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

NOTICE THAT NO LEGAL PROCEEDINGS ARE CONTEMPLATED

Dear \_\_\_\_\_,  
(Name of Customer)

This letter will notify you that no legal proceedings are now contemplated against you in connection with the investigation for which certain of your financial records were sought from \_\_\_\_\_

(Name of Financial Institution)

on \_\_\_\_\_, 19\_\_\_\_,  
(Date)

This notice to you is required by Section 1110(d)(2) of the Right To Financial Privacy Act of 1978, which is published in 12 U.S.C. §3410(d)(2).

You have thirty days from the date you receive this letter during which to file an appeal of the United States District Court's decision denying the motion you made. If you wish to appeal, you should file your appeal with the Clerk of the United States Court of Appeals for the \_\_\_\_\_ Circuit.

\_\_\_\_\_, 19\_\_\_\_,  
(Date)

\_\_\_\_\_  
(Name and Title of Official)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_  
(Government Agency)

NOTE:

§1110(d)(2) of the Right To Financial  
Privacy Act, 12 U.S.C. §3410(d)(2)

FORM DOJ-473  
3-10-79



**UNITED STATES DEPARTMENT OF JUSTICE**

WASHINGTON, D.C. 20530

Address Reply to the  
Division Indicated  
and Refer to Initial and Number

**CERTIFICATION FOR TRANSFERRING RECORDS  
OBTAINED PURSUANT TO THE RIGHT TO  
FINANCIAL PRIVACY ACT OF 1978**

TO: \_\_\_\_\_  
(Name and Address of Receiving Agency)

FROM: \_\_\_\_\_  
(Name and Address of Transferring Government Agency)

The records of the following customer of a financial institution are in our possession:

\_\_\_\_\_  
(Name of Customer)

\_\_\_\_\_  
(Address of Customer)

\_\_\_\_\_  
(Type of Records and Account Number)

\_\_\_\_\_  
(Name of Financial Institution)

Pursuant to Section 1112(a) of the Right To Financial Privacy Act of 1978, 12 U.S.C. §3412(a), the records described above are being transferred to you. I certify that there is reason to believe that the records being transferred are relevant to a legitimate law enforcement inquiry within the jurisdiction of your agency or department.

\_\_\_\_\_, 19\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Name of Official and Title)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_  
(Government Agency)

Copies to the Following Files:

§§1112(a) of the Right to Financial Privacy Act, 12 U.S.C. §3412(a)

FORM DOJ-474  
4-4-79

DECEMBER 31, 1984  
Ch. 4, p. 219



**UNITED STATES DEPARTMENT OF JUSTICE**

WASHINGTON, D.C. 20530

**FORMAL WRITTEN REQUEST FOR ACCOUNT INFORMATION  
AND  
CERTIFICATE OF COMPLIANCE WITH  
THE RIGHT TO FINANCIAL PRIVACY ACT**

TO: \_\_\_\_\_  
(Name and Address of Financial Institution)

FROM: \_\_\_\_\_  
(Name and Address of Government Agency)

In connection with a legitimate law enforcement inquiry and pursuant to Section 1113(g) of the Right To Financial Privacy Act of 1978, 12 U.S.C. §3413(g), you are requested to provide the following account information:

I hereby certify, pursuant to Section 1103(b), the Right To Financial Privacy Act of 1978, 12 U.S.C. §3403(b), that the provisions of the Act have been complied with as to this request for account information and that good faith reliance upon this certificate relieves your institution and its employees and agents of any possible liability to the customer in connection with the disclosure of this account information.

\_\_\_\_\_  
(Name and Title of Official)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_, 19\_\_\_\_  
(Date)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_  
(Government Agency)

Remarks:

§1113(g) of the Right To Financial Privacy Act, 12 U.S.C. §3413(g)

FORM DOJ-475  
3-10-79



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

NOTICE OF TRANSFER  
OF FINANCIAL RECORDS

Dear \_\_\_\_\_,  
(Name of Customer)

Copies of, or information contained in, your financial records lawfully in the possession of \_\_\_\_\_  
(Government Agency)

have been furnished to \_\_\_\_\_ pursuant  
(Government Agency)

to the Right to Financial Privacy Act of 1978 for the following purpose: \_\_\_\_\_

If you believe that this transfer has not been made to further a legitimate law enforcement inquiry, you may have legal rights under the Right To Financial Privacy Act of 1978 or the Privacy Act of 1974.

\_\_\_\_\_, 19\_\_\_\_  
(Date)

\_\_\_\_\_  
(Telephone)

\_\_\_\_\_  
(Name and Title of Official)

\_\_\_\_\_  
(Government Agency)

\_\_\_\_\_  
(Address)

§1112(b) of the Right To Financial Privacy Act, 12 U.S.C. §3412(b)

FORM DOJ-476  
3-10-79

DECEMBER 31, 1984  
Ch. 4, p. 221

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-1

IN THE UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN RE: GRAND JURY SUBPOENAS )  
 )  
 DUCES TECUM, DATED ) MISC. NO. \_\_\_\_\_  
 )  
 (INSERT DATE) )

MOTION FOR ORDER PROHIBITING NOTIFICATION OF  
SERVICE OF GRAND JURY SUBPOENAS DUCES TECUM

The United States of America, by \_\_\_\_\_, United States Attorney for the District of \_\_\_\_\_, and (insert name of Assistant U.S. Attorney) Assistant United States Attorney for said District, moves the Court, pursuant to 12 U.S.C. §3409, and 28 U.S.C. §1651, and pursuant to the Federal Rules of Criminal Procedure, for an Order prohibiting (insert name of bank) from serving upon its customers notification of the service upon that institution of a Grand Jury subpoena duces tecum, and states as follows:

1. On (insert month and year), this Court assigned to the \_\_\_\_\_ Grand Jury, (insert month and year), Term, an investigation of (insert brief description of nature of investigation). With the assistance of the Office of the United States Attorney for the District of (insert state) the Special Grand Jury is presently conducting an investigation of certain violations of the federal criminal laws involving (insert brief description of nature of investigation). [On (insert date), that investigation was transferred by the Court to the (insert month and year) Term \_\_\_\_\_ Grand Jury \_\_\_\_\_].

2. On or about (insert date of subpoena), a subpoena duces tecum was issued, on behalf of the Grand Jury, addressed to the Custodian of Records of (insert name of bank), and calling for production by them of certain financial records before the (insert month and year), Term \_\_\_\_\_ Grand Jury. A copy of that subpoena is attached hereto. There is reason to believe that the records, whose production is sought under the terms of the subpoena, are relevant to the \_\_\_\_\_ Grand Jury's present investigation of, (insert investigation description). The subpoena was served upon the (insert name of bank) shortly after its issuance.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-1

[3. When served with the Grand Jury's subpoena, the custodian of records of the (insert name of bank) notified the Government that, in accordance with the Bank's policy (and/or applicable state law), the Bank would undertake immediately to notify its customers of the fact of service of that subpoena, despite the fact that such notice is not required by the Right to Financial Privacy Act. Such disclosure to the customers of the financial institution subpoenaed will result in serious prejudice to the \_\_\_\_\_ Grand Jury's ongoing investigation. In particular, notification of those customers of the service of that subpoena will seriously jeopardize the \_\_\_\_\_ Grand Jury's investigation by impairing its ability to obtain the testimony of other potential witnesses, (and will seriously jeopardize an ongoing undercover investigative effort presently being conducted by the Federal Bureau of Investigation).]

WHEREFORE, the Government respectfully requests this Court issue an order as follows:

(1) Directing that, for a period not to exceed 90 days, (insert name of bank) shall not provide its customers, either directly or indirectly, with notice of the fact of service of the Grand Jury subpoenas duces tecum dated (insert date of subpoena), or notice of the nature of the documents whose production is commanded under the terms of the subpoena, or notice of the fact that such documents have been produced before the Grand Jury in compliance with the subpoena's terms; and

(2) Commanding that this motion and the order issued pursuant hereto shall remain sealed for a period of time not to exceed 90 days, or until further order of this Court, whichever shall first occur, and providing that a copy of the order issued pursuant hereto may be served upon the custodian of records of the (insert name of bank); and

(3) Commanding that a copy of the Grand Jury subpoena duces tecum dated (insert date of subpoena), attached hereto, shall remain sealed until the \_\_\_\_\_ Grand Jury, (insert month and year) Term, concludes its present investigation of (insert investigation description), or until further order of this Court, whichever shall first occur.

Respectfully submitted,

\_\_\_\_\_  
United States Attorney

By: \_\_\_\_\_  
Assistant U.S. Attorney

(Attach a copy of Grand Jury Subpoena Duces Tecum)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-2

IN THE UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN RE: GRAND JURY SUBPOENAS )  
 )  
DUCES TECUM, DATED ) MISC. NO. \_\_\_\_\_  
 )  
(INSERT DATE OF SUBPOENA) )

MEMORANDUM IN SUPPORT OF MOTION  
FOR AN ORDER PROHIBITING NOTIFICATION  
OF THE SERVICE OF GRAND JURY SUBPOENA

The United States has moved the Court to prohibit (insert name of bank) from disclosing to its customers, for a period of ninety days, that the bank has been served with a Grand Jury subpoena duces tecum. 1/ The motion is filed under the terms of the Right to Financial Privacy Act, 12 U.S.C. §3401 et seq., pursuant to the Court's inherent powers, and under the provisions of the All Writs Act, 28 U.S.C. §1651.

The Government's application is made for the soundest of reasons. 2/ The Order whose entry is requested is framed in terms that parallel precisely the terms of the delayed-notice provisions of the Right to Financial Privacy Act, 12 U.S.C. §3409. And, the Order has been framed to be issued pursuant to the Court's inherent powers, and under the terms of the All Writs Act, 28 U.S.C. §1651. See United States v. New York Telephone Co., 434 U.S. 159, 172-178 (1977). The Order is drawn so that

---

1/ The requested Order would also prohibit the financial institution from notifying its customers of the matter of the documents subpoenaed, and of the nature and extent of compliance by the institutions with the subpoena's terms.

2/ The reasons advanced by the Government are explicated fully in an Affidavit filed ex parte and in camera together with this pleading. The government contends that the financial institution and its customers are not entitled to those reasons at this time, and requests the court to retain the Affidavit filed by the government under seal of court.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-2

no one will be prohibited from relating "facts within their knowledge acquired beyond the grand jury room;" United States v. Central Supply Association, 34 F. Supp. 241, 245 (N.D. Ohio 1940). Rather, by the least restrictive available means, the Order will simply defer the time at which the (insert name of bank) will become free to disclose publicly what it stated to or learned from the Grand Jury; King v. Jones, 319 F. Supp. 653, 658-659 (N.D. Ohio 1940).

In pertinent part, Rule 6(e) of the Federal Rules of Criminal Procedure provides that "No obligation of secrecy may be imposed upon any person except in accordance with this rule." 3/ Although seemingly absolute on its face, those parts of Rule 6(e) were designed to ameliorate the "unnecessary hardship" of imposing an oath of secrecy upon the witness concerning testimony before the grand jury. See Fed. R. Crim. P., Rule 6(e), Advisory Committee Note 2 (emphasis supplied). 4/

Both prior and subsequent to the enactment of Rule 6(e) of the Federal Rules of Criminal Procedure, the courts have recognized that some circumstances exist in which some appropriate limitation upon disclosure

---

3/ Rule 6(e) of the Federal Rules of Criminal Procedure provides:

(1) General Rule.--A grand jury, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court. [Emphasis added.]

4/ Whatever "hardship" may be imposed upon the witnesses served with the Requested Orders is clearly not "unnecessary." To the contrary, the imposition of any such "hardship" is essential to preserve the legitimate functions of the grand jury and the integrity of the judicial process itself. And, whatever "hardship" may be imposed is, in any event, not overly burdensome on either those subject to the orders or the customers themselves.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-2

of matters may be imposed upon grand jury witnesses, despite the seemingly absolute language of the Rule. In Goodman v. United States, 108 F.2d 516 (9th Cir. 1939), the court found it "well within the discretionary power of the court to impose an obligation of secrecy not alone upon grand jurors, but upon the witnesses, if the court believes the precaution necessary in the investigation of crime." Id. at 520. And, in United States v. Central Supply Association, 34 F. Supp. 241, 245 (N.D. Ohio 1940), the court enumerated at least five circumstances in which such a precaution might be found "necessary in the investigation of crime." See King v. Jones, supra, 319 F. Supp., at 658.

Following the enactment of Rule 6(e) of the Federal Rules of Criminal Procedure in 1946, 5 F.R.D. 573, 583 (1946), <sup>5/</sup> the witness secrecy provision of Rule 6(e) of the Federal Rules of Criminal Procedure was not subjected to judicial scrutiny until the decision in United States v. Smyth, 104 F. Supp. 279 (N.D. Cal. 1952). Finding that the rule enunciated in Goodman survived the enactment of Rule 6(e) of the Federal Rules of Criminal Procedure, the Smyth court noted that:

...the secrecy of grand jury proceedings is of substance and not of procedure. The power of the trial court to enforce secrecy is jurisdictional and a necessity if grand juries are to function. The Federal Constitution encysted the common law grand

---

<sup>5/</sup> It is interesting to note that one of the framers of Rule 6(e) of the *Federal Rules of Criminal Procedure* suggested that the Rule itself contemplated the possible imposition of a limited oath of secrecy upon grand jury witnesses, and that the purpose of including the witness secrecy provision of the Rule was only to circumscribe the type of oath which might properly be imposed. After noting that the "Rule is specific that 'no obligation of secrecy may be imposed on any person except in accordance with this rule,'" George F. Longsdorf, a member of the Advisory Committee that drafted the original version of the Federal Rules of Criminal Procedure, suggested in 1951, that the "rules do not prescribe the forms of oaths to be taken by grand jurors or by witnesses called before the grand jury." That fact was mentioned, he added, "to make allusion to the practices sometimes formerly followed of exacting before Federal grand juries a form of oath to witnesses which exacted greater secrecy than Rule 6(e) requires." G.F. Longsdorf, The Beginnings and Background of Federal Criminal Procedure, in 4 W.W. Barron, Federal Practice and Procedure, at 24 (Rules ed. 1951).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-2

jury with all its incidents. The Rules could not change the Constitution nor prevent the court from imposing secrecy upon everyone in connection with such a proceeding in the public interest. See also United States v. Central Supply Association, 34 F. Supp. 241 (N.D. Ohio 1940). Smyth, supra, 104 F. Supp. at 280-81, n.5.

The same conclusion has been reached by each of the other courts that have considered the courts' powers to impose some appropriate limitations upon the disclosures which federal grand jury witnesses are able to make. See In re Proceedings Before The Grand Jury Summoned October 12, 1970, 321 F. Supp. 238, 240 (N.D. Ohio 1970); King v. Jones, supra 319 F. Supp., at 657; In re Grand Jury Witnesses, 370 F. Supp. 1282, 1285 n.5 (S. D. Fla. 1974).

Furthermore, the entry of an Order such as that requested here is well within the powers of the Court. The grand jury is an arm of the court, which exercises jurisdiction of persons and subjects under the authority and supervision of the Court. In re Long Visitor, 523 F.2d 443, 446-47 (8th Cir. 1975), and In re Gompman, 531 F.2d 262, 266 (5th Cir. 1976). As the Supreme Court noted in Brown v. United States, 359 U.S. 41, 49 (1958):

A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refused to do so. 6/

---

6/ Since the grand jury is able to compel the attendance of witnesses only through the use of the district court's process, it might well be argued that the district court has the power in this case to issue the requested Orders as a logical derivative of its power to issue the subpoenas duces tecum to which the Order relates, under Rule 17 of the Federal Rules of Criminal Procedure. In such case the witness secrecy provision of Rule 6(e) of the Federal Rules of Criminal Procedure may not be called into play at all.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-2

See also O'Bryan v. Chandler, 352 F.2d 987, 990 (10th Cir. 1965); In re A & H Transportation, Inc., 319 F.2d 69, 71 (4th Cir. 1963); and In re Seiffert, 446 F. Supp. 1153 (N.D.N.Y. 1978). The power of a district court to enforce secrecy is jurisdictional and an incident of the court's supervisory authority over grand juries "encysted" by the Constitution. See United States v. Smyth, supra, at 280-81, n.5.

Federal courts are endowed by All Writs Act, Title 28, United States Code, Section 1651, with "the power to issue such commands . . . as may be necessary to effectuate and prevent the frustration of orders . . . previously issued in [the] exercise of jurisdiction otherwise obtained." United States v. New York Telephone Co., supra, at 172. While "the power of federal courts to impose duties upon third parties is not without limits," id., the district courts should be "trusted to exercise their powers under the All Writs Act only in cases of clear necessity and to balance the burden imposed upon the party required to render assistance against the necessity." Id. at 165, n.5. Though "unreasonable burdens may not be imposed," the power conferred by the All Writs Act is available "as a 'legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" Id. at 172, citing Harris v. Nelson, 394 U.S. 286, 299 (1969); and Price v. Johnston, 334 U.S. 266, 282 (1948).

The requested Order is sought under the terms of the All Writs Act, to render effective the process of this grand jury. That process consists in the subpoena duces tecum to which the Order relates. The subpoena is no more than "orders . . . previously issued in [the] exercise of jurisdiction otherwise obtained" and properly exercised, either directly by the district court or through its investigative arm, the grand jury. The requested Order is simply a "command" issued by the court, in the exercise of its discretion, "necessary to effectuate and prevent the frustration" of the grand jury's process. Appropriately balancing "the burden imposed upon the party required to render assistance against the necessity" presented by the facts which compelled the government to seek issuance of the Order, the government contends that the Court should find the Order both permissible and necessary under these circumstances; essential to preserve the legitimate functions of the grand jury; rationally related to the reasons for which it is sought; and not overly burdensome on those subject to the Order or on the customers of (insert name of the bank). Compare United States v. New York Telephone Co., supra at 174.

Finally, the court should note that the entry of an Order such as that sought here is not without precedent. Indeed, in a recent decision, the Fourth Circuit implicitly approved the entry of such an Order under similar circumstances. See In re Swearingen Aviation Corporation, etc., 4486 F. Supp. 9 (D. Md.), aff'd 605 F.2d 125 (4th Cir. 1979).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-2

Respectfully submitted,

\_\_\_\_\_  
United States Attorney

By: \_\_\_\_\_  
Assistant U.S. Attorney

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-3

IN THE UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN RE: GRAND JURY SUBPOENAS )  
 )  
DUCES TECUM, ) MISC. NO. \_\_\_\_\_  
 )  
[INSERT DATE OF SUBPOENA] )

SAMPLE

A F F I D A V I T

I HEREBY CERTIFY that on this \_\_\_\_\_ day of \_\_\_\_\_, 1981, before me, a Notary Public in and for the City of (insert name of city and state), personally appeared (name of affiant) and made oath in due form of law as follows:

1. The affiant is a Criminal Investigator employed by the (insert name of agency) and assigned the responsibility of assisting the (insert month and year) Term \_\_\_\_\_ Grand Jury in its investigation of certain offenses against the Federal criminal laws involving (insert brief description of nature of investigation).

2. With the assistance of the affiant, the United States Attorney, and Assistant United States Attorney (insert name of Assistant U.S. Attorney), the Grand Jury is continuing an investigation begun by the (insert name of agency) into allegations that (describe allegations under investigation by the grand jury).

3. Notification of service of the subpoena duces tecum upon the (insert name of bank) will directly alert several persons, including (insert name), to the existence, and perhaps to the nature, of the Grand Jury's investigation. Such notification (will seriously jeopardize the undercover investigative efforts presently conducted by the (insert name of agency) and) will impair the ability of the Grand Jury to obtain testimony and other evidence concerning the violations of federal law now under investigation. Consequently, the government has sought the issuance of an Order, under the terms of the Right to Financial Privacy Act, Title 12, United States Code, Section 3401, et seq., the Court's inherent

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-3

powers, and the All Writs Act, Title 28, United States Code, Section 1651, to delay for 90 days the notification of any customer of the financial institution of the fact of service of the subpoena; of the nature of the documents subpoenaed; and of the fact that such records have been produced in compliance with the terms of the subpoena.

4. The Government will move the Court to vacate the Order as expeditiously as practicable to limit as much as possible the potential infringement upon the rights of the Bank to speak freely about the subpoena with which it has been served.

\_\_\_\_\_  
(INSERT NAME OF AFFIANT)

\_\_\_\_\_  
NOTARY PUBLIC

MY COMMISSION EXPIRES: \_\_\_\_\_



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Form Q-4  
remain sealed until the \_\_\_\_\_ Grand Jury, (insert month and year) Term,  
concludes the investigation pursuant to which the subpoena has been  
issued, or until further Order of this Court, whichever shall first occur.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

DATED: \_\_\_\_\_

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

FORM R

NOTICE

A. Pursuant to the Right to Financial Privacy Act, Title 12, United States Code, Section 3415, financial institutions may be reimbursed for necessary costs actually incurred effective October 1, 1979. The Federal Reserve Board has established the following guidelines:

1. Search and Processing Costs--May be billed at the rate of \$2.50 per quarter hour, or fraction thereof, for time spent by employees locating and retrieving documents, reproducing documents, or packaging and preparing documents for shipment. Computer time and necessary supplies may also be billed if itemized separately.

2. Reproduction Costs--May be billed at a rate of 15 cents per page.

3. Transportation Costs--May bill for direct costs incurred to transport employees to locate and retrieve material required. May also bill for direct costs incurred in transporting material to location required by legal process.

B. An itemized bill or invoice must be furnished the United States Attorney in order to receive reimbursement. However, reimbursement may be made only in connection with the following types of financial records: checking, savings, share, loan or credit card account records pertaining to accounts of individuals or partnerships of five or fewer partners. Reimbursement cannot be made for records relating to accounts of:

1. Corporations
2. Large partnerships (6 or more partners)
3. Associations
4. Trusts
5. Government agencies
6. Other legal entities

You may refer to the Federal Register, Volume 44, No. 190, September 28, 1979, pp. 55812-55815, for more detailed guidelines. If you have further questions, please contact:

---

---

---

U.S. Department of Justice  
Washington, D.C. 20530

Request for Financial Information (Authorization,  
Purchase Order, Receiving Report)

This form shall only be used when requesting financial records of individuals and partnerships of five or fewer individuals.

1 Purchase Order Number:	2 Date Order Prepared:	3 Case Number: (Optional)
--------------------------	------------------------	---------------------------

**Section A—Authorization and Purchase Order**

4 Name and Address of Financial Institution:	
5 Deliver To:	6 Return Date:
7 Remarks:	
8 Name of Requestor: (Type or Print)	9 Telephone Number:
10 Date of Request:	

**Section B—Financial Institution Invoice**

No Payment Shall Be Made Unless Expenses Are Itemized Below Or On Your Form To Be Attached.

11 Service/Financial Records Provided:	Quantity	Unit Price		Amount
		Cost	Per	

12 Signature of Financial Institution Official:	13 Date Signed:	Total Amount Claimed By Financial Institution
<b>Section C—Receiving Report</b>		16 Disallowance (See Attached)
14 I certify that the articles and services listed were received	15 Date Received:	17 Net To Financial Institution

18 Right to Financial Privacy Act—Public Law 95-630 (12 U.S.C. 3401-3422) Request Pursuant To: (Check One Only)	19 Signature of Approving Official	20 Accounting Classification Code																																
<table style="width:100%; border-collapse: collapse;"> <tr> <th style="text-align: left;">SECTION</th> <th style="text-align: left;">OBJECT CLASS</th> </tr> <tr> <td><input type="checkbox"/> 3404 Customer Authorization</td> <td>2540</td> </tr> <tr> <td><input type="checkbox"/> 3405 Administrative Subpoena or Summons</td> <td>2541</td> </tr> <tr> <td><input type="checkbox"/> 3406 Search Warrant</td> <td>2542</td> </tr> <tr> <td><input type="checkbox"/> 3407 Judicial Subpoena</td> <td>2543</td> </tr> <tr> <td><input type="checkbox"/> 3408 Formal Written Request</td> <td>2544</td> </tr> <tr> <td><input type="checkbox"/> 3413 I Grand Jury Subpoena</td> <td>2545</td> </tr> <tr> <td><input type="checkbox"/> 3414 Special Procedures</td> <td>2546</td> </tr> </table>	SECTION	OBJECT CLASS	<input type="checkbox"/> 3404 Customer Authorization	2540	<input type="checkbox"/> 3405 Administrative Subpoena or Summons	2541	<input type="checkbox"/> 3406 Search Warrant	2542	<input type="checkbox"/> 3407 Judicial Subpoena	2543	<input type="checkbox"/> 3408 Formal Written Request	2544	<input type="checkbox"/> 3413 I Grand Jury Subpoena	2545	<input type="checkbox"/> 3414 Special Procedures	2546	<table border="1" style="width:100%; border-collapse: collapse;"> <tr> <th style="text-align: left;">FY</th> <th style="text-align: left;">FC</th> <th style="text-align: left;">1</th> <th style="text-align: left;">2</th> <th style="text-align: left;">3</th> <th style="text-align: left;">4</th> <th style="text-align: left;">5</th> <th style="text-align: left;">PROJ</th> </tr> <tr> <td> </td> </tr> </table>	FY	FC	1	2	3	4	5	PROJ									21 Schedule and Voucher Number
SECTION	OBJECT CLASS																																	
<input type="checkbox"/> 3404 Customer Authorization	2540																																	
<input type="checkbox"/> 3405 Administrative Subpoena or Summons	2541																																	
<input type="checkbox"/> 3406 Search Warrant	2542																																	
<input type="checkbox"/> 3407 Judicial Subpoena	2543																																	
<input type="checkbox"/> 3408 Formal Written Request	2544																																	
<input type="checkbox"/> 3413 I Grand Jury Subpoena	2545																																	
<input type="checkbox"/> 3414 Special Procedures	2546																																	
FY	FC	1	2	3	4	5	PROJ																											

22 Remarks:

Original—Payment Copy

FORM OBD-211  
MAY 81

DECEMBER 31, 1984  
Ch. 4, p. 235

**DEPARTMENT  
OF JUSTICE**

**Order**

DOJ 2110.40

Apr. 30, 1980

**Subject:** RIGHT TO FINANCIAL PRIVACY ACT REIMBURSEMENT PROCEDURES AND  
REPORTING REQUIREMENTS

1. PURPOSE. This order provides procedures for the payment of fees to financial institutions and for the preparation of the congressional report as required by the Right to Financial Privacy Act of 1978, P.L. 95-630, 12 U.S.C. 3401 et seq.
2. SCOPE. The provisions of this order apply to all Offices, Boards, Divisions, and Bureaus of the Department of Justice.
3. CANCELLATION. This order cancels Order DOJ 2740.2.
4. SUMMARY. Section 3415 of Title 12 of the U.S. Code requires Government authorities under limited circumstances to reimburse financial institutions for the direct costs incurred in researching, assembling, reproducing, and transmitting financial information on individuals and partnerships comprised of five or fewer persons. 12 U.S.C. 3421(b) requires the submission of an annual report to the Congress on requests for financial records and incidents of judicially delayed notification relating thereto. The Assistant Attorney General for Administration (AAG/A) is assigned the responsibility for preparing the Department report. In order to facilitate the preparation of the report, a standardized reporting format (Appendix 1) has been developed for submission to the AAG/A and for the consolidated Department report to the Congress.
5. DEFINITIONS
  - a. Financial Institution. Any office of a bank, savings bank, card issuer as defined in Section 103 of the Consumers Credit Protection Act (15 U.S.C. 1602(n)), industrial loan company, trust company, savings and loan, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution, located in any State or territory of the United States, the District of Columbia, Puerto Rico, Guam, American Samoa, or the Virgin Islands.

**Distribution:** Bureau Financial Managers  
OBD/H-2

**Initiated By:** Justice Management Division  
Finance Staff

- b. Financial Record. An original of, a copy of, or information known to have been derived from any record held by a financial institution pertaining to a customer's relationship with the financial institution.
- c. Government Authority. Any agency or department of the United States, or any officer, employee or agent thereof.
- d. Person. An individual or a partnership of five or fewer individuals.
- e. Customer. Any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name. "Customer" does not include corporations or partnerships comprised of more than five persons.
- f. Directly Incurred Costs. Costs incurred solely and necessarily as a consequence of searching for, reproducing or transporting books, papers, records, or other data, in order to comply with legal process or a formal written request or a customer's authorization to produce a customer's financial record. The term does not include any allocation of fixed costs (overhead, equipment, depreciation, etc.). If a financial institution has financial records that are stored at an independent storage facility that charges a fee to search for, reproduce, or transport particular records requested, these costs are considered to be directly incurred by the financial institution.

6. COST REIMBURSEMENT PROCEDURES. Each Office, Board, Division and Bureau which requires or requests access to financial records pertaining to a customer shall pay to the financial institution that assembles or provides the financial records a fee for reimbursement of reasonably necessary costs which have been directly incurred. Paragraph 6a sets forth reimbursable costs and rates for reimbursement. Incurred costs for requests for assembling or providing certain types of financial records which are not reimbursable are set forth in paragraph 6b. Action required for payment of reimbursable costs are contained in paragraph 6c.

a. Allowable Costs.

(1) Search and processing costs.

- (a) Reimbursement of search and processing costs shall be for the total amount of personnel direct time incurred in locating and retrieving, reproducing, packaging and preparing financial records for shipment.

(b) The rate for search and processing costs is \$10 per hour per person, computed on the basis of \$2.50 per quarter hour or fraction thereof, and is limited to the total amount of personnel time spent in locating and retrieving documents or information or reproducing or packaging and preparing documents for shipment where required or requested by a government authority. Specific salaries of such persons shall not be included in search costs. In addition, search and processing costs do not include salaries, fees, or similar costs for analysis of material or for managerial or legal advice, expertise, research, or time spent for any of these activities. If itemized separately, search and processing costs may include the actual cost of extracting information stored by computer in the format in which it is normally produced, based on computer time and necessary supplies; however, personnel time for computer search may be paid only at the rate specified in this paragraph.

(2) Reproduction costs

(a) Reimbursement for reproduction costs shall be for costs incurred in making copies of documents required or requested.

(b) The rate for reproduction costs for making copies of required or requested documents is 15 cents for each page, including copies produced by reader/printer reproduction processes. Photographs, films, and other materials are reimbursed at actual cost.

(3) Transportation costs. Reimbursement for transportation costs shall be for necessary costs directly incurred to transport personnel to locate and retrieve the information required or requested, and necessary costs directly incurred solely by the need to convey the required or requested material to the place of examination.

b. Exceptions. A financial institution is not entitled to reimbursement for costs incurred in assembling or providing the following financial records or information.

(1) Security interests, bankruptcy claims, debt collection. Any financial records provided as an incident to perfecting a security interest, proving a claim in bankruptcy, or otherwise collecting a debt owing either to the financial institution itself or in its role as fiduciary.

- (2) Government Loan Programs. Financial records provided in connection with a government authority's consideration or administration of assistance to a customer in the form of a government loan, loan guaranty, or loan insurance program or as an incident to processing an application for assistance to a customer in the form of a government loan, loan guaranty, or loan insurance agreement; or as an incident to processing a default on, or administering, a government-guaranteed or insured loan, as necessary authority to permit a responsible government authority to carry out its responsibilities under the loan, loan guaranty, or loan insurance agreement.
- (3) Nonidentifiable Information. Financial records that are not identified with or identifiable as being derived from the financial records of a particular customer.
- (4) Federally Required Reports. Financial records required to be reported in accordance with any federal statute or rule promulgated thereunder.
- (5) Government Civil or Criminal Litigation. Financial records sought by a government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the government authority and the customer are parties.  
*NB.* This exception does not apply to grand jury subpoenas. A financial institution is entitled to reimbursement for the costs incurred in providing records, data or information pursuant to a subpoena or court order issued in connection with proceedings before a grand jury. 12 U.S.C. 3413(1), 3415.
- (6) Administrative Agency Subpoenas. Financial records sought by a government authority pursuant to an administrative subpoena issued by an administrative law judge in an adjudicatory proceeding subject to Section 554 of Title 5, U.S. Code, and to which the government authority and the customer are parties.
- (7) Identity of Accounts in Limited Circumstances. Financial information sought by a government authority in accordance with the Right to Financial Privacy Act and for a legitimate law enforcement inquiry, and limited only to the name, address, account number and type of account of any customer or ascertainable group of customers associated with a financial transaction or class of financial transactions, or with a foreign country or subdivision thereof in the case of government authority exercising financial controls over foreign accounts in the United

States under section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. 5(b); the International Emergency Economic Powers Act (Title II, P. L. 95-223); or section 5 of the United Nations Participation Act (22 U.S.C. 287(c)).

(8) Investigation of a Financial Institution or its Noncustomers. Financial records sought by a government authority in connection with a lawful proceeding, investigation, examination or inspection directed at the financial institution in possession of such records or at a legal entity or person which is not a customer.

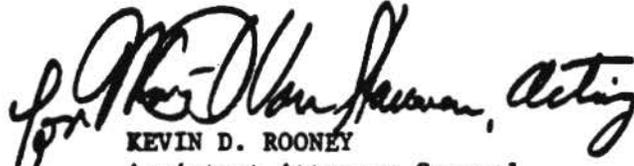
c. Payments. Payments are to be made for reasonably necessary direct costs incurred by the financial institution. Payments will be for work completed or for work done prior to withdrawal of the request or legal process. No payments will be made without an itemized bill or invoice which identifies costs as search and processing, reproduction, and transportation. See 6a(1), (2) and (3) above. See 12 CFR 219.6. The cost of furnishing such records shall be charged to the organizational appropriation of the official who directly obtained the legal process for the production of the financial records.

7. REPORTING PROCEDURES. The head of each Office, Board, Division and Bureau which accesses financial records pursuant to 12 U.S.C. 3404, 3405, 3406, 3407, 3408, 3414, or 3420 shall submit to the Office of the Controller, Justice Management Division, a report by February 28 covering the preceding calendar year. This report shall enumerate the number of requests for financial records made under each of the above sections. The information regarding requests under 12 U.S.C. 3420 (grand jury requests) is being collected for Departmental use, and will not be included in the congressional submission. The report will also reflect organization experience under the subject Act for the reporting period. The individual reports will be consolidated by the Office of the Controller and directed to the AAG/A for submission to the House Banking, Finance and Urban Affairs Committee and the Senate Banking, Housing, and Urban Affairs Committee by April 30 of each year. Appendix 1 sets forth an acceptable format for reporting the required information.

8. IMPLEMENTING PROCEDURES. The Administrator of the Drug Enforcement Administration, Commissioner of the Immigration and Naturalization Service, Director of the Federal Bureau of Investigation, and the Deputy Assistant Attorney General for Administration, Office of the

DOJ 2110.40  
Apr. 30, 1980

Controller, for the Offices, Boards, Divisions and U.S. Marshals Service shall promulgate procedural directives in accordance with the guidance contained in this order.

  
KEVIN D. ROONEY  
Assistant Attorney General  
for Administration

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DOJ 2110.40  
Apr. 30, 1980

APPENDIX 1. REPORT FORMAT AND CONTENT  
Calendar Year Ended December 31, 19\_\_

<u>1w</u> <u>USC</u> <u>Section</u>	<u>Number of</u> <u>Requests Presented</u>	<u>Occasions of</u> <u>Delayed Notice</u>
12 U.S.C. §3404--Customer Authorizations	XXX	XXX
12 U.S.C. §3405--Admin. Subpoenas & Summonses	XXX	XXX
12 U.S.C. §3406--Search Warrants	XXX	XXX
12 U.S.C. §3407--Judicial Subpoena	XXX	XXX
12 U.S.C. §3408--Formal Written requests	XXX	XXX
Subtotal:	XXX	XXX
12 U.S.C. §3414--Special Procedures	XXX	XXX
Total:	XXX	XXX

---

	<u>Number of</u> <u>Requests Presented</u>	
12 U.S.C. §3420*-- Grand Jury Information	XXX	N.A.

Assessment of Experience

Organizations shall show the amount of payments made to the financial institutions for direct costs incurred for providing requested information (pursuant to 12 U.S.C. §3415). Also, they shall specify the operational impact of the Act (e.g., time delays encountered; number of times injunctive relief sought, and granted; experience with the courts and financial institutions; workload impact; etc.)

\*Will not be included in the congressional report.

DOJ-1980-05

Appendix 1  
Page 1

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-4.900 ACCESS TO AND DISCLOSURE OF TAX RETURNS IN A NONTAX CRIMINAL  
CASE

Section 1202 of the Tax Reform Act of 1976 (Pub. L. No. 94-455), as amended by section 356(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. No. 97-248), was designed to protect the confidentiality of tax returns and return information and establishes criteria for the disclosure of such material by the Internal Revenue Service and its use and further disclosure by the beneficiaries of disclosure. See USAM 9-4.901 and 9-4.902, *infra*. Effective January 1, 1977, disclosure of returns and return information is prohibited except as specifically provided in 26 U.S.C. §6103, as amended, or other sections of the Code. Disclosure in violation of these provisions subjects the offender to possible criminal penalties.

Among the disclosures authorized by the Act are those in 26 U.S.C. §6103(i) concerning access to returns and return information by certain Department of Justice personnel for use in the investigation and prosecution of federal criminal statutory violations and related civil forfeitures not involving tax administration. The access procedures and use restrictions in such a case are set forth at USAM 9-4.910, *infra*.

9-4.901 Definitions

A. "Return" means any tax or information return, declaration of estimated tax, or claim for refund required by, provided for, or permitted under, the provisions of Title 26 which is filed with IRS by, on behalf of, or with respect to, any person, and any amendment or supplement, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return. See 26 U.S.C. §6103(b)(1).

B. The term "return information" includes all tax information relating to a taxpayer which is contained within the files of the Internal Revenue Service. Return information is divided into two distinct classifications:

1. Taxpayer return information: that information filed with, or furnished to the Internal Revenue Service by or on behalf of a taxpayer. An example of taxpayer return information is that portion of an interview between an IRS agent and the representative of a named taxpayer functioning in that capacity, discussing the taxpayer.

2. Return information other than taxpayer return information: that return information not provided to the Internal Revenue Service

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

by or on behalf of a taxpayer, i.e., information obtained from third parties who are not representatives of the taxpayer.

Examples of return information other than taxpayer return information are:

a. The books and records of a named taxpayer supplied to IRS by a third party.

b. That portion of an interview between an IRS agent and a third party discussing a named taxpayer.

c. Information developed by IRS agents in the course of investigating a named taxpayer's return from sources other than the taxpayer's representative functioning in that capacity.

d. The fact that a named taxpayer filed or failed to file a return.

C. "Tax administration" means the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and the development and formulation of federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions. 26 U.S.C. §6103(b)(4).

D. "Person" means an individual, a trust, estate, partnership, association, company or corporation. 26 U.S.C. §7701(a)(1).

E. "Secretary" means the Secretary of the Treasury or his/her delegate. 26 U.S.C. §7701(a)(11)(B). The delegate with regard to 26 U.S.C. §6103 is IRS. 26 U.S.C. §7701(a)(12)(A)(i), Treasury Order No. 150-37 (Mar. 17, 1955), Treasury Reg. §301.9000-1 (June 15, 1967).

#### 9-4.902 Disclosure

Disclosure is defined in 26 U.S.C. §6103(b)(8) as "the making known to any person in any manner whatever a return or return information." The breadth of this definition invalidates a number of prior access procedures. For example, upon inquiry by the appropriate Division, IRS was formerly permitted under 26 U.S.C. §6103(f) to indicate whether a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

named person did or did not file a return (i.e., notification of the existence of a return). Under 26 U.S.C. §6103 as amended, such notification would be a prohibited disclosure unless the provisions of 26 U.S.C. §6103(i)(2) were met. See S. Rep. No. 94-938, 94th Cong., 2d Sess., at 339, 342.

Although the definition of disclosure does not appear to admit many exceptions, the return to the supplier of information supplied to IRS appears to be one. Arguably, therefore, it is not a disclosure for IRS to return taxpayer records supplied by a U.S. Attorney to that U.S. Attorney, provided that no supplementary tax material prepared by IRS is included. Likewise, "disclosure" by the prosecutor of a return obtained pursuant to 26 U.S.C. §6103(i)(1) to the taxpayer who filed the return with IRS would not appear to be prohibited since no "making known" of information is involved.

9-4.903 Consent to Disclosure

Seeking disclosure pursuant to 26 U.S.C. §6103(i) is unnecessary whenever the taxpayer to whom return or return information pertains consents to disclosure. See 26 U.S.C. §6103(c). Normally, IRS will make disclosure upon proper receipt of a taxpayer's waiver.

A taxpayer's consent to disclosure must be formalized by "a written document pertaining solely to the authorized disclosure." 26 C.F.R. §301.6103(c)-1(a). That document must conform to the requirements of 26 C.F.R. §301.6103(c)-1(a).

When a taxpayer files a motion for disclosure of illegal electronic surveillance under 18 U.S.C. §3504, he/she is deemed to have requested or consented to disclosure under 26 C.F.R. §301.6103(c)-1(a) insofar as returns and return information are involved. See USAM 9-4.983, *infra*.

9-4.910 Access to Returns and Return Information

26 U.S.C. §6103(i) sets forth the conditions which govern IRS's disclosure of tax returns and return information protected under 26 U.S.C. §6103(a), for use in proceedings pertaining to either the enforcement of a federal criminal statute, or related civil forfeiture proceedings which may be pursued in addition to or in lieu of criminal prosecutions. The methods which must be used to obtain IRS's disclosure vary according to the type of material sought and reason for its disclosure.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Disclosure of tax returns and taxpayer return information must be secured through the issuance of an ex parte order by a federal district judge or magistrate under 26 U.S.C. §6103(1)(1). See USAM 9-4.911, infra. Such orders automatically include return information other than taxpayer return information (i.e., information about a taxpayer from a third party). Thus, when filing an application under 26 U.S.C. §6103(1)(1), it is not necessary to make a separate request under 26 U.S.C. §6103(1)(2) (as discussed below and in USAM 9-4.912, infra).

If, however, only return information other than taxpayer return information is sought, it may be obtained pursuant to a written request under 26 U.S.C. §6103(1)(2). See USAM 9-4.912, infra.

26 U.S.C. §6103(1)(3) authorizes IRS to make disclosures of return information other than taxpayer return information on its own initiative under certain conditions, and any return information under other, more restrictive conditions. See USAM 9-4.913, infra.

26 U.S.C. §6103(1)(4) governs the use of information obtained under 26 U.S.C. §6103(1)(1), (1)(2), or (1)(3) in judicial or administrative proceedings. See USAM 9-4.914, infra. It should be noted, however, that, although 26 U.S.C. §6103(1)(4) authorizes use in civil forfeitures related to the enforcement of federal criminal statutes, this use alone does not authorize disclosure under 26 U.S.C. §6103(1)(1) or (1)(2). Thus, caution should be exercised that any returns or return information needed for a civil forfeiture are obtained under the appropriate procedure before termination of the criminal enforcement proceeding. Criminal enforcement proceedings should not be initiated, however, solely as a means of obtaining return information which would otherwise not be available for use in a civil forfeiture.

26 U.S.C. §6103(1)(5) governs the disclosure of a return or return information for the purpose of locating a fugitive from justice. See USAM 9-4.915, infra.

26 U.S.C. §6103(1)(6) provides that the Secretary shall not disclose any return or return information under the specified paragraphs and subparagraphs of 26 U.S.C. §6103(1) if he/she determines "that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation."

The Internal Revenue Service has offered the services of the local District Disclosure Officer to each U.S. Attorney for the purpose of briefing the U.S. Attorney and his/her assistants on the procedures to be followed in obtaining returns and return information under the revised

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

statute. Each U.S. Attorney is urged to respond to this offer. IRS is anxious to cooperate in successfully implementing the statute, and close coordination between individual U.S. Attorneys' offices and the local District Disclosure Officer will expedite the processing of requests.

In addition, the Criminal Division, through its Office of Enforcement Operation, will be available to lend assistance and answer questions. The local and FTS number for such assistance is 724-6672.

9-4.911 Disclosure Under 26 U.S.C. §6103(i)(1)

26 U.S.C. §6103(i)(1) authorizes application for an ex parte order for the disclosure of "any return or return information . . . to officers or employees of any federal agency who are personally and directly engaged in" the investigation, or preparation for prosecution, of violations of specifically designated federal criminal statutes other than ones involving tax administration. The application must explain the intended use.

Applications for the ex parte order authorized by this paragraph may be authorized by: the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, and U.S. Attorney, any special prosecutor appointed under 28 U.S.C. §593, or any attorney in charge of a Criminal Division organized crime strike force established pursuant to 28 U.S.C. §510. It is anticipated that most applications will be authorized by U.S. Attorneys or Strike Force Chiefs. Samples of an application and resulting order appear at the end of this section.

A. Prior to the submission of this application, however, the responsible official should notify the appropriate IRS District Director that such action is being planned. This notice should include all relevant details so that IRS can:

1. Assemble the requested information; and
2. Make any appropriate determination provided for in 26 U.S.C. §6103(i)(6), (see USAM 9-4.916, infra).

B. Applications may be submitted to either federal magistrates or federal district court judges.

C. Applicants must demonstrate that:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. There is reasonable cause to believe that a specific federal crime has occurred;

2. There is reasonable cause to believe that the tax information sought is relevant to the offense;

3. The information will be used exclusively in a federal criminal investigation of proceeding concerning such act (except as provided in 26 U.S.C. §6103(i)(4), see USAM 9-4.914, infra); and

4. That the information cannot reasonably be obtained from another source.

Language in the application and order should track the statutory language as closely as possible. Since 26 U.S.C. §6103(i)(1) refers to disclosure for the "enforcement of a specifically designated federal criminal statute," applicants should list every statutory violation for which "reasonable cause" exists.

D. Applicants should file simultaneously with the application a motion requesting the court to seal the application and its order granting or denying the application. U.S. Attorneys should notify Internal Revenue Service whenever a motion to seal is granted, and whenever the records are subsequently unsealed. Such motions are not necessary when an applicant determines that disclosure of the application will not jeopardize an ongoing investigation.

E. As noted in USAM 9-4.910, supra, 26 U.S.C. §6103(i)(1), applications now cover return information other than taxpayer return information (as well as all return and taxpayer return information). Therefore, when such an application has been made, it is not necessary to make a separate 26 U.S.C. §6103(i)(2) request for return information other than taxpayer return information.

F. Disclosures under this paragraph are limited by the restrictions in 26 U.S.C. §6103(i)(6). See USAM 9-4.916, infra.

G. Sample application to be used when requesting either 26 U.S.C. §6103(i)(1) information only or joint 26 U.S.C. §6103(i)(1) and (i)(2) disclosures.



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

matter in issue related to the commission of the crime and facts sufficient for the court to find that such connection exists.)

(3) The returns and return information are sought exclusively for use in a federal criminal investigation or proceeding concerning such act.

(4) The information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.

Applicant further alleges and states that in addition to (himself/herself)

Name:

Title:

(It is only necessary to include the names of the attorneys involved in the investigation and/or prosecution.)

are personally and directly engaged in investigating the above-mentioned violations of \_\_\_\_\_ U.S.C. \_\_\_\_\_ and preparing the matter for trial. The information sought herein is solely for our use for that purpose. No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. §6103 and 26 C.F.R. §301.6103(i)-1.

This application is authorized by (name and title of authorizing official).

Therefore, applicant prays that this Court enter an order, ex parte, on this application granting disclosure by the Internal Revenue Service of the returns and return information specified in this application.

Respectfully submitted,

H. Sample order to be used when requesting either 26 U.S.C. §6102(i)(1) information only or joint 26 U.S.C. §6103(i)(1) and (i)(2) disclosures:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

IN THE UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA )  
 )  
 v. )  
 )  
 )  
 )  
 )

---

ORDER FOR DISCLOSURE  
OF RETURNS AND RETURN INFORMATION

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, comes for the attention of the Court the application of the United States Attorney for the \_\_\_\_\_ District of \_\_\_\_\_, (Attorney-in-Charge of the \_\_\_\_\_ Strike Force) for an ex parte order, pursuant to 26 U.S.C. §6103(i)(1), directing the Internal Revenue Service to disclose returns and return information of:

Name:

Address:

Social Security Number or Employer Identification Number:

for the taxable period(s). (State year(s) for which disclosure is sought.)

After examining the application the Court finds:

(1) There is reasonable cause to believe, based upon information believed to be reliable, that a violation of a federal criminal statute, namely \_\_\_\_\_ U.S.C. \_\_\_\_\_, has been committed.

(2) There is reasonable cause to believe that the returns and return information are or may be relevant to a matter related to the commission of such act.

(3) The returns and return information are sought exclusively for use in a federal criminal investigation or proceeding concerning such act.

(4) The information sought to be obtained cannot reasonably be obtained, under the circumstances, from another source.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The Court further finds that applicant and:

Name:

Title:

(It is only necessary to include the names and titles of attorneys involved in the investigation and/or prosecution.)

are employees of the United States Department of Justice and are primarily and directly engaged in, and the information sought is solely for their use in, investigating the above-mentioned violation of \_\_\_\_\_ U.S.C. \_\_\_\_\_, and preparing the matter for trial; and that the application is authorized by (name of authorizing official).

It is therefore ordered that the Internal Revenue Service:

- (1) disclose such returns and return information of

Name:

Address:

Social Security Number of Employer Identification Number:

for the taxable period(s) (state year(s)), as have been filed and are on file with the Internal Revenue Service;

- (2) certify where returns and return information described above have not been filed or are not on file with the Internal Revenue Service that no such returns and return information have been filed or are on file;

- (3) disclose such returns and return information described above as come into the possession of the Internal Revenue Service subsequent to the date of this order, but for not longer than 90 days thereafter;

- (4) disclose such returns and return information and make such certification only to applicant and:

Name:

Title:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(State names of many attorneys involved in the investigation and prosecution.)

and to no other person; and

(5) disclose no returns or return information not described above.

It is further ordered that applicant:

Name:

Title:

and any officer or employee of any federal agency who may be subsequently assigned in this matter shall use the returns and return information disclosed solely in investigating the above-mentioned violation of \_\_\_\_\_ U.S.C. \_\_\_\_\_, and such other violations of any federal criminal statutes, although presently unknown, as are discovered in the course of this investigation of \_\_\_\_\_ U.S.C. \_\_\_\_\_, and preparing the matter for trial, and that no disclosure be made to any other person except in accordance with the provisions of 26 U.S.C. §6103 and 26 C.F.R. §301.6103(1)-1.

\_\_\_\_\_  
Judge

9-4.912 Disclosure Under 26 U.S.C. §6103(1)(2)

The procedure established by this paragraph is to be utilized only when the requester's sole interest is return information other than taxpayer return information. See USAM 9-4.911, supra.

A. Written requests for this kind of information may be addressed to the appropriate IRS District Director by the head or Inspector General of any federal agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, and any official authorized to authorize an application under 26 U.S.C. §6103(1)(1). See USAM 9-4.911, supra. Thus, a letter from a U.S. Attorney to the appropriate District Director which meets the statutory requirements is sufficient to obtain information available under 26 U.S.C. §6103(1)(2). An example request letter appears at the end of this section.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. The uses authorized for such information are identical to those for information obtained under 26 U.S.C. §6103(1)(1) and the request must explain the intended use. See USAM 9-4.911, supra.

The request must set forth:

1. The taxpayer's name and address;
2. The taxable period(s) for which information is sought;
3. The statutory authority under which the enforcement proceeding is being conducted; and
4. The specific reason or reasons why the information sought is relevant to the enforcement proceeding.

Disclosures under this paragraph are limited by the restrictions in 26 U.S.C. §6103(1)(6). See USAM 9-4.916, infra.

C. Sample letter to be used when requesting 26 U.S.C. §6103(1)(2) information only:

Mr./Ms. \_\_\_\_\_  
District Director  
Internal Revenue Service  
Street Address  
City, State---Zip Code

Attention: Disclosure Officer

Re: Tax Disclosure Pursuant to  
26 U.S.C. §6103(1)(2)  
(State name of Case)  
Our Ref: \_\_\_\_\_

Dear Mr./Ms. \_\_\_\_\_:

Pursuant to 26 U.S.C. §6103(1)(2), the Department of Justice requests the Internal Revenue Service to furnish return information, other than taxpayer return information, for the taxable period(s) (state years for which disclosure is sought) regarding (state names, addresses, and Social Security numbers for individual taxpayers; names, addresses, and employer identification numbers for corporations).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The subject(s) of this request is/are the subject(s) of an investigation/indictment regarding possible violations of \_\_\_\_\_ U.S.C.  
\_\_\_\_\_ .

Involved in this investigation/prosecution (state facts).

Disclosure of the requested return information is or may be relevant to the investigation/indictment in establishing (state reasons for relevancy).

Access to the information will be limited to: (state names, title, and addresses of attorneys working on the investigation or prosecution), or such other officers and employees of a federal agency as shall be specifically assigned to participate in the investigation, preparation for trial, or trial, of this matter. No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. §6103 and 26 C.F.R. §301.6103(i)-1.

At this time it is anticipated that the disclosed material will be used. (State the intended use, i.e., whether the material is sought solely for investigative purposes at the time of the request or whether the requester currently anticipates using the information in a judicial proceeding and an estimated time table.) Therefore, disclosure is required on or before (date).

At this time it is not anticipated that returns and taxpayer return information will be sought pursuant to 26 U.S.C. §6103(i)(1).

Sincerely,

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

9-4.913 Disclosures Under 26 U.S.C. §6103(i)(3)

This paragraph authorizes IRS initiated disclosure of return information in carefully specified circumstances.

A. IRS may disclose return information (other than taxpayer return information; i.e., 26 U.S.C. §6103(i)(2) information) which indicates that a federal criminal law (not involving tax administration) has been

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

violated to the head of the federal agency responsible for enforcing the law. The head of the agency may then disclose the information to officers and employees of the agency to the extent necessary to enforce the law.

B. If there is return information eligible for disclosure under the above criteria, the taxpayer's identity may also be disclosed. Disclosures under this subparagraph are limited by the restrictions in 26 U.S.C. §6103(i)(6). See USAM 9-4.916, infra.

C. In practice all 26 U.S.C. §6103(i)(3) disclosures are made to the Office of Enforcement Operations (OEO) as the designated representative of the Attorney General. OEO then refers the material, as appropriate, within the Department of Justice (including Offices of the United States Attorneys). If, however, the information should go to another agency, (e.g., the Social Security Administration), OEO must return it to IRS and request that IRS send it to the designated agency.

D. IRS is also authorized to disclose any return information to:

1. Any federal or state law enforcement agency to the extent necessary to apprise it of "circumstances involving an imminent danger of death or physical injury to any individual;" and

2. Any federal law enforcement agency to apprise it of "circumstances involving "the imminent flight of any individual from Federal prosecution."

Disclosures for these two purposes are not limited by the restrictions in 26 U.S.C. §6103(i)(6). See USAM 9-4.916, infra.

9-4.914 Use of Certain Disclosed Returns and Return Information in  
Judicial or Administrative Proceedings, 26 U.S.C. §6103(i)(4)

This paragraph governs disclosures which agencies may make of returns or return information obtained from IRS under either 26 U.S.C. §6103(i)(1) or (i)(2). They "may be disclosed in any judicial or administrative proceeding pertaining to the enforcement of a specifically designated federal criminal statute or related civil forfeiture to which the United States or a federal agency is a party" upon a finding that the information is probative of a matter in issue relevant to the commission of a crime, or of the guilt or liability of a party. Disclosure may also be made pursuant to either the Jencks Act or Rule 16 of the Federal Rules of Criminal Procedure.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

No finding of relevance is required for disclosure of return information other than taxpayer return information in any proceeding described above when the United States or a federal agency is a party.

No return or return information is to be admitted into evidence if IRS notifies the Attorney General of a determination that disclosure "would identify a confidential informant or seriously impair a criminal or civil tax investigation." This situation is not likely to occur since IRS normally will not have disclosed the information to the agency if either of these events is likely to result from such disclosure. In any event, the burden of notification is clearly on IRS.

Admission in violation of this prohibition does not constitute reversible error.

The Criminal Division has interpreted this language to include use in any post-conviction proceeding resulting from the original conviction. The justifying theory is that enforcement continues until the defendant is no longer subject to the custody of the Attorney General. Thus, the United States Parole Commission may use tax material in a hearing to determine whether to terminate parole supervision pursuant to 18 U.S.C. §4211(c). Moreover, such use is appropriate even though it may not, technically, amount to an introduction "into evidence." For example, tax material may be provided to the court for its use in sentencing pursuant to Rule 32(c), of the Federal Rules of Criminal Procedure.

9-4.915 Disclosure to Locate Fugitives from Justice 26 U.S.C. §6103(i)(5)

A. Any official who may authorize an application to a judge or magistrate under 26 U.S.C. §6103(i)(1) (see USAM 9-4.911, *supra*) may also authorize one under subsection (i)(5) for the disclosure of returns and return information to the extent necessary to locate a fugitive. The advantage of proceeding under subsection (i)(5), when appropriate, rather than 26 U.S.C. §6103(i)(1) is that less is required to justify granting the application. Applicants must establish only that:

1. A federal arrest warrant for commission of a federal felony has been issued for the taxpayer who is now a fugitive;
2. The return or return information is being sought solely for purposes of locating the taxpayer; and
3. There is "reasonable cause" to believe that the return or return information will further efforts to locate the taxpayer.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It should be noted that this paragraph authorizes disclosure only of returns and return information of the individual who is a fugitive.

A sample application is included at the end of this section.

Disclosures under this paragraph are limited by the restrictions in 26 U.S.C. §6103(i)(6). See USAM 9-4.916, infra.

B. Sample application to be used when requesting returns and return information to locate a fugitive from justice pursuant to 26 U.S.C. §6103(i)(5).

IN THE UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA, )

v. )

)  
)

APPLICATION FOR EX PARTE ORDER  
TO DISCLOSE RETURNS AND RETURN INFORMATION

Comes now the United States Attorney for the \_\_\_\_\_ District of \_\_\_\_\_, (Attorney-in-Charge of the \_\_\_\_\_ Strike Force), pursuant to 26 U.S.C. §6103(i)(5), and makes application to the Court for an ex parte order directing the Internal Revenue Service (IRS) to disclose to applicant (and others hereinafter named) returns and return information of:

Name:

Address:

Social Security Number or Employer Identification Number:

which returns and return information are described as those returns and return information for the taxable period(s): (State year(s) for which disclosure is sought.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In support of its application applicant alleges and states the following:

(1) A federal arrest warrant relating to the commission of a federal felony offense(s) of (list offense(s)) has been issued for the individual(s) named above who (is) (are) (a) fugitive(s) from justice.

(2) The return of such individual(s) or return information with respect of such individual(s) is sought exclusively for use in locating (him) (her) (them).

(3) There is reasonable cause to believe that such return or return information may be relevant in determining the location of such individual(s).

Applicant further alleges and states that in addition to (himself) (herself)

Name:

Title: (it is only necessary to include the names of the attorneys involved in the investigation and/or prosecution.)

are personally and directly engaged in locating the above-mentioned individual(s). No disclosure will be made to any other person except in accordance with the provisions of 26 U.S.C. §6103.

This application is authorized by (Name and Title of authorizing official).

Therefore, applicant prays that this Court enter an order, ex parte, on this application, granting disclosure by the Internal Revenue Service of the returns and return information specified in this application.

Respectfully submitted,

---

C. Sample order to be used when requesting information pursuant to 26 U.S.C. §6103(1)(5).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

IN THE UNITED STATES DISTRICT COURT  
FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA, )  
 )  
 v. )  
 )  
 )  
 )

---

ORDER FOR DISCLOSURE OF  
RETURNS AND RETURN INFORMATION

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, comes for the attention of the Court the application of the United States Attorney for the \_\_\_\_\_ District of \_\_\_\_\_, (Attorney-in-Charge of the \_\_\_\_\_ Strike Force) for an ex parte order, pursuant to 26 U.S.C. §6103(i)(5), directing the Internal Revenue Service to disclose returns and return information of:

Name:

Address:

Social Security Number or Employer Identification Number:

for the taxable period(s): (State year(s) for which disclosure is sought.)

After examining the application the Court finds:

(1) A federal arrest warrant relating to the commission of the federal felony offense(s) of (list offense(s)) has been issued for the individual(s) named above who (is) (are) (a) fugitive(s) from justice.

(2) The return(s) of such individual(s) or return information with respect to such individual(s) is sought exclusively for use in locating (him) (her) (them).

(3) There is reasonable cause to believe that such return or return information may be relevant in determining the location of such individual(s).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The Court further finds that applicant and

Name:

Title: (it is only necessary to include the names and titles of attorneys involved in the investigation and/or prosecution.)

are employees of the United States Department of Justice and are primarily and directly engaged in and the information sought is solely for their use in, locating the above named individual(s) who (is) (are) (a) fugitive(s) from justice, and the application is authorized by (name of authorizing official). It is therefore ordered that the Internal Revenue Service

(1) Disclose such returns and return information of:

Name:

Address:

Social Security Number or Employer Identification Number:

for the taxable period \_\_\_\_\_, 19\_\_\_, as have been filed and are on file with the Internal Revenue Service;

(2) Certify where returns and return information described above have not been filed or are not on file with the Internal Revenue Service that no such returns and return information have been filed or are on file;

(3) Disclose such returns and return information described above as come into the possession of the Internal Revenue Service subsequent to the date of this order, but for not longer than 90 days thereafter;

(4) Disclose such returns and return information and make such certification only to applicant; and

Name:

Title:

(State names of any attorneys involved in the investigation or prosecution.)

(5) Disclose no returns or return information not described above.

It is further ordered that applicant and any officer or employee of any federal agency who may be subsequently assigned to this matter shall use the returns and return information disclosed exclusively for use in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

locating the above named fugitive(s) and that no disclosure be made to any other person except in accordance with the provisions of 26 U.S.C. §6103.

---

Judge

9-4.916 Restrictions on Disclosures, 26 U.S.C. §6103(1)(6)

This paragraph prohibits IRS from making all but one disclosure described in USAM 9-4.911 through 9-4.915 if a determination is made that disclosure "would identify a confidential informant or seriously impair a civil or criminal tax investigation." In the case of an application for a court order under either 26 U.S.C. §6103(1)(1) or (1)(5), IRS must certify the making of this determination to the court.

These restrictions are administered solely by IRS; they do not require any action by applicants or requesters.

The exception to their application is an IRS initiated disclosure under 26 U.S.C. §6103(1)(3)(B) to prevent death, physical injury, or flight to avoid federal prosecution.

9-4.917 Communication with IRS Personnel

26 U.S.C. §6103 governs not only access to tangible tax material (e.g., returns, IRS investigative reports), but also communications regarding such material. See USAM 9-4.902, *supra*. Communication between IRS personnel and the prosecutor (e.g., the furnishing by IRS of investigative leads, discussion of IRS investigative results) is severely restricted. Satisfactory communication is possible, however, where disclosure has been obtained pursuant to 26 U.S.C. §6103(1)(1) or (1)(2).

Under either 26 U.S.C. §6103(1)(1) or (1)(2), communication between a prosecutor and IRS agent is permissible to the same extent that disclosure is authorized in the court order or request. The prosecutor and the IRS agent can discuss fully the material initially disclosed to the prosecutor. Assuming the order or request authorizes IRS disclosure of subsequently obtained material, discussion and exchange of information can continue within the boundaries of the order or request as dictated by the necessities of the investigation. Separate court orders or requests are required, however, to facilitate communication where the investigation

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

expands to focus on taxpayers not included in the original order or request.

Absent a 26 U.S.C. §6103(i)(1) court order or a 26 U.S.C. §6103(i)(2) request, IRS can only provide tax material under 26 U.S.C. §6103(i)(3) and 26 U.S.C. §6103(k)(6), both of which inhibit ongoing communication.

Under 26 U.S.C. §6103(i)(3)(A), 26 U.S.C. §6103 material may be disclosed by IRS "to the extent necessary to apprise" the prosecutor of the possible commission of a federal crime. See USAM 9-4.913, *supra*. The provision appears geared to precipitating a 26 U.S.C. §6103(i)(1) or (i)(2) request and not to supplying a flow of investigative leads. Assuming the latter use is not improper, the material, once disclosed by IRS, could be discussed with an IRS agent where an investigation could not otherwise be properly conducted. Unlike 26 U.S.C. §6103(i)(1) and (i)(2), 26 U.S.C. §6103(i)(3)(A) required that all disclosures--initial and subsequent--be in writing. Communication subject to such an impediment appears overly cumbersome.

By contrast, 26 U.S.C. §6103(i)(3)(B) does not require that disclosures be in writing, which is sensible since it pertains to emergency circumstances. The provision appears to be geared to supplying investigative leads calling for an immediate response by law enforcement authorities, and thus communications between IRS and law enforcement authorities should be uninhibited under 26 U.S.C. §6103(i)(3)(B).

Under 26 U.S.C. §6103(k)(6), 26 U.S.C. §6103 material may be disclosed to a prosecutor by an IRS agent "to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available," for purposes of tax administration. The provision is designed to allow an IRS investigator to make limited disclosures for purposes of completing a tax case, but does not contemplate aiding the prosecutor with the preparation of a nontax criminal case. Thus, a prosecutor may not receive all the material relevant to the nontax criminal case and, under 26 U.S.C. §6103(k)(6), has no way of ascertaining the extent of relevant material withheld. No genuine exchange of information is possible under 26 U.S.C. §6103(k)(6).

#### 9-4.918 Utilization of IRS Personnel

An IRS tax investigation operates independently of a prosecutor's nontax investigation unless a tax investigation and prosecution are authorized by the Tax Division. See USAM 9-4.970, *infra*. Generally, absent tax case authorization, the prosecutor will not receive IRS

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

investigative assistance, except to the extent of disclosure and communication permitted by the methods previously discussed. See USAM 9-4.910, supra. However, given a nontax criminal investigative situation which requires special expertise of the type possessed by certain IRS personnel, an IRS agent with such expertise may be utilized in that investigation without imposing the restrictions of 26 U.S.C. §6103. This result is accomplished by "insulating" the agent from the Service through his/her appointment as a special agent of the grand jury, assignment as a Strike Force investigator, or designation to serve in some capacity other than as an IRS agent.

A. The prosecutor seeking such IRS participation in a nontax criminal case should keep in mind the following:

1. A request for the assistance of IRS personnel is a request for IRS expertise; a request should be made only where such expertise is essential to the investigation.

2. Reliance on IRS personnel provides no additional access route to 26 U.S.C. §6103 tax material; an IRS agent, while so serving, may not gain access to tax material held by IRS relating to the subject of his/her service except as prescribed by 26 U.S.C. §6103.

3. Use of IRS personnel is controlled by internal IRS considerations; and requires IRS authorization (often obtainable at the district director level).

B. Examples of situations in which the prosecutor might seek IRS participation in a nontax criminal case include the following:

1. An investigation involving political corruption centers around a corporate bookkeeping system suspected of containing camouflaged payoff entries;

2. An informant wishes to provide evidence of a nontax crime but refuses to deal with other than a trusted IRS agent.



U.S. Department of Justice

Executive Office for United States Attorneys

---

Washington, D.C. 20530

November 6, 1985

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Pretrial Detention Hearing Reporting Requirements

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-6.400

PURPOSE: This bluesheet implements revised policy regarding pretrial detention hearing reporting requirements for monitoring the use of pretrial detention under the Bail Reform Act of 1984. (Chapter 6, entitled Release of Detained Persons, will be revised shortly to reflect the changes of the Bail Reform Act of 1984.)

---

The following is a new section:

9-6.400 Pretrial Detention Hearing Reporting Requirements

The Department of Justice has established the following reporting requirements for monitoring the use of the pretrial detention provisions of the Bail Reform Act of 1984.

Effective October 1, 1985:

1. Assistant United States Attorneys are not required to consult with the Criminal Division before making motions for pretrial detention hearings, although they should consider doing so in making close decisions or when they encounter unusual problems.

2. The Offices of United States Attorneys will report the following information monthly:
  - a. Number of pretrial detention hearings requested by the Government and Court (initial motions only -- does not include motions for ten-day holds, motions that were withdrawn before final ruling, or motions for revocation of release);
  - b. Results of hearings (motion granted or denied);
  - c. Basis for rulings by judicial officer (risk of flight, dangerousness, or both);
  - d. Results of District Court Reviews of magistrate orders (defendant detained or released). NOTE: appeals should continue to be reported as required to the Appellate Section; and
  - e. Additional comments describing particularly significant rulings, noteworthy cases, or special problems in obtaining detention orders, at the option of the United States Attorney.

Although the method for collecting the above information is the prerogative of the United States Attorney, each United States Attorney should designate a single person responsible for collecting and transmitting the information (typically an administrative assistant or supervising secretary). An optional Tally Sheet is attached, along with a standard Reporting Form for their use. A supervising Assistant United States Attorney should decide whether to add any optional comments.

3. Using the attached or a similar Reporting Form, monthly totals for each United States Attorneys' Office, along with any additional comments, must be mailed to the Department during the first week of each month to:

Pretrial Detention  
Office of Policy and Management Analysis  
Criminal Division  
U.S. Department of Justice  
Room 2216 Main  
10th & Constitution Avenue, N.W.  
Washington, D.C. 20530

PRETRIAL DETENTION  
REPORTING FORM

District: \_\_\_\_\_

Month: \_\_\_\_\_

DETENTION MOTIONS

Initial motions. Do not include motions for ten-day holds, motions that were withdrawn before final ruling, or motions for revocation of release.

TOTALS

A.	By Government _____	
	By Court _____	
B.*	Granted _____	
	Denied _____	
C.*	Basis for Rulings by Judicial Officer:	
	1. Risk of Flight _____	
	2. Dangerousness _____	
	3. Both _____	

\* NOTE: The total number of detention motions granted and denied in B must equal the total number of motions made in A. The total number granted in B must equal the total bases listed in C.

DISTRICT COURT REVIEWS OF MAGISTRATE ORDERS

A.	Requested By Government to Detain:	
	1. Detained _____	
	2. Not detained _____	
B.	Requested By Defense to Release:	
	1. Released _____	
	2. Not released _____	

COMMENTS (Optional)

Please attach brief narrative summaries of particularly significant rulings, noteworthy cases, or special problems in obtaining detention orders.

PRETRIAL DETENTION TALLY SHEET

Month: \_\_\_\_\_

Defendant Name	Detention Motions				(Initial motions. Do not include motions for ten-day holds, motions that were withdrawn before final ruling, or motions for revocation of release.)		Result of District Court Reviews of Magistrate Orders	
	Origin		Result		Basis for Ruling		Detained	Released
	Government	Court	Granted	Denied	Risk of Flight	Dangerousness		
TOTALS								

1984 USAM (superseded)

Risk of Flight alone. \_\_\_\_\_  
 Dangerousness alone.. \_\_\_\_\_  
 Both..... \_\_\_\_\_

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 6

	<u>Page</u>
9-6.000 <u>RELEASE OF DETAINED PERSONS</u>	1
9-6.100 ANALYSIS OF THE BAIL REFORM ACT--18 U.S.C. §§3141-3151	1
9-6.101 Background of the Bail Reform Act	1
9-6.110 <u>Offenses</u>	1
9-6.120 <u>Release Authority</u>	2
9-6.130 <u>Release in Noncapital Cases Prior to Trial</u>	3
9-6.131 Presumption of Release	3
9-6.132 Conditions of Release--18 U.S.C. §3146(a)(1)-(a)(5)	4
9-6.133 Criteria to be Examined by Judicial Officer--18 U.S.C. §3146(b); Bail Reform Act Form No. 1	7
9-6.134 Release Order--18 U.S.C. §3146(c); Bail Reform Act Form No. 2	8
9-6.135 Twenty-Four Hour Review--18 U.S.C. §3146(d)	8
9-6.136 Amendment of Release Order--18 U.S.C. §3146(e)	9
9-6.137 Rules of Evidence--18 U.S.C. §3146(f)	10
9-6.138 Forfeiture of Collateral--18 U.S.C. §3146(g)	10
9-6.140 <u>Appeals from Conditions of Release--18 U.S.C. §3146</u>	10
9-6.150 <u>Release in Capital Cases or After Conviction-- 18 U.S.C. §3148</u>	12
9-6.160 <u>Release of Material Witnesses--18 U.S.C. §3149</u>	14
9-6.170 <u>Penalties for Failure to Appear--18 U.S.C. §3150</u>	15
9-6.171 Warnings Required at Initial Bail Release Not a Prerequisite for Subsequent Bail Jumping Prosecution	18
9-6.180 <u>Contempt--18 U.S.C. §3151</u>	19
9-6.190 <u>Bail Reform Act Forms</u>	19

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

	<u>Page</u>	
9-6.200	THE BAIL REFORM ACT OF 1966 (CONT.)	20
9-6.210	<u>Effective Date of Sentence: Credit for Time in Custody Prior to the Imposition of Sentence-- 18 U.S.C. §3568</u>	27
9-6.220	<u>Cases Removed from State Court--18 U.S.C. §3144</u>	27
9-6.300	PRETRIAL SERVICES ACT OF 1982	27
9-6.301	Background of the Pretrial Services Act of 1982	27
9-6.302	Purpose of Act	29
9-6.310	<u>Establishment of Pretrial Services-- 18 U.S.C. §3152</u>	29
9-6.320	<u>Organization and Administration of Pretrial Services--18 U.S.C. §3153</u>	30
9-6.321	Appointment of Necessary Personnel	30
9-6.322	Temporary and Intermittent Services	30
9-6.323	Designation of Personnel	30
9-6.324	Confidentiality of Information	30
9-6.325	Regulations on Pretrial Services Information	31
9-6.330	<u>Functions and Power Relating to Pretrial Services--18 U.S.C. §3154</u>	37
9-6.340	<u>Annual Reports--18 U.S.C. §3155</u>	37
9-6.350	<u>Definitions--18 U.S.C. §3156</u>	38
9-6.400	PRETRIAL DETENTION HEARING REPORTING REQUIREMENTS	38

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-6.000 RELEASE OF DETAINED PERSONS

9-6.100 ANALYSIS OF THE BAIL REFORM ACT--18 U.S.C. §§3141-3151

9-6.101 Background of the Bail Reform Act

The Eighth Amendment to the Constitution of the United States of America provides that: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." Prior to ratification of the Bill of Rights, Congress passed the Judiciary Act of 1789 which provided that, "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death." 1 Stat. 73, 91 (1789). This has continued to be the basic federal bail policy to this date.

In the mid-1960's studies of the bail system in the United States indicated that bail practices which relied primarily on financial considerations inevitably disadvantaged poor defendants and that there was no significant correlation between poverty and appearance for trial. In order to eliminate the inequities of the bail system, Congress enacted the Bail Reform Act of 1966, which became effective on September 20, 1966, "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest." Bail Reform Act of 1966, Pub. L. No. 89-465, §2, 89 Stat. 214, 216 (1966), 18 U.S.C. §§3146-3151.

The emphasis of the Bail Reform Act is on release of accused persons prior to trial on appropriate conditions. Standards to be used in determining the conditions of release are delineated in the Act. Of significance is the fact that the word "Release" was substituted for the word "Bail" as the heading of Chapter 207. The change of words indicates a change of emphasis from monetary bail to release on a series of conditions among which bail is but one possible method used to assure appearance as required.

9-6.110 Offenses

Offenses covered by this act include any criminal offense which is in violation of an Act of Congress and is triable by a court established by an Act of Congress other than an offense triable by court-martial,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

military commissioner, provost court, or other military tribunal. See 18 U.S.C. §3156(a)(2).

Even though an offense under the District of Columbia Code is in violation of an Act of Congress, specific bail provisions in the District of Columbia Court Reform and Criminal Procedure Act of 1970 (Pub. L. No. 91-358, District of Columbia Code, §§23.1321-1332), which was enacted several years after the Bail Reform Act, govern release determinations concerning local offenses under the District of Columbia Code. See United States v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1972).

9-6.120 Release Authority

Rule 5(a) of the Federal Rules of Criminal Procedure requires that an arresting officer shall take the arrested person without unnecessary delay before the nearest available magistrate, or in the event that a federal magistrate is unavailable, before a state or local judicial officer, empowered to commit persons charged with offenses against the law of the United States pursuant to 18 U.S.C. §3041, Power of Courts and Magistrates.

Conditions of pretrial release are determined at an accused's hearing before a judicial officer, United States v. Wind, 527 F.2d 672 (6th Cir. 1975); United States v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969), who is empowered to release the accused. See 18 U.S.C. §3146. An in camera proceeding, from which defendant and counsel are excluded, is not allowable under the Bail Reform Act. See United States v. Wind, supra, at 675.

A judicial officer is defined as any person or court authorized pursuant to 18 U.S.C. §3041 or the Federal Rules of Criminal Procedure to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States. See 18 U.S.C. §3156, Fed. R. Crim. P. 46.

18 U.S.C. §3141, Power of Courts and Magistrates, provides that bail may be taken by any court, judge, or magistrate authorized to arrest and commit offenders. A judicial officer would thus include a state judicial officer who is authorized to arrest and commit offenders. In capital cases, only a judge of a court of the United States that has original jurisdiction in criminal cases is authorized to grant release. See 18 U.S.C. §3141. Accordingly, United States Magistrates are not empowered to grant release in capital cases since their jurisdiction is derived

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

solely from the District Court. However, because they are officers authorized to arrest and commit offenders, they are authorized to order a pretrial release in noncapital cases.

9-6.130 Release in Noncapital Cases Prior to Trial

9-6.131 Presumption of Release

The Bail Reform Act of 1966 creates a presumption in favor of pretrial release for defendants charged with noncapital offenses. See 18 U.S.C. §3146. Any person charged with a noncapital crime shall be released on his/her personal recognizance (R.O.R.) or upon the execution of an unsecured appearance bond, unless it is determined that additional safeguards are required to assure the appearance of such person in which case a judicial officer may impose one of a series, or any combination of a series, of additional conditions of release. See 18 U.S.C. §3146(a).

The major consideration of the judicial officer in determining the appropriate release conditions is to determine which condition or combination of conditions will reasonably assure the appearance of the accused. See United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971), cert. denied, 405 U.S. 977 (1976). The judicial officer in exercise of his/her discretion should initially seek minimal nonfinancial conditions of release which will reasonably assure the defendant's appearance for trial; imposition of a money bond is proper only after all other nonfinancial conditions have been found inadequate. See United States v. Wright, 483 F.2d 1068 (4th Cir. 1973); United States v. Cramer, 451 F.2d 1198 (5th Cir. 1971); United States v. Smith, *supra*, at 62; United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969); Wood v. United States, 391 F.2d 981 (D.C. Cir. 1968); United States v. Cowper, 349 F. Supp. 560 (N.D. Ohio 1972); United States v. Gillin, 345 F. Supp. 1145 (S.D. Tex. 1972).

The only generally recognized exception to the general rule that in noncapital cases a person is to be released under the minimal conditions necessary to reasonably assure his/her appearance when required is where a defendant has threatened a potential witness against him/her. The courts, in such cases, have inherent power to confine a defendant in order to protect future witnesses at the pretrial stage as well as during trial. See United States v. Phillips, No. 77-1731 (4th Cir. June 10, 1977) (*unpublished opinion*); United States v. Wind, 527 F.2d 672 (6th Cir. 1975); United States v. Gilbert, 425 F.2d 490 (D.C. Cir. 1969). (See also, United States v. Bigelow, 544 F.2d 904 (6th Cir. 1976), in which

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Wind was held inapplicable to a situation in which the defendant was charged with the offense of threatening the President).

In addition, it should be noted that the First Circuit has upheld a district court order denying pretrial release to a defendant who was indicted for the offense of making a false statement (18 U.S.C. §1001), holding that, while 18 U.S.C. §3146 does create a strong presumption in favor of pretrial release, the statute does not expressly provide that a defendant has an absolute right to bail in every circumstance. See United States v. Abrahams, 575 F.2d 3 (1st Cir. 1978). The court, after examination of the defendant's record, concluded that "there is nothing in the record that suggests that bail will result in his [defendant's] appearance at trial," and that this case is "the rare case of extreme and unusual circumstances that justifies pretrial detention without bail." Id. at 8. The defendant's record included previous convictions, previous failures to appear in this case for removal and other prosecutions, fugitive status in a state case, the use of false identities, the transfer of large sums of money to Bermuda, and the giving of false information at previous bail hearings.

9-6.132 Conditions of Release--18 U.S.C. §3146(a)(1)-(a)(5)

Once a judicial officer determines that R.O.R. or an unsecured appearance bond will not reasonably assure appearance, then he/she is to consider the conditions outlined in 18 U.S.C. §3146(a)(1)-(a)(5), ad seriatim, and impose the first of the conditions or any combination of conditions which will reasonably assure appearance. The Eighth Circuit has held that the restrictive conditions of 18 U.S.C. §3146 are not violative of the Eighth Amendment even when they are imposed in addition to money bail. See United States v. Smith, 444 F.2d 61 (8th Cir. 1971), cert. denied, 405 U.S. 977 (1976). The court in Smith held that the primary purpose of the permitted conditions is to assure the presence of the defendant, and as such, the conditions set forth in the statute are in aid of the fundamental power of the court to call an accused to answer a complaint and are patently reasonable. Id. at 62.

The release conditions follow:

A. Third Party Custodians--18 U.S.C. §3146(a)(1)

The first alternative is to place the accused in the custody of a third person or organization. The Act does not specify who would be a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

proper custodian. The Senate debate suggests that a qualified third person such as the accused's attorney (United States v. Robinson, 453 F. Supp. 1 (S.D.N.Y. 1977)), minister, employer, relative, or other person or group considered by the court to be a responsible citizen, and in whose custody the accused is not likely to flee, would be an appropriate custodian. See 111 Cong. Rec. 3993 (daily ed. March 4, 1965) (remarks of Senator Ervin). It is not clear whether the failure of Congress to prohibit the use of certain persons as custodians leaves the courts free to assign persons such as probation officers, United States Marshals, etc. However, the District of Columbia Circuit Court of Appeals released a defendant in the custody of military police. See United States v. Bronson, 433 F.2d 537 (D.C. Cir. 1970).

The Act requires that the group or party supervising the accused agree to take custody. Bail Reform Act Form No. 2 provides for the signature of the custodian or proxy who agrees (1) to supervise the defendant in accordance with conditions as set out in the release order, (2) to use every effort to assure appearance of defendant at all scheduled hearings before the United States Magistrate or Court, and (3) to notify the Magistrate or Court immediately in the event the defendant violates any condition of his/her release or disappears. This form should be used in all cases of release under the Bail Reform Act and is not limited to cases of third party custody.

B. Restrictions on Travel, Abode and Associations--18 U.S.C.  
§3146(a)(2)

In the event that third party custody is determined to be inadequate to assure the later appearance of the accused, the judicial officer may place restrictions on travel, association, or residence of an accused. Restrictions on travel have been held to be allowable conditions for the purpose of reasonably assuring appearance at trial. See United States v. Cook, 428 F.2d 461 (5th Cir. 1970); Brown v. United States, 392 F.2d 189 (5th Cir. 1968); Brown v. Fogel, 387 F.2d 692 (4th Cir. 1967).

C. Appearance Bond Secured by Percentage Deposit--18 U.S.C.  
§2146(a)(3)

The third alternative allows the judicial officer to require the execution of an appearance bond in a specified amount and a deposit in the registry of the court of a sum not to exceed 10% of the bond. The deposit may be in a security or cash and is to be refunded when the accused has performed the conditions of his/her release. There are several objectives served by this release alternative. Cash bail eliminates the bondsman/

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

bondswoman as the middle person and reduces the financial loss to the accused who performs his/her obligation. Since the money or security is his/hers, the deterrent value is theoretically greater than posting a purchased bond because once the premium is spent it cannot be recovered; however, a cash deposit is refundable. This provision focuses attention on the accused's reliability enabling him/her to get his/her money back if he/she performs the required conditions. The provision also enables a disadvantaged defendant to post his/her own money or borrow money with the assurance that it will be returned and that he/she will have the future use of the money either to repay a loan or perhaps to aid in his/her own defense.

In holding that a third party supplying an 18 U.S.C. §3146(a)(3) deposit would ordinarily be entitled to the return of his/her deposit upon the performance of the conditions of release, the Court of Appeals for the Fifth Circuit held there is no provision that the cash deposited be the property of the party bonded. See United States v. Bursey, 515 F.2d 1228, 1235 (5th Cir. 1975). It is an abuse of discretion for the trial court to refuse to release defendant's bail deposit on the ground that defendant had not paid his/her fine, where there is no question that he/she had complied with all the conditions of his/her appearance bond. See United States v. Wickenhauser, 710 F.2d 486 (8th Cir. 1983).

D. Bail--18 U.S.C. §3146(a)(4)

The fourth alternative allows posting a bail bond or cash in lieu of a bond. This is essentially equivalent to the present bail system. It is important to note that in addition to R.O.R. and release on an unsecured appearance bond there are the three nonfinancial release conditions and the one financial condition referred to above which must be considered before a judge can require a bail bond. Bail is the least desirable alternative because it discriminates against the poor. See United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969); United States v. Gillin, 345 F. Supp. 1145 (S.D. Tex. 1972).

It may be appropriate for the court to inquire into the sources of proffered bail and if the court lacks confidence in the surety's ability to secure the appearance of a bailed defendant, it may refuse approval of the bond. See United States v. Nebbia, 357 F.2d 303 (2d Cir. 1966); United States v. Melville, 309 F. Supp. 822 (S.D.N.Y. 1970).

There are two other statutes that, although not technically part of the Bail Reform Act, are both still in effect and impinge on the issue of money bail. First, 18 U.S.C. §3142 gives the surety the power to arrest a defendant who has been released on execution of an appearance bond in order to vacate the obligation of the surety. In such case the surety is

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

authorized to deliver the person to the custody of the marshal who, in turn, is to bring him/her before the court.

Second, under 18 U.S.C. §3143, the judge or committing magistrate may also require a defendant, previously released on execution of an appearance bond, to give better surety if proof is received that the defendant is about to abscond and that the bail is insufficient. For default thereof, the judge may order the arrest of the defendant.

E. Alternative Conditions--18 U.S.C. §3146(a)(5)

The fifth alternative allows the judicial officer to impose any other condition deemed reasonably necessary to assure the appearance of the accused. The court is authorized to exercise discretion and inventiveness in developing other methods of release that are consistent with the goals of eliminating unnecessary pretrial detention and making criminal justice more efficient. This last alternative also specifically allows conditions requiring that a person return to custody after designated hours. The accused's return to custody gives the court a close check on him/her and enables the court to institute proceedings against him/her quickly if he/she flees. Since this type of release requires part-time custody, it was placed as the last alternative because the Act favors release whenever possible.

9-6.133 Criteria to be Examined by Judicial Officer--18 U.S.C. §3146(b);  
Bail Reform Act Form No. 1

In determining which conditions of release will reasonably assure appearance, the judicial officer is to take into account, on the basis of available information, the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his/her residence in the community, his/her record of convictions, and his/her record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings. See 18 U.S.C. §3146(b). These factors are to be considered in light of their bearing on the likelihood of the accused's appearance when required.

A determination by the judicial officer is to be made on the basis of "available information". Since some of the information would be highly prejudicial if released to the jury, such information should be kept confidential, whenever possible, and care should be taken to avoid undue publicity which might be unfair to the accused.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Bail Reform Act Form No. 1 is an appropriate vehicle to assist the judicial officer in the gathering and recording of information pertinent to his/her determination. Part I lists questions to be asked of the representative of the United States. Part II contains questions for the defendant or other person having information in accordance with factors to be considered as outlined in 18 U.S.C. §3146(b). See USAM 9-6.200, infra.

9-6.134 Release Order--18 U.S.C. §3146(c); Bail Reform Act Form No. 2

18 U.S.C. §3146(c) provides that the judicial officer who authorizes the release of an individual is also to issue an order containing the conditions imposed. Bail Reform Act Form No. 2, Order Specifying Methods and Conditions of Release, has been prepared for this purpose and is an extremely important and useful tool because it may constitute the only instructions an accused may have concerning his/her release obligations. See USAM 9-6.200, infra. 18 U.S.C. §3146(c) also mandates the judicial officer to inform a defendant who is to be released of the penalties applicable to violation of the conditions imposed on his/her release and to inform him/her that a warrant for his/her arrest will be issued upon such violation. This warning is not a condition precedent to a subsequent conviction for bail jumping under 18 U.S.C. §3150. See USAM 9-6.180, infra, (Penalties for Failure to Appear).

9-6.135 Twenty-Four Hour Review--18 U.S.C. §3146(d)

If a person is not able to meet his/her conditions of release and is still detained after twenty-four hours, or if such person is regularly required to return to custody at a specified time (daytime release), after the imposition of such conditions, he/she may file an application for review of the release condition by the judicial officer who imposed the original conditions. In the event that the judicial officer who imposed conditions of release is not available, any other officer in the district may review such conditions. See 18 U.S.C. §3146(d).

If the conditions are not modified when the application is reviewed by the judicial officer, the officer is directed to set forth in writing the reasons for imposing the release conditions. The requirement of "written reasons" is set forth in Rule 9A of the Federal Rules of Appellate Procedure as well as 18 U.S.C. §3146(d).

Courts of Appeals, when reviewing an action pursuant to 18 U.S.C. §3147, (See USAM 9-6.150, infra, (Review)), often remand the case so that the judicial officer may state in writing the reasons for imposing

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

conditons. See United States v. Briggs, 471 F.2d 947 (5th Cir. 1973); United States v. Estes, 458 F.2d 1076 (5th Cir. 1972); United States v. Bennett, 444 F.2d 535 (9th Cir. 1971); Weaver v. United States, 405 F.2d 353 (D.C. Cir. 1968).

Many individuals will not be aware of their right to review; therefore, it is recommended that they be instructed of their right to review at the initial hearing before the judicial officer, as provided in Bail Reform Act Form No. 2.

The judicial officer who originally imposed conditions of release will be responsible for establishing new appropriate release conditions if the original order is reviewed successfully on appeal to a higher court. In one case, although the Court of Appeals determined that the District Court had erroneously remanded the defendant to custody without bail, the court declined to fix pretrial bail because it was initially within the province of the District Court. United States v. Wind, 527 F.2d 672 (6th Cir. 1975).

9-6.136 Amendment of Release Order--18 U.S.C. §3146(e)

A judicial officer may amend his/her order in writing at any time to impose additional or different conditions. This subsection was enacted in order to allow a judicial officer to amend his/her order when additional information comes to his/her attention after the hearing which indicates that other conditions are more appropriate. In light of the short period of time between arrest and presentation to the judicial officer, it may be difficult in some cases to gather adequate information for the hearing, or a court appointed attorney may not yet be available to an indigent accused, and, as a result, such accused's presentation of facts in his/her favor to the judicial officer may be incomplete. In addition, the accused's complete criminal record and background may not be available to the government. Therefore, later information may be highly relevant and the power to amend gives needed flexibility in such cases.

There is no requirement of a formal hearing before release conditions are amended. See S. Rep. No. 1541, 89th Cong., 2nd Sess. 11 (1966). Amendment of release conditions based on new adverse information as to the likelihood that the defendant will appear may necessitate an ex parte hearing to establish new conditions. As soon thereafter as possible the defendant should be brought before the judicial officer to be informed of the new conditions and be given an opportunity to meet them or challenge the changes. Whenever practicable, the defendant's attorney should be informed of a hearing to change conditions based on new information. It

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

is expected that the judicial officer will also generally notify the U.S. Attorney before amending release conditions at the suggestion of the defendant. If the original or the amended conditions cause an accused to be detained in custody, even if only at specified times, e.g., daytime release, the accused is entitled to exercise the right to apply for review under 18 U.S.C. §3146(d).

9-6.137 Rules of Evidence--18 U.S.C. §3146(f)

The rules of evidence pertaining to the admissibility of evidence in a court of law do not apply to information offered in connection with release hearings under the Act.

9-6.138 Forfeiture of Collateral--18 U.S.C. §3146(g)

The Act allows for disposition of minor cases by forfeiture of collateral security when such disposition is authorized by the court, thus enabling defendants who do not wish to contest these minor offenses to be released under the liberal provisions of this Act. See 18 U.S.C. §3146(g).

9-6.140 Appeals from Conditions of Release--18 U.S.C. §3146

18 U.S.C. §3147 gives a detained person the right to file a motion for review of release conditions and subsequent appeal to a court having appellate jurisdiction if such motion does not result in his/her release.

The statute sets up a series of review provisions. The first two steps of this series, twenty-four hour review and the power to amend release conditions, are described above. 18 U.S.C. §3147 deals with the last two steps of review, a motion to the court having original jurisdiction over the offense, and an appeal to the court having appropriate appellate jurisdiction.

A person detained or required to return to custody at specified times who desires to have such release conditions reviewed must first file an application for review under 18 U.S.C. §3146(d), which is a review by a judicial officer after such party is detained for twenty-four hours. Once the 18 U.S.C. §3146(d) review is terminated, such person, if still detained, may move the court having original jurisdiction over the offense to amend the order of release pursuant to 18 U.S.C. §3147(a). Such motion need not be filed if the judicial officer who set the conditions and held the twenty-four hour review is a judge of the court having original jurisdiction over the offense with which the detained party is charged, a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

judge of the United States Court of Appeals, or a Justice of the Supreme Court. The court of original jurisdiction must promptly review the motion. Thus, a jurisdictional prerequisite to review is an application pursuant to 18 U.S.C. §3146(d) to the original judicial officer. See Shackleford v. United States, 383 F.2d 212 (D.C. Cir. 1967); United States v. Clark, 289 F. Supp. 608 (E.D. Pa. 1968).

The House report on the Bail Reform Act of 1966 specifically defines what constitutes prompt determination as follows:

Prompt determination as required by this subsection [18 U.S.C. §3147(a)] means that such a motion shall be given priority and that determination shall be expedited in conformity with the underlying purpose of this legislation, namely, that the accused shall not needlessly be detained pending his appearance to answer charges when such detention serves neither the ends of justice nor the public interest.

H.R. Rep. No. 1541, 89th Cong., 2d Sess. 14 (1966).

There is no mention in the Bail Reform Act of the requirements of a written order by the court concerning its decision on an 18 U.S.C. §3147(a) motion; however, the Senate report indicates that a written order is contemplated since the appellate court is to review the order of the trial court on the accused's motion to amend. See S. Rep. No. 750, 89th Cong., 1st Sess. 19 (1965). In light of the intention of Congress expressed above, which clearly requires meaningful review of release proceedings, the order of the trial court should be as detailed as possible and should delineate the relevant facts and the basis for its decision.

The statute does not give guidelines for the hearing on this type of motion. Since this is a motion to amend, rather than an appeal, it can be assumed that a de novo investigation may be taken, with evidence presented and reviewed by the court concerning facts and reasons which provide a basis to amend the order.

When the court denies the motion to amend allowed by 18 U.S.C. §3147(a) or conditions for release have been imposed by a judge of the court having original jurisdiction over the offense, and an 18 U.S.C. §3147(a) motion is, therefore, not necessary, an appeal may be taken to the court having appellate jurisdiction over such court.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The Senate report indicates that the appellate court shall review the statement of evidence in the release order and the order of the trial court on the accused's motion to amend. See S. Rep. No. 750, *supra*. Any order appealed shall be affirmed if "it is supported by the proceedings below."

If the appellate court finds that the order is not supported by the proceedings below, it may remand the case for further hearing or may request additional evidence or order the person released pursuant to 18 U.S.C. §3146(a). The appeal is to be heard promptly with the same priority as an 18 U.S.C. §3147(a) motion.

9-6.150 Release in Capital Cases or After Conviction--18 U.S.C. §3148

18 U.S.C. §3148 deals with release from two types of detention: (1) detention of persons charged with offenses punishable by death; and (2) detention of a person convicted of an offense who is awaiting sentence, or sentence review under 18 U.S.C. §3576, or has filed an appeal or a petition for writ of certiorari. Unlike offenders covered in 18 U.S.C. §3146, there is no traditional right to bail in either of the above cases. Historically there was no right to bail for capital crimes. After conviction, since the presumption of innocence is gone, detention may be based on a finding that the defendant is guilty. Congress recognized this distinction and the Bail Reform Act treats these offenders differently. 18 U.S.C. §3148 provides that these persons are presumptively to be released under the provisions of §3146 (see *United States v. Fields*, 466 F.2d 119 (2d Cir. 1972)), but may be detained if the court or judge has reason to believe that the conditions of release will not reasonably assure that the person will not flee, or pose a danger to any person or the community, or if it appears that the appeal or writ is frivolous or taken for delay. This is the only section of the Act which authorizes denial of release for possibly dangerous persons.

The current validity of the provision of 18 U.S.C. §3148 relating to capital offenses is seriously in doubt because it is triggered by a charge of a capital offense, and, pursuant to the holding of the Supreme Court in *Furman v. Georgia*, 408 U.S. 233 (1972), the death penalty provisions of all federal statutes are apparently unconstitutional, with the exception of the recently revised provisions of 49 U.S.C. §1472, relating to aircraft piracy, *United States v. Kaiser*, 545 F.2d 467, 471 (5th Cir. 1977). See USAM 9-10.000, *infra*, (Capital Crimes). A majority of the courts that have examined the procedural benefits accorded by federal statute to persons charged with capital offenses have held that the unconstitutionality of the death penalty provision of the substantive

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

offenses invalidates the attendant procedural provisions. See Kaiser, supra, at 475; United States v. Hoyt, 451 F.2d 570 (5th Cir. 1971), cert. denied, 465 U.S. 995 (1972); United States v. Freeman, 380 F. Supp. 1004 (D. N.D. 1974); contra, United States v. Watson, 496 F.2d 1125 (4th Cir. 1973). While these cases have not ruled directly on the question of whether the government may continue to treat offenses that were formerly punishable by death as capital for the purpose of denying bail, it is the Department's position that the government may not continue to treat such offenses as capital for any concomitant provision of a death penalty statute, whether the purpose is to restrain or protect the defendant.

The power to release an individual in a capital case is confined to a court or judge, under 18 U.S.C. §3148, rather than by any other judicial officers. See 18 U.S.C. §3141. This limits the persons authorized to allow release. In addition, none of the review provisions of 18 U.S.C. §3147 apply to persons subject to 18 U.S.C. §3148 whether they are pretrial in a capital case or their status is post-trial. However, rights of judicial review that exist elsewhere are not affected. An individual covered by 18 U.S.C. §3148 can appeal from a decision refusing bail and the appellate court can reverse the decision of the lower court if there was a clear abuse of discretion or other mistake of law. See Harris v. United States, 404 U.S. 1232 (1971) (Douglas, Circuit Justice) (in which Justice Douglas made an independent determination of the merits of an application where bail was denied by the District Court and the Court of Appeals).

There are no specific standards set out in the statute to be used by the judicial officer in determining whether a person seeking release under 18 U.S.C. §3148 will flee or pose a danger to another person or to the community. In determining whether or not a certain person will pose a danger, the criteria listed within 18 U.S.C. §3146(b) of the Bail Reform Act are highly relevant. See the discussion in Harris v. United States, supra, at 1232; United States ex. rel. Waler v. Twomey, 484 F.2d 874 (7th Cir. 1973); United States v. Baca, 444 F.2d 1292 (10th Cir. 1971), cert. denied, 404 U.S. 979 (1971); Leary v. United States, 431 F.2d 85 (5th Cir. 1970); United States v. Quicksey, 371 F. Supp. 561 (S.D. W. Va. 1974), for an examination of facts considered in determining denial of release pursuant to 18 U.S.C. §3148.

Because the convicted defendant is presumptively releasable, the government has the burden of proving that the defendant has not met the minimum standards for allowing release and should be detained without bail. See Harris v. United States, supra, at 1232; Leary v. United States, supra, at 86; United States v. Brown, 399 F. Supp. 631 (W. D. Okla. 1975). See also, Ward v. United States, 79 S. Ct. 1063, 1065 (1956) (Frankfurter, Circuit Justice).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-6.160 Release of Material Witnesses--18 U.S.C. §3149

The policy of the Act requires the release of material witnesses whenever possible. If it is shown by affidavit that a person's testimony is material in any criminal proceeding and that it may become impracticable to secure the presence of the witness by subpoena, a judicial officer is to impose conditions of release pursuant to 18 U.S.C. §3146.

No material witness is to be detained because of his/her inability to fulfill the conditions of his/her release if his/her testimony can adequately be secured by deposition and further detention is not required to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Under Rule 15(a) of the Federal Rules of Criminal Procedure, if a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his/her deposition be taken. The court may discharge the witness after the deposition has been subscribed.

Although the Federal Rules of Criminal Procedure do not specifically allow for a motion by a witness to have his/her deposition taken when he/she is unable to fulfill a condition of release other than bail, it is assumed that the witness is entitled to make a Rule 15(a) of the Federal Rules of Criminal Procedure motion. The reason for allowing the deposition is to preserve the testimony of the witness and to eliminate unnecessary pretrial detention. Imposition of a non-monetary condition of release which the witness cannot fulfill and which therefore results in his/her detention, or which requires part-time detention, instead of bail, should not affect the right of a witness to have his/her deposition transcribed and subsequently to be released from custody. Although the Act contemplates the release of material witnesses, where appropriate conditions are imposed under 18 U.S.C. §3146 which result in the detention of a witness, that witness has the responsibility to file a motion pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure requesting that his/her deposition be subscribed so that he/she may be released. A witness may be detained for a reasonable period of time until his/her deposition is recorded. For example, because notice to the accused is required, it is not unreasonable to keep the witness in custody while such notice is given pursuant to Rule 15 of the Federal Rules of Criminal Procedure.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A court in exercise of its sound discretion, has the power, inferable from 18 U.S.C. §3149 and Rule 46(b) of the Federal Rules of Criminal Procedure, to issue a warrant of arrest, not preceded by a subpoena, for a material witness. See United States v. Anfield, 539 F.2d 674, 677 (9th Cir. 1976); Bacon v. United States, 449 F.2d 933, 937 (9th Cir. 1971). A material witness warrant must be based on probable cause, which under Rule 46 of the Federal Rules of Criminal Procedure and 18 U.S.C. §3149, is tested by two criteria--that the testimony of the person is material and that it may become impracticable to secure the presence of the person by subpoena. Bacon, *supra*, at 943; United States v. Feingold, 416 F. Supp. 627, 628 (E.D.N.Y. 1976).

9-6.170 Penalties for Failure to Appear--18 U.S.C. §3150

The Bail Reform Act provides penalties for any person released pursuant to the provisions of the Act who willfully fails to appear before any court or judicial officer as required. See 18 U.S.C. §3150. Because many persons charged with an offense are released pursuant to the Bail Reform Act without posting traditional bail, this section contains a penalty for persons who willfully fail to appear even though they will not have forfeited bail. Anyone released in connection with a felony charge, or while awaiting sentence or pending appeal or certiorari after conviction of any offense who willfully fails to appear as required is to be fined not more than \$5,000, or imprisoned not more than five years, or both, or if released in connection with a charge of misdemeanor, is to be fined not more than the maximum provided for such misdemeanor or imprisoned for not more than one year or both, and anyone released for appearance as a material witness, who fails to appear, is to be fined not more than \$1,000 or imprisoned not more than one year or both.

There is no thirty-day "grace period" during which an offender may appear before being subject to penal sanctions as was the case in the pre-1966 law. If a person willfully does not appear as required, he/she is immediately subject to the penalties of 18 U.S.C. §3150.

In the event bail was posted the bail is forfeited in addition to the penalties specified above. The forfeiture is governed by Rule 46(e) of the Federal Rules of Criminal Procedure, which provides that on breach of a condition of the bond, the court is to declare a forfeiture. If it appears to the court that justice does not require the enforcement of the forfeiture, the court may set aside the forfeiture. See Fed. R. Crim. P. 46(e)(2). When a forfeiture of default has not been set aside, the court is to enter a judgment of default and may issue an execution on the bond. See Fed. R. Crim. P. 46(e)(3). The applicability of Rule 46 of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Federal Rules of Criminal Procedure to the Bail Reform Act has been challenged and the argument has been made that since 18 U.S.C. §3151 provides for contempt for breaches of its provisions, that Congress must have intended the remedies under the Bail Reform Act to be exclusive--forfeiture, fine and imprisonment for nonappearance, and contempt for violation of other conditions. However, it has been held that Rule 46 of the Federal Rules of Criminal Procedure and the Bail Reform Act are complementary and form a unified system for dealing with pretrial release. See Brown v. United States, 410 F.2d 212, 216 (5th Cir. 1969), cert. denied, 396 U.S. 932 (1969).

The bail jumping statute, 18 U.S.C. §3150, proscribes the failure to appear before "any court or judicial officer as required." The question has arisen whether a defendant's failure to report to a United States Marshal or probation officer is a failure to appear before "any court or judicial officer as required." A failure to appear before a probation officer for preparation of a pre-sentence report may be deemed a violation of a defendant's release conditions but is not a failure to appear before the court or judicial officer as required to uphold a conviction under 18 U.S.C. §3150. See United States v. Clark, 412 F.2d 885 (5th Cir. 1969). However, a majority of the courts have upheld convictions of persons who failed to surrender to a marshal to begin serving sentence on the theory that the marshal is the court's designated agent for limited purposes such as taking a defendant into custody. See United States v. Burleson, 638 F.2d 237 (10th Cir. 1981); United States v. Harris, 544 F.2d 947 (8th Cir. 1976); United States v. Black, 543 F.2d 35 (7th Cir. 1976); United States v. Bright, 541 F.2d 471 (5th Cir. 1974); United States v. Cardillo, 473 F.2d 325 (4th Cir. 1973) (dictum) (stating that a clerk, who delivered a warning to the defendant in the presence of the judicial officer, was an agent of the court.)

18 U.S.C. §3150 has withstood constitutional challenges of vagueness, the court holding that any ambiguity of the "when required" provision is cured by the requirement that the failure must be willful. See United States v. DePugh, 434 F.2d 584 (8th Cir. 1970), cert. denied, 401 U.S. 978 (1971). Because a conviction under 18 U.S.C. §3150 is for a willful failure to appear and not for nonappearance resulting from a mistake or misunderstanding, the courts have considered circumstantial evidence such as whether adequate notice of a required appearance was given, United States v. Cardillo, supra; United States v. Currier 405 F.2d 1039 (2d Cir. 1969), cert. denied, 395 U.S. 914 (1969), and whether the defendant signed an order stating she would appear for hearings, United States v. Guerrero, 517 F.2d 528 (10th Cir. 1975), to determine willfulness.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Although a prosecution under 18 U.S.C. §3150 contemplates that a defendant be given a reasonable notice as to any required court appearance, the federal courts have upheld convictions when the defendant's nonappearance occurs because he/she purposely engaged in a course of conduct designed to prevent him/her from receiving notice, the courts holding that such conduct can be as "willful" as when a defendant receives and deliberately ignores a notice to appear. In those cases, actual notice is not required. See United States v. DePugh, *supra*; United States v. Cardillo, *supra*, at 327. Thus, nonappearance has been held to be willful when a defendant hides from court notice, United States v. Bright, *supra*; United States v. Depugh, *supra*, at 552; United States v. Hall, 346 F.2d 875 (2d Cir. 1965), *cert. denied*, 382 U.S. 910 (1965); when a defendant signed a bond that she would appear for scheduled appearances, United States v. Guerrero, *supra*, at 529; when a defendant was present when the date was set for trial after executing a bond, United States v. Dorman, 496 F.2d 438 (4th Cir. 1974), *cert. denied*, 419 U.S. 942 (1974); when a defendant failed to keep his attorney advised of his location coupled with leaving the jurisdiction, Gant v. United States, 506 F.2d 518 (8th Cir. 1974), *cert. denied*, 420 U.S. 1005 (1975); and when a person uses an alias and returns the notice to the court having jurisdiction, United States v. Cohen, 450 F.2d 1019 (5th Cir. 1971). However, mere proof of nonappearance standing alone is not sufficient to establish willfulness, and one court overturned a conviction when the defendant's attorney failed to notify the court that the defendant was in jail in another jurisdiction. See United States v. Reed, 354 F. Supp. 18 (W.D. Mo. 1973). It is not a sufficient defense to combat the "willfulness" element of the offense that the defendant feared for his/her personal safety, United States v. Ely, 480 F.2d 617 (5th Cir. 1973), *reh'g denied*, 480 F.2d 925, *cert. denied*, 414 U.S. 1041 (1973); United States v. Miller, 451 F.2d 1306 (4th Cir. 1971); nor is it an adequate defense that the nonappearance was a result of defendant's discovery that a co-defendant was going to testify against him/her, United States v. Garcia-Turino, 458 F.2d 1345 (9th Cir. 1972), *cert. denied*, 409 U.S. 951, *reh'g denied*, 409 U.S. 1068 (1972).

It is not error to introduce a bonding company's posters indicating that the defendant was a fugitive to prove willfulness. See United States v. Washam, 529 F.2d 402 (5th Cir. 1976). Nor is it error to permit a defense attorney to testify that he/she notified the defendant to be present because relating such information was counsel's duty as an officer of the court and was not within the boundary of the attorney-client privilege. See United States v. Freeman, 519 F.2d 67 (9th Cir. 1975); United States v. Bourassa, 411 F.2d 69 (10th Cir. 1969), *cert. denied*, 396 U.S. 915 (1969). However, it has been held to be inadmissible hearsay for the attorney to state that in the past he/she had told the court he/she informed his/her client. See United States v. Freeman, *supra*, at 69.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The question of when an appearance is "required" or whether the defendant was ordered to appear has arisen under 18 U.S.C. §3150. A court docket or notice mailed to a defendant's attorney may be construed as a court direction to appear for the purpose of 18 U.S.C. §3150. See Gant v. United States, *supra*; United States v. Cardillo, *supra*.

9-6.171 Warnings Required at Initial Bail Release Not a Prerequisite for Subsequent Bail Jumping Prosecution

Three federal courts have held that the failure to render a warning, required under 18 U.S.C. §3146(c), as to the applicable penalties for violation of release conditions is not a bar to a subsequent prosecution for violation of 18 U.S.C. §3150, because the legislative history indicated that Congress did not intend such a warning to be a prerequisite to prosecution or an element of the offense. See United States v. Cardillo, *supra*; United States v. Eskew, 469 F.2d 278 (9th Cir. 1972); United States v. DePugh, *supra*. In Senate Judiciary Committee hearings, then Deputy Attorney General Ramsey Clark testified that the warning requirement "is not designed as a prerequisite to subsequent prosecution, but in order to enhance its deterrent value of increased emphasis on criminal penalties." Senate Judiciary Committee Hearing on S. 1357, 89th Cong., June 15, 1965, at 22-23.

It should be noted that at least two prosecutions were lost because defendants were not warned at the time of their initial release, of the penalties applicable for failure to appear at later court appearances, when district courts interpreted the warning requirement to be followed literally. See United States v. Campbell, Crim. R. 68-72 (D. Ore. March 10, 1969) (unreported opinion); United States v. Graves, Crim. R. 14110 (D. Nev. Aug. 11, 1969)(unreported opinion). Neither case is reported and the Circuit Courts of Appeals decisions noted above are all subsequent in time and should be controlling.

However, any future incidents of this problem can be avoided by the use of the prepared Bail Reform Act Form No. 2, which contains all warnings and notices to the defendant required by the Bail Reform Act. (See USAM 9-6.200, *infra*).

The Act does not provide penalties for a violation of a condition of release short of failing to appear before a judicial officer or court as required. See United States v. Williams, 594 F.2d 86 (5th Cir. 1979), *on reh'g*, 622 F.2d 830, *cert. denied*, 449 U.S. 1127 (1981); United States v. Bright, 541 F.2d 471 (5th Cir. 1976), *reh'g denied*, 544 F. 2d 5181, *cert.*

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

denied, 430 U.S. 935 (1977). There are three possible ways of handling violations not covered by 18 U.S.C. §3150. First, the conditions of release can be amended to include additional conditions to be performed by the accused which take into account the violation of the prior release conditions. Second, a warrant for arrest can issue immediately upon violation of release conditions pursuant to 18 U.S.C. §3146(c), such an arrest can be based on the court's contempt powers as preserved in bail matters in 18 U.S.C. §3151. Finally, if bond has been posted, forfeiture of the bond is an alternative sanction for violation of the bond. See United States v. Clark, 412 F.2d 885 (5th Cir. 1969); Brown v. United States, 410 F.2d 212 (5th Cir. 1969), cert. denied, 396 U.S. 932 (1969). See USAM 9-121.100 (Appearance Bond Forfeiture Judgment).

9-6.180 Contempt--18 U.S.C. §3151

This section provides that nothing in the Bail Reform Act shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

9-6.190 Bail Reform Act Forms

The Administrative Office of the United States Courts has designed two forms to assist a judicial officer in determining which conditions of release will reasonably assure appearance. Bail Reform Act Form No. 1, AO 201 (10-70), Record of Responses to Questions at Bail Reform Act Hearing, is comprised of 2 parts, both designed to assist the judicial officer in obtaining and recording pertinent information required by the Bail Reform Act of 1966. This information will enable the officer to issue the Order Specifying Methods and Conditions of Release (Bail Reform Act Form No. 2); additionally, the responses will be useful in further proceedings under the Act. Part I contains questions for the representative of the government concerning the circumstances of the offense, circumstances of arrest and inquiries about other relevant information including threats to *potential witnesses, and possible attempts to flee the jurisdiction* if released. Part II includes questions for the defendant or any person having information about the accused and elicits information about the accused's background, family, employment, financial resources, health, criminal record, record of previous appearances, etc.

*Bail Reform Act No. 2, Order Specifying Methods and Conditions of Release*, is a form designed to assist the judicial officer in his/her release order. In addition to specifying the conditions of release, the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Bail Reform Act Form No. 2 will provide notice to the defendant of the review provisions of the Act, further appearance that may be required or ordered, a warning of the penalties for violation of any condition of his/her release, and notice of the offense of bail jumping, 18 U.S.C. §3150. The defendant must acknowledge the conditions of release and penalties and forfeitures for violation of conditions of release and failure to appear. The information contained on Bail Reform Act Form No. 2 is invaluable in establishing the elements of a bail jumping prosecution under 18 U.S.C. §3150 if such a prosecution shall ultimately result. Accordingly, each U.S. Attorney's office should follow a policy of requiring the preparation of this form in all cases of persons released pursuant to the Bail Reform Act.

1984 USAM (superseded)

# United States District Court

\_\_\_\_\_ District of \_\_\_\_\_

United States of America

v.

\_\_\_\_\_ Defendant

Magistrate's Docket No. \_\_\_\_\_

Case No. \_\_\_\_\_

## RECORD OF RESPONSES TO QUESTIONS AT BAIL REFORM ACT HEARING

The Bail Reform Act of 1966 requires that each judicial officer, in determining which conditions of release will reasonable assure appearance, shall take into account available information concerning the following:

- the nature and circumstances of the offense charged
- the weight of the evidence against the accused
- the accused's family ties
- employment and financial resources
- character and mental condition
- length of residence in the community
- record of convictions
- record of appearance at court proceedings
- record of flight to avoid prosecution
- record of failure to appear at court proceedings.

This information is necessary to enable the officer to issue the Order Specifying Methods and Conditions of Release (Bail Reform Act Form No. 2).

The questions listed in Part I are designed to assist the judicial officer in obtaining information, principally from the representative of the United States, concerning the nature and circumstances of the offense charged, the weight of the evidence against the accused, and the circumstances of the arrest. The questions set forth in Part II are designed to assist in obtaining information, principally from the defendant, concerning the other factors specified in the statute. In each part, the information or its verification may be sought from any source.

Questions need not be limited to the ones suggested here, nor need all questions be asked in all cases. Neither the defendant nor the representative of the United States may be compelled to answer any question. Responses to questions should be recorded on this form in order to facilitate their use in further proceedings under the Act.

This Form No. 1 need not be used if the United States Attorney and counsel for the defendant agree on the terms of an order (Form No. 2) which specifies methods and conditions of release acceptable to the judicial officer.

### PART I. QUESTIONS FOR THE REPRESENTATIVE OF THE UNITED STATES

#### A. General information

1. WHAT ARE THE CHARGES AGAINST THE DEFENDANT? \_\_\_\_\_
2. WHAT ARE THE MAXIMUM PENALTIES APPLICABLE TO THESE CHARGES? \_\_\_\_\_
3. WHEN AND WHERE DID THE OFFENSE TAKE PLACE? \_\_\_\_\_
4. WHEN AND WHERE WAS THE DEFENDANT TAKEN INTO CUSTODY? \_\_\_\_\_

5. IS THE DEFENDANT HERE PURSUANT TO AN ARREST OR A SUMMONS? \_\_\_\_\_  
 6. ARE ANY DETAINERS OUTSTANDING? \_\_\_\_\_

**B. Circumstances of the offense**

7. WAS THE DEFENDANT ARMED AT THE TIME OF THE OFFENSE? \_\_\_\_\_  
 WAS A WEAPON USED? \_\_\_\_\_ IF SO, WHAT KIND? \_\_\_\_\_  
 8. WAS ANY VICTIM'S PROPERTY TAKEN OR DESTROYED? \_\_\_\_\_ IF SO, WHAT IS THE ESTIMATED VALUE OF THE  
 PROPERTY AND HAS IT BEEN RECOVERED? \_\_\_\_\_  
 9. WERE PERSONAL INJURIES INFLICTED OR THREATENED AGAINST ANYONE DURING THE COURSE OF THE OFFENSE? \_\_\_\_\_  
 IF SO, WHAT WAS THE NATURE AND EXTENT OF THE INJURIES? \_\_\_\_\_

**C. Circumstances of the arrest**

10. DID THE DEFENDANT ATTEMPT TO AVOID OR RESIST ARREST? \_\_\_\_\_  
 IF SO, HOW? \_\_\_\_\_  
 11. WAS THE DEFENDANT ARMED AT THE TIME OF ARREST? \_\_\_\_\_ WHAT KIND OF WEAPON? \_\_\_\_\_  
 12. WAS EVIDENCE OF THE OFFENSE FOUND IN THE DEFENDANT'S POSSESSION? \_\_\_\_\_  
 13. HAS THE DEFENDANT ADMITTED INVOLVEMENT IN THE OFFENSE? \_\_\_\_\_

**D. Other relevant information**

14. HAS THE DEFENDANT MADE ANY THREATS AGAINST POTENTIAL WITNESSES? \_\_\_\_\_  
 WHAT KINDS? \_\_\_\_\_  
 15. IS THERE ANY INDICATION THAT THE DEFENDANT IS AN ALCOHOLIC? \_\_\_\_\_  
 AN ADDICT? \_\_\_\_\_ MENTALLY DISTURBED? \_\_\_\_\_  
 16. IS THERE ANY OTHER INFORMATION WHICH INDICATES THAT THE DEFENDANT MAY ATTEMPT TO FLEE IF RELEASED? \_\_\_\_\_  
 IF SO, WHAT INFORMATION? \_\_\_\_\_  
 17. NAME AND ADDRESS OF THE GOVERNMENT REPRESENTATIVE AND ANY OTHER PERSON WHO FURNISHED INFORMATION IN  
 RESPONSE TO THE FOREGOING QUESTIONS. \_\_\_\_\_

**PART II. QUESTIONS FOR THE DEFENDANT OR  
 OTHER PERSONS HAVING INFORMATION**

**A. Background and Residence**

1. FULL NAME OF DEFENDANT \_\_\_\_\_  
 2. AGE \_\_\_\_\_ SEX \_\_\_\_\_ 3. ALIAS OR NICKNAMES \_\_\_\_\_  
 4. a. PLACE OF BIRTH \_\_\_\_\_ b. PRESENT CITIZENSHIP \_\_\_\_\_  
 5. PRESENT ADDRESS \_\_\_\_\_  
 6. TELEPHONE NO. \_\_\_\_\_ 7. HOW LONG AT THIS ADDRESS \_\_\_\_\_  
 8. WHAT OTHER ADDRESSES DURING PAST YEAR, AND HOW LONG AT EACH \_\_\_\_\_  
 9. AT WHAT PLACE HAVE YOU LIVED THE LONGEST IN THE PAST FIVE YEARS, AND FOR HOW LONG? \_\_\_\_\_  
 10. WHERE WILL YOU GO IF RELEASED TODAY? \_\_\_\_\_  
 11. ARE YOU PRESENTLY IN MILITARY SERVICE? \_\_\_\_\_ BRANCH AND RANK \_\_\_\_\_

**B. Family**

12. ARE YOU MARRIED? \_\_\_\_\_ 13. LIVING WITH YOUR WIFE? \_\_\_\_\_ 14. HOW MANY CHILDREN ARE LIVING WITH YOU? \_\_\_\_\_  
 15. IF YOU HAVE REGULAR CONTACT WITH ANY PARENT, CHILD, RELATIVE OR OTHER PERSON, FURNISH THE FOLLOWING IN-  
 FORMATION

	NAME	RELATIONSHIP	ADDRESS	MONTHLY SUPPORT
a.				
b.				
c.				
d.				

**C. Employment during past twelve months**

16.

PERIOD		NAME OF COMPANY OR EMPLOYER	ADDRESS		KIND OF WORK	WAGE	
FROM	TO		CITY	STATE		AMT.	PERIOD
a.							
b.							
c.							
d.							

17. WHAT IS THE NAME OF YOUR PRESENT SUPERVISOR? \_\_\_\_\_ HIS TEL. NO. \_\_\_\_\_

**D. Financial resources**

18. HOW MUCH CASH DO YOU HAVE ON HAND? \$ \_\_\_\_\_ 19. HOW MUCH CASH IN THE BANK? \$ \_\_\_\_\_  
 20. WHAT OTHER PROPERTY DO YOU OWN (HOUSE, CAR, ETC.)? \_\_\_\_\_  
 21. WHAT SOURCES OF SUPPORT DO YOU HAVE OTHER THAN THE EMPLOYMENT LISTED IN ITEM 16? \_\_\_\_\_

**E. Health**

22. WHEN WERE YOU LAST IN A HOSPITAL? \_\_\_\_\_ OR UNDER A DOCTOR'S CARE? \_\_\_\_\_  
 23. WITHIN THE PAST FIVE YEARS HAVE YOU BEEN TREATED FOR  
 a. ANY MENTAL CONDITION? \_\_\_\_\_ b. DRUG ADDICTION? \_\_\_\_\_ c. ALCOHOLISM? \_\_\_\_\_

**F. Criminal record**

24. HAVE YOU EVER BEEN CONVICTED OF A CRIME OR FORFEITED COLLATERAL (YOU MAY OMIT MENTION OF TRAFFIC VIOLATIONS FOR WHICH A FINE OF \$30 OR LESS WAS IMPOSED)? \_\_\_\_\_  
 25. WHILE IN MILITARY SERVICE, WERE YOU EVER CONVICTED BY A GENERAL COURT MARTIAL? \_\_\_\_\_  
 26. ARE YOU NOW UNDER CHARGES IN ANY OTHER ADULT OR JUVENILE COURT? \_\_\_\_\_  
 27. WITHIN THE PAST FIVE YEARS, HAVE YOU BEEN ARRESTED FOR ANY OFFENSE OTHER THAN THOSE MENTIONED IN ITEMS 24, 25 OR 26? \_\_\_\_\_  
 28. FOR EACH YES ANSWER TO QUESTIONS 24-27, FURNISH THE FOLLOWING INFORMATION:

QUESTION NO.	CHARGE	DISPOSITION	MONTH & YEAR	LOCATION OF COURT

29. ARE YOU NOW ON PAROLE OR PROBATION? \_\_\_\_\_ WHAT IS THE NAME AND ADDRESS OF YOUR SUPERVISING OFFICER? \_\_\_\_\_

30. HAVE YOU EVER HAD PAROLE OR PROBATION REVOKED? \_\_\_\_\_ WHEN AND WHERE? \_\_\_\_\_

**G. Record of appearance**

31. IF YOU HAVE EVER BEEN RELEASED ON BAIL OR OTHER CONDITIONS PENDING TRIAL OR APPEAL, FURNISH THE FOLLOWING INFORMATION

DATE	COURT WHICH RELEASED YOU	CHARGE	DID YOU EVER FAIL TO APPEAR AS REQUIRED?

**H. Identifying documents**

32. SOCIAL SECURITY NO. \_\_\_\_\_ 33. MOTOR VEHICLE REG. NO. \_\_\_\_\_  
 34. DRIVER'S LICENSE NO. \_\_\_\_\_ 35. SELECTIVE SERVICE NO. \_\_\_\_\_  
 36. OTHER \_\_\_\_\_

**I. Supervision**

37. IS THERE ANY ORGANIZATION (CHURCH, UNION, CLUB, ETC.) OR PERSON WHO MIGHT AGREE TO SUPERVISE YOU AND BE RESPONSIBLE FOR YOUR RETURN TO COURT? IF SO, FURNISH THE FOLLOWING INFORMATION:

ORGANIZATION	PERSON TO CONTACT	ADDRESS	TELEPHONE NO.

**J. Verification**

38. DO YOU OBJECT TO CONTACT BEING MADE WITH ANY PERSON NAMED ABOVE? \_\_\_\_\_

**K. Additional relevant information**

39. NAME AND ADDRESS OF EACH PERSON OTHER THAN THE DEFENDANT WHO FURNISHED INFORMATION IN RESPONSE TO QUESTIONS IN PART II:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

40. CONTINUATION SPACE IF NEEDED (INDICATE ITEM NUMBER)

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*United States Magistrate  
or District Judge*

UNITED STATES DISTRICT COURT

\_\_\_\_\_ District of \_\_\_\_\_

United States of America

v.

\_\_\_\_\_ Defendant

Magistrate's Docket No. \_\_\_\_\_

Case No. \_\_\_\_\_

ORDER SPECIFYING METHODS AND CONDITIONS OF RELEASE

Part I.—Preferred Methods of Release

It is hereby ORDERED that the above-named defendant be released, provided

Personal  
Recognizance

that he promises to appear at all scheduled hearings as required.

Unsecured Bond

that he will execute a bond binding himself to pay the United States the sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_) in the event that he fails to appear as required.

[NOTE: The judicial officer is required to release the defendant by one of the above methods unless he determines that such a release will not reasonably assure the appearance of the defendant as required. In the event such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first condition of release listed below which will reasonably assure the appearance of the person for trial. If no single condition gives that assurance, any combination of conditions may be used.]

Part II.—Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant, it is hereby FURTHER ORDERED that the defendant be released on the condition (s) checked below:

Third Party  
Custody

(1) The defendant is placed in the custody of \_\_\_\_\_  
(Name of person or organization) \_\_\_\_\_  
(Address) \_\_\_\_\_  
(City and State) \_\_\_\_\_ Tel. No. \_\_\_\_\_

who agrees (a) to supervise the defendant in accordance with conditions 2 and 5 as checked below, (b) to use every effort to assure the appearance of the defendant at all scheduled hearings before the United States Magistrate or Court, and (c) to notify the Magistrate or Court immediately in the event the defendant violates any condition of his release or disappears.

Signed: \_\_\_\_\_  
Magistrate or Proxy

Restrictions on  
Travel, Associa-  
tion or Place  
of Abode

(2) The defendant will comply with each of the following conditions: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

10% Deposit

(3) The defendant will execute a bond binding himself to pay to the United States the sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_) and will deposit in the registry of the court the sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_), in \_\_\_\_\_, being not more than 10%  
(cash or account)

of the amount of the bond, such deposit to be returned upon the court's determination that the defendant has performed the conditions of his release.

Cash or Surety  
Bond

(4) The defendant will execute a bond in the amount of \_\_\_\_\_ dollars (\$ \_\_\_\_\_) either secured by the undertakings of sufficient solvent sureties or by the deposit of an equal amount of cash or other security in lieu thereof.

Part-time Release

( ) (5) (a) The defendant will be released from \_\_\_\_\_ <sup>a.m.</sup> to \_\_\_\_\_ <sup>p.m.</sup> on \_\_\_\_\_  
(Specify days of work)  
on condition that he return to custody at the specified time at such place of confinement as the United States Marshal shall designate.

Other Conditions

( ) (5) (b) The defendant agrees that he will comply with the following other conditions of release: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(NOTE: A defendant for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them.)

Part III.—Appearance and Penalties

Appearance

It is hereby FURTHER ORDERED that the defendant shall appear next at \_\_\_\_\_

\_\_\_\_\_ <sup>Place</sup> \_\_\_\_\_ <sup>Date and Time</sup>  
and at such other places and times as the United States Magistrate or Court may order or direct.

Penalties

If the defendant violates any condition of his release, a warrant for his arrest will issue immediately. After arrest, the terms and conditions of any further release will be redetermined.

If the defendant fails to appear before any court or judicial officer as required, an additional criminal case may be instituted against him. If the failure to appear is in connection with a charge of felony, or while awaiting sentence, or pending appeal or certiorari after conviction, the penalty is a fine of not more than \$5,000 or imprisonment for not more than five years, or both; if he fails to appear after being released on a misdemeanor charge, the penalty is a fine of not more than the maximum provided for the misdemeanor or imprisonment for not more than one year, or both.

Part IV.—Acknowledgment by Defendant

Acknowledgment

I \_\_\_\_\_ <sup>Defendant</sup> understand the methods and conditions of my release which have been checked above and the penalties and forfeitures applicable in the event I violate any condition or fail to appear as required.

I agree to comply fully with each of the obligations imposed on my release and to notify the Magistrate or Court promptly in the event I change the address indicated below.

\_\_\_\_\_  
<sup>Defendant</sup>  
\_\_\_\_\_  
<sup>Address</sup>  
\_\_\_\_\_  
<sup>City and State</sup> \_\_\_\_\_ <sup>Tel. No.</sup>

RELEASE ORDERED:

Date: \_\_\_\_\_

\_\_\_\_\_  
<sup>United States Magistrate</sup>  
or  
<sup>United States District Judge</sup>

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-6.200 THE BAIL REFORM ACT OF 1966 (CONT.)

9-6.210 Effective Date of Sentence: Credit for Time in Custody Prior to the Imposition of Sentence--18 U.S.C. §3568

Section 4 of the Bail Reform Act which amended existing 18 U.S.C. §3568 provides that the Attorney General is to give credit towards service of the sentence imposed for any days spent in custody in connection with the offense or acts for which the sentence is imposed. It should be noted that current 18 U.S.C. §3568 thus gives credit for time spent in custody for any reason. This allowance applies to sentences imposed in bailable and non-bailable offenses, since credit is to be given against all offenses.

In addition, 18 U.S.C. §3568 provides that credit will be given for time in custody due to "the offense or acts for which the sentence is imposed." This language is used to make it clear that the allowance is earned where a person is arrested on a more serious charge but is convicted and sentenced for a lesser offense. Credit is also given for the time spent in custody of a state on a charge which subsequently is determined to be a federal offense.

The Attorney General is instructed to give the deduction for time spent in custody to insure that all defendants get equal treatment and that such credit is not discretionary with a judge. An offense under 18 U.S.C. §3568 is any criminal offense other than an offense triable by court-martial, military commission, provost court, or other military tribunal which is in violation of an Act of Congress and triable in any court established by Act of Congress. However, the provisions of 18 U.S.C. §3568, which was amended considerably by the Bail Reform Act, are not retroactive and do not apply to sentences imposed prior to September 20, 1966.

9-6.220 Cases Removed from State Court--18 U.S.C. §3144

When a state court judgment in a criminal proceeding is brought to the Supreme Court for review, the defendant may not be released from custody until final judgment upon such review, or, if the offense is bailable, until a bond, with sufficient sureties, in a reasonable sum, is given.

9-6.300 PRETRIAL SERVICES ACT OF 1982

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-6.301 Background of the Pretrial Services Act of 1982

A. Origin of Pretrial Services

In 1974 Congress enacted the Speedy Trial Act in response to the alarming number of defendants who committed crimes while on release awaiting trial. The Speedy Trial Act had two essential elements. Title I established a short period of time before trial and Title II created Pretrial Services Agencies to implement the Bail Reform Act of 1966.

Title II of the Speedy Trial Act of 1974 directed the Administrative Office of the U.S. Courts to set up demonstration pretrial services agencies in ten federal judicial districts. The primary functions of the agencies were to: (1) collect, verify and report promptly to the judicial officer all information pertaining to the pretrial release of persons charged with an offense and recommend appropriate release conditions; (2) review and modify the reports and recommendations; (3) supervise and provide supportive services to persons released in their custody; and (4) inform the court of violations of conditions of release.

The ten demonstration districts were chosen by the Chief Justice, upon consultation with the Attorney General, on the basis of the number of criminal cases in the district, the percentage of defendants detained before trial, the incidence of crime charged to persons released prior to trial, and the resources available.

Under the Speedy Trial Act of 1974, the Director of the Administrative Office of the U.S. Courts was required to report annually to the Congress on the accomplishments of the demonstration pretrial services agencies with particular attention to their effectiveness in: (1) reducing crime committed by persons on pretrial release; (2) reducing the volume and cost of unnecessary pretrial detention; and (3) their general effectiveness in improving the bail process. In addition, the fourth and final report issued by the Director was required to include a recommendation concerning the expansion of pretrial services agencies beyond the ten demonstration districts and compare the performance of the agencies administered by the Division of Probation with the agencies administered by the Board of Trustees.

On May 14, 1980, Senator Biden, along with Senators Kennedy, Mathias, and Thurmond introduced S. 2705, a bill to expand pretrial services beyond the existing ten demonstration districts.

On May 13, 1980, the Senate Judiciary Subcommittee on Criminal Justice held a hearing to review the performance of the ten demonstration districts and also to evaluate proposals to expand pretrial services.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

On July 30, 1980, the Senate Judiciary Committee ordered S. 2705, as amended, reported to the Senate. Subsequently, on September 20, 1980, S. 2705 passed the Senate without further amendment and was sent to the House of Representatives.

On April 8, 1981, Senators Biden and Mathias introduced the Pretrial Services Act of 1981 (S. 923), which was virtually identical to S. 2705 as passed by the Senate in 1980. On September 27, 1982, Congress enacted the Pretrial Services Act of 1982, which appears in Title 18 U.S.C. §§3152-3156.

9-6.302 Purpose of Act

The Pretrial Services Act of 1982 established pretrial services for defendants in every federal judicial district except the District of Columbia. The most important functions of pretrial services are: (1) compiling and verifying personal background information on individuals charged with violation of federal criminal law for use by judges and magistrates in making bail decisions; (2) monitoring and supervising individuals released on bail; and (3) reporting to the court all violations of the conditions of release and recommending necessary modifications in conditions of release. Demonstration pretrial services programs in 10 representative judicial districts proved that the programs would meet the objectives of reducing the number of defendants who fail to appear for trial; reducing the number of defendants unnecessarily confined during the pretrial detention period; increasing the use of nonfinancial terms of conditions of release; and reducing the cost of unnecessary pretrial detention. See U.S. Code Cong. & Ad. News 3, 2d Sess. at 2377.

9-6.310 Establishment of Pretrial Services--18 U.S.C. §3152

18 U.S.C. §3152 requires the Director of the Administrative Office of the U.S. Courts, under the supervision and direction of the Judicial Conference of the United States, to establish pretrial services in each judicial district, other than the District of Columbia. The chief probation officer will supervise pretrial services, except in Special Districts created under 18 U.S.C. §3152(b), which authorizes the Administrative Office of the U.S. Courts to establish pretrial services in certain Special Districts. The appropriate United States district court and the circuit judicial council must jointly recommend that a district be designated a Special District.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-6.320 Organization and Administration of Pretrial Services--18 U.S.C.  
§3153

18 U.S.C. §3153 provides for the organization and administration of pretrial services in all districts. This includes districts in which pretrial services are supervised by a probation officer as well as districts in which pretrial services are supervised by chief pretrial services officers in Special Districts.

9-6.321 Appointment of Necessary Personnel

18 U.S.C. §3153(a)(1) authorizes the appointment of necessary personnel with the approval of the district court. In Special Districts, the panel responsible for the appointment of the chief pretrial services officer should be notified and consulted prior to any such appointment.

9-6.322 Temporary and Intermittent Services

18 U.S.C. §3153(a)(2) authorizes the chief pretrial services officer in Special Districts and the chief probation officer in all other districts to procure temporary and intermittent services to the extent authorized by 5 U.S.C. §3109.

9-6.323 Designation of Personnel

18 U.S.C. §3153(b) authorizes the chief probation officers in all districts (except Special Districts) in which pretrial services are established to designate personnel under chapter 231 of this Title to perform pretrial services.

9-6.324 Confidentiality of Information

18 U.S.C. §3153(c)(1) establishes the general rule governing confidentiality of information contained in pretrial services files, presented in any pretrial services report or divulged by a pretrial services officer, probation officer or staff member during the course of any hearing. Such information should be confidential and only be used for a bail determination. The confidentiality rule is designed to promote candor and truthfulness by the defendant in bail interviews. The final

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

pretrial services report must be made available to the attorney for the accused and the attorney for the government.

9-6.325 Regulations on Pretrial Services Information

18 U.S.C. §3153(c)(2) provides for exceptions to the general rule that pretrial services files should only be used for bail determinations. The Director of the Administrative Office of the U.S. Courts is required to issue regulations which will establish the policy governing release of such information.

The following regulations have been promulgated by the Director as of May 6, 1983, pursuant to 18 U.S.C. §3153(c)(2):

A. Regulations and Statutory Provisions Governing the Release of Pretrial Services Information

The Pretrial Services Act of 1982, 18 U.S.C. §3153(c), contains the following provisions regarding the meaning and use of pretrial services information:

1. Definition

Pretrial services information means information obtained in the course of performing pretrial services functions in relation to a particular accused. 18 U.S.C. §3153(c)(1).

2. General principle of confidentiality

Except as provided in regulations issued by the Director of the Administrative Office, pretrial services information shall be used only for the purpose of a bail determination and shall otherwise be confidential. 18 U.S.C. §3153(c)(1).

3. Admissibility on the issue of guilt

Pretrial services information is not admissible on the issue of guilt in a criminal judicial proceeding unless such proceeding is a prosecution for a crime committed in the course of obtaining pretrial release or a prosecution for failure to appear for the criminal judicial proceeding with respect to which

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

pretrial services were provided. 18 U.S.C. §3153  
(c)(3).

B. Pretrial Services Confidentiality Regulations

The following regulations are issued under the authority vested in me as Director of the Administrative Office of the United States Courts by the Pretrial Services Act of 1982, 18 U.S.C. §3153(c)(2), and 28 U.S.C. §604(f). They shall govern the release of information obtained in the course of a pretrial services investigation or ongoing bail supervision.

I. General

A. Recordation of pretrial services information

A pretrial services officer (PSO) shall record only such information as is pertinent to the determination of bail and to bail supervision. A PSO shall not solicit, record, or indicate in any form information regarding the alleged offense(s) unless such information has been obtained from documents of public record. Whenever information obtained from public records is developed and recorded, the PSO shall identify the source of information.

This regulation is not to be interpreted as prohibiting the report to a judicial officer of information relating to any danger that the release of a person charged with an offense may pose to any other person or the community, where such report is authorized by federal law.

B. Disclosure of pretrial services information

Except as provided in these regulations, pretrial services information shall not be divulged in connection with any civil, criminal, administrative, or legislative proceeding conducted by a federal, state or local authority.

C. Response to subpoenas

Pretrial services officers shall not disclose pretrial services information and shall not release their files and reports, or any other information developed during the bail investigation or during bail

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

supervision, in response to a subpoena, subpoena duces tecum, or any other form of judicial process in any federal, state or local judicial proceeding unless authorized by these regulations or directed by a judge of the district court which the officer serves.

D. Minimal disclosure

Any disclosure of pretrial services information which is made pursuant to these regulations shall be limited to the minimum information necessary to meet the need and purpose for the disclosure, as determined by the chief pretrial services officer (CPSO), the chief probation officer (in those districts where such officer supervises pretrial services as provided by 18 U.S.C. §3152(a)), or by such other court officer as may be specifically authorized under these regulations to make such determination.

E. Deletion of information in pretrial services report

A pretrial services officer may request that the judicial officer to whom a pretrial services report is furnished delete certain information from the report before making such report available to the attorney for the defendant and the attorney for the government. Specifically, the PSO may request that the judicial officer delete such information as the judicial officer determines, following an in camera inspection of the report, (1) would violate the promise of confidentiality by which it was obtained from a defendant or a third party or (2) might result in harm to the physical or mental health of the defendant or another person.

F. Return of counsels' copies

Any copies of the pretrial services report which are divulged to the defendant and/or to his attorney, or to the attorney for the government, for the purpose of a bail determination or in connection with bail revocation or the modification of release conditions, shall be returned to pretrial services at the end of the hearing and shall not be made part of the record.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

II. Authorized disclosures

A. Research

1. Pretrial services information shall be available to members of the pretrial services staff and to other qualified persons for the purpose of research related to the administration of justice. "Other qualified persons" are those whose training and experience are appropriate to the nature of the work in which they are engaged and who are performing such work with adequate administrative safeguards against the unauthorized disclosure of confidential information.

2. The CPSO, or the chief probation officer who supervises pretrial services, with the written approval of the chief of the Pretrial Services Branch, Division of Probation, Administrative Office of the United States Courts, shall determine which persons meet the definition of "other qualified persons" in subsection (1), supra, for the purpose of qualifying to receive pretrial services information needed for research related to the administration of justice.

3. A release of information for research purposes shall not be granted without a formal written proposal submitted to the CPSO or the chief probation officer who supervises pretrial services.

4. Necessary procedural safeguards shall be taken to protect the anonymity of those individuals to whom information released under this section relates. Such safeguards must include, but need not be limited to, the completion of a nondisclosure agreement affirming the continued confidentiality of information received.

B. Contract agencies

1. Pretrial services information is available to private agencies which have contracted with pretrial services to provide supportive services for the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

custody or care of persons released pursuant to 18 U.S.C. §3154(4).

2. Contracts with private agencies which may receive pretrial services information must contain a non-disclosure agreement which requires the agency to adhere to the same policies and practices regarding the release of confidential information as are followed by pretrial services officers. Such non-disclosure agreement must be executed before pretrial services information can be released to the agencies or their employees.

C. Families

Information regarding a subject's status or adjustment in a pretrial services program may be furnished to members of his or her family only if (1) in the professional judgment of the contract agency and the PSO, such information would be beneficial in the ongoing supervision, treatment, or rehabilitation of the defendant, and (2) the defendant authorizes in writing the release of such information to specified family members.

D. Probation officers

Pretrial services information shall be available to probation officers for the purpose of compiling a presentence investigation report. A probation officer who receives pretrial services information must maintain the confidentiality of such information at all times.

E. Counsel

The attorney for the defendant and the attorney for the government shall have access to pretrial services information to the extent that such information is contained in a pretrial diversion report.

F. Law enforcement agencies

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

At the discretion of the court, pretrial services information may be used by law enforcement agencies for investigatory and enforcement purposes in certain limited circumstances if, in the opinion of the appropriate judicial officer, the disclosure of such information would not violate the promise of confidentiality by which it was obtained from a third party, and if the disclosure would not result in harm to the physical or mental health of the defendant or other persons. Such limited circumstances include (1) an investigation of or arrest for the defendant's failure to appear, (2) an investigation of alleged violations of the conditions of release, and (3) an investigation of crimes committed to secure or maintain release under the release provisions of chapter 207 of title 18, United States Code, such as perjury or false statements to a federal officer (18 U.S.C. §§1001, 1621, 1623).

This regulation is not to be interpreted as in any way diminishing the responsibility of pretrial services to inform the court and the United States attorney, pursuant to 18 U.S.C. §3154(5), of all apparent violations of pretrial release conditions, arrests of released persons, and any danger that a released person may come to pose to any other person or the community.

G. Defendant

Pretrial services information shall be available to the defendant upon written request in specified circumstances if (1) in the opinion of the CPSO, or the chief probation officer who supervises pretrial services, its disclosure would not violate the promise of confidentiality by which it was obtained from a third party, (2) disclosure would not result in harm to the physical or mental health of other persons, and (3) the defendant manifests in his request the understanding that the information which he is seeking may not necessarily be favorable to him. "Specified circumstances" are those occasions when the information is derived for the purpose of securing or maintaining employment, securing clemency, or securing

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

or maintaining government benefits such as social security, veterans' payment, or pension benefits.

H. In camera inspection by court

Pretrial services information which a pretrial services officer believes may be exculpatory of a defendant or a third party (including but not limited to a codefendant) may be released to the court for in camera inspection where the interest of justice so requires.

If a defendant or a third party demonstrates a basis for believing exculpatory information is contained in the files or report of a pretrial services officer, such information may be released to a judicial officer for in camera inspection where the interest of justice so requires.

For the purposes of this regulation, it is presumed that the "interest of justice" would be served by an in camera inspection of pretrial services information in situations where there is a substantial likelihood that the information, if disclosed in open court, would be material, exonerating on the issue of guilt, or germane to the issue of truth in an administrative, legislative, or judicial proceeding, and would not be otherwise available in such proceeding.

May 6, 1983

/s/ William E. Foley  
Director

9-6.330 Functions and Power Relating to Pretrial Services--18 U.S.C. §3154

9-6.340 Annual Reports--18 U.S.C. §3155

18 U.S.C. §3155 requires annual reports by the chief pretrial services officer in Special Districts, by the chief probation officer in all other districts and by the Director of the Administrative Office of the U.S. Courts. The chief pretrial services officer in Special Districts and the chief probation officer in all other districts must report to the

MARCH 1, 1986  
Sec. 9-6.325-.340  
Ch. 6, p. 37

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Chief Judge of the district on the administration and operation of pretrial services within the district. The Chief Judge of the circuit and the magistrate or their designees who serve on the panel in Special Districts should also be provided with a copy of the report in a timely fashion. The annual report to the Judicial Conference of the United States by the Director of the Administrative Office of the U.S. Courts will include a report on the administration and operation of pretrial services for the previous year.

9-6.350 Definitions--18 U.S.C. §3156

18 U.S.C. §3156(b) provides:

As used in sections 3152-3155 of this chapter.

(1) the term "judicial officer" means, unless otherwise indicated, any person or court authorized pursuant to section 3041 of this title, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).

9-6.400 PRETRIAL DETENTION HEARING REPORTING REQUIREMENTS

The Department of Justice has established the following reporting requirements for monitoring the use of the pretrial detention provisions of the Bail Reform Act of 1984.

Effective October 1, 1985:

1. Assistant U.S. Attorneys are not required to consult with the Criminal Division before making motions for pretrial detention hearings, although they should consider doing so in making close decisions or when they encounter unusual problems.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

2. The offices of U.S. Attorneys will report the following information monthly:

a. Number of pretrial detention hearings requested by the government and court (initial motions only--does not include motions for ten-day holds, motions that were withdrawn before final ruling, or motions for revocation of release);

b. Results of hearings (motion granted or denied);

c. Basis for rulings by judicial officer (risk of flight, dangerousness, or both);

d. Results of district court reviews of magistrate orders (defendant detained or released). NOTE: Appeals should continue to be reported as required to the Appellate Section; and

e. Additional comments describing particularly significant rulings, noteworthy cases, or special problems in obtaining detention orders, at the option of the U.S. Attorney.

Although the method for collecting the above information is the prerogative of the U.S. Attorney, each U.S. Attorney should designate a single person responsible for collecting and transmitting the information (typically an administrative assistant or supervising secretary). An optional Tally Sheet follows, along with a standard Reporting Form for their use. A supervising Assistant U.S. Attorney should decide whether to add any optional comments.

3. Using the following or a similar Reporting Form, monthly totals for each U.S. Attorney's Office, along with any additional comments, must be mailed to the Department during the first week of each month to:

Pretrial Detention  
Office of Policy and Management Analysis  
Criminal Division  
U.S. Department of Justice  
Room 2216 Main  
10th & Constitution Avenue, N.W.  
Washington, D.C. 20530

PRETRIAL DETENTION  
REPORTING FORM

District: \_\_\_\_\_

Month: \_\_\_\_\_

DETENTION MOTIONS

Initial motions. Do not include motions for ten-day holds, motions that were withdrawn before final ruling, or motions for revocation of release.

	<u>TOTALS</u>
A. By Government _____	
By Court _____	
B.* Granted _____	
Denied _____	
C.* Basis for Rulings by Judicial Officer:	
1. Risk of Flight _____	
2. Dangerousness _____	
3. Both _____	

\* NOTE: The total number of detention motions granted and denied in B must equal the total number of motions made in A. The total number granted in B must equal the total bases listed in C.

DISTRICT COURT REVIEWS OF MAGISTRATE ORDERS

A. Requested By Government to Detain:	
1. Detained _____	
2. Not detained _____	
B. Requested By Defense to Release:	
1. Released _____	
2. Not released _____	

COMMENTS (Optional)

Please attach brief narrative summaries of particularly significant rulings, noteworthy cases, or special problems in obtaining detention orders.



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 7

	<u>Page</u>
9-7.000 <u>ELECTRONIC SURVEILLANCE</u>	1
9-7.010 <u>Purpose and Scope</u>	1
9-7.011 Introduction	1
9-7.012 Scope of Title III	1
9-7.013 Consensual Monitoring	4
9-7.014 Use of Pen Registers	11
9-7.100 THE AUTHORIZATION	12
9-7.110 <u>Authorization of Applications for Interception Orders</u>	12
9-7.120 <u>Types of Cases in Which Authorization May be Granted</u>	12a
9-7.130 <u>Manner in Which Authorization is Given</u>	13
9-7.140 <u>Requesting Authorization to Apply for an Interception order</u>	13
9-7.150 <u>Information to be Contained in Requests for Authorization</u>	14
9-7.160 <u>The Affidavit</u>	15
9-7.170 <u>The Application</u>	19
9-7.180 <u>The Order</u>	21
9-7.200 APPLICATION PROCEDURE	24
9-7.210 <u>Who May Apply for Interception Orders</u>	24
9-7.220 <u>Judges to Whom Application Should be Presented</u>	24
9-7.230 <u>Documents to be Presented</u>	24
9-7.231 <u>Trap and Trace Guidelines</u>	25

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-7.240	<u>Presentation of Application</u>	27
9-7.250	<u>Sealing of Documents</u>	29
9-7.260	<u>Procedure if the Application for an Interception Order is Denied</u>	29
9-7.270	<u>Emergency Interceptions</u>	29
9-7.300	CONDUCT OF INTERCEPTION	30
9-7.301	Preliminary Action	30
9-7.302	Preliminary Meeting Held by Supervising Attorney	31
9-7.303	Posting the Order	32
9-7.310	<u>Duties of Agents in General</u>	32
9-7.311	Duties of the Supervising Agent	32
9-7.312	Duties of Monitoring Agents	33
9-7.313	The Log	33
9-7.314	Duties of the Technical Agent	34
9-7.315	Minimizing the Interception	35
9-7.316	Evidence of other Crimes	35
9-7.317	Privileged Communications	36
9-7.318	Reports to the Court	37
9-7.320	<u>Recording the Intercepted Communications</u>	39
9-7.321	Protection of the Recording	39
9-7.322	Procedure When No Recording Can Be Made	40
9-7.323	Duplicate Recordings	40
9-7.330	<u>Termination of the Interception</u>	41
9-7.331	Termination upon Achievement of Authorized Objective	41
9-7.332	Termination Upon Expiration of Period of Interception	42
9-7.333	Application for Extension of Inter- ception	42
9-7.340	<u>Sealing and Custody of the Recording Upon Termination of Interception</u>	43
9-7.350	<u>Use of Original Recording before Trial</u>	44

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

	<u>Page</u>
9-7.400	THE INVENTORY 45
9-7.410	<u>The Notice Requirement</u> 45
9-7.420	<u>Persons Entitled to Receive Notice</u> 45
9-7.430	<u>Contents of the Inventory</u> 45
9-7.440	<u>Time of Service</u> 46
9-7.450	<u>Postponing of the Inventory</u> 46
9-7.460	<u>Preparation of Inventory Lists</u> 47
9-7.500	DISCLOSURE OF INTERCEPTED COMMUNICATIONS 48
9-7.510	<u>Who May Disclose Intercepted Communications</u> 48
9-7.520	<u>To Whom Intercepted Communication May be Disclosed</u> 49
9-7.530	<u>Non-Statutory Restriction on Disclosure</u> 49
9-7.540	<u>Use of Intercepted Communications by an Investigative or Law Enforcement Officer</u> 50
9-7.550	<u>Disclosure to a Grand Jury or in a Criminal Proceeding</u> 50
9-7.560	<u>Approval for Use of Intercepted Communications in Civil Litigation</u> 51
9-7.570	<u>Defendant Overhearings and Attorney Overhearings Wiretap Motions</u> 52
9-7.600	GRAND JURY PREPARATION 57
9-7.610	<u>Preliminary Action</u> 57
9-7.620	<u>Recalcitrant Witnesses and the Gelbard Doctrine</u> 58
9-7.700	PRE-TRIAL PROCEEDINGS 59
9-7.710	<u>Pre-Trial Notice of Interception Use</u> 59

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-7.720	<u>Grounds of Motions to Suppress</u>	60
9-7.730	<u>"Aggrieved Person" Defined</u>	60
9-7.740	<u>Time for Filing Suppression Motions</u>	61
9-7.750	<u>Pre-Trial Discovery</u>	61
9-7.760	<u>Common Bases of Motions to Suppress</u>	62
9-7.761	Constitutionality	62
9-7.762	Authorization Procedures	62
9-7.763	Probable Case	63
9-7.764	Minimization	63
9-7.765	Suppression of Communications	66
9-7.766	Requisite Necessity	67
9-7.800	TRIAL	67
9-7.810	<u>Preliminary Preparation</u>	67
9-7.820	<u>Pre-Trial Conference</u>	67
9-7.830	<u>Presentation of Government's Case-in-Chief</u>	68
9-7.840	<u>Playback of Tapes for the Jury</u>	70
9-7.850	<u>Voice Identification</u>	70
9-7.860	<u>Transcripts</u>	71
9-7.870	<u>Use of Expert Witnesses</u>	71
9-7.880	<u>Instruction and Charge Conference</u>	72
9-7.900	FORMS	73
9-7.910	<u>Form Interception Application</u>	73
9-7.920	<u>Form Interception Order</u>	81
9-7.921	Form Interception Order--Standard	81
9-7.922	Form Proviso to Order When Interception is of Coin-Operated Public Telephones	83

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-7.923	Form Proviso to Order when Prospective Interceptee is Under Indictment	83
9-7.924	Form Common Carrier Order	83
9-7.925	Application for Applying for Pen Register	85
9-7.926	Order for Applying for Pen Register	87
9-7.927	Form Trap and Trace Application	89
9-7.928	Form Trap and Trace Order	91
9-7.930	<u>Form Sealing Order</u>	93
9-7.940	<u>Forms Relating to Inventory</u>	94
9-7.941	Form Report to Court Prior to Inventory	95
9-7.942	Form Inventory Order	96
9-7.943	Form Inventory Order	97
9-7.950	<u>Form Application for 18 U.S.C. §2517(5) Order</u>	97
9-7.960	<u>Form 18 U.S.C. §2517(5) Order</u>	99
9-7.970	<u>Form Voir Dire</u>	100
9-7.980	<u>Form Stipulation</u>	101
9-7.990	<u>Form Proposed Jury Instruction</u>	102
9-7.1000	VIDEO SURVEILLANCE	102
9-7.1010	<u>Authority--The Department of Justice Guidelines</u>	102
9-7.1011	Order Delegating Authority	103
9-7.1020	<u>Relationship to Title III</u>	104
9-7.1030	<u>Court Authorization</u>	106
9-7.1031	Form Video Surveillance Application	106a
9-7.1032	Form Video Surveillance Order	108

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.000 ELECTRONIC SURVEILLANCE

9-7.010 Purpose and Scope

9-7.011 Introduction

The purpose of this chapter is to provide information and guidance to Department of Justice attorneys with respect to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (see 18 U.S.C. §2510 et seq.), and closed circuit television surveillance.

9-7.012 Scope of Title III

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (see 18 U.S.C. §§2510-2520) is a comprehensive scheme for controlling the interception of an unauthorized disclosure and use of oral, wire, and radio communications. The legislative history relating to Title III states that the purpose of Title III is to prohibit:

[A]ll wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order, with exceptions provided for interceptions by employees of communications facilities whose normal course of employment would make necessary such interception, personnel of the Federal Communications Commission in the normal course of employment, and Government agents to secure information under the powers of the President to protect the Nation against actual or potential attack, or to otherwise protect the national security.

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) at 27 reported in 7 Cong. News, 1968, 1635.

Except as otherwise specifically provided in other sections of Title III, 18 U.S.C. §2511 makes it a criminal offense to acquire aurally by means of an electronic or other device and a separate offense to disclose or use information obtained through such acquisition by means of an electronic or other device:

(a) any communication transmitted, in whole or through wire or cable facilities; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(b) any oral communication uttered by one who exhibits a reasonable expectation that such communication is not subject to interception.

"Intercept" is defined in 18 U.S.C. §2510(4) as the aural acquisition of the contents of a communication ". . . through the use of any electronic, mechanical or other device." This definition clearly excludes simple eavesdropping by the unaided human ear from the coverage of the statute even if the conversation involved occurs in what otherwise would be considered a private place, but it is not equally clear what is intended to be included in the terms "aural acquisition" and "contents of the communication." The Senate Committee on the Judiciary, Report on the Omnibus Crime Control and Safe Streets Act of 1967, 90th Cong., 2d Sess. (S. Rep. 1097, April 29, 1968) (hereinafter, Senate Report) states at page 90 that, "[t]he proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register,' for example, is not governed by the procedures prescribed by Title III, because that device does not result in aural acquisition of the contents of the communication. See United States v. Illinois Bell Telephone Company, 531 F.2d 809 (7th Cir. 1976).

18 U.S.C. §2510(1) defines "wire communication" as covering all communications carried, in whole or in part, by wire or cable, and 18 U.S.C. §2511(1) therefore constitutes an absolute prohibition against wiretapping. On the other hand, 18 U.S.C. §2510(2) limits the meaning of "oral communication" to one uttered ". . . by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation" and, therefore, creates a prohibition which will vary in scope with changing factual situations. The Senate Report (at 89-90) indicates that the definition is intended to "reflect existing law" as set forth in Katz v. United States, 389 U.S. 347 (1967), but its description of the factors to be considered in determining whether the speaker's expectation of privacy is reasonable makes very little sense in a practical context.

The report's assertion that the speaker's subjective intent is not to be the controlling factor seems to be a statement of the obvious if it means only that reasonableness is an objective test, but it is clear that the efforts a subject makes to secure privacy for his/her conversation are extremely relevant even if, unbeknownst to him/her, he/she is in a place which is subject to eavesdropping by passersby. If the subject goes into a room and engages in a whispered discussion which an agent stationed outside the room's open window cannot hear clearly, the recording of that discussion by the agent through a sensitive microphone would be a violation of the statute even if the room were public and filled with

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

strangers. Similarly, if it were known that the subject met with his/her co-conspirators every noon at a particular table in a restaurant where they discussed plans for a murder, despite the public nature of the place where the conspiracy was carried on, a microphone could be placed under their table only pursuant to an interception order.

It may be that, as the Senate Report states, any conversation in a jail cell may be recorded and that a prisoner can have no reasonable expectation of privacy there, but there will be very few places in which the subject of the interception may be said to have anything approaching a proprietary interest where such liberties will be permissible. The further example of the subject who loses the protection of the statute in his/her home by speaking loudly enough for those outside to hear has little practical relevance; it is difficult to imagine any great number of cases in which agents would be interested in recording criminal discussions being conducted for public consumption.

In sum, little in the way of substantive guidelines can be offered for resolution of the question of the speaker's expectation of privacy, but the decision of the Supreme Court in Mancusi v. DeForte, 392 U.S. 364 (1968), indicates that a liberal approach will be taken in extending the ambit of the Fourth Amendment's protection. When the issue is in doubt, the best practice is to proceed by way of an interception order.

18 U.S.C. §2510(5) excludes from the otherwise broad definition of "electrical, mechanical or other" devices any telephone equipment ". . . furnished to the subscriber or used by a communications common carrier in the ordinary course of its business [or] . . . being used . . . by an investigative or law enforcement officer in the ordinary course of his duties." The Senate Report does not amplify this exception, but the language seems clearly to be intended to exempt from the statutory prohibition an interception by extension telephone; whether any other result is intended is problematical. But see United States v. Harpel, 493 F.2d 346 (10th Cir. 1974), holding that an extension telephone used to accomplish an interception is not within the exception.

It is the view of the Department that radio communications which are transmitted independently of the facilities of a wire communications common carrier are not within the scope of the provisions of Title III regarding wire and oral communications. But see United States v. Hall, 488 F.2d 193 (9th Cir. 1973), holding that such transmissions are "oral communications" if attended by a reasonable expectation of privacy. At least as to so-called Citizen Band radio traffic, the view of the Department is that no such reasonable expectation of privacy can exist.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Interception of radio transmissions is, of course, within the scope of 47 U.S.C. §605. However, that section has no application to law enforcement officers acting in the regular course of their employment. See United States v. Hall, *supra*. For a more detailed discussion of the prohibitions against interception of wire, oral and radio communications, see USAM 9-60.200 *et seq.*

9-7.013 Consensual Monitoring

18 U.S.C. §2511(2)(c) provides that "it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." See United States v. White, 401 U.S. 745 (1971). As such consensual interceptions need not be made under Title III procedures. Interception orders under 18 U.S.C. §2518 are not available and should not be sought in cases falling within 18 U.S.C. §2511(2)(c). In this connection, the Attorney General has issued policy guidance concerning the monitoring of a private conversation with the consent of a party. The following constitutes the Attorney General's Memorandum of November 7, 1983, on consensual monitoring:

NOVEMBER 7, 1983 MEMORANDUM OF THE ATTORNEY GENERAL ON CONSENSUAL MONITORING

By Memorandum dated October 16, 1972, the Attorney General directed all federal departments and agencies to obtain Department of Justice authorization before intercepting verbal communications without the consent of all parties to the communication. This directive was clarified and continued in force by the Attorney General's subsequent Memorandum of September 22, 1980, to Heads and Inspectors General of Executive Departments and Agencies.

This Memorandum supersedes the aforementioned directives. It establishes new authorization procedures with relevant rules and guidelines while it continues existing reporting procedures. It limits the requirement for prior written approval by the Department of Justice to specific types of investigations, but it continues to require verbal authorization from Department of Justice attorneys in all other types of investigations. This change in policy, eliminating prior written Department of Justice approval in most cases of consensual surveillance, is a result of the exercise of the Department's review function for some ten years. This experience reflects the fact that the departments and agencies have been uniformly applying the required procedures with great

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

care, consistency, and good judgment, and that the number of inappropriate requests for consensual interceptions has been negligible.

The Fourth Amendment to the Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. §2510, et seq.) and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.) permit government agents, acting with the consent of a party to a communication, to engage in warrantless interceptions of telephone communications and verbal, non-wire communications. See United States v. White, 401 U.S. 745 (1971); United States v. Caceres, 440 U.S. 741 (1979). Similarly, the Constitution and federal statutes permit federal agents to engage in warrantless interceptions of verbal, non-wire communications when the communicating parties have no justifiable expectation of privacy. <sup>1/</sup> Since such interception techniques are particularly effective and reliable, the Department of Justice encourages their use by federal agents for the purpose of gathering evidence of violations of federal law, protecting informants or undercover law enforcement agents, or fulfilling some other similarly compelling need. While these techniques are lawful and helpful, their use in investigations is frequently sensitive, so they must remain the subject of careful, self-regulation by the agencies employing them.

The sources of authority for this Memorandum are Executive Order No. 11396 ("Providing for the Coordination by the Attorney General of Federal Law Enforcement and Crime Prevention Programs"); Presidential Memorandum ("Federal Law Enforcement Coordination, Policy and Priorities") of September 11, 1979; Presidential Memorandum (untitled) of June 30, 1965, on, inter alia, the utilization of mechanical or electronic devices to overhear non-telephone conversations; and the inherent authority of the Attorney General as the chief law enforcement officer of the United States.

#### I. DEFINITIONS

As used in this Memorandum, the term "agency" means all of the Executive Branch departments and agencies and specifically includes United States Attorneys' Offices which utilize their own investigators and the Offices of the Inspectors General.

---

<sup>1/</sup> As a general rule, nonconsensual interceptions of verbal wire communications violate 18 U.S.C. §2511, regardless of the communicating parties' expectation of privacy, unless the interceptor complies with the court-authorization procedures of Title III. of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §2510, et seq.) or with the provisions of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

As used in this Memorandum, the term "interception" means the aural acquisition of verbal communications by use of an electronic, mechanical, or other device. Cf. 18 U.S.C. §2510(4).

As used in this Memorandum, the term "public official" means an official of any public entity of government including special districts as well as all federal, state, county, and municipal governmental units.

II. NEED FOR WRITTEN AUTHORIZATION

A. Investigations Where Written Department of Justice Approval is Required

A request for authorization to intercept a verbal communication without the consent of all parties to the communication must be sent for approval to the Director of the Office of Enforcement Operations, Criminal Division, Department of Justice, when it is known that:

1. The interception relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV. or above, or a person who has served in such capacity within the previous two years;
2. The interception relates to an investigation of any public official and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties;
3. The interception relates to an investigation of a federal law enforcement official;
4. The consenting or nonconsenting person is a member of the diplomatic corps of a foreign country;
5. The consenting or nonconsenting person is or has been a member of the Witness Security Program and that fact is known to the agency involved or its officers;
6. The consenting or nonconsenting person is in the custody of the Bureau or Prisons or the United States Marshals Service; or
7. The Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General for the Criminal Division, or the United States Attorney in the district where an investigation is being conducted has requested the investigating

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

agency to obtain prior written consent for making a consensual interception in a specific investigation.

B. Investigations Where Written Department of Justice Approval is Not Required

In all other cases approval of consensual surveillances will be in accordance with the procedures set forth in Part V. below.

C. Interceptions Not Within Scope of Memorandum

Even if the interception falls within one of the seven categories above, the procedures and rules in this Memorandum do not apply to:

1. Extraterritorial interceptions;
2. Foreign intelligence interceptions, including interceptions pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, et seq.);
3. Interceptions pursuant to the court-authorization procedures of Title III. of the Omnibus Crime Control and Safe Streets Act of 1968 as amended (18 U.S.C. §2510, et seq.);
4. Routine Bureau of Prisons interceptions of verbal communications which are not attended by a justifiable expectation of privacy;
5. Interceptions of radio communications; and
6. Interceptions of telephone communications.

III. AUTHORIZATION PROCEDURES AND RULES

A. Required Information

The following information must be set forth on any request to intercept a verbal communication without the consent of all parties to the communication:

1. Reasons for the Interception. The request must contain a reasonably detailed statement of the background and need for the interception.
2. Offense. If an interception is for investigative purposes, the request must include a citation to the principal criminal statute involved.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

3. Danger. If an interception is for protection purposes, the request must explain the danger to the consenting party.

4. Location of Devices. The request must state where the interception device will be hidden, i.e., on the person, in personal effects, or in a fixed location.

5. Location of Interception. The request must specify the location and primary judicial district where the interception will take place. An interception authorization is not restricted to the original district. However, if the location of an interception changes, notice should be promptly given to the approving official. The record maintained on the request should reflect the location change.

6. Time. The request must state the length of time needed for the interception. Initially, an authorization may be granted for up to thirty days from the day the interception is scheduled to begin. If there is need for continued interception, extensions for periods of up to thirty days may be granted. In special cases (e.g., "fencing" operations run by law enforcement agents), authorization for up to sixty days may be granted with similar extensions.

7. Names. The request must give the names of persons, if known, whose communications the department or agency expects to intercept and the relation of such persons to the matter under investigation or to the need for the interception.

8. Trial Attorney Approval. The request must state that the facts of the surveillance have been discussed with the United States Attorney, an Assistant United States Attorney, an Organized Crime Strike Force Attorney for the district in which the surveillance will occur, or any previously designated Department of Justice attorney for a particular investigation, and that such attorney has stated that the surveillance is appropriate under this Order. Such statement may be made orally.

9. Renewals. A request for renewal authority to intercept verbal communications must contain all the information required for an initial request. The renewal request must also refer to all previous authorizations and explain why an additional authorization is needed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Verbal Requests

Unless a request is of an emergency nature, it must be in written form and contain all of the information set forth above. Emergency (for example, telephonic) requests in cases in which written Department of Justice approval is required may be made to the Director or Associate Director of the Office of Enforcement Operations and should then be reduced to writing and submitted to the appropriate headquarters official as soon as possible after authorization has been obtained. An appropriate headquarters filing system is to be maintained for surveillance requests which have been received and approved in this manner. These verbal requests must include all the information required for any regular written requests as set forth above.

C. Authorization

Authority to engage in a consensual interception in situations set forth in Part II. A. of this Memorandum may be given by the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the Director or Associate Director of the Criminal Division's Office of Enforcement Operations.

D. Emergency Interceptions

If an emergency situation requires a consensual interception during non-working hours at the Department of Justice, the authorization may be given by the head of the responsible department or agency, or his or her designee. Such department or agency must then notify the Office of Enforcement Operations not later than five working days after the emergency authorization. The notification shall explain the emergency and shall contain all other items required for a non-emergency request for authorization as set forth in Part III. A. above.

IV. SPECIAL LIMITATIONS

A. Consensual Interceptions

When a communicating party consents to the interception of his or her verbal communications, the device may be concealed on his or her person, in personal effects, or in a fixed location. Each department and agency engaging in such consensual interceptions must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

person cooperating with the department or agency trespasses while installing a device in a fixed location, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party. See United States v. Padilla, 520 F.2d 526 (1st Cir. 1975).

B. Non-Consensual, Non-Private Interceptions

The interceptions of verbal, non-wire communications when no party to the communication has consented and when no party has a justifiable expectation of privacy <sup>2/</sup> must be conducted under tightly controlled circumstances. Each department or agency must ensure that no communication of any party who has a justifiable expectation of privacy is intercepted.

V. CONSENSUAL INTERCEPTIONS WHERE NO WRITTEN APPROVAL REQUIRED

Each agency must continue to maintain internal procedures for supervising, monitoring, and approving all consensual interceptions of verbal communications. Approval for a consensual interception must come from the head of the agency or his/her designee. Any designee should be a high-ranking supervisory official at headquarters level.

Prior to receiving approval for a consensual interception from the head of the agency or his/her designee, a representative of the agency must contact the United States Attorney, an Assistant United States Attorney, an Organized Crime Strike Force attorney in the district where the interception is to occur, or any previously designated Department of Justice attorney for a particular investigation. Final authorization may be obtained verbally from the attorney so contacted. The attorney, in giving final authorization, will determine both the legality and propriety of the interception in question.

Each department or agency shall establish procedures for emergency authorizations consistent with the requirements of Part III. D. above, with a follow-up verbal Department of Justice attorney authorization.

Records are to be maintained for each interception. These records are to include the information set forth in items 1 through 8 of Part III. A. above.

<sup>2/</sup> For example, burglars, while committing a burglary, have no justifiable expectation of privacy. Cf. United States v. Pui Kan Lam, 483 F.2d 1202 (2d. Cir. 1973), cert. denied, 415 U.S. 984 (1974).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

VI. REPORTS

The head of each department or agency, or his or her designee, shall make quarterly reports summarizing the results of interceptions authorized pursuant to this Memorandum. The report shall contain the following information broken down by offense or reason for interception: the number of requests for authorization, the number of emergency authorizations, the number of times that the interceptions provided information which corroborated or assisted in corroborating the allegation or suspicion, and the number of authorizations not used. The quarterly reports shall be submitted in January, April, July, and October of each year to the Office of Enforcement Operations in the Criminal Division.

In October of each year, each department or agency shall submit to the Attorney General an inventory of all devices which are intended for the surreptitious interception of telephone or verbal, non-wire communications, including devices used to intercept communications pursuant to the warrant provisions of Title III. of the Omnibus Crime Control and Safe Streets Act of 1968 as amended.

VII. GENERAL LIMITATIONS

This Memorandum relates solely to the subject of consensual interception of verbal communications except where otherwise indicated. This Memorandum does not alter or supersede any current policies or directives relating to the subject of obtaining necessary approval for engaging in nonconsensual electronic surveillance or any other form of nonconsensual interception.

9-7.014 Use of Pen Registers

One commonly used electronic surveillance device is the pen register. A pen register is a mechanical device that records the numbers dialed on a telephone. Unlike other devices used in electronic surveillance, a pen register does not actually overhear oral communications. For this reason a pen register has been regarded as a less intrusive form of electronic surveillance.

The United States Supreme Court has held that no warrant is required under either the Fourth Amendment or Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq., when installing a pen register. See Smith v. Maryland, 442 U.S. 735 (1979) (Fourth Amendment); United States v. New York Telephone Co., 434 U.S. 157 (1977) (Title III).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

However, it is the policy of the Department of Justice that no pen register shall be installed by any federal law enforcement agency except pursuant to an order issued by a federal district court. Such an order may be obtained under Rule 57(b) of the Federal Rules of Criminal Procedure and, as an adjunct thereto, an order pursuant to the All Writs Act may be obtained directing the cooperation of the concerned telephone company. Procedures for obtaining such orders are described in USAM 9-7.231, infra. A model application and order are included in USAM 9-7.925 and 9-7.926.

1984 USAM (superseded)

Pages 12-14 missing from original document

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

5. A description of the communication expected to be intercepted together with an analysis of the relevance of that communication to the investigation;

6. The names of all persons whose communications may be expected to be intercepted together with their backgrounds and places in the investigation;

7. The length of time it is requested that the device be activated; and

8. Any information not specified which may be relevant to the request or which may shed light on problems to be anticipated in the securing or execution of the order.

9-7.160 The Affidavit

The affidavit is a document of particular importance, and its preparation must be attentively supervised by the attorney who will oversee the interception. 18 U.S.C. §2518(1) and (4) specify the information to be contained in the application (including the supporting affidavit of probable cause) and order, respectively.

The probable cause standard for a Title III affidavit is the same as in other search and seizure situations. It is not the purpose or intent of this chapter to review the law of probable cause, and the chapter on search and seizure should be referred to for that purpose. Many courts have expressed views as to the sufficiency of the probable cause in support of applications for Title III interceptions, and these should be consulted for additional guidance. These cases include United States v. Cantor, 328 F. Supp. 561 (E.D. Pa. 1971); United States v. Leta, 332 F. Supp. 1357 (M.D. Pa. 1971); United States v. LaGorge, 336 F. Supp. 190 (W.D. Pa. 1971); United States v. Becker, 334 F. Supp. 546 (S.D.N.Y. 1971); United States v. Focarile, 340 F. Supp. 1034 (D. Md. 1972); United States v. Escander, 319 F. Supp. 295 (S.D. Fla. 1970); United States v. Scott, 331 F. Supp. 233 (D.D.C. 1971).

As a general matter, the highest degree of specificity consistent with the information available at the time of application and with the safeguarding of intelligence sources should characterize the affidavit. There should be no tendency to allege only the minimum necessary to establish probable cause, and the applying agent should be as candid and cooperative as is possible under the circumstances.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In Illinois v. Gates, 103 S. Ct. 2317 (1983), the Supreme Court abandoned strict application of the "two pronged test" set forth in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), for determining the sufficiency of an affidavit based on information from an informant. The Court concluded that the wiser approach was the totality of the circumstances analysis that traditionally applies to probable cause determinations. The issuing judge is now charged with making "a practical, common-sense decision whether, given all the circumstances set forth in the affidavit. . . including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that . . . evidence of a crime will be found in a particular place." Id. at 2332. Thus, the principles announced in Aguilar, supra, and Spinelli, supra, should still be observed and in drafting the affidavit, particular care should be accorded to establishing the reliability of informants and the accuracy of the information which they provide. There is a tendency to assert conclusions rather than facts in Title III affidavits, and care must be used to avoid unsupported statements of opinion and conclusions, particularly where they relate to key facts. The source of each item of information in the affidavit should be specified. It is important to set forth underlying circumstances and the factors which give intrinsic reliability to the basic facts established by the affidavit.

The statute requires that the affidavit contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous. See 18 U.S.C. §2518(1)(d). In this connection, the use of stereotype statements and "boiler plate" should be avoided, and effort should be devoted to tailoring the statement to the "factual situation" presented. In United States v. Kerrigan, 514 F.2d 35 (9th Cir. 1975), the court said, "... the boiler plate recitation of the difficulties of gathering usable evidence in bookmaking prosecutions is not a sufficient basis for granting a wiretap order." However, the court affirmed the conviction, noting that the government had demonstrated a factual basis for the conclusion that other investigative means would not suffice. See also United States v. Pezzino, 535 F.2d 483 (9th Cir. 1976), and United States v. Smith, 519 F.2d 516 (9th Cir. 1975). This statement should, as part of its exposition, include consideration of every ordinary technique set out in the Senate Report. (Failure to list them in the application is not grounds for suppression, however, so long as they are factually eliminated by the allegations of the affidavit. See United States v. Curreri, 363 F. Supp. 430 (D. Md. 1973). The following excerpt from the Senate Report at 101, supra, deals with the showing planned by the drafters:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely . . . What the provision envisions is that the showing be tested in a practical and commonsense fashion . . . .

In most situations where use of electronic surveillance will be contemplated, ordinary visual surveillance will have been attempted and resulted in agent testimony which, while helpful to probable cause, falls far short of the quantum of proof necessary for conviction. Visual surveillance might also be impracticable in ethnic or close, established neighborhoods where the residents are well known to each other or are aware of and hostile to the presence of law enforcement officers.

Questioning under a grant of immunity might be unfeasible on the practical grounds that such questioning would alert the subjects of the investigation to enforcement interest and cause a change in their methods of operation, if no reasonable number of persons could give testimony embracing the entire spectrum of the operation under investigation, or if the identity of the persons to subpoena and immunize is unknown.

Use of search warrants might be foreclosed because the particular offense involved seldom or never generates physical evidence, the organization under investigation keeps its records in easily disposable form, e.g., chalk boards, rice or flash paper or has in the past destroyed evidence in a search, the records sought are kept in code or mean little unless examined in the light of the transactions by telephone which gave rise to them (see United States v. Bobo, 477 F. 2d 974 (4th Cir. 1973)), or by the fact that such records were kept and retained for only 14 days while proof of a federal offense requires illegal activity for 30 days or longer.

Undercover operations are not a "standard" investigative technique. They are dangerous, expensive, and highly speculative ventures. The fact that the organization has existed for years with no additions to its membership, that such additions as were made to membership were made from an identifiable class of persons in existence for a long period of time, or that no one operative could hope to uncover the scope of the operations

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(see United States v. Bobo, supra) might constitute reasons why no operative can be inserted.

The above listing is not to be used as a litany of excuses for use of electronic surveillance in working a case. It is intended solely as examples of reasons which might force consideration of electronic surveillance. Wire and oral interceptions have been and should remain almost the last resort of law enforcement.

In United States v. Donovan, 429 U.S. 413 (1977), the Supreme Court held that 18 U.S.C. §2518(1)(b)(iv) requires "that a wiretap application must name an individual if the Government has probable cause to believe that he is engaged in the criminal activity under investigation and expects to intercept his conversations over the target telephone" (45 U.S.L.W. at 4119). Thus, the application (and the proposed order, see United States v. Kahn, 415 U.S. 143, 152 (1967)) should include a list of those persons whom there is probable cause to believe are committing the offense and a list of those persons whom there is probable cause to believe will be overheard in conversations relating to the offense. See Appendices I and II at USAM 9-7.170, 9-7.180, 9-7.910, and 9-7.921, infra.

Where the sufficiency of the probable cause to warrant identification of a person is borderline, that person should be named in the application and order. In other words, the naming requirements of the statute should be liberally construed in the interest of caution. Accordingly, applications for extension interceptions should also name any person who was intercepted during a previous period of interception unless the evidence shows that the person either was not committing the offense or will not be overheard during the extension.

When transcribed conversations contain jargon or uncommon terminology, the terms should be explained. The explanation may be included in a short paragraph following the paragraph in which the communications are set out.

While the drawing of the affidavit is the business, in the first instance, of the supervising agent, the supervising attorney should work closely with him/her to insure that the affidavit fully complies with all technical requirements. In this connection, it should be noted that those who review proposed affidavits in the Department of Justice apply high standards, and they are not satisfied with minimal or arguable probable cause levels. Unsatisfactory affidavits will result in delay while the supervising attorney is contacted to provide required correction.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Finally, immediately prior to submission to the Department for review, the proposed affidavit should be reviewed to determine whether the probable cause in it is current. Generally, the Department expects the basic probable cause to be no more than 15 days old at the time the file containing the proposed affidavit, application, and order are received by the Office of Enforcement Operations in the Department which will process the request.

9-7.170 The Application

A. 18 U.S.C. §2518 lists in detail the information required to be contained in an application for an interception order as follows:

(a) The identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) Where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

B. The requirements of 18 U.S.C. §2518 are designed to respond directly to the Supreme Court's analysis of the New York statute in Berger v. New York, 388 U.S. 41 (1967), the major elements of which are listed in the Senate Report, at 74, as

(1) Particularity in describing the place to be searched and the person or thing to be seized;

(2) Particularity in describing the crime that has been, is being, or is about to be committed;

(3) Particularity in describing the type of conversation sought;

(4) Limitations on the officer executing the eavesdrop order which would (a) prevent his searching unauthorized areas, and (b) prevent further searching once the property sought is found;

(5) Probable cause in seeking to renew the eavesdrop order;

(6) Dispatch in executing the eavesdrop order;

(7) Requirement that the executing officer make a return on the eavesdrop order showing what was seized;

(8) A showing of exigent circumstances in order to overcome the defect of not giving prior notice.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. In light of this congressional purpose, some discussion of the requirements of 18 U.S.C. §2518 is in order.

1. As a general matter, the highest degree of specificity consistent with the information available at the time of application and with the safeguarding of intelligence sources should characterize the application;

2. A form of application appears in USAM 9-7.900, infra. The form provides for the separate listing of those: (a) who are committing the offenses; and (b) whose communications are to be intercepted. See United States v. Kahn, 415 U.S. 143 (1974). Care should be taken to list under each category only those persons for whom the affidavit establishes probable cause. Complete instructions are included on the form;

3. If a probable interceptee is under indictment or being tried, this fact should be noted in the application. Likewise, if a telephone to be tapped is a public pay phone, it should be set out. In both instances the court will be provided an opportunity to draw or modify the order so as to make allowances for the given situation;

4. Lastly, if effectuation of the proposed electronic surveillance will require surreptitious or covert entry, the application should so advise the court. See Dalia v. United States, 441 U.S. 238, 259 n.22 (1979). See also suggested application form appearing at USAM 9-7.910, infra.

9-7.180 The Order

18 U.S.C. §2518(4) requires that an interception order contain the following information:

(a) The identity of the person, if known, whose communications are to be intercepted;

(b) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(d) The identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

18 U.S.C. §2518(5) also requires that every order and extension thereof contain the following statement to the effect that:

The authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event . . . [insert time specified in order]. Section 2518(5) expressly provides that the interception . . . must terminate upon attainment of the authorized objective, or in any event in thirty days.

The form and content of the interception order raise few problems not already raised in the preceding discussion, but again it must be borne in mind that each of the requirements listed above should be met in as great detail as possible. As with a normal warrant, the scope of the permissible search will be construed against the government, and it is likely that where the order omits some seemingly obvious point the court hearing a motion to suppress will be little inclined to give the agent the benefit of the doubt.

A form of order appears in USAM 9-7.921, *infra*. Where a public telephone is to be tapped, the order should be drafted to limit, insofar as practicable, monitoring activity to instances when the facility is being used by those whose interception has been authorized. See United States v. George, 465 F. 2d 772 (6th Cir. 1972). Physical surveillance of the telephone is usually necessary in this type of situation. In this way, interception is limited to calls placed by or to the subjects. See United States v. LaGorga, 336 F. Supp. 190 (W.D. Pa. 1971). A sample form for this purpose is included in USAM 9-7.922, *infra*. In situations where physical surveillance is impossible, provision for voice identification should be made.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Where the application sets forth the fact that a subject of the electronic surveillance is under indictment, the order should contain restrictive language requiring particular care to avoid the monitoring of conversations pertinent to trial or other disposition of that case. A sample form for such actions appears in USAM 9-7.923, infra.

Neither Title III nor the Fourth Amendment ". . . require that a Title III electronic surveillance order include a specific authorization to enter covertly the premises described in the order." Dalia v. United States, supra at 255 n.17, 258-259. Nevertheless, it is the policy of the Department that orders authorizing microphone surveillance should expressly authorize the installing agents to enter the premises surreptitiously to install the interception device, to maintain the device, to place the device more effectively, and to remove it at the expiration of the order. See suggested interception order form appearing at USAM 9-7.921, infra. Once the initial entry has been accomplished pursuant to the court's approval it is not necessary to secure either additional Department or court approval for subsequent entries in order to accomplish repositioning, maintenance, or removal. Contra United States v. Ford, 553, F. 2d 146 (D.C. Cir. 1977). See also J. Carr, The Law of Electronic Surveillance §4.07[2][b] (1977 & Supp. 1980); C. Fishman, Wiretapping and Eavesdropping §§104, 117, and 124 (1978 & Supp. 1980).

The order should contain a provision requiring periodic reports by the supervising attorney. The judge who authorizes an interception may, in his/her discretion, order that the court be furnished with periodic reports ". . . showing what progress has been made toward achievement of the authorized objective and the need for continued interception." See 18 U.S.C. §2518(6). The statute does not make mandatory the filing of these reports unless the judge so directs in the authorization order. The frequency of these reports is similarly left to the discretion of the court. It is, however, clearly in the interest of the government to file these reports in order to: (1) demonstrate continuing judicial interception; and (2) to build the strongest possible record on appeal. Accordingly, the supervisory attorney should, as a matter of course, recommend to the district judge that the reporting requirement be included in any orders authorizing interception of oral communications. This may be accomplished by including such a requirement in the draft order submitted to the court. The appropriate interval between reports depends upon what is reasonable under the facts of the case. The usual interval is about five days.

Based on recent allegations of possible breaches in some Title III investigations, it has been concluded that there is no legal need for a communication common carrier, landlord, custodian or other person to be

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

acquainted with the full details of the court order such as, the names of the subjects to be intercepted, the violations of law being investigated, etc., in order for them to furnish the necessary assistance. Therefore, in the interest of security, a separate abbreviated order should be prepared and presented to the court in the applicable circumstances. A copy of this order may be left in the possession of the communication carrier. A sample form for this purpose is included in USAM 9-7.924, infra.

9-7.200 APPLICATION PROCEDURE

9-7.210 Who May Apply for Interception Orders

Although the statute authorizes applications for interception orders to be made by investigative or law enforcement officers, it is the policy of the Department that all such applications be filed by supervising attorneys.

9-7.220 Judges to Whom Application Should be Presented

Judges of the United States district courts or of the United States courts of appeals are competent to issue interception orders within the area over which they have physical jurisdiction.

18 U.S.C. §2516(1) and §2518(1) refer to "judges of competent jurisdiction," and that term is defined in 18 U.S.C. §2510(9)(a) to include judges of both the district courts and courts of appeals. Except in extraordinary circumstances, all applications should be presented to district court judges.

9-7.230 Documents to be Presented

The documents to be presented to the judge include the application, with copies of the authorization and transmitted letter attached, the affidavit, and the original and one copy each of the proposed orders for interception and for pen register or tone decoder to be used.

It is the policy of the Criminal Division that no pen register shall be installed by any federal law enforcement agency except pursuant to an order issued by a federal district court.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Such an order may be obtained pursuant to Rule 57(b), Federal Rules of Criminal Procedures and as an adjunct thereto an order pursuant to the All Writs Act may be obtained directing the cooperation of the concerned telephone company. Sample forms which may be utilized in applying for an order are included at USAM 9-7.925 and 9-7.926, infra.

Attorneys applying for such orders are to satisfy themselves that the agency requesting the order is engaged in an investigation of possible criminal activity within the jurisdiction of the agency and that the requested pen register is reasonably calculated to further the investigation.

In no case should the duration of any order exceed thirty days, but applications for extension of an order may be made when, in the view of the U.S. Attorney or Strike Force Chief, it is necessary to accomplish the objective of the investigation.

9-7.231 Trap and Trace Guidelines

In United States v. New York Telephone, 434 U.S. 159 (1977), the Supreme Court held that a district court had the power to compel a telephone company to provide facilities and other assistance to agents of the government in order to attach a pen register to a given line. The Court further held, however, that a telephone company may not be compelled to provide such assistance in cases where such an order would be overly burdensome on the company. The courts have used the same rationale in cases concerning the placement of trap and trace devices to discover the originating numbers of incoming calls. See, e.g., United States v. Mountain States Telephone & Telegraph Company, 616 F.2d 1122 (9th Cir. 1980), In the Matter of the Application of the United States, 610 F.2d 1148 (3d Cir. 1979).

Providing the minimal assistance necessary to place a pen register on a line is generally a simple matter for the phone company, but providing assistance to trap and trace a call entails far greater expenditures of phone company time, manpower and operational capacity. Thus, a telephone company is more likely to feel that an order compelling its cooperation in tracing a phone call is too burdensome, and a court is more likely to scrutinize a request for such an order to determine its effect on the company. Therefore, to minimize the burden on a telephone company that might defeat an order, and further to minimize possible litigation that could delay an important trace, the Criminal Division, after some discussion with appropriate officials of the Bell System, believes that the following guidelines will be beneficial to all concerned with this investigative technique.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. Before considering an application for a trap and trace order, the supervising attorney will make certain that the investigating agency is conducting a bona fide criminal investigation of matters within its recognized jurisdiction.

B. Before an agent seeks an order to trace incoming calls to a particular line, he/she should, whenever possible, review the proposed trace with the local telephone company's security department. The security department should be able to advise the agent of foreseeable problems in the execution of the proposed order.

C. Except in very rare instances, orders should be limited to Electronic Switching System (ESS) or No. 5 cross-bar facilities. The likelihood of successfully tracing a telephone call through a system using less sophisticated equipment is extremely low and requires an inordinate amount of time, manpower and equipment.

D. Where possible, all orders should also be limited with respect to:

1. Scope--an order should avoid having a trap and trace device on more than one line at a given switching facility.

2. Geography--it is preferable that the order limit traces to "all calls originating in X city" or "all calls originating within a Y-mile radius of Z town." If the target phone is located in a large city, the order should limit the trace to a specific section or sections of the city whenever possible (i.e. "the east side of X city" or "the Borough of \_\_\_\_\_ in Y city").

3. Duration--orders should limit the trace to twenty (20) days, subject to an extension if the supervising attorney determines it to be necessary.

4. Hours--if it is possible to anticipate when calls will come into a target phone, tracing should be limited to these hours.

E. Except in unusual circumstances, the agent should seek the tracing information from the local telephone company only during regular business hours. The time intervals at which the agent may seek the information will vary, based upon the particular circumstances of each case. Appropriate arrangements can be made during the preliminary discussions with the local telephone company security department.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

F. Each order should contain a clause forbidding the phone company to disclose that a trace is or has been in progress.

G. A telephone company should be given the opportunity for a hearing in camera to seek limitations of any proposed order if it feels the order is too burdensome.

H. AT&T has indicated that it will accept orders under Rule 57(b), Federal Rules of Criminal Procedure, as well as under Rule 41, Federal Rules of Criminal Procedure.

I. As with pen registers, no central Justice Department authorization or separate affidavit will be required.

Please bear in mind that these guidelines are meant to be somewhat flexible depending on the circumstances of each investigation. As noted above, the actual scope, duration, etc., of any trace should be negotiated with the security department of the local company. Also, it should be noted that these guidelines may prove too restrictive for emergency situations (e.g., kidnappings), requiring even more flexibility. In general, however, compliance with these guidelines will result in a minimum of delay in obtaining an order and will assure close cooperation with AT&T, its Bell System subsidiaries, and other telephone companies. While we cannot consult with every private telephone company, these guidelines should also provide a useful framework for cooperation with other companies.

A model order incorporating the above guidelines is included at USAM 9-7.928, infra. A sample application for such an order is included at USAM 9-7.927, infra.

9-7.240 Presentation of Application

The application should be presented as expeditiously as possible following the receipt of authorization under 18 U.S.C. §2516(1). 18 U.S.C. §2518(3) provides that interception orders are to be issued in an ex parte proceeding if the issuing judge determines that:

- (a) There is probable cause for belief that . . .  
a particular offense . . . [listed] in section 2516 .  
. . [has been, is being, or is about to be committed];

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) Normal investigative procedures have been tried and have failed or [if not tried] reasonably appear to be unlikely to succeed . . . or to be too dangerous;

(d) There is probable cause for belief that the facilities [or place] from which . . . [the interception will be made] are being used, or are about to be used, in connection with the . . . [offense involved] or are leased to, listed in the name of, or commonly used by . . . [the subject of the order].

Although 18 U.S.C. §2518(3)(b) requires a finding that ". . . particular communications . . ." will be intercepted, the Senate Report at 102 states that the judge is required ". . . to determine that there is probable cause for belief that facts concerning . . . the offense may be obtained . . . ."

The Senate Report at 102 states that these findings "together . . . are intended to meet the test of the Constitution that electric surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity . . . ."

18 U.S.C. §2518, paragraphs (2) and (3), indicate that the issuing judge is expected to play an active role in the application and issuance procedure. 18 U.S.C. §2518(2) provides that he/she may require the applicant ". . . to furnish additional testimony or documentary evidence . . ." if that contained in the original application is insufficient to justify the granting of an order, and 18 U.S.C. §2518(3) provides that the order may be issued as requested or as modified.

The Senate Report at 102 states that additional testimony given in connection with an application should be under oath, and a record should be made through the use of a court reporter. Since these ex parte proceedings are intended to be confidential, the judge should be requested to instruct the court reporter concerning this requirement of confidentiality and order that all the copies of the transcript and stenographic notes or tapes be placed under seal and treated in the same fashion as are recordings. See USAM 9-7.340, infra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.250 Sealing of Documents

As soon as the order has been signed, the supervisory attorney should make certain that the judge has sealed the documents and has caused them to be properly safeguarded or to seal them himself/herself in the court's presence. See United States v. Cantor, 470 F.2d 890 (3d Cir. 1971). The usual practice is either to file the sealed package with the district court clerk for safekeeping in the clerk's vault or for the supervising attorney to take and retain custody of the sealed documents until the interception has been completed, at which time they will be filed with the court. If this latter procedure is followed, it must be ordered by the court and the identifying number of the action placed on the sealing envelope. (It is good practice to secure either a duplicate original or to make a duplicate copy for the supervising attorney's work file. Such a document is frequently needed prior to the normal time for unsealing. A copy of the signed order is usually provided to the communications common carrier in conjunction with any request for information, facilities, or technical assistance.)

9-7.260 Procedure if the Application for an Interception Order is Denied

In the event that a judge refuses to issue an interception order, notice must be given to the Department of Justice, Office of Enforcement Operations. Upon receipt of notification that an application has been denied, the Department will determine whether a new application can be or should be made on the facts available or whether additional investigation is needed.

9-7.270 Emergency Interceptions

18 U.S.C. §2518(7) provides for the interception of communications for up to 48 hours without a prior court order under certain emergency conditions. However, that section also provides that an application for a court order approving the interception must be made within 48 hours after interception has begun to occur.

The Attorney General, the Deputy Attorney General, or the Associate Attorney General will exercise his/her power to authorize such emergency interceptions in appropriate cases. As this provision does not dispense with any of the application procedures prescribed under 18 U.S.C. §2518(1)-(6) but merely delays the application process for 48 hours, the investigative agency requesting such authorization should, insofar as practicable, submit its request in the form indicated below:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. A written request to the Attorney General signed by the director or head of the investigating agency. In addition to identifying the persons to be intercepted, the facilities from which, or the place where, the wire or oral communications are to be intercepted, and the offenses to which the communications are expected to relate, the request must expressly state that the requester has determined that:

1. An emergency situation exists that involves an immediate danger of death or serious physical injury to any person, conspiratorial activities threatening the national security interest, or conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained; and
2. There are grounds upon which such an order could be entered under Title III.

The request should be accompanied by documentation setting forth probable cause for belief that:

- a. An individual is committing, has committed, or is about to commit a particular offense enumerated in 18 U.S.C. §2516;
- b. That particular communications concerning that offense will be obtained through such interception; and
- c. That the facilities from which or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offenses.

When it appears that an emergency authorization may be needed, the Office of Enforcement Operations should be immediately contacted for further information and advice.

9-7.300 CONDUCT OF INTERCEPTION

9-7.301 Preliminary Action

The statute requires that the interception devices be installed as soon after entry of the order as practicable. The supervising attorney should encourage the investigative agency to take whatever preliminary

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

steps are appropriate to insure that the devices are installed at the earliest possible moment. Such action may include making preliminary arrangements with the telephone company or finding a means for surreptitious entry, where that will be necessary, in advance of approval by the court. The technical agent for a wiretap should obtain pertinent cable and pair and junction box information (appearances of leads) from the communications common carrier whenever possible. Also, the supervising agent and technical agent should select a listening post and obtain the necessary technical equipment to conduct the interception. The supervising agent should determine what personnel will be needed to conduct the interception and any visual surveillance and he/she should make arrangements for obtaining them. He/she should also set up the shifts and posts for all personnel.

9-7.302 Preliminary Meeting Held by Supervising Attorney

Prior to any monitoring, action should be taken to insure that the interception will be in conformity with the court order and the statute. The supervising attorney should hold a meeting of the supervising agent, case agent, technical agent, and as many prospective monitoring agents as possible. During this meeting, he/she should inform the agents of the contents of the anticipated order. Stress should be placed on those provisions of the order describing:

- A. The type of communication sought to be intercepted;
- B. The particular offense to which it relates;
- C. Minimization; and
- D. Termination when the objective of the interception has been obtained.

He/she should instruct them what to do when confronted with the interception of communications involving crimes not named in the order, privileged communications, how to minimize interception of non-pertinent matters and when to terminate the interception. The supervising attorney should emphasize that any limitations in the order relating to, for example, limited hours of operation or visual surveillance or voice identification should be followed strictly.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.303 Posting the Order

As the interception must be confined to the terms of the court order, a copy of the order should be posted at the situs of the listening post. Each monitoring agent should be required to read, initial, and date the order prior to beginning his/her first monitoring shift.

9-7.310 Duties of Agents In General

9-7.311 Duties of the Supervising Agent

A. The supervising agent normally is the liaison between the supervising attorney and the monitoring agents. This insures that instructions from the attorney are properly communicated to the agents and that the attorney receives a clear picture of what the interception is producing. The supervising agent is also charged with the responsibility of conducting the interception in compliance with all instructions of the court and the supervising attorney and insuring that the interception device is installed as soon as practicable after the court order is obtained.

B. The supervising agent should prepare and deliver to the supervising attorney daily written reports. There is no prescribed form for such reports, but they should show the nature and scope of the interception for that day. For instance, they should indicate the number of relevant conversations intercepted, the number of non-pertinent conversations terminated, whether any of the individuals named in the order was intercepted, whether any new participants were identified, and whether any problems have arisen, e.g., equipment malfunction, privileged communications, or evidence of other crimes. These daily reports should be made even throughout a weekend or holiday period and may originally be accomplished via telephone with the documentation being prepared the next working day. A copy of the corresponding day's log should accompany each report.

C. The supervising agent's duties include providing for the integrity and admissibility of the recordings by following the principles set forth herein and insuring proper termination of the interception either on the day specified in the court order or when the objective of the interception has been accomplished, whichever comes first. If during the course of the interception the supervisory agent determines that the communications expected to be overheard are intercepted and recorded, the supervisory agent must immediately terminate the interception and inform the supervising attorney.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.312 Duties of Monitoring Agents

The monitoring agents have initial responsibility in the following circumstances:

A. In the event conversations between individuals in the relationship of husband-wife, clergyman-penitent, and physician-patient are intercepted, the agent must notify the supervising agent as soon as practicable;

B. In the event conversations between individuals in the relationship of attorney-client are intercepted:

1. If the conversation concerns a pending criminal case (the client under indictment), the agent must immediately shut off the recording device, remove the earphones, note such in the logs (identifying the parties intercepted), and notify the supervising agent; or

2. If the conversation relates to matters other than a pending criminal case, proceed as in A. above.

C. In the event conversations relating to crimes other than those specified in the court order are intercepted, the agent must notify the supervising agent as soon as practicable;

D. If the court order authorizes the interception of specific individuals' telephone calls from a public booth, the agent may intercept and record only those pertinent conversations of the specified subjects. When other persons are using the phone the recording device must be shut off and the earphones must be removed; and

E. In the event the communications expected to be overheard are intercepted and recorded, the agent must immediately request instructions from the supervising agent as to whether to terminate the interception.

9-7.313 The Log

The monitoring agents should maintain a contemporaneous log, by shifts, of all communications intercepted, indicating the reel and footage location of each communication; the time and duration of the interception; whether outgoing or incoming in the case of telephone conversations; the number called if the call was outgoing; the participants, if known; the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

subject and, to an abbreviated extent, the content of all pertinent conversations. Any peculiarities, such as codes, foreign language use, or background sounds, should also be noted. When the interception of a communication is terminated for purposes of minimization, that fact should be noted. This log should record the names of the personnel in each shift and the function performed by each, malfunctions of the equipment or interruptions in the surveillance for any other reason and the time spans thereof, and interceptions of possibly privileged conversations or conversations relative to crimes not specified in the original interception order. Each entry in the log should be initialed by the person making it.

9-7.314 Duties of the Technical Agent

As previously noted, the technical agent should:

A. Prior to the order:

1. If a wiretap, secure the necessary technical information regarding the connections to be made to accomplish the interception. (This information should be preserved with the records of the case for later court use.) If the interception is to be of oral communications, he/she should similarly make necessary plans and preparations to facilitate the installation of the interception device;

2. Secure and establish the listening post in conjunction with the supervising agent;

3. Obtain and set up the interception equipment at the listening post. This equipment may include tape recorders in sequence, a cassette recorder, and a pen register or tone decoder.

B. Subsequent to the order:

If a wire interception, test the wire pairs with a hand set and make a test call to insure that the equipment is connected to the proper telephone line. See United States v. Lawson, 334 F. Supp. 612 (E.D. Pa. 1971).

Every technical act performed should be carefully recorded for future court use.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.315 Minimizing the Interception

18 U.S.C. §2518(5) provides that every order shall contain a provision that the interception shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception. This provision requires the intercept procedure to be conducted so as to reduce to the smallest possible number the interception of "innocent" communications. In this context, the word "possible" means feasible or practicable consistent with the objective of obtaining evidence of the criminal activity described in the interception order. See United States v. Focarile, 340 F. Supp. 1033, 1047 (D. Md. 1972); United States v. Ramsey, 503 F.2d 524, 532, n. 26 (7th Cir. 1974). In the usual situation, some interception must take place before it can be determined that the interception of the communication should be interrupted.

Conversations which must be minimized include privileged communications. However, it is difficult to draw any hard and fast rules in this area, for there appears to be an exception to every truism concerning minimization. As a guiding principle, it may be said that problems relating to minimization must be dealt with on an ad hoc basis and that monitoring agents must be provided with instructions by the supervising attorney as the surveillance progresses. For his/her part, the attorney should be familiar with the expanding case law in this area. See Scott v. United States, 436 U.S. 128 (1978); United States v. Terry, 702 F.2d 299 (2d Cir.), cert. denied, 103 S. Ct. 2095 (1983); United States v. Feldman, 606 F.2d 673 (6th Cir. 1979).

The supervising attorney should provide guidance to the monitoring agents at his/her preliminary meeting. In addition, he/she should provide written instructions for posting at the listening post if the nature of the interception suggests the desirability of such action. During the course of the interception, the supervising attorney should review and change his/her instructions as to minimization whenever appropriate.

9-7.316 Evidence of Other Crime

The monitoring agents should also be instructed as to how to react to interceptions which apparently relate to crimes other than those enumerated in the order. Essentially, they should continue to intercept and record calls of this nature and report this fact to the supervising attorney as soon as possible, but not later than the next monitoring day. The attorney should then make an initial determination as to whether the conversation may be evidence of a crime not listed in the order. If so, the supervising judge should be informed via the next periodic report.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.317 Privileged Communications

A prime objective of authorized interceptions of private communications is to provide the government with legally admissible evidence of criminal activity which could not be obtained through normal investigative techniques. However, the confidentiality of conversations between individuals who stand in the relationship of husband-wife, clergyman-penitent, physician-patient, and attorney-client are protected by testimonial privilege. If a defendant could properly assert such a privilege against introduction of his/her conversations when the government had obtained evidence of them through normal investigative techniques, then it was not the intent of Congress to allow the government to use these conversations as evidence when obtained through electronic surveillance. Accordingly, 18 U.S.C. §2517(4) states:

No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

The practical effect on the investigative agency of this section is this: If an intercepted communication would be otherwise privileged, the government may not introduce evidence of the communication's content at trial. Whenever the agent supervising the interception becomes aware that the subject whose conversation is being intercepted is talking to his/her spouse, his/her physician, or his/her clergymen, the agent should bring this fact to the attention of the supervising attorney at the end of the recording period, or as soon thereafter as practicable. After being informed of the nature and content of these conversations, the supervisory attorney can make a determination as to whether or not the communication in question is one which qualifies for the privilege and so advise the investigative agent.

A more serious situation is presented when the conversations overheard by the government are between the subject and his/her attorney (or if the subject is an attorney, between the subject and his/her client) In this instance, the confidential communication is not only protected by a testimonial privilege but also by the Sixth Amendment's guarantee of the individual's right to the assistance of counsel. If the intercepted communications deal with legal advice given by the attorney to the client concerning a pending criminal case, then care must be taken not to violate the client's Sixth Amendment rights.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In the event that the electronic surveillance intercepts a communication between an attorney and client concerning a pending criminal case, that is, a case in which the client is under indictment, the agent supervising the interception must immediately shut off the interception equipment and make a notation in the logs that the conversation was shut off and was not overheard. The log should identify the attorney and the client who were on the line which occasioned the shut off. The agent should also bring this fact to the immediate attention of the supervising attorney. In rare instances, the government may be authorized to intercept the conversations of a subject and his/her attorney after an indictment has been returned against the subject; Cf. Osborn v. United States, 385 U.S. 323 (1966). However, great care must be exercised by the supervising attorney that actual pending cases against a subject are not needlessly jeopardized in order to further potential cases.

In the event, on the other hand, that the electronic surveillance intercepts a communication between an attorney and client relating to matters other than a pending criminal case, e.g., a conversation in relation to an illegal activity, the agent supervising the interception should, at the earliest practicable moment, bring this fact to the attention of the supervising attorney. Upon being informed of the circumstances and content of the conversation, the supervising attorney must decide if the conversation is in fact privileged. If that determination is made, the supervising attorney should instruct the investigative agency not to disclose the content of the privileged communication to other investigative or police agencies, nor to conduct further investigation based upon the contents of the privileged communication. Such privileged conversations should not be included in the copies of transcriptions of the tapes, but should be recorded on the sealed copy that will remain in the custody of the court.

9-7.318 Reports to the Court

The authorizing order normally requires that reports be filed periodically with the supervising judge. 18 U.S.C. §2518(6) provides that the reports should show ". . . what progress has been made toward achievement of the authorized objective and the need for continued interception." As a matter of policy, the supervising judge should be kept fully advised of the progress of the interception.

The forms used for this purpose vary from district to district. However, it is good practice to include as part of each periodic report to the court copies of the daily reports received by the supervising attorney

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

from the supervising agent. The report should clearly identify the interception by docket number or whatever other means is used in the district, the date it is made, and the period it covers. It should also explain to the court matters which, in the opinion of the supervising attorney, might not be clear to the court. It might contain a copy of the minimization instructions given to the agents at the onset of the interception and, in later reports, such changes as are made in these instructions. In this manner the court could change the instructions if appropriate. If certain expected communications have not been overheard and the reason is apparent, this information should be included in the report. For example, that an expected conversation between X and Y at X's house might not occur on a certain date because Y was ill. It is not necessary to go into great detail or cover matters which do not relate to the authorized objective. But the supervising attorney should take care that his/her summary fairly apprises the court of the progress of the surveillance.

In advising the court of ". . . the need for continued interception," the supervising attorney is essentially restating and updating the probable cause to continue the surveillance under the original authorization. While the sufficiency of the report will not be tested by the same standards as the original application, the record of the case will be strengthened if the government has demonstrated throughout the surveillance that the conditions which justified the original authorization are still operative. Therefore, the supervising attorney should not phrase the continued need in a conclusory fashion, but he/she should candidly, and, in some detail, inform the court why he/she thinks the electronic surveillance should continue. Each report should contain an order sealing it until after the conclusion of the interception and placing it in the custody of whomever has custody of the application and order.

The interval between reports will, of course, be determined by the desires of the supervising judge. Absent some firm indication by him/her, the interval suggested should depend on what is reasonable in the case; the longer the period of authorized interception, the longer the periods between reports may be. Usually, the interval is set at about five days. The reports to the court have assumed importance because of the significance which courts of appeals and reviewing district courts have attached to them, particularly in evaluating the effectiveness of judicial supervision of minimization. See United States v. Bynum, 485 F.2d 490 (2d Cir. 1973); United States v. Quintana, 508 F.2d 867, 875 (7th Cir. 1975); United States v. James, 494 F.2d 1007, 1021 (D.C. Cir. 1974); United States v. Cox, 462 F.2d 1293, 1301 (8th Cir. 1972).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.320 Recording the Intercepted Communications

Title III directs that the contents of any intercepted communication ". . . shall, if possible, be recorded on tape or wire or other comparable device." (See 18 U.S.C. §2518(8)(a)). This requirement would seem to be mandatory in all but the most extraordinary situations. Although mechanical breakdown of recording equipment would probably be temporarily excusable under this section, the preferred practice is to provide for recorder redundancy in an effort to avoid such a situation.

9-7.321 Protection of the Recording

The statute commands "the recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations." (See 18 U.S.C. §2518(8)(a)). Accordingly, the following procedure should be followed during the period of authorized interceptions:

A. Either during or at the end of each recording period a copy of the recorded communications should be made for the use of the investigative agency and the supervising attorney;

B. The original recording should be placed in a sealed evidence envelope and kept in the custody of the investigative agency until it is made available to the court at the expiration of the period of the order;

C. A chain of custody form should accompany the original recording. On this form should be a brief statement, signed by the agent supervising the interception, which identifies:

1. The order which authorized the recorded interceptions (by number if possible);
2. The date and time period of the recorded conversations;
3. The identity (where possible) of the individuals whose conversations were recorded;
4. The place where the intercepted communications took place.

The form should indicate to whom the supervising agent has transferred the custody of the original recording and the date and time that this occurred. Each subsequent transfer, including that to the court, should be similarly noted on the form.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The agent supervising the recording should mark a label attached to the original tape reel or wire so as to identify it as corresponding with the accompanying chain of custody form. The date of the recording should also be marked on the label and this should be initialed by the agent.

D. Each agent or other person signing the chain of custody form should be prepared to testify in court that the original tape, while in his/her custody, was kept secure from the access of third parties (unless so noted on the form) and was not altered or edited in any manner.

It is the responsibility of the investigative agency to ensure that original recordings in their custody will be maintained in such way as to ensure their admissibility in evidence at trial over objections to the integrity of the recording.

9-7.322 Procedure When No Recording Can Be Made

In those unusual instances where no recording of the intercepted communications could be made, the following procedure should be utilized:

A. If it is intended that the overheard conversation be introduced in evidence at trial the intercepting agent should make a contemporaneous log or memorandum. This log should be as near to a verbatim transcript as is possible under the circumstances of the interception;

B. The log or memorandum should close with a brief statement signed by the agent indicating the date, time, and place of the intercepted conversation. The order authorizing the interception should be identified. The agent should indicate that the log or memorandum contains the contents of the intercepted communication which he/she overheard. This should be followed by the agent's signature; and

C. This log should be treated by the investigative agency as if it were an original recording of the intercepted communication, and the procedure outlined in USAM 9-7.321, supra, should be followed.

9-7.323 Duplicate Recordings

The statute allows the investigative agency to make duplicate recordings of the original tape or wire before the original is sealed. Since the sealed original will, as a practical matter, be unavailable for replay by the investigative agency or the Department of Justice, at least

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

one duplicate should always be made from the original before sealing. Some agencies record a duplicate original "work copy" of the tape contemporaneous with the recording of the original. See United States v. Lanza, 349 F. Supp. 929 (M.D. Fla. 1972).

9-7.330 Termination of the Interception

Congress provided a statutory scheme allowing authorized electronic surveillance of private conversations for the limited purpose of securing evidence of crime which could not easily be obtained in other ways. Although modern techniques of electronic surveillance might be useful in providing investigative agencies with general intelligence concerning criminal activities, the use of the technique solely for general intelligence gathering would raise serious constitutional questions under the Fourth Amendment. Therefore, 18 U.S.C. §2518(5) commands interception to terminate either when the objective of the surveillance has been realized, or on a specified date within 30 days after the initial interception--whichever comes first.

9-7.331 Termination upon Achievement of Authorized Objective

The interception of private conversations must terminate as soon as the government has obtained the evidence which was the objective of the authorization. If interception is continued beyond that point, evidence derived from continued interception will not be construed as obtained pursuant to court order. "No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization . . ." (See 18 U.S.C. §2518(5)). Such an unauthorized interception would be violative of the Fourth Amendment. (See Katz v. United States, 389 U.S. 347 (1967)), and would have three serious consequences: First, evidence derived from the unauthorized interception would be rendered inadmissible. See 18 U.S.C. §2515; Weeks v. United States, 232 U.S. 383 (1914). Second, the agents conducting the unauthorized interception might be subject to criminal penalties. (See 18 U.S.C. §2511). Third, the agents conducting the unauthorized interception subject to civil suit by persons whose conversations were intercepted. (See 18 U.S.C. §2520).

It would be well to note that, while many orders cite the identification of co-conspirators as one of the primary objectives, a blind reliance upon this language as grounds for continuing the surveillance until the calendar expiration date could be fraught with

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

serious consequences. While it is true that identifying and defining the roles of conspirators is a proper objective, it must be realized that these interceptions, especially gambling interceptions, rarely result in the identification of all participants. The central consideration is whether a continued interception can stand the test of subsequent court scrutiny.

The investigative agent supervising the interception bears initial responsibility for terminating the interception. When, during the course of the interception, the supervising agent determines that the communications expected to be overheard have been intercepted and recorded, he/she shall cause the interception to terminate immediately. He/she shall then inform the supervising attorney of his/her decision. If the supervising attorney does not concur, when interception under the original order shall be resumed. The daily report of the supervising agent to the supervising attorney will enable the supervising attorney to make an independent judgment as to whether the objective of the surveillance has been accomplished. If the supervising attorney determines that sufficient evidence has been obtained from the authorized interception, the investigative agency must immediately cease further electronic surveillance.

9-7.332 Termination Upon Expiration of Period of Interception

Regardless of whether or not an authorized interception has achieved its objective, it may only take place during the period authorized by the court order. It is the responsibility of the investigating agency to terminate the interception within the time period appearing on the order. The investigative agency should install the intercepting device as soon as authorization is obtained so that the authorized time period does not begin to run after the initial probable cause has grown stale. Whether execution of the warrant was sufficiently prompt is a question of fact which decided adversely to the government could be fatal in a motion to suppress. The investigative agent supervising the interception should promptly inform the supervising attorney that termination of the electronic surveillance has occurred.

9-7.333 Application for Extension of Interception

If the supervising attorney anticipates that the interception will terminate without achieving its authorized objective, he/she should determine if there are facts which would justify making application for an extension of the authorization. If the supervising attorney decides that

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

application for an extension is appropriate, he/she should obtain authorization from the Attorney General or specially designated Assistant Attorney General to apply for the extension exactly as if he were applying for an original order for an interception. An application for an extension, if filed without the express authorization of the Attorney General or a specially designated Assistant Attorney General, is unauthorized and communications intercepted pursuant to the extension order will be suppressed as the product of an illegal interception. It should be noted that the draft application which he/she submits must include ". . . a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." (See 18 U.S.C. §2518(1)(f)). If the supervising attorney intends that an existing interception continue without interruption via an extension, it is his/her responsibility to take the necessary steps to secure an extension from the authorizing court before the time when the interception must terminate pursuant to the original order.

When a gap exists between the termination of the original interception and the signing of the extension order, it is not necessary that the interception facilities be removed or dismantled. It is sufficient that they be inactivated, that is, turned off. During this period it is imperative that the intercepting agents understand that they do not have authority to intercept or record communications unless and until the court signs the extension, and even then their authority is circumscribed by the terms of the extension order and not the original. However, terms inadvertently omitted from the extension may be determined by reference back to the original. See United States v. Poeta, 455 F. 2d 117 (2d Cir. 1972). During the extension interception, the same procedure should be followed as during the original interception.

9-7.340 Sealing and Custody of the Recording Upon Termination of Interception

Immediately upon termination of the interception, the original recordings of the conversations should be submitted by the supervisory attorney to the judge authorizing the interception. See United States v. Poeta, supra. The judge will then order the original recordings sealed and order their place of custody. As most courts and their clerks are not equipped to safeguard evidence, the supervisory attorney should suggest that the court order the custody of the sealed recordings to remain with the investigative agency which undertook the surveillance. In many instances, the bulk of the tapes will preclude their being kept by the clerk of the court. The sealing should be done under the supervision of the authorizing judge.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Any delay should be carefully documented to show a good faith attempt at compliance with the statute by the government. If the failure to seal on the day of termination is foreseeable, the supervisory attorney should seek an order of the supervising judge extending the time for sealing. If not, the procedure followed in most districts of submitting a form sealing order to the court could help. In addition to the matters required by 18 U.S.C. §2518(8)(a), the order could recite the reasons for any delay in sealing. It is suggested that the order likewise recite the number of tapes sealed. See USAM 9-9.730, infra, for a form sealing order.

If the court so orders, it is the responsibility of the investigative agency to maintain the recordings without breaking the seal placed upon them by court order. The statute directs that the unbroken seal of the court or an explanation for its absence is pre-requisite to admitting the recordings in evidence at trial. The investigative agency must be prepared to maintain safely the original recordings for a minimum period of 10 years. Even after this 10 year period, the recording may only be destroyed pursuant to an order of the court which issued the original authorization to intercept. At the time of signing of the sealing order, it is also appropriate to remind the court of its reporting obligation under 18 U.S.C. §2519 and to fill the report out for the court and submit it to the court, if that is the practice in the district. Failure to file this report is not a ground for suppression. See United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973).

9-7.350 Use of Original Recording before Trial

As noted, the prerequisite for admissibility into evidence of the original recording is the presence of the court's seal or a satisfactory explanation for its absence. If for any reason, however, it becomes necessary for the government to make use of the original recording before trial, the supervising attorney should apply to the authorizing judge for an order allowing him/her to break the seal and use the recording. The application should state in detail the reasons for the request and the uses to which the original recording will be put. If the supervising attorney drafts the order authorizing breaking of the seal, this order should contain the same information appearing in the application.

Some courts will handle the question of admissibility of the recording in a pre-trial conference. In those situations, the trial attorney will have an opportunity to break the seal and listen to the recording before trial. This enables the trial attorney to examine the quality and content of the recording. Storage in high heat or close to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

strong magnetic forces can lower the quality of the recording. At this pre-trial stage, counsel for the defendant should be afforded an opportunity to be present at the breaking of the seal, playing of the original tape, and resealing of the original tape. It should be noted that 18 U.S.C. §2518(8)(c) makes violation of the recording, sealing, and custody provisions subject to the contempt power of the court.

9-7.400 THE INVENTORY

9-7.410 The Notice Requirement

Congress has provided that notice be served on certain persons whenever an application for an interception order has been filed (See 18 U.S.C. §2518(8)(d)). Congress intended by this provision that the government's activities under Title III would be made public. In addition, Congress intended to put the subject of the interception on notice so that he/she could seek civil redress under 18 U.S.C. §2520 if he/she believed his/her privacy was violated (See Senate Report, at 105).

9-7.420 Persons Entitled to Receive Notice

The persons named in the order or the application are entitled to receive notice. Other parties to intercepted communications may receive notice if the issuing judge determines in his/her discretion that it is in the interest of justice. (See 18 U.S.C. §2518(8)(d)). Everyone whose communications were intercepted is a potential recipient of notice under this section.

9-7.430 Contents of the Inventory

Notice is given to a party by serving upon him/her an inventory which includes:

- (1) the fact of the entry of the order or the application;
- (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
- (3) the fact that during the period wire or oral communications were or were not intercepted.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

See 18 U.S.C. §2518(8)(d). Upon receipt of the inventory, the recipient or his/her counsel may move for inspection of the application, order, and recorded interceptions. The judge may grant this inspection in full or in part if he/she determines it to be in the interest of justice.

9-7.440 Time of Service

The court shall order service of the inventory "[w]ithin a reasonable time . . ." after (a) the date of filing of an application for an order of approval under 18 U.S.C. §2518(7)(b), which is subsequently denied or (b) the termination of the period of an order or extension thereof. The "reasonable time" must occur within 90 days of either (a) or (b).

9-7.450 Postponing of the Inventory

Congress recognized that continuing investigation of a subject could be compromised if the inventory invariably was served within the 90 day period. The filing of the inventory may, therefore, be postponed during a period when the supervising attorney can demonstrate that there is "good cause" for the postponement. See 18 U.S.C. §2518(8)(d) (1976).

Whenever the supervising attorney has reason to believe that there is "good cause" to postpone the serving of the inventory, he/she should immediately file an ex parte motion stating the good cause and requesting postponement. The motion may be made to any judge of competent jurisdiction. Normally, it would be made before the judge to whom application for the order was originally made. It is clear that the inventory may be late, See United States v. John, 508 F.2d 1134 (8th Cir. 1975); United States v. Lucido, 373 F. Supp. 1142 (E.D. Mich. 1974); United States v. Wolk, 466 F.2d 1143 (8th Cir. 1972); United States v. Forlano, 358 F. Supp. 56 (S.D. N.Y. 1973); United States v. Cafero, 473 F. 2d 489, (3d Cir. 1973). Failure to serve any inventory at all may result in suppression where there is a further showing of specific prejudice to support suppression as to any defendant. See United States v. Principie, 531 F. 2d 1132 (2d Cir. 1976). The inventory time can, of course, be extended pursuant to appropriate order. See United States v. Manfredi, 488 F. 2d 588 (2d Cir. 1973); United States v. Schullo, 363 F. Supp. 246 (D. Minn. 1973); United States v. Cafero, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.460 Preparation of Inventory List

The second requirement set forth by the Supreme Court in Donovan, 513 F.2d 337 (6th Cir. 1975), involves post intercept inventory notice. The Court held that 18 U.S.C. §2518(8)(d) requires the government, when the intercept is over, to classify all persons whose conversations have been overheard and to provide that information to the issuing judge so that he/she may use it in causing mandatory notice to be served on persons named in the application or order and in exercising his/her discretionary power to have notice served on unnamed persons who were intercepted; see Donovan, supra. The following are essential classifications:

- A. Persons named in the order or the application;
- B. Other persons whose intercepted communications apparently incriminate them in the offense or offenses specified in the interception order;
- C. Other persons whose intercepted communications apparently incriminate them in offenses not specified in the interception order; and
- D. Persons whose intercepted communications are apparently non-incriminating.

See USAM 9-7.400 to 9-7.450, supra, and USAM 9-7.940 to 9-7.943, infra.

If any omission is discovered after the judge has been provided with the classifications, a supplementary report correcting the omission should be made to him/her as soon as possible.

To facilitate the preparation of the inventory listing, the supervising attorney should require the supervising agent to furnish him/her a preliminary report detailing the names of those intercepted and the category into which each falls, approximately 80 days after termination of the interception.

On preparation of inventory generally, see United States v. Chun, 503 F.2d 533 (9th Cir. 1974). See also United States v. Doolittle, 507 F.2d 1368, affirmed en banc, 518 F.2d 500: (6th Cir. 1975), cert. denied, 430 U.S. 905 (1977), and United States v. Donovan, supra.

The inventory listing should be forwarded by the supervising attorney to the court about 5 days prior to the date inventory is due together with a proposed order in which the names of those to be mandatorily inventoried are listed by category. The proposed order should also make provisions for insertion by the court of the names of those to be discretionally

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

inventoried. This will permit the supervising judge to exercise his/her discretion by indicating who is to be inventoried. The supervising attorney should assist the judge in the exercise of this function by making recommendations. Ordinarily, those in the first three of the above categories are inventoried and those in the fourth one are not. It is important to insure that every indictee and prospective indictee who has been indentified subsequent to the inventory proceedings is served with an inventory as soon as practicable.

9-7.500 DISCLOSURE OF INTERCEPTED COMMUNICATIONS

Congress did not intend to make private communications become public property through the use of authorized electronic surveillance. The statute (18 U.S.C. §2517(1), (2), and (3)) sets forth the limited categories of who may disclose information derived through electronic surveillance, to whom the information may be disclosed, and how the information may be used. In 18 U.S.C. §2517, the Congress struck a balance between the need of the community to keep private its communications and the need of the community for effective law enforcement through disclosure of the fruits of electronic surveillance. Any disclosure by government attorneys and agents or any other person of the contents of intercepted communications which is not pursuant to 18 U.S.C. §2517 may subject the offending party to a civil action for damages under 18 U.S.C. §2520.

9-7.510 Who May Disclose Intercepted Communications

Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose or use the information in the performance of his/her official duties. (18 U.S.C. §2517(1) and (2)). This would include investigative agents and supervising attorneys who either participated in the interception of the communication to be disclosed or who have learned of its contents from someone entitled to tell them.

Not every "investigative or law enforcement officer" may disclose or use his/her knowledge of the contents of an intercepted communication, however. Only those agents and attorneys who in the course of their duties transmit such information are authorized to do so. The contents of an intercepted communication is to be disclosed by an agent or attorney only after he/she is satisfied that the person to whom disclosure is made has a need to know the information.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.520 To Whom Intercepted Communications may be Disclosed

Disclosure may be made ". . . to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer . . . receiving the disclosure." (See 18 U.S.C. §2517(1)). By this section, Congress intended that there be close cooperation among the different federal investigative agencies, and between federal and state or local law enforcement agencies in the administration of criminal justice (see Senate Report, at 99). If an individual is authorized by law to investigate, make arrests, or prosecute any of the offenses enumerated in 18 U.S.C. §2516, and would be able to make use of the information in the course of his/her official duties, then disclosure to him/her of the contents of an intercepted communication is proper. See Iannelli v. United States, 477 F.2d 999 (3d Cir. 1973). This limitation is applicable to state and local jurisdiction investigative and law enforcement officers.

9-7.530 Non-Statutory Restriction on Disclosure

Although the statute permits disclosure of information pursuant to 18 U.S.C. §2517(1) and (2), situations will arise wherein the congressional policy of cooperation between federal and state investigative agencies is counterbalanced by a policy of non-disclosure of information between separate investigative agencies to protect the security and integrity of an agency's authorized interception and the subsequent prosecution of the subject. Therefore, while intra-agency disclosure will be governed by procedures established by the director of the agency conducting the authorized interception, and disclosure to the Attorney General and Department of Justice (Criminal Division) attorneys will be governed by statute and procedures established herein, all other disclosures will be governed by the following:

A. Disclosure may be made at the discretion of the investigative agency. A memorandum of disclosure should be prepared by the investigative or law enforcement officer making the disclosure. This memorandum should indicate the name and agency of the person to whom disclosure was made, the date of disclosure, a brief summary of the information disclosed, or identification (by number of the order if possible) of the authorized interception, and the purpose for making the disclosure.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. The investigative agency must inform the recipient that the disclosed information came from an authorized interception and that subsequent authorization must be obtained before use in any proceeding.

9-7.540 Use of Intercepted Communications by an Investigative or Law Enforcement Officer

An investigative or law enforcement officer may use evidence derived from intercepted communications in the same manner as he/she would use any other items of information or evidence in the course of his/her duties. See United States v. Vento, 533 F.2d 838 (3d Cir. 1976).

9-7.550 Disclosure to a Grand Jury or in a Criminal Proceeding

If a witness before a grand jury or in a criminal proceeding in federal or state court has knowledge of the contents of an intercepted communication or evidence derived therefrom, he/she may testify under oath concerning this communication or evidence if he/she obtained the information upon which his/her testimony is based in a manner authorized by 18 U.S.C. §2517(1) or (2). However, before such a witness may disclose communications relating to offenses not specified in the interception order, an order authorizing the disclosure must be obtained from a judge of competent jurisdiction in accordance with 18 U.S.C. §2517(5). See United States v. Brodson, 528 F.2d 214 (7th Cir. 1975). An order should be obtained for any disclosure from an interception conducted by another jurisdiction, such as by a state or a foreign government. See United States v. Marion, 535 F.2d 697 (2d Cir. 1976).

Such a disclosure order may be issued even though the communication is evidence of a crime not designated in 18 U.S.C. §2516 and is one for which an original authorization could not be obtained. (See Senate Report, at 100). If the intercepted communication relates solely to a state offense, and is to be used in state proceedings, it is the responsibility of state prosecuting officials to make the "subsequent application" before a state judge of competent jurisdiction. The statute does not require that the supervisory attorney or the state prosecutor must present the subsequent application to the same judge who authorized the original interception. In the federal system, subsequent application should be made to a judge of competent jurisdiction in the district wherein venue lies for the particular offense in question. Forms for such an application and order are at USAM 9-7.950 and 9-7.960, infra.

The statute directs that once evidence relating to other crimes is derived from an authorized interception, "[s]uch [subsequent] application

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

shall be made as soon as practicable." See 18 U.S.C. §2517(5). Accordingly, whenever an authorized interception discloses evidence of crimes other than those specified in the authorization, the agent supervising the interception should inform the supervising attorney of the existence and contents of the communication in question by including the relevant facts in the daily report (see USAM 9-7.311, supra). Although applications for such orders should not be unduly delayed, neither should orders be sought in cases which are never brought to complaint or indictment. Also, it has been held that while failure to make timely application for an order under 18 U.S.C. §2517(5) may be grounds for refusing to issue the order, once the order has been entered lack of timeliness is not ground for suppression of the intercepted communications. See United States v. Denisio, 360 F. Supp. 715 (D. Mo. 1973); and United States v. Vento, supra.

9-7.560 Approval for Use of Intercepted Communications in Civil  
Litigation

The approval of the Assistant Attorney General, Criminal Division, should be obtained prior to the use of communications intercepted under Title III in civil litigation in order to avoid compromise of pending or prospective criminal investigations or other actions. The approval should be sought by memorandum addressed to the Assistant Attorney General, Criminal Division, setting out:

A. The name of the intercepting agency and the agent who will testify and produce the tapes;

B. Whether the intercepting agency has any objection to such testimony;

C. The status of any other indicted criminal cases arising out of the evidence derived from the interception;

D. The names of any attorneys engaged in criminal prosecution of the cases arising out of such evidence and the attorneys' opinions as to whether disclosure will delay, damage or impair the progress of these criminal cases;

E. The court before which application for disclosure will be made (if appropriate);

F. The court in which the evidence will be used;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

G. The name of the opposing party in the suit in which the evidence will be used;

H. The type of proceeding in which the evidence will be used; and

I. The benefit to the government in use of the interception evidence.

9-7.570 Defendant Overhearings and Attorney Overhearings Wiretap Motions

Recently, we have received a number of questions from United States Attorneys concerning the appropriate response to be made to various wiretap motions filed in connection with federal criminal cases. The question most frequently asked concerns the government's obligation to inquire as to whether or not defendants or their attorneys have been overheard.

A. Defendant Overhearings

Generally, when a defendant alleges he/she had been overheard, the government has an obligation to conduct a search of the appropriate agencies and to affirm or deny the claim pursuant to the provisions of 18 U.S.C. §3504. This search is initiated at the request of the U.S. Attorney to the Office of Enforcement Operations of the Criminal Division and the results of the check are reported to that office. The agencies which should be canvassed in most instances are:

1. The United States Secret Service;
2. The Bureau of Alcohol, Tobacco and Firearms;
3. The United States Customs Service;
4. The United States Postal Inspection Service;
5. The Internal Revenue Service;
6. The Drug Enforcement Administration; and
7. The Federal Bureau of Investigation.

Other appropriate agencies will be canvassed depending on whether the court has ordered additional agencies searched or whether the nature of the charges would make it appropriate to conduct a search.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Pursuant to 26 U.S.C. §6103(c), the Internal Revenue Service requires the written consent of the taxpayer before any information concerning that taxpayer is released in a non-tax case. Therefore, it is necessary that if a search of the Internal Revenue Service is to be undertaken, the request must be accompanied by a motion signed by either the taxpayer or his/her counsel. If a waiver indicating the taxpayer's consent is submitted, the taxpayer himself/herself must sign that document. In multi-party cases an indication of consent from each party is required.

Although "mere assertion" has generally been sufficient to raise a claim under 18 U.S.C. §3504, see In re Evans, 452 F.2d 1239, 1247 (D.C. Cir. 1971), there is some indication that courts are beginning to raise the threshold.

The Fifth Circuit held in United States v. Tucker, 526 F.2d 279, 282 (5th Cir. 1976), cert. denied, 425 U.S. 935, that a claim surveillance "may have taken place" was not sufficient; a positive statement that unlawful surveillance had taken place was required. See also, In re Millow, 529 F.2d 770, 774-775 (2nd Cir. 1976) (lacks any colorable basis, objection should be raised to the search on that ground).

Further, many courts have adopted the view that the government's response must be measured against the specificity of the allegations of unlawful electronic surveillance and the strength of the support of these allegations. See United States v. Gardner, 611 F.2d 770 (9th Cir. 1980); In re Brummitt, 613 F.2d 62 (5th Cir. 1980), cert. denied, 447 U.S. 907; and, United States v. Alvillar, 575 F.2d 1316 (10th Cir. 1978).

In response to the defendant's motion or discovery request, the government should ask the court to require the defendant to provide descriptive biographical data and a specific time period for the survey in order to assist government agencies in making an accurate and expeditious check. It is important to keep in mind that it is the province of either the court or the defendant to set a time period to be searched; not the government's. Unless the government makes no attempt to limit the time of the search or is unsuccessful in persuading the court or the defendant to do so, the search conducted will encompass the present date to as far back as records exist. This is a very costly and time consuming process which we should attempt to avoid by procuring a narrow time limit for the search.

The identifying information which should be included with an Electronic Surveillance (Elsur) request consists of the full name of the subject to be checked, all known aliases used by that individual, date and place of birth, race, sex, social security number, and an FBI number if

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

one is available. The time period for which the check is to be performed and all addresses and phone numbers, both residential and commercial, in which the subject of the Elsur check had a proprietary interest during that period, should also be included. This identifying information will both speed the search and help assure its accuracy, especially when the subject has a common surname.

Elsur requests should be made at the earliest opportunity in order to give the agencies involved sufficient time to conduct a thorough and accurate search. The average time needed to conduct the search is 6-8 weeks. In your written request to conduct a 18 U.S.C. §3504 search, please include all necessary identifying information, a list of agencies to be surveyed other than the normal seven (see list above), the time period of the search, the citations of the statutes involved in the investigation or changed in the indictment, your deadlines, and a copy of the subject's signed motion or waiver. (See list of agencies above.) A specific exception to the government's obligation to search has been recognized where there is an inherent impossibility that the evidence to be offered could be the fruits of an illegal surveillance. For example, in In re Dellinger, 357 F. Supp. 949, 958-61 (N.D. Ill. 1973), the charge was contempt of court and the evidence to be offered was a trial transcript. Since there was no possibility that the trial transcript could have resulted in any way from an illegal surveillance, the court held that 18 U.S.C. §3504 did not apply. Should any of your cases involve evidence that could not possibly be obtained as the result of electronic surveillance, you should object, preliminarily, to conducting the search for defendant overhearings on that ground.

Even if the answers of the appropriate agencies are negative, the response to the 18 U.S.C. §3504 motion should not be made in the absolute to the effect that defendant has never been overheard. The records or indices maintained by the agencies would not necessarily disclose all overhearings but only those which have been identified and catalogued. Accordingly, if the result of the search is negative, the response should state that the search of the appropriate records or indices fails to reveal any overhearing of the defendant.

If the search reveals that the defendant has been overheard, the following procedure shall be employed by the agency conducting the search in determining who should be notified of the electronic surveillance. All overhearings or oral acquisitions initiated and conducted in connection with an investigation of criminal activity are reported to the Office of Enforcement Operations. That office will in turn apprise the U.S. Attorney of the results of the electronic surveillance search as reported by each agency. Electronic surveillance involving a domestic national

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

security matter (one having no ostensible connection with a foreign country or foreign national), see Zweibon v. Mitchell, 516 F.2d 594, 663-70 (D.C. Cir. 1975), should normally be reported directly to the Office of Enforcement Operations. If, as will be explained later, any doubt exists as to whether a particular oral acquisition was initiated for foreign intelligence purposes or for a domestic national security purpose, the matter should be referred to the General Litigation and Legal Advice Section of the Criminal Division. If the agency conducting the search determines that the electronic surveillance was authorized for foreign intelligence purposes, it will report that overheard to the General Litigation and Legal Advice Section of the Criminal Division, which will prepare the necessary response, supporting memorandum and affidavits so that the court can make an in camera determination of the foreign intelligence wiretap's legality.

§ 4. Attorney Overhearings

Overhearings of attorneys and defense counsel staff involve Sixth, rather than Fourth Amendment rights, and should be handled somewhat differently.

Although there is always an obligation to complete voluntary disclosure to the court when an overheard of the defense staff concerning a trial is discovered, the Department is under no obligation to conduct a search for such overhearings, absent a showing that conversations relating to the conduct of the defense may have been overheard. In Black v. United States, 385 U.S. 26 (1966), and O'Brien v. United States, 386 U.S. 345 (1967), the United States recognized its affirmative obligation to bring to a court's attention any overhearings of which it was aware which relate to the defendant's case whether or not a demand is made for such overhearings. See Dellinger, supra, at 957. You must inform the court of all overhearings of defendant's attorneys of which you are aware in each case you prosecute. In short, a "mere assertion" is insufficient to trigger an obligation to conduct a search for Sixth Amendment overhearings. Instead, some minimum showing is required before a search must be undertaken.

The reason for this difference is that a defendant's Sixth Amendment rights are not implicated when his/her attorney is overheard unless the conversations overheard are relevant to the representation of the particular client in the matter at hand. See United States v. Union Nacional de Trabajadores, 576 F.2d 388, 394 (1st Cir. 1978); United States v. Vielguth, 502 F.2d 1257, 1260 (9th Cir. 1974).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

An example of the minimum showing required before the government must respond to a claim that counsel had been overheard is found in United States v. Alter, 482 F.2d 1016, 1026 (9th Cir. 1973), which held that the claimant at least show by affidavit:

(1) The specific facts which reasonably lead the affiant to believe that named counsel for the named (defendant) has been subjected to electronic surveillance;

(2) The dates of such suspected surveillance;

(3) The outside dates of representation of (defendant) by the lawyer during the period of surveillance;

(4) The identity of the person(s), by name or description, together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and

(5) Facts showing some connection between possible electronic surveillance and the (defendant) who asserts the claim . . .

When these elements appear by affidavit or other evidence the government must affirm or deny illegal surveillance . . .

See United States v. Alter, *supra* at 1026.

For your guidance, then, searches for attorney overhearings should be resisted unless the defendant makes at least the minimal showing required by Alter, and should be strictly limited to the time period during which the attorney legally represented the defendant. A standard similar to that in Alter is set forth in Beverly v. United States, 468 F.2d 732, 752 (5th Cir. 1972).

Once the defendant has established in accordance with Alter a prima facie case that electronic surveillance of counsel has occurred, the government has an obligation to conduct a search of the appropriate agencies. Any intercepted communications of defense counsel or the defense staff, except for those involving a foreign intelligence surveillance, will be reported by the agency conducting the search to the Office of Enforcement Operations. Intercepted communications of defense

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

counsel or the defense staff involving foreign intelligence surveillances will be reported by the agency conducting the search to the General Litigation and Legal Advice Section of the Criminal Division, which has the responsibility in this area.

Should you have any questions, please contact the Office of Enforcement Operations (724-6867).

9-7.600 GRAND JURY PREPARATION

9-7.610 Preliminary Action

Normally, only selected intercepted communications will be disclosed to the grand jury in the interest of presenting the government's case in the briefest and most direct way possible. The process of selection should start with the logs of the interception, which can be utilized as an index to the transcripts. In addition, the supervising agent should be consulted as to his/her knowledge of any especially pertinent communications which might not be readily apparent from examination of the logs themselves.

Once the supervising or trial attorney decides which specific conversations are to be used, a composite tape composed of them should be prepared for grand jury use from the copies of the original tapes lodged with the investigative agency. See United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973). The trial attorney should listen to the composite and satisfy himself/herself as to its clarity, recording quality, and probative value. After such listening, additional or substitute conversations may be desired. The composite tape may be changed accordingly. If expert testimony is needed concerning the meaning or cumulative effect of the conversations, the trial attorney should satisfy himself/herself that every conversation relied upon by the expert is on the composite tape.

Such composite tapes of the conversations of potential grand jury witnesses are useful for playback to a witness as they assure that his/her testimony will be accurate and truthful. Although an agent is not authorized to be present solely for the purpose of operating a tape playback machine under Rule 6(e), Federal Rules of Criminal Procedure, an agent may present evidence consisting of intercepted communications as part of his/her testimony. In other situations in which the agent desires to play back recorded conversations, as for example, to confront a witness with his/her statement, the attorney might have to operate the tape

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

machine himself/herself. In such a case, he/she should be prepared with ready references to the conversations which he/she plans to use.

9-7.620 Recalcitrant Witnesses and the Gelbard Doctrine

There is considerable tactical advantage in questioning an immunized hostile witness in a grand jury setting using the tapes of his/her recorded conversations to assure that his/her testimony will be truthful.

Preliminary notice is not required for such use. Also, the suppression provisions of 18 U.S.C. §2518(10) are not applicable to a grand jury. See Gelbard v. United States, 408 U.S. 41, 54 (1972); United States v. Best, 363 F. Supp. 11 (S.D. Fla. 1973). Further, copies of the original recordings may be used, thereby permitting the seal on the original to be undisturbed.

Occasionally, a grand jury witness may invoke the prohibition against the improper use of intercepted communications of 18 U.S.C. §2515 as "just cause" for his/her refusal to answer and thereby attempt to escape contempt citation under 28 U.S.C. 1826(a), relying on the rationale of Gelbard, supra. It is important to note that Gelbard does not confer standing on a grand jury witness to suppress evidence before a grand jury. In re Marcus, 491 F.2d 901 (1st Cir. 1974). It merely extends the right not to testify in response to interrogation based on the illegal interception of his communications. See Gelbard, supra, at 47.

It is the Department's view that in instances in which electronic surveillance was conducted pursuant to court order, the in camera examination of the order, should preclude further inquiry into the legality of the surveillance. See Gelbard, supra, at 70 (concurring opinion of Mr. Justice White) combined with the dissenting opinion of Justices Rehnquist, Burger, Blackman, and Powell. However, the courts of appeals which have considered this question have not been uniform in specifying the evidence required to satisfy them of the legality of an interception for this purpose. The Seventh Circuit in In re DeMonte, 667 F.2d 590, 595-96 (1981), held that when a witness fails to make a specific showing of probable illegal electronic surveillance, the prosecutor's affidavit denying that the surveillance was illegal is an adequate response. The Second Circuit, in In re Persico, 491 F.2d 1156 (1974), held the government had met its burden of proof by producing the court order for the electronic surveillance for in camera inspection. The First Circuit, In re Lochiatto, 497 F.2d 803 (1974), held that the government must also produce for inspection the supporting documents to include the application for the interception order, the affidavits in support of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

court order, and a government order, the affidavit indicating the length of time the surveillance was conducted. This court left to the discretion of the district judge the question of whether the witness should have access to the documents over objection by the government. It should be noted that several courts of appeals have accepted the government's affidavit denying any electronic surveillance. The Fifth Circuit, Beverly v. United States, 468 F.2d 732 (1972), accepted as sufficient an affidavit stating that inquiry had been made with the appropriate federal government agencies and that there had been no electronic surveillance. Accord, In re Grumbles, 453 F.2d 119 (3d Cir. 1971); Korman v. United States, 486 F.2d 926 (7th Cir. 1975). See 18 U.S.C. §3504. The Ninth Circuit, United States v. Alter, 482 F.2d 1016 (1973), held the affidavit must meet the specifics set out in the claim, that is, it must identify the persons contacted, the substance of the inquiry, and the substance of the replies.

9-7.700 PRE-TRIAL PROCEEDINGS

9-7.710 Pre-Trial Notice of Interception Use

When the government intends to introduce the contents of intercepted communications, or evidence derived therefrom, in a federal criminal proceeding, each party to the proceeding must be furnished with a copy of the application and court order under which the interception was authorized or approved. Unless the parties have been served with these copies at least 10 days prior to the hearing, trial or proceeding, the evidence shall be inadmissible unless there is a waiver of the period. (See 18 U.S.C. §2518(9)). This section does not apply to grand jury hearings where evidence derived from electronic surveillance is offered (See Senate Report at 105).

The intent of the 10 day notice requirement of 18 U.S.C. §2518(9) is to allow parties to the hearing to file motions to suppress under 18 U.S.C. §2518(10). In those unusual cases wherein the government is unable to furnish the above information 10 days prior to the proceeding, the judge may waive the 10 day time limit. In such a situation, the trial attorney should move the presiding judge for a waiver. The motion should allege facts from which the court could find that the government could not meet the 10 day requirement and that the parties will not be prejudiced by a delay in receiving such information.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.720 Grounds of Motions to Suppress

Congress has permitted "[a]ny aggrieved person ..." to "...move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom," on the ground that:

- (i) the communication was unlawfully intercepted; or
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.

See 18 U.S.C. §2518(10)(a). The purpose of this section is to provide a definite remedy to the right conferred upon "aggrieved persons" in 18 U.S.C. §2515 that the fruits of unlawful electronic surveillance not be admitted into evidence. To promote this remedy, the moving party or his/her counsel may inspect portions of the intercepted communications or evidence derived therefrom if the judge determines that this would be in the interest of justice. Congress clearly intended to limit a party's right of inspection to the minimum necessary under the circumstances of the case. Inspection was not intended to be a substitute for far ranging discovery into the government's electronic surveillance files. "Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications." (See Senate Report, at 106).

9-7.730 "Aggrieved Person" Defined

"A person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed" is the definition of aggrieved person given by 18 U.S.C. §2510(11). The "...person against whom the interception was directed" refers to the subjects of the surveillance named in the application. In a proceeding brought against such a person, he/she would be an "aggrieved person" in regard to evidence of communications of others which was derived from an electronic surveillance directed against him/her or which occurred on a premises in which he had a proprietary interest. See United States v. King, 478 F.2d 494 (9th Cir. 1973); United States v. Ahmad, 347 F. Supp. 912 (M.D. Pa. 1972); Alderman v. United States, 394 U.S. 165 (1969). Traditional notions of standing would seem to limit the class of aggrieved persons entitled to move for suppression under 18 U.S.C. §2518(10) to parties to the proceeding in which the motion is filed. The wording of 18

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S.C. §2510(11) and 18 U.S.C. §2518(10) is so broad, however, that this does not necessarily follow from the language of the statute. If a motion to suppress is filed by an "aggrieved person" who is not a party to the proceeding in which the motion is filed, the motion should be resisted on the ground of no standing. The Senate Report indicates that the status of a person as a party to a proceeding is a prerequisite to the person's standing to file a motion to suppress under 18 U.S.C. §2518(10)(a). See United States v. Dorfman, 690 F.2d 1217 (7th Cir. 1982) (standing depends on the likelihood of an invasion of privacy actually occurring through the disclosure of unlawfully obtained evidence).

9-7.740 Time for Filing Suppression Motions

The statute places two limitations on when the motion to suppress may be filed. First, the motion must be filed in conjunction with "... any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States...." The motion may not be filed any time a party desires, but only when some type of proceeding is pending, see United States v. Persico, 362 F. Supp. (S.D.N.Y. 1973), although the proceeding need not be of a traditional criminal category.

Secondly, the motion must be made before the proceeding "...unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion." See United States v. Sisca, 361 F. Supp. 735, 738-741 (S.D.N.Y. 1973). See also 18 U.S.C. §2518(10)(a). The statute appears to contemplate, but does not expressly require, that any hearing on the motion or a decision thereon be similarly accomplished before the trial or other proceedings. It is important that the trial attorney oppose any motions not timely filed and request a hearing and decision prior to the actual trial. Otherwise, the right of the United States to appeal from an order of suppression (see 18 U.S.C. §2518(10)(b)) might be defeated. (See, Senate Report, at 106). If a motion to suppress is granted during the course of a proceeding, the supervisory attorney should immediately prosecute an emergency appeal. See 18 U.S.C. §2518(10)(b).

9-7.750 Pre-Trial Discovery

Under Rule 16, Federal Rules of Criminal Procedure, each defendant is entitled to receive transcripts of his/her own conversations and in those districts allowing liberal discovery--transcripts of the conversations contained on the composite tape which will be used in evidence. 18 U.S.C.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

§2518(10)(a) also grants the court discretion to deliver to a defendant "... such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice." The two provisions place little limit on discovery of the tapes and transcripts, but Congress clearly intended to limit a party's right of inspection to the minimum necessary under the circumstances of the case. Inspection under 18 U.S.C. §2518(10)(a) was not intended to be a substitute for far ranging discovery into the conversations of others. "Nor should the privacy of other people be unduly invaded in the process of litigating the propriety of the interception of an aggrieved person's communications." See Senate Report at 106. (Emphasis supplied).

9-7.760 Common Bases of Motions to Suppress

Pre-trial motions to suppress have in the past usually been used on deficiencies or irregularities affecting:

- A. Constitutionality;
- B. Authorization procedures;
- C. Probable cause;
- D. Minimization;
- E. Attainment of authorized objective; and
- F. Requisite necessity.

9-7.761 Constitutionality

The constitutionality of Title III has been affirmatively determined by several courts. See United States v. Tortorello, 480 F.2d 764, 771-75 (2d Cir. 1973), cert. denied 414 U.S. 866 (1973); United States v. Cafero, 473 F.2d 489 (3d Cir. 1973); United States v. Cox, 462 F.2d 1293, 1302-04, 1362 n. 12 (8th Cir. 1972); United States v. Cox, 449 F.2d 679, 687 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972).

9-7.762 Authorization Procedures

The Supreme Court of the United States has stated that the provision in 18 U.S.C. §2516(1) for approval of an interception application by the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Attorney General "was intended to play a central role in the statutory scheme and that suppression must follow when this statutory requirement has been ignored", see United States v. Giordano, 416 U.S. 505 (1974), but that suppression is not required where the application and order incorrectly state that the authorization had been given by a specially designated Assistant Attorney General, see United States v. Chavez, 416 U.S. 562 (1974).

9-7.763 Probable Cause

An attack on the affidavit sometimes takes the form of an allegation of insufficiency of probable cause. General discussion of probable cause sufficiency may be found in USAM 9-4.100 *et seq.* (search and seizure). The cases listed below deal with the quantum of probable cause required in electronic interception situations. See United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973); United States v. Poeta, 455 F.2d 117, 121-22 (2d Cir. 1972), cert. denied, 406 U.S. 948 (1972); United States v. LaGorga, 336 F. Supp. 190, 193 (W.D. Pa. 1971); United States v. King, 335 F. Supp. 523, 532-37 (S.D. Cal. 1971); United States v. Becker, 334 F. Supp. 546, 549-50 (S.D.N.Y. 1971); United States v. Leth, 332 F. Supp. 1357, 1361-62 (M.D. Pa. 1971); United States v. Scott, 331 F. Supp. 233, 242-44 (D. D.C. 1971); Dudley v. United States, 320 F. Supp. 456, 458-60 (N.D. Ga. 1970); United States v. Escandar, 319 F. Supp. 295, 304 (S.D. Fla. 1970). Another comment regarding probable cause appears in USAM 9-7.160, *supra*.

9-7.764 Minimization

As previously noted, 18 U.S.C. §2518(5) provides that every interception order must require that the interception be conducted in such a way as to minimize the interception of communications not subject to interception. The burden of making a *prima facie* showing of minimization rests on the government. See United States v. Rizzo, 491 F.2d 215, 217, n. 7 (2d Cir. 1974). However, the court is not required to hold a full adversary hearing on the issue of minimization. It may, for example, deny a defense motion to suppress on the basis that affidavits, supplemented by logs and tapes, make the necessary showing. See United States v. Cirillo, 499 F.2d 872, 880-881 (2d Cir. 1974).

The minimization requirement is a creature of statute, United States v. Cox, 462 F.2d 1293, 1300 (8th Cir. 1972), and the court decisions view the statute's minimization command as requiring a case-by-case analysis of the reasonableness of a particular interception. See United States v. Quintana, *supra*; United States v. Quintana, *supra*; United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Armocida, 515 F.2d 49 (3d Cir. 1975); United States v. Scott, 516 F.2d 751, (D.C. Cir. 1975). The requirement only reaches those conversations which are not likely to lead to the discovery of any searched-for evidence. United States v. Bynum, 360 F. Supp. 400, 409 (S.D.N.Y. 1973), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974). Also, in United States v. Kahn, 415 U.S. 143, 903 (1974). Also in United States v. Kahn, 415 U.S. 143, 154 (1974), the Supreme Court expressed the view that the minimization requirement is a duty "to execute the warrant in such a manner as to minimize the interception of any innocent conversations." (Underscoring added).

In view of the foregoing, it is considered that the minimization provision stems from a legislative as distinguished from a constitutional source, that the provision is to be broadly construed in favor of the interception of conversations having investigative value, and that the statute is not necessarily transgressed by the interception of innocent conversations.

In determining whether the requirement of minimization has been satisfied, courts have established specific factors for evaluation. United States v. Bynum, supra, at 410. The character of the criminal enterprise is such a factor. For the nature of the activity, its complexity and size, its geographical reach, and similar considerations all bear on the conduct of an interception. See United States v. Quintana, supra, at 874; United States v. Armocida, 515 F.2d 29 (3d Cir. 1975); United States v. James, 494 F.2d 1007, 1019 (D.C. Cir. 1974); United States v. Scott, supra.

The purpose of the investigation may be a critical factor in determining the authorized scope of the interception. Where an objective of the interception is to define the scope of criminal activity, or to identify unknown conspirators, or to obtain information on the operation of an illegal business, the parameters of interception are much broader than when an interception is instituted for a narrow, limited purpose. See United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973); cert. denied, 417 U.S. 936 (1974); accord: United States v. Quintana, supra, at 874; United States v. James, supra, at 1021; United States v. Chavez, 533 F.2d 491 (9th Cir. 1976).

Courts have also considered whether the government could have developed screening instructions based on the expected content of communications as a factor bearing upon minimization. For example, if, at the time of the initiation of the interception, the government knows all the persons who are suspected of the criminal offense, it can tailor its minimization efforts to avoid monitoring incoming or outgoing calls involving other persons; similarly, if the government knows during what

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

time of the day the telephone will be used for criminal activity, it can avoid intercepting calls at other times. Such considerations affect the initial minimization tactics employed by the government, but the interception policy may be expanded or contracted to conform with investigative requirements as the interception continues. See United States v. James, *supra*, at 1020. On the other hand, where the government does not, at the outset, have reason to believe that any identifiable group of calls will be innocent, it may be reasonable to monitor all calls until a pattern of innocent calls develops. Such a pattern may not always be identifiable, however, because it is often impossible to determine that a particular conversation would be irrelevant and innocent until it has been concluded. See United States v. Quintana, *supra* at 874; accord: United States v. Armocida, *supra*, at 53; United States v. Bynum, 485 F.2d 490, 500 (2d Cir. 1973); United States v. Manfredi, *supra*, at 600; United States v. Chavez, *supra*; United States v. Scott, *supra*.

The use of code words, cover-up jargon, or other evasive tactics, particularly in a narcotics conspiracy, makes investigation difficult and necessitates more detailed and extensive monitoring of conversations. See United States v. James, *supra*, at 1019-1020, accord: United States v. Quintana, *supra*, at 874, n. 7; United States v. Cox, *supra*, at 1300-1301; United States v. Manfredi, *supra* at 600; United States v. Scott, *supra*, at 751; United States v. Chavez, *supra*. Accordingly, the interception of all telephone communications for such time as is appropriate where evasive tactics are used does not constitute a failure to minimize. See United States v. Manfredi, *supra* at 600.

Another important factor is that of judicial supervision. Where a judge has required and reviewed reports at specified intervals, courts have been inclined to find that the minimization requirement has not been violated. See United States v. Quintana, *supra*, at 875; United States v. Armocida, *supra*, at 32; United States v. Bynum, *supra*, at 410; United States v. James, *supra*, at 1021; United States v. Cox, *supra*, at 1301; United States v. Bynum, *supra*, at 501; United States v. Scott, *supra*, at 751; United States v. Chavez, *supra*.

In analyzing the overall interception, courts have said that telephone conversations of brief duration do not permit intercepting agents sufficient opportunity to identify the caller and characterize the conversation. See United States v. Scott, 504 F.2d 194, 198 (D.C. Cir. 1974). Interceptions of such conversations completed in less than 2 minutes cannot be considered unreasonable. See United States v. Bynum, *supra*, at 500; accord: United States v. Scott, *supra*, at 516 F.2d 751. Moreover, calls between known coconspirators may be monitored in their entirety, for relevant information may emerge at any point in a call.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Where one of the parties is a known conspirator, the monitoring of his/her conversations may be more extensive than if he/she were not suspected, at least during the early phases of the interception; by listening to such calls, agents can effect the screening of unknown parties. The interception of communications of suspected conspirators is similarly appropriate until their complicity can be determined. See United States v. Bynum, 360 F. Supp. 400, 416 (S.D.N.Y. 1973), aff'd., 485 F.2d 490 (2d Cir.) vacated on other grounds, 417 U.S. 903 (1974). One court has viewed the brief length of time an interception was in operation as having a substantial bearing on whether the minimization was reasonable. It considered one of the most obvious indicia of minimization to be termination of the entire interception within a relatively short time. See United States v. Chavez, supra.

9-7.765 Suppression of Communications

Only violations which are basic to the protection of Title III require suppression of intercepted communications. When a court grants a motion based on the grounds of lack of proper authorization under 18 U.S.C. §2516(1) or lack of probable cause, it will usually suppress all the fruits of the interception. See United States v. Giordano, supra.

In other situations, the suppression should be tailored to the degree required to provide an appropriate remedy. For example, the remedy for failure to minimize the interception of a communication, is suppression of that communication, not suppression of the entire interception. See United States v. Cox, 462 F.2d 1293 (8th Cir. 1972); United States v. Scott, supra, at 751, n. 19; United States v. Sisca, 361 F. Supp. 735, 746-47 (S.D.N.Y. 1973); aff'd., 503 F.2d 1337 (2d Cir. 1974); United States v. Bynum, supra, at 403-04, n. 3; United States v. Mainello, 345 F. Supp. 863, 874-77 (E.D. 1972); United States v. LaGorga, 336 F. Supp. 190, 196-97 (W.D. Pa. 1971); United States v. King, 335 F. Supp. 523, 543-45 (S.D. Cal. 1971), rev'd. on other grounds, 478 F.2d 494 (9th Cir. 1973); See United States v. Askins, 351 F. Supp. 408, 415 (D. Md. 1972); United States v. Leta, 332 F. Supp. 1357, 1360 (M.D. Pa. 1971); United States v. Principe, 531 F.2d 1132 (2d Cir. 1976). 18 U.S.C. §2515 must be read in the light of 18 U.S.C. §2518(10)(a). These provisions were not intended to press the scope of the suppression role beyond present search and seizure law. See Senate Report, at 96. See also Nardone v. United States, 302 U.S. 379 (1937); Nardone v. United States, 127 F.2d 521 (2d Cir.), cert. denied, 316 U.S. 698 (1942); Wong Sun v. United States, 371 U.S. 471 (1963).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.766 Requisite Necessity

The statute requires a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." See 18 U.S.C. §2518(1)(c). While the circuits are uniform in condemning purely conclusory affidavits that merely track the statutory language, they vary in the amount of detail necessary in the affidavit to meet the requirement of requisite necessity. Electronic surveillance need not be a tool of last resort but the affidavit must specifically demonstrate the limitations of normal investigative techniques. See United States v. Southard, 700 F.2d 1 (1st Cir.), cert. denied, 52 U.S.L.W. 3262 (1983); United States v. Robinson, 698 F.2d 448 (D.C. Cir. 1983); United States v. Lilla, 699 F.2d 99 (2d Cir. 1983); United States v. Vento 533 F.2d 833 (3d Cir. 1976); United States v. Webster, 639 F.2d 174 (4th Cir. 1981); United States v. Cifarelli, 589 F.2d 180 (5th Cir. 1979); United States v. Landmesser, 553 F.2d 17 (6th Cir.), cert. denied, 434 U.S. 855 (1977); In re Demonte, 674 F.2d 1169 (7th Cir. 1982); United States v. Jackson, 549 F.2d 517 (8th Cir. 1977); United States v. Martinez 588 F.2d 1227 (9th Cir. 1978); United States v. Johnson, 645 F.2d 865 (10th Cir.) cert. denied, 454 U.S. 866 (1981); United States v. Messersmith, 692 F.2d 1315 (11th Cir. 1982).

9-7.800 TRIAL

9-7.810 Preliminary Preparation

Composite tapes and transcripts should be prepared well in advance of trial. In addition, the trial attorney should decide what matters should be the subject of stipulation and judicial notice. One desirable stipulation relates to use of the composite tape. Such a stipulation will facilitate the trial because the agent operating the playback machine will not have to change reels or skip around within reels to play pertinent conversations. To this end, a copy of the composite tape might be delivered to the defense for examination and comparison. The interception order is an item which should be listed for judicial notice.

9-7.820 Pre-Trial Conference

In a case utilizing Title III wiretape evidence, a pre-trial conference is most desirable, particularly if the case is before a judge who has never presided over such a wiretap trial. A pre-trial conference

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

will make it possible for the attorneys on both sides to discuss with the judge the problems that they anticipate will arise, and it is suggested that a trial brief be prepared in support of the position to be taken with respect to the admissibility of the tape recordings and transcripts, competence of a layperson to identify a voice, and other possible legal issues. The trial brief should be presented at the pre-trial conference in order to give the judge sufficient time to review it.

At the time of the pre-trial conference, there should also be a discussion of the physical problems, if any, deriving from the use of electronic equipment in the courtroom. The type of equipment to be used will, of course, vary based upon local conditions and agency capability, but the placement of available equipment can be worked out in advance. Also, a test for acoustical problems might be advisable, particularly in older courthouses.

Another matter which can be resolved at a pre-trial conference is the inclusion of a voir dire question concerning prospective jurors' feelings on the use of court-authorized electronic surveillance. Two sample questions are included in USAM 9-7.970, infra. Finally, at the pre-trial conference, every attempt should be made to arrive at stipulations concerning facts not in dispute, such as the data reflected by telephone company records. A stipulation as to the contents of not only the subscriber records but also installation records and toll call records would eliminate the testimony of at least one and perhaps several telephone company employees. A sample stipulation as to subscriber records is contained in USAM 9-7.980, infra.

9-7.830 Presentation of Government's Case-In-Chief

The following outline suggested for presentation of the government's case lists various witnesses who may not be necessary if stipulations have been obtained. It appears that courts which have never heard a trial involving Title III material tend to require more explicit testimony concerning the technical and electronic process than courts which are familiar with the procedures.

Generally, the following order of witnesses will be the most efficient:

A. Case Agent. This witness should briefly describe the investigation leading up to the application for the Title III, including an explanation of the nature and subjects of the investigation. The case

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

agent is usually the affiant for the Title III affidavit and can testify as to the application process and the signing of the order. At this point, for purposes of continuity, it might be best to have the case agent step down subject to recall to continue his/her testimony later in the trial. In this preliminary testimony, it is suggested that the attorney attempt to lay the foundation as to relevancy of the tape recordings not only to the defendants but also to the violations charged.

B. Chief of Security or other Security Representatives of the Telephone Company. The testimony of this witness should cover the matters leading up to the connection of the interception wires, including the serving of process, and the technical assistance that was furnished to the investigative agency by the telephone company. He/she may also be used to define certain technical terms and procedures peculiar to the telephone company.

C. Technical Agent. This witness should testify concerning the obtaining of technical information and assistance from the telephone company and that, subsequent to the entry of the court order, he/she performed the steps necessary to conduct an electronic surveillance of the specified telephone lines. He/she should also testify that he/she tested the connection to insure monitoring of the correct telephone and concerning procurement, setting up, and testing of the interception and recording equipment. In most jurisdictions, this agent is also the person in charge of duplication of the tapes and is often the custody agent, although occasionally the custody will rest primarily with the supervising agent. When these duties are all performed by the technical man, he/she will describe the overall system of custody of the tapes, beginning with the placement of the unused tape on the machine at the beginning of the monitoring day, its removal at the conclusion of the day, the procedures utilized by him/her in the duplication of the tape, and the subsequent handling of both the original tape and the duplicate, including the court-ordered sealing of the original tapes. The technical agent generally instructs all monitoring agents in the operation of the recording machines, and therefore, testimony from the supervising agent and the technical agent as to the procedures followed in the interception and recording of conversations should be sufficient. In certain instances, courts have required testimony from monitoring agents, including their explanation of the making of the logs.

D. Supervising Agent. If the supervising agent is the witness for chain of custody, he/she should be called for testimony to show not only custody but the fact that the tapes were never edited or altered. The supervising agent may also be in a position to testify that he/she

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

compared the composite tape with the original and that it is an exact copy of the portions included in the composite. Additionally, he/she should be able to testify as to the procedures utilized in preparing the transcripts and to the fact that he/she compared the transcripts to the tapes and the transcripts accurately reflect the recorded conversations. If a composite tape is used, it will also be necessary to adduce evidence establishing the authenticity and accuracy of its contents.

9-7.840 Playback of Tapes for the Jury

The type of equipment utilized for the playing of the tapes will vary, depending upon agency capability and local courtroom conditions. The acoustics should be tested prior to trial if a speaker system is to be used. If headsets are to be used, care should be taken to insure that the jurors are instructed to raise their hands in case of a malfunction of equipment.

9-7.850 Voice Identification

There are several ways to conduct voice identification at trial. One is to use an agent who is familiar with the voice of one or both of the parties to the conversation. See United States v. Turner, 528 F.2d 143, 163 (1975); United States v. James, 494 F.2d 1007 (D.C. Cir. 1974); United States v. Turner, 485 F.2d 976 (D.C. Cir. 1973). Another method is to use a party to the conversation as the witness. A third method is to use as a witness a person who is familiar with the voice of the defendant as it sounds over the telephone, such as friends of the defendant who had talked with him/her on numerous occasions over the telephone. When utilizing the latter two methods, it is advisable to memorialize their expected testimony by sworn affidavit or grand jury testimony or both.

The use of spectrographs for purposes of voice identification without corroborating evidence is discouraged. There is no objection to their use in conjunction with other means of identification.

Although voice identification is used, corroborating evidence, such as telephone subscriber records showing the phone listed to the defendant, surveillances putting the defendant at the place of interception, and the like should be used to confirm the voice identification. Circumstantial evidence of voice identity is sufficient in itself to support a conviction. See United States v. Kohne, *supra*; United States v. Iannelli, 477 F.2d 999 (3d Cir. 1973), *aff'd*, 420 U.S. 770 (1975). See also United States v. Turner, 485 F.2d 976, 979 (D.C. Cir. 1973).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It is helpful to use transcripts as an aid to the jury during the playing of the tapes. When this occurs, the voice identification agents must be prepared to testify that they compared the transcripts to the tapes and the transcript identification is identical to their identification of the voices of the respective defendants. Allowed in United States v. Kohne, *supra*; United States v. Vigi, 363 F. Supp. 314 (E.D. Mich. 1973).

9-7.860 Transcripts

The necessary foundation for the transcripts can generally be provided through the testimony of the supervising agent. In attempting to utilize transcripts for purposes of voice identification, it is suggested that the following procedure be employed:

A. Have the parties to each conversation identified on the transcripts;

B. Have this identification made by the person who would be the voice identification witness at trial;

C. Have each voice identification witness explain how he/she became familiar with the voice of the person he/she identified; and

D. Have the witness verify his/her identification of parties as noted on the transcript.

The above, in addition to the supervising agent's testimony as to the method of preparation of the transcripts, should provide the proper foundation for introduction of the transcripts.

9-7.870 Use of Expert Witnesses

The expert can be utilized for various purposes. Among them are the interpretation of the tapes, including definitions of terms used in the particular illegal business, and the analysis of seized records. He/she can be called either at the end of the trial, or during the playing of the tapes. The latter is not only more efficient but also more effective, as it permits analysis of terminology and opinions based on facts established by the intercepted communications. When the expert is called at the end of the trial and is asked to interpret a specific communication, he/she may refer to it by the time of interception and some distinctive words or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

phrases used, or, by transcript page number. If the latter method is followed, the jury should have the transcript in its possession at the time of his/her testimony.

If he/she is to be called at the end of the trial, the expert should be exempted from the witness exclusion rule for the limited purpose of being in the courtroom while the tapes are being played to the jury. Such a procedure avoids the question of whether the expert heard the same tapes that the jury heard.

The following items should normally be covered in testimony from an expert witness in a gambling case:

- A. Definitions of gambling terminology and "jargon";
- B. General description of the operation;
- C. The relationship of the specific operation to the general description;
- D. A call-by-call analysis;
- E. Relationship between tapes and records seized;
- F. Gross volume or continuity of existence or both; and
- G. Analysis of flash paper, or water soluble paper.

Another method of interpretation of tapes is to utilize as a witness one who was a party to a conversation. Such a witness can cogently explain the nature of the conversation and what was meant by the particular words or terms used during the conversation. However, these witnesses are generally reluctant, and it is often easier to use an expert.

Once the expert has testified as to the meaning of various terms and the significance of certain types of conversations, it is not necessary for him/her to provide the same testimony as to every conversation.

9-7.880 Instruction and Charge Conference

A request that frequently comes back from the jury after it has retired for deliberation is to have certain of the tapes replayed. Certain judges will not permit this, although the government's position

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

has generally been that it is legally proper to permit a replaying, just as it is proper to permit the jurors to look at documentary evidence. In any event, while at the charge conference, the judge's position on this issue should be determined. If the judge's decision is to not permit the replaying, the jury should be informed before it retires that it will not be permitted to hear the tapes again.

The only instruction peculiar to cases involving the use of Title III is one relating back to the voir dire question concerning jurors' feelings on the use of evidence derived from court-authorized electronic surveillance. A proposed instruction is included in USAM 9-7.990, infra.

9-7.900 FORMS

9-7.910 Form Interception Applications

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION )  
OF THE UNITED STATES FOR AN ORDER )  
AUTHORIZING THE INTERCEPTION OF )  
(WIRE) (ORAL) COMMUNICATIONS )

APPLICATION

\_\_\_\_\_, an attorney of the United States Department of Justice, being duly sworn, states:

A. He/she is an "investigative or law enforcement officer--of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is--an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

B. Pursuant to Section 2516 of Title 18, United States Code, the Assistant Attorney General of the \_\_\_\_\_ Division, United States Department of Justice, having been specially designated by the Attorney General pursuant to Order Number 931-81 of January 19, 1981, has approved this application for an order authorizing the interception of (wire) (oral) communications. Attached to this application is a copy of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Order Number 931-81 of January 19, 1981, specially designating the Assistant Attorney General of the \_\_\_\_\_ Division to approve applications for court orders authorizing interception of wire or oral communications. Also attached is a copy of the Assistant Attorney General's memorandum of authorization, approving this application.

C. This application seeks authorization to intercept (wire) (oral) communications of \_\_\_\_\_ and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is--offenses involving [the transmission, by means of an interstate wire facility, of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code,] [ \_\_\_\_\_ ] which have been committed and are being committed by \_\_\_\_\_ and others as yet unknown.

D. He/she has discussed all the circumstances of the above offenses with Special Agent \_\_\_\_\_ of the \_\_\_\_\_ office of the [Federal Bureau of Investigation] [ \_\_\_\_\_ ] who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent \_\_\_\_\_ (attached to this application as Exhibit C and incorporated by reference herein) which alleges the facts therein in order to show that:

1. There is probable cause to believe that \_\_\_\_\_ and others as yet unknown have committed and are committing offenses involving [the transmission, by means of (an) interstate facilit(y) (ies), of gambling and wagering information by a person engaged in the business of gambling, in violation of Title 18, United States Code, Section 1084, and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling), in violation of Section 1952 of Title 18, United States Code, and a conspiracy to commit such offenses in violation of Section 371 of Title 18, United States Code] [ \_\_\_\_\_ ];

2. There is probable cause to believe that particular (oral) (wire) communications of \_\_\_\_\_ and others as yet unknown concerning these offenses will be obtained through the interception for which authorization is herewith applied. In particular, these (wire) (oral) communications will concern the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

[interstate transmission of gambling information related to horse-race results and the dissemination of such information to persons engaged in the unlawful business of gambling, the identity of the participants, the precise nature and scope of the illegal activity, and the relationships of the enterprise with other gambling activities] [ ]. In addition, the communications are expected to constitute admissible evidence of the commission of the offenses;

3. The attached affidavit contains a full and complete statement explaining why normal investigative procedures either have been tried and have failed or reasonably appear unlikely to succeed if continued, or reasonably appear unlikely to succeed if tried;

4. There is probable cause to believe that the [specified] [telephone(s) subscribed by \_\_\_\_\_ and located at \_\_\_\_\_ and carrying telephone number(s)] (has) (have) been used and (is) (are) being used by \_\_\_\_\_ and others as yet unknown in connection with the commission of the above-described offenses.

E. (No previous application to any judge for authorization to intercept, or for approval of interception of, wire or oral communications involving any of the same persons, facilities, or places specified in this application are known to the individual authorizing and making this application.) (The following is) (The attached affidavit contains) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making this application made to any judge for authorization to intercept, or for approval of interceptions, or wire or oral communications involving any of the same persons, facilities, or places specified in this application, and the action taken by the judge on each such application).

WHEREFORE, your affiant believes that probable cause exists to believe that \_\_\_\_\_ and others as yet unknown are engaged in the commission of offenses involving the transmission of gambling and wagering information of an interstate wire facilit(y) (ies) by a person engaged in the business of gambling and the use of interstate telephone communication facilities for the transmission of betting information in aid of a racketeering enterprise (gambling) and a conspiracy to do so] [\_\_\_\_]; that \_\_\_\_\_ and others as yet unknown have used, and are using the [premises \_\_\_\_\_] [telephone(s) subscribed to by \_\_\_\_\_, located at \_\_\_\_\_ and bearing number(s) \_\_\_\_\_] in connection with the commission of the above-described offenses; that communications of \_\_\_\_\_ and others as yet unknown concerning these offenses will \_\_\_\_\_

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

be intercepted [at \_\_\_\_\_] [to and from the above-described telephone(s)]; and that normal investigative procedures appear unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent \_\_\_\_\_, attached thereto, affiant requests this court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the [Federal Bureau of Investigation] [\_\_\_\_\_] to intercept (wire) (oral) communications [at \_\_\_\_\_] [to and from the above described telephone(s)] until communications are intercepted which reveal the manner in which \_\_\_\_\_ and others as yet unknown participate in the [illegal use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (gambling)] [\_\_\_\_\_] and which reveal the identities of his/her confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of \_\_\_\_\_ days from the date of that order, whichever is earlier.

[It is further requested that the order authorize surreptitious entry of the premises for the purpose of installing, maintaining and removing any electronic oral interception devices utilized pursuant to the authority granted by its order.]

[It is further requested that this court issue an order pursuant to Section 2518(4)(e) of Title 18, United States Code, directing that the [Name of telephone company], a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such a carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the [Name of telephone company] to be compensated for by the applicant at the prevailing rates. [This order to communication common carrier is a separate abbreviated order and a sample is found in USAM 9-7.924, infra.]]

---

Subscribed and sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

SPECIAL DESIGNATION OF ASSISTANT ATTORNEYS GENERAL  
TO AUTHORIZE APPLICATIONS FOR COURT ORDERS AND  
TO APPROVE EMERGENCY INTERCEPTION OF WIRE AND  
ORAL COMMUNICATIONS UNDER CHAPTER 199,  
TITLE 18, UNITED STATES CODE

Order No. 931-81

By virtue of the authority vested in me by 28 U.S.C. §509, 510, 5 U.S.C. §301, and 18 U.S.C. §§2516, 2518(7), I hereby specially designate the Assistant Attorney General in charge of the Criminal Division, the Assistant Attorney General in charge of the Tax Division, the Assistant Attorney General in charge of the Office of Legal Counsel, and the Assistant Attorney General in charge of the Antitrust Division (1) to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for the investigation of the offense as to which such application is made, when such interception may provide evidence of any of the offenses specified in Section 2516 of Title 18, United States Code, and (2) when I am not in the District of Columbia or am otherwise not available to exercise the power conferred by Section 2518(7) of Title 18, United States Code, to approve an emergency interception of wire or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

oral communications in accordance with the statutory requirements. Provided, that the Assistant Attorney General in charge of the Tax Division is authorized to exercise the power herein conferred only when the Assistant Attorney General in charge of the Criminal Division is not in the District of Columbia or is otherwise not available. Provided further, that the Assistant Attorney General in charge of the Office of Legal Counsel is authorized to exercise the power conferred only when both the Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney General in charge of the Tax Division are not in the District of Columbia or are otherwise not available. Provided further, that the Assistant Attorney General in charge of the Antitrust Division is authorized to exercise the power herein conferred only when the Assistant Attorney General in charge of the Tax Division, the Assistant Attorney General in charge of the Criminal Division and the Assistant Attorney General in charge of the Office of Legal Counsel are not in the District of Columbia or are otherwise not available.

Order No. 799-78 of August 15, 1978 is revoked.

Date: 1/19/81

/s/ Benjamin R. Civiletti  
Attorney General



**Office of the Attorney General**  
**Washington, D. C. 20530**

**SPECIAL DESIGNATION OF ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION OF JUSTICE TO AUTHORIZE APPLICATIONS FOR COURT ORDERS AND TO APPROVE EMERGENCY INTERCEPTIONS OF WIRE AND ORAL COMMUNICATIONS UNDER CHAPTER 119, TITLE 18, UNITED STATES CODE**

Order No. 934-81

Section 1. By virtue of the authority vested in me as Attorney General by 28 U.S.C. 509, 510, 5 U.S.C. 301, and 18 U.S.C. 2516, 2518(7) I hereby specially designate the Assistant Attorney General in charge of the Office for Improvements in the Administration of Justice (1) to exercise the power conferred by Section 2516 of Title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications by the Federal Bureau of Investigation or a Federal agency having responsibility for the investigation of the offense as to which such application is made, when such interception may provide evidence of any of the offenses specified in Section 2516 of Title 18, United States Code, and (2) when I am not in the District of Columbia or am otherwise not available, to exercise the power conferred by Section 2518(7) of Title 18, United States Code, to approve an emergency interception of wire or oral communications in accordance with the statutory requirements.

MAY 9, 1984  
Ch. 7, p. 79

Sec. 2. Attorney General Order No. 931-81 of January 19, 1981 is hereby corrected, effective January 19, 1981, by deleting from the sixth line on the second page thereof the number "2510(7)," a typographical error, and substituting therefor "2518(7)." Attorney General Order No. 931-81 remains in effect.

Sec. 3. The designation made in Sec. 1 of this order shall terminate at such time as an Assistant Attorney General in charge of the Criminal Division, appointed with the advice and consent of the Senate, enters upon duty.

Date

Feb 27, 1981

  
William French Smith  
Attorney General

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.920 Form Interception Order

9-7.921 Form Interception Order--Standard

UNITED STATES DISTRICT COURT  
\_\_\_\_\_  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION :  
OF THE UNITED STATES FOR AN ORDER :  
AUTHORIZING THE INTERCEPTION OF :  
(WIRE) (ORAL) COMMUNICATIONS :

ORDER

AUTHORIZING INTERCEPTION OF (WIRE) (ORAL) COMMUNICATIONS

Application under oath having been made before me by \_\_\_\_\_,  
on "investigative or law enforcement officer" as defined in Section 2510  
of Title 18, United States Code, for an order authorizing the interception  
of (wire) (oral) communications pursuant to Section 2518 of Title 18,  
United States Code, and full consideration having been given to the  
matters set forth therein, the court finds:

A. There is probable cause to believe that \_\_\_\_\_ and  
others as yet unknown have committed and are committing offenses involving  
[the transmission, by means of (an) interstate wire facilit(y) (ies), of  
gambling and wagering information by a person engaged in the business of  
gambling, in violation of Title 18, United States Code, Section 1084, and  
the use of interstate telephone communication facilities for the  
transmission of betting information in aid of a racketeering enterprise  
(gambling), in violation of Section 1952 of Title 18, United States Code,  
and are conspiring to commit such offenses in violation of Section 371 of  
Title 18, United States Code] [\_\_\_\_\_].

B. There is probable cause to believe that particular (wire) (oral)  
communications concerning these offenses will be obtained through the  
interception for which authorization is herewith applied. In particular,  
these (wire) (oral) communications will concern the [interstate  
transmission of gambling information related to horse-race results and the  
dissemination of such information to persons engaged in the unlawful  
business of gambling, the identity of the participants, the precise nature  
and scope of the illegal activity, and the relationships of the enterprise  
with other gambling activities] [\_\_\_\_\_]. In addition, the  
communications are expected to constitute admissible evidence of the  
commission of the offenses.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. Normal investigative procedures either have been tried without success and reasonably appear unlikely to succeed if continued or reasonably appear unlikely to succeed if tried.

D. There is probable cause to believe that [the telephone subscribed to by \_\_\_\_\_ and located in premises at \_\_\_\_\_ and carrying telephone number(s) \_\_\_\_\_] [premises \_\_\_\_\_] (has) (have) been and (is) (are) being used by \_\_\_\_\_ and others as yet unknown in connection with the commission of the above-stated offenses.

WHEREFORE, it is hereby ordered that the [investigative agency] is authorized, pursuant to application authorized by the Assistant Attorney General of the \_\_\_\_\_ Division, the Honorable \_\_\_\_\_, pursuant to the power delegated to the Assistant Attorney General of the \_\_\_\_\_ Division by special designation of the Attorney General under the authority vested in him/her by Section 2516 of Title 18, United States Code: to intercept (wire) (oral) communications of \_\_\_\_\_ and others as yet unknown concerning the above-described offenses [to and from the telephone(s) subscribed to by \_\_\_\_\_ and bearing telephone number(s) \_\_\_\_\_] [from the premises known as \_\_\_\_\_] located at \_\_\_\_\_. Such interception shall not automatically terminate when the type of communication described above in paragraph (B) has first been obtained but shall continue until communications are intercepted which reveal the manner in which \_\_\_\_\_ and others as yet unknown participate in the illegal use of interstate telephone facilities for the transmission of betting information in aid of a racketeering enterprise (gambling)] [ ] and which reveal the identities of (his) (her) (their) confederates, their places of operation, and the nature of the conspiracy involved therein, or for a period of \_\_\_\_\_ days from the date of this order, whichever is earlier.

[It is further ordered that special agents of the (Federal Bureau of Investigation) ( ) are authorized to enter the foregoing premises surreptitiously for the purposes of installing, maintaining, and removing any electronic oral interception devices utilized pursuant to the authority granted by this order.]

PROVIDING THAT, this authorization to intercept (wire) (oral) communications shall be executed as soon as practicable after the signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

attainment of the authorized objective or, in any event, at the end of \_\_\_\_\_ ( ) days from the date of this order.

PROVIDING ALSO, that \_\_\_\_\_ shall provide the court with a report on or about what \_\_\_\_\_ and \_\_\_\_\_ days following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
Date

9-7.922 Form Proviso to Order When Interception is of Coin Operated  
Public Telephones

Providing that the above-described wire communications to and from the coin-operated public telephone(s) bearing number(s) \_\_\_\_\_ may be monitored only when it has been determined by surveillance that \_\_\_\_\_ [is using the telephone] [is within the premise in which the telephone(s) (are) (is) located and may be intercepted only when it has been determined by voice identification that \_\_\_\_\_ is a party to the conversation.]

9-7.923 Form Proviso to Order When Prospective Interceptee is Under  
Indictment

PROVIDING FURTHER THAT, particular care will be exercised to avoid the interception of any conversation of a person under criminal indictment which pertains to his/her culpability in relation to his/her indictment or the strategy which he/she contemplates employing in his/her defense.

9-7.924 Form Common Carrier Order

IN RE: APPLICATION OF THE UNITED :  
STATES FOR AN ORDER AUTHORIZING THE : MISC. NO.  
INTERCEPTION OF WIRE COMMUNICATIONS :

\_\_\_\_\_  
MAY 9, 1984  
Ch. 7, p. 83

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

ORDER

This matter having come before the Court pursuant to the application of the United States for the interception of wire communications on telephone numbers \_\_\_\_\_ and subscribed to by \_\_\_\_\_ at \_\_\_\_\_.

IT APPEARING that the Court, having reviewed the application and having found that it conforms in all respects to the requirements of Title 18, United States Code, Sections 2516 and 2518, has this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, signed an Order conforming to the provisions of Title 18, United States Code, Section 2518, authorizing special agents of the Federal Bureau of Investigation to accomplish the aforesaid interception, and

IT FURTHER APPEARING THAT (name of communication carrier) of \_\_\_\_\_ is a communication common carrier within the meaning of Title 18, United States Code, Section 2510(10), and

IT FURTHER APPEARING that the applicant has requested that (name of communication carrier) or \_\_\_\_\_ be directed to furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish this interception unobtrusively and with minimum interference to the service to be intercepted, it is by the Court this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_,

ORDERED THAT (name of communication carrier) of \_\_\_\_\_ shall furnish the Federal Bureau of Investigation such information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service presently accorded persons whose communications are to be intercepted, and

FURTHER ORDERED that the furnishing of any such facilities or technical assistance by (name of communication carrier) of \_\_\_\_\_ be compensated by the applicant at the prevailing rates, and

FURTHER ORDERED that the furnishing of said information, facilities, and technical assistance shall terminate \_\_\_\_\_ days from the date of this Order unless otherwise ordered by this Court, and

FURTHER ORDERED that this Order is sealed and that (name of communication carrier) of \_\_\_\_\_, its agents and employees

1/ A modification of this form should be used where the assistance of a landlord, custodian or other person is required.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

shall not disclose to the listed subscribers for the said telephone numbers or to any other persons the existence of the Orders or this investigation until otherwise ordered by the Court.

\_\_\_\_\_  
United States District Judge

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

9-7.925 Application for Applying for Pen Register

UNITED STATES DISTRICT COURT

\_\_\_\_\_  
DISTRICT OF \_\_\_\_\_

IN THE MATER OF THE APPLICATION OF )  
THE UNITED STATES OF AMERICA FOR AN )  
ORDER AUTHORIZING THE INSTALLATION )  
AND USE OF A DEVICE TO REGISTER )  
TELEPHONE NUMBERS )

No. \_\_\_\_\_

APPLICATION

The United States of America, by its attorney(s) \_\_\_\_\_

A. Moves this Honorable court, pursuant to Federal Rules of Criminal Procedure, Rule 57(b) to grant an order authorizing the installation and use of a device to register telephone numbers dialed or pulsed ("dialed") from telephone number(s) \_\_\_\_\_, located at \_\_\_\_\_, and subscribed to by \_\_\_\_\_, and,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Moves this court, pursuant to the All Writs Act, 28 U.S.C. §1651(a), to direct the \_\_\_\_\_ Telephone Company of \_\_\_\_\_, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to forthwith furnish (agents of investigative agency) with all of the information, facilities, and technical assistance necessary to unobtrusively accomplish the installation and use of the registering device(s). In support of this application, the United States represents as follows:

1. \_\_\_\_\_ agents of the (investigative agency) have been engaged in a lengthy and extensive investigation of \_\_\_\_\_ (subjects) \_\_\_\_\_ for violations of federal laws, including \_\_\_\_\_.

2. It is believed that \_\_\_\_\_ (subjects) use telephone number(s) \_\_\_\_\_ located at \_\_\_\_\_ and subscribed to by \_\_\_\_\_ to discuss (his) (her) (their) criminal activit(y) (ies), and/or to further (his) (her) (their) criminal activit(y) (ies);

3. It is believed that information concerning the aforementioned offenses, additional co-conspirators, and the victims of those offenses will be obtained upon discovery of the numbers, locations, and subscribers of the telephone(s) being dialed from \_\_\_\_\_ (telephone number(s)).

WHEREFORE, it is respectfully requested that this court grant an order for a \_\_\_\_\_ ( ) period (1) authorizing the installation and use of a device to register numbers dialed from telephone number(s) \_\_\_\_\_, (2) directing the \_\_\_\_\_ Telephone Company of \_\_\_\_\_, a communication common carrier as defined Section 2510(10) of Title 18, United States Code, to forthwith furnish agents of the \_\_\_\_\_ with all information, facilities, and technical assistance necessary to accomplish the installation and use of the registering device(s) unobtrusively and with minimum interference to the service presently accorded persons whose communications are to be the subject of the registering device(s), and (3) sealing this application and the court's order.

Respectfully Submitted,

\_\_\_\_\_

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.926 Order for Applying for Pen Register

UNITED STATES DISTRICT COURT  
\_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION OF )  
THE UNITED STATES OF AMERICA FOR AN ) No.  
ORDER AUTHORIZING THE INSTALLATION )  
AND USE OF A DEVICE TO REGISTER )  
TELEPHONE NUMBERS )

ORDER

This matter having come before the court pursuant to the application of the United States of America, which application requested that an order be issued (1) authorizing the installation and use of a device to register telephone number dialed or pulsed ("dialed") from telephone number(s) \_\_\_\_\_ located at \_\_\_\_\_ and subscribed to by \_\_\_\_\_ and (2) directing the \_\_\_\_\_ Telephone Company of \_\_\_\_\_, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to forthwith furnish (agents of investigative agency) with all of the information, facilities, and technical assistance necessary to accomplish installation and use of the registering device(s) unobtrusively and with a minimum of interference with services that such carrier is presently according the person(s) whose communications are to be the subject of the registering device(s), and;

IT APPEARING that the application has been made in good faith in the furtherance of a pending criminal investigation, and it appearing that there is reason to believe that the aforementioned telephone(s) (are) (is) being and will continue to be used in connection with criminal activity,

IT IS ORDERED, pursuant to Federal Rules of Criminal Procedure, Rule 57(b), that \_\_\_\_\_ agents of the (investigative agency) are authorized to use and install the requested registering device(s) on the aforementioned telephone(s), and;

IT IS FURTHER ORDERED, pursuant to the All Writs Act, 28 U.S.C. §1651(a), that the \_\_\_\_\_ Telephone Company of \_\_\_\_\_ forthwith provide \_\_\_\_\_ agents of the (investigative agency) with all of the information, facilities, and

\_\_\_\_\_  
MAY 9, 1984  
Ch. 7, p. 87

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

technical assistance necessary to accomplish the installation and use of the registering device(s) unobtrusively and with a minimum of interference to the service(s) that such carrier is presently according the person(s) whose communications are to be the subject of the registering device(s), and;

IT IS FURTHER ORDERED that the \_\_\_\_\_ Telephone Company of \_\_\_\_\_ be compensated by the applicant at the prevailing rates, and;

IT IS FURTHER ORDERED that the normal operations of the \_\_\_\_\_ Telephone Company of \_\_\_\_\_ shall not be disrupted and;

IT IS FURTHER ORDERED that this order and application are sealed and that the \_\_\_\_\_ Telephone Company of \_\_\_\_\_, its agents, and its employees shall not disclose to the listed subscriber(s) of the said telephone number(s), nor to any other person, the existence of this application or order, or the existence of this investigation or of the device(s) used to accomplish the aforementioned registering, unless and until otherwise ordered by the court.

THIS ORDER, unless sooner renewed, will automatically terminate \_\_\_\_\_ days from today.

\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
Date

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.927 Form Trap and Trace Application

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE )  
APPLICATION OF THE UNITED )  
STATES OF AMERICA FOR AN )  
ORDER AUTHORIZING THE )  
INSTALLATION AND USE OF )  
A DEVICE TO TRAP AND )  
TRACE ORIGINATING TELEPHONE )  
NUMBERS )

No. \_\_\_\_\_

APPLICATION

The United States, by its attorney(s), moves this court pursuant to Federal Rules of Criminal Procedure, Rule 57(b), to grant an order (1) authorizing the installation and use of an electronic or mechanical device to trace and identify the telephone numbers of parties placing calls to telephone number(s) \_\_\_\_\_ located at \_\_\_\_\_ and subscribed to by \_\_\_\_\_ and (2) directing the \_\_\_\_\_ Telephone Company of \_\_\_\_\_, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to furnish forthwith \_\_\_\_\_ (agents of investigating agency) with all of the information facilities and technical assistance necessary to unobtrusively accomplish such tracing and identification, including installation and operation of the device. In support of this application, the United States represents as follows:

A. \_\_\_\_\_ (Special) \_\_\_\_\_ agents of the \_\_\_\_\_ (agency) have been engaged in an investigation of \_\_\_\_\_ (subject) for violations of federal laws, including \_\_\_\_\_;

B. It is believed that \_\_\_\_\_ (subject) \_\_\_\_\_ use(s) telephone number(s) located at \_\_\_\_\_ and subscribed to by \_\_\_\_\_ to discuss (his)(her)(their) criminal activity(ies), to conduct (his)(her)(their) criminal activity(ies), and/or to further (his)(her)(their) criminal activity(ies);

C. It is believed that information concerning the afore-mentioned offenses, additional co-conspirators, and the victims of these offenses

\_\_\_\_\_  
MAY 9, 1984  
Ch. 7, p. 89

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

will be obtained upon discovery of the numbers, locations and subscribers of the telephones from which \_\_\_\_\_ (target wire) \_\_\_\_\_ is called.

Wherefore it is respectfully requested that this court grant an order:

1. Authorizing the installation and/or use of an electronic or mechanical device to trace and identify the telephone numbers of, and provide the name and address of the subscriber of record to, each identified incoming call to telephone number(s) \_\_\_\_\_;

2. Directing the \_\_\_\_\_ Telephone Company of \_\_\_\_\_, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to forthwith furnish \_\_\_\_\_ (Special) agents of the \_\_\_\_\_ (agency) with all information, facilities, and technical assistance necessary to accomplish the tracing and identification, including installation and operation of the device, unobtrusively and with a minimum of disruption to normal telephone service;

3. Directing the \_\_\_\_\_ Telephone Company of \_\_\_\_\_ to provide \_\_\_\_\_ (Special) agents of the \_\_\_\_\_ (agency) at reasonable intervals during regular business hours with the results of the tracing and identification, including the telephone number of, and the name and address of the subscriber of record to, each identified incoming call to telephone number(s) \_\_\_\_\_ and, where possible, the time and duration of each such call; and

4. Further directing that the \_\_\_\_\_ Telephone Company of \_\_\_\_\_, its agents and employees shall not disclose to the listed subscriber(s) of the above-mentioned telephone number(s), nor to any other person, the existence of this order or of this investigation, unless otherwise ordered by the court.

Furthermore it is respectfully requested that the court's order be limited in the following respects:

a. The tracing operation shall be limited to Electronic Switching System (ESS) or No. 5 cross-bar facilities;

b. The tracing operation shall be restricted to tracing and recording only those calls originating from \_\_\_\_\_ ;

c. The tracing operation shall be restricted to the hours of \_\_\_\_\_ to \_\_\_\_\_ daily;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

d. The court's order shall be in effect for twenty (20) days from the time it is granted.

Respectfully Submitted,

---

9-7.928 Form Trap and Trace Order

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE )  
APPLICATION OF THE UNITED )  
STATES OF AMERICA FOR AN )  
ORDER AUTHORIZING THE )  
INSTALLATION AND USE OF )  
A DEVICE TO TRAP AND )  
TRACE ORIGINATING )  
TELEPHONE NUMBERS )

NO. \_\_\_\_\_

ORDER

This matter having come before the court pursuant to the application of the United States of America, which application requested that an order be issued (1) authorizing the installation and use of a device to trace and identify the telephone numbers of certain parties placing calls to telephone number(s) \_\_\_\_\_ located at \_\_\_\_\_ and subscribed to by \_\_\_\_\_ and (2) directing the \_\_\_\_\_ Telephone Company of \_\_\_\_\_, a communication common carrier as defined in Section 2510(10) of Title 18, United States Code, to forthwith furnish \_\_\_\_\_ (agents of investing agency) with all of the information, facilities and technical assistance necessary to unobtrusively accomplish the tracing and identification, and;

MAY 9, 1984  
Ch. 7, p. 91

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It appearing that the application has been made in good faith in furtherance of a pending criminal investigation, and it appearing that there is reason to believe that the telephone(s) from which incoming telephone calls are to be traced and identified (is) (are) being and will be used in connection with criminal activity,

It is ordered, pursuant to Federal Rules of Criminal Procedure, Rule 57(b), and the All Writs Act, 28 U.S.C. §1651(a), that the \_\_\_\_\_ Telephone Company is hereby authorized and ordered to:

A. Install and/or operate an electronic or mechanical device in order to trace and identify the telephone number or, and provide the name and address of the subscriber of record to, each identified incoming call to telephone number(s) \_\_\_\_\_, and, where possible, provide the time and duration of each such call;

B. Continue the operation of such tracing operation for a period not to exceed twenty (20) days from the date of this Order.

Provided, however, that the tracing operation be limited to telephone facilities employing ESS or No. 5 cross-bar switching facilities, and only those reasonably necessary to trace all calls originating from \_\_\_\_\_; provided further that the tracing operation can be conducted unobtrusively, with a minimum of disruption to normal telephone service; and that the tracing operation be limited to the hours of \_\_\_\_\_.

It is further ordered that:

1. The \_\_\_\_\_ Telephone Company will give to (Special) Agents of \_\_\_\_\_ all information gathered by reason of the Order at reasonable intervals while this Order is in effect.

2. The \_\_\_\_\_ (agency) will compensate and/or reimburse the \_\_\_\_\_ Telephone Company for all charges and/or expenses incurred in complying with this Order.

3. \_\_\_\_\_ Telephone Company, its agents and employees shall not disclose to the listed subscribers of the above-mentioned telephone number(s), nor to any other person, the existence of this order or of this investigation, unless otherwise ordered by the court.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

This order, unless sooner renewed, will terminate \_\_\_\_\_ days from now  
at \_\_\_\_\_ (time) on \_\_\_\_\_ (date) .

\_\_\_\_\_  
Judge

\_\_\_\_\_  
Date

DOJ - 1980-09

9-7.930 Form Sealing Order

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE )  
APPLICATION BY THE UNITED )  
STATES FOR AN ORDER )  
AUTHORIZING THE INTERCEPTION )  
OF (WIRE) (ORAL) )  
COMMUNICATIONS )

NO. \_\_\_\_\_

ORDER

Pursuant to the powers conferred upon this court by Section 2518 of Title 18, United States Code, on \_\_\_\_\_ (date) , this court issued its order authorizing special (agents) (investigator) of the \_\_\_\_\_ (agency) to intercept (wire) (oral) communications to and from certain (telephone facilities) (certain premises).

Such authorized interception of communications was finally terminated on \_\_\_\_\_ (date) .

The \_\_\_\_\_ (agency) through its agents, in accordance with requirements of Section 2518(8)(a) of Title 18, United States Code, has made the \_\_\_\_\_ (number) reels of tape recordings of such intercepted communications available to this court, now, therefore, it is

ORDERED:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. That said recordings be sealed and the seal verified by the signature of this court;

B. That (designated official and agency) is directed to maintain custody of said recordings for a period of 10 years beginning on this date;

C. That the said recordings shall not be destroyed except upon an order of this court, and in any event, said recordings shall be protected for the 10 year period set out above;

D. That said recordings shall be protected from editing or alteration;

E. That except as provided by Section 2517 of Title 18, United States Code, the contents of the said recordings shall be disclosed only upon the order of this court;

F. The application of the United States (Attorney) (Department of Justice Attorney) \_\_\_\_\_ (name) \_\_\_\_\_, the affidavit of \_\_\_\_\_ (agency) \_\_\_\_\_ (special agent) \_\_\_\_\_ (investigator) (name) \_\_\_\_\_, supporting documents thereto, periodic reports to this court, and the order entered by this court authorizing the interception of certin (wire) (oral) communications entered on \_\_\_\_\_ (date) \_\_\_\_\_, all of which have been previously placed in the custody of the clerk of the court under seal of this court, shall be disclosed only upon showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of this court, and in any event shall be kept for 10 years.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

\_\_\_\_\_  
Date

9-7.940 Forms Relating to Inventory

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.941 Form Report to Court Prior to Inventory

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION	)	
OF THE UNITED STATES FOR AN ORDER	)	NO. _____
AUTHORIZING THE INTERCEPTION OF	)	LIST OF INTERCEPTees AND
(WIRE) (ORAL) COMMUNICATIONS	)	PERSONS NAMED IN THE ORDER
	)	FOR INTERCEPTION OF (WIRE)
	)	(ORAL) COMMUNICATIONS

In order to assist the court in making its determination of those persons to be served with inventories as provided by 18 U.S.C. §2518(8)(d) in the above matter, the government submits this compilation of the names of those persons named in the order or application or who have been identified by agents of the \_\_\_\_\_ (agency) as interceptees:

A. The persons named in the order or the application are: \_\_\_\_\_

B. Other persons whose intercepted communications apparently incriminate them in offense(s) which (was) (were) specified in the interception order are: \_\_\_\_\_;

C. Other persons whose intercepted communication apparently incriminate them in offense(s) which (was) (were) not specified in the interception ordered are: \_\_\_\_\_;

D. Persons whose intercepted communications are apparently nonincriminating are: \_\_\_\_\_.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

\_\_\_\_\_  
(signature of supervising attorney)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.942 Form Inventory Order

UNITED STATES DISTRICT COURT  
\_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION )  
OF THE UNITED STATES FOR AN ORDER ) NO. \_\_\_\_\_  
AUTHORIZING THE INTERCEPTION OF )  
(WIRE) (ORAL) COMMUNICATIONS ) ORDER FOR INVENTORY  
 ) 18 U.S.C. §2518(8)(d)

TO: Attorneys of the United States Department of Justice

Having examined the government's list of identified interceptees and person named either in the order of application and pursuant to 18 U.S.C. §2518(8)(d): It is hereby ordered that attorneys for the United States Department of Justice shall cause to be served upon the person named below an inventory which shall include notice of:

- A. The fact of the (entry of the order) (making of the application);
- B. The date of the (entry) (and the period) of (authorized) (approved) (disapproval of application for) interception; and
- C. The fact that during the period wire or oral communications were not intercepted.

The persons to be served are: \_\_\_\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

\_\_\_\_\_  
Date

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.943 Form Inventory Order

UNITED STATES DISTRICT COURT  
\_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION )  
OF THE UNITED STATES FOR AN ORDER ) NO. \_\_\_\_\_  
AUTHORIZING THE INTERCEPTION OF )  
(WIRE) (ORAL) COMMUNICATIONS ) INVENTORY

TO: (Name of Interceptee)

Pursuant to 18 U.S.C. §2518(8)(d), you are advised as follows:

A. That on \_\_\_\_\_ (date), an application for an order authorizing interception of (wire) (oral) communications was filed in the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, under Docket No. \_\_\_\_\_.

B. That pursuant to the above application, an order was entered that same day, \_\_\_\_\_ (date) (authorizing) (denying) the application of (wire) (oral) interceptions for a period of \_\_\_\_\_ days;

C. That between the dates of \_\_\_\_\_ (date) and \_\_\_\_\_ (date) (wire) (oral) communications were (not) intercepted.

9-7.950 Form Application For 18 U.S.C. §2517(5) Order

UNITED STATES DISTRICT COURT  
\_\_\_\_\_ DISTRICT OF \_\_\_\_\_

IN THE MATTER OF AN APPLICATION )  
FOR AN ORDER AUTHORIZING USE OF ) NO. \_\_\_\_\_  
INTERCEPTED (WIRE) (ORAL) )  
COMMUNICATIONS )

APPLICATION

\_\_\_\_\_, (applicant's name), \_\_\_\_\_, (Title), \_\_\_\_\_  
District of \_\_\_\_\_, being duly sworn states:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

This sworn application is submitted for an order pursuant to 18 U.S.C. §2517(5) authorizing the use, pursuant to the provision of 18 U.S.C. §2517(3) in any criminal proceeding held under the authority of the United States of the contents and any evidence derived therefrom of (wire) (oral) communications intercepted by an investigative or law enforcement officer in a manner authorized by Chapter 119, 18 U.S.C. which relate to offenses other than those specified in the order of authorization.

A. He/she is an "investigative or law enforcement officer of the United States" within the meaning of 18 U.S.C. §2510(7)--that is, he/she is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in 18 U.S.C. §2516.

B. On \_\_\_\_\_, upon application of \_\_\_\_\_ (applicant's name) (title) \_\_\_\_\_, District of \_\_\_\_\_, an order was issued by Judge \_\_\_\_\_, authorizing agents of the \_\_\_\_\_ to intercept of a period of \_\_\_\_\_ days (wire) (oral) communications of \_\_\_\_\_ and \_\_\_\_\_ and unknown others to and from telephone number(s) \_\_\_\_\_ subscribed to by \_\_\_\_\_ in the premises known as \_\_\_\_\_, located at \_\_\_\_\_, for the purpose of securing evidence that \_\_\_\_\_ and unknown others were committing offenses specified in 18 U.S.C. §2516, to wit: offenses involving violations of \_\_\_\_\_. A copy of that order along with the application and supporting affidavit is attached to this application as Exhibit B and incorporated by reference herein.

C. On \_\_\_\_\_, agents of the \_\_\_\_\_ commenced the court order interception set forth in paragraph B above. These interceptions continued until termination on \_\_\_\_\_.

D. During the authorized period of interception, (wire) (oral) communications were intercepted which indicated that \_\_\_\_\_ and unknown others were committing offenses other than those specified in the aforementioned order(s), that is, offenses in violation of \_\_\_\_\_ U.S.C. \_\_\_\_\_. These communications were intercepted incidentally and in good faith.

On the bases of the allegations contained in this application, affiant requests the court to issue an order pursuant to 18 U.S.C. §2517(5) authorizing the use of the contents of the intercepted (wire) (oral) communications regarding the violations set forth in paragraph D above by those persons whose names are set out in paragraph D above, in any criminal proceeding held under the authority of the United States as provided by 18 U.S.C. §2517(3).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

\_\_\_\_\_  
NAME OF APPLICANT  
ADDRESS OF APPLICANT

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
(Notary) (\_\_\_\_\_)

9-7.960 Form 18 U.S.C. §2517(5) Order

1984 (S) (Superseded)  
UNITED STATES DISTRICT COURT  
\_\_\_\_\_  
DISTRICT OF \_\_\_\_\_

Application under oath having been made before me for an order pursuant to 18 U.S.C. §2517(5) by the United States, through its attorney, (name) \_\_\_\_\_, for the \_\_\_\_\_ District of \_\_\_\_\_, an "investigative or law enforcement officer" \_\_\_\_\_ of the United States" as defined in 18 U.S.C. §2510(7), I find that:

A. On \_\_\_\_\_, upon application of \_\_\_\_\_ (applicant's name) \_\_\_\_\_, an order was issued by Judge \_\_\_\_\_, United States District Court, \_\_\_\_\_ District of \_\_\_\_\_, authorizing agents of the \_\_\_\_\_ to intercept for a period of \_\_\_\_\_ days (wire) (oral) communications of \_\_\_\_\_ and unknown others, to and from telephone number(s) \_\_\_\_\_ subscribed to by \_\_\_\_\_ in the premises known as \_\_\_\_\_, and located at \_\_\_\_\_, for the purpose of securing evidence that \_\_\_\_\_ and unknown others were committing offenses specified in 18 U.S.C. §2516, to wit: offenses involving violations of \_\_\_\_\_ U.S.C. \_\_\_\_\_.

During the period of authorized interception, which commenced on \_\_\_\_\_ and terminated on \_\_\_\_\_, agents of the \_\_\_\_\_ intercepted numbers (wire) (oral) communications not specified in the interception order, that is, offenses involving violations of \_\_\_\_\_ U.S.C. \_\_\_\_\_.

C. The communications mentioned in paragraph B above, relating to violations not specified in the interception order, were intercepted

\_\_\_\_\_  
MAY 9, 1984  
Ch. 7, p. 99

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

incidentally and in good faith by agents of the \_\_\_\_\_  
in the course of authorized interceptions, and accordingly, were "otherwise  
intercepted" in accordance with the provisions of 18 U.S.C. Chapter 119.

WHEREFORE, it is ordered pursuant to the provisions of 18 U.S.C.  
§2517(5) that any person who has received, by any means authorized by  
Chapter 119 18 U.S.C. any information concerning (wire) (oral) communica-  
tions, or evidence derived therefrom, intercepted over telephone number(s)  
\_\_\_\_\_, pursuant to the order of Judge \_\_\_\_\_, United States District  
Court, \_\_\_\_\_ District of \_\_\_\_\_, dated \_\_\_\_\_, but relating to  
offenses other than those specified in the said order, to wit: violations  
of \_\_\_\_\_ U.S.C. \_\_\_\_\_ may disclose the contents of said  
communications and any evidence derived from such communications while  
giving testimony under oath or affirmation in any criminal proceeding held  
under the authority of the United States of America.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

\_\_\_\_\_  
DATE

9-7.970 Form Voir Dire

A. Does any juror have any strong conviction, belief, or prejudice  
against the federal law which permits a United States district judge to  
authorize federal investigative agencies, upon a proper showing of  
probable cause to believe that a crime is being committed, (to wiretap a  
designated telephone or telephones) (to listen to conversations between  
conspirators).

If any juror answers affirmatively, please inquire as to whether such  
belief would render that juror unable to serve as a fair and impartial  
juror in a case involving court-authorized wiretapping.

B. As an alternative to the above, should it be denied, the  
government submits the following question: "the government intends to  
present evidence derived from the use of court-authorized electronic  
surveillance, to wit: (wiretapping). If the judge instructs you that  
such evidence is admissible, would the fact that it was derived from a  
legal (wiretap) ( ) prejudice you in any way?"



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-7.990 Form Proposed Jury Instruction

Ladies and Gentlemen of the jury, when you were being questioned to determine your qualifications to sit as a juror in this case, you stated that you would not be prejudiced against evidence that had been obtained through court-authorized electronic surveillance. I now instruct you that I have ruled the tape-recorded evidence to be admissible, and you are to consider it as you would the other evidence in this case.

9-7.1000 VIDEO SURVEILLANCE

Video surveillance is not covered by Title III of the Omnibus Crime Control and Safe Streets Act because Title III relates only to the "aural acquisition of the contents of any wire or oral communication." See 18 U.S.C. §2510 (4) (emphasis added). Moreover, video surveillance is an area of the law where there is at present very little case precedent to provide guidance. The Department does, however, have guidelines governing the use of video surveillance and there are two cases, United States v. Torres, 751 F.2d 875 (7th Cir. 1984) and United States v. Biasucci, 786 F.2d 504 (2nd Cir. 1986), which discuss the use of video surveillance in detail. Special care should be taken to ensure that both the guidelines and the Torres and Biasucci decisions are followed when video surveillance is used during a federal criminal investigation.

9-7.1010 Authority--The Department of Justice Guidelines

Certain officials of the Criminal Division have been delegated authority to review and evaluate requests to conduct closed circuit television surveillance for law enforcement purposes by any component of the Department of Justice. See Department of Justice Order No. 985-82, dated August 6, 1982, at USAM 9-7.1011. The delegated authority encompasses every use of television surveillance for law enforcement purposes except the use of such surveillance to record events in public places or places to which the public has unrestricted access and where camera equipment can be installed in such places or in areas to which investigators have lawful access. The heads of investigative agencies are empowered to ensure that electronic surveillance of "public places" is conducted in a proper manner. "Public places" include such areas as open fields, public streets, and public parking lots. Places in which the public has unrestricted access include such places as public hallways in buildings.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The officials responsible for monitoring video surveillance matters are the Assistant Attorney General and Deputy Assistant Attorneys General of the Criminal Division as well as the Director and Associate Directors of the Office of Enforcement Operations. Ordinarily, the Director and Senior Associate Director of the Office of Enforcement Operations review video surveillance requests. A request may be approved as a matter of course by one of these officials when no intrusion on a person's legitimate privacy rights appears to be involved. The most common such situation is when a consenting party to the presence of the camera will be present at all times. However, when justifiable expectations of privacy seem to exist, the Criminal Division takes the position that the use of video surveillance may be considered as equivalent to a search and thus requires judicial authorization. For example, there seems to be little doubt that the conducting of video surveillance in a private office or residence without a consenting party present would constitute an invasion of one's reasonable expectations of privacy and thus be a "search" within the meaning of the Fourth Amendment.

9-7.1011 Order Delegating Authority

DEPARTMENT OF JUSTICE

Order No. 985-82

DELEGATION OF AUTHORITY TO  
AUTHORIZE TELEVISION SURVEILLANCE

I hereby delegate to the Assistant Attorney General of the Criminal Division, the Deputy Assistant Attorneys General of the Criminal Division, and the Director and Associate Director of the Office of Enforcement Operations, Criminal Division, authority to review and evaluate all requests to conduct television surveillance for law enforcement purposes within the Department of Justice. When, on the basis of such review and evaluation, the responsible official concludes that the proposed surveillance would not intrude on the subject's justifiable expectations of privacy, he/she may authorize the surveillance. If such official concludes that the surveillance would infringe on the subject's justifiable expectations of privacy, he/she shall initiate proceedings to obtain a judicial warrant.

In an emergency situation, i.e., where a television surveillance request cannot be delivered to the Director of the Office of Enforcement Operations at least forty-eight (48) hours before the proposed use of such

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

surveillance, authorization may be given by the head of the responsible Department of Justice investigative service or his/her designee. The investigative service shall give written notification to the Office of Enforcement Operations no later than five (5) working days after the authorization of the circumstances which gave rise to it. The notification shall set forth the nature of the emergency, the need for expeditious action, and a description of the investigation being conducted, including the subject of the investigation and the method of utilization of the closed circuit television surveillance.

This order shall not apply to closed circuit television surveillances of events transpiring in public places or places to which the public has general unrestricted access and where the camera equipment can be placed in the public area or in an area to which the surveilling agents have non-trespassory, lawful access. The head of each responsible Department of Justice investigative service shall issue written guidelines concerning such closed circuit television surveillances so as to insure strict adherence to the spirit and substance of this order.

Date: August 6, 1982

(signed)  
\_\_\_\_\_  
William French Smith  
Attorney General

9-7.1020 CCTV Where There is a Reasonable Expectation of Privacy

As set forth in the above guidelines (See USAM 9-7.1011), the Criminal Division takes the position that the use of CCTV in a situation where an individual has a constitutionally protected expectation of privacy constitutes a search and requires judicial authorization. Since the provisions of Title III do not specifically apply to CCTV and since there is no other federal statute that relates directly to video surveillance, the legal requirements for a court order authorizing CCTV and, indeed, even the court's authority to order this type of surveillance were somewhat speculative. These questions seem to have been resolved by the Seventh Circuit in United States v. Torres, 751 F.2d 875 (7th Cir. 1984) and by the Second Circuit in United States v. Biasucci, 786 F.2d 504 (2nd Cir. 1986). Torres and Biasucci are the leading cases in this area and should be consulted whenever video surveillance is considered in situations where the Fourth Amendment is implicated.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In Torres, the FBI procured a court order under Title III to place a bug and a video surveillance camera inside two premises in connection with an investigation into terrorist activities. The trial judge suppressed the video evidence, holding that there was no statutory or other basis for the order allowing television surveillance and that therefore the fruits of the surveillance were inadmissible. See United States v. Torres, 583 F. Supp. 86, 99-105 (N.D. Ill. 1984). The Seventh Circuit reversed, indicating that a warrant for video surveillance that complies with the provisions that Congress put into Title III in order to comply with the Fourth Amendment ought to satisfy that amendment's requirement of particularity. The court went on to say that Title III was Congress' carefully thought out and constitutionally valid effort to implement the requirements of the Fourth Amendment with regard to the necessarily unconventional type of warrant that is used to authorize electronic eavesdropping. The court concluded that because electronic interception is thought to pose a greater threat to personal privacy than physical searches, Congress made the requirements for a valid intercept warrant higher than those for a conventional Rule 41 warrant, noting that, except for probable cause, none of the requirements of 18 U.S.C. §2518 are found in Rule 41. The court then reasoned that if the government conducts electronic surveillance in conformity with the requirements of particularity that Title III imposes on electronic eavesdropping, the government has also conformed with the requirement of particularity in the Fourth Amendment's warrant clause. The court made clear, however, that a warrant for television surveillance that does not satisfy the four provisions of Title III that implement the particularity requirement would violate the Fourth Amendment. Ibid at 882-885.

In Biasucci, the court issued an order pursuant to Rules 41 and 57b of the Federal Rules of Criminal Procedure authorizing FBI agents to install a hidden video camera in business offices in connection with a loansharking investigation. The defendants moved to suppress the tapes based upon a lack of statutory authority for the order and alternatively that the government did not demonstrate a valid basis for its issuance. The motion was denied and the defendants were later convicted on a variety of racketeering and extortion charges. The convictions were affirmed by the Second Circuit in all respects. The court in citing Torres indicated that it found the reasoning in Torres to be compelling and that it was joining the Seventh Circuit in holding that district courts, federal magistrates, and state judges may authorize television surveillance in appropriate circumstances. The court cited the minimum constitutional standards for aural electronic surveillance set forth in both Berger v. New York, 388 U.S. 41 (1967), and Katz v. United States, 389 U.S. 347 (1967), by the Supreme Court and said that given the obvious similarities between oral and video surveillance, it believed the same standards

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

governing the former should be applied to the latter. The court went on to say that when Congress passed Title III, there was abundant evidence that it specifically intended to adopt the constitutional guidelines announced in Berger and Katz. The court indicated that the Torres court in similar fashion borrowed four provisions of Title III implementing the Fourth Amendment's requirements of particularity and minimization as a "measure of the government's constitutional obligation of particular description in using television surveillance to investigate crime." Ibid at 885. "We," said the court, "likewise believe that these standards, borrowed from Title III together with the more general constitutional requirements, form a sufficient outline of the showing the government must make before a warrant should issue authorizing video surveillance."

The four provisions that must be satisfied before a CCTV order can be issued are the following: (1) a showing that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried or to be too dangerous; (2) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates; (3) the interception period cannot be longer than necessary to achieve the objective of the authorization, nor in any event longer than 30 days; (4) the interception must be conducted in such a way as to minimize the interception of communications (video images) not otherwise subject to interception. See Torres, 751 F.2d at 883-84. Applications, orders, and supporting affidavits should comport with the guidelines set forth in Torres and Biasucci.

9-7.1030 Court Authorization

When court authorization for video surveillance is deemed necessary, it should be obtained by way of an application and order based on Rules 41(b) and 57 of the Federal Rules of Criminal Procedure and the All Writs Act (28 U.S.C. §1651). The application and order should be based on an affidavit that establishes probable cause to believe that evidence of a federal crime will be obtained by the surveillance and should include: (1) a statement indicating that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; (2) a particularized description of the premises to be surveilled; (3) the names of the persons to be surveilled, if known; (4) a statement of the steps to be taken to assure that the surveillance will be minimized to effectuate only the purposes for which the order is issued; and (5) a statement of the duration of the order which shall not be longer than is necessary to achieve the objective of the authorization nor in any event longer than thirty days.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The closed circuit television order should not be incorporated into an order for electronic surveillance pursuant to 18 U.S.C. §2518. In the event the closed circuit television order is being filed in conjunction with an electronic surveillance order pursuant to 18 U.S.C. §2518, the affidavit used in support of the latter order may, where appropriate, also be used in support of the separate closed circuit television order. However, Department policy requires that the video surveillance order be separate from and not part of the Title III order.

9-7.1031 Form Video Surveillance Application

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

-----  
IN THE MATTER OF THE APPLICATION )  
OF THE UNITED STATES FOR AN ORDER ) APPLICATION FOR AN ORDER  
AUTHORIZING THE INTERCEPTION OF VISUAL, ) AUTHORIZING THE INTERCEPTION  
NON-VERBAL CONDUCT AND ACTIVITIES BY ) OF VISUAL, NON-VERBAL CONDUCT  
MEANS OF CLOSED CIRCUIT TELEVISION ) AND ACTIVITIES BY MEANS OF  
OCCURRING WITHIN THE PREMISES KNOWN AS ) CLOSED CIRCUIT TELEVISION  
\_\_\_\_\_)  
-----

A. Pursuant to Rules 41(b) and 57 of the Federal Rules of Criminal Procedure and the All Writs Act (28 U.S.C. §1651), the United States of America by and through \_\_\_\_\_, United States Attorney for the \_\_\_\_\_ District of \_\_\_\_\_, and \_\_\_\_\_, an Assistant United States Attorney for said District, hereby makes application to this Court for an order authorizing the interception and recording of visual, non-verbal conduct by means of closed circuit television occurring within the following premises: [At this point set forth a particularized description of the premises to be surveilled.] The factual basis for the granting of this application is set forth in the attached affidavit of \_\_\_\_\_, which is incorporated by reference herein.

B. Also attached to this application is a letter from the Director, Office of Enforcement Operations, Criminal Division, United States Department of Justice, authorizing the making of this application for visual surveillance by means of closed circuit television.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

C. The attached affidavit of \_\_\_\_\_ reflects that there is probable cause to believe:

1. That the premises known as \_\_\_\_\_, located at \_\_\_\_\_, are being and will continue to be used by \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and others as yet unknown to discuss, plan, and commit offenses involving \_\_\_\_\_ in violation of Sections \_\_\_\_\_ and \_\_\_\_\_ of Title \_\_\_\_\_, United States Code.

2. That visual non-verbal conduct of the above-named individuals will be obtained through interception by means of closed circuit television at these premises and that such conduct will provide:

1984 USAM (superseded)

SEPTEMBER 1, 1986  
Sec. 9-7.1031  
Ch. 7, p. 106b

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

a. information indicating the precise nature, scope, extent, and methods of operation of the participants in the illegal activities referred to above;

b. information reflecting the identities and roles of all accomplices, aiders and abettors, co-conspirators, and participants in the illegal activities referred to above; and

c. admissible evidence of commission of the offenses described above.

D. Installation of electronic visual surveillance equipment will require surreptitious entry into the premises (by breaking and entering if necessary) and the danger to the safety of the agents inherent in such entry requires that the agents be armed.

E. Normal investigative procedures have been tried and failed or reasonably appear unlikely to succeed if tried or appear to be too dangerous to employ.

F. On the basis of the attached affidavit of \_\_\_\_\_ and allegations contained in this application:

IT IS HEREBY REQUESTED that this Court authorize Special Agents of the \_\_\_\_\_ to intercept and record by means of closed circuit television visual, non-verbal conduct of \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and others as yet unknown within the premises known as \_\_\_\_\_, located at \_\_\_\_\_, concerning offenses involving \_\_\_\_\_ in violation of Sections \_\_\_\_\_ and \_\_\_\_\_ of Title \_\_\_\_\_, United States Code.

IT IS FURTHER REQUESTED that such interception not automatically terminate when the type of visual, non-verbal conduct described above has first been obtained but continue until conduct is intercepted that reveals: (1) the manner in which the above-named individuals and others as yet unknown participate in the above-described offenses; (2) the precise nature, scope, and extent of the above-described offenses, and (3) the identity and roles of all accomplices, aiders and abettors, co-conspirators, and participants, or for a period of thirty (30) days from the date of this order, whichever is earlier.

IT IS FURTHER REQUESTED that Special Agents of the \_\_\_\_\_ be authorized to enter the above-described premises surreptitiously, covertly, and by breaking and entering in order to install, maintain, and



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

TO: SPECIAL AGENTS OF THE \_\_\_\_\_  
-----

A. Upon the application of \_\_\_\_\_, United States Attorney for the \_\_\_\_\_ District of \_\_\_\_\_, by Assistant United States Attorney \_\_\_\_\_, for an Order authorizing the interception and recording by means of closed circuit television of visual, non-verbal conduct occurring within [particularly describe premises to be viewed], pursuant to Rules 41(b) and 57(b) of the Federal Rules of Criminal Procedure and the All Writs Act (28 U.S.C. §1651), and based upon the affidavit of \_\_\_\_\_, sworn to before me, full consideration having been given to the matters set forth therein, the Court finds there is probable cause to believe that:

1. The premises known as \_\_\_\_\_ have been, are being, and will continue to be used by \_\_\_\_\_, \_\_\_\_\_, and others as yet unknown to discuss, plan, and commit offenses involving \_\_\_\_\_, in violation of Sections \_\_\_\_\_ and \_\_\_\_\_ of Title \_\_\_\_\_, United States Code.

2. Visual non-verbal conduct of the above-named individuals will be obtained through interception by means of closed circuit television at these premises and interception of such conduct will provide:

a. information indicating the precise nature, scope, extent, and methods of operation of the participants in the illegal activities referred to above;

b. information reflecting the identities and roles of all accomplices, aiders and abettors, co-conspirators, and participants in the illegal activities referred to above, and

c. admissible evidence of commission of the above-described offenses.

3. Installation of electronic visual surveillance equipment to effectuate this Court's order will require surreptitious entry into the premises (by breaking and entering if necessary) and that the danger to the safety of the agents inherent in such entry requires that the agents be armed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

4. Normal investigative techniques have been tried and failed or reasonably appear unlikely to succeed if tried or to be too dangerous to employ.

B. WHEREFORE, IT IS HEREBY ORDERED that the \_\_\_\_\_ is authorized to intercept and to record by means of closed circuit television visual, non-verbal conduct within the premises known as \_\_\_\_\_, of \_\_\_\_\_, \_\_\_\_\_, and others as yet unknown concerning offenses involving \_\_\_\_\_, in violation of Sections \_\_\_\_\_ and \_\_\_\_\_ of Title \_\_\_\_\_, United States Code.

IT IS FURTHER ORDERED THAT such interception shall not automatically terminate when the types of visual, non-verbal conduct described above have first been obtained, but shall continue until conduct is intercepted that reveals: (1) the manner in which the above-named individuals and others as yet unknown participate in the above-described offenses; (2) the precise nature, scope, and extent of the offenses, and (3) the identity and roles of all accomplices, aiders and abettors, co-conspirators and participants, or for a period of thirty (30) days from the date of this order, whichever is earlier.

IT IS FURTHER ORDERED that Special Agents of the \_\_\_\_\_ are authorized to enter the foregoing premises surreptitiously, covertly, and by breaking and entering in order to install, maintain, and remove electronic visual equipment needed to intercept and to record visual, non-verbal conduct occurring within the foregoing premises and that such agents may be armed.

IT IS FURTHER ORDERED that this Order shall be executed as soon as practicable and that interception shall be conducted in such a manner as to minimize the interception of visual, non-verbal conduct when it is determined that a named interceptee's conduct is not criminal in nature. This Order shall terminate upon attainment of the authorized objectives or at the end of thirty (30) days from the date of this Order, whichever is earlier.

IT IS FURTHER ORDERED that when it is determined that none of the named interceptees nor any person subsequently identified as an accomplice who uses the premises to commit or converse about the designated offenses is inside the premises, interception of visual, non-verbal conduct shall be discontinued, except that if such a determination is made, visual monitoring ceases, and agents are thereafter unable to ascertain whether

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

any of the aforementioned persons is inside the premises, agents may engage in spot monitoring to determine whether any of the persons is once again inside the premises. Whenever it is determined that any of the aforementioned persons is within the premises, interception of visual, non-verbal conduct may be initiated to determine whether such conduct involves the designated offenses. If the conduct relates to such offenses, it may be intercepted.

---

United States District Judge

---

Date

1984 USAM (superseded)

---

AUGUST 1, 1985  
Sec. 9-7.1032  
Ch. 7, p. 111



U.S. Department of Justice

Executive Office for United States Attorneys

Washington, D.C. 20530

April 6, 1987  
(Expires September 6, 1987)

TO: Holders of United States Attorneys' Manual Title 9  
FROM: United States Attorneys' Manual Staff  
Executive Office for the United States Attorneys

WFW  
by  
\*  
William F. Weld  
Assistant Attorney General  
Criminal Division

RE: The Electronic Communications Privacy Act of 1986

NOTE: 1. This is issued pursuant to 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-7.2000 et seq.

PURPOSE: This bluesheet provides an analysis of the Electronic Communications Privacy Act of 1986.

The following is a new section:\*

9-7.2000 ANALYSIS OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT  
OF 1986, PUBLIC LAW NO. 99-508

On October 21 1986, President Reagan signed into law the Electronic Communications Privacy Act of 1986, Public Law No. 99-508. This legislation is primarily a comprehensive revision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. It provides coverage for the technological advances developed in the area of electronic communications since the passage of the original act. The 1968 act governed only the aural acquisition of the contents of a wire or oral communication. Thus, if the intercepted conversation could not be heard or understood by the human ear, the existing law did not

\*Table of Contents follows page 34.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

TABLE OF CONTENTS  
FOR CHAPTER 7

9-7.2000	ANALYSIS OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986, PUBLIC LAW NO. 99-508
9-7.2100	TITLE I - THE INTERCEPTION OF COMMUNICATIONS AND RELATED MATTERS
9-7.2110	<u>Wire Communications</u>
9-7.2120	<u>Oral Communications</u>
9-7.2130	<u>Electronic Communications</u>
9-7.2140	<u>Exceptions</u>
9-7.2150	<u>Hybrid Communications</u>
9-7.2160	<u>Penalties</u>
9-7.2170	<u>New Crimes</u>
9-7.2180	<u>Procedural Changes</u>
9-7.2190	<u>Recovery of Civil Damages</u>
9-7.2200	<u>Injunctive Remedy</u>
9-7.3000	TITLE II - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS
9-7.3010	<u>Unlawful Access to Stored Communications</u>
9-7.3020	<u>Disclosure of the Contents of a Stored Communication</u>
9-7.3030	<u>Requirements for Governmental Access to Stored Communications</u>
9-7.3040	<u>Backup Preservation of Information in Storage</u>
9-7.3050	<u>Delayed Notice</u>
9-7.3060	<u>Cost Reimbursement</u>

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- 9-7.3070            Civil Action
- 9-7.3080            Exclusivity of Remedies
- 9-7.3090            Counterintelligence Access to Telephone  
Toll and Transactional Records
- 9-7.4000            TITLE III - PEN REGISTER AND TRAP AND TRACE  
DEVICES
- 9-7.4010            Procedure
- 9-7.4020            Pen Register and Trap and Trace Reports

1984 USAM (superseded)

apply. The new legislation encompasses not only the interception of wire and oral communications as defined in the original act, but virtually all forms of non-aural electronic communications during both the transmission stage and the period when such communications are maintained in electronic storage. Included within the concept of electronic communication are such new and increasingly utilized communication methods as electronic mail, computer data transmissions and video teleconferencing. The principal purpose of the new statute is to regulate the use of these dramatically improved communications technologies that have been developed since 1968 and to protect the transmission of all forms of information, including voice, data and some forms of video, from improper interception. The overall thrust of the legislation is to expand privacy protection in the new areas of electronic communication while recognizing and preserving the interests of effective law enforcement. The purpose of this section is to provide a broad overview of the new Act and acquaint attorneys with those provisions that have special significance for federal law enforcement.

Initially, it should be noted that most of the provisions of the new Act became effective on January 20, 1987, which is 90 days from the date the Act was signed. There is, however, one provision of the Act which took effect immediately. The new provisions of 18 U.S.C. 2516 extend authority to authorize a request for an electronic surveillance order to any Acting Assistant Attorney General or Deputy Assistant Attorney General in the Criminal Division, as well as to an Assistant Attorney General, once those officials are so designated by the Attorney General. This provision of the Act will be implemented by a new Attorney General delegation order.

It should also be noted at the outset that while the intent of the new statute is to cover all known electronic communications technologies to which an expectation of privacy can reasonably attach, several exceptions were made to exclude forms of communications where privacy interests were deemed to be relatively weak (e.g., handheld or cordless telephones, tone only pagers) or nonexistent (e.g., many forms of radio communications). These exceptions will be discussed in detail later in this section.

The Electronic Communications Privacy Act of 1986 is divided into three separate, but closely related, titles: Title I - Interception of Communications and Related Matters; Title II - Stored Wire and Electronic Communications and Transactional Records Access; and Title III - Pen Registers and Trap and Trace Devices.

9-7.2100 TITLE I - THE INTERCEPTION OF COMMUNICATIONS AND RELATED MATTERS

The first portion of the new Act is comprised of amendments to Title III of the 1968 act. The amendments establish a new category denominated "electronic communications" in addition to the wire and oral communications covered under the original act and address some of the difficulties perceived by law enforcement officials in utilizing the former Title III. 18 U.S.C. 2510-2520.

The new statute defines and regulates three types of communications: (1) wire; (2) oral; and (3) electronic communications. The last type, in essence, is any form of communication using electronics in which the human voice is not utilized. In addition, in one transmission there may be more than one type of communication, such as a voice telephone conversation followed by a computer transmission on the same line utilizing modems. All forms of communications will now be covered with the limited exceptions noted below. Thus, coverage of transmission of electronic communications both from the perspective of protecting the individual communication from third party interception and regulating governmental interception will be virtually all-inclusive.

In actuality, the new Act mandates little change in the substantive or procedural requirements for obtaining an order to intercept a traditional wire or oral communication. For the most part, with respect to wire and oral communications, the United States Attorneys will proceed in precisely the same manner as they have in the past. With respect to electronic communications, the substantive provisions of the law are primarily the same as those governing oral and wire communications, but the procedural provisions are somewhat different. The Act treats electronic communications in two different categories. Title I of the Act regulates interception of electronic communications during the transmission stage and, accordingly, treats them much as a wire or oral interception, although, as noted, with several lessened procedural requirements. Title II of the Act, discussed infra, is directed to electronic records that are temporarily in storage before or after the actual transmission. Many of the changes to the wire or oral communications provisions noted below are quite beneficial to law enforcement, and many of these were made at the Department's suggestion.

The new Act's most significant changes, additions and exceptions set forth in Title I are the following:

9-7.2110 Wire Communications

The definition of "wire communication" under the old statute has been redrafted to include only "aural transfers," which are defined as communications that involve the human voice at some point in the transmission. 18 U.S.C. 2510(1)(18). Wire communications are specifically excluded from the new definition of electronic communications. 18 U.S.C. 2510(12)(B). The Department insisted on keeping the distinction between wire and electronic communications in order to ensure that the case law in this area, built up over 18 years, would continue to be applicable and the courts would not be called upon to reinterpret established electronic surveillance principles.

The new law eliminates the distinction contained in the original Title III between common carrier and non-common carrier electronic communication systems where the system is designed to carry private communications not readily accessible to the public. The new Act applies to any person (as defined in 18 U.S.C. 2510(6)) engaged in providing facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce. 18 U.S.C. 2510(1). This amendment was added to provide coverage of private communications systems where the affecting commerce jurisdictional basis is present. This change is in recognition of the fact that some major corporations and professional firms that are not traditional common carriers are installing their own private communications systems.

9-7.2120 Oral Communications

The definition of oral communication remains the same but is specifically excluded from the definition of electronic communication. 18 U.S.C. Section 2510(2). The effect of the exclusion is to make it clear that an oral communication under the statute can never be a radio communication. See, United States v. Rose, 669 F.2d 23, 25-26 (1st Cir.) cert. denied, 459 U.S. 828 (1982)

9-7.2130 Electronic Communications

An "electronic communication" under the new statute is any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical

system that affects interstate or foreign commerce. "Electronic communication" is also specifically defined to exclude a wire or oral communication. 18 U.S.C. 2510(12)(B). The effect of the breadth of this definition is that any and all forms of electronic communications, unless specifically exempted, are now subject to the provisions of the statute just as wire communications have been covered since 1968.

The term "intercept" under the new Act has been broadened to mean the aural "or other" acquisition of the contents of wire, electronic or oral communications. The "or other" was added to accommodate the non-aural acquisition of electronic communications. 18 U.S.C. 2510(4)

#### 9-7.2140 Exceptions

Because the definition of electronic communication is so broad and all-inclusive it became necessary to carve out some forms of electronic communications that either appeared patently not to be deserving of privacy protection or where a policy decision was made by the Congress not to include a specific form of electronic communication. Those exceptions appear in the legislation either as exceptions to defined terms in 18 U.S.C. 2510 or as exceptions to the section that penalizes certain activity as unlawful, 18 U.S.C. 2511. The exceptions are as follows:

- (a) The radio portion of handheld or cordless telephone conversations. These utilize a radio transmission over a limited distance to a base station at a regular telephone. They are so easily intercepted, often over an ordinary AM radio, that the decision was made that there is no reasonable expectation of privacy in these communications. Such handheld, cordless, telephones should be distinguished from cellular telephones, which are covered under the Act. 18 U.S.C. 2510(12)(A)
- (b) Tone only paging devices. It has been the Department's position that intercepting only tone beeps or vibrations from a pager is not a search and, therefore, such interceptions raise no Fourth Amendment implications; the Act endorses this policy. By contrast, digital display and voice paging devices are covered by the new legislation. 18 U.S.C. 2510(12)(C)
- (c) Communications from tracking devices (beepers) placed in automobiles or packages to trace their location. 18 U.S.C. 2510(12)(D). These are specifically excluded from this legislation, and the decision was made to leave this area to case law development. However, it should be noted that the new legislation adds a new 18 U.S.C. 3117 to specifically solve one problem that arises in connection with the use of

mobile tracking devices. These devices, by their nature, can easily be transported across jurisdictional lines. However, a court order, in those circumstances where one is required under case law, might well be limited to one judicial district. This new section provides extra-jurisdictional effect to a court order that authorizes the installation of a mobile tracking device. It should be noted that the authorization outside the jurisdiction of the court is not limited to the territorial jurisdiction of the United States for a mobile tracking device.

- (d) A partial exception for video interceptions exists. The new Act covers and criminalizes the unauthorized interception of a closed circuit television broadcast between two points. For example, a business competitor breaking into the wire transmission of a teleconference violates the law, and a law enforcement interception of that communication by tapping into the lines requires a court order under the statute. The Act, however, does not cover the government's use of its own video equipment to surreptitiously intercept and televise a meeting without the consent of a party because there is no interception of an electronic communication occurring as no wires are tapped. (See H. Rep. No. 99-647, 99th Cong., 2d Sess. p. 36 (1986)) The latter does require a search warrant issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure and, accordingly, the law in this area has been left to the courts to develop. See, United States v. Biasucci, 786 F.2d 506 (2nd Cir. 1986); United States v. Torres, 751 F.2d 875 (7th Cir. 1984), cert. denied, 105 S. Ct. 1853 (1985).
- (e) Pen registers and trap and trace devices. These investigative tools qualify as electronic communications as that term is broadly defined. Since the privacy interests involved are so limited with these techniques, they have both been excluded from the coverage of Title I of the Act. 18 U.S.C. 2511(h)(i). However, Title III of the Act specifically regulates these techniques. By and large that Title, to be discussed infra, merely codifies existing Department policy and practices on pen registers and trap and trace devices. 18 U.S.C. 3121 - 3125.
- (f) Certain radio communications. The definition of electronic communication is so broad that it sweeps in all forms of radio communications. Thus, it was necessary for the statute to specifically exclude various forms of radio communications that patently should not be subject to protection from interception such as electronic communications that are broadcast so as to be readily accessible to the public (AM and FM radio station broadcasts), ship to shore general public type communications, public safety communications, citizen band

radio, general mobile radio services and the like. 18 U.S.C. 2511(2)(g). This subsection of the Act also contains other specific exceptions relating to interaction with the Federal Communications Act or where there is a necessity to service the system or locate interference. Id.

9-7.2150 Hybrid Communications

To cure the ambiguities that exist relating to conversations that are in part wire and in part radio communications, the Act had to address handheld or cordless telephone conversations, cellular telephone conversations and paging devices. All of these combine wire and electronic communications. See, United States v. Hall, 488 F.2d 193 (9th Cir. 1973). As noted, the radio portion of a handheld or cordless telephone communication is specifically excluded from the Act. 18 U.S.C. 2510(1). This is in recognition of the fact that such "backyard" phones are so easily intercepted within their very short range from the base station phone that no true privacy interests can be deemed present. An interception of the wire portion of such a conversation, however, is covered by the Act as long as the interception is made on the wire portion as opposed to listening to the radio portion.

Both the wire and radio portions of a cellular telephone conversation are specifically covered by the Act. A reference to connections in switching stations in 18 U.S.C. 2510(1) is included so that even radio to radio cellular communications that would occur in a conversation between persons utilizing two cellular car phones will come within the proscriptions of the statute. Including cellular communications within the statute is a Congressional recognition that persons using car phones or briefcase phones that are fully mobile expect that their conversations are private, much as conversations on traditional telephones are private. The mobility of these phones, as opposed to the very limited mobility of a handheld, cordless phone, and the difficulty of intercepting cellular conversations also argue for their privacy protection.

Another problem addressed by the statute is the potential for combining both wire and electronic communications into one conversation over the same telephone line. For instance, two parties can converse in a normal voice conversation, then, using modems, send data to computer terminals and/or exchange written messages on their terminals, and later return to the voice communication method before terminating the conversation. The legislative history makes it clear that if any part of the conversation is a wire communication, then for purposes of the statute, Congress expects that the conversation will be deemed a wire communication. H. Rep. No. 99-647, supra, at p. 35. This has only a limited practical effect because only certain of the

procedural aspects of the statute are different for wire communications than they are for electronic communications.

9-7.2160 Penalties

The basic penalty provisions of the existing statute are retained and anyone who intentionally discloses or endeavors to disclose the contents of any wire, oral or electronic communication having reason to know the information was obtained through an unlawful interception is subject to both criminal and civil penalties. Thus, the penalty provisions that apply to the illegal tapping of wire communications are extended to interceptions of electronic communications.

Several of the existing penalty provisions have been modified. For instance, the culpability standard for all wire, oral or electronic communications interception offenses has been changed from "willfully" to "intentionally." 18 U.S.C. 2511. Initial research indicates that this change will be of little practical effect.

In addition, the penalty provision for the interception of the radio portion of a cellular telephone conversation required careful handling because of the presence of radio scanners on the market. These scanners, which are currently in the hands of amateur radio hobbyists, are designed so that they can intercept cellular calls as long as the cellular phone and the radio interceptee are in the same cell and on the same frequency. A first offense for such an interception, if the interception is not for a tortious or illegal purpose or for commercial gain, carries only a \$500 fine. 18 U.S.C. 2511(4)(b)(ii). Subsequent offenses or an offense for a tortious or illegal purpose or for commercial gain can carry up to a five year prison term. 18 U.S.C. 2511(4)(a).

Finally, the bill also sets up a reduced penalty structure for a private home television viewer who, using a satellite dish, intercepts specified unscrambled satellite transmissions for private, non-commercial use. For a first offense under these circumstances the only sanction available will be a civil suit by the federal government seeking injunctive relief. 18 U.S.C. 2511(5)(a)(ii).

A full discussion of the penalty provisions of the statute will appear later in an amended United States Attorneys' Manual section.

The legislation also adds a new provision to Title 18 that criminalizes the disclosure of a court approved electronic surveillance application. This new statute, added as a subsection (c) to 18 U.S.C. 2232, provides a five year penalty and a fine for warning, or attempting to warn, the subject of an electronic surveillance application "in order to obstruct,

impede, or prevent such interception." The provision applies to both interceptions under the new Act and those authorized under the Foreign Intelligence Surveillance Act (50 U.S.C. 1801, et seq.). Disclosure of existing wiretap orders has been an occasional problem in recent years, since not all cases fit within the less specific obstruction of justice and contempt statutes. A specific offense will close this gap.

#### 9-7.2170 New Crimes

A large number of new crimes have been added to the list of crimes enumerated in 18 U.S.C. Section 2516 for which a wire or oral interception order can be obtained. Expansion of the list of wiretap predicate offenses was a major goal of the Department in the drafting of the Act and should work to make this investigative technique more useful. These additional crimes are: 18 U.S.C. 751 (escape), 18 U.S.C. 1952A (use of interstate commerce facilities in the commission of murder for hire), 18 U.S.C. 1952B (violent crimes in aid of racketeering activity), 18 U.S.C. 2312, 2313, 2314, (interstate transportation or receipt of stolen vehicles), the second section 2320 of Title 18 (trafficking in certain motor vehicles or motor vehicle parts), 18 U.S.C. 1203 (hostage taking), 18 U.S.C. 1029 (fraud and related activity in connection with access devices), 18 U.S.C. 3146 (penalty for failure to appear), 18 U.S.C. 3521(b)(3) (witness relocation and assistance), 18 U.S.C. 32 (destruction of aircraft or aircraft facilities), 18 U.S.C. 115 (threatening or retaliating against a federal official), 18 U.S.C. 1365 (destruction of an energy facility), 18 U.S.C. 1341 (mail fraud), 18 U.S.C. 2511, 2512 (interception and disclosure of certain communications and use of certain interception devices), 18 U.S.C. 831 (prohibited transactions involving nuclear materials), 18 U.S.C. 33 (destruction of motor vehicles or motor vehicle facilities), 18 U.S.C. 1992 (wrecking trains), 22 U.S.C. 2778 (relating to the Arms Export Control Act), 42 U.S.C. 2284 (sabotage of nuclear facilities or fuel), 49 U.S.C. 1679(c)(2) (destruction of natural gas pipeline), 49 U.S.C. 1472(i) or (n) (aircraft piracy), and any felony violations of Chapter 65 (malicious mischief), Chapter 111 (destruction of vessels), and Chapter 81 (piracy) of Title 18, United States Code. In addition, a new subsection was added that authorizes interception to ascertain the location of any fugitive from justice from an offense described in 18 U.S.C. 2516(1).

#### 9-7.2180 Procedural Changes

Section 2518 of Title 18, which describes the procedure for intercepting wire, oral, and now electronic communications remains substantially the same under the new law. There are, however, some significant changes designed, for the most part, to ease certain procedural requirements for the interception of such communications by federal law enforcement officers. Some of these new procedural provisions are as follows:

(a) Interception of electronic communications. 18 U.S.C. 2516(3) allows any attorney for the government to make an application for an electronic communications interception order in connection with any federal felony. This is in contrast to the enumerated crimes that limit requests for wire or oral interception orders. Moreover, the new law does not require approval from Washington as a prerequisite to filing an application for an electronic communications interception order. However, although Washington approval for this type of interception order is not required by the Act, the Department of Justice has agreed with Congress to administratively require Washington approval for the first three years to insure that the Act is properly implemented. See, H. Rep. No. 99-647, supra, at p. 51. Accordingly, for the initial three year period, requests to intercept electronic communications must be authorized by the same officials in Washington that authorize the interception of wire communications.

It is also important to note that pursuant to 18 U.S.C. 2518(10)(c), as to the interception of electronic communications, the remedies and sanctions described in the statute are the only judicial remedies and sanctions available for nonconstitutional violations of the Act. When a violation of constitutional magnitude is involved, the trial court will apply the existing constitutional law with respect to the exclusionary rule. United States v. Leon, 468 U.S. 897 (1984).

(b) Mobile interception devices. Under the prior wiretap statute, a law enforcement agency wishing to install an oral interception device in an automobile had to obtain an order authorizing the interception from a court in every district that the automobile was expected to enter or forego intercepting conversations in districts in which no order had been obtained. The new statute amends 18 U.S.C. 2518(3) by providing that court orders for mobile interception devices need only be obtained in one district. Thus, there will no longer be a need to secure separate court orders in each jurisdiction that the vehicle passes through; an order in any jurisdiction within the United States will authorize the requested interception. This provision should be available not only for oral bugging devices installed in vehicles, but for court orders authorizing interception of cellular phone conversations over car telephones. Note that in contrast with the provision on mobile tracking devices, 18 U.S.C. 3117, the authorization under 18 U.S.C. 2518(3) for mobile interception devices is valid only within the United States.

(c) Commencement of the thirty day period. 18 U.S.C. 2518 (5) has been amended to provide that the thirty day period for an order authorizing the interception of a wire, oral or electronic communication begins on the earlier of the day on which the

interception begins or ten days after the order is entered. This latter provision allows a grace period in case of difficulties in setting up equipment or other technical or operational problems. Thus, investigative agents will have up to ten days in which to place a listening device, often a difficult job, before the thirty day time limit begins to run on the order. This provision makes it more likely that a full interception period will take place before an extension order has to be sought.

(d) After the fact minimization. 18 U.S.C. 2518(5) has also been amended to specifically authorize after the fact minimization in cases where codes or foreign languages are used by the interceptees and there is no expert reasonably available to translate the conversations during the interception period. This amendment provides statutory authorization for what is becoming a more frequent practice as interceptees use complex codes and foreign languages in an attempt to ensure the secrecy of their conversations. Often, the codes and languages used are so obscure that it is impossible to find a translator until the interception period is well under way or over.

(e) The use of support personnel. One of the most frequent problems encountered by agencies conducting electronic surveillance pursuant to the original statute has been the need to use "law enforcement officers," as that term is defined in 18 U.S.C. 2510(7), to monitor intercepted conversations. This requirement necessitated that non-agent translators, state and local investigators, or any other individuals needed to aid in the monitoring, who were not federal law enforcement officers under the specific statutory definitions, be deputized as United States Marshals before conducting the interceptions. The deputation requirement often resulted in disputes over the meaning of "law enforcement officer" and delays in the authorization process. The problem has been eliminated by the new law, which provides that an interception may be conducted by "Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception." 18 U.S.C. 2518(5). This change is designed to substantially reduce the deputation procedure as well as free field agents from the need to monitor interceptions so that they can engage in other law enforcement activities. The key to the provision is that the government or contract personnel must be working under the supervision of an appropriate investigative or law enforcement official.

(f) Roving interceptions. One of the most significant additions to 18 U.S.C. 2518 concerns the specificity required in the description of the place to be bugged or the telephone to be tapped. The original law required that the application for, and the order authorizing, an electronic surveillance request indicate the "particular" facility or place in which the interception was to occur. The new law contains an exception to

the particularity requirement and, in effect, allows an interception order to target a specific person rather than the specific telephone or premises that that person might use. The amendments establish two similar rules to govern the interception of "oral communications" and "wire or electronic communications" where the target facility need not be identified with specificity before the interception order is obtained. 18 U.S.C. 2518(11).

With respect to "oral communications," the application must contain a full and complete statement as to why the ordinary specification requirements are not practical. The application must also identify the person committing the offense and whose communications are to be intercepted. The judge must then make a specific finding that the ordinary specification rules are not practical under the circumstances. 18 U.S.C. 2518(11)(a). Examples of situations where ordinary specification rules would not be practical include cases in which suspects meet in parking lots or fields or move from hotel room to hotel room in an attempt to avoid electronic surveillance. In such cases, the order would allow law enforcement officers to follow the targeted individual and engage in the interception once the conversation occurs. 18 U.S.C. 2518(12).

The provision concerning "wire or electronic communications" is similar to that governing oral communications. The application must specifically identify the person committing the offense whose communications are to be intercepted. The application must also show, however, that the person committing the offense has demonstrated a purpose to thwart interception by changing facilities. In these cases, the court must specifically find that such a purpose has been evidenced by the suspect. An example of a situation that would meet this test would be the subject who moves from phone booth to phone booth numerous times to avoid interception. 18 U.S.C. Section 2518(11)(b).

With respect to both oral and wire or electronic communications, the approval of the Attorney General, Deputy Attorney General, Associate Attorney General, Assistant Attorney General or an Acting Assistant Attorney General is required before a relaxed specificity order is sought. Approval by a Deputy Assistant Attorney General in the Criminal Division, which is authorized for all other interceptions, is not sufficient for this type of application.

The government cannot begin the interception until the facilities from which, or the place where, the communication is to be intercepted is determined by the agency implementing the order. 18 U.S.C. 2518(12). Congress also intended that the actual interception not commence until the targeted individual begins, or evidences an intention to begin, a conversation. It was not intended that the relaxed specificity order be used to tap a series of telephones, intercept all conversations over those phones, and then minimize the conversations recorded as a

result. This provision puts the burden on the investigatory agency to determine when and where the interception is to commence. See, H. Rep. No. 99-647, *supra*, at p. 53. There is no requirement of notification to the court once the premises or specific phone is identified prior to making the interception; however a specific place or phone must be identified. Limiting interceptions to specific places once they are determined should satisfy the specificity requirement of the Fourth Amendment.

Obviously, this provision will be a valuable tool in criminal investigations as sophisticated suspects have been quite effective in avoiding electronic surveillance by frequently changing their meeting places and telephones. However, the Fourth Amendment implications involved in this procedure should not be ignored. This is an extraordinary provision and it is the intention of the Department of Justice that it be used sparingly and only in clearly appropriate cases. This provision is not a substitute for investigative footwork; it is not intended that the ordinary showing of probable cause with respect to a specific telephone or location be dispensed with on the theory that the subject is a criminal who engages in criminal conversations wherever he goes.

A further consideration, especially in wire or electronic interceptions, is the practical problems faced by the telephone company or other provider of electronic communication services in effecting the interception, complete with leased lines to the government listening post, on extremely short notice. Care has to be exercised to work with the telecommunication companies and to provide them with as much information and notice as possible as far in advance as possible. Telephone companies in particular have expressed great concern about their ability to comply with such orders, which may require action on their part that will strain their ability to assist law enforcement officials in these cases. Congress, at the request of the telephone companies, included a provision in the Act allowing the companies to move the court that has issued a reduced specificity order for the interception of wire or electronic communications to modify or quash the order if the interception cannot be performed in a timely or reasonable manner. 18 U.S.C. 2518(12). The key for all concerned is to approach this procedure with care and foresight and to be aware of the practical and legal problems that may arise.

(g) Reporting requirements. 18 U.S.C. 2519, which requires judicial reports to the Administrative Office of the United States Courts, has been amended to require reports on wire, oral, or electronic communication surveillance orders issued under the relaxed specificity provisions noted above. 18 U.S.C. 2519(1)(b). Otherwise the reporting section is unchanged.

9-7.2190 Recovery of Civil Damages

18 U.S.C. 2520 relating to civil damages has been largely rewritten. The new section provides for equitable relief, compensatory and punitive damages, and attorneys' fees for a violation of the chapter. Added to section 2520 are statutory provisions for the computation of damages and a two year statute of limitations on actions brought under the section. Finally, 18 U.S.C. 2520(d) provides a good faith defense to actions brought under the section and specifically includes reliance on a facially valid court order within the meaning of "good faith."

9-7.2200 Injunctive Remedy

A new section, 18 U.S.C. 2521, has been added to the law. This section enables the Attorney General to initiate civil proceedings to enjoin a felony violation of the chapter that presents a continuing and substantial injury to the United States or to any person or class for whose protection the action is brought.

9-7.3000 TITLE II - STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

Title II of the Act is completely new and is designed to protect the privacy of stored electronic communications, either before such a communication is transmitted to the recipient or, if a copy of the message is kept, after it is delivered. In developing legislation to cover new communications technologies, now identified by the statute as "electronic communications," it became apparent that entirely different problems exist with reference to such methods as electronic mail and computer transmissions than are present in the case of wire or oral communications. In the former, copies, whether backup to guard against computer failure or stored copies in a remote computing system, are a central feature of the new technology; in the latter, preserved copies of spoken telephone messages are virtually unknown. Businesses and companies that provide communications services urged Congress to establish appropriate methods for government access to these new stored records to protect their customers' interests and to bring certainty to this developing communications industry. In addition, privacy interests were recognized by making it a federal offense to improperly access or disclose the contents of stored electronic communications. In developing the legislation these new electronic communications were divided into two categories: a) communications during the transmission stage, and b) communications in "storage." Electronic storage is defined in 18 U.S.C. 2510(17) as both any temporary, intermediate storage of a wire or electronic communication incidental to the electronic

transmission thereof and the storage of such communication by an electronic communication service for purposes of backup protection of such communication.

There was general recognition that the interception of communications during the transmission stage is more intrusive than of those in storage and, accordingly, those communications were given almost the same protection as that provided for wire and oral communications. However, as noted earlier in this section, it is somewhat easier to obtain an interception order for an electronic communication in transmission than it is to obtain a wire or oral interception order. The provisions governing electronic communications during the transmission stage are set forth in Title I of the Act and are discussed in detail at p. 9, supra.

With respect to stored communications, the Department originally urged that these communications should be treated as third party records and should be available by administrative or grand jury subpoena or by a court order. The various concerned segments of the communications industry had considerable difficulty with this concept, arguing that in the business community clients would not use electronic communications services if the records being transmitted were readily available to law enforcement agencies. These communications were likened to regular mail being handled by the Post Office. Under present day standards, a search warrant would be required to intercept mail since it enjoys Fourth Amendment protection. Congress ultimately decided that electronic mail in storage incident to transmission should be accorded the same protection. 18 U.S.C. 2703(a).

The same principle applies to "backup" copies made by the providers of electronic communications services to protect the communications from loss when the system has a malfunction and records are inadvertently lost, a not infrequent occurrence. As these copies are kept to protect the owner, the argument was made that since their existence is for the owner's benefit, a search warrant should be required to obtain them just as it would be needed to seek the records if possessed at the owner's headquarters. Similar protection was requested for records maintained by providers of remote computing services that were simply performing processing functions and did not have access to the contents of the communications. Without the right to actually access the records, the claim was made that the remote computing service provider was not truly a third party custodian. An example of a remote computing service would be a firm that takes time and salary records from a large firm, applies established computer programs to the records, and returns pay checks with appropriate tax deductions made.

The consensus that was reached was to accord Fourth Amendment type protection to the stored data for the first 180

days, requiring a search warrant under Rule 41 of the Federal Rules of Criminal Procedure for government access. After the 180-day period expired, any records still retained would revert to the status of third party records and would be available by administrative or grand jury subpoena or by a specially created court order procedure. The Act's provisions also permit the government to ask a computer storage company to create a copy of existing records as they exist on a specific day and hold them pending court order access. This provision, to be discussed infra, should be quite beneficial in certain large scale fraud investigations where remote computing facilities are used as it will eliminate the danger of a computer command to destroy the records when the perpetrator suspects law enforcement interest in his activities.

The most important provisions of Title II are the following:

9-7.3010 Unlawful Access to Stored Communications

18 U.S.C. 2701 makes it an offense to (a) intentionally access, without authorization, a facility through which an electronic communication service is provided; or (b) intentionally exceed the authorization of such facility; and as a result of this conduct, obtain, alter or prevent authorized access to a wire or electronic communication while it is in electronic storage in such a system. 18 U.S.C. 2701(a). An "electronic mail" service, which permits a sender to transmit a digital message to the service's facility, where it is held in storage until the addressee requests it, would be subject to 18 U.S.C. 2701. A "voice mail" service operates in much the same way, except that the stored message takes the form of the sender's voice, usually in digital code. It would likewise be subject to this section. Moreover, a remote computing service provided through an electronic communication service is also protected.

This provision is intended to address the increasing problem of both unauthorized "computer hackers" and corporate spies who deliberately gain access to, and sometimes tamper with, electronic communications that are not available to the public. The provision is not intended to criminalize access to "electronic bulletin boards," which are generally open to the public so that interested persons may communicate on specific topics. Where communications are readily accessible to the general public, the sender has, for purposes of 18 U.S.C. 2701(a), extended an "authorization" to the public to access those communications. A communication will be found to be readily accessible to the general public if the telephone number of the system and other means of access are widely known, and if a person does not, in the course of gaining access, encounter any warnings, encryptions, password requests, or other indicia of intended privacy. To access a communication on such a system is not a violation of the law. 18 U.S.C. 2701(a).

If a violation of 18 U.S.C. 2701(a) was committed for commercial advantage, malicious destruction or damage, or private financial gain, the violator could receive up to a year in prison and a \$250,000 fine for the first offense and up to two years imprisonment and a fine as provided by Title 18, United States Code, for a second or subsequent offense. In all other cases, a jail term of up to six months and a fine of \$5,000, or both, could be imposed. 18 U.S.C. 2701(b)(2).

9-7.3020 Disclosure of the Contents of a Stored Communication

18 U.S.C. 2702 governs disclosure of the contents of a stored communication. 18 U.S.C. 2702(a) generally prohibits the provider of a wire or electronic communication service from knowingly divulging the contents of any communication while in electronic storage by that service to any person other than the addressee or intended recipient of the communication. Similarly, 18 U.S.C. 2511(3), as amended, prohibits such a provider from divulging the contents of a communication while it is in the transmission stage. Neither provision, however, nor any other provision of the Act, is intended to affect any other provision of federal law that prohibits the disclosure of information on the basis of the content of the information, such as the Fair Credit Reporting Act, 15 U.S.C. 1681(b), which limits the circumstances under which consumer reporting agencies may disclose certain information relating to consumers.

18 U.S.C. 2702(a)(1) states that a provider of an electronic communication service shall not knowingly divulge the contents of a communication while in electronic storage.

18 U.S.C. 2702(a)(2) prohibits the provider of a remote computing service from disclosing the contents of any communication that is maintained by the service if certain conditions are met. The first condition is that the communication must be on behalf of and received by means of electronic transmission from (or created by means of computer processing of communications received by means of transmission from) a subscriber or customer of such service. 18 U.S.C. 2702(a)(2)(A). The second condition is that the communication must be solely for the purpose of providing storage or computer processing services to the subscriber or customer if the provider is not authorized to access the contents of any such communications for purposes of providing services other than storage or computer processing. 18 U.S.C. 2702(a)(2)(B). The practical purpose of this provision was set forth in the Report of the House of Representatives Committee on the Judiciary as follows:

This provision reflects the rapidly growing importance of information storage and processing to the Nation's commerce. Today, the subject matter of

commerce increasingly is information in electronic form and the processing of information itself has become a major industry. The secure storage of electronic information has thus become as important to the commercial system as the protection of paper records. Accordingly, where an electronic communication is transmitted by a subscriber or customer to such a service, and is stored on the subscriber's behalf solely for the purpose of providing storage or computer processing services to the subscriber, the Committee intends that the communication - - together with the products of any processing that the service performs for the customer - - remain available only to the subscriber and to the persons he designates, with certain exceptions enumerated in Section 2702(b). H. Rep. No. 99-647, supra, pp. 65-66.

18 U.S.C. 2702(b) provides six distinct exceptions that modify the general prohibitions against disclosure contained in 2702(a). Accordingly, the contents of a communication may be disclosed under the following circumstances:

- a. to an addressee or intended recipient of the communication or his agent;
- b. as otherwise authorized in 18 U.S.C. 2517 (the basic wire and electronic communications disclosure provisions); 18 U.S.C. 2511(2)(a) (disclosure to suitable switchboard operators and telephone company personnel in the ordinary course of business); or the new 18 U.S.C. 2703 (access by the government to the contents of electronic communications);
- c. with the consent of the originator, addressee, or intended recipient, or the subscriber in the case of a remote computing service;
- d. to an employee or other person whose facilities are used to transmit the communication to its destination;
- e. as may be necessary in order to provide the service or to protect the property or rights of the provider of the service;

- f. to a law enforcement agency, if the contents were:
- (i) inadvertently obtained by the service provider; and
  - (ii) appear to pertain to the commission of a crime.

The final exception is intended to be read narrowly. It is not intended to be a substitute for fulfilling the procedural requirements contained in 18 U.S.C. 2703, which govern government access to stored communications. A service provider's systematic practice of reviewing these communications to look for evidence of a crime would not qualify as inadvertent. H. Rep. No. 99-647, supra, at p. 67.

It should be noted that the penalty for improper disclosure by a service provider of stored communications is civil in nature since this section provides no criminal penalty. A provision for a civil action for violation of most of the provisions of Title II of the bill is set out in the new 18 U.S.C. 2707.

9-7.3030 Requirements for Governmental Access to Stored Communications

(a) Procedures for access to the contents of a stored communication. 18 U.S.C. 2703 sets forth the procedural requirements that the government must meet in order to obtain access to electronic communications in storage and related transactional records. The statute draws a distinction between contents of electronic communications that have been in storage for 180 days or less and those that have been stored for a longer period of time. Thus, the section provides that a governmental entity may only obtain access to the contents of an electronic communication that has been in storage for 180 days or less pursuant to a search warrant issued under the Federal Rules of Criminal Procedure or an equivalent state warrant. If the message has been stored for more than 180 days the government can, as discussed below, obtain the information by a variety of procedures including a search warrant, grand jury subpoena, administrative subpoena, or a court order, depending on the type of notification the government wishes to provide the subscriber. The distinction results from Congress's conclusion that while the contents of a message in storage should be protected by Fourth Amendment standards as are the contents of a regularly mailed letter, to the extent that the record is kept beyond six months, it is closer to a business record maintained by a third party for its own

benefit and, therefore, deserving of a lessened standard of protection. The above provision clearly applies to the new communication concept generally referred to as electronic mail in which messages are sent between parties much like traditional mail except that an electronic communications system is utilized instead of a postal service. As noted below, the provision, with its search warrant requirement, may not apply in the case of a remote computing service in which a data base may be held by the service for less than or more than 180 days and can be modified and updated on a weekly or even a daily basis.

18 U.S.C. 2703(b) sets forth the procedures that the government may use to obtain access to electronic communications held for more than 180 days or to such communications held by a provider of a remote computing service. That subsection provides that the government may proceed using any of three alternative means of access. The government may, without providing any notice to the subscriber, obtain a state or federal search warrant based upon probable cause. 18 U.S.C. 2703(b)(A). If the government chooses to give notice to the subscriber, it may obtain access to the records by using either a grand jury or administrative subpoena, 18 U.S.C. 2703(b)(B)(i), or a new statutory court order based upon a finding that the records are relevant to a legitimate law enforcement inquiry. 18 U.S.C. 2703(d). Please note that the required notification to the subscriber may be delayed pursuant to 18 U.S.C. 2705, as discussed below.

As noted, 18 U.S.C. 2703(a), which governs the procedures for governmental access to the contents of records in electronic storage, requires that a search warrant based on probable cause be obtained for access to the contents of an electronic communication held for less than 180 days. Such communication contents held for more than 180 days can be obtained by the methods set forth in 18 U.S.C. 2703(b), which, along with search warrants, include a specially created court order and grand jury and administrative subpoenas. 18 U.S.C. 2703(b) relates specifically to records held in remote computing systems and such records are not mentioned anywhere in 18 U.S.C. 2703(a). The question arises as to whether the 180 day provision in 18 U.S.C. 2703(a) applies as well to records held in remote computing systems as it clearly does to communications during transmission such as those utilized by an electronic mail company. Is access to records held by remote computing systems limited during the first 180 days in the system to situations where search warrants can be obtained, or can those records be accessed by the government, regardless of their length of time in the system, simply by use of a grand jury or administrative subpoena or the new statutory court order?

The Act is clearly disjunctive in its treatment of "Electronic Communications in Electronic Storage" under 18 U.S.C. 2703(a) and "Electronic Communications in a Remote Computing Service" under 18 U.S.C. 2703(b). It would appear, therefore, that Congress intended that access to communications in a remote computing service be governed only by the provisions of 2703(b), which makes a search warrant optional to a subpoena or court order. Since no time limit is set forth in 2703(b), it seems that the government could obtain records in a remote computing service at any time by issuing an administrative or grand jury subpoena or obtaining a court order based upon a simple showing of relevancy. The legislative histories of the Act, however, make this proposition far from clear.

The House Report treats communications in electronic storage and communications in a remote computing system in the disjunctive, as the Act itself does. Thus, the House Report states that 18 U.S.C. 2703(a) deals with the contents of an electronic communication in storage, noting that such records can only be obtained through a search warrant during the first 180 days in storage. H. Rep. No. 99-647, *supra*, at pp. 67-68. The House Report also notes that "electronically stored communications can be of two types. The first type of stored communications are those associated with transmission and incident thereto. The second type of storage is of a back-up variety." *Id.* at p. 68. This statement, and the fact that remote computing service records are discussed under a separate subsection in the House Report, supports the view that records given to a remote computing service are neither given over for, nor held incidentally to, purposes of transmission and, therefore, are not governed by the 180 day provisions set forth in 18 U.S.C. 2703(a).

The Senate Report, however, appears to treat the two types of records in the same manner in stating that 18 U.S.C. 2703(b) "provides that for electronic communications that are maintained by a remote computing service and that have been in storage in an electronic communication service for more than 180 days the Government can gain access in several ways." S. Rep. No. 99-541, 99th Cong., 2d Sess. at p. 38 (1986). The Senate Report contains no independent discussion of remote computing service records in storage for less than 180 days. The argument can be made that the Senate Report is incorrect as it does not reflect the plain meaning of the statute as set forth in 18 U.S.C. 2703(a) and (b). Moreover, since the language was originally drafted by the House, the House Report should be the more authoritative as the Senate made no changes in this language.

Although it does not appear in either Report, an argument can be made that because a remote computing company has little access to the records themselves, they are

nothing more than a mere extension of the record originator and should stand in the originator's place in the face of a government request for access to the records. If a search warrant would be required to obtain the originator's records in his own office, then, similarly, a search warrant should be necessary to obtain the same records from a remote computing service possessing the records under circumstances in which the service cannot access the records except for purposes of storage or to run a computer program. Without independent access to the records, the remote computing service should not be deemed an ordinary third party custodian of records who must respond to a subpoena. This is the argument the remote computing industry is sure to raise.

Ultimately, the courts will have to determine the correct legislative meaning and intent on this issue. Initially, United States attorneys are urged to argue that government access to the contents of an electronic communication held by a remote computing service does not require a search warrant during the first 180 days. All those implementing this statute for the government should be aware, however, that this ambiguity exists and be prepared for a court challenge to a subpoena or the more limited statutory court order for such records.

As just referred to above, the type of electronic communication held by a remote computing service that is subject to these provisions on governmental access is limited. The communication must be on behalf of a subscriber of a remote computing service and must have been given to the remote computing service under narrow conditions. The communication must have been received in a certain form (i.e., by means of electronic transmission or similar means). 18 U.S.C. 2703(b)(2)(A). In addition, the communication must have been surrendered solely for the purpose of providing storage or computer processing services to the subscriber, and the provider may not be authorized to access the contents of any such communication for purposes of providing any services other than storage or computer processing. 18 U.S.C. 2703(b)(2)(B). A computer storage company that does not meet these requirements would certainly be deemed an ordinary third party custodian of records regardless of the ultimate decision as to the remote computing service.

(b) Procedures for access to transactional information including telephone toll records. 18 U.S.C. 2703(c) sets forth the rules under which the government may obtain access to transactional records. These are records that pertain to the subscriber to, or customer of, an electronic communication service or remote computing service and which do not involve the contents of a communication. In

electronic communications these are the records that are the equivalent of the traditional telephone toll records maintained by a telephone company. As drafted, this provision covers not only transactional records of an electronic mail company or a computer data processor, but also, in fact, covers and regulates governmental access to traditional telephone toll records themselves. It is important to note at the outset that the statute's provisions in the area of telephone toll records impose no greater burden on the government than the previous Department policy of obtaining such records by way of subpoena or administrative summons. In fact, in some cases, the statute will actually make it easier for an investigative agency to obtain and use such records. Nevertheless, as part of the general intent of the Act to cover all forms of wire and electronic communications, telephone toll records, like pen registers, will now be covered by a federal statute.

As discussed below, the government will be able to obtain such transactional records by grand jury subpoena, administrative subpoena, or court order based upon a finding of relevancy. In the past, the Federal Bureau of Investigation could only obtain these records pursuant to a grand jury subpoena with such a subpoena's attendant Rule 6(e) disclosure and storage restrictions and problems. Under 18 U.S.C. 2703(c), the Bureau, and other investigative agencies lacking administrative subpoena powers, will now be able to obtain transactional records, including telephone toll records, pursuant to a court order based on a readily available standard and telephone toll records available solely as grand jury records will no longer be a problem.

18 U.S.C. 2703(c) (1) (B) and 18 U.S.C. 2703(c) (2) allow the government to obtain transactional records without notice to the subscriber by obtaining (1) an administrative or grand jury subpoena; (2) a search warrant pursuant to state or federal law; or (3) a court order pursuant to 18 U.S.C. 2703(d) based upon a finding that the information is relevant to a legitimate law enforcement inquiry. Granted that pen register data (regulated in Title III of the Act) and telephone toll records provide identical type data, that court process of some nature is now required under Department policy for such records, and that the Act's intent is to regulate all forms of wire and electronic communications, this provision with its relevancy standard both effectuates the Congressional purpose and protects legitimate law enforcement interests in obtaining the necessary information. The government may also, of course, obtain such records from the service provider when the customer consents to the disclosure. 18 U.S.C. 2703(c) (1) (B) (iv).

(c) Court orders for disclosure of the contents of communications or transactional records. 18 U.S.C. 2703(d) governs court orders issued pursuant to 18 U.S.C. 2703(b) (B) (ii) relating to the contents of stored communications and 18 U.S.C. 2703(c) (1) (B) (iii) relating to transactional records. 18 U.S.C. 2703(d) provides that to obtain such an order the government must demonstrate that there is reason to believe that the contents of an electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry. The only contents that can be sought using the court order option are those stored for more than 180 days. Thus, the standard for the order for contents of records stored more than 180 days is the same as for transactional records. However, for contents, as opposed to transactional records, notice to the subscriber is also required unless it can be delayed under 18 U.S.C. 2705; no notice is required to the subscriber for access to transactional records.

(d) Cause of action barred. 18 U.S.C. 2703(e) provides that no cause of action shall lie against the provider of a wire or electronic communications service, or its officers and employees, for providing information, facilities, or assistance to the government pursuant to a court order, subpoena, warrant or certification.

#### 9-7.3040 Backup Preservation of Information in Storage

(a) Government access. 18 U.S.C. 2704 sets forth the procedures that apply to backup copy preservation. This is the provision that will permit law enforcement officials to have a copy, in the nature of a picture of the records that exist on a given day, made of records of illegal activities in which a computer storage or remote processing firm is utilized in the criminal activity. It is an innovation that should be of major value to law enforcement in coming years. 18 U.S.C. 2704(a) (1) provides that when the government seeks records that are being held by a remote computing storage company pursuant to 18 U.S.C. 2703(b) (2), the government may include in its subpoena or court order a requirement that the service provider create a backup copy of the communication in order to preserve the communication. The provider is directed to create the requested backup copy as soon as practicable consistent with its regular business practices, but in any event within two business days of the receipt of the order or subpoena and then notify the government that the copy has been made. The provider is also directed not to notify the subscriber of the order or subpoena.

18 U.S.C. 2704(a) (2) provides that the government is required to notify the subscriber of the subpoena or court

order within three days after the receipt of the service provider's confirmation of the creation of the backup copy. This notice can be delayed pursuant to 18 U.S.C. 2705(a). 18 U.S.C. 2704(a)(3) states that the provider may not destroy the backup copy until the later of (1) the delivery of the information to the government; or (2) the resolution of any legal proceedings related to the government's order or subpoena.

Under 18 U.S.C. 2704(a)(4) the service provider is required to release the backup copy to the government no sooner than 14 days after the government provides notice to the subscriber if (1) the provider has not received notice that the subscriber has challenged the government's request; and (2) the provider has not initiated proceedings to challenge the subpoena or court order.

18 U.S.C. 2704(a)(5) provides that a government agency may require the creation of a backup copy under 2701(a)(1) if in its sole discretion the agency determines that there is reason to believe that notification pursuant to 18 U.S.C. 2703 of the existence of a subpoena or court order for the production of stored communications may result in the destruction of or tampering with the evidence sought. It is of special significance that this determination is not subject to challenge by the subscriber or service provider. The key to this provision is that the government can make certain that a copy of the relevant records is created prior to any litigation or notice and before any attempt to alter or destroy the records electronically can be made.

(b) Customer challenges. 18 U.S.C. 2704(b)(1) provides that within 14 days after notice by the government that a backup copy has been requested, the subscriber may move to vacate the court order or quash the subpoena ordering that the backup copy be made. The subsection then sets forth the procedural details governing proceedings to quash or vacate. The challenger must serve the government with notice and provide written notice to the service provider. The challenger must then establish that he is the relevant customer or subscriber and that the records sought are not relevant to a legitimate law enforcement inquiry or that the government failed to comply with the statutory requirements for access to the records.

If the court finds that the challenger has met the requirements of 2704(b)(1), the government must file a sworn response, in camera if appropriate. 18 U.S.C. 2704(b)(3). If the court determines that the challenger has failed to meet these requirements, it will order the process enforced. On the other hand, if the challenger has standing and can show either lack of relevance or noncompliance with the procedural requirements, the court can vacate the order or

quash the subpoena. 18 U.S.C. 2704(b)(4). Thus, once the backup copy is created, the government can enforce access to it by complying with the procedural provisions of this section and by merely establishing relevancy to a legitimate law enforcement inquiry.

18 U.S.C. 2704(b)(5) provides that a court order denying a motion or application shall not be deemed a final order and, therefore, no interlocutory appeal may be taken from the denial. Of course, nothing precludes a subscriber from raising these issues again during a subsequent hearing or trial.

9-7.3050 Delayed Notice

(a) Procedure. 18 U.S.C. 2705 governs delay of notification to the customer or subscriber. Where the government seeks the contents of a stored electronic communication pursuant to the provisions of 18 U.S.C. 2703(b) by way of a court order, it may include in its application a request for delayed notification of 90 days or less. The court is to grant this request if it determines that there is reason to believe that notification might have an adverse result as described in 2705(a)(2). 18 U.S.C. 2705(a)(1)(A). Where the government seeks the contents of a communication governed by 18 U.S.C. 2703(b) by way of an administrative or grand jury subpoena, it may obtain a delay of notification for a period of up to 90 days upon the certification of a supervisory official that there is reason to believe that notification of the existence of the subpoena may have an adverse result described in 2705(a)(2). 18 U.S.C. 2705(a)(1)(B). It should be noted that under this latter provision, the government need provide only the written certification; it is not necessary for the government to obtain a court order based upon a finding of adverse results. Thus, this provision, unlike similar delayed notification provisions in statutes such as the Right to Financial Privacy Act, 12 U.S.C. 3409, requires nothing more than a government certification to trigger delayed notification.

A "supervisory official" for purposes of this provision includes the investigative agent or assistant investigative agent in charge of a field office or an equivalent official in the investigating agency's headquarters or regional office. Thus, for instance, it will require the certification of a supervisory agent such as the Special Agent in Charge or the Assistant Special Agent in charge of an FBI or DEA office to comply with this provision. A certification by the agent in charge of an investigation would not suffice. The term also means the chief prosecuting attorney, the first assistant or an equivalent

official in a regional or headquarters office. 18 U.S.C. 2705(a)(6).

18 U.S.C. 2705(a)(4) provides that extensions of up to 90 days may be made of the delayed notification as long as the original requirements of the section are met with respect to the extension.

(b) Adverse results. An adverse result that can trigger delayed notification is one of the following: (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of, or tampering with, evidence; (4) intimidation of potential witnesses (including victims of any crimes); and (5) otherwise seriously jeopardizing an investigation or unduly delaying an ongoing trial. 18 U.S.C. 2705(a)(2).

(c) Preclusion of notification. 18 U.S.C. 2705(b) provides a procedure for the government to preclude the service provider from notifying its customer or subscriber of the existence of a warrant, subpoena, or court order. That section states that such preclusion may only be obtained in cases where the government is not required to notify, or where the government has obtained the authority to delay notification. A preclusion of notification must be granted by a court of competent jurisdiction that finds that there is reason to believe that adverse results set forth in 18 U.S.C. 2705(a)(2) will occur if notification is given.

#### 9-7.3060 Cost Reimbursement

(a) Payment. 18 U.S.C. 2706(a) provides that the government, when seeking records pursuant to 18 U.S.C. 2702, 2703, or 2704, must reimburse the person or entity assembling or providing the records for all reasonable costs that have been incurred in providing the information. Note that 18 U.S.C. 2706(c) exempts telephone toll records and telephone listings from the reimbursement requirement. These records are excluded primarily because the government has not traditionally paid the telephone companies for providing this type of information. The court can, however, order the government to reimburse the provider of telephone toll records where the information sought is unusually voluminous or causes an undue burden on the provider. 18 U.S.C. 2706(c).

(b) Amount. Under 18 U.S.C. 2706(b), the amount of the reimbursement payment will be as mutually agreed by the government and the provider or, in the absence of such an agreement, as determined by the court.

#### 9-7.3070 Civil Action

(a) Cause of action. 18 U.S.C. 2707(a) provides a civil cause of action for a provider of an electronic communication service, or its customer or subscriber who is aggrieved by an intentional violation of the statute. However, this provision and 18 U.S.C. 2703(e) specifically preclude any cause of action against a provider of an electronic communication service that discloses information pursuant to a court order, warrant, subpoena or certification.

(b) Relief. 18 U.S.C. 2707(b) defines the relief that may be appropriate in civil actions to include preliminary or other equitable or declaratory relief, damages, attorneys' fees, and other reasonably incurred litigation costs. Damages include actual damages and any profits made by the violator as a result of the violation, but in no case less than \$1,000. 18 U.S.C. 2707(c).

(c) Defenses. 18 U.S.C. 2707(d) sets forth the defenses to actions brought under the statute. This subsection provides a complete defense to any civil or criminal action brought under Title 18, United States Code, or any other law where the defendant demonstrates a good faith reliance on a court order, warrant, subpoena, or legislative or statutory authorization, or in good faith complies with a request from a law enforcement officer. 18 U.S.C. 2707(d) also provides a complete defense to defendants who rely upon a good faith determination that 18 U.S.C. 2511(3) permitted the conduct complained of.

(d) Statute of limitations. 18 U.S.C. 2707(e) provides that a civil action may not be commenced later than two years after the date upon which the claimant first discovered or had reasonable opportunity to discover the violation.

9-7.3080 Exclusivity of Remedies

18 U.S.C. 2708 provides that the remedies and sanctions described in the statute are the only judicial remedies and sanctions available for nonconstitutional violations of the Act. When a violation of constitutional magnitude is involved, the trial court will apply the existing constitutional law with respect to the exclusionary rule. United States v. Leon, 468 U.S. 897 (1984).

9-7.3090 Counterintelligence Access to Telephone Toll and Transactional Records

(a) Duty to provide. 18 U.S.C. 2709 sets forth the rules governing counterintelligence access to telephone toll and transactional records. 18 U.S.C. 2709(a) provides that a communications common carrier or the provider of an

electronic communication service shall provide such subscriber information or telephone toll records pursuant to a request from the Director of the Federal Bureau of Investigation under 18 U.S.C. 2709(b).

(b) Certification. 18 U.S.C. 2709(b) contains the conditions under which the Director of the FBI, or his designee, may request these records. This section states that the Director or his designee must certify in writing that the information sought is relevant to an authorized foreign counterintelligence investigation; and that there are specific, articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power as defined in the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 et seq.

(c) Disclosure prohibition. 18 U.S.C. 2709(c) prohibits the service provider from disclosing to any person that the FBI has sought or obtained transactional records under the provisions of 18 U.S.C. 2709.

(d) Dissemination by the FBI. 18 U.S.C. 2709(d) provides that the FBI may disseminate records obtained under this section only as provided in guidelines approved by the Attorney General for foreign counterintelligence collection and foreign counterintelligence investigations conducted by the FBI, and with respect to dissemination to an agency of the United States the dissemination can only be made if the information is clearly relevant to the authorized responsibilities of such agency.

(e) Congressional consultation. 18 U.S.C. 2709(e) provides that the Director of the FBI shall fully inform the House and Senate intelligence committees concerning all requests made under this section.

9-7.4000 TITLE III - PEN REGISTER AND TRAP AND  
TRACE DEVICES

The final Title of the legislation adds a new Chapter 206 to Title 18 of the United States Code, Section 3121 et seq., which regulates the use of pen registers and trap and trace devices. The title begins with a general prohibition against the use of a pen register or a trap and trace device without first obtaining a court order pursuant to 18 U.S.C. 3123 or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.). Although the courts have clearly held that pen registers were not within the reach of the wiretap statute and that the Fourth Amendment does not

require a warrant for this procedure, (United States v. New York Telephone Co., 434 U.S. 159 (1977); Smith v. Maryland, 442 U.S. 735 (1979)), the telephone companies have insisted on court orders for fear of civil liability before they would assist in placing a pen register. The same principle has applied to trap and trace devices. Accordingly, for a number of years Department policy has required the use of a court order issued under Rules 41 or 57 of the Federal Rules of Criminal Procedure for pen registers and trap and trace devices. USAM 9-7.014; 7.231. Thus, this new chapter in Title 18 in essence codifies the existing Department policy of obtaining a court order to authorize the installation of a pen register or a trap and trace device and sets forth the procedure for seeking such an order. It is important to note that the chapter places no new restrictions on law enforcement in this regard in that it applies basically the same standards required now. In addition, it has certain procedural changes that are advantageous to law enforcement. Moreover, codifying the pen register and trap and trace procedures should eliminate the risk of more restrictive legislation, such as that contained in the original bills in this area, from being enacted in the future.

The statute contains provisions excepting the use of pen registers and trap and trace devices from the court order requirement in certain circumstances. Thus, a service provider need not obtain a court order before using a pen register or trap and trace device in order to test, operate, or maintain its equipment and services, or to protect the property rights of its customers. 18 U.S.C. 3121(b)(1). The service provider may also use a pen register or trap and trace device without first securing a court order to record the fact that a wire or electronic communication was initiated or completed in order to protect itself, or another provider, or a customer from fraud or abuse. 18 U.S.C. 3121(b)(2). Finally, it is not necessary to obtain a court order when the telephone user consents to the installation of the pen register or trap and trace device. 18 U.S.C. 3121(b)(2).

9-7.4010 Procedure

(a) The application. 18 U.S.C. 3122(a)(1) provides that any attorney for the government may apply for a pen register or trap and trace order or an extension of such an order under 18 U.S.C. 3123. The application must be in writing and under oath. It must identify the agency conducting the investigation and the person making the application and must contain a certification that the information likely to be obtained is relevant to an ongoing criminal investigation.

Please note that the standard for obtaining the order is relevancy to an ongoing criminal investigation, not probable cause or reasonable suspicion. This lesser standard reflects that while Congress wished to provide some protection against the random use of these devices, it recognized that an individual does not have a reasonable expectation of privacy in the numbers dialed to or from his telephone and, therefore, that the installation and use of a pen register or trap and trace device is not a "search" within the meaning of the Fourth Amendment requiring the protection of a warrant based upon probable cause. See, Smith v. Maryland, 442 U.S. at 743-44.

18 U.S.C. 3122(a)(2) provides that a state investigative or law enforcement officer may apply for a pen register or trap and trace order "[u]nless prohibited by State law." This phrase was included in the section to make it clear that the new law does not preempt any existing state laws governing the installation and use of pen registers and trap and trace devices by state officials. Thus, a state law requiring a higher standard of proof as a prerequisite to a pen register or trap and trace order will continue in effect with respect to that state's officials.

(b) The order. 18 U.S.C. 3122 provides that a pen register or trap and trace order may be issued by "a court of competent jurisdiction." The definition of court of competent jurisdiction includes any "district court of the United States (including a magistrate of such a court)." 18 U.S.C. 3126(2)(A). This definition, and, indeed this title, finally provides the magistrates with unquestioned authority to issue pen register and trap and trace orders. The problem prior to this provision was that although magistrates have authority under Rule 41 of the Federal Rules of Criminal Procedure to authorize the use of pen registers, there are no statutes, rules, or reported case law indicating whether magistrates could issue the ancillary technical assistance orders, and the telephone companies have refused to honor such an order issued by a magistrate. It was therefore the Department's policy that pen register and trap and trace orders be obtained only from district court judges. As noted, the definition of "court of competent jurisdiction" in section 3126 now makes it clear that a magistrate may issue enforceable pen register and trap and trace orders. See 18 U.S.C. 3124.

18 U.S.C. 3123 sets forth the procedure that must be followed by the court in issuing a pen register or trap and trace order. The section contains four subsections as follows:

Subsection (a) states that upon an application the court shall issue an ex parte order authorizing the

installation and use of a pen register or trap and trace device within the jurisdiction of the court if the court finds that the government attorney has certified that information likely to be obtained through the pen register or trap and trace is relevant to an ongoing criminal investigation. This provision does not authorize the court to conduct an independent judicial review of whether the application meets the relevance standard; it need only review the completeness of the attorney's certification. Accordingly, there will be no need for an affidavit to establish a factual basis; all that will be required is a sworn application containing the requisite certification and a draft order for the court to issue. This, too, comports with current practice.

Subsection (b) sets forth the contents of the pen register or trap and trace order. The order is required to specify (1) the identity, if known, of the person to whom is leased, or in whose name is listed, the telephone line to which the device is to be attached; (2) the identity, if known, of the person who is the subject of the criminal investigation; (3) the number and, if known, physical location of the telephone line to which the pen register or trap and trace is to be attached; and (4) a statement of the offense to which the information likely to be obtained by the device relates. In addition, the order is to direct, upon request, the furnishing of information, facilities and technical assistance necessary to accomplish the installation of the device from the service provider. The content of the order relating to cooperation is intended to codify the existing informal practice of cooperation between the telephone companies and the Department. The subsection on the required order contains largely the same requirements now imposed on federal prosecutors for a pen register order as set forth in the United States Attorneys' Manual. USAM 9-7.014, 9-7.925 and 9-7.926.

Subsection (c) provides that an order may authorize the use of a pen register or trap and trace device for a 60 day period, with possible extensions of 60 days. This is a doubling of the 30 day period now set out in the existing Department policy and should serve to limit the number of such repetitive orders.

Subsection (d) directs that the order be sealed until otherwise ordered by the court. This subsection also prohibits the disclosure of the existence of either the order or the underlying investigation to any unauthorized person unless or until otherwise ordered by the court. Violations of this provision will be punishable as a contempt of court.

(c) Technical assistance. 18 U.S.C. 3124 governs technical assistance orders. 18 U.S.C. 3124(a), which relates to pen register technical assistance orders, provides that upon the request of an authorized person a provider of a wire communication service, landlord, custodian, or other person shall furnish all the information, facilities, and technical assistance necessary to effectuate the order unobtrusively and with a minimum of interference. This is patterned on the same provision in 18 U.S.C. 2518 for assistance in the installation of a wiretap.

18 U.S.C. 3124(b) regulates technical assistance orders for trap and trace devices. The installation of these devices requires more in the way of telephone company assistance than does the installation of a pen register. Thus, this subsection states that the provider of a wire communication service, landlord, custodian, or other person shall install the trap and trace device on the appropriate line and provide all other necessary technical assistance. The subsection also requires that the third party furnish the results of the trap and trace device to the designated law enforcement agency at reasonable intervals during regular business hours for the duration of the order.

It should be noted that the telephone companies have requested, and the Department has agreed, that trap and trace technical assistance applications contain the following language that reflects the technical and business hour requirements unique to trap and trace orders:

- i. the tracing operation is to be limited to Electronic Switching System (ESS) or No. 5 cross-bar facilities;
- ii. the tracing operation is to be restricted to tracing and recording only those calls originating from a specific city within a certain mileage radius or, in the case of a large city, from a specific section or sections of that city; and
- iii. the tracing operation is to be restricted to certain specific hours daily.

This specific language is currently required by Department policy, and, although not included in the statute, Department policy will be to continue this practice until changing technology requires modification. USAM 9-7.927 and 7.928.

18 U.S.C. 3124(c) states that the persons providing technical assistance shall be reasonably compensated for reasonable expenses incurred in providing technical

facilities and other assistance. This compensation provision is also modeled after the provision that applies in Chapter 119 of Title 18 concerning wiretap orders and is intended to be interpreted and implemented in a similar fashion.

18 U.S.C. 3124(d) provides that no cause of action shall lie against the provider of a wire or electronic communication service or its employees for providing technical assistance as required by a court order issued pursuant to this section.

Finally, 18 U.S.C. 3124(e) provides that a good faith reliance upon a court order or a legislative or statutory authorization is a complete defense to any civil or criminal action brought under this chapter or any other law.

9-7.4020 Pen Register and Trap and Trace Reports

18 U.S.C. 3125 requires the Attorney General to make an annual report to Congress on the number of pen register and trap and trace orders applied for by law enforcement agencies of the Department of Justice. Current Department policy already requires that the Department's agencies compile quarterly statistics concerning their pen register usage. (Memorandum of September 24, 1979, to investigative agencies from Philip B. Heymann, Assistant Attorney General, Criminal Division.) This section merely requires that this information be reformulated, with the added trap and trace data, and submitted to Congress. As there are relatively few trap and trace orders there should be little added burden caused by this reporting requirement.



U.S. Department of Justice

Executive Office for United States Attorneys

---

Washington, D.C. 20530

April 6, 1987  
(Expires September 6, 1987)

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for the United States Attorneys

WFW  
by  
JK William F. Weld  
Assistant Attorney General  
Criminal Division

RE: Forms - The Electronic Communications Privacy Act of 1986

NOTE: 1. This is issued pursuant to 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-7.5000

PURPOSE: This bluesheet provides sample forms to be used as guidelines in preparing documents pursuant to the Electronic Communications Privacy Act of 1986.

---

The following is a new section:

9-7.5000 FORMS - THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

Listed below are a set of forms for use in obtaining court orders in electronic surveillance cases which replace a number of the forms currently set out in USAM 9-7.900.

1. Application and order seeking interception of a wire or oral communication pursuant to 18 U.S.C. §2518.

2. Application and order seeking interception of an electronic communication pursuant to 18 U.S.C. §2518.

3. Application and order seeking installation and use of a pen register pursuant to 18 U.S.C. §§3122-23.

4. Application and order seeking installation and use of a trap and trace device pursuant to 18 U.S.C. §3122-23.

5. Order directing assistance of a wire or electronic communication service provider in executing a court order for a wire, oral or electronic interception of communications.

Several points must be kept in mind in implementing the amended statute after its date of effect and in utilizing these forms. First, there has been little basic change in the forms for seeking a court order to intercept a wire or oral communication. The changes in these forms are basically to utilize new terminology set forth in the Act.

Second, the forms for interception of an electronic communication are new and, with one exception, immediate and widespread use of this new investigative tool is not expected although it is not discouraged. The exception concerns interception of digital display pagers sometimes called "clone" pagers. These are pagers in which an alpha-numeric message, usually a call back telephone number, appears on the display after the pager number is called and the message transmitted. Investigators have obtained duplicate or "clone" pagers used by suspects and have been receiving the same message on the clone pager that the suspect receives on his pager. We believe a number of clone pagers are currently being utilized by federal investigative agencies. Prior Department policy has required that a court order, based on probable cause, be obtained pursuant to Rule 41 of the Federal Rules of Criminal Procedure for interception of such pager messages. After January 20, 1987, messages sent on such pagers will be considered as the sending of electronic communications and their interception will require an application and court order pursuant to 18 U.S.C. §2518. Unlike an ordinary wire or oral interception order, the statute does not require prior consent in Washington before an application for an electronic communication interception order can be submitted to the court. However, in order to obtain this reduced level of approval, the Department promised both Judiciary Committees of the Congress that Washington approval would informally be required for all interceptions of electronic communications for a period of three years. In order to live up to this promise, we must require that all applications for electronic communications, including those for clone pagers, be submitted

to the Office of Enforcement Operations in the Criminal Division for prior review. The submission must include the draft application, order and affidavit. Efforts will be made to set up an expedited review process for clone pagers due to the limited nature of the information that will be intercepted. Nevertheless, we must insist on this procedure being followed in all cases.

Second, pen registers will require a court order by statute as opposed to a court order sought pursuant to the All Writs Act which is the current Department policy. The attached forms on pen registers (and trap and trace devices) contain all the requirements of the new statute. We do not believe that obtaining a pen register will be in any way more difficult than it is under current law. In this regard, please note that a pen register order can be sought for up to 60 days, that the application can be presented to a United States Magistrate, that no affidavit should be necessary, and that no prior Washington approval is required for pen registers or trap and trace device orders.

Third, any existing court order on January 20, 1987, for a wire or oral communication, pen register, or a clone pager remains valid until it expires under its terms. Only extensions or new orders filed after the effective date are covered by the new statute.

Fourth, the statute permits a form of interception called "roving interception." (See the December 15, 1986 analysis at pp. 10-12). This is potentially a very valuable new investigative tool. The Criminal Division intends to maintain close control over the initial orders in this area. We are currently drafting the appropriate forms and any office that believes it has a case that might effectively utilize this new procedure should contact the Office of Enforcement Operations.

Any questions on the new statute or the forms should be directed to the Office of Enforcement Operations in the Criminal Division at FTS: 633-3684 or 633-2869.

LIST OF FORMS

<u>FORM</u>		<u>SUBJECT</u>
1	-	Wire/Oral Communications Application
2	-	Wire/Oral Communications Order
3	-	Electronic Communications Application
4	-	Electronic Communications Order
5	-	Pen Register Application
6	-	Pen Register Order
7	-	Trap and Trace Application
8	-	Trap and Trace Order
9	-	Wire or Electronic Communications Service Provider Technical Assistance Order

1984 USAM (superseded)

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION )  
OF THE UNITED STATES FOR AN ORDER )  
AUTHORIZING THE INTERCEPTION OF )  
(WIRE) (ORAL) COMMUNICATIONS )

APPLICATION

\_\_\_\_\_, an attorney of the United States Department of Justice states:

A. Applicant is an "investigative or law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is, an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

B. Pursuant to Section 2516 of Title 18, United States Code, the (Assistant) (Acting Assistant) (Deputy Assistant) Attorney General of the Criminal Division, United States Department of Justice, having been specially designated by the Attorney General pursuant to Order Number 1162-86 of December 12, 1986, has approved this application for an order authorizing the interception of (wire) (oral) communications. Attached to this application is a copy of Order Number 1162-86 of December 12, 1986, specially designating the above official to approve applications for court orders authorizing interception of wire or

oral communications. Also attached is a copy of that official's memorandum of authorization, approving this application.

C. This application seeks authorization to intercept (wire) (oral) communications of \_\_\_\_\_ and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code, that is, offenses involving (characterize offenses) which have been committed and are being committed by \_\_\_\_\_ and others as yet unknown.

D. Applicant has discussed all the circumstances of the above offenses with Special Agent \_\_\_\_\_ of the \_\_\_\_\_ who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent \_\_\_\_\_ attached to this application as Exhibit\_\_ and incorporated by reference herein which alleges facts to show that:

1. There is probable cause to believe that \_\_\_\_\_ and others as yet unknown have committed and are committing offenses involving (characterize offenses);

2. There is probable cause to believe that particular (wire) (oral) communications of \_\_\_\_\_ and others as yet unknown concerning these offenses will be obtained through the interception for which

authorization is herewith applied. In particular, these (wire) (oral) communications will concern the (characterize offenses.) In addition, the communications are expected to constitute admissible evidence of the commission of the offenses;

3. The attached affidavit contains a full and complete statement explaining why normal investigative procedures have been tried and failed, reasonably appear unlikely to succeed if continued, reasonably appear unlikely to succeed if tried, or are too dangerous;

4. There is probable cause to believe that the (telephone(s) subscribed to by \_\_\_\_\_, located at \_\_\_\_\_ and carrying telephone number(s) \_\_\_\_\_) (premises located at \_\_\_\_\_) (has) (have) been used and (is) (are) being used by \_\_\_\_\_ and others as yet unknown in connection with the commission of the above-described offenses.

E. (No previous application to any judge for authorization to intercept, or for approval of interception of, wire or oral communications involving any of the same persons, facilities, or places specified in this application are known to the individual authorizing and/or making this application.) (The following is)

(The attached affidavit contains) (a full and complete statement of the facts concerning all previous applications known to the individual(s) authorizing and making this application made to any judge for authorization to intercept, or for approval of interceptions, of wire, oral, or electronic communications involving any of the same persons, facilities, or places specified in this application, and the action taken by the judge on each application).

WHEREFORE, your affiant believes that probable cause exists to believe that \_\_\_\_\_ and others as yet unknown are engaged in the commission of offenses involving (characterize offenses); that \_\_\_\_\_ and others as yet unknown have used, and are using, the (telephone(s) subscribed to by \_\_\_\_\_, located at \_\_\_\_\_ and bearing number(s) \_\_\_\_\_) (premises located at \_\_\_\_\_) in connection with the commission of the above-described offenses; that (wire) (oral) communications of \_\_\_\_\_ and others as yet unknown concerning these offenses will be intercepted (to and from the above-described telephone(s)) (at the above described locations); and that normal investigative procedures appear unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent \_\_\_\_\_, attached hereto, the applicant requests this court to issue an order pursuant to the power conferred on it by Section

2518 of Title 18, United States Code, authorizing the (investigative agency) to intercept (wire) (oral) communications (to and from the above described telephone(s)) (at the above described location) until communications are intercepted that reveal the manner in which \_\_\_\_\_ and others as yet unknown participate in the specified offenses and that reveal the identities of (his) (her) (their) coconspirators, their places of operation, and the nature of the conspiracy involved therein, or for a period of (not to exceed 30) days, whichever is earlier; pursuant to Section 2518(5) of Title 18, United States Code, the applicant requests that the time set forth in the order run from the earlier of the day on which the investigative or law enforcement officer first begins to conduct the interception or ten days from the date of this order.

(It is further requested that the order authorize surreptitious entry of the premises for the purpose of installing, maintaining and removing any electronic oral interception devices utilized pursuant to the authority granted by this order.)

(It is further requested that this court issue an order pursuant to Section 2518(4) of Title 18, United States Code, directing that the (name of wire communication service provider, landlord, custodian, or other person) shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a

minimum of interference with the services that such service provider, landlord, custodian, or other person is according the person whose communications are to be intercepted; the service provider, landlord, custodian, or other person furnishing such facilities or technical assistance shall be compensated by the applicant for reasonable expenses incurred in providing such facilities or assistance.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_, 19\_\_

\_\_\_\_\_  
Applicant

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION )  
OF THE UNITED STATES FOR AN ORDER )  
AUTHORIZING THE INTERCEPTION OF )  
(WIRE) (ORAL) COMMUNICATIONS )

ORDER

AUTHORIZING INTERCEPTION OF (WIRE) (ORAL) COMMUNICATIONS

Application under oath having been made before me by \_\_\_\_\_  
\_\_\_\_\_, an "investigative or law enforcement officer" as  
defined in Section 2510 of Title 18, United States Code, for an  
order authorizing the interception of (wire) (oral)  
communications pursuant to Section 2518 of Title 18, United  
States Code, and full consideration having been given to the  
matters set forth therein, the court finds:

A. There is probable cause to believe that \_\_\_\_\_  
and others as yet unknown have committed and are committing  
offenses involving (characterize offenses).

B. There is probable cause to believe that particular  
(wire) (oral) communications concerning these offenses will be  
obtained through the interception for which authorization is  
herewith applied. In particular, these (wire) (oral)  
communications will concern the (characterize offenses).

C. Normal investigative procedures have been tried and failed, reasonably appear unlikely to succeed if continued, reasonably appear unlikely to succeed if tried, or are too dangerous.

D. There is probable cause to believe that (the telephone(s) subscribed to by \_\_\_\_\_, located at \_\_\_\_\_ and carrying number(s) \_\_\_\_\_) (premises located at \_\_\_\_\_) (has) (have) been and (is) (are) being used by \_\_\_\_\_ and others as yet unknown in connection with the commission of the above-stated offenses.

WHEREFORE, IT IS HEREBY ORDERED that the (investigative agency) is authorized, pursuant to an application authorized by an appropriate official of the Criminal Division, United States Department of Justice, pursuant to the power delegated to that official by special designation of the Attorney General under the authority vested in him by Section 2516 of Title 18, United States Code: to intercept (wire) (oral) communications of \_\_\_\_\_ and others as yet unknown concerning the above-described offenses (to and from the telephone(s) subscribed to by \_\_\_\_\_ and bearing telephone number(s) \_\_\_\_\_) (from the premises located at \_\_\_\_\_). Such interception shall not automatically terminate when the type of communications described above in paragraph (B) have first been obtained but shall

continue until communications are intercepted that reveal the manner in which \_\_\_\_\_ and others as yet unknown participate in the specified offenses and that reveal the identities of (his) (her) (their) coconspirators, their places of operation, and the nature of the conspiracy involved therein, or for a period of (not to exceed 30) days, whichever is earlier; pursuant to Section 2518(5) of Title 18, United States Code, the time set forth in the order shall run from the earlier of the day on which the investigative or law enforcement officer first begins to conduct the interception or ten days from the date of this order.

(It is further ordered that special agents of the (investigative agency) are authorized to enter the foregoing premises surreptitiously for the purposes of installing, maintaining, and removing any electronic oral interception devices utilized pursuant to the authority granted by this order.)

PROVIDING THAT, this authorization to intercept (wire) (oral) communications shall be executed as soon as practicable after the signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective or, in any event, at the end of (not to exceed 30) days measured from the earlier of the day on which the

investigative or law enforcement officer first begins to conduct the interception or ten days from the date of this order.

PROVIDING ALSO, that (applicant) shall provide the court with a report on or about (such intervals as the court may require) days following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
Date

1984 USAM (superseded)

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION )  
OF THE UNITED STATES FOR AN ORDER )  
AUTHORIZING THE INTERCEPTION OF )  
ELECTRONIC COMMUNICATIONS )

APPLICATION

\_\_\_\_\_, an attorney of the United States Department of  
Justice, states:

A. Applicant is an "investigative or law enforcement officer of the United States" within the meaning of Section 2510(7) of Title 18, United States Code, that is, an attorney authorized by law to prosecute or participate in the prosecution of all violations of federal law.

B. Applicant is also an "attorney for the Government" as defined in Rule 54(c) of the Federal Rules of Criminal Procedure, and, therefore, pursuant to Section 2516(3) of Title 18, United States Code is authorized to make an application to a Federal judge of competent jurisdiction for an order authorizing or approving the interception of an electronic communication.

C. This application seeks authorization to intercept electronic communications of \_\_\_\_\_ and

others as yet unknown, concerning felony violations of federal law, that is violations of \_\_\_\_\_ (characterize offenses) \_\_\_\_\_

\_\_\_\_\_, which have been committed and are being committed by \_\_\_\_\_ and others as yet unknown.

D. Applicant has discussed all the circumstances of the above offenses with Special Agent \_\_\_\_\_ of the (investigative agency) \_\_\_\_\_ who has directed and participated in the conduct of the investigation herein, and has examined the affidavit of Special Agent \_\_\_\_\_ (attached to this application as Exhibit \_\_\_\_\_ and which in its entirety is incorporated by reference herein) which alleges the facts therein to show that:

1. There is probable cause to believe that \_\_\_\_\_ and others as yet unknown, have committed and are committing felony offenses in violation of Section(s) \_\_\_\_\_ of Title \_\_\_\_\_ of the United States Code.

2. There is probable cause to believe that particular electronic communications of \_\_\_\_\_ and others as yet unknown, concerning these offenses will be obtained through the interception for which authorization is herewith

applied. In particular these electronic communications will concern (characterize offenses).

In addition, the communications are expected to constitute admissible evidence of the commission of the offenses set forth herein.

3. The affidavit contains a full and complete statement explaining why normal investigative procedures either have been tried and failed or reasonably appear unlikely to succeed if continued, or reasonably appear unlikely to succeed, if tried, or are too dangerous.

4. There is probable cause to believe that the electronic communication facilit(ies)(y) to wit: \_\_\_\_\_ owned or leased and operated by \_\_\_\_\_ and located in the premises known as \_\_\_\_\_ (has)(have)been and (is)(are) being used by \_\_\_\_\_ and others as yet unknown, in connection with the commission of the above stated offenses.

(No previous application to any judge for authorization to intercept, or for approval of interception of, electronic

communications involving any of the same persons, facilities, or places specified in this application are known to the individual authorizing and making this application.) (The following is \_\_\_\_\_) (The attached affidavit contains) (a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making this application for authorization to intercept, or for approval of interceptions of wire, oral or electronic communications involving any of the same persons, facilities or places specified in this application and the action taken by the judge on each such application).

WHEREFORE, your affiant believes that probable cause exists to believe that \_\_\_\_\_ and others as yet unknown, are engaged in the commission of felony offenses involving \_\_\_\_\_ (characterize offenses) \_\_\_\_\_; that \_\_\_\_\_ and others as yet unknown, have used and are using \_\_\_\_\_ located at \_\_\_\_\_, in connection with the commission of the above described offenses; that electronic communications of \_\_\_\_\_ and others as yet unknown, concerning these offenses will be intercepted over \_\_\_\_\_; and that normal investigative procedures appear unlikely to succeed.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent \_\_\_\_\_, attached hereto, the applicant requests this

court to issue an order, pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the (investigative agency) to intercept electronic communications to and from the above described facilit(ies)(y), until electronic communications are intercepted which reveal the manner in which \_\_\_\_\_ and others as yet unknown participate in the specified offenses, and that reveal the identities of (his)(her)(their) co-conspirators, their places of operation, and the nature of the conspiracy involved therein, or for a period of (not to exceed 30) days, whichever is earlier; pursuant to Section 2518 of Title 18, United States Code, the applicant requests that the time set forth in the order run from the earlier of the day on which the investigative or law enforcement officer first begins to conduct the interception or ten days from the date of this order.

It is further requested that this court issue an order include, pursuant to Section 2518(4), United States Code, directing that the (name of provider of electronic communications services) shall furnish the applicant, forthwith, all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service that such service provider is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by the

(name provider of electronic communications services) to be compensated for by the applicant for reasonable expenses incurred in providing such facilities or assistance.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_, 19\_\_\_\_

\_\_\_\_\_

Applicant

1984 USAM (superseded)

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE APPLICATION )  
OF THE UNITED STATES FOR AN ORDER )  
AUTHORIZING THE INTERCEPTION OF )  
ELECTRONIC COMMUNICATIONS )

ORDER

AUTHORIZING INTERCEPTION OF ELECTRONIC COMMUNICATIONS

Application under penalty of perjury having been made before me by \_\_\_\_\_, an "Investigative or Law Enforcement Officer" as defined in Section 2510(7) of Title 18, United States Code, and an "attorney for the Government" as defined in Rule 54(c) of the Federal Rules of Criminal Procedure, for an order authorizing the interception of electronic communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the court finds:

A. There is probable cause to believe that \_\_\_\_\_ and others as yet unknown, have committed and are committing felony offenses in violation of Section(s) \_\_\_\_\_ of Title \_\_\_\_\_ of the United States Code.

B. There is probable cause to believe that particular electronic communications concerning the offenses listed herein will be obtained through the interception for which authorization is herewith applied. In particular, these electronic

communications will concern the (characterize offenses) In addition, the communications are expected to constitute admissible evidence of the commission of the aforementioned offenses.

C. Normal investigative procedures either have been tried without success, reasonably appear unlikely to succeed if tried, or would be too dangerous.

D. There is probable cause to believe that the electronics communications facilit(ies)(y), \_\_\_\_\_ owned or leased and operated by \_\_\_\_\_ and located in the premises known as \_\_\_\_\_ (has), (have) been and (is) (are) being used by \_\_\_\_\_ and others as yet unknown in connection with the commission of the above stated offenses.

WHEREFORE, IT IS HEREBY ORDERED that the (investigative agency) is authorized, pursuant to an application authorized by (name of applicant) pursuant to the authority vested in him by Section 2516(3) of Title 18, United States Code: to intercept electronic communications of \_\_\_\_\_ and others as yet unknown, concerning the above described offenses to and from \_\_\_\_\_ and located in the premises known as \_\_\_\_\_. Such interception shall not automatically terminate when the type of communications described above in paragraph (B) have first been obtained but

shall continue until communications are intercepted that reveal the manner in which \_\_\_\_\_ and others as yet unknown, participate in the specified offenses and that reveal the identities of (his) (her) (their) co-conspirators, their places of operation, and the nature of the conspiracy involved therein, or for a period of (not to exceed 30) days, whichever is earlier; pursuant to Section 2518(5) of Title 18, United States Code, the time set forth in this order shall run from the earlier of the day on which the investigative or law enforcement officer first begins to conduct the interception or ten days from the date of this order.

Providing that, this authorization to intercept electronic communications shall be executed as soon as practicable after the signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18 of the United States Code, and must terminate upon attainment of the authorized objective or, in any event, at the end of (not to exceed 30) days measured from the earlier of the day on which the investigative or law enforcement officer first begins to conduct the interception or ten days from the date of the order, whichever is earlier.

Providing also, that applicant shall provide the court with a report on or about (such intervals as the court may require)

days following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

---

Judge

---

Date

1984 USAM (superseded)

UNITED STATES DISTRICT COURT  
District of \_\_\_\_\_

IN THE MATTER OF THE )  
APPLICATION OF THE UNITED )  
STATES OF AMERICA FOR AN )  
ORDER AUTHORIZING THE )  
INSTALLATION AND USE OF )  
A PEN REGISTER )

APPLICATION

\_\_\_\_\_, an attorney of the United States Department of Justice, hereby applies to the court for an order authorizing the installation and use of a pen register on telephone number(s) \_\_\_\_\_. In support of this application he states the following:

1. Applicant is an "attorney for the Government" as defined in Rule 54(c) of the Federal Rules of Criminal Procedure, and therefore, pursuant to Section 3122 of Title 18, United States Code, may apply for an order authorizing the installation and use of a pen register.

2. Applicant certifies that the (investigative agency) is conducting a criminal investigation of \_\_\_\_\_ and others as yet unknown, in connection with possible violations of \_\_\_\_\_; that it is believed that the subjects of the investigation are using telephone number(s) \_\_\_\_\_, (listed in the name of) (leased to) \_\_\_\_\_ and located at

\_\_\_\_\_ in furtherance of the subject offenses; and that the information likely to be obtained from the pen register is relevant to the ongoing criminal investigation in that it is believed that this information will concern the aforementioned offenses.

3. Applicant requests that the court issue an order authorizing the installation and use of a pen register to register numbers dialed or pulsed from telephone number (s) \_\_\_\_\_, to record the date and time of such dialings or pulsings, and to record the length of time the telephone receiver(s) in question (is) (are) off the hook for incoming or outgoing calls, for a period of (not to exceed 60) days.

4. The applicant further requests that the order direct the furnishing of information, facilities, and technical assistance necessary to unobtrusively accomplish the installation of the pen register by the (wire or electronic communications service provider), with reasonable compensation to be paid by the applicant for reasonable expenses incurred in providing such facilities and assistance.

WHEREFORE, it is respectfully requested that the court grant an order for a period of (not to exceed 60) days (1) authorizing the installation and use of a pen register to record numbers dialed or pulsed from telephone numbers(s) \_\_\_\_\_, (2) directing

the (wire or electronic communications service provider) to forthwith furnish agents of the (investigative agency) with all information, facilities and technical assistance necessary to accomplish the installation and use of the device(s) unobtrusively and with minimum interference to the service presently accorded persons whose dialings or pulsings are the subject of the pen register(s) and, (3) sealing this application and the court's order.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_, 19\_\_\_\_

\_\_\_\_\_  
Applicant

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE )  
APPLICATION OF THE )  
UNITED STATES OF AMERICA )  
FOR AN ORDER AUTHORIZING )  
THE INSTALLATION AND USE )  
OF A PEN REGISTER )

ORDER

This matter having come before the court pursuant to an application under Title 18, United States Code, Section 3122 by \_\_\_\_\_, an attorney for the Government, which application requests an order under Title 18, United States Code, Section 3123 authorizing the installation and use of a pen register on telephone number(s) \_\_\_\_\_, the court finds that the applicant has certified that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation into possible violations of \_\_\_\_\_ by \_\_\_\_\_ and others as yet unknown.

IT APPEARING that the numbers dialed or pulsed from telephone number(s) \_\_\_\_\_, (listed to) (leased

by) \_\_\_\_\_, and located at \_\_\_\_\_, (is) (are) relevant to an ongoing criminal investigation of the specified offenses,

IT IS ORDERED, pursuant to Title 18, United States Code, Section 3123, that agents of (investigative agency) may install and use a pen register to register numbers dialed or pulsed from telephone number(s) \_\_\_\_\_, to record the date and time of such pulsings or recordings, and to record the length of time the telephone receiver(s) in question (is) (are) off the hook for incoming or outgoing calls for a period of (not to exceed 60) days; and

IT IS FURTHER ORDERED, pursuant to Title 18, United States Code, Section 3123(b)(2), that (wire or electronic communications service provider) shall furnish agents of the (investigative agency) forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with minimum interference with the services that are accorded persons with respect to whom the installation and use is to take place; and

IT IS FURTHER ORDERED, that (wire or electronic communications service provider) be compensated by the applicant for reasonable expenses incurred in providing technical assistance; and

IT IS FURTHER ORDERED, pursuant to Title 18, United States Code, Section 3123(d), that this order and the application be sealed until otherwise ordered by the court, and that (wire or electronic communications service provider) shall not disclose the existence of the pen register or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

---

JUDGE

---

Date

1984 USAM (superseded)

UNITED STATES DISTRICT COURT  
District of \_\_\_\_\_

IN THE MATTER OF THE )  
APPLICATION OF THE UNITED )  
STATES OF AMERICA FOR AN )  
ORDER AUTHORIZING THE )  
INSTALLATION AND USE OF )  
A TRAP AND TRACE DEVICE )

APPLICATION

\_\_\_\_\_, an attorney of the United States Department of Justice, hereby applies to the court for an order authorizing the installation and use of a trap and trace device on telephone number(s) \_\_\_\_\_. In support of this application he/she states the following:

1. Applicant is an "attorney for the Government" as defined in Rule 54(c) of the Federal Rules of Criminal Procedure, and therefore, pursuant to Section 3122 of Title 18, United States Code, may apply for an order authorizing the installation and use of a trap and trace device.

2. Applicant certifies that the (investigative agency) is conducting a criminal investigation of \_\_\_\_\_ and others as yet unknown, in connection with possible violations of \_\_\_\_\_; it is believed that the subjects of the investigation are using telephone number(s) \_\_\_\_\_, (listed in the name of) (leased to) \_\_\_\_\_ and located at \_\_\_\_\_ in furtherance of the subject offenses; and that the information likely to be obtained from the trap and trace

device(s) is relevant to the ongoing criminal investigation in that it is believed that this information will concern the aforementioned offenses.

3. Applicant requests that the court issue an order authorizing the installation and use of a trap and trace device to capture the incoming electronic or other impulses which identify the originating number of a wire or electronic communication and the date, time and duration of such incoming impulses for a period of (not to exceed 60) days.

4. The applicant further requests that the order direct the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the trap and trace device including installation and operation of the device, unobtrusively and with a minimum of disruption of normal telephone service. The wire communications service provider shall be compensated by the applicant for reasonable expenses incurred in providing such facilities and technical assistance.

5. The applicant further requests that the order direct that the results of the trap and trace device shall be furnished to Special Agents of the (investigative agency) at reasonable intervals during regular business hours for the duration of the order.

6. The applicant further requests that the court order direct (wire or electronic communications service provider), its agents and employees not to disclose to the subscriber, or any other person, the existence of this order or of this investigation unless otherwise ordered by court.

7. The applicant further requests that the court order be limited in the following respects:

(a) the tracing operation shall be limited to Electronic Switching System (ESS) or No. 5 cross-bar switching facilities; and

(b) the tracing operation shall be restricted to tracing and recording only those calls originating from (geographical area).

WHEREFORE, it is respectfully requested that the court grant an order for (not to exceed 60) days (1) authorizing the installation and use of a trap and trace device(s) to identify incoming calls on telephone number(s) \_\_\_\_\_, (2) directing the (wire or electronic communications provider) to forthwith furnish agents of the (investigative agency) with all information, facilities and technical assistance necessary to accomplish the installation of the trap and trace device(s), including installation and operation of the device(s), unobtrusively and with minimum interference to the service

presently accorded the person whose telephone is to be the subject of the device(s) and, (3) sealing the application and the court's order.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_, 19\_\_

\_\_\_\_\_

Applicant

1984 USAM (superseded)

UNITED STATES DISTRICT COURT  
DISTRICT OF \_\_\_\_\_

IN THE MATTER OF THE )  
APPLICATION OF THE )  
UNITED STATES OF AMERICA )  
FOR AN ORDER AUTHORIZING )  
THE INSTALLATION AND USE )  
OF A TRAP AND TRACE DEVICE )

ORDER

This matter having come before the court pursuant to an application under Title 18, United States Code, Section 3122 by \_\_\_\_\_, an attorney for the Government, which application requests an order under Title 18, United States Code, Section 3123 authorizing the installation and use of a trap and trace device on telephone number(s) \_\_\_\_\_, the court finds that the applicant has certified that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation into possible violations of \_\_\_\_\_ by \_\_\_\_\_ and others as yet unknown.

IT APPEARING that a trap and trace device installed on telephone number(s) \_\_\_\_\_, (listed to) (leased by) \_\_\_\_\_, and located at \_\_\_\_\_, is relevant to an ongoing criminal investigation of the specified offenses,

IT IS ORDERED, pursuant to Title 18, United States Code, Section 3123, that agents of (investigative agency) may direct (wire or electronic communications service provider) to install a trap and trace device on telephone number(s) \_\_\_\_\_ to capture the incoming electronic impulses which identify the originating number of a wire or electronic communication and the date, time, and duration of such incoming impulses for a period of (not to exceed 60) days; and

IT IS FURTHER ORDERED, pursuant to Title 18, United States Code, Section 3123(b)(2), that (wire or electronic communications service provider) shall furnish agents of the (investigative agency) forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the trap and trace device(s), unobtrusively and with minimum interference to the services that are accorded persons whose telephone is (are) to be the subject of the device(s).

IT IS FURTHER ORDERED, that the (investigative agency) will compensate the (wire or electronic communication service provider) for expenses reasonably incurred in complying with this order.

IT IS FURTHER ORDERED, that the results of the trap and trace device(s) shall be furnished to the (investigative agency) at reasonable intervals during regular business hours for the duration of the order.

IT IS FURTHER ORDERED that:

a) the tracing operation shall be limited to Electronic Switching System (ESS) or No. 5 cross-bar switching facilities; and

b) the tracing operation shall be restricted to tracing and recording only those incoming calls originating from (geographical areas).

IT IS FURTHER ORDERED, pursuant to Title 18, United States Code, Section 3123(d), that this order and the application be sealed until otherwise ordered by the court, and that (wire or electronic communications service provider) shall not disclose the existence of the trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

---

JUDGE

---

Date

WIRE OR ELECTRONIC COMMUNICATION SERVICE PROVIDER

ORDER

This matter having come before the Court pursuant to the application of the United States for the interception of (wire)(electronic) communications on (facilities)(telephone numbers) \_\_\_\_\_ and subscribed to by \_\_\_\_\_ at \_\_\_\_\_.

IT APPEARING that the Court, having reviewed the application and having found that it conforms in all respects to the requirements of Title 18, United States Code, Sections 2516 and 2518, has this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_, signed an Order conforming to the provisions of Title 18, United States Code, Section 2518, authorizing special agents of the (investigative agency) to accomplish the aforesaid interception, and

IT FURTHER APPEARING THAT (name of wire or electronic communication service provider) is a provider of electronic communication services within the meaning of Title 18, United States Code, Section 2510(15), and

IT FURTHER APPEARING that the applicant has requested that (name of wire or electronic communication service provider)

be directed to furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish this interception unobtrusively and with minimum interference to the service to be intercepted, it is by the Court this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_,

ORDERED THAT (name of wire or electronic communication service provider) shall furnish the (investigative agency) such information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference to the services that are accorded persons whose communications are to be intercepted, and

FURTHER ORDERED that the furnishing of any such facilities or technical assistance by (name of wire or electronic communication service provider) be compensated by the applicant for reasonable expenses incurred in providing such facilities or assistance, and

FURTHER ORDERED that the furnishing of said information, facilities, and technical assistance shall terminate (not to exceed 30) days from the date of execution of this Order unless otherwise ordered by this Court, and

FURTHER ORDERED that this Order is sealed and that (name of wire or electronic communication service provider) its agents and

employees shall not disclose to the listed subscribers for the said telephone numbers or facilities or to any other persons the existence of the Order or this investigation until otherwise ordered by the Court.

\_\_\_\_\_  
United States District Judge

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 8

	<u>Page</u>
9-8.000 <u>JUVENILES: YOUTH CORRECTIONS ACT</u>	1
9-8.010 <u>Armed Forces Enlistment as an Alternative to Federal Prosecution</u>	1
9-8.100 JUVENILES	1
9-8.110 <u>Certification</u>	2
9-8.111 Exception to Certification	4
9-8.120 <u>Filing of the Complaint</u>	4
9-8.130 <u>Motion to Transfer</u>	5
9-8.131 Repeat Offenders	6
9-8.132 Conviction on Lesser Charges	6
9-8.133 Prior Juvenile Records	7
9-8.140 <u>Prosecutorial Discretion</u>	7
9-8.150 <u>Jury Trials</u>	7
9-8.160 <u>Notification</u>	8
9-8.170 <u>Detention</u>	8
9-8.180 <u>Information Concerning Juveniles</u>	9
9-8.200 YOUTH CORRECTIONS ACT	9
9-8.210 <u>Probation - Youth Offender</u>	10
9-8.220 <u>Commitment Without Regard to the Act</u>	11
9-8.230 <u>Juvenile Delinquents Not Committable as Youth Offenders</u>	12
9-8.240 <u>Release of Committed Youth Offenders</u>	12
9-8.250 <u>Youth Corrections Act</u>	12

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-8.000 JUVENILES: YOUTH CORRECTIONS ACT

9-8.010 Armed Forces Enlistment as an Alternative to Federal Prosecution

Present regulations of the Armed Services prohibit the enlistment or induction of an individual against whom criminal or juvenile charges are pending or against whom the charges have been dismissed to facilitate the individual's enlistment or induction. This policy is based, in part, on the premise that the individual who enlists or volunteers for induction under such conditions is not properly motivated to become an effective member of the Armed Forces.

Determination as to whether prosecution should be instituted or pending criminal charges dismissed in any case should be made on the basis of whether the public interest would thereby best be served and without reference to possible military service on the part of the subject. The Armed Forces are not to be regarded as correctional institutions and U.S. Attorneys are urged to give full cooperation to the Department of Defense in the latter's efforts to ensure a highly motivated all-volunteer Armed Forces and to bolster public confidence in military service as a thoroughly respectable and honorable profession.

There may be exceptional cases in which imminent military service, together with other factors, may be considered in deciding to decline prosecution if the offense is trivial or insubstantial, the offender is generally of good character, has no record or habits of anti-social behavior and does not require rehabilitation through existing criminal institutional methods and failure to prosecute will not seriously impair observance of the law in question or respect for law generally. In no case however, should the U.S. Attorney be a party to, or encourage, an agreement respecting criminal prosecution in exchange for enlistment or induction into the Armed Services.

9-8.100 JUVENILES

A "juvenile" for purposes of 18 U.S.C. Chapter 403 (18 U.S.C. §§5031 - 5042) is a person who has not attained his/her eighteenth birthday, or for the purpose of proceedings and disposition under that chapter for an alleged act of juvenile delinquency, a person who has not attained his/her twenty-first birthday. "Juvenile delinquency" is the violation of a law of the United States committed by a person prior to his/her eighteenth birthday which would have been a crime if committed by an adult.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The Juvenile Justice and Delinquency Prevention Act of 1974 was signed into law on September 7, 1974, and was amended by the Comprehensive Crime Control Act of 1984. On October 16, 1974, the Attorney General pursuant to Order No. 579.74 (28 C.F.R. §0.57) authorized the Assistant Attorney General, Criminal Division to exercise the power and authority vested in the Attorney General by 18 U.S.C. §§5032, 5036. By a criminal division memorandum dated March 12, 1985, to all U.S. Attorneys effective October 12, 1984, the authority to prosecute juveniles for acts of juvenile delinquency (including proceeding by information) and the power to certify under 18 U.S.C. §5032 were redelegated to all U.S. Attorneys. It should be noted that prior approval from the General Litigation and Legal Advice Section of the Criminal Division is requested before filing a motion to transfer. See 9-8.130, infra.

9-8.110 Certification

With one limited exception (see USAM 9-8.111, infra), under 18 U.S.C. §5032, a juvenile cannot be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate United States District Court that (1) the juvenile court or other appropriate state court does not have jurisdiction or refuses to assume jurisdiction over the juvenile with respect to the alleged act of juvenile delinquency; (2) the state does not have available programs and services adequate for the needs of juveniles; or (3) the offense charged is a violent felony or an offense described in 21 U.S.C. §§841, 952(a), 955 or 95, and there is a substantial federal interest that justifies the exercise of federal jurisdiction.

The authority to proceed with this certification in those cases where it is deemed appropriate has been delegated to U.S. Attorneys. This was effected by Attorney General Order No. 579-74 (28 C.F.R. §0.57) and a memorandum to all U.S. Attorneys dated March 12, 1985.

Before the certification can be made, an investigation must take place. To satisfy this requirement the following steps should be taken:

A. Cases of Exclusive U.S. Jurisdiction - The U.S. Attorney should, at a minimum, research the appropriate law and statutory provisions which apply to that case. It may be advisable to contact the appropriate local prosecutor and obtain his/her concurrence in such finding of exclusivity of jurisdiction.

B. Cases of Concurrent Jurisdiction - The appropriate local prosecutor should be contacted and the facts of the case discussed with

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

him/her. A determination should be made as to whether he/she is accepting or refusing prosecutorial responsibilities in the matter. It is strongly urged that, when the local prosecutor refuses to assume jurisdiction over the juvenile, you receive a letter from him/her to this effect and append it to the certification filed with court.

C. Adequacy of State Juvenile Programs and Services - The U.S. Attorney should request the Chief Probation Officer in his/her judicial corrections system to conduct an investigation into the state juvenile corrections system in that district to determine whether there are available programs and services adequate for the needs of juveniles. Such studies should be made on a periodic basis to reflect any possible changes brought about by state juvenile authorities. We strongly urge that when you utilize this procedure you obtain a statement from the probation officer, outlining the basis for his/her findings, and append this to the certification.

D. Violent Felony and Substantial Federal Interest - The Comprehensive Crime Control Act of 1984 added this category permitting the disposition of a case involving a juvenile charged with a serious felony by means of a federal proceeding. If the crime charged is a felony crime of violence or a serious drug offense as described in 21 U.S.C. §§841, 952(a), 955 or 959, and there is a "substantial Federal interest in the case or offense to warrant the exercise of Federal jurisdiction," it may be certified for federal prosecution.

This provision is limited to serious violent felonies and drug offenses so that the federal government will continue to defer to state authorities for less serious juvenile offenses. See S. Rep. No. 225, 98th Cong., 1st Sess. 389 (1983). Congress clearly intended that the determination of a "substantial Federal interest" be based on a finding that the nature of the offense or the circumstances of the case give rise to special federal concerns. *Id.* Examples would include assault on, or assassination of a federal official; aircraft hijacking; interstate kidnaping; major espionage or sabotage activity; large-scale drug trafficking; or significant or willful destruction of United States property.

*If, after investigation, any one of the above factors are found to exist, the U.S. Attorney shall proceed with the certification. The certification must specifically set out the kind of investigation made and, as a result of the investigation, which of the factors allowing federal jurisdiction was found to exist.*

Since it is possible that a successful attack on the certification may be based on the U.S. Attorney's abuse of discretion in this area, the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

criteria outlined above should be adhered to as closely as possible when utilizing the certification provisions of the Act.

9-8.111 Exception to Certification

The certification requirement does not apply to violations of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months. Most of these cases involve petty offenses committed on government land where summary disposition is in everyone's best interest. See S. Rep. No. 225, 98th Cong., 1st Sess. 388 (1983). In such a case, regular adult procedures may be followed.

9-8.120 Filing of the Complaint

Paragraph one of 18 U.S.C. §5032 states:

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless . . . [the certification procedure is followed].

The proceedings referred to are properly interpreted as either the filing of the information which initiates juvenile adjudication action or in those cases where it is warranted, the commencement of criminal prosecution which is begun by motion to transfer. It is only at the point where the United States has decided it will not surrender the juvenile to the state, but will proceed against him/her in federal court, that the certification is required in cases not falling within the limited exception.

In other words, the Department does not interpret 18 U.S.C. §5032 as requiring certification prior to the filing of a complaint and issuance of an arrest warrant. That part of 18 U.S.C. §5032 which states "[i]f the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such state" (emphasis added) necessarily implies that an arrest procedure has been completed. Upon a juvenile's arrest, the U.S. Attorney should move as expeditiously as

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

possible to make the determination as to whether he/she is to be turned over to state authorities or whether there is a substantial basis to file a certification invoking federal jurisdiction.

Nor should certification be required in cases where a juvenile is brought before a magistrate for a Federal Rules of Criminal Procedures, Rule 40, removal hearing. The U.S. Attorney in the district where the removal hearing is being held should set out the government's position based on the Department's interpretation of 18 U.S.C. §5032 as indicated above. He/she should also urge that the U.S. Attorney in the district where the crime was committed or the complaint was filed is the only party who can make the proper determination concerning the appropriate forum for the handling of the case (*i.e.*, only he/she can determine whether one of the factors necessary for certification exists or whether the case should be turned over to state authorities).

It must be emphasized that the major thrust of the Act is to insure greater participation by the states in the handling of juvenile criminal matters. Accordingly, the U.S. Attorney should make every effort to funnel cases to state authorities where it has been determined that there is no exclusive federal jurisdiction.

9-8.130 Motion to Transfer

18 U.S.C. §5032 provides several avenues for adult prosecution of a juvenile. The first is where he/she has requested in writing, upon advice of counsel, to be proceeded against as an adult. The other procedure involves the filing of a "motion of transfer" in cases involving juveniles who have committed a crime of violence or a serious drug offense (as defined in 18 U.S.C. §5032) after their fifteenth birthday. In the latter case, after filing of the motion to transfer (Motion to Proceed Against the Juvenile as an Adult) in the United States District Court, the court must conduct a hearing to determine whether such prosecution would be in the interest of justice. In making this determination, the court must consider the criteria set out in 18 U.S.C. §5032. In doing so it must receive evidence on each of the factors set out and make findings in the record with regard to each of those factors. In the case of repeat offenders see USAM 9-8.131, infra.

To maintain uniformity in those cases where adult prosecution is desired, U.S. Attorneys must forward a request to so proceed to the Department. Such requests should be forwarded only in those cases where, after a careful study of the facts, the U.S. Attorney feels the criteria set out in the statute can be met. The request must set out the facts on

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the case in detail; state that, after study, it has been determined that the criteria can be met; and give the reasons for the U.S. Attorney's desire to proceed against the juvenile as an adult in the particular case. The request for authority to proceed by motion to transfer should be referred to the Chief of the General Litigation and Legal Advice Section of the Criminal Division. Upon the granting of such request, the U.S. Attorney shall file the motion to transfer.

9-8.131 Repeat Offenders

Where a juvenile of sixteen years of age or older is charged with a serious crime involving violence against persons or a particularly dangerous crime involving destruction of property (as defined in 18 U.S.C. §5032) and he/she has been previously found guilty of such a serious offense, this fact alone should serve as adequate justification for federal prosecution of the juvenile. Therefore, in such cases involving repeat offenders who have prior records of similar, serious offenses, transfer of the case for prosecution upon motion of the government seems to be mandatory.

Juvenile adjudications are not generally considered findings of guilt or innocence. The fact that no proceedings against a juvenile may be commenced until prior juvenile records are received by the court, however, supports the argument that juvenile records may be used in determining whether the juvenile is a repeat offender. Moreover, the wording of the statute dictates that a juvenile offender "who has previously been found guilty of an act which if committed by an adult would have been one of the offenses set forth in this subsection or an offense in violation of a state felony statute which would have been such an offense if a circumstance giving rise to federal jurisdiction had existed, shall be transferred to the appropriate district court . . . for [federal] criminal prosecution." (Emphasis added.) This wording supports the Department's argument in favor of considering prior juvenile adjudications, for it makes federal prosecution mandatory where there is a prior record of this type. See S. Rep. No. 225, 98th Cong., 1st Sess. 391-392 (1983).

9-8.132 Conviction on Lesser Charges

If a juvenile is transferred for prosecution and is convicted of a lesser charge which could not have supported the transfer, then the disposition of the juvenile is to proceed in the same manner as if he/she had been adjudicated delinquent rather than criminally convicted. If a juvenile is convicted of a charge that could not have supported the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

original transfer of his/her case, he/she should not be held to the consequences of criminal conviction but rather should be treated as though he/she had been adjudicated delinquent.

9-8.133 Prior Juvenile Records

Proceedings against a juvenile are not to commence until any prior juvenile court records of the juvenile have been received by the court, or the clerk of the court certifies that the juvenile has no prior record or that the records are unavailable and explains why. These requirements are to be understood in the context of a standard of reasonableness. See S. Rep. No. 225, 98th Cong., 1st Sess. 391 (1983).

9-8.140 Prosecutorial Discretion

The Act does not change the long-established rule that prosecutors have discretion to forego certain prosecutions in the interest of justice. Where a state treats its juveniles as adults or has poor programs and services there is still no affirmative requirement to prosecute. Courts have uniformly held that U.S. Attorneys were not stripped of their normal prosecutorial discretion even when statutes "required" prosecution. See Inmates of Attica v. Rockefeller, 477 F.2d 375 (2d Cir. 1973).

Similarly, selective prosecution is not a denial of equal prosecution unless the selection is based on an unjustifiable standard such as race or religion. See United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962). U.S. Attorneys should continue to exercise their discretion in a manner consistent with the best interests of society and the criminal justice system.

The use of any pre-trial diversion program, including the "Brooklyn Plan," for juveniles is inappropriate unless the certification requirements of the Act have been met and the pre-trial diversion guidelines set out by the Department have been complied with. (See USAM 1-12.010.)

9-8.150 Jury Trials

Some confusion about this issue has arisen as a result of a memorandum to federal judges, magistrates, etc., from the Administrative Office of the United States Courts stating that the statutory prohibition

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

against jury trial in juvenile proceedings has been deleted. That is true. However, it is the view of the Department that the Act does not require jury trials and the jury trials shall be opposed.

There is no constitutional requirement of a jury trial in a state juvenile proceeding. See McKiever v. Pennsylvania, 403 U.S. 528 (1971). This rule has been extended to federal juvenile proceedings. See United States v. Cuomo, 525 F.2d 1285 (5th Cir. 1976); Cotton v. United States, 446 F.2d 107 (7th Cir. 1971); United States v. Salcido-Medina, 483 F.2d 162 (9th Cir. 1973); United States v. James, 464 F.2d 1228 (9th Cir. 1972); United States v. John Doe, 385 F. Supp. 902 (D. Ariz. 1974). If this rule is to be changed, it should be by clear and explicit provisions in the Act showing that Congress intended to change the settled case law. See Callanan v. United States, 364 U.S. 587, 594-595 (1961); Toilet Goods v. Finch, 419 F.2d 21, 27 (2d Cir. 1969). This rule of statutory construction applies with special force where, as here, the statute does explicitly provide for other constitutional rights normally associated with the trial of "crimes" including the right to counsel, see 18 U.S.C. §§5032, 5034 and 5037, and the right to a speedy trial, see 18 U.S.C. §5036.

The legislative history of the Act indicates that the statutory prohibition was deleted not to change the law but to allow the courts to decide on a constitutional ground whether a jury trial is required. Every Court of Appeals that has considered this issue has held that there is not a constitutional right to a jury trial in a federal juvenile delinquency proceeding. For a summary of decisions, see United States v. Cuomo, supra.

9-8.160 Notification

U.S. Attorneys should insure that the law enforcement officers in their judicial district are made aware of the requirements of 18 U.S.C. §5033. In addition to the requirement that the juvenile be advised of his/her constitutional rights in language comprehensive to the juvenile, the arresting officers must also notify the Attorney General (notice to U.S. Attorney will suffice), and the juvenile's parents, guardian, or custodian of such custody. The arresting officer must also notify the parents, guardian, or custodian of the rights of the juvenile and of the nature of the alleged offense.

9-8.170 Detention

U.S. Attorneys must insure that the juvenile is detained in a proper facility in accordance with 18 U.S.C. §5035. Note that the juvenile

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

alleged to be a delinquent should not be detained or confined in any institution in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.

9-8.180 Information Concerning Juveniles

Subsections (a) through (c) of 18 U.S.C. §5038 guard against improper disclosure of juvenile records.

Subsection (d) provides for the fingerprinting and photographing not only of juveniles prosecuted as adults but also of juveniles adjudicated delinquent with respect to offenses that are felonies involving violence or serious drug crimes. Fingerprints and photographs of juveniles not prosecuted as adults may be made available only in accordance with the provisions of 18 U.S.C. §5038(a).

Subsection (e) prohibits the publication of the name or picture of any juvenile in connection with a juvenile delinquent proceeding. While this does not prohibit the publication of information obtained legitimately by the media, it does bar the release of such information by court or government officials.

Subsection (f) directs the transmission to the Federal Bureau of Investigation of all information concerning adjudications which relate to a juvenile who has on two separate occasions been found guilty of committing an act which, if committed by an adult, would be a felony involving violence or an offense described in 21 U.S.C. §§841, 925(a), 955 or 958.

9-8.200 YOUTH CORRECTIONS ACT

The purpose of the Act is to provide a more flexible method of sentencing convicted youth offenders in order to secure corrective treatment and release under supervision. The court may invoke the alternative sentencing provisions of the Federal Youth Correction Act (18 U.S.C. §§5005-5026) if:

A. The defendant has been convicted of a criminal offense, whether a felony or misdemeanor or petty offense, under regular adult procedure; and

B. At the time of conviction the defendant was under 22 years of age (Youth Offender), or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. At the time of conviction he/she has attained his/her 22nd birthday but has not attained his/her 26th birthday, and the court finds, after consideration of the defendant's previous record of delinquency or crime, his/her social background, capabilities, health, and other factors, that there is reasonable ground to believe that he/she will benefit from treatment under the Act, 18 U.S.C. §4206 (Young Adult Offender).

For purposes of determining whether a defendant qualifies as a "youth offender" the time of conviction has been held to be the time the verdict is returned or a plea of guilty is taken. See United States v. Branich, 495 F.2d 1066 (D.C. Cir. 1974) rather than the time of the judgment on the verdict. See 18 U.S.C. §5006(e), (h).

If the above requirements are met and the court in its discretion decides to proceed under the provisions of the Youth Corrections Act, the court is vested with authority as set forth below.

9-8.210 Probation - Youth Offender

If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation (18 U.S.C. §5010(a)). Expungement of the conviction of a youth offender placed on probation under 18 U.S.C. §5010(a) occurs when the court has exercised its discretion to discharge the youth unconditionally prior to expiration of his/her probationary period, but does not occur merely upon his/her successful completion of probation. Tuten v. United States, 103 S. Ct 1412 (1983).

A. Indeterminate Sentence Not Exceeding 6 Years. The court may commit the youth offender to the custody of the Attorney General for treatment and supervision until discharged by the Youth Correction Division of the Board of Parole, 18 U.S.C. §5010(b). A youth offender may be given an indeterminate sentence under 18 U.S.C. §5010(b) irrespective of the maximum term of imprisonment otherwise provided by law for the offense of which he/she has been convicted. However, where the youth offender enters a plea of guilty to a crime for which the maximum penalty is less than the maximum under the indeterminate sentencing of the Youth Act, it is essential that he/she understand, at the time of his/her plea, the alternative sentencing provisions of the Youth Act. When he/she appears for sentencing, if there appears doubt that he/she was aware of such provisions at the time of his/her plea, he/she should be permitted to withdraw his/her plea, if he/she so elects.

B. Indeterminate Sentence Exceeding 6 Years. If the aggregate punishment otherwise provided by law for the offense or offenses of which

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the youth offender has been convicted exceeds 6 years, and if the court finds that the youth offender may not be able to derive maximum benefit from treatment by the Youth Correction Division of the Board of Parole prior to the expiration of 6 years from the date of conviction, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision of any further period that may be authorized by law for the offense or offenses of which he/she stands convicted or until discharged by the Youth Correction Division, 18 U.S.C. §5010(c). Such a sentence extends the permissible period of treatment and supervision for such additional time in excess of 6 years as the sentencing court has fixed.

C. Commitment for Observation and Study. If the court desires additional information as to whether a youth offender will derive benefit from treatment under 18 U.S.C. §5010(b), (c), it may order his/her commitment to the custody of the Attorney General for observation and study at an appropriate classification center or agency. See 18 U.S.C. §5010(e). The law provides that within 60 days from the date of such order, or within such additional period as the court may grant, the Youth Correction Division must report its finding to the court.

D. Split Sentences. The Ninth Circuit holds that the Youth Corrections Act permits the court to sentence youth offenders to "split sentences" consisting of periods of confinement and probation. See United States v. Roberts, 638 F.2d 1344 (9th Cir. 1981); United States v. Smith, 645 F.2d 747 (9th Cir. 1981). (It should be noted that the Department disagrees with this interpretation).

9-8.220 Commitment Without Regard to the Act

If the court finds that the youth offender will not benefit from treatment under 18 U.S.C. §5010(b), (c), the court may then sentence him/her under any other applicable penalty provision of law. See 18 U.S.C. §5010(d). However, before the court may impose an adult sentence on an individual who is eligible for sentencing under the Youth Corrections Act an explicit finding that the offender will "not benefit" from such treatment must be made on the record by the sentencing court. See Dorszynski v. United States, 418 U.S. 424 (1974). Retroactive application of the rule set out in Dorszynski should be opposed by all U.S. Attorneys. See Jackson v. United States, 510 F.2d 1335 (10th Cir. 1975); Owens v. United States, 515 F.2d 507 (3d Cir. 1975), summarily affirming Owens v. United States, 383 F. Supp. 780 (M.D. Pa. 1974). All

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S. Attorneys should also insure that defendants are fully advised before plea and sentence as to the maximum sentence they may receive under the Youth Corrections Act. See Fed. R. Crim. P. 11. An existing Youth Corrections Act sentence may be modified to an adult sentence by the imposition of a federal concurrent or consecutive adult sentence. In such cases, the subsequent sentencing court should make an explicit finding that the offender would not benefit further from youth treatment during the remainder of his/her YCA term. See Ralston v. Robinson, 454 U.S. 201 (1981). In cases where the subsequent adult conviction and sentence is in state court, it is necessary for the original sentencing court to make a specific "no further benefit" finding in order to modify the YCA sentence to adult treatment. See King v. Kennedy, 671 F.2d 1053 (7th Cir. 1982).

9-8.230 Juvenile Delinquents Not Committable as Youth Offenders

A juvenile who has been processed under the Juvenile Delinquency Act and found by the court to be a juvenile delinquent, but not convicted under regular criminal procedure, may not be committed under the provisions of the Youth Corrections Act. See 18 U.S.C. §5037 (Juvenile Delinquency Act), 18 U.S.C. §5006, particularly (e) and (h); and §5032(b).

9-8.240 Release of Committed Youth Offenders

A committed youth offender may be released conditionally under supervision by the Youth Division at any time, 18 U.S.C. §5017(a). The offender may be discharged unconditionally upon expiration of 1 year from the date of conditional release. See 18 U.S.C. §5017(b). Youth offenders committed under 18 U.S.C. §§5010(b) or 5010(c) must be released conditionally under supervision not later than 2 years before expiration of their respective maximum terms. The maximum term under 18 U.S.C. §5010(b) is set by the statute at 6 years; under 18 U.S.C. §5010(c) the court fixes the maximum term. 18 U.S.C. §§5017(c), 5017(d).

9-8.250 Youth Corrections Act

Although most of the Sentencing Reform Act has a substantially delayed effective date, the Youth Corrections Act was repealed on October 12, 1984. This repeal also had the effect, as intended, of nullifying the Young Adult Offenders Act, former 18 U.S.C. §4216.

Because of ex post facto and other policy considerations, however, the Department takes the position that the repeal of these statutes is

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

applicable only as to offenses committed after October 12, 1984. See generally, Weaver v. Graham, 450 U.S. 24 (1981). Nevertheless, although the statute may still be available for application in such cases if judges should choose to use them, attorneys for the government should argue in individual cases that judges should not exercise their discretion to impose a Youth Corrections Act sentence and should find that the defendant will not benefit from its provision. See 18 U.S.C. §5010(c) and Dorszynski v. United States, 418 U.S. 424 (1974). As the legislative history behind the repeal of the Youth Corrections Act shows, there are only a few youth facilities in the country, with the result that the youngest federal prisoners, those who may most need to retain family ties, are often the furthest from home of any federal offenders. As the statute is phased out, fewer and fewer offenders will be in the remaining facilities, so that there will be fewer programs and less reason to suppose that a youthful offender will receive any benefit from being sentenced under the Youth Corrections Act.

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 9

	<u>Page</u>
9-9.000 <u>MENTAL COMPETENCY OF AN ACCUSED</u>	1
9-9.100 EXAMINATION BEFORE TRIAL	1
9-9.110 <u>When an Examination is Necessary</u>	1
9-9.120 <u>Procedure for Examination and Report</u>	1
9-9.130 <u>Use of Local Psychiatrists Whenever Possible</u>	2
9-9.140 <u>Order for Examination</u>	2
9-9.200 PROCEEDINGS AFTER EXAMINATION	3
9-9.210 <u>Subpoena of Psychiatrists</u>	3
9-9.300 COMMITMENT	4
9-9.310 <u>Commitment Order Should Contain Statement of Charges Against the Subject</u>	4
9-9.400 COMPETENCY RECOVERED--TRIAL	5
9-9.410 <u>Procedure for the Return of Defendant to the District</u>	5
9-9.420 <u>Judicial Finding Of Mental Competency</u>	5
9-9.430 <u>Effect of Psychotropic Drugs</u>	5
9-9.500 MENTAL INCOMPETENCY UNDISCLOSED AT TRIAL	6
9-9.510 <u>Procedure</u>	6
9-9.520 <u>Person Cannot Compel a Certification of Mental Incompetency Under 18 U.S.C. §4245</u>	6

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-9.000 MENTAL COMPETENCY OF AN ACCUSED

The conviction of a defendant while he/she is mentally incompetent violates due process. Pate v. Robinson, 383 U.S. 375, 379 (1966). 18 U.S.C. §§4244-4248 prescribe the procedure required when the mental competency of the defendant at the time of trial (or at the time of a guilty plea) comes under suspicion before trial or after commitment under sentence, and also when mental competency is present on expiration of sentence. See generally, C. Wright, Federal Practice and Procedure, Criminal 2d §196. See also USAM 3-3.000 (Psychiatric Examinations in Criminal Cases).

The separate question of insanity or incompetence at the time of the offense as a defense to criminal charges is discussed at USAM 9-18.200 et seq.

9-9.100 EXAMINATION BEFORE TRIAL

9-9.110 When An Examination is Necessary

18 U.S.C. §4244 requires the U.S. Attorney to file a motion for judicial determination of the mental competency of a person charged with violation of federal law if he/she has reasonable cause to believe that the mental condition of the defendant may render him/her unable to understand the charges against him/her or properly assist in his/her defense. See Dusky v. United States, 362 U.S. 402 (1960). Such motion may also be filed on behalf of the accused or the court may act on its own motion.

It has been held that the initial motion for a 18 U.S.C. §4244 examination cannot be denied unless the motion fails to set forth reasonable cause for belief that the defendant is incompetent, or unless it is determined that the motion is frivolous or not made in good faith. The degree of discretion allowed the district judge in this determination varies among the circuits. Compare United States v. Metcalf, 698 F.2d 877 (7th Cir. 1983) with Chavez v. United States, 656 F.2d 512 (9th Cir. 1981). The district court is allowed greater discretion in denying subsequent motions. Chavez v. United States, supra, at 517.

9-9.120 Procedure For Examination and Report

It is urged that examinations be made by private psychiatrists or on an outpatient basis at a hospital or clinic. See USAM 3-3.310. It is the responsibility of the U.S. Attorney to determine the availability of board-certified psychiatrists and to maintain a panel from which selections may be made. If it should be found necessary, the court may order the accused committed to a private hospital for examination but such commitments should

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

be avoided where possible. Only in exceptional circumstances, such as the absence of other facilities or where long term commitment or examinations under adequate security conditions is necessary, should defendants be placed in federal custody for such examination.

Whenever the accused is referred for examination, it is imperative that the U.S. Attorney forward to the examining doctor a summary letter setting forth a full exposition concerning the alleged crime together with all background information on the accused, including his/her history of criminal convictions and any prior history of mental illness.

9-9.130 Use of Local Psychiatrists Wherever Possible

With regard to the original mental examination it is of the utmost importance that the services of local, or the nearest available, qualified psychiatrists be utilized as far as possible. If satisfactory examination cannot be secured in the area, the Bureau of Prisons will offer suggestions upon request. When commitment is ordered for the conduct of the examination, the use of the nearest hospital or other facility acceptable to the court is recommended. Commitment to the Bureau of Prisons (Springfield, Missouri; Butner, North Carolina; and Lexington, Kentucky—females) should not routinely be ordered for the initial examination and report under 18 U.S.C. §4244, because the facilities and resources of the available institutions are continually overtaxed. Bureau of Prisons' facilities should be utilized where a secure facility is indicated and when the court is willing to commit the accused to such a facility for an extended period of time (i.e., 60 to 90 days). See USAM 3-3.310. If, at the time of commitment to a Bureau of Prisons' facility, it appears that medical or psychiatric treatment may be required, the court should be asked to indicate in the commitment order its directives regarding treatment, including the use of antipsychotic medication.

9-9.140 Order for Examination

The order should specify the specific purpose of the examination, i.e., mental competency to stand trial, rather than merely citing 18 U.S.C. §4244. See USAM 3-3.301, 3-3.303. The order for examination may also specifically direct that an examiner render an opinion as to the accused's mental responsibility at the time of the alleged offense, under the framework of the responsibility tests applicable in the trial district. See Fed. R. Crim. P. 12.2; United States v. Reason, 549 F.2d 309, 312 (4th Cir. 1977); United States v. Reifsteck, 535 F.2d 1030 (8th Cir. 1976); see also United States v. Dysart, 705 F.2d 1247 (10th Cir. 1983). Local examination is highly desirable for "dual purpose" examinations because local doctors are more readily available for trial testimony on the responsibility issue. See USAM 3-3.302, 3-3.320. In the exceptional cases in which defendants are

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

committed to a Bureau of Prisons facility, dual purpose examinations may be ordered only if only a single doctor is asked to render an opinion both on competency and responsibility.

9-9.200 PROCEEDINGS AFTER EXAMINATION

Where the report indicates that the accused is presently mentally incompetent, the statute requires that the court hold a hearing upon due notice and make a finding on the evidence. Where the psychiatrist's report indicates that the accused is presently competent, no hearing is required unless the evidence, as a whole, raises a bona fide doubt as to the defendant's competence to stand trial. A judicial determination as to competence is required in every case after the psychiatric examination, regardless of the content of the report. See Chavez v. United States, 656 F.2d 512, 516-517 (9th Cir. 1981).

The nature of the precommitment hearing mentioned in 18 U.S.C. §4244 is not described in the statute. In many cases the hearing has been held on the basis of the medical reports without the presence of the reporting psychiatrist. This has resulted in habeas corpus suits challenging commitment to custody under 18 U.S.C. §4246 on the basis that the precommitment hearing was lacking in due process because held on the basis of reports without live testimony by the psychiatrist. Waivers of the presence of the reporting psychiatrists have been held to be ineffective since the accused is considered mentally incompetent, nor can waivers by the accused's counsel be considered appropriate. Consequently the habeas corpus courts have frequently found the hearing to have been invalid and have ordered the return of the accused to the committing court for a new hearing.

9-9.210 Subpoena of Psychiatrists

In order to insure a proper precommitment hearing under 18 U.S.C. §4244, U.S. Attorneys should as a general rule subpoena the reporting psychiatrist to testify in person. In this manner the defense attorneys and the U.S. Attorney will be enabled properly to probe the basis of the conclusion of lack of mental capacity for trial, within the definition established in decisions under the mental competency statutes. The need for personal appearance of the reporting psychiatrist points up the necessity that whenever possible local examinations or local commitments for examination be made in order to obviate extensive travel by the Bureau of Prisons.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-9.300 COMMITMENT

If the court finds that the accused is in fact mentally incompetent it may order him/her committed, pursuant to 18 U.S.C. §4246, to the custody of the Attorney General. As a result of the Supreme Court's decision in Jackson v. Indiana, 406 U.S. 715 (1972), a person committed to the custody of the Attorney General pursuant to 18 U.S.C. §4246 can be held only for a reasonable period of time necessary to determine whether there is a substantial probability that he/she will attain mental competency to stand trial in the foreseeable future. If it appears that the person will not be mentally competent to stand trial in the foreseeable future, the government must either institute the customary civil commitment proceedings that would be required to commit indefinitely any other citizen, or release the defendant. United States v. Wood, 469 F.2d 676 (5th Cir. 1972); United States v. Debellis, 649 F.2d 1 (1st Cir. 1982); United States v. Lancaster, 408 F. Supp. 225 (D. D.C. 1976). If the release of the person would endanger the officers, property, or other interests of the United States, a hearing should be conducted pursuant to 18 U.S.C. §4247. Upon such hearing, if the court determines that the release of the person would endanger the officers, property, or other interests of the United States, the court may commit the person to the custody of the Attorney General. United States v. Wood, *supra*. A person committed to the custody of the Attorney General pursuant to 18 U.S.C. §4247 shall remain in the custody of the Attorney General until the sanity or mental competency of such person shall be restored or until the mental condition of the person is so improved that if he/she be released he/she will not endanger the safety of the officers, the property, or other interests of the United States or until suitable arrangements have been made for the custody and care of the prisoner by the state of his/her residence. See 18 U.S.C. §4248. If the release of the person does not meet the standard set out in 18 U.S.C. §4247, but his/her release would pose a danger to the community, it is up to the state to institute civil commitment proceedings and the U.S. Attorney should seek to persuade the appropriate state officials to institute such proceedings.

9-9.310 Commitment Order Should Contain Statement Of Charges Against the Subject

When commitment follows a finding of mental incompetency, the U.S. Attorney should make certain that the commitment order includes a brief statement of the charges pending against the subject. The order should be accompanied by copies of any reports relating to the charges or the background of the accused, as well as copies of all available psychiatric records and reports upon which the finding of incompetency is based. The furnishing of such material enables institutional authorities to chart appropriate treatment whereas, without it, they must depend upon information furnished by the subject which may be inaccurate.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-9.400 COMPETENCY RECOVERED--TRIAL

9-9.410 Procedure for the Return of Defendant to the District

Upon receipt of notice from the Bureau of Prisons that a defendant has recovered mentally to the point of being able to stand trial, or that after a reasonable period of examination it does not appear that the accused will regain competency in the foreseeable future, the U.S. Attorney should promptly cause issuance of a writ of habeas corpus ad prosequendum out of his/her court to be executed by the U.S. Marshal for his/her district by taking the accused into custody at the named institution. No funds are available to the institutional authorities for the return of a defendant to the district from which he/she was committed. It is important that the defendant be returned to the district as soon as possible since the time limitations of the Speedy Trial Act begin to run from the time the court receives notification that the defendant is able to stand trial. See Guidelines to the Administration of the "Speedy Trial Act of 1974" of the Committee of the Judicial Conference on the Administration of the Criminal Law, section 3161(h)(4), pp. 21-22.

9-9.420 Judicial Finding Of Mental Competency

Once a defendant has been returned to the district, a trial cannot proceed without an antecedent judicial finding, with or without hearing, that the accused has recovered mental competency. If the court, upon all the evidence in hand, is unconvinced as to mental recovery it may order the subject returned for further treatment under the original commitment. See United States v. Clark, 617 F.2d 180 (9th Cir. 1980).

9-9.430 Effect Of Psychotropic Drugs

In all cases where the defendant is returned to the trial district with maintenance of his/her competency contingent upon his/her continued usage of psychotropic drugs, the U.S. Attorney should request a full hearing on the defendant's competency. It has been held that the use of a prescribed tranquilizer which enables the defendant to understand the charge against him/her and to discuss the matter with an adequate degree of understanding does not render defendant mentally incompetent to stand trial. See United States v. Hayes, 589 F.2d 811, 123 (5th Cir. 1979), cert. denied, 444 U.S. 847 (1979); Government of Virgin Islands v. Crowe, 391 F. Supp. 987 (D. V.I. 1974), aff'd., 529 F.2d 511 (3d Cir. 1975).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-9.500 MENTAL INCOMPETENCY UNDISCLOSED AT TRIAL

9-9.510 Procedure

When a board of examiners referred to in 18 U.S.C. §4241 has examined a sentenced prisoner and has found probable cause to believe that he/she was mentally incompetent at the time of trial, provided such issue was not raised and determined during trial, the Director of the Bureau of Prisons is required under 18 U.S.C. §4245, to certify the finding of the board, and such certificate, with a copy of the finding, must be transmitted to the clerk of the sentencing court. For the issue to be barred as having been raised and determined during trial, the trial judge must have held a hearing on the issue, followed by a finding of mental competency. Stone v. United States, 358 F.2d 503 (9th Cir. 1966). On receipt of the certificate from the Director, the court must hold a hearing. If it concludes that mental incompetency existed at the time of trial it must vacate the judgment of conviction and grant a new trial. Prior to the new trial, the defendant should be examined pursuant to 18 U.S.C. §4244 to determine his/her competency to stand trial.

9-9.520 Person Cannot Compel A Certification Of Mental Incompetency Under 18 U.S.C. §4245

A person serving a sentence cannot compel the Director of the Bureau of Prisons to issue a certification of mental incompetency under 18 U.S.C. §4245. Such certification may be initiated only upon the finding of the board of examiners that there is probable cause to believe that defendant was mentally incompetent at the time of trial and only if the issue was not raised and determined during trial. While this issue can be subsequently raised in a habeas corpus proceeding, it is left to the court's discretion whether it is necessary for a psychiatrist to examine defendant or whether a hearing has to be held to determine if defendant was competent to stand trial. See Nunley v. Chandler, 308 F.2d 223 (10th Cir. 1962); Burrow v. United States, 301 F.2d 442 (8th Cir. 1962); United States v. Thomas, 291 F.2d 478 (6th Cir. 1961); Hoskins v. United States, 251 F.2d 51 (6th Cir. 1957).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 10

	<u>Page</u>
9-10.000 <u>CAPITAL CRIMES</u>	1
9-10.010 <u>Federal Death Penalty Provisions</u>	1
9-10.020 <u>Recommendation of Death Penalty</u>	1
9-10.100 PROCEDURAL REQUIREMENTS IN CASES UNDER STATUTES AUTHORIZING DEATH PENALTY--AFTER <u>FURMAN</u>	1

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-10.000 CAPITAL CRIMES

9-10.010 Federal Death Penalty Provisions

With the exception of the Aircraft Piracy statute, the various existing federal death penalty provisions are unenforceable in view of a series of Supreme Court decisions including Furman v. Georgia, 408 U.S. 238 (1972) and United States v. Jackson, 390 U.S. 570 (1968). These death penalty provisions are void because they set forth no legislated guidelines to control the fact-finder's discretion in determining whether the penalty of death is to be imposed.

Subsequent to Furman, Congress amended the Aircraft Piracy statute, 49 U.S.C. §§1472-1473, which provides for the death penalty, but which places substantial constraints on the discretion of the fact-finder. Essentially, this statute provides that a separate hearing must be held before a defendant is sentenced to death. The hearing must be held before a jury, or, on motion of the defendant, before a judge. The fact-finder then must return a special verdict setting forth findings as to the existence or non-existence of specified mitigating and aggravating factors which are set forth in 49 U.S.C. §1473(c)(6) and (7). If any one of five mitigating factors is found to exist, the court may not impose sentence of death. If, however, the fact-finder determines that none of the mitigating factors exist and that one or more of the specified aggravating factors exist, the court may impose sentence of death. It is the Department's view that this procedure is constitutionally permissible because it provides specific guidelines which preclude the arbitrary and capricious imposition of the death penalty.

9-10.020 Recommendation of Death Penalty

The death penalty shall not be recommended without the approval of the Attorney General. See USAM 9-2.151, supra.

9-10.100 Procedural Requirements in Cases Under Statutes Authorizing Death Penalty--After Furman

Federal law contains various provisions which establish special procedures for the trial of capital cases. The provisions include the following:

A. 18 U.S.C. §3005 (appointment of two attorneys for defense in capital cases)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- B. 18 U.S.C. §3148 (release on bail in capital cases)
- C. 18 U.S.C. §3235 (venue in capital cases)
- D. 18 U.S.C. §3281 (no time limitation on instituting proceedings in capital cases)
- E. 18 U.S.C. §3432 (requiring disclosure of the government witness list and the list of persons summoned to be perspective jurors at least three days before trial)
- F. Rule 7(a), Fed. R. Crim. P. (prohibiting waiver of indictment in capital cases)
- G. Rule 24(b), Fed. R. Crim. P. (increased preemptory challenges in capital cases)

With regard to prosecutions under statutes having death penalty provisions that are unconstitutional under Furman, supra, there is some uncertainty about the applicability of the aforementioned procedural safeguards.

The majority of courts that have considered this issue have concluded that in prosecutions where the death penalty provision is unconstitutional, a defendant is not entitled to the special procedural safeguards applicable to capital cases. For example, it has been held that because the death penalty provision under the federal murder statute, 18 U.S.C. §1111, was invalid, a defendant is not entitled to two court appointed attorneys. See United States v. Dufer, 648 F.2d 512 (9th Cir. 1980), cert. denied, 450 U.S. 925 (1981); United States v. Shepherd, 576 F.2d 719 (7th Cir. 1978), cert. denied, 439 U.S. 852 (1978); United States v. Weddell, 576 F.2d 767 (8th Cir. 1977), cert. denied, 436 U.S. 919 (1978).

Similarly, such a defendant would not be entitled to additional peremptory challenges. See United States v. Maestos, 523 F.2d 316 (10th Cir. 1975); United States v. Martinez, 536 F.2d 886 (9th Cir. 1976), cert. denied, 429 U.S. 907 (1976); United States v. McNally, 485 F.2d 398 (8th Cir. 1973), cert. denied, 415 U.S. 978 (1974); United States v. Hoyt, 451 F.2d 570 (5th Cir. 1971), cert. denied 405 U.S. 995 (1972). Furthermore, a defendant would not be entitled to the government's witness list and a list of persons summoned to be perspective jurors three days before trial. See Hoyt, supra; United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

This view of the issue is given further support by a line of cases which antedates Furman, supra, and holds that where the government expressly or implicitly agrees not to seek the death penalty, there is no error in denying the defendant the benefit of the procedural protections. See Loux v. United States, 389 F.2d 911 (9th Cir. 1968); Amsler v. United States, 381 F.2d 37 (9th Cir. 1967); Hall v. United States, 410 F.2d 653 (4th Cir. 1969); see also United States v. Crowell, 498 F.2d 324 (5th Cir. 1974).

A contrary view on this issue was expressed by a divided panel of the Fourth Circuit in United States v. Watson, 496 F.2d 1125 (4th Cir. 1973). The panel majority held that, notwithstanding Furman, supra, a defendant, charged with first degree murder under 18 U.S.C. §1111, had an absolute right to two attorneys under 18 U.S.C. §3005. The majority opinion made no effort to reconcile its decision with the prior Fourth Circuit decision in Hall, supra. The dissenting judge in Watson, supra, agreed with the weight of authority that the procedural safeguards accorded to defendants in capital cases are applicable only where death was a possible penalty.

With regard to the unlimited statute of limitations (see 18 U.S.C. §3281) and the more restrictive bail provisions (see 18 U.S.C. §3148) in capital cases, it is the Department's view that these statutory provisions remain in effect in prosecutions for capital offenses with unconstitutional death penalty provisions. The unlimited statute of limitations and the more restrictive bail provisions clearly are not intended to provide additional safeguards to a defendant faced with the death penalty. Rather, these provisions are tied to the extremely serious nature of the offense charged and the possibility that the defendant may present a danger to another person or to the community. Because the purpose of these statutes derives from the nature of the offense rather than from the severity of the penalty, it is our view that they remain in effect so long as Congress has not downgraded the offense to non-capital status. See United States v. Kennedy, 618 F.2d 557 (9th Cir. 1980); United States v. Provenzano, 423 F. Supp. 662 (S.D. N.Y. 1976) aff'd without opinion, 556 F.2d 562 (2d Cir. 1977); United States v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 11

		<u>Page</u>
9-11.000	<u>GRAND JURY</u>	1
9-11.001	<u>Monograph</u>	1
9-11.010	<u>Grand Jury Indictment Required by the Fifth Amendment</u>	1
9-11.020	<u>The Role Of The Prosecutor</u>	1
9-11.030	<u>Presentment No Longer Used</u>	2
9-11.040	<u>Offenses That Must Be Prosecuted by Indictment</u>	2
9-11.100	INDICTMENT OF MEMBERS OF THE ARMED FORCES	2
9-11.200	POWERS AND LIMITATIONS OF GRAND JURIES	3
9-11.201	The Functions of a Grand Jury	3
9-11.210	<u>The Investigative Powers of a Grand Jury</u>	4
9-11.220	<u>Power of a Grand Jury Limited By Its Functions</u>	5
9-11.221	Power of a Grand Jury Limited by Venue	30
9-11.222	Power of a Grand Jury Limited by the District Court	30
9-11.223	Power of a Grand Jury Limited by the Government Attorney	31
9-11.224	Power of a Grand Jury Limited by Testimonial Privilege	31
9-11.230	<u>Limitation on Naming Persons Unindicted Co-Conspirators</u>	32
9-11.240	<u>Limitation on Grand Jury Subpoenas</u>	33
9-11.241	Fair Credit Reporting Act and Jury Subpoenas--Discretion of United States Attorneys	36
9-11.250	<u>Authority to Arrest Material Witness</u>	36

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-11.260	<u>Advice of "Rights"</u>	37
9-11.261	Subpoenaing Targets of the Investigation	39
9-11.262	Requests by Subjects and Targets to Testify before the Grand Jury	39
9-11.263	Notification of Targets	40
9-11.264	Advance Assertions of an Intention to Claim the Fifth Amendment Privilege Against Compulsory Self-Incrimination	40
9-11.270	<u>Limitation on Resubpoenaing Contumacious Witnesses before Successive Grand Juries</u>	41
9-11.300	THE PROVISIONS OF FEDERAL RULES OF CRIMINAL PROCEDURE 6	41
9-11.310	<u>Summoning Grand Juries (Fed. R. Crim. P. 6 (a) and (b))</u>	42
9-11.320	<u>Objections to Grand Jury and to Grand Jurors</u>	42
9-11.321	Challenges	42
9-11.322	Motions to Dismiss, in General	42
9-11.323	Tests for Determining Motions to Dismiss	43
9-11.324	Standing to Object	43
9-11.325	Motion to Dismiss Because of Objections Individual Jurors	43
9-11.326	Motions to Dismiss Based upon Objections to the Array	44
9-11.327	Giving the Court Information Pertinent to Jury Selection	46
9-11.328	Dismissal Required by Substantial Failure to Comply	46
9-11.329	Effect of a Dismissal Because of Objection to the Array	47
9-11.330	<u>Objections to Grand Jury and Grand Jurors (Cont'd)</u>	47
9-11.331	Motions to Dismiss on Other Bases: Illegally Obtained Evidence Before a Grand Jury	48
9-11.332	Use of Hearsay in a Grand Jury Proceeding	49
9-11.333	Presumption of Regularity	50
9-11.334	Presentation of Exculpatory Evidence	50
9-11.340	<u>Foreman, Deputy Foreman, and Secretary (Fed. R. Crim. P. 6(c))</u>	50
9-11.350	<u>Who May Be Present at Grand Jury Sessions (Fed. R. Crim. P. 6(d))</u>	51

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

		<u>Page</u>
9-11.351	DQJ Attorneys Authorized to Conduct Jury Proceedings	52
9-11.352	Non-Department of Justice Government Attorneys	53
9-11.353	Presence of the Witness Under Examination	55
9-11.354	Presence of a Stenographer - Recording Required	55
9-11.355	Presence of an Interpreter	56
9-11.356	Counsel for Witnesses Excluded	56
9-11.357	No Exceptions	56
9-11.360	<u>Grand Jury Secrecy: Purpose</u>	56
9-11.361	Who is Covered by Fed. R. Crim. P. 6(e): Persons Other Than Witnesses	57
9-11.362	Who is not Covered by Fed. R. Crim. P. 6(e): Only Witnesses	57
9-11.363	What is Covered by Fed. R. Crim. P. 6(e)	58
9-11.364	Grand Jury Transcripts	58
9-11.364(a)	Disclosure of a Defendant's Own Grand Jury Testimony	59
9-11.364(b)	Disclosure to Defendant of the Grand Jury Testimony of Government Witnesses	60
9-11.364(c)	Pre-trial Discovery of Grand Jury Testimony Strictly Limited	60
9-11.364(d)	Disclosure of Government Memoranda	60
9-11.365	Documents: Generally Not Covered by Fed. R. Crim. P. 6(e)	61
9-11.366	Documents: Court Order Still Necessary for Public Disclosure	61
9-11.367	Disclosure Under Fed. R. Crim. P. 6(e): To Attorneys for the Government, Including for Civil Use	62
9-11.368	Disclosure Under Fed. R. Crim. P. 6(e): To Other Government Personnel	62
9-11.369	Disclosure Under Fed. R. Crim. P. 6(e): Preliminarily to or in Connection with a Judicial Proceedings	63
9-11.370	<u>Penalty for Breach of Grand Jury Secrecy</u>	65
9-11.380	<u>Sealing the Indictment Pending Arrest</u>	66
9-11.381	Jurors Not Continuously Present May Nevertheless Vote	66
9-11.382	Duty to Report a No-Bill to the Court	66
9-11.390	<u>Tenure and Discharge of a Grand Jury</u>	67
9-11.391	Replacing a Grand Juror	67

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

	<u>Page</u>	
9-11.400	THE SPECIAL GRAND JURY - 18 U.S.C. §1331	67
9-11.410	<u>Impaneling Special Grand Juries</u>	68
9-11.411	Request for Certification	68
9-11.412	Districts Where Special Grand Juries Must be Impaneled	68
9-11.413	Additional Special Grand Juries	68
9-11.420	<u>Terms and Extensions of Terms of Special Grand Juries</u>	69
9-11.421	Appeals to Continue the Service of Special Grand Juries	69
9-11.430	<u>Special Duties Imposed Upon Attorneys for the Government</u>	69
9-11.440	<u>Reports of Special Grand Juries</u>	70
9-11.441	* Consultation With the Criminal Division About Reports	72

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.000 GRAND JURY

9-11.001 Monograph

The Narcotic and Dangerous Drug Section has prepared a monograph entitled "Federal Grand Jury Practice" (Volumes I and II). Copies may be obtained from that Section, FTS 724-7045.

9-11.010 Grand Jury Indictment Required by the Fifth Amendment

The Fifth Amendment to the Constitution of the United States provides, in part, that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

While it is a very effective instrument of law enforcement, the grand jury is regarded primarily as a protection for the individual. It has been said that the grand jury stands between the accuser and the accused as "a primary security to the innocent against hasty, malicious, and oppressive persecution." See Wood v. Georgia, 370 U.S. 375, 390 (1962). The grand jury functions to determine whether there is probable cause to believe that a certain person committed a certain offense and, thus, to protect individuals against the lodging of unfounded criminal charges. See United States v. Calandra, 414 U.S. 338 (1974); Bransburg v. Hayes, 408 U.S. 665 (1972); United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 391 U.S. 935 (1965).

9-11.020 The Role of the Prosecutor

In his/her dealings with the grand jury, the prosecutor must always conduct himself/herself as an officer of the court whose function is to insure that justice is done and that guilt shall not escape nor innocence suffer. He/she must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, he/she must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.030 Presentment No Longer Used

The presentment has been obsolete for some time now as a method of instituting federal prosecutions. The presentment was a charge that the grand jury preferred on its own initiative. The word, "presentment," is still used today in various non-Constitutional senses, perhaps most commonly to refer to a grand jury report of the type authorized under 18 U.S.C. §3333. See Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969); United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); In re Grand Jury January, 1969, 315 F. Supp. 662 (D. Md. 1970). 8 Moore's Federal Practice-Cipes, Criminal §6.02(3); Wright, Federal Practice and Procedure, Criminal 3110.

9-11.040 Offenses that Must be Prosecuted by Indictment

The Fifth Amendment protection is embodied in Rule 7 of the Federal Rules of Criminal Procedure. Under Rule 7(a), an offense punishable by death must be prosecuted by indictment, while an offense punishable by imprisonment for more than one year or at hard labor must be prosecuted by indictment unless indictment is waived, in which event it may be prosecuted by information. All other offenses may be prosecuted either by indictment or information.

Federal Rules of Criminal Procedure 7 specifies what are "otherwise infamous" crimes within the meaning of the Fifth Amendment. See Ex parte Wilson, 114 U.S. 417 (1885). As classified in 18 U.S.C. §1, all felonies must be prosecuted by indictment absent an appropriate waiver (which may not occur in a capital case), and all misdemeanors (including petty offenses) may be prosecuted either by indictment or information. It follows from the provision in Rule 7 that a grand jury may properly inquire into the least (as well as the most) serious federal offenses. See In re Grand Jury Investigation, 186 F. Supp. 298 (D.D.C. 1960). See also USAM 9-12.000 on indictments.

9-11.100 INDICTMENT OF MEMBERS OF THE ARMED FORCES

It was once considered appropriate for the armed forces to prosecute their own members by court-martial for all offenses chargeable under the punitive articles of the Uniform Code of Military Justice (10 U.S.C. §§877-934). There is no grand jury in the military justice system. In 1969, the Supreme Court interpreted the Fifth Amendment to restrict courts-martial jurisdiction, at least within the United States and in peacetime, to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

offenses which are "service-connected." See O'Callahan v. Parker, 395 U.S. 258 (1969). An offense committed by a member of the service on a military installation that affects the security of a person or of property there, is considered to be service-connected. See Relford v. Commandant, 401 U.S. 355 (1971). Without a service-connection, however, an offense committed by a member of the service in a civilian setting in the United States will have to be prosecuted like any other federal offense and cannot be left for prosecution by military authorities. In short, the offense will have to be charged under federal statutes other than the Uniform Code of Military Justice, and an indictment will have to be obtained if required under Federal Rule of Criminal Procedure 7.

The court-martial system is no part of the federal judiciary but is established under the Constitutional power of Congress to make rules for the government and regulation of the armed forces of the United States. See Manual For Court-Martial, United States, 1969 (revised edition), paragraph 8. The fact that an offender is prosecutable by court-martial does not prevent prosecution for the offense by civilian authorities; members of the armed forces are subject to federal and state prosecution on the same basis as civilians. See Caldwell v. Parker, 252 U.S. 376 (1920); Owens v. United States, 383 F. Supp. 780 (M.D. Pa. 1974), aff'd, 515 F.2d 507; People v. Powers, 227 N.Y.S. 2d 433, cert. denied, 374 U.S. 811 (1962). But, as pertinent, consider the policies discussed at USAM 9-2.142 and possible double jeopardy. See Grafton v. United States, 206 U.S. 333 (1907).

9-11.200 POWERS AND LIMITATIONS OF GRAND JURIES

9-11.201 The Functions of a Grand Jury

While grand juries are sometimes described as performing accusatory and investigatory functions, it is particularly useful to say that a grand jury's function is to determine whether or not there is probable cause to believe that a certain person committed a certain federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions—to indict or, in the alternative, to return a "no-bill," see Wright, Federal Practice and Procedure, Criminal §110. It is useful to look upon the functions of a grand jury in this way because, in general, a grand jury may not perform any different function. The investigative grand jury works toward such an end, although some investigations are never brought to fruition.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under 18 U.S.C. §3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees. This is discussed fully at USAM 9-11.440, *infra*. It would seem that a grand jury impaneled under Rule 6 of the Federal Rules of Criminal Procedure also has a power to issue reports on non-criminal matters. See Jenkins v. McKeithen, 395 U.S. 411 (1969); Hannah v. Larche, 363 U.S. 420 (1960); 8 Moore's Federal Practice--Cipes, Criminal §6.02[3]; Application of Johnson 484 F.2d 791 (7th Cir. 1973) (and cases cited therein). Whether and in what form a grand jury report should be issued is in all events a difficult and complex question. Consultation should be had with the Criminal Division before any grand jury report is initiated, whether by a regular or special grand jury. See USAM 9-11.441, *infra*.

9-11.210 The Investigative Powers of a Grand Jury

The grand jury has always been accorded the broadest latitude in conducting its investigations. The proceedings are conducted *ex parte*, in secret, and without any judicial officer in attendance to monitor them, and there is no exclusionary rule or standard of relevancy or materiality to inhibit grand jury inquiry. A grand juror's own information, newspaper reports, rumors, or whatever, may properly be used to trigger an investigation. The grand jury may act upon mere suspicion that the law has been violated, or with the objective of seeking assurance that it has not. The grand jury may investigate a field of fact with no defendant or criminal charge specifically in mind and with no duty to measure its steps according to predictions about the outcome. Thus the grand jury may conduct the broadest kind of investigation before stopping to determine whether an indictment should be found. See United States v. Calandra, 414 U.S. 338 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Morton Salt Co., 338 U.S. 632 (1950); Blair v. United States, 250 U.S. 273 (1919); Haye v. Henkel, 201 U.S. 43 (1906); United States v. Smyth, 104 F. Supp. 283 (N.D. Cal. 1952).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.220 Power of a Grand Jury Limited by Its Functions

However expansive the courts have been in describing the investigative powers of a grand jury, these powers must be exercised with a view toward possible return of an indictment. It is an abuse of grand jury process to call witnesses simply for purposes of discovery or trial preparation in a case instituted independently or under an indictment returned by a former grand jury. Such an abuse of process would not necessarily vitiate a conviction, however; and grand jury process is not abused when utilized after the return of one indictment with a view toward the possible return of a superseding or additional indictment, nor when information duly obtained in a criminal investigation is used for related civil purposes. There is no principle like double jeopardy or collateral estoppel to prevent a grand jury from conducting an investigation similar to one undertaken by another grand jury, even if that other grand jury returned a no-bill. See United States v. Proctor and Gamble Company, 356 U.S. 677 (1958); United States v. Thompson, 251 U.S. 407 (1920); United States v. Brasch, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, 412 U.S. 954 (1973); United States v. Senak, 477 F.2d 304 (7th Cir. 1973); United States v. Star, 470 F.2d 1214 (9th Cir. 1972); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972); United States v. Dardi, 330 F.2d 316 (2d Cir. 1964); Durbin v. United States, 330 F.2d 316 (D. D.C. 1954).

A. Approval Required Prior to Resubmission of Same Matter to Grand Jury

However, once a grand jury returns a no-bill or otherwise acts on the merits in declining to return an indictment, the same matter (i.e., the same transaction or event and the same putative defendant) should not be presented to another grand jury or presented again to the same grand jury without first securing the approval of the responsible Assistant Attorney General. Ordinarily, such approval will not be given in the absence of additional or newly discovered evidence or a clear circumstance of a miscarriage of justice. For a case recognizing that the U.S. Attorney will often issue the subpoenas when the grand jury is not in session and collecting numerous cases on grand jury practice, see United States v. Kleen Laundry and Cleaners, Inc., 381 F. Supp. 519 (E.D. N.Y. 1974).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

B. Use Of Grand Jury To Locate Fugitives

It is the Department's position that it is a misuse of the grand jury to utilize the grand jury solely as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest. In re Pedro Archuleta, 432 F. Supp. 583 (S.D.N.Y. 1977); and In re Wood, 430 F. Supp. 41 (S.D.N.Y. 1977), aff'd. In re Cueto, 554 F.2d 14 (2d Cir. 1977). Furthermore, while such investigations are often justified on the ground that the grand jury is actually investigating harboring violations, this explanation may well be viewed as merely a subterfuge, particularly when the person thought to be the harborer is compelled to testify under 18 U.S.C. §6003. Only in extraordinary situations (i.e., harboring by a number of individuals) will a request for an order to compel testimony be considered for an alleged participant in the harboring.

There are, however, some limited situations in which the courts have recognized that grand jury efforts to locate a fugitive are proper, as described below. In any of these situations, a proposed grand jury subpoena of witnesses or records aimed at locating a fugitive must be submitted to the General Litigation and Legal Advice Section of the Criminal Division and will require approval by the Assistant Attorney General in charge of the Criminal Division or other responsible Assistant Attorney General or by a designated Deputy Assistant Attorney General. Additional procedural requirements are detailed below.

1. The use of grand jury process to locate a fugitive is proper when the grand jury is interested in hearing the fugitive's testimony. Thus, in Matter of Archuleta, 432 F. Supp. 583, 595 (S.D.N.Y. 1977), the court stated:

A grand jury may use its subpoena power to call witnesses to aid in finding other witnesses whose whereabouts are unknown and whom the grand jury believes it should hear.

In Matter of Wood, 430 F. Supp. 41, 48 (S.D.N.Y. 1977), the court stated:

[T]he grand jury may properly be employed to locate other prospective witnesses, even when those persons may be fugitives from justice. See Hoffman v. United States 341 U.S. 479 (1951). As the Supreme Court stated in that case, 'the government may inquire of witnesses before the grand jury as to the whereabouts of unlocated witnesses . . . .' Id. at 488.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Thus, if the grand jury seeks the testimony of the fugitive in the investigation of federal criminal violations before it, it may subpoena other witnesses and records in an effort to locate the fugitive witness. However, there are several cautions in this regard:

a. Interest in the fugitive's testimony must not be pretextual. The sole motive for inquiring into the fugitive's location must be the potential value of his/her testimony. A subpoena for the fugitive witness must be approved by the grand jury before seeking to subpoena witnesses or records to locate the fugitive; and

b. It is not proper to seek to obtain grand jury testimony from any witness, including a fugitive, concerning an already returned indictment. In Beverly v. United States, 468 F.2d 732, 742-43 (5th Cir. 1972); the court stated:

It is true . . . 'it is improper to use the grand jury for the purpose of preparing an already pending indictment for trial. United States v. Dardi, 330 F.2d 216 (2d Cir. 1964). It is a misuse of the grand jury to use it as a substitute for discovery.

Thus, it would not be proper to seek to locate a fugitive for the purpose of having him/her testify about matter for which an indictment has already been returned, unless there are additional unindicted defendants to be discovered or additional criminal acts to be investigated through the testimony of the fugitive. In re Russo, 448 F.2d 369, 374 (9th Cir. 1971); Beverly v. United States, *supra*, at 743.

c. Current policy on "target" witnesses must be observed. See USAM 9-11.260. Grand jury subpoenas for witnesses and records aimed at locating a fugitive witness who is a target of the grand jury investigation will be approved only where a target subpoena already has been approved by the responsible Assistant Attorney General.

Such approval, per USAM 9-11.260, will depend on "A) The importance to the successful conduct of the grand jury's investigation of [the target's] testimony or other information sought; B) Whether the substance of his/her testimony or other information sought could be provided by other witnesses; C) whether the questions the prosecutor and grand jury intend to ask or the other information sought would be protected by a valid claim of privilege."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

2. Use of the grand jury to learn the present location of a fugitive is proper when present location is an element of the offense under investigation.

a. Harboring, Misprision, Accessory: On adequate facts, the present location of a fugitive might tend to establish that another person is harboring him/her, 18 U.S.C. §§1071, 1072, 1381, or has committed misprision, 18 U.S.C. §4, or is an accessory after the fact in the present concealment of the fugitive, 18 U.S.C. §3. In Raymond v. United States, (6th Cir, Aug. 5, 1975) (unpublished), the court of appeals stated that "the present location of the fugitives in question is a relevant and necessary subject of inquiry in the investigation of possible offenses, such as harboring fugitives and misprision of a felony. . . ." And in In re Grusse, 402 F. Supp. 1232, 1237-38 (D. Conn. 1975), the court concluded that grand jury witnesses could properly be questioned on whether two fugitives had stayed in that district, in an investigation of harboring, 18 U.S.C. §1071, and accessory after the fact, 18 U.S.C. §3.

However, this justification could be viewed as a subterfuge if the suspected harborer (or the person potentially guilty of misprision or as an accessory) were to be subjected to an order under (18 U.S.C. §6003) to compel his/her testimony about the location of the fugitive. In order to insure the proper use of investigations for harboring, misprision, and accessory after the fact, based on acts of concealment, U.S. Attorneys are to consult with the General Litigation and Legal Advice Section of the Criminal Division prior to initiating grand jury investigations for these offenses.

b. Escape and Bondjump: The Criminal Division does not view the present location of a fugitive as relevant evidence in a grand jury investigation concerning escape by a federal prisoner, see 18 U.S.C. §751, or bondjump, see 18 U.S.C. §3150. These offenses address the circumstances of prior departure from a known location. The fugitive's present location is not a relevant factor as it is in harboring or misprision investigations. No case law supports such a rationale for use of the grand jury to locate a fugitive.

c. Unlawful Flight to Avoid Prosecution: It has been suggested that grand jury subpoenas might be used to locate a fugitive in investigations of unlawful flight to avoid prosecution, 18 U.S.C. §1073.

However, in such investigations "normally the federal complaint will be dismissed when the fugitive has been apprehended and turned

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

over to state authorities to await interstate extradition. See USAM 9-69.410. Since such cases are as a rule not prosecuted, and under the terms of 18 U.S.C. §1073 cannot be prosecuted without written authorization from the Attorney General or an Assistant Attorney General, we have concluded that any effort to use the grand jury in the investigation of such cases shall be preceded by consultation with the General Litigation and Legal Advice Section of the Criminal Division, and by written authorization to prosecute pursuant to 18 U.S.C. §1073, from the Assistant Attorney General in charge of the Criminal Division. See also USAM 1-3.115(c), INTERPOL-USNCB, Fugitive Unit.

3. Flight as evidence of consciousness of guilt.

The grand jury cannot be used to locate a fugitive on the rationale that present location is relevant to flight as consciousness of guilt. As in escape cases, the relevant facts concerning flight are those surrounding a prior departure from a known location and not the present location of the fugitive.

It is the Criminal Division's view that the areas of permissible use of grand jury subpoenas to locate fugitives here spelled out can be sustained in court against any challenge.

C. Obtaining Records to Aid in the Location of Federal Fugitives by use of the All Writs Act, 28 U.S.C. §1651; an Alternative to use of Grand Jury Subpoenas for Such Purpose

The Criminal Division recognizes the importance of providing to federal investigative agencies a means of obtaining records which would aid in the search for federal fugitives. Usually the records sought are telephone toll records of close associates and relatives of the fugitive, although other records might also be valuable in ascertaining the location of the fugitive. As a result of a careful study of this problem, it is the recommendation of this Division that such records may be obtained by a court order issued under the All Writs Act, 28 U.S.C. §1651, in those cases in which a complaint or an indictment and arrest warrant have been issued.

Generally, a grand jury subpoena may not be used to locate fugitives unless the grand jury is investigating the crime of harboring, 18 U.S.C. §1071, accessory after the fact, 18 U.S.C. §3, or misprision, 18 U.S.C. §4. A federal grand jury subpoena may be used to locate a fugitive if the grand jury wants the testimony of the fugitive. However, in those instances in which the sole purpose for obtaining records relating to the fugitive's whereabouts is to apprehend him/her for prosecution, a court order under 28 U.S.C. §1651 should be obtained for such records.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

It is suggested that in those cases in which a complaint or an indictment has been returned against the fugitive and there is an outstanding warrant for his/her apprehension, telephone toll records or other records reasonably expected to furnish leads to the fugitive's whereabouts may be obtained by a proper application to the district court before which the complaint or indictment is pending for an order for production of such records to the United States Marshal, or other federal officer charged with the responsibility for locating and apprehending the fugitive. The authority for such a court order is the All Writs Act, 28 U.S.C. §1651. The All Writs Act provides:

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the use and principles of law.

The Supreme Court has recognized in numerous cases the power of a federal court to issue such orders under the All Writs Act "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in the exercise of its jurisdiction." See United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). "This statute has served since its inception, in substance, in the original Judiciary Act as a 'legislatively approved source of procedural instruments designed to achieve 'the rational ends of law.'" Harris v. Nelson, 394 U.S. 286, 299 (1969), quoting Price v. Johnson, 334 U.S. 266, 282 (1948). As the Supreme Court noted in Adams v. United States ex rel. McCann, 317 U.S. 269 (1942), "[u]nless appropriately confined by Congress, a Federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." Id. at 273.

The Supreme Court has applied the All Writs Act flexibly to accomplish these purposes. See United States v. New York Telephone Co., supra. Adams v. United States ex rel. McCann, supra, held that the use of these supplemental powers is not limited to only those situations where it is "necessary" in the sense that the court could not otherwise discharge its duties. Thus, the All Writs Act has been used to produce a prisoner before the court of appeals to personally argue his/her appeal, Price v. Johnson, 334 U.S. 266 (1948); to produce federal prisoners in district courts for hearings under 28 U.S.C. §2255, United States v. Hayman, 342 U.S. 205 (1952); to issue discovery orders in the absence of statutory authority in habeas corpus proceedings, Harris v. Nelson, supra; to order the telephone company to assist the FBI to install pen registers ordered by the court, United States v. New York Telephone Co., supra; United States v. Illinois Bell Telephone Co., 531 F.2d 809 (7th Cir. 1976); Michigan Bell Telephone

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Co. v. United States, 565 F.2d 385 (6th Cir. 1977); to order the telephone company to assist the FBI to trace telephone calls by performing mechanical and manual traces, In the Matter of the Application of the United States, 610 F.2d 1148 (3d Cir. 1979). The Act may be used by courts to issue orders appropriate to assist them in conducting factual inquiries, Harris v. Nelson, *supra*, citing American Lithographic Co. v. Werckmeister, 221 U.S. 603, 609 (1911), or for producing documents for pre-trial discovery, Bethlehem Shipbuilding Corp. v. NLRB, 120 F.2d 126, 127 (1st Cir. 1941).

The All Writs Act may be applied to persons who are not parties to the original action or engaged in wrongdoing but may be in a position to frustrate the implementation of a court order or the proper administration of justice. It also encompasses those who have not taken any affirmative action to hinder justice. See United States v. New York Telephone Co., *supra*; Mississippi Valley Barge Line Co. v. United States, 273 F. Supp. 1 (E.D. Mo. 1967), *aff'd*, 389 U.S. 579 (1968); Board of Education v. York, 429 F.2d 66 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Field v. United States, 193 F.2d 92 (2d Cir.), *cert. denied*, 342 U.S. 892 (1951). Thus, in Penn Central Transportation Co. v. Irving Trust Co., 594 F.2d 952 (3d Cir. 1979), the All Writs Act was used by a reorganization court under the Bankruptcy Act to enjoin interference with the property of a debtor and to enjoin proceedings in other courts. In United States v. State of Washington, 459 F. Supp. 1070 (W.D. Wash. 1978), the Act was used to close Puget Sound waterways to red salmon fishing during certain times of the year.

In upholding the authority of the district court to order the telephone company to assist the FBI in the installation of court authorized pen registers, the Supreme Court stated:

We are unable to agree with the Company's assertion that 'it is extraordinary to expect citizens to directly involve themselves in the law enforcement process.' . . . The conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions. See Babington v. Yellow Taxi Corp., 250 N.Y. 14, 17, 164 726, 272 (1928) (Cardozo, C.J.) ("Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand").

See also Michigan Bell Telephone Co. v. United States, 565 F.2d 385, 389, (6th Cir. 1977).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

In applying these principles to the use of the All Writs Act to locate fugitives, it is clear that there must first be a proceeding in the issuing court to give jurisdiction to the court. See Adams v. United States ex rel. McCann, *supra*, at 273. Thus, any such application, which should be verified, for the use of the All Writs Act to obtain telephone company toll records or any other documents to locate a fugitive should be sought only from the U.S. district court in which a complaint or an indictment for the fugitive has been returned and is pending. It is further clear from the cases that there should be a warrant for the arrest of the fugitive named in the indictment in order that the order sought under 28 U.S.C. §1651 is in aid of and "to effectuate and prevent the frustration of orders . . . previously issued." See United States v. New York Telephone Co., *supra*, at 172. As the Supreme Court said in that case: "The order issued by the District Court compelling the company to provide technical assistance was required to prevent nullification of the court's warrant and the frustration of the government's right under the warrant to conduct a pen register surveillance." *Id.* at 175. The order obtained may then direct the production of the documents sought at some designated reasonable time to the appropriate official charged with the responsibility for execution of the warrant. The documents may be ordered produced to the court, or U.S. Attorney if necessary, but the preferred method is to provide the records to the enforcement officers. Sufficient time should be allowed for the affected party to challenge the order by appropriate motion in the district court.

The use of 28 U.S.C. §1651 as a means of obtaining telephone toll records or other documents to locate a fugitive is not a procedure to be used in every fugitive case. The willingness of courts to issue these orders will depend on the selectivity with which applications are made and courts will not condone a wholesale use of the All Writs Act for this purpose. Thus, this procedure should be used only in important cases where a strong showing can be made that the records are likely to lead to the whereabouts of the fugitive. The application should clearly demonstrate the reasonable belief that the records sought may reveal leads to the whereabouts of the fugitive. Telephone toll records of associates and relatives known, to have had recent and frequent contact with the fugitive seem the logical source for such information.

The order sought for such records must not be burdensome, United States v. New York Telephone Co., *supra*, at 172. In re Application of the United States, *supra*, where the order under the All Writs Act required the telephone company to use its facilities and manpower to mechanically and manually trace telephone calls, the appellate court said since the tracing order denied the company of the free use of its equipment and employees in a substantial manner, that due process required a hearing on the issue of burdensomeness. If, however, the deprivation of the use of the company's

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

equipment and personnel resources is de minimus, no hearing should be necessary. Thus, in applications for court orders for records to locate a fugitive, the request for records should be narrowly limited both in the types of records sought, the number of individuals involved, and the time period covered.

In those cases where disclosure by the telephone company to the individuals whose records are sought by the order might impede the fugitive investigation, the court should be requested to include in its order such a finding and an order that the telephone company make no disclosure for ninety days. As an alternative to seeking such an order from the court, the order for production of the telephone company records may be accompanied by a certification from the person making the application for the order stating that the records are sought in an official federal fugitive investigation, that disclosure could impede the investigation and interfere with enforcement of the law, and that the company should not disclose the existence of the order for ninety days. See Department of Justice Memorandum No. 796, February 20, 1974, "American Telephone and Telegraph Company Policy for Release of Toll Information."

Although there are no reported cases in which the All Writs Act has been used for the purpose indicated herein, several United States district courts have approved such orders. It must be reemphasized that this procedure should be used selectively and only in important cases where a demonstrable reasonable belief exists that the records sought should lead to the whereabouts of the fugitive. This procedure should rarely, if ever, be used to locate a state fugitive for whom an arrest warrant has been issued upon a complaint filed under 18 U.S.C. §1073 when there is no intention to prosecute that offense. See USAM 9-69.410, 9-69.450. Although location of such a fugitive is arguably in aid of the jurisdiction of the issuing court, the court might well consider such an application for its assistance an abuse of process. Cf. United States v. Love, 425 F. Supp. 1248 (S.D.N.Y. 1977) (Rule 40, Fed. R. Crim. P., cannot be used to remove a fugitive felon to the state from which he fled in the absence of an intention to prosecute the federal unlawful flight offense). Use of the procedure in unlawful flight cases should be reserved for those in which there has been a long, intensive and unsuccessful effort by state and federal authorities to locate a fugitive in a major and significant case. Any questions regarding the use of this procedure or the form or content of applications and orders thereunder should be addressed to the General Litigation Legal Advice Section, Criminal Division.

In fugitive cases, federal law enforcement agencies frequently seek to obtain telephone toll records or other documents in order to locate the fugitive. It is the Department's position that these records can be obtained through an order issued pursuant to the All Writs Act, 28 U.S.C. §1651. See USAM 9-11.220. But see United States v. Walters, 558 F. Supp. 726 (D. Md. 1980).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Prosecutors who have employed the All Writs Act for this purpose have encountered a recurring question: Can All Writs Act orders be directed to telephone companies or other third parties outside the territorial jurisdiction of the issuing court? This issue is very important because an interpretation of the All Writs Act which denies it extraterritorial effect significantly reduces the effectiveness of this statute as a law enforcement tool in fugitive cases.

28 U.S.C. §1651 is not an independent source of federal jurisdiction. Rather, it simply provides federal courts with the power to issue writs in aid of their existing jurisdiction. See Goodbar v. Banner, 599 F.2d 431, 433-34 (C.C.P.A.), cert. denied, 444 U.S. 927 (1979). Thus, in fugitive cases only the district court where the complaint, indictment, or warrant is pending may issue orders under the All Writs Act. A fugitive is, by definition, a person who is fleeing the jurisdiction of some court. Therefore, in many instances the fugitive will not be found in the district where the complaint or indictment has been filed or warrant has been issued. If All Writs Act orders are construed only to apply within the territorial limits of the issuing district, the Act loses much of its practical significance in fugitive cases.

It is the Department's position that orders obtained pursuant to the All Writs Act, 28 U.S.C. §1651, have extraterritorial effect. Indeed, in criminal cases several courts have expressly held that orders entered under the Act apply beyond the territorial limits of the issuing court. For example, in Carbo v. United States, 277 F.2d 433 (9th Cir. 1960), aff'd on other grounds, 364 U.S. 611 (1961), Carbo, a state prisoner in New York, tried to resist a writ of habeas corpus ad prosequendum issued by a district court in the Southern District of California by arguing that he was beyond the territorial jurisdiction of that court. The court of appeals flatly rejected this argument, concluding that the district court's power under the All Writs Act extended beyond the territorial limits of the district. Carbo v. United States, supra, at 436. The court noted that, in criminal cases, a district court may issue arrest warrants and subpoenas which have extraterritorial effect; id., citing Rules 4 and 17, Fed. R. Crim. P., and reasoned that the district court's power under the All Writs Act must be at least as extensive as its authority under the Federal Rules of Criminal Procedure. Therefore, in the court's view, the Act, like the Federal Rules of Criminal Procedure, applied beyond the territorial limits of the district court. Similarly, in Christian v. United States, 394 A.2d 1 (D.C. Cir. 1978), cert. denied sub nom. Clark v. United States, 442 U.S. 944 (1979), a prisoner outside the territorial jurisdiction of the District of Columbia argued that the All Writs Act could not be used to compel his/her presence in the District for a police line-up. The District of Columbia Court of Appeals rejected this narrow construction of 28 U.S.C. §1651, holding instead that, "in aid of its authorized jurisdiction the Superior Court [of the District of Columbia] may issue extraterritorial writs." Christian v. United States, supra, at 45 [emphasis in original].

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

While the Supreme Court has not expressly addressed this question, several cases suggest that the Court would apply 28 U.S.C. §1651 extraterritorially. Indeed, in United States v. Hayman, 342 U.S. 205 (1952), the Supreme Court expressly endorsed an extraterritorial use of the Act. Hayman involved a prisoner's petition, under 28 U.S.C. §2255, to vacate his sentence. At the time the prisoner filed this motion he was confined in a federal penitentiary outside the territorial limits of the sentencing court. In its opinion, the Supreme Court concluded that the prisoner was entitled to a hearing on this motion and held that the All Writs Act authorized the district court to compel his presence since, "[i]ssuance of an order to produce the prisoner is auxiliary to the jurisdiction of the trial court. . . in 28 U.S.C. §2255 itself. . . . Id. at 220.

Similarly, in Carbo v. United States, 364 U.S. 611 (1961), the Supreme Court held that a district court could issue writs of habeas corpus ad prosequendum to persons outside its territorial limits. In reaching this conclusion the court relied exclusively on 28 U.S.C. §2241, the federal habeas corpus statute. Nonetheless, the court's rationale should apply with equal force to writs issued under 28 U.S.C. §1651 since these two sections share a common statutory antecedent. (Both 28 U.S.C. §1651 and 28 U.S.C. §2241 were derived from Section 14 of the Judiciary Act of 1789, 1 Stat. 81-82 (1789). See Carbo v. United States, supra, at 614-17 (1961)).

Indeed, a construction of 28 U.S.C. §1651 which does not give it extraterritorial effect creates a jurisdictional anomaly. District courts would be able to issue arrest warrants, subpoenas and writs of habeas corpus which could be served outside their districts; yet they could not rely upon the All Writs Act to issue orders of similar force and effect.

A more detailed analysis of this issue has been prepared by the General Litigation and Legal Advice Section of the Criminal Division. Prosecutors with questions concerning the extraterritorial effect of All Writs Act orders in fugitive cases are encouraged to contact the Section at FTS 724-7035.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

It should further be noted that Rule 17(c), Federal Rule of Criminal Procedure, should not be used as an alternative to the grand jury subpoena to secure telephone toll records and other evidence to aid in the search for a fugitive even in cases where the fugitive is wanted on a federal indictment. Rule 17 of the Federal Rules of Criminal Procedures indicates that subpoenas issued under that rule are for the purpose of obtaining witnesses and documents for trial or in anticipation of trial. Use of a Rule 17(c) subpoena before the defendant has been located and arraigned is inappropriate. See United States v. General Department of International Air Services, 420 F. Supp. 98 (S.D.N.Y. 1976), where the court stated:

Rule 17(c) was not intended to provide an additional means of discovery. Bowman Dairy Co. v. United States, 341 U.S. 214 . . . (1951); In re Magnus, Mahee and Reynard, Inc., 311 F.2d 12 (2d Cir. 1962), cert. denied 373 U.S. 902 . . . (1963); United States v. Murray, 297 F.2d 812 (2d Cir.), cert. denied, 369 U.S. 828 . . . (1962) . . . . Finally, it is well recognized that 'a motion of this nature [for rule 17 (c) subpoenas] should not be made or entertained before preliminary motions e.g., addressed to the indictment) have been disposed of.' 8 Moore Federal Practice, Par. 17.07 (1975 ed.). See also United States v. Long, 15 F. R.D. 25 (D.C. Pa. 1953).

See also United States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963), and United States v. Nixon, 418 U.S. 683 (1974) at 698-99, where the court discussed the requirements for a Rule 17(c) subpoena. The court enumerated the requirements for Rule 17(c) subpoenas: (1) the documents sought are evidentiary and relevant; (2) they were not otherwise procurable in advance of trial; and (3) the party cannot prepare for trial without the documents, and the trial would be unreasonably delayed without production before trial; (4) application is in good faith and not a fishing expedition. It is clear that subpoenas issued before arrest of the defendant and for the sole purpose of locating him/her could not meet the requirements for Rule 17(c) subpoenas set forth in United States v. Nixon, *supra*, and any attempt to use such subpoena to locate the fugitive would be improper.

Following are sample forms which may be used when making applications for court orders under the All Writs Act, 28 U.S.C. §1651, for the production of telephone company toll records or any other records to be used for locating a federal fugitive. The forms in "Set A" consist of an application which is to be verified by the Assistant U.S. Attorney and an order for the court's signature. The verified application must contain a statement in paragraph 2 setting forth the factual basis for the reasonable belief that the records sought might lead to location of the fugitive.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The forms in "Set B" consist of an application by the Assistant U.S. Attorney which is not verified, and an affidavit to be signed by the investigating agent which sets forth the factual basis for a reasonable belief that the records sought will lead to location of the fugitive. "Set B" also contains a court order.

It is recommended that, when possible, "Set A" forms be used due to their brevity. Many U.S. Attorneys' offices have used forms similar to these which do not require an additional affidavit from the investigating agent.

These forms are suggested forms only. U.S. Attorneys may have already adopted a form for All Writs Act requests which vary in some respects. If the U.S. Attorney's forms contain all of the basic elements of these suggested forms, the U.S. Attorney's existing forms may be used.

Any questions regarding the use of the All Writs Act for the production of records in federal fugitive cases should be addressed to the General Litigation and Legal Advice Section of the Criminal Division, FTS 724-6948.

U.S.A.M. (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

The following guidelines should be observed in All Writs Act application:

1. There must be an outstanding arrest warrant for the fugitive from the U.S. District Court or the U.S. Magistrate.

2. The All Writs Act Order can only be issued in the federal district where the criminal case is pending, not in the district where the records are located where that is a different district.

3. The order should be obtained from a judge of the U.S. District Court unless the U.S. District Court has delegated appropriate authority to the U.S. Magistrate. In some districts magistrates have issued such orders, however this authority may vary in some districts.

4. The records will be produced to agents of the field office which has jurisdiction over the city where the records are located.

5. The All Writs Act Order should allow approximately ten to twelve days between the date of the order and the required production of the records. The purpose of this requirement is to allow the affected company sufficient time to challenge the order in the District Court of issuance if it desires to do so. It should be noted that this time requirement does not preclude more timely production of the records if the company is cooperative.

6. The verified application of Set A, and the affidavit of Set B, should clearly demonstrate the reasonable belief that the records sought may reveal leads to the whereabouts of the fugitive. See suggestions in paragraph 2 of the form for a verified application, and paragraph 4 of the form for an affidavit.

7. Although the telephone toll records will probably be the most common records sought with this procedure, All Writs Act orders may be used for the production of other records which might assist in the location of the fugitive. For example, such orders have been used for the production of medical records and utility records. In any event, there must be a showing of a reasonable belief that the records sought will contain information leading to the location of the fugitive.

8. All Writs Act orders may not be utilized to obtain records to locate federal parole violators who are wanted on federal parole violators' warrants for the reason that there is no pending case in the U.S. District Court and the court therefore lacks jurisdiction.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

ALL WRITS ACT FORMS, SET A

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA )  
 )  
 ) NO. )  
 v. )  
 )  
 (Name of defendant) )  
 )  
 Defendant )

APPLICATION FOR PRODUCTION OF  
(Telephone toll records or other records)

Comes now the United States of America by and through the United States Attorney for the District of \_\_\_\_\_ and makes application for an order pursuant to Title 28, United States Code, Section 1651, the All Writs Act, directing the \_\_\_\_\_ (company of \_\_\_\_\_ (city), \_\_\_\_\_ (state) to produce \_\_\_\_\_ (telephone toll records or other records) for telephone number \_\_\_\_\_ subscribed to by \_\_\_\_\_ (name of subscriber), \_\_\_\_\_ (address of subscriber) for a period from \_\_\_\_\_ to \_\_\_\_\_ and in support of this application alleges and states:

1. That the defendant herein, \_\_\_\_\_ (name of defendant), (indicted or charged by complaint) in this Court on \_\_\_\_\_ (date) for violations of \_\_\_\_\_ (statutes); that a warrant for the arrest of the defendant (name) \_\_\_\_\_ on these charge was issued on \_\_\_\_\_ (date); that since

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

that time the defendant has concealed himself/herself and remains a fugitive; that the order for the production of the records sought herein pursuant to Title 28, United States Code, Section 1651, is in aid of and to effectuate and prevent the frustration of the arrest warrant issued for the arrest of the defendant \_\_\_\_\_ (name) . United States v. New York Telephone Company, 434 U.S. 159, 172 (1977).

2. Based on the investigation of the agency \_\_\_\_\_ (agency) , it is reasonably believed that the \_\_\_\_\_ (telephone toll records or other records) of the \_\_\_\_\_ (company) of \_\_\_\_\_ (city) , \_\_\_\_\_ (state), for telephone number \_\_\_\_\_ subscribed to by \_\_\_\_\_ will be of substantial assistance in locating and apprehending the defendant \_\_\_\_\_ (name of defendant) on the warrant issued in this district for his/her arrest; that this reasonable belief is based upon the following:

(Set out the relationship between fugitive and subscriber (romantic, family, business, prison associate, or otherwise); frequency of past contacts, most recent contacts, reason why fugitive might contact subscriber, and any other information which might show why or how the records sought might lead to location of the fugitive.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

3. Disclosure of the production to the (agency) of the records sought herein would prejudice the investigation of that agency in its efforts to locate and apprehend the fugitive (name of defendant).

WHEREFORE, the United States requests that this Court order, pursuant to Title 28, United States Code, Section 1651, that the custodian of records for the (company), of (city), (state), produce to agents of the (agency), on or before (date, at least 10-12 days after the date of order) for telephone number (number) subscribed to by (name), (address), for the period (period) to (period); it is further requested that the (company), of (city), (state), and its agents and employees be ordered not to disclose the existence of this application and order for production or any production of records made thereunder unless authorized by this Court; it is further requested that the Clerk of this Court seal this application and the order issued thereon until further order of the Court.

(Name of U.S. Attorney), U.S. Attorney  
for the District of (District)

By:

(Name of Assistant U.S. Attorney)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

VERIFICATION

I, (name of Assistant U.S. Attorney), being first duly sworn, depose and state that I am an Assistant U.S. Attorney for the District of \_\_\_\_\_, and that the foregoing Application is made on the basis of information officially furnished and upon the basis of such information is true and correct.

\_\_\_\_\_  
(Name of Assistant U.S. Attorney)

Subscribed and Sworn to before me this \_\_\_\_\_

day of \_\_\_\_\_, 198\_\_

\_\_\_\_\_  
NOTARY PUBLIC.

\_\_\_\_\_  
JUNE 15, 1984  
Ch. 11, p. 19

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA )

v. )

NO. )

(Name of defendant) )

ORDER

This matter comes before the Court on the Verified Application of \_\_\_\_\_ (name of U.S. Attorney) for the District of \_\_\_\_\_ by \_\_\_\_\_ (name of AUSA) for an order for production of records pursuant to Title 28, United States Code, Section 1651.

It appearing that the Application is made in good faith, and that there is a reasonable belief that the \_\_\_\_\_ (telephone toll records or other records) of the \_\_\_\_\_ (company), \_\_\_\_\_ (city), \_\_\_\_\_ (state), for telephone number \_\_\_\_\_ subscribed by \_\_\_\_\_ (subscriber), \_\_\_\_\_ (address) \_\_\_\_\_, will assist the \_\_\_\_\_ (agency), in locating and apprehending the defendant \_\_\_\_\_ (name of defendant) on the arrest warrant issued in this Court on \_\_\_\_\_ (date).

IT IS HEREBY ORDERED, pursuant to Title 28, United States Code, Section 1651, that the \_\_\_\_\_ (company), \_\_\_\_\_ (city), \_\_\_\_\_ (state) produce and deliver to agents of the \_\_\_\_\_ (agency)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

on or before \_\_\_\_\_ (date 10-12 days after date of order) \_\_\_\_\_, the \_\_\_\_\_  
(telephone toll records or other records)

for the telephone number \_\_\_\_\_ subscribed by \_\_\_\_\_ (name) \_\_\_\_\_,  
(address) \_\_\_\_\_, for a period from \_\_\_\_\_ to \_\_\_\_\_;

IT IS FURTHER ORDERED, that the \_\_\_\_\_ (company) \_\_\_\_\_ of \_\_\_\_\_ (city) \_\_\_\_\_,  
\_\_\_\_\_ (state) \_\_\_\_\_, and its agents and employees make no  
disclosure of the existence of this Application and Order for production or  
of any production of records made thereunder unless and until authorized by  
this Court;

IT IS FURTHER ORDERED that the Clerk of this Court seal the Application  
for Production of records and this Order until further order of this Court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 198\_.

\_\_\_\_\_  
JUDGE

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

ALL WRITS ACT FORMS, SET B

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA )  
 )  
 )  
 v. ) NO. )  
 )  
 )  
 (Name of defendant), )  
 )  
 Defendant )

APPLICATION FOR PRODUCTION OF  
(Telephone toll records or other records)

Comes now the United States of America by and through the United States Attorney for the District of \_\_\_\_\_ and makes application for an order, pursuant to Title 28, United States Code, Section 1651, the All Writs Act, directing the \_\_\_\_\_ (company) of \_\_\_\_\_ (city), \_\_\_\_\_ (state), to produce \_\_\_\_\_ (telephone toll records or other records) for the telephone number \_\_\_\_\_ subscribed to by \_\_\_\_\_ (name of subscriber), \_\_\_\_\_ (address of subscribed), for a period from \_\_\_\_\_ to \_\_\_\_\_ and in support of this application alleges and states:

1. That the defendant herein, \_\_\_\_\_ (name of defendant), was \_\_\_\_\_ (indicted or charged by complaint) in this court on \_\_\_\_\_ (date) for violations of \_\_\_\_\_ (statutes); that a warrant for the arrest of the defendant \_\_\_\_\_ (name) on these charges was issued on \_\_\_\_\_ (date); that since that



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

date of order) \_\_\_\_\_ the \_\_\_\_\_ (telephone toll records or other records) \_\_\_\_\_ for  
telephone number \_\_\_\_\_ subscribed to by \_\_\_\_\_ (name) \_\_\_\_\_, \_\_\_\_\_ (address) \_\_\_\_\_,  
for the period \_\_\_\_\_ to \_\_\_\_\_. It is further requested that  
the \_\_\_\_\_ (company) \_\_\_\_\_, of \_\_\_\_\_ (city) \_\_\_\_\_, \_\_\_\_\_ (state) \_\_\_\_\_,  
and its agents and employees be ordered not to disclose the existence of  
this application and order for production or any production of records made  
thereunder unless authorized by this Court. It is further requested that  
the Clerk of this Court seal this application and order issued thereon until  
further order of the Court.

\_\_\_\_\_  
(Name of U.S. Attorney), U.S. Attorney  
for the District of \_\_\_\_\_

By:

\_\_\_\_\_  
(Name of Assistant U.S. Attorney)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

AFFIDAVIT

                     (Name of agent)                     , under penalty of perjury declares and states:

1. That he/she is an agent of                      (agency) assigned to conduct investigation to locate and apprehend                      (defendant) on an arrest warrant from the United States District Court for the District of                     ;

2. That                      (defendant's name) was                      (indicted or charged by complaint) in the United States District Court for the District of                      on                      (date) for violations of                      (statutes); that a warrant for the arrest of                      (defendant) on these charges was issued on                      (date); that affiant and the                      (agency) have conducted an investigation to locate and arrest                      (defendant); that since the issuance of the arrest warrant, the said                      (defendant) has concealed himself/herself and remains a fugitive;

3. That based on the investigation conducted by affiant and other agents of the                      (agency), and based on the experience of affiant in investigations to locate fugitives, affiant has a reasonable belief that the                      (telephone toll records or other records) of the                      (company) of                      (city),                      (state), for telephone number                      subscribed

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

to by \_\_\_\_\_ (name) \_\_\_\_\_, \_\_\_\_\_ (address) \_\_\_\_\_, for the period \_\_\_\_\_  
to \_\_\_\_\_ will be of substantial assistance in locating and apprehending  
the said \_\_\_\_\_ (defendant) \_\_\_\_\_ on the arrest warrant referred to above;

4. That affiant's reasonable belief that the records of the \_\_\_\_\_ (company)  
referred to above will substantially assist the investigation to locate and  
apprehend the fugitive \_\_\_\_\_ (defendant) \_\_\_\_\_ is based upon the following

(Set out the relationship between fugitive and subscriber  
(romantic, family, business, prison associate or other  
wise); frequency of past contacts, most recent contacts,  
reason why fugitive might contact subscriber, and any  
other information which might show why or how the records  
sought might lead to location of the fugitive.)

5. Based on affiant's knowledge of the investigation to locate  
\_\_\_\_\_ (defendant) \_\_\_\_\_ and on affiant's experience in investigations to locate  
fugitives, it is believed that disclosure by \_\_\_\_\_ (company) \_\_\_\_\_ or its agents  
and employees of the production of the records referred to above would  
prejudice the \_\_\_\_\_ (agency) \_\_\_\_\_ investigation to locate and apprehend the  
fugitive \_\_\_\_\_ (defendant) \_\_\_\_\_.

\_\_\_\_\_  
(Name of agent.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

I,           (name of agent)          , declare and certify pursuant to Title 28,  
United States Code, Section 1746, that under penalty of perjury the above  
and foregoing is true and correct.

\_\_\_\_\_  
(Name of agent)

(Note: This form of affidavit does not require  
signature and seal of Notary Public.)

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF \_\_\_\_\_

UNITED STATES OF AMERICA )  
 )  
 )  
 v. )  
 )  
 )  
 (Name of defendant) , )

NO. \_\_\_\_\_

Defendant

ORDER

This matter comes before the Court on the Application of (name of U.S. Attorney) for the District of \_\_\_\_\_ by (name of Assistant U.S. Attorney) for an order for production of records, pursuant to Title 28, United States Code, Section 1651.

It appearing that the Application is made in good faith, and that there is a reasonable belief that the (records) of the (company), (city), (state), for telephone number \_\_\_\_\_ subscribed by (subscriber), (address), will assist the (agency), in locating and apprehending the defendant (name of defendant) on the arrest warrant issued in this Court on (date).

IT IS HEREBY ORDERED, pursuant to Title 28, United States Code, Section 1651, that the (company), (city), (state), produce and deliver to agents of the (agency)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

on or before 10-12 days after date of order) \_\_\_\_\_, the \_\_\_\_\_ (telephone toll records or other records) \_\_\_\_\_ for telephone number \_\_\_\_\_ subscribed by \_\_\_\_\_ (name) \_\_\_\_\_ (address) \_\_\_\_\_ for the period from \_\_\_\_\_ to \_\_\_\_\_;

IT IS FURTHER ORDERED, that the \_\_\_\_\_ (company) \_\_\_\_\_ of \_\_\_\_\_ (city) \_\_\_\_\_, \_\_\_\_\_ (state) \_\_\_\_\_, and its agents and employees make no disclosure of the existence of this Application and Order for production or of any production of records made thereunder unless and until authorized by this Court;

IT IS FURTHER ORDERED that the Clerk of this Court seal the Application for Production or records and this Order until further order of this Court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1983.

\_\_\_\_\_  
JUDGE

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.221 Power of a Grand Jury Limited by Venue

A case should not be presented to a grand jury in a district unless venue for the offense lies in that district. Nevertheless, it is common for a grand jury to investigate matters occurring at least partly outside its own district, because federal offenses are often prosecutable in more than one district, and a grand jury is under no obligation to determine venue early in its investigation. A witness should not be heard to challenge the right of a grand jury to inquire into events that happened in other districts. As a general matter, a witness has a duty to testify if the grand jury has a de facto existence and cannot resist questions on the grounds of relevancy or materiality. The matter is discussed more fully below. See United States v. Blair, 250 U.S. 273 (1919); Brown v. United States, 245 F.2d 549 (8th Cir. 1957); United States v. Girgenti, 197 F.2d 218 (3d Cir. 1952).

9-11.222 Power of a Grand Jury Limited by the District Court

It is often said that the grand jury is an arm or appendage of the court. This has a certain significance but is also misleading. The grand jury is dependent on the court in certain respects and independent in other respects.

Lacking powers of its own, the grand jury must rely upon the district court's subpoena and contempt powers if witnesses are to be compelled to attend and to testify in grand jury sessions. See Brown v. United States, 359 U.S. 41 (1959). This presents no problems in the ordinary course. But a court may properly deny a grand jury the use of subpoenas to engage in "the indiscriminate summoning of witnesses with no definite object in mind and in a spirit of meddlesome inquiry"; the court may curb a grand jury when it clearly exceeds "its historic authority." See Hale v. Henkel, 201 U.S. 43, 63 (1906); In re April 1956 Term Grand Jury, 230 F.2d 263, 269 (7th Cir. 1956). In any event, the district court has broad authority to discharge a grand jury impaneled under Rule 6 of the Federal Rules of Criminal Procedure, and rather than monitor the issuance of grand jury subpoenas in situations involving a flagrant abuse, the court might more likely put an end to the grand jury by discharging it. See Fed. R. Crim. P. 6(g); Wright, Federal Practice and Procedure, Criminal §§101, 112. Contrast the provisions governing discharge of special grand juries discussed at USAM 9-11.420, infra.

There is a counterbalancing principle. Since the grand jury enjoys Constitutional status, the district court must neither control nor interfere with the grand jury in "the exercise of its essential functions." See United States v. United States District Court for the Southern District of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

West Virginia, 238 F.2d 713 (4th Cir. 1956), cert. denied, sub nom., Valley Bell Dairy Co. v. United States, 352 U.S. 981 (1957). In that case, the district court was held to have interfered improperly with the grand jury by denying government counsel the use of the grand jury transcript and by instructing the jurors to vote without the benefit of government counsel's summarization of the evidence.

The government attorney also enjoys a constitutionally-based independence. Court, prosecutor, and grand jury--each has its own authority; and a court may not exercise its supervisory power over the grand jury in such a way as to encroach upon the jurors' or the prosecutor's prerogatives, unless there is a clear basis in law and fact for doing so. See United States v. Chanen, 549 F.2d 1306 (9th Cir. 1977).

The subpoena power of the court is limited to an extent under Rule 17 of the Federal Rules of Criminal Procedure, and this in turn affects the investigative power of the grand jury. The subject is treated below at USAM 9-11.230.

9-11.223 Power of a Grand Jury Limited by the Government Attorney

No federal grand jury can indict without the concurrence of the attorney for the government. He/she must sign the indictment under Rule 7(c) of the Federal Rules of Criminal Procedure for the indictment to be valid, and the judiciary cannot compel the attorney for the government to sign any indictment. In signing an indictment, the attorney for the government is not just complying with Rule 7; the attorney is exercising a power belonging to the executive branch of the government. See United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 391 U.S. 935 (1965); Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 391 U.S. 841 (1967).

9-11.224 Power of a Grand Jury Limited By Testimonial Privilege

A witness before a grand jury enjoys the same testimonial privilege he/she would have at any stage of a criminal proceeding. The single rule in the Federal Rules of Evidence that is made applicable to grand jury proceedings is Rule 501 on testimonial privileges; see Fed. R. Evid. 101 and 1101(c) and (d). Federal Rule of Evidence 501 provides that, except as otherwise required by the testimonial privileges of witnesses "shall be governed by the United States in the light of reason and experience." The subject is thus left for case law development. But Rule 501 is clear: federal law (not state law) is controlling on the matter of testimonial privilege before grand juries. See United States v. Woodall, 438 F.2d 1317 (5th Cir. 1970), cert. denied, 403 U.S. 933 (1971). It is emphasized, however, that Rule 501 is only a rule for the witness and does not set a standard for what may be heard and used as a basis for indictment.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

See the Advisory Committee's Note to Rule 1101 of the Federal Rule of Evidence. In short, a grand jury may consider and indict on the basis of testimony that will not necessarily be admissible at trial; and the indictment will not be vitiated because evidence was obtained in violation of a testimonial privilege. See, e.g., United States v. Fultz, 602 F.2d 830 (8th Cir. 1979); United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); cf. United States v. Franklin, 598 F.2d 954 (5th Cir.), cert. denied 444 U.S. 870 (1970.)

When a grand jury witness invokes a testimonial privilege, the attorney for the government will want to examine the claim very carefully to ascertain whether the privilege, although perhaps available in that state, is properly invoked in a federal proceeding. Each witness is under a broad duty to answer questions; the witness has no privilege to protect others. See United States v. Mandujano, 425 U.S. 564 (1976). To compel a witness to give testimony, resort may be had to the civil contempt remedy under 18 U.S.C. §401, and Rule 42 of the Federal Rules of Criminal Procedure is utilized for punitive purposes. If the privilege against self-incrimination is invoked in appropriate circumstances, it may be necessary to consider whether to seek authority for obtaining an order to compel testimony under 18 U.S.C. §6003, which may be enforced by use of the civil contempt remedy.

One exceptional situation is to be noted. A grand jury witness is entitled, by reason of 18 U.S.C. §2515, to refuse to respond to questions based on illegal interception of oral or wire communications. Gelbard v. United States, 408 U.S. 41 (1972). The decision is based on the statute and not any broader principle.

9-11.230 Limitation on Naming Persons Unindicted Co-Conspirators

The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severely criticized in United States v. Briggs, 514 F.2d 794 (5th Cir. 1974), and other cases. In granting appellants' motion for an order of expungement in Briggs, the court of appeals held that, in charging them with criminal conduct without indicting them, the grand jury exceeded its power and authority and that its action was a denial of due process to appellants since it deprived them of an opportunity to challenge the correctness of the grand jury's accusation. See also United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977); Application of Jordan, 439 F. Supp. 199 (S.D. W.Va. 1977); United States v. Hansen, 422 F. Supp. 430 (E.D.Wis. 1976); cf. In Re Smith, 656 F.2d 1101 (5th Cir. 1981) (accusation in prosecutor's summary).

Primarily on the basis of Briggs, the American Bar Association has

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

recently adopted, as part of its policy on the grand jury, the following statement of principle. "The grand jury shall not name a person in an indictment as an unindicted co-conspirator in a criminal conspiracy. Nothing herein shall prevent supplying such names in a bill of particulars." Principle 7 of 25 principles.

The Department did not oppose the adoption of this Principle by the ABA and generally concurs in it. As the court in Briggs pointed out, there is no need ordinarily to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known." The identity of the person can be supplied, upon request, in a bill of particulars. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

Accordingly, in the absence of some sound reason (e.g., where the fact of the person's conspiratorial involvement is a matter of public record or knowledge), it is not desirable for U.S. Attorneys to identify unindicted co-conspirators in conspiracy indictments.

9-11.240 Limitation on Grand Jury Subpoenas

Subpoenas in federal proceedings, including grand jury proceedings, are governed by Rule 17 of the Federal Rules of Criminal Procedure. As authorized under the Rule, the clerk of the court makes available to the grand jury (or the attorney for the government) a supply of subpoenas signed and sealed but otherwise in blank. See United States v. Kleen Laundry and Cleaners, Inc., 381 F. Supp. 519 (E.D.N.Y. 1974). Grand jury subpoenas are usually served by the marshals, but service by other persons is authorized if the other persons are not less than 18 years of age (and not parties to the litigation). Grand jury subpoenas may be served at any place within the United States. Under Rule 17(g) of the Federal Rule of Criminal Procedure, a failure by a person without adequate excuse to obey a subpoena served upon him/her may be deemed a contempt of the court.

Rule 17 of the Federal Rule of Criminal Procedure provides that, "on motion made promptly," a court may quash or modify any subpoena duces tecum if compliance therewith would be "unreasonable or oppressive." Unlike Rule 45(b) the Federal Rules of Civil Procedure, the Criminal Rule allows for the consideration of a motion to quash even if it is made as late as the time set for compliance with the subpoena. See Wright, Federal Practice and Procedure, Criminal §275. The party who files a motion to quash has the burden of showing that a subpoena is unreasonable and oppressive.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

In Re Grand Jury Subpoenas, 391 F. Supp. 991 (D.R.I. 1975) (collecting numerous cases on motions to quash subpoenas).

The breadth of the investigative powers of a grand jury does not justify the issuance of general subpoenas duces tecum. Subpoenas duces tecum must be reasonably specific. Rule 17 does not require a precise identification of the exact documents sought by the grand jury; a reasonable particularity is all that is necessary. The description given is usually in terms of the subjects to which the writings relate and if a subpoena is broader in one respect (covering, for example, a lengthy period of record-keeping), it may have to be more specific or narrower in describing the material sought, depending upon the overall circumstances. Illustrative cases are collected at Wright, Federal Practice and Procedure, Criminal §275.

It is sometimes said that Rule 17 implements the Fourth Amendment prohibition against unreasonable searches and seizures. A subpoena, however, is a process quite distinct from a search warrant. If at all applicable to subpoenas duces tecum, Fourth Amendment considerations simply militate against subpoenas that are sweeping in scope. See United States v. Dionisio, 410 U.S. 1 (1973); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); United States v. Universal Manufacturing Company, 525 F.2d 808 (8th Cir. 1975). A subpoena duces tecum is subject to no more stringent Fourth Amendment requirements than is the "ordinary" subpoena. See United States v. Miller, 425 U.S. 435 (1976), at No. 8. But see United States v. Hilton, 534 F.2d 556, 564-565 (3d Cir. 1976) (concerning irregularly issued subpoenas).

The breadth of the investigative powers of a grand jury does justify the issuance of subpoenas ad testificandum without any fine regard for the relevancy or materiality of the testimony likely to be adduced. It follows that witnesses cannot resist questions by a grand jury on the grounds of relevancy or materiality or require any showing of the reasons why individuals were subpoenaed. A grand jury may, for example, subpoena a large number of witnesses in order to obtain voice exemplars without being limited by Fourth Amendment standards. Only if there was a real abuse of the grand jury's powers--if, for example, the jury were to pry into someone's business or domestic affairs for idle purposes--would a court exercise its inherent power to control the grand jury's use of subpoenas ad testificandum. See Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Dionisio, *supra*; Blair v. United States, 250 U.S. 273 (1919); Hale v. Henkel, 201 U.S. 43 (1906); United States v. Doe, 460 F.2d 328 (1st Cir. 1972); In re April 1956 Term Grand Jury, 230 F.2d 263 (7th Cir. 1956).

Motions to quash subpoenas duces tecum may be granted on more specific bases that appear in Rule 17; for example, the privileged character of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

material sought may place the material effectively beyond the reach of a subpoena. See Continental Oil Company v. United States, 330 F.2d 347 (9th Cir. 1964); United States v. Guterman, 272 F.2d 344 (2d Cir. 1959); cf. Gelbard v. United States, 408 U.S. 41 (1972), concerning grand jury inquiry based upon an illegal interception of an oral or wire communication. It is emphasized, again, that issues of privilege are determined under federal law, rather than state law. See Rule 501 of the Federal Rules of Evidence.

Grand jury subpoenas may be issued, to be served abroad, to compel the appearance before the grand jury of a national or resident of the United States and the production of "a specified document or other thing by him." The decision to the contrary in United States v. Thompson, 319 F.2d 665 (2d Cir. 1963), was overcome by an amendment of 28 U.S.C. §1783. See Wright, Federal Practice and Procedure, Criminal §277. However, before issuing a subpoena to a witness abroad, the district court is required under 28 U.S.C. §1783(a) to make certain findings regarding the necessity for subpoenaing the witness. The issuance of a grand jury subpoena to an American citizen in a foreign country may at times be obviated by presenting the person's statement to the grand jury in the form of hearsay.

There can be enormous difficulties involved in investigating any matter abroad and in seeking to obtain the testimony of persons located in other countries, even if they are citizens of the United States. See Jones, International Judicial Assistance: Procedural Chaos And A Program For Reform, 62 Yale L.J. 515. Subpoenas cannot be issued and served abroad upon foreign nationals; even to request a foreign national to appear in this country may involve sensitive problems. Accordingly, before making any effort or initiating any process to obtain testimony or evidence from abroad, prior consultation with the Criminal Division is required. Inquiries should be directed to the Office of International Affairs.

All grand jury witnesses should be accorded reasonable advance notice of their appearance before the grand jury. "Forthwith" or "eo instantanter" subpoenas should be used only when swift action is important and then only with the prior approval of the U.S. Attorney. Considerations, among others, which bear upon the desirability of using such subpoenas include the following: 1) the risk of flight; 2) the risk of destruction or fabrication of evidence; 3) the need for the orderly presentation of evidence; and, 4) the degree of inconvenience of the witness.

Policies regarding the issuance of subpoenas to members of the news media and subpoenas for telephone toll records of members of the news media are discussed at USAM 9-2.161 and 1-5.410.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-11.241 Fair Credit Reporting Act and Grand Jury Subpoenas--Special Handling Necessary

The Fair Credit Reporting Act (15 U.S.C. §1681 et seq.) prohibits credit reporting agencies from furnishing consumer reports except, inter alia, "in response to the order of a court" of competent jurisdiction. Authorities are divided on the question whether grand jury subpoenas are court orders within the meaning of the quoted language (at 15 U.S.C. §1681 b(1)). The cases are collected in Matter of Application to Quash Grand Jury Subpoena, 526 F. Supp. 1253 (D. Md. 1981). The only circuit court to rule on the issue held that a subpoena is not a court order within the meaning of the Act. See In re Gren, 633 F.2d 825 (9th Cir. 1980).

Because of the division of opinion on the legal issue and the resulting differences in practices in the various districts, credit reporting agencies are often constrained to resist grand jury subpoenas which they would promptly obey if the subpoenas were specially issued by the district courts. The trouble, expense and delay involved for the agencies and the government seem particularly unwarranted when no definitive resolution of the legal issue is foreseeable at an early date. Heretofore, in order to try to minimize these problems, and the need for litigation, U.S. Attorneys were given discretion to seek court approval of a grand jury subpoena. This policy, however, has not been completely successful in resolving the issue. Accordingly, to provide consistency and uniformity in the various districts, the Department of Justice has determined that henceforth attorneys for the government in seeking to obtain credit reporting agency records, should seek court orders or the endorsement or other special handling of subpoenas by the district court so as to obviate the legal difficulties. See, e.g., In Re Gren, supra, at n. 3.

It is to be noted that this change does not reflect an abandonment or modification of the Department's legal position but is adopted solely for reasons of policy in order to facilitate grand jury access to credit reporting agency records.

It should be sufficient simply to make an in camera, ex parte showing that the information sought from the credit reporting agency is or may be relevant to an ongoing investigation, that it is properly within the grand jury's jurisdiction and that it is not sought primarily for any other purpose. Cf. In Re Grand Jury Proceedings (Larry Smith), 579 F.2d 836 (3d Cir. 1978).

9-11.250 Authority to Arrest Material Witness

It has been inferred from Rule 46(b) of the Federal Rules of Criminal Procedure and from 18 U.S.C. §3149 that federal district courts have the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

authority to order the arrest of material witnesses and to detain such witnesses or to require them to give bail to insure their future appearance as witnesses. There must be a showing and an independent determination by the court that probable cause exists for the arrest and detention of a material witness. See Bacon v. United States, 449 F.2d 933 (9th Cir. 1971) (and cases cited therein).

9-11.260 Advice of "Rights"

The policy concerning advice of rights to be given to grand jury witnesses has been changed. It is now the Department's policy to advise a grand jury witness of the rights described below only if such witness is a "target" or "subject" (as hereinafter defined) of a grand jury investigation.

The Supreme Court declined to decide whether a grand jury witness must be warned of his/her Fifth Amendment privilege against compulsory self-incrimination before his/her grand jury testimony can be used against the witness. See United States v. Washington, 431 U.S. 181, 186 & 190-191 (1977); United States v. Wong, 431 U.S. 174 (1977); United States v. Mandujano, 425 U.S. 564, 582 n.7 (1976). It is important to note, however, that in Mandujano the Court took cognizance of the fact that federal prosecutors customarily warn "targets" of their Fifth Amendment rights before grand jury questioning begins. See United States v. Mandujano, *supra*. Similarly, in Washington the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting. See United States v. Washington, *supra*, at 188.

Notwithstanding the lack of a clear constitutional imperative, it is the internal policy of the Department that an "Advice of Rights" form, as set forth below, be appended to all grand jury subpoenas to be served on any "target" or "subject" (as hereinafter defined) of an investigation:

Advice of Rights

A. The grand jury is conducting an investigation of possible violations of federal criminal laws involving: (State here the general subject matter of inquiry, e.g., the conducting of an illegal gambling business in violation of 18 U.S.C. §1955).

B. You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.

C. Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

In addition, these "warnings" should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically to be considered as a target even if such officer's or employee's conduct contributed to the commission of crime by the target organization, and the same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target. Although the Court in United States v. Washington, supra, held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant[s]", the Department continues its longstanding internal practice to advise witnesses who are known "targets" of the investigation that their conduct is being investigated for possible violation of federal criminal law. This supplemental "warning" will be administered on the record when the target witness is advised of the matters discussed in the preceding paragraphs.

A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

Where a local district court insists that the notice of rights may not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.261 Subpoenaing Targets of the Investigation

A grand jury may properly subpoena a subject or a target of the investigation and question him/her about his/her involvement in the crime under investigation. See United States v. Wong, 431 U.S. 174, 179 n.8 (1977); United States v. Washington, 431 U.S. 181, 190 n.6 (1977); United States v. Mandujano, 425 U.S. 564, 573-75 and 584 n.9 (1976); United States v. Dionisio, 410 U.S. 1, 10 n.8 (1973); Kastigar v. United States, 406 U.S. 441, 446 (1972); Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 102 (1964) (concurring opinion); Brown v. Walker, 161 U.S. 591, 610 (1896); United States v. Friedman, 445 F.2d 1076 (9th Cir. 1971); United States v. Capaldo, 402 F.2d 821 (2d Cir. 1968); United States v. Scully, 225 F.2d 113 (2d Cir.), cert. denied, 350 U.S. 897 (1955). However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known "target" (as defined in USAM 9-11.260, *supra*) is subpoenaed to testify before the grand jury about his/her involvement in the crime under investigation, an effort should be made to secure his/her voluntary appearance. If a voluntary appearance cannot be obtained, he/she should be subpoenaed only after the grand jury and U.S. Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a "target," careful attention will be paid to the following considerations:

A. The importance to the successful conduct of the grand jury's investigation of the testimony or other information sought;

B. Whether the substance of the testimony or other information sought could be provided by other witnesses; and

C. Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

9-11.262 Requests by Subjects and Targets to Testify before the Grand Jury

It is not altogether uncommon for subjects or targets of the grand jury's investigation, particularly in white-collar cases, to request or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such witnesses to testify (United States v. Leverage Funding System, Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Gardner, 516 F.2d 334 (7th Cir. 1975), cert. denied, 423 U.S. 861 (1976)), a refusal to do so can create the appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation (as defined in USAM 9-11.260, supra) personally to testify before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his/her privilege against self-incrimination and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.

Some such witnesses undoubtedly will wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests, reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses is a matter which is left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence. See, e.g., United States v. Calandra, 414 U.S. 338, 343 (1974).

9-11.263 Notification of Targets

Where a target is not called to testify pursuant to USAM 9-11.261, supra, and does not request to testify on his/her own motion (see USAM 9-11.262, supra), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him/her an opportunity to testify (subject to the conditions set forth in USAM 9-11.262, supra) before the grand jury. Of course, notification would not be appropriate in routine clear cases nor where such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9-11.264 Advance Assertions of an Intention to Claim the Fifth Amendment Privilege Against Compulsory Self-Incrimination

A question frequently faced by federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify he/she will refuse to testify on Fifth Amendment grounds. Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. §6003, the witness should be excused from testifying. However, such a broad

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

rule would be improper and too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself/herself. However, if a "target" of the investigation (as defined in USAM 9-11.260, *supra*) and his/her attorney state in a writing, signed by both, that the "target" will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, *i.e.*, the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry. (See USAM 9-11.261, *supra*.)

9-11.270 Limitation on Resubpoenaing Contumacious Witnesses before Successive Grand Juries

While the Supreme Court in *Shillitani v. United States*, 384 U.S. 364, 371 n.8 (1965), appears to approve the reimposition of civil contempt sanctions in successive grand juries, it is the general policy of the Department not to subpoena and seek contempt citations in a successor grand jury against a witness who refused to testify before the prior grand jury and was consequently incarcerated for such refusal. The resubpoenaing of a contumacious witness may, however, be justified in certain limited situations such as when the questions to be asked the witness relate to matters not covered in the previous proceedings or when there is an indication from the witness or his/her legal counsel that the witness will in fact testify if called before the new grand jury. If the witness is believed to possess information essential to the investigation, resubpoenaing may also be justified when the witness himself/herself is involved to a significant degree in the criminality about which he can testify. In such cases, prior authorization must be obtained from the Assistant Attorney General, Criminal Division, to subpoena the witness before the successive grand jury as well as to seek civil contempt sanctions if the witness continues to persist in his/her refusal to testify.

Since the coercive effect of a civil contempt adjudication is substantially diluted when the grand jury's term is about to expire, it is recommended that a subpoena ordinarily not be issued to a witness who it is anticipated will refuse to testify before such grand jury. This, of course, is a matter of judgment for the U.S. Attorney and there may well be situations when it is necessary to subpoena a witness and institute contempt proceedings for recalcitrance in such circumstances. In most situations, however, it would seem preferable to subpoena the witness before a new grand jury.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-11.300 THE PROVISIONS OF FEDERAL RULES OF CRIMINAL PROCEDURE 6

9-11.310 Summoning Grand Juries (Fed. R. Crim. P. 6(a) and (b))

Rule 6(a) of the Federal Rules of Criminal Procedure authorizes courts to impanel as many grand juries "as the public interest requires." Each grand jury must consist of not less than 16 nor more than 23 members. The jury selection process is discussed below at USAM 9-11.326 *infra*. Either the clerk of the court or a jury commission (depending upon the type of plan adopted for the random selection of jurors) manages the jury selection process under the Jury Selection and Service Act.

Rule 6 of the Federal Rules of Criminal Procedure does not state explicitly what constitutes a quorum to enable a grand jury to operate. However, since a grand jury cannot be impaneled with less than sixteen members, it is considered that 16 jurors constitute a quorum. A grand jury should not function with less than 16 members in attendance.

9-11.320 Objection to Grand Jury and to Grand Jurors

The U.S. Attorney's primary concern with the grand jury selection process arises under Rule 6(b) of the Federal Rules of Criminal Procedure. Rule 6(b) of the Federal Rules of Criminal Procedure allows for the making of two basic types of objections: Objections to the array (that the jurors were not selected, drawn, or summoned in accordance with law); and objections to individual jurors (that they are not legally qualified to serve). The Rule provides two methods for making these objections.

9-11.321 Challenges

Rule 6(b)(1) of the Federal Rules of Criminal Procedure permits the attorney for the government or a defendant held to answer in the district court to make challenges before the administration of the oath to the grand jurors. The rule was recognized, when framed, as being of limited practical value and was not meant to prevent objections being made instead by means of motions to dismiss. See the original note to subdivision (b) of Federal Rules of Criminal Procedure 6.

9-11.322 Motions to Dismiss, in General

If not previously determined upon challenge, objections to the array or to individual jurors may be made under Rule 6(b)(2) of the Federal Rules of Criminal Procedure 6(b)(2) by means of motions to dismiss the indictment. Objections will usually be raised by this method. It is expressly provided in the Rule that such motions to dismiss should be made and granted as provided in 28 U.S.C. §1867(e).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.323 Tests for Determining Motions to Dismiss

Under Federal Rule Criminal Procedure 6(b)(2), an indictment shall not be dismissed because one or more of the grand jurors was not legally qualified to serve if it appears from the record (discussed below) that, after deducting the number not legally qualified, there were still twelve or more jurors who concurred in finding the indictment. Nor (as discussed below) shall an indictment be dismissed because of any other objection to an individual juror if his/her vote cannot have been decisive in returning an indictment.

Motions to dismiss on the basis of objections to the array must rest, under 28 U.S.C. §1867, "on the ground of substantial failure to comply" with the Jury Selection and Service Act; and the burden of proof rests with the party attacking the jury selection procedure. See United States v. Goodlow, 597 F.2d 159 (9th Cir.), cert. denied, 442 U.S. 913 (1979); Mobley v. United States, 379 F.2d 768 (6th Cir. 1967); United States v. Smaidone, 485 F.2d 1333 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

9-11.324 Standing to Object

Only a defendant "who has been held to answer" is permitted under the Rule to challenge the grand jury prior to his indictment. See, e.g., United States v. Barone, 311 F. Supp. 496 (W.D. Pa. 1970). Any defendant has standing to object when a jury has been selected on an impermissible basis whether or not the defendant was a member of the excluded class or group. Peters v. Kiff 407 U.S. 492 (1972); Pallard v. United States, 329 U.S. 187 (1946). There is no standing to object, however, in a witness who is resisting a grand jury subpoena or court order to testify. United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, sub nom. Meisel v. United States, 412 U.S. 954 (1973); United States v. Duncan, 456 F.2d 1401 (9th Cir. 1972).

9-11.325 Motion to Dismiss Because of Objections to Individual Jurors

Section 1865 of Title 28 enumerates the legal qualifications for jurors. Every person is to be considered qualified to serve on a jury (grand or petit) unless: (1) he/she is not a United States citizen eighteen years of age who has resided for one year within the judicial district; (2) he/she is unable to read, write, and understand English sufficiently to fill out the juror qualification form in a satisfactory manner; (3) he/she is unable to speak English; (4) he/she is incapable of rendering satisfactory jury service due to mental or physical infirmity; or (5) he/she has been convicted in a state or federal court of record of a felony and has not had his/her civil rights restored, or he/she is under a pending felony charge.

An individual may be legally qualified and still excluded from

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

serving as a juror, by reason, e.g., of an inability to be impartial or a tendency to be disruptive. See 28 U.S.C. §1866(c). Even if a motion to dismiss an indictment involves a complaint about a juror for reason other than his/her legal qualifications, the problem may be obviated, just as it is when the complaint concerns a juror's legal qualifications, by showing that at least twelve other jurors concurred in finding the indictment. See United States v. Anzelmo, 319 F. Supp. 1106 (E.D. La. 1970); United States v. Brandt, 139 F. Supp. 349 (N.D. Ohio 1955).

9-11.326 Motions to Dismiss Based Upon Objections to the Array

An objection to the array under Rule 6(b) is an objection that the grand jury was not selected, drawn, or summoned according to law. Incorporated by reference into Rule 6, the provisions of 28 U.S.C. §1867 are made the exclusive means for raising objections to the array. A motion to dismiss based upon an objection to the array must, pursuant to 28 U.S.C. §1867(a) and (b), allege a "substantial failure" to comply with the Jury Selection and Service Act. The "substantial failure" should involve some frustration of the goals of the Jury Selection and Service Act. See United States v. Evans, 526 F.2d 701 (5th Cir. 1976).

It is declared federal policy under the Jury Selection and Service Act (specifically 28 U.S.C. §1861 and §1862) that grand and petit jurors shall be "selected at random from a fair cross section of the community in the district or division wherein the court convenes," and no citizen shall be excluded from serving on account of race, color, religion, sex, national origin, or economic status. Pursuant to 28 U.S.C. §1863, each U.S. District Court has placed into operation a written plan for random selection of jurors. This jury selection plan generates, in accordance with 28 U.S.C. §§1864-1866, first a "master jury wheel" of names selected at random from particular sources (generally voter registration lists and certain supplemental sources); and then (on the basis of juror qualification forms executed by the persons on the master jury wheel, and "other competent evidence") a "qualified jury wheel" of names of legally qualified and non-exempt persons. From time to time, random (and usually public) drawings are conducted and subpoenas issued to a certain number of persons on the qualified jury wheel. These prospective jurors are examined further in court and, as needed, grand and petit juries are impaneled. (18 U.S.C. §3321 of Title 18 allows for the summoning of additional jurors to complete a grand jury when less than sixteen of the persons summoned attend or remain after the court allows challenges.) It is a practice in certain districts to designate alternate grand jurors, but they do not sit like their counterparts on petit juries; they sit only to replace a grand juror who is permanently excused.

*Every grand jury plan must, under 28 U.S.C. §1863(b)(6), exempt the following from serving on juries: (1) members in active service in the armed forces of the United States; (2) members of the fire or police departments of any state, district, territory, possession, or subdivision thereof; and*

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(3) public officers in any of the three branches of the federal government or of any state, district, territory, possession, or subdivision thereof, who are actively engaged in the performance of official duties. Under 28 U.S.C. §1866(e), no person can be required to serve on more than one grand jury, or on both a grand jury and petit jury, within any two-year period.

There can be no proper reason for disqualifying, excluding, excusing, or exempting a person from jury service unless that reason can be found in one of the following: (1) 28 U.S.C. §1865; (2) 28 U.S.C. §1866 (note particularly the provision in §1866(c)); or (3) provisions of jury selection plans adopted in accordance with 28 U.S.C. §1863(b)(5), (6), or (7). In this connection, it is noted that the administration of the jury selection process rests within the sound discretion of the courts and their officers. See United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd. 385 U.S. 293 (1966); United States v. Anderson, 509 F.2d 312 (D. D.C. 1974), cert. denied, 420 U.S. 991 (1975).

The Jury Selection and Service Act was intended to guarantee a random selection of jurors from a fair cross section of the community, but it was recognized that the process could hardly result in jury panels that actually mirror the makeup of the community. See 1968 U.S. Code Congressional and Administrative News, 1794. The Act does not require that the selection be from a fair cross section of the total population of a district without any qualifications; to the contrary, the Act allows for and contemplates the imposition of certain restrictions that are not compatible with a statistically balanced representation in jury panels of all elements of a community. See United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd. 385 U.S. 293 (1966); United States v. McVean, 436 F.2d 1120 (5th Cir.), cert. denied, 404 U.S. 822 (1971); United States v. Gast, 457 F.2d 141 (7th Cir.), cert. denied, 406 U.S. 969 (1972).

While U.S. Attorneys have no responsibility for administering the Jury Selection and Service Act, they have an obvious stake in the Act's being properly administered. The requirement in 28 U.S.C. §1863(b)(4) that the master jury wheel be emptied and refilled periodically (at least every four years) affords an opportunity for reflecting upon the jury selection system and the possible effect of changed circumstances in the community. See, e.g., United States v. Gooding, 473 F.2d 425 (5th Cir.), cert. denied, 412 U.S. 928 (1973); United States v. Guzman, 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973). While it is contemplated that voter lists will be the primary source of jurors, it is also contemplated that supplemental sources will be used at times as a corrective in the system. See United States v. Ross, 468 F.2d 1213 (9th Cir. 1972), cert. denied, 410 U.S. 989 (1973); United States v. Lewis, 472 F.2d 252 (3d Cir. 1973); 1968 U.S. Code Congressional and Administrative News, 1974.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.327 Giving the Court Information Pertinent to Jury Selection

Especially when a grand jury is to be selected to conduct a highly sensitive investigation, a U.S. Attorney will want to inform the district court of all facts that may be pertinent to the matter of excluding jurors under 28 U.S.C. §1866(c). Care should be taken especially to prevent the impaneling of a juror who might "be unable to render impartial jury service." If provided for in the jury selection plan, in accordance with 28 U.S.C. §1863(b)(8), the court may vary from its customary practice and keep the names drawn from the qualified jury wheel confidential "in any case where the interests of justice so require."

9-11.328 Dismissal Required by Substantial Failure to Comply

Motions challenging compliance with selection procedures shall, under 28 U.S.C. §1867(d), contain a sworn statement of the facts making out a substantial failure to comply. The moving party is entitled, in support of his/her motion, to utilize the testimony of the clerk or jury commissioner, any relevant records and papers of the jury commission or clerk that are not public or otherwise available, and any other relevant evidence. If the court finds that there has been a substantial failure to comply with the law in selecting the grand jury, the court shall stay the proceedings pending the proper selection of a grand jury, or dismiss the indictment, whichever is appropriate. See 18 U.S.C. §3288 and §3289 alleviating problems with statutes of limitation in returning new indictments.

Under 28 U.S.C. §1867(a) and (b), the rule applicable to the Attorney General and to defendants in criminal cases is that motions to dismiss or to stay the proceedings shall be made either before voir dire examination begins, or within seven days after discovery of grounds or the time when grounds could have been discovered by the exercise of diligence, whichever of these times is earlier.

Parties challenging compliance with selection procedures are entitled, under 28 U.S.C. §1867(f), to inspect records and papers used by the jury commission or clerk in connection with the jury selection process. United States v. Test, 420 U.S. 28 (1975).

A failure to make timely objection to the jury selection procedure constitutes a waiver of the objection. United States v. Jones, 687 F.2d 1265 (8th Cir. 1982); United States v. Bearden, 659 F.2d 590 (5th Cir. 1981), cert. denied, 102 S. Ct. 1993; United States v. Noah, 475 F.2d 688 (9th Cir. 1973), cert. denied, sub nom., Ross v. United States, 414 U.S. 821 (1973); United States v. Owen, 492 F.2d 1100 (4th Cir. 1974). The only proper way for a party to be heard is by means of a sworn statement of facts

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

which, if true, would establish a substantial failure to comply with the law. United States v. Guzman, 468 F.2d 1245 (2d Cir. 1972), cert. denied, 410 U.S. 937 (1973); United States v. Jones, 480 F.2d 1135 (1st Cir. 1973); United States v. James, 453 F.2d 27 (9th Cir. 1971).

Waiver of the technical objection that jury selection requirements were not substantially complied with does not necessarily preclude a court from granting relief on the broader ground of an actual prejudice to a defendant. Thus, in United States v. Silverman, 449 F.2d 1341 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972); the court held that the defendant had waived an objection that a juror was disqualified from serving due to an inability to read; but the court indicated in dictum that, had the juror's disqualification extended to an inability to decide the case intelligently, appropriate relief should have been granted even in the absence of a timely objection.

Defendants may seek to avoid a waiver of the statutory grounds for objections by casting their objections in Constitutional terms. See Taylor v. Louisiana, 419 U.S. 522 (1975); United States v. Jones, supra; United States v. Geelan, 509 F.2d 737 (8th Cir. 1974), cert. denied, 421 U.S. 999 (1975); United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); United States v. DeAlba Conrado, 481 F.2d 1266 (5th Cir. 1973). There is a specific provision in subsection (e) of 28 U.S.C. §1867 saving "any other" available remedy from the requirements set out in 28 U.S.C. §1867. It should be noted, however, that defenses and objections based on defects in the institution or the prosecution, or on defects in the indictment or information, must be raised prior to trial to comply with Rule 12 of the Federal Rules of Criminal Procedure. Accordingly, whether the objection be on procedural or constitutional grounds, it is raised too late after trial. A waiver will be enforced on the basis either of 28 U.S.C. §1867 or Rule 12. Davis v. United States, 411 U.S. 233 (1973); Little v. United States, 524 F.2d 335 (8th Cir. 1975).

9-11.329 Effect of a Dismissal Because of Objection to the Array

It was pointed out above that what happens before one grand jury does not limit investigation by a subsequent grand jury. A dismissal of an indictment because of a challenge to the array does not mean that the evidence obtained under subpoena duces tecum was illegally obtained, and the dismissal does not prevent any subsequent subpoenaing of or use of the evidence. See United States v. Wallace and Tiernan Co., 336 U.S. 739 (1948).

9-11.330 Objections to Grand Jury And Grand Jurors (Cont'd)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.331 Motions to Dismiss on Other Bases; Illegally Obtained Evidence Before a Grand Jury

Apart from objections to individual jurors and objections to the array, other kinds of objections related to the grand jury have been made by means of motions to dismiss but, in general, they have been rejected by the courts. Objections have been made, for example, about the effect upon the grand jury of adverse publicity regarding the defendant, the use in the grand jury of illegally obtained or otherwise incompetent evidence, and the misconduct of the attorney for the government before the grand jury. See, Silverthorn v. United States, 400 F.2d 627 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971); United States v. Bruzgo, 373 F.2d 383 (3d Cir. 1967); Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir. 1963); Back v. Washington, 369 U.S. 541 (1962); United States v. Gardner, 516 F.2d 334 (7th Cir. 1975), cert. denied, 423 U.S. 861 (1975); 8 Moore Federal Practice—Cipes, Criminal Rules §6.03[2]-6.04. It should be observed in this connection, that Rule 6(e) allows for pre-trial discovery of the grand jury transcript upon a showing that grounds may exist for a motion to dismiss the indictment because of matters "occurring before the grand jury."

There are few principles of more importance in the administration of criminal justice than the principle announced in Costello v. United States, 350 U.S. 359, 363 (1956): an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is sufficient to call for trial of the charges on the merits. The fact that illegally obtained, privileged, or otherwise incompetent evidence was presented to the grand jury is no cause for abating the prosecution under the indictment, or for inquiring into the sufficiency of the competent evidence before the grand jury, even if the defendant may be expected to have the illegally obtained evidence suppressed or incompetent evidence excluded at trial. See United States v. Dionisio, 410 U.S. 1 (1973); United States v. Ryan, 402 U.S. 530 (1971); Lawn v. United States, 355 U.S. 359 (1956); United States v. Blue, 384 U.S. 251 (1966); United States v. Short, 671 F.2d 178 (6th Cir. 1982), cert. denied, 102 S. Ct. 932, United States v. Colasurdo, 453 F.2d 585 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); West v. United States, 359 F.2d 50 (8th Cir. 1966); Federal Rule of Evidence 1101(d)(2). Despite some argument that the Costello rule has been eroded by cases calling for a more limited use of hearsay in grand jury proceedings, it appears that the rule is entitled to its full force today in light of the broad bases for decision in United States v. Calandra, 414 U.S. 338 (1974).

In Calandra, the Supreme Court held that a grand jury witness cannot properly refuse to answer questions based upon evidence obtained from an unlawful search and seizure. The court reasoned that a contrary rule would deter police misconduct in only a speculative and minimal way while it would exact a prohibitive price by impeding the grand jury's investigation.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings. Orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective. The probable result would be 'protracted' interruption of grand jury proceedings, '\*\*\*effectively transforming them into preliminary trials on the merits.'

The Court cited United States v. Dionisio, *supra*, as reaffirming "our disinclination to allow litigious interference with grand jury proceedings." The Court also recognized the existence of an internal control in that prosecutors will hardly seek indictments where convictions cannot be obtained. At 414 U.S. 349-351.

It is in recognition of this principle that the Department has formulated the following internal policy of self-restraint regarding presentation to the grand jury of unconstitutionally obtained evidence: A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation.

The Calandra decision would be virtually meaningless without Costello to prevent the same sort of issues from being raised and litigated after indictment. It remains, however, that there is an exceptional situation. The Supreme Court has construed 18 U.S.C. §2515 as preventing a witness from being questioned on the basis of an illegal interception of an oral or wire communication. Gelbard v. United States, 409 U.S. 41 (1972). Still, there is dictum in Gelbard, at 409 U.S. 59-60, indicating that if a witness does not contest the questioning or answers questions based on an illegal interception, any resulting indictment is invulnerable to a motion to dismiss. See S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968).

9-11.332 Use of Hearsay in a Grand Jury Proceeding

There has been considerable criticism voiced that hearsay evidence is relied upon too much in grand jury proceedings. From the perspective, however, that a grand jury is a layman's inquiry, conducted *ex parte* to determine probable cause rather than guilt or innocence, and that in certain forms hearsay is highly creditable evidence, there is a justification for using hearsay in grand jury proceedings. Each U.S. Attorney should be accountable to him/herself in this regard and to the grand jurors. Worthy

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

of consideration are guidelines on the use of hearsay in grand jury proceedings set out in A.B.A. Standards For Criminal Justice, Standards Relating To The Prosecution Function 3.6(a) (Approved Draft, 1971). Hearsay evidence should be presented on its merits so that the jurors are not misled into believing that the witness is giving his/her own personal account. See United States v. Leibowitz, 420 F.2d 39 (2d Cir.1969); but see United States v. Trass, 644 F.2d 791 (9th Cir.1981). The question should not be so much whether to use hearsay evidence, but whether, at the end, the presentation was in keeping with the professional obligations of attorneys for the government, and afforded the grand jurors a substantial basis for voting upon an indictment. Government attorneys are charged with a high duty in presenting matters to grand juries but are also entitled to a constitutionally-based independence. See United States v. Chanen, 549 F.2d 1306 (9th Cir. 1977).

9-11.333 Presumption of Regularity

A presumption of regularity attaches to grand jury proceedings, to grand jury subpoenas, and to the actions of the attorneys for the government in making grand jury presentations. See United States v. Leverage Funding System, Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); In re Lopreato, 511 F.2d 1150 (1st Cir. 1975); In re Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972). The requirement in 28 U.S.C. §1867(c) that a motion to dismiss contain a sworn statement of the facts constituting a substantial failure to comply with the law on grand jury selection reflects this presumption of regularity and serves to minimize the incidence of litigation not involving the essential question of guilt or innocence.

9-11.334 Presentation of Exculpatory Evidence

Although neither statutory nor case law imposes upon the prosecutor a legal obligation to present exculpatory evidence to the grand jury (United States v. Leverage Funding System, Inc., supra; United States v. Y. Hata Co., 535 F.2d 508, 512 (9th Cir.), cert. denied, 429 U.S. 828 (1976); Lorraine v. United States, 396 F.2d 335, 339 (9th Cir.), cert. denied, 393 U.S. 933 (1968)), it is the Department's internal policy to do so under many circumstances. For example, when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

9-11.340 Foreman, Deputy Foreman, and Secretary (Fed. R. Crim. P. 6(c))

Rule 6(c) of the Federal Rules of Criminal Procedure provides that the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

court shall appoint one of the jurors to be the foreman and another to be deputy foreman, who will act during the absence of the foreman. The foreman is empowered to administer oaths and affirmations. He/she signs all indictments. He/she or another juror designated by him/her maintains a record of the number of jurors who concurred in finding indictments. The record is filed with the clerk of the court and may be made public only upon order of the court. It is by means of this record that an indictment may be saved under Federal Rule Criminal Procedure 6(b)(2) if it should appear that one or more of the grand jurors was not qualified to serve, and the record will be the primary source of information if an issue arises regarding the number of votes for indictment. See United States v. Bullock, 448 F.2d 728 (8th Cir. 1975).

The foreman should control the sessions of the grand jury and be its spokesman vis-a-vis the witnesses in such matters as continuing subpoenas to another day or in directing recalcitrant witnesses to respond to questions. The foreman has authority to direct a witness to appear before the grand jury at a later day, under peril of contempt. See United States v. Germann, 370 F.2d 1019 (2d Cir. 1967), vacated, 389 U.S. 329 (1967). While the foreman should sign every indictment returned by the grand jury, any failure to do so is considered merely an irregularity that does not vitiate the indictment. On this point, the framers of the Rule adopted the decision in Frisbie v. United States, 157 U.S. 160 (1895). See the Advisory Committee's Note under Rule 6 of the Federal Rules of Criminal Procedure.

A grand juror designated to keep a record of the voting is usually called the secretary of the grand jury. Although not required by Rule 6, it is customary in many districts for the secretary to keep a record showing (in addition to the voting) the attendance of the jurors at each session, the particular matters presented to the jury, the witnesses who were called, and other matters. This record may be of critical importance in settling issues raised about grand jury proceedings, such as whether there was a quorum present at a particular session of the grand jury.

9-11.350 Who May be Present at Grand Jury Sessions (Fed. R. Crim. P. 6(d))

Under Rule 6(d) of the Federal Rules of Criminal Procedure, no person may be present while a grand jury is in session other than attorneys for the government, the witness under examination, interpreters when needed, and stenographers or operators of recording devices who are making a record of the evidence. No one at all other than the jurors may be present while the grand jury is deliberating or voting. (Eavesdropping upon the deliberations or voting of a grand jury is punishable as an obstruction of justice under 18 U.S.C. §1508.)

The importance of a rigid adherence to this Rule is well recognized, since the presence of an unauthorized person at a grand jury session may

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

vitiate an indictment. See, e.g., United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982), cert. denied, 32 Cr. L. 4146 (1983); United States v. Echols, 542 F.2d 948 (5th Cir. 1976). The rule does not apply to the grand jury room as such, but only to a grand jury session. Martin v. United States, 266 F.2d 770 (5th Cir. 1959). A brief and unintentional interruption of a session by a person not permitted to be present may not be a sufficient reason for invalidating the proceedings. United States v. Rath, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969). Other courts, however, have recognized a per se rule that any unauthorized intrusion into a grand jury session may be grounds for the dismissal of the indictment. United States v. Computer Sciences Corp., 511 F. Supp. 1125 (E.D. Va. 1981); United States v. Phillips Petroleum Corp., 435 F. Supp. 610, 618 (N.D. Okla. 1977); United States v. Furman, 507 F. Supp. 848 (D. Md. 1981).

9-11.351 DOJ Attorneys Authorized to Conduct Grand Jury Proceedings

Federal Rules of Criminal Procedure 6(d) authorizes attorneys for the government to appear before the grand jury. For purposes of that Rule, "attorney for the government" is defined in Federal Rules Criminal Procedure 54(c) as the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney, an authorized assistant of a U.S. Attorney, and certain other persons in cases arising under the laws of Guam.

The authority for a U.S. Attorney to conduct grand jury proceedings is set forth in the statute establishing U.S. Attorney duties, 28 U.S.C. §547. U.S. Attorneys are directed in that statute to "prosecute for all offenses against the United States." Assistant U.S. Attorneys similarly derive their authority to conduct grand jury proceedings in the district of their appointment from their appointment statute, 28 U.S.C. §542.

When a U.S. Attorney or Assistant U.S. Attorney needs to appear before a grand jury in a district other than the district in which he/she is appointed, the U.S. Attorney for either the district of appointment or the district of the grand jury should submit a request to the Executive Office for U.S. Attorneys for an appointment as a Special Assistant U.S. Attorney. The request should identify the attorney, and the reasons therefor. The Executive Office will send the notice of appointment to the U.S. Attorney in the district in which the grand jury is sitting.

Departmental attorneys, other than U.S. Attorneys and Assistant U.S. Attorneys, may conduct grand jury proceedings when authorized to do so by the Attorney General or a delegee pursuant to 28 U.S.C. §515(a). The Attorney General has delegated this authority to direct Department of Justice Attorneys to conduct grand jury proceedings to all Assistant Attorneys General and Deputy Assistant Attorneys General in matters by them. (Order No. 725-77.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

In the Criminal Division, requests for grand jury authorizations are processed by the Office of Enforcement Operations, FTS 724-7184. See USAM 9-1.161. Departmental attorneys directed to conduct grand jury proceedings will be provided with the following letter of authorization to evidence their designation:

Dear \_\_\_\_\_:

As an attorney for the government employed full time by the Department of Justice and assigned to the \_\_\_\_\_ Division, you are hereby authorized and directed to file informations and to conduct in the District of \_\_\_\_\_ and any other judicial district any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before United States Magistrates, which United States Attorneys are authorized to conduct.

You may file a copy of this letter with the clerk of the District Court to evidence this a authorization.

\_\_\_\_\_  
Assistant Attorney General  
\_\_\_\_\_  
Division

Courts have upheld the delegation of the Attorney General's authority under 28 U.S.C. §515(a) to direct attorneys to conduct grand jury proceedings. See In re Persico, 522 F.2d 41 (2d Cir. 1975); United States v. Agrusa, 520 F.2d 370 (8th Cir. 1975). The courts have also upheld broadly worded directions to attorneys to conduct such proceedings. See United States v. Prueitt, 540 F.2d 995 (9th Cir. 1976); United States v. Morris, 532 F.2d 436 (5th Cir. 1976); Infelice v. United States, 528 F.2d 204 (7th Cir. 1975); In re Persico, 522 F.2d 41 (2d Cir. 1975); United States v. Wrigley, 520 F.2d 362 (8th Cir.), cert. denied, 423 U.S. 987 (1975).

9-11.352 Non-Department of Justice Government Attorneys

Federal Rules Criminal Procedure 6(d) provides that the only prosecutorial personnel who may be present while the grand jury is in session are "attorneys for the government." Rule 54(c) defines attorney for the government for Federal Rules Criminal Procedure purposes as "the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Attorney General, an authorized assistant of the Attorney General, a United States Attorney, (and) an authorized assistant of a United States Attorney."

An agency attorney or other non-Department of Justice attorney must be appointed as a Special Assistant or a Special Assistant to the Attorney General, pursuant to 28 U.S.C. §515, or a Special Assistant to a U.S. Attorney, pursuant to 28 U.S.C. §543, in order to appear before a grand jury in the district of appointment. Normally the Special Assistant to a U.S. Attorney appointment is employed. Where the less common Special Assistant or Special Assistant to the Attorney General appointment is to be used in cases or matters within the jurisdiction of the Criminal Division, the Office of Enforcement Operations should be contacted at FTS 724-7184 for information.

Appointments as Special Assistants to U.S. Attorneys are made by the Associate Attorney General. A letter of appointment is executed and the oath of office as a Special Assistant to a U.S. Attorney must be taken (see 28 U.S.C. §§543, 544). Requests for such appointments must be made in writing through the Director of the Executive Office for U.S. Attorneys and must include the following information:

- A. The facts and circumstances of the case;
- B. The reasons supporting the appointment;
- C. The duration and any special conditions of the appointment;
- D. Whether the appointee may be called as a witness before the grand jury. If such a possibility exists, it ordinarily would be unwise to make the appointment;
- E. How the attorney has been informed of the Fed. R. Crim. P. 6(e) grand jury secrecy requirements.
- F. If the appointee is an agency attorney, whether the agency from which the attorney comes is conducting or may conduct contemporaneous administrative or other civil proceedings. If so, a full description of the substance and status of such proceedings should be included; and
- G. If the appointee is an agency attorney, a full description of the arrangements that have been made to prevent the attorney's agency from obtaining access through the attorney to grand jury materials in the case.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

The request must also state that the agency attorney will be accompanied at all times while before the grand jury by an experienced Department of Justice attorney, the U.S. Attorney, or an Assistant U.S. Attorney. Finally, the request must contain the following statement, signed by the agency attorney:

I understand the restrictions on the grand jury secrecy obligations of this appointment as a Special Assistant to the United States Attorney and do hereby certify that I will adhere to the requirements contained in this letter.

The use of agency attorneys as Special Assistants before the grand jury has been upheld by the courts. See United States v. Wencke, 604 F.2d 607 (9th Cir. 1979); United States v. Birdman, 602 F.2d 547 (3rd Cir. 1979); In re Perlin, 589 F.2d 260 (7th Cir. 1978). The U.S. Attorney or Departmental attorney with responsibility for the case retains such full responsibility. Cf. D.C. Cir. 1979 Judicial Conference Proceedings, 85 F.R.D. 180-181.

9-11.353 Presence of the Witness Under Examination

As the wording of the Rule indicates, witnesses should be called one at a time to testify before the grand jury. See United States v. Bowdach, 324 F. Supp. 123 (S.D. Fla. 1971); but see United States v. Echols, 542 F.2d 948 (5th Cir. 1976) (movie projectionist). If it is necessary for an expert witness to be utilized, for example, to analyze a set of records produced by another witness, the expert should be called into the grand jury session separately and asked by the foreman to undertake an examination of the records and to report the results to the grand jury. See In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956). On the matter of grand jury secrecy and disclosure to government agents to aid an investigation, see USAM 9-11.368, infra.

9-11.354 Presence of a Stenographer--Recording Required

Federal Rules Criminal Procedure 6(e)(1) requires that all grand jury proceedings be recorded, except when the grand jury is deliberating or voting. Government attorneys should not have any conversations, even of a casual nature, with grand jurors unless they are being recorded. The recording, however, is not required to be transcribed and transcripts should not be prepared unless there is a specific need for them.

Reporters and stenographers are bound by the grand jury secrecy requirements under Rule 6(e)(2). It is important that they be made aware of this requirement. For further information on grand jury reporters see USAM 10-3.324.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.355 Presence of an Interpreter

Federal Rules Criminal Procedure 6(d) permits the presence of an interpreter when needed in grand jury proceedings. Such interpreters should be obtained in accordance with 28 U.S.C. §1827 and Rule 28. An interpreter is bound not to disclose matters occurring before the grand jury without judicial authority; see the discussion of Fed. R. Crim. P. 6(e) below. It is suggested that attorneys for the government make certain that any interpreter used in a grand jury proceeding is fully aware of his/her obligation of secrecy. See also USAM 10-3.240.

9-11.356 Counsel for Witnesses Excluded

A witness before a federal grand jury is not entitled to have his/her attorney accompany him/her into the grand jury room; indeed, the Rule forbids that. See United States v. Mandujano, 425 U.S. 564 (1976). However, the witness may leave the grand jury room from time to time, as reasonable, in order to consult with his/her counsel. In re Taylor, 567 F.2d 1183 (2d Cir. 1977); In re Tierney, 465 F.2d 806 (5th Cir. 1972).

9-11.357 No Exceptions

Federal Rules Criminal Procedure 6(d) does not admit of any exception under which persons not usually authorized to be present are allowed to attend a grand jury session under extraordinary circumstances. As noted in USAM 9-11.350, *supra*, the presence of any unauthorized person during a grand jury session may be grounds for dismissal of the indictment. Thus, a parent may not accompany a child who is to testify, nor may a marshal be present to control a potentially unruly witness. United States v. Borys, 169 F. Supp. 366 (D. Alaska 1959); see United States v. Carper, 116 F. Supp. 817 (D. D.C. 1953).

9-11.360 Grand Jury Secrecy: Purpose

It is a matter of fundamental importance to the criminal justice system, especially in preserving the vitality of the investigative function of the grand jury, that grand jury proceedings be kept secret to the fullest extent practicable. Grand jury secrecy is maintained principally: (1) to encourage witnesses to come forward and to testify freely and confidentially; (2) to minimize the risks that prospective defendants will flee or use corrupt means to thwart investigations and escape punishment; (3) to safeguard the grand jurors themselves and the proceedings from extraneous pressures and influences; (4) to avoid unnecessary disclosures that may make persons appear to be guilty of misconduct without their being afforded

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

adequate opportunity to challenge the allegations; and (5) to prevent information adduced under compulsion and for purposes of public justice from being used for insubstantial purposes, such as gossip, to the detriment of the criminal justice system. See *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *United States v. Procter and Gamble Co.*, 356 U.S. 677, 681-2, n.6 (1953). Grand jury secrecy has also traditionally been invoked to justify the limited procedural safeguards available to targets and witnesses. *Illinois v. Abbott & Associates, Inc.*, \_\_\_ U.S. \_\_\_ at note 11 103 S.Ct. 1356, n.11 (1983) (51 L.W. 4311).

The reasons for grand jury secrecy may lose some of their force after the proceedings have been concluded. Nevertheless, grand jury secrecy may never be breached, for example, to spare private litigants or even public agencies from making their own investigations, unless the disclosure is authorized under the rule. See, e.g., *United States v. Short*, 671 F.2d 178 (6th Cir.), cert. denied, 102 S.Ct. 932 (1982).

The rule for grand jury secrecy is Rule 6(e)(2) of the Federal Rules of Criminal Procedure. The rule of secrecy is subject to the three major exceptions discussed in the following three sections: a grand jury witness cannot be obliged to keep the proceedings secret; courts may order disclosure of grand jury proceedings; and disclosures may be made to the attorneys for the government for use in the performance of their duties and to subordinate government personnel to assist a government attorney to enforce federal criminal law. Under no circumstances, however, may any disclosure be made of the grand jury's deliberations or voting, and no one but grand jurors may be present during the deliberations and voting. It is only required, under Federal Rules Criminal Procedure 6(c), that a record be kept of the number of votes cast for indictment; the individual juror's vote is not recorded.

9-11.361 Who is Covered by Fed. R. Crim. P. 6(e): Persons Other Than Witnesses

All persons present at a session of a grand jury other than a witness are subject to a requirement of secrecy and can be relieved of that obligation only by a court. It is implicit in the rule, however, that the person who records the grand jury proceedings may utilize other persons as typists to transcribe the recorded testimony, because Federal Rules Criminal Procedure 6(e) includes such typists among those who are prohibited generally from making disclosures.

9-11.362 Who is not Covered by Fed. R. Crim. P. 6(e): Only Witnesses

Federal Rules of Criminal Procedure 6(e) specifically prohibits any obligation of secrecy from being imposed "upon any person except in accordance with this rule." Witnesses, therefore, cannot be put under any

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

obligation of secrecy. See Application of Eisenberg, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981). This, however, should not prevent the grand jury foreman from requesting a witness not to make unnecessary disclosures when those disclosures or the attendant publicity might hinder an investigation.

One of the purposes of grand jury secrecy--and a purpose it serves extremely well--is to foster the cooperation of witnesses. Only by making witnesses aware of the protection afforded them can the full value of grand jury secrecy be realized. It is suggested that in an appropriate situation the witness be told that the proceedings will remain secret until such time as disclosure is required in court, and, therefore, that the witness's cooperation with grand jury will not be known publicly unless the witness chooses to make it known. A witness may be helped in fending off unwelcome questions if the witness is requested by the grand jury not to make disclosures.

9-11.363 What is Covered by Fed. R. Crim. P. 6(e)

Federal Rules of Criminal Procedure 6(e)(2) prohibits the disclosure to any person of "matters occurring before the grand jury," except when made in accordance with one of the exceptions contained in the rule. The phrase "matters occurring before the grand jury" is not further defined and its meaning has developed through case law. Its purpose has been described as being:

. . . to prevent disclosure of the way in which information was presented to the grand jury, the specific questions and inquiries of the grand jury, the deliberations and vote of the grand jury, the targets upon which the grand jury's suspicion focuses, and specific details of what took place before the grand jury. In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299, 1302-3 (M.D. Fla. 1977).

This concept has been applied as described in the following sections.

9-11.364 Grand Jury Transcripts

Transcripts of the testimony of witnesses, statements made by attorneys for the government before the grand jury, and any other statements made by or before the grand jury while in session incontrovertibly constitute "matters occurring before the grand jury." Cf., United States v. Proctor and Gamble Co., 356 U.S. 677 (1958); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Consequently, grand jury transcripts may not be released except in conformity with one of the Federal Rules Criminal Procedure 6(e) exceptions as discussed in USAM 9-11.364 to 9-11.369, infra.

Some courts have held that witnesses may be shown the transcript of their own testimony without a court order. United States v. Bazzano, 570 F.2d 1120 (3d Cir. 1970); King v. Jones, 319 F. Supp. 653 (N.D. Ohio 1970). Other courts require a court order. United States v. Scrimgeour, 636 F.2d

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

1019, 1025 (5th Cir. 1981). However, there is agreement that a witness does not have a right to see his/her own transcript, and that such access will be granted over government objection only where is a special showing of need. United States v. Clavey 565 F.2d 111 (7th Cir. en banc, 1977); In re Bianchi, 542 F.2d 98 (1st Cir. 1976); Bost v. United States, 542 F.2d 893 (4th Cir. 1976).

9-11.364(a) Disclosure of a Defendant's Own Grand Jury Testimony

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure mandates a pre-trial disclosure to a defendant, on request, of any recorded testimony given by him/her before a grand jury. The testimony must relate to the offense charged before disclosure is required under the Rule.

If the defendant is a corporation, partnership, association, or labor union, and so requests by motion, the court may grant the defendant pre-trial discovery of any relevant recorded testimony of any grand jury witness who was either: (1) at the time of his/her testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense; or (2) at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to the alleged conduct in which he/she was involved. By implication, the corporation, partnership, association, or labor union is entitled to no broader discovery of grand jury testimony.

It is important to note that Federal Rules of Criminal Procedure 16 gives courts a discretion to grant or deny corporations and other business entities the pre-trial discovery of the grand jury testimony of its principal officers and employees. There is also considerable latitude given to the courts under Rule 16(d)(1) to restrict, defer, or otherwise regulate the discovery called for under Rule 16. The Rule, it is to be noted further, provides for discovery only of relevant testimony.

By cooperating with a grand jury investigation, an officer or employee of one of the business entities named in Rule 16(a)(1)(A) may risk serious prejudice to himself/herself in his/her employment, profession, or associations. To minimize such risks is one of the purposes for grand jury secrecy. The least that can be done to help protect such witnesses is to prevent disclosure of any testimony given that is not relevant to the charges in the indictment. Postponing disclosure may increase the possibility that disclosure will be obviated under a guilty plea or some other disposition of the case. This is not to suggest that Rule 16 offers a ready means of protecting witnesses from unnecessary injuries; to the contrary, it will require considerable skill and ingenuity to utilize the special features of Rule 16 effectively to protect witnesses. There is a clear advantage to be derived in preventing discovery when the witness was

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

not legally able to bind the defendant or otherwise does not fit the descriptions employed in Rule 16(a)(1)(A).

9-11.364(b) Disclosure to Defendant of the Grand Jury Testimony of Government Witnesses

A defendant may have access to the grand jury testimony of government witnesses only in the circumstances set out in 18 U.S.C. §3500. A grand jury transcript is a "statement" for purposes of the statute, and, under subsections (a) and (b) of 18 U.S.C. §3500, a defendant is entitled to the transcript of grand jury testimony of government witnesses only after they have testified on direct examination in the trial of the case. The court is authorized under 18 U.S.C. §3500(c) to inspect the grand jury transcript in camera before turning it over to the defendant and to excise any portion of the transcript that does not relate to the subject matter of the witness's testimony on direct examination. If a part is excised and the trial continues to an adjudication of guilt, the excision is subject to appellate review.

9-11.364(c) Pre-trial Discovery of Grand Jury Testimony Strictly Limited

Federal Rules of Criminal Procedure 16(a)(3) states specifically that the Criminal Rules do not relate to the discovery or inspection of grand jury transcripts other than as provided for in Rule 6 and in Rule 16(a)(1)(A). This is an important provision. Under the previous formulation of Federal Rules of Criminal Procedure 16, there was confusion and conflict among the courts regarding the proper scope of pre-trial discovery of grand jury transcripts. Pre-trial discovery of grand jury transcripts is now clearly limited under Rule 16. The limitations are underscored in 18 U.S.C. §3500(a).

9-11.364(d) Disclosure of Government Memoranda

A government document that records or summarizes any statement made or action taken before or by a grand jury is covered by the secrecy requirements of Rule 6(e). In re Grand Jury Proceedings, 613 F.2d 501, 505 (5th Cir. 1980); U.S. Industries, Inc. v. U.S. District Court, 345 F.2d 18 (9th Cir. 1965); United States v. Armco Steel Corp., 458 F. Supp. 784 (W.D. Mo. 1978). On the other hand, government documents that relate information provided by grand jury witnesses outside of the grand jury room to government attorneys or other government personnel ordinarily are not covered by Rule 6(e). But see In re the Special February 1975 Grand Jury, 652 F.2d 1302 (7th Cir. 1981). However, where a witness is interviewed by the government after appearing before a grand jury and relates what was said before the grand jury, any record of that interview should be considered to be grand jury material and covered by Rule 6(e).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.365 Documents: Generally Not Covered by Fed. R. Crim. P. 6(e)

Individual documents subpoenaed by the grand jury have come to be held by the courts ordinarily not to constitute "matters occurring before the grand jury." Hence, they are not usually covered by the restrictions of Rule 6(e). The rule that has become generally accepted is that Rule 6(e) does not restrict the release of subpoenaed documents that are sought for the information they contain, rather than to reveal the direction or strategy of the grand jury investigation. SEC v. Dresser Industries, 628 F.2d 1368, 1382-3 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); United States v. Interstate Dress Carriers, 230 F.2d 52, 54 (2d Cir. 1960). But see Index Fund v. Hagopian, 512 F. Supp. 1122, 1127-9 (S.D. N.Y. 1981).

The most commonly denied requests for grand jury documents are requests for the disclosure of or access to all the documents subpoenaed by a particular grand jury or a list or inventory of all such documents. United States v. Stanford, supra, at n.6; In re Grand Jury Impanelled October 2, 1978, 510 F. Supp. 112 (D. D.C. 1981). While recent cases have generally favored disclosure, the best argument for resisting a disclosure request is to demonstrate how such disclosure would frustrate one or more of the purposes of grand jury secrecy set forth in USAM 9-11.360, supra. See Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 868-70 (D.C. Cir. 1981); Iglasias v. Central Intelligence Agency, 525 F.Supp. 547, 554-7 (D. D.C. 1981).

9-11.366 Documents: Court Order Still Necessary for Public Disclosure

While Federal Rules of Criminal Procedure 6(e) ordinarily does not apply to the release of documents subpoenaed by the grand jury, a court order nevertheless is required for their public disclosure. Such documents have been held to remain the property of the persons from whom they were subpoenaed, with the grand jury merely having taken temporary custody. Where the owner of the documents does not consent to their release, disclosure must be court authorized. The standard for such authorization, however, is not the Rule 6(e) exception. Rather, the test is whether the party seeking the documents is lawfully entitled to access to them. United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960); Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972). Note that disclosure may also be restricted by other laws; e.g., the Right To Financial Privacy Act of 1978 requires that protected financial records subpoenaed by a grand jury be accorded the same protections as Rule 6(e) material (12 U.S.C. §3420; USAM 9-4.844), and the Tax Reform Act of 1976

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

restricts disclosures of tax information obtained from the Internal Revenue Service irrespective of whether it has been presented to a grand jury (26 U.S.C. §6103; USAM 9-4.900 et seq.).

9-11.367 Disclosure Under Fed. R. Crim. P. 6(e): To Attorneys for the Government, Including for Civil Use

Disclosure of materials covered by Federal Rules of Criminal Procedure 6(e) may be made "to an attorney for the government for use in the performance of such attorney's duty." See Federal Rules of Criminal Procedure 6(e)(3)(A)(i). "Attorney for the government" is defined in Federal Rules of Criminal Procedure 54(c). Disclosure to government attorneys and their assistants for use in a civil suit is permissible only with a court order under Rule 6(e)(3)(C)(i). United States v. Sells Engineering, Inc., 103 S.Ct. 3133 (1983). See Guide on Rule 6(e) after Sells and Baggot 6-8, 18-32 (January 1984).

From the Federal Rules of Criminal Procedure 54(c) definition it is clear that Rule 6(e) does not authorize disclosure to attorneys for other federal government agencies. See United States v. Bates, 627 F.2d 349, 351 (D.C. Cir. 1980). Nor is disclosure permitted under this section to attorneys for state or local governments. In re Holovachka, 317 F.2d 834 (7th Cir. 1963); Corona Construction Co. v. Ampress Brick Co., Inc., 376 F. Supp. 598 (N.D. Ill. 1974).

When disclosure is authorized by court order under Rule 6(e)(3)(C)(i), of the Federal Rules of Criminal Procedure, for use in civil proceedings, there is a danger of misuse, or the appearance thereof, when such disclosure is made during the pendency of the grand jury investigation. There is no rule of law that would require a civil disclosure within the Department to be deferred until the relevant criminal investigation has been completed; but unless there is a genuine need for disclosure during the pendency of the grand jury investigation, it is the better practice to forestall the disclosure until the criminal investigation is completed.

9-11.368 Disclosure Under Fed. R. Crim. P. 6(e): To Other Government Personnel

Disclosure of materials covered by Federal Rules of Criminal Procedure 6(e) may be made to "government personnel...to assist an attorney for the government. . . to enforce federal criminal law." "Government personnel" includes not only federal criminal investigators such as the FBI, but also employees of any federal agency who are assisting the prosecutor. See S. Rep. No. 95-354, 95th Cong., 1st Sess., reprinted in [1977] U.S. Code Cong. & Ad. News 530. The decision to use government personnel to assist the grand jury investigation is within the discretion of the prosecutor and need not be justified. In re Perlin, 589 F.2d 260, 268 (7th Cir. 1978). Such personnel may use the material disclosed in conducting interviews. Cf United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

As stated in the legislative history of the 1977 amendment to Rule 6(e), it is not necessary to obtain a court order to make the above-described disclosures nor to make investigators "agents of the grand jury" by having them take an oath in the grand jury. It is necessary, however, to "promptly" provide the supervising judge with a list of those agents to whom disclosure has been made. Although not required by the Rule, Congress contemplated that the list of names generally be furnished to the court before the information is disclosed. S. Rep. No. 95-354, 95th Cong., 1st Sess., reprinted in [1977] U.S. Code Cong. & Ad. News 530. Failure to comply with the requirement that government personnel be listed with the court is not grounds to quash a grand jury subpoena. In re Grand Jury Proceedings (Larry Smith), 579 F.2d 836, 840 (3d Cir. 1978).

Strict precautions should be taken when employing personnel from agencies which have a civil function, such as the Securities and Exchange Commission, the Environmental Protection Agency, or the Internal Revenue Service, to ensure that knowledge of the grand jury investigation or documents subpoenaed by the grand jury are not used improperly for civil purposes by the agency. Grand jury documents should be segregated and personnel assisting the grand jury investigation should not work on a civil matter involving the same subjects unless a court order has been obtained authorizing such use. It may be valuable to issue written precautionary instructions which can be used in any hearing challenging the grand jury procedures. See Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1126 (E.D. Pa. 1975).

Courts have differed over whether employees of state and local government are included under the "government personnel" exception. In re 1979 Grand Jury Proceedings, 479 F. Supp. 93, 95 (E.D. N.Y. 1979) (state and local personnel included); In re Miami Federal Grand Jury No. 79-9, 478 F. Supp. 490, 492 (S.D. Fla. 1979), and In re Grand Jury Proceedings, 445 F. Supp. 349 (D. RI.), appeal dismissed, 580 F.2d 13 (1st Cir. 1978) (state and local personnel not included). Rather than relying solely on this provision, it is preferable to have the state or local personnel sworn as agents of the grand jury (see United States v. Stanford, supra,) and to seek a court order authorizing release under Federal Rules of Criminal Procedure 6(e)(3)(C)(i), which allows for release "preliminarily to . . . a judicial proceeding," as discussed in the next section. See In re Grand Jury Matter, 516 F. Supp. 27 (E.D. Pa. 1981).

9-11.369 Disclosure Under Fed. R. Crim. P. 6(e): Preliminarily to or in Connection with a Judicial Proceeding

Under subsection (3)(C)(i) of Federal Rules of Criminal Procedure 6(e), grand jury materials may be disclosed by order of a court preliminarily to or in connection with a judicial proceeding." A court must make two determinations before entering such an order.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

The first is whether the requested disclosure is indeed preliminarily to or in connection with a judicial proceeding. The leading definition of judicial proceeding is that provided by Judge Learned Hand:

The term 'judicial proceeding' includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime. An interpretation that should not go at least so far, would not only be in the teeth of the language employed, but would defeat any rational purpose that can be imputed to the Rule. Poe v. Rosenberg, 255 F.2d 118, 120 (2d Cir. 1958).

However, the courts have not been consistent in the application of this concept. The following proceedings have been found to fall within the definition of judicial proceedings: the grand jury's own proceedings, In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D. N.Y. 1979); other grand juries, United States v. Stanford, 589 F.2d (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); attorney discipline proceedings, United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980); United States v. Salanitro, 437 F. Supp. 240 (D. Neb. 1977), aff'd, 580 F.2d 281 (8th Cir. 1978); police officer discipline proceedings, Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973); In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970); Internal Revenue Service proceedings, Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975); impeachment hearings, Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974); and state criminal trials, In re Grand Jury Proceedings, 654 F.2d 268, 271-2 (3d Cir. 1981); In re Grand Jury Proceedings, 483 F. Supp. 422 (E.D. Pa. 1979).

On the other hand, courts have denied disclosure of grand jury materials for use in: a U.S. Parole Commission parole revocation hearing, Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980); a Federal Energy Regulatory Commission preliminary investigation, In re J. Ray McDermott and Co., Inc., 622 F.2d 166 (5th Cir. 1980); a Federal Maritime Commission adjudicatory hearing, United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980); a state medical board investigation, United States v. Young, 494 F. Supp. 57 (E.D. Tex. 1980); and a Federal Trade Commission investigation, In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962).

State grand jury proceedings have been held to constitute proceedings preliminarily to or in connection with a judicial proceeding. In Re Petition for Disclosure of Evidence Taken Before the Special Grand Jury, 650

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

F.2d 599 (5th Cir. 1981). One court has held that a state investigation not involving a grand jury may be "preliminarily to or in connection with a judicial proceeding," provided particularized need is shown. In re Grand Jury Matter, 516 F. Supp. 27 (E.D. Pa. 1981).

The courts have split also on whether Internal Revenue Service civil proceedings are preliminarily to or in connection with a judicial proceeding. Because IRS has unique powers to assess and collect taxes without resort to litigation, its tax audits and other proceedings may not qualify for disclosure under Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedures. United States v. Baggot, \_\_\_ U.S. \_\_\_, 103 S.Ct. 3164 (1983).

The second determination the courts make before authorizing disclosure of grand jury materials to private parties is to weigh the particularized need of the party seeking disclosure against the public interest in grand jury secrecy. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 216-219 (1979); Guide on Rule 6(e) after Sells and Baggot at 22-27 (January 1984). A failure to demonstrate sufficient need can result in the denial of a request for otherwise permissible disclosure. See United States v. Young, *supra* (state medical board); and In re Grand Jury Proceedings, 483 F. Supp. 422 (E.D. Pa. 1979) (state prosecutor). The Department takes the position that the particularized need requirement is inapplicable when grand jury materials are sought for federal law enforcement purposes. See In re Grand Jury Subpoenas, April 1978, 581 F.2d 1103, 1110 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979); In re Grand Jury (LIV), 583 F.2d 128, 130-31 (5th Cir. 1978).

As with disclosure to Department of Justice attorneys for use in civil proceedings, discussed *supra*, it is preferable to await the completion of a grand jury investigation before seeking disclosure to another government agency for civil purposes. Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975).

#### 9-11.370 Penalty for Breach of Grand Jury Secrecy

Despite a significant incidence of unlawful breaches of grand jury secrecy, see, e.g., In re Biaggi, 478 F.2d 489 (2d Cir. 1973), no criminal statute exists to cover the problem adequately (see 18 U.S.C. §1508). Therefore, the contempt remedy, while not always wholly adequate, must be relied upon. Strict security should, of course, be maintained over grand jury transcripts and memoranda reflecting matters that occurred before the grand jury. Every unlawful breach of grand jury secrecy should be viewed as a very serious matter requiring attention, if not with a view toward punitive action, at least with the objective of preventing future breaches of grand jury secrecy. Special precautions may be considered at the start of a particularly sensitive investigation to safeguard against breaches of grand jury secrecy.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.380 Sealing the Indictment Pending Arrest

A district court may, under Federal Rules of Criminal Procedure 6(e), direct that an indictment be kept secret until a defendant is in custody or has given bail (except insofar a disclosure of the indictment is necessary for issuance and execution of a warrant under Federal Rules of Criminal Procedure 4). Indictments have been kept sealed for lengthy periods of time under this provision. An indictment found within the period of limitations prescribed in chapter 213 of title 18 is not barred because it is kept sealed until the statutory period has expired. See United States v. Michael, 180 F.2d 55 (3d Cir. 1949), cert. denied, 339 U.S. 978 (1950).

9-11.381 Jurors not Continuously Present May Nevertheless Vote

Under Federal Rules of Criminal Procedure 6(f) an indictment may be found only upon the concurrence of 12 or more jurors. Indictments are not defective because jurors voted who had not been present during the entire investigation. See United States v. Garner, 663 F.2d 834 (9th Cir. 1981), cert. denied, 102 S.Ct. 1750 (1982); United States v. Provenzano, 688 F.2d 194, 201-202 (3d Cir. 1982), cert. denied, 103 S.Ct. 492 (1982); United States v. Lang, 644 F.2d 1232, 1235-1239 (7th Cir.), cert. denied, 454 U.S. 870 (1981); United States v. Leverage Funding Systems, Inc., 637 F.2d 645, 647-648 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Colasurdo, 453 F.2d 585, 596 (2d Cir. 1971), cert. denied, 406 U.S. 917 (1972); Lustiger v. United States 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968). It is good practice, however, to cause a juror who was absent during a significant part of a grand jury presentation to read (or be read) the transcript of the testimony the juror did not hear, or, depending upon the circumstances, some lesser measure can be taken to have the gist of the testimony communicated to a juror who had not been present for the testimony. The record should be made to reflect whatever is done in this regard.

9-11.382 Duty to Report a No Bill to the Court

When a defendant is in custody or has been released on bail and less than 12 jurors concur in finding an indictment, a duty is placed on the foreman of the grand jury by Rule 6(f) of the Federal Rules of Criminal Procedure to report the no bill to a federal magistrate "in writing forthwith." As indicated in the original Advisory Committee note, the purpose is to allow for the necessary release of a defendant or an exoneration of a defendant's bail as promptly as possible.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-11.390 Tenure and Discharge of a Grand Jury

Under Rule 6(g) of the Federal Rules of Criminal Procedure, the tenure and powers of a grand jury are not affected by the beginning or the expiration of a term of court, and the grand jury serves until discharged by the court, provided, however, that no grand jury impaneled under Rule 6 may serve for more than 18 months. See United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981); United States v. Fein, 504 F.2d 1170 (2d Cir. 1974).

It is within the discretion of the district court, without assigning any reason, to discharge a grand jury before the expiration of its term. In re Texas Co., 201 F.2d 177 (D.D.C.), cert. denied, 344 U.S. 904 (1952). The discharge or expiration of the term of a grand jury usually warrants the return to the appropriate parties of subpoenaed materials, but this does not prevent making and retaining copies of documents or subsequently subpoenaing the same materials. See United States v. Wallace & Tiernam Co., 336 U.S. 793 (1948); In re Petroleum Industry Investigation, 152 F. Supp. 646 (E.D.Va. 1957); Virginia Milk Producers Ass'n. v. United States 250 F.2d 425 (D.D.C. 1957).

9-11.391 Replacing a Grand Juror

Rule 6(g) of the Federal Rules of Criminal Procedure authorizes the district court, at any time for cause shown, to excuse a juror, either temporarily or permanently; and if a juror is excused permanently, the court may impanel another person to take the place of the juror who was excused. It is noted, however, that 28 U.S.C. §1866(c) governs the excusing of jurors, and the "cause shown" must be consistent with 28 U.S.C. §1866(c). When a juror is replaced, it is advisable to have the new juror in some manner apprised of the evidence already before the grand jury. There is no necessity for replacing a juror who was excused, provided that a sufficient number remains to constitute a quorum of sixteen jurors. If a bare quorum remains, however, it is well to impanel a new juror (or jurors) to obviate future quorum problems.

9-11.400 THE SPECIAL GRAND JURY - 18 U.S.C. §3331

It has been common for investigative grand juries and for grand juries other than the first of two or more impaneled in a district to be called "special" grand juries. The term is now ambiguous. Legislation enacted in 1970 has created "special" grand juries primarily to meet the special needs of organized crime investigations. These statutory grand juries differ in several significant respects from grand juries impaneled under Federal Rules Criminal Procedure 6. Care should be taken in using the term special grand jury to avoid any misunderstanding. The term may be used, for example, with a parenthetical reference to the statute or the Rule, if the meaning is not otherwise clear from the context.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

The distinctive features of special grand juries are discussed below. To the extent these distinctive features permit, the special grand juries are governed by the same statutes, rules, and case law applicable to regular grand juries. See 18 U.S.C. §3334. In a very large measure, special grand juries and regular grand juries are alike.

9-11.410 Impaneling Special Grand Juries

As provided in 18 U.S.C. §3334(a), the district court in every judicial district having more than four million inhabitants must impanel a special grand jury at least once every eighteen months (unless a special grand jury is then sitting); and the district court must also impanel a special grand jury when the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General certifies in writing to the chief judge of the district that in his/her judgment, a special grand jury is necessary "because of criminal activity in the district." (See 28 C.F.R. §0.59 under which the Assistant Attorney General in charge of the Criminal Division is designated to make certifications under 18 U.S.C. §3331.)

9-11.411 Request for Certification

U.S. Attorneys who want certification made to cause the impaneling of special grand juries should direct their requests for certification to the Chief of the Organized Crime and Racketeering Section of the Criminal Division, explaining briefly the reasons for the request and the nature and scope of the criminal activities to be investigated.

9-11.412 Districts Where Special Grand Juries Must be Impaneled

At this writing, the following districts have more than four million inhabitants and are, therefore, to have special grand juries impaneled at least once in every eighteen months in addition to the regular grand juries impaneled: the Central, Eastern, and Northern Districts of California, the Middle District of Florida, the Northern District of Illinois, the District of Maryland, the District of Massachusetts, the Eastern District of Michigan, the District of Minnesota, the District of New Jersey, the Eastern and Southern Districts of New York, the Northern and Southern Districts of Ohio, the Eastern and Western Districts of Pennsylvania, and the Northern and Southern Districts of Texas. This list is based upon estimates made by the Bureau of the Census and is, of course, subject to revision from time to time as newer estimates become available.

9-11.413 Additional Special Grand Juries

District courts are authorized under 18 U.S.C. §3332(b) to impanel

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

additional special grand juries when the special grand juries already impaneled have more business than they can properly handle. When impaneling additional special grand juries, a court should make a finding as to the need; and a court should always make it clear that the special grand jury is being impaneled under 18 U.S.C. §3331 (and is therefore not subject to the limitations of a regular grand jury). See Wax v. Motley, 510 F.2d 318 (2d Cir. 1975); United States v. Lawson, 507 F.2d 433 (7th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); Korman v. United States 486 F.2d 926 (7th Cir. 1973); United States v. Fein, 370 F. Supp. 466 (E.D.N.Y. 1974), aff'd. 504 F.2d 1170 (2d Cir. 1974).

9-11.420 Terms and Extensions of Terms of Special Grand Juries

Like regular grand juries, special grand juries serve a basic term of eighteen months, unless they are discharged earlier. Here the similarity ends, however, because 18 U.S.C. §3331 limits the authority of the courts to discharge grand juries and provides for extensions of service well beyond the initial term of eighteen months.

A special grand jury may be discharged before it has served its initial term of eighteen months only if the jurors themselves (by majority vote) determine that the grand jury's business has been completed. For the grand jury to serve longer than eighteen months requires a finding by the district court. If at the end of eighteen months or any extended period, the district court finds that the grand jury's business has not been completed, the court may extend its service, in increments of six months, for a maximum period of thirty-six months (subject to one exception discussed below). (Note that under 18 U.S.C. §1826 a recalcitrant witness confined for civil contempt may in no event be confined for longer than eighteen months.)

9-11.421 Appeals to Continue the Service of Special Grand Juries

Under 18 U.S.C. §3331(b), if a district court fails to extend the term of a special grand jury or orders the discharge of a special grand jury before the jurors determine that their business has been completed, the jurors may, by majority vote, apply to the chief judge of the circuit court for an order continuing the term of the special grand jury. While any such application is pending, the term of the special grand jury continues by operation of law, but the maximum term of service permissible is still thirty-six months.

9-11.430 Special Duties Imposed Upon Attorneys for the Government

The special grand jury has a duty under 18 U.S.C. §3332(a) "to inquire into offenses against the criminal laws of the United States alleged to have

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

been committed within the district." Such alleged offenses may be brought to the jury's attention by the court or by any attorney appearing for the United States to present evidence to the jury. It is incumbent upon any such government attorney to whom it is reported that a federal offense was committed within the district, if the source of information so requests, to refer the information to the special grand jury, naming the source and apprising the jury of the attorney's action or recommendation regarding the information.

9-11.440 Reports of Special Grand Juries

At the conclusion of its service, a special grand jury is authorized under 18 U.S.C. §3333, by a majority vote of its members, to submit to the district court, potentially for public release, a grand jury report, which must concern either: (1) noncriminal misconduct, malfeasance, or misfeasance in office involving organized crime activity by an appointed public officer or employee, as the basis for a recommendation or removal or disciplinary action; or (2) organized crime conditions in the district, without however being critical of any identified person. ("Public officer or employee" is defined broadly in 18 U.S.C. §3333(f) to include federal, state and local officials.)

Upon receiving a report from a special grand jury, the district court must examine it, together with the minutes of the special grand jury, and accept it, for eventual filing as a public record, if the report is: (1) one of the two types authorized by 18 U.S.C. §3333(a); (2) based upon facts discovered in the course of an authorized criminal investigation; (3) supported by a preponderance of the evidence; and if (4) each public officer or employee named in the report was afforded a reasonable opportunity to testify and present witnesses on his/her own behalf before the special grand jury, prior to its filing the report. (It would seem that 18 U.S.C. §3333(a) necessitates a recording of the proceedings if a special grand jury may issue a grand jury report.)

The wording and the legislative history of 18 U.S.C. §3332(a) and §3333(b)(1) indicate that a special grand jury should not investigate for the sole purpose of writing a report; the report must emanate from the criminal investigation. At bottom, then, a special grand jury functions essentially like a regular grand jury. It is only after the "completion" of the criminal investigation, when the time is near for discharging the jury, that a report may be submitted to the court under 18 U.S.C. §3333(a). The grand jury will by that time have exhausted all investigative leads and have found all appropriate indictments.

The "misconduct," "malfeasance," or "misfeasance" that may be the subject of a report (provided it is related to organized criminal activity)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

must, to some degree, involve willful wrongdoing as distinguished from mere inaction or lack of diligence on the part of the public official. Nonfeasance in office, however, if it is of such serious dimensions as to be equitable with misconduct, may be a basis for a special grand jury report. See S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969); 1970 U.S. Code Cong. & Ad. News 4007.

Reports involving public officials must connect "misconduct," "malfeasance," or "misfeasance" with "organized criminal activity." "Organized criminal activity" should be interpreted as being much broader than "organized crimes;" it includes "any criminal activity collectively undertaken." This statement is based upon the legislative history of 18 U.S.C. §3503(a), not of 18 U.S.C. §3333, but both sections were part of the Organized Crime Control Act of 1970, making it logical to construe the term the same way for both sections. See 116 Cong. Rec. 35293 (October 7, 1970).

Before the district court may enter as a public record a special grand jury report concerning appointed public officers or employees, a complex procedure must be followed as set down in 18 U.S.C. §3333(c). The court begins by sealing its order accepting the report and the report itself. The report may not be made public or disclosed under subpoena until at least 31 days after a copy has been served upon each public officer or employee named in the report, and an answer has been filed or the time for filing an answer has expired. (Despite use of the singular in the legislation, the Criminal Division takes the position that no report should be made public until all the answers have been filed or the time for filing has elapsed as to all the public officers or employees named.) Furthermore, the report may not be made public if an appeal is taken from the court's determination that the report is supported by the evidence until all rights of review of the public officers or employees have expired or terminated in an order accepting the report. In addition, the order accepting the report may not be entered until 30 days after delivery of the report to the public officer or body as prescribed in 18 U.S.C. §3333(c)(3).

The court is empowered to make appropriate orders to prevent unauthorized publication of the report and to punish for contempt anyone who does publish it without authorization.

Within 20 days after service of the order and report on him/her, a public officer or employee may file with the clerk a verified answer to the report in accordance with 18 U.S.C. §3333(c)(2). The court may extend the time within which the answer may be filed and may also order such limited publication of the report as may be necessary for the preparation of an answer. The answer should concisely state the facts and law constituting the accused's defense to the charges, and shall become the appendix to the report. The court may order that those portions of the answer which have been inserted scandalously, prejudiciously, or unnecessarily be omitted from the appendix.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

The court is authorized, under 18 U.S.C. §3333(d), to put off the filing of the report as a public record if the court finds that the filing may prejudice the fair consideration of a pending criminal matter. In that situation, the court shall order that the report be sealed. The report will not be subject to subpoena or public inspection during the pendency of the criminal matter, except upon order of the court.

If a court decides that a report submitted to it by a special grand jury regarding a public officer or employee does not comply with the law, the court may seal the report and keep it secret or, for remedial purposes, order the same grand jury to take additional testimony. For purposes of taking additional testimony, a special grand jury may be extended to serve for longer than thirty-six months (but this is the only exception to the thirty-six months limitation).

If the district court feels that the filing of a special grand jury report as a public record would prejudice the fair consideration of a pending criminal matter, the court is authorized under 18 U.S.C. §3333(d) to keep the report sealed during the pendency of that matter. Sealed for such a reason, the report would not be subject to subpoena.

When appropriate, U.S. Attorneys will deliver copies of grand jury reports, together with the appendices, to the governmental bodies having jurisdiction to discipline the appointed officers and employees whose involvement in "organized criminal activity" is the subject of the report. See 18 U.S.C. §3333(c)(3). (The prospect of such disciplinary action does not prevent the officer's or employee's being compelled to testify under a grant of immunity; see In re Reno, 331 F. Supp. 507 (E.D.Mich. 1971)).

#### 9-11.441 Consultation with the Criminal Division about Reports

If a special grand jury will be considering the issuance of a report at the culmination of its service, U.S. Attorneys are requested to notify the Chief of the Organized Crime and Racketeering Section promptly of the fact and explain why an indictment cannot be found to obviate the issuance of a grand jury report. It should also be explained how the facts developed during a criminal investigation support one of the authorized types of reports. Before any draft report is furnished to the grand jury, it must be submitted to the Chief of the Organized Crime and Racketeering Section for approval.

It is not clear what remedy the government would have if a court was wrong in sealing a special grand jury report and refusing to make it public. The Chief of the Organized Crime and Racketeering Section should be notified

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

promptly if a court finally determines for any reason that a grand jury report is deficient or not properly to be released, so that consideration may be given to the possibility of taking the matter to the court of appeals.

1984 USAM (superseded)



U.S. Department of Justice

Executive Office for United States Attorneys

*incorporated in  
b-7*

Washington, D.C. 20530

July 24, 1984

TO: Holders of United States Attorneys' Manual Title 9  
FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott *SST/TK*  
Assistant Attorney General  
Criminal Division

RE: Forfeiture

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at USAM 9-12.340.

AFFECTS: USAM 9-12.340

The following replaces the material at USAM 9-12.340

9-12.340 Forfeiture

Rule 7(c) (2), Fed. R. Crim. P., as amended in 1979,  
provides:

No judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

To accomplish the criminal forfeiture of property pursuant to one of the statutes providing for such forfeiture, among which are 18 U.S.C. §1963(c), RICO; 21 U.S.C. §848, controlled substance; 17 U.S.C. §605(b), copyright infringement; the indictment has to include a paragraph listing the property or interest that is subject to forfeiture. Absent such an allegation, there can be no special verdict concerning the property to be forfeited, Rule 31(e), Fed. R. Crim. P.

United States v. Grammatikos, 633 F.2d 1013 (2d Cir. 1980), is instructive as to what constitutes a sufficient forfeiture allegation. The Court of Appeals did not require the indictment to identify each of the properties which would be the subject of a special verdict. Rule 7 (c)(2) of the Federal Rules of Criminal Procedure only required an allegation of the extent of the interest to be forfeited. The rule was satisfied in this instance since the indictment advised the defendant that all of his interest in the illicit enterprise was to be forfeited. Each item of property subject to forfeiture did not have to be considered by the grand jury since forfeiture was not an essential element of the offense, but was merely intended to serve an additional penalty for its violation.

Furthermore, the Court of Appeals in United States v. Peacock, 654 F.2d 334, 351 (5th Cir. 1981), refused to limit its determination of compliance with Rule 7 (c)(2) of the Federal Rules of Criminal Procedure to just the paragraph reciting the property subject to forfeiture, but considered all the listed acts constituting the pattern of racketeering activity to see if the defendants were given adequate notice, as it so found, of the property the government sought to have forfeited.

Note that the Department of Justice no longer recommends including a forfeiture provision in an indictment even when the government does not intend to pursue the criminal forfeiture. The case which originally prompted this recommendation by the Department, United States v. Hall, 521 F.2d 406 (9th Cir. 1975) (indictment dismissal for violation, of Rule 7 (c)(2)) of the Federal Rules of Criminal Procedure should have no further application. Rule 7 (c)(2) of the Federal Rules of Criminal Procedure has since been amended in specific response to the Hall decision. See Advisory Committee Notes to 1979 amendment. Additionally, subsequent case law has further negated Hall's authority. See United States v. Bolar, 569 F.2d 1071 (9th Cir. 1978); United States v. Brigance, 472 F. Supp. 1177 (S.D. Tex. 1979).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 12

	<u>Page</u>
9-12.000 <u>INDICTMENTS AND INFORMATIONS</u>	1
9-12.010 <u>Obtaining an Indictment</u>	1
9-12.020 <u>Obtaining an Information</u>	1
9-12.100 USE OF AN INDICTMENT OR INFORMATION	1
9-12.110 <u>When an Indictment is Required</u>	2
9-12.120 <u>When an Information May be Used</u>	2
9-12.130 <u>When Neither an Indictment Nor an Information is Required</u>	3
9-12.140 <u>Presentments</u>	3
9-12.200 WAIVER OF INDICTMENT	4
9-12.201 Effect of <u>Furman v. Georgia</u>	4
9-12.210 <u>Waiver Procedure</u>	5
9-12.220 <u>Prosecutorial Discretion to Allow</u>	5
9-12.230 <u>Judicial Discretion to Set Aside</u>	6
9-12.240 <u>Effect at New Trial</u>	6
9-12.300 DRAFTING INDICTMENTS AND INFORMATIONS	6
9-12.310 <u>Formalities</u>	6
9-12.311 Caption	7
9-12.312 Subscription	7
9-12.313 Incorporation by Reference	8
9-12.314 Citation of the Statute Violated	9
9-12.315 Grammar, Spelling, and Typographical Errors	10

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		Page
9-12.320	<u>Sufficiency</u>	11
9-12.321	Elements of the Offense	11
9-12.322	Requirement of Specificity	12
9-12.323	Plea of Former Jeopardy	13
9-12.324	Charging in the Language of the Statute	13
9-12.325	Negating Statutory Exceptions	15
9-12.326	Conjunctive and Disjunctive Elements	15
9-12.330	<u>Particular Allegations</u>	16
9-12.331	Time and Date	16
9-12.332	Place of Offense	17
9-12.333	Means	18
9-12.334	Venue	18
9-12.335	Intent	19
9-12.336	Aiding and Abetting	22
9-12.340	<u>Forfeiture</u>	22
9-12.400	AMENDMENT	25
9-12.410	<u>Amendment of Information</u>	25
9-12.420	<u>Amendment of Indictments</u>	26
9-12.430	<u>Amendment of Indictments for Offenses That Could Have Been Initiated by Informations</u>	27

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-12.000 INDICTMENTS AND INFORMATIONS

An indictment, as defined in Black's Law Dictionary (4th ed.), is:

An accusation in writing found and presented by a grand jury, legally convoked and sworn, to the court in which it is impaneled, charging that a person therein named has done some act, or been guilty of some omission, which, by law, is a public offense, punishable on indictment.

An information, as defined in Black's, id., is:

A formal accusation of crime, differing from an indictment only in that it is preferred by a prosecuting officer instead of by a grand jury.

Together with the pleas of guilty, not guilty, or nolo contendere, the indictment and information constitute the pleadings in federal criminal proceedings. See Rule 12(a), Federal Rules of Criminal Procedure.

9.12.010 Obtaining an Indictment

See USAM 9-11.000.

9-12.020 Obtaining an Information

An information, drawn up by a prosecutor, may be filed without leave of court. See Rule 7(a), Federal Rules of Criminal Procedure. See also ABA Standards Relating To The Administration of Criminal Justice, "The Prosecution Function," 3.7 (1974). The information need not be supported by affidavit unless an arrest warrant is sought. See Rule 9(a), Federal Rules of Criminal Procedure.

9-12.100 USE OF AN INDICTMENT OR INFORMATION

Rule 7(a), Federal Rules of Criminal Procedure, provides in pertinent part:

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information.

9-12.110 When an Indictment is Required

The Fifth Amendment commands that no person be held to answer for "a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." As with a capital crime, whether a crime is "infamous" depends upon its punishment rather than upon the character of the criminal act. Any crime that may be punished by imprisonment in a penitentiary or at hard labor is an infamous crime. See Green v. United States, 356 U.S. 165, 183 (1958); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943). Title 18, United States Code, classifies offenses whose penalty is death or imprisonment exceeding one year as felonies and classifies all other crimes as misdemeanors. See 18 U.S.C. §1. Imprisonment in a penitentiary may be imposed upon conviction of a felony. See 18 U.S.C. §4083. Although the penalty for a misdemeanor may be imprisonment for one year, a misdemeanor is not an "infamous" crime because the defendant cannot be placed in a penitentiary without his/her consent. See 18 U.S.C. §4083. Therefore, unless an indictment is waived, see USAM 9-12.200, infra, its use is required to charge a felony.

9-12.120 When an Information May be Used

An information may be used where indictment is waived. See USAM 9-12.200, infra.

If the defendant is a corporation, it may be prosecuted by information since corporations are not amenable to imprisonment, but only to a monetary penalty. See United States v. Yellow Freight Sys., 637 F.2d 1248, 1253-55 (9th Cir.), cert. denied, 454 U.S. 815 (1980). A fine, even one potentially of a million dollars, cannot be considered an infamous punishment. See United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir.), cert. denied, 450 U.S. 965 (1980).

An information may also be used where the offense charged is punishable by imprisonment for one year or less. See Duke v. United States, 301 U.S. 492 (1937). Where several misdemeanor offenses are charged in separate counts, the fact that the aggregate penalty upon conviction may exceed one year does not require prosecution by indictment. See United States v. Johnson, 585 F.2d 374, 377 (8th Cir.), cert. denied, 440 U.S. 921 (1978); United States v. Kahl, 583 F.2d 1351, 1355 (5th Cir. 1978).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Although an indictment is not required, a grand jury may return an indictment for a misdemeanor. See Hammond v. Brown, 323 F. Supp. 326, 332 (N.D. Ohio), aff'd, 450 F.2d 480 (6th Cir. 1971). However, having chosen to proceed by indictment rather than by information in such a case, the prosecution is bound by the principles governing indictments. See United States v. Goldstein, 502 F.2d 526 (3d Cir. 1974). See also USAM 9-12.420, infra. But see United States v. Pandilidis 524 F.2d 644 (6th Cir. 1975), where amendment of a misdemeanor indictment by a bill of particulars was held to be harmless error. See USAM 9-12.430, infra.

9-12.130 When Neither an Indictment Nor an Information is Required

The Fifth Amendment specifically excepts from the indictment requirement those cases "arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." In fact, all offenses arising under the Uniform Code of Military Justice in which the accused is on active duty in the military service may be prosecuted by court-martial, provided that the offense is "service-connected." See O'Callahan v. Parker, 395 U.S. 258 (1969).

Criminal contempt represents another exception to the rule that prosecutions must be initiated by an indictment or information. Proceedings under 18 U.S.C. §401 may be initiated summarily by the court or upon notice and hearing in accordance with Rule 42, Federal Rules of Criminal Procedure. See Green v. United States, 356 U.S. 165 (1958). An indictment, although not required, may be used. See United States v. Mensik, 440 F.2d 1232 (4th Cir. 1971). However, in the case of contempt of Congress under 2 U.S.C. §194, the use of an indictment is required by statute and must be employed. See Russell v. United States, 369 U.S. 749 (1962).

9-12.140 Presentments

Rule 7, Federal Rules of Criminal Procedure, does not recognize the use of a presentment, a charge preferred by a grand jury on its own initiative. While a grand jury may itself investigate, call witnesses, and make a presentment charging a crime, the presentment so returned cannot serve to initiate a prosecution. To initiate a prosecution, a presentment would first have to be submitted to the grand jury in the form of an indictment and be voted for in accordance with Rule 6(f), Federal Rules of Criminal Procedure. See Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-12.200 WAIVER OF INDICTMENT

Rule 7(b), Federal Rules of Criminal Procedure, provides:

An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

Unless the offense is one which "may be punished by death" within the meaning of Rule 7(a), Federal Rules of Criminal Procedure, the defendant may waive his/her right to be indicted by a grand jury for any felony. See USAM 9-12.201, infra.

9-12.201 Effect of Furman v. Georgia

Furman v. Georgia, 408 U.S. 238 (1971), raised the issue of whether offenses which are statutorily punishable by death must be prosecuted by indictment pursuant to Rule 7(a), Federal Rules of Criminal Procedure, or whether a post-Furman defendant may waive indictment as in the case of other non-capital offenses. Furman has not been uniformly viewed as necessarily having the effect of invalidating all statutes and procedural rules that were tied to the concept of a "capital" case. If the statute's purpose derived from the nature of the offense and not from the potential severity of the punishment, the statute remains in effect. See United States v. Kennedy, 618 F.2d 557 (9th Cir. 1980). Once a case has clearly lost its "capital" character, one court has held that the defendant was no longer entitled to twenty preemptory challenges under Rule 24(b), Federal Rules of Criminal Procedure, United States v. Maestas, 523 F.2d (10th Cir. 1975), and another held that the government was no longer required to comply with the disclosure requirement of 18 U.S.C. §3432, United States v. Trapnell, 638 F.2d 1016, 1029 (7th Cir. 1980). But another circuit has held that even though the death penalty could not be constitutionally imposed, the defendant had an absolute right to two attorneys pursuant to 18 U.S.C. §3005. See United States v. Watson, 496 F.2d 1125 (4th Cir. 1973).

In view of the uncertainty as to the effect of Furman on Rule 7, Federal Rules of Criminal Procedure, prosecution of all offenses having a capital penalty should be prosecuted by indictment, notwithstanding a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

defendant's willingness to waive his/her right to be indicted by a grand jury. Post-Furman legislation which provides for a death penalty such as the air piracy statute, 49 U.S.C. §1472, requires an indictment to initiate prosecution.

9-12.210 Waiver Procedure

There is no formal procedure for obtaining a waiver of indictment. Rule 7, Federal Rules of Criminal Procedure, merely requires that it be waived "in open court." However, the court must be satisfied that the defendant knowingly, voluntarily, and understandingly waives his/her right to be indicted by a grand jury. See Bartlett v. United States, 354 F.2d 745, (8th Cir.), cert. denied, 384 U.S. 945 (1966); Farr v. United States, 314 F. Supp. 1125 (W.D. Mo. 1970) adopted, 436 F.2d 975 (8th Cir.), cert. denied, 402 U.S. 947 (1971). However, a waiver of indictment, being merely a waiver of a finding of probable cause by a grand jury, does not call for all the protections associated with the entry of a guilty plea. See United States v. Montgomery, 628 F.2d 414 (5th Cir. 1980).

Where a waiver form is used, the fact that the defendant does not actually sign the waiver in court is not objectionable where the form is filed of record before arraignment. See Ching v. United States, 292 F.2d 31 (10th Cir. 1965).

A waiver may be executed in a district other than that in which the crime was committed. Boyes v. United States, 298 F.2d 828 (8th Cir.), cert. denied, 370 U.S. 948 (1962). United States v. Scavo, 593 F.2d 837 (8th Cir. 1979). The fact that the defendant waives indictment before the information is actually filed does not affect the information thereafter filed. The court acquires jurisdiction upon the filing of the information at which time the waiver becomes effective. Young v. United States, 354 F.2d 449 (10th Cir. 1965).

9-12.220 Prosecutorial Discretion to Allow

Although Rule 7, Federal Rules of Criminal Procedure, allows a defendant to waive his/her right to be indicted by a grand jury, the prosecutor retains the discretion to proceed by indictment regardless of the defendant's preference. See Rattley v. Ireland, 197 F.2d 585 (D.C. Cir. 1952).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-12.230 Judicial Discretion to Set Aside

The court may set aside a valid waiver of indictment, and, as in the case of a motion to set aside a plea of guilty, the court's exercise of discretion will be upheld on appeal unless it is clearly erroneous. However, the courts are not as likely to set aside a waiver of indictment as a guilty plea, for the right to be indicted, though valuable, involves only the procedure for initiating a criminal prosecution. Setting aside a guilty plea, on the other hand, is fundamental to determining the defendant's guilt. See Bartlett v. United States, 354 F.2d 745 (8th Cir.), cert. denied, 384 U.S. 945 (1966); Williams v. United States, 410 F.2d 370 (3d Cir. 1969). Note that a court's allowance of the withdrawal of a guilty plea does not compel the withdrawal of a waiver of indictment entered in conjunction with the plea. See United States v. Scavo, 593 F.2d 837 (8th Cir. 1979).

9-12.240 Effect at New Trial

A waiver of indictment will be effective at a new trial upon the same information following reversal of the case on appeal because of an error in the admission of evidence, at least in the absence of a request to withdraw the waiver prior to the second trial. See Brooks v. United States, 351 F.2d 282 (10th Cir. 1965), cert. denied, 383 U.S. 916 (1966).

9-12.300 DRAFTING INDICTMENTS AND INFORMATIONS

The Sixth Amendment commands that the accused in a criminal prosecution "be informed of the nature and cause of the accusation." This is comprehended by the language of Rule 7(c), Federal Rules of Criminal Procedure, requiring an indictment to be "a plain, concise and definite written statement of the essential facts constituting the offense charged." Thus, the drafter of indictments and informations must afford the defendant not only a document that contains all of the elements of the offense, whether or not such elements appear in the statute, but one that is sufficiently descriptive to give the defendant notice of the particular offense.

9-12.310 Formalities

Rule 7(c), Federal Rules of Criminal Procedure, deals with the drafting formalities discussed, infra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-12.311 Caption

Rule 7(c), Federal Rules of Criminal Procedure, specifically provides that the indictment or the information need not contain a "formal commencement," or a "formal conclusion," or any other matter not necessary to a plain, concise, and definite statement of the essential facts of the charge. The Appendix of Forms referred to in Rule 58, Federal Rules of Criminal Procedure, for example, is an indictment for murder in the first degree under 18 U.S.C. §§1111, 1114. The caption "in the United States District Court for the . . . District of . . . Division" merely identifies the court in which the indictment is returned. The caption is not a part of the body of the indictment and erroneous information contained in the caption will not affect the validity of the indictment. See Stillman v. United States, 177 F.2d 607 (9th Cir. 1949).

9-12.312 Subscription

Rule 6(c), Federal Rules of Criminal Procedure, provides, among other things, that the foreperson of the grand jury "shall sign indictments." This requirement is satisfied by his/her signature below the endorsement, "A True Bill," Jones v. Pescor, 169 F.2d 853 (8th Cir. 1948). The fact that by inadvertence the indictment is unsigned when handed to the clerk is not fatal where the foreperson appears thereafter in open court and signs it in the presence of the grand jury. See United States v. Long, 118 F. Supp. 857 (D. P.R. 1954).

Rule 7(c), Federal Rules of Criminal Procedure, provides that the indictment and information "shall be signed by the attorney for the government." If the attorney for the government refuses to sign, which is within his/her discretion, there is no indictment. This provision of Rule 7, recognizes the power of government counsel "to permit or not to permit the initiation of a prosecution." See United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965); In Re Grand Jury January, 1969, 315 F. Supp. 662 (D. Md. 1970).

Rule 54(c), Federal Rules of Criminal Procedure, defines the phrase "attorney for the government" to include the Attorney General, an authorized assistant of the Attorney General, and an authorized assistant of a U.S. Attorney. An indictment may be signed in the name of the U.S. Attorney by an assistant who is authorized to sign the U.S. Attorney's name. See United States v. Funkhouser, 198 F. Supp. 708 (D. Md. 1961), opinion adopted, 299 F.2d 940 (4th Cir.), cert. denied 370 U.S. 939, reh'g denied, 371 U.S. 854 (1962); Wheatley v. United States, 159 F.2d 599 (4th

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Cir. 1946); United States v. Keig, 334 F.2d 823 (7th Cir. 1964). In turn, there is nothing impermissible in having a high ranking Justice Department official's signature on an indictment. See United States v. Climatemp, Inc., 482 F. Supp. 376 (N.D. Ill. 1979).

The fact that the name of the attorney for the government is typewritten does not affect the indictment where the question is not raised before trial. See Wiltsey v. United States, 222 F.2d 600 (4th Cir. 1955). The courts have reasoned that the signature of the U.S. Attorney, like the caption, is not a part of the indictment and serves only to evidence the authenticity of the indictment and the government's consent to prosecution. The manner in which it is signed is therefore not such a defect as would invalidate the indictment. See United States v. Keig, supra.

9-12.313 Incorporation by Reference

Rule 7(c)(1), Federal Rules of Criminal Procedure, provides that "[a]llegations made in one count may be incorporated by reference in another count." The device of incorporating material from other counts is useful to avoid repetition such as is typical in fraud, conspiracy, and bankruptcy cases. For example, in a mail fraud case an introductory paragraph to one count was employed to charge all of the necessary elements represented by individual mailings, which may be incorporated by reference and set out in columnar form to avoid repetition. See United States v. McGuire, 381 F.2d 306 (2d Cir.), cert. denied, 389 U.S. 1053 (1967).

Form 3 of the Appendix of Forms referred to in Rule 58, Federal Rules of Criminal Procedure, illustrates incorporation of material from another count: "The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof." The safe course to follow in incorporating material from another county is to employ the term "incorporate" unless the reference is otherwise clear. If, for example, one count describes a particular election, a reference in subsequent counts to "said election" properly refers to the same election. See Blitz v. United States, 153 U.S. 308 (1894). Incorporation should not be made to the point of incorporating the allegations of a count in one indictment into a count of a different indictment as was done in United States v. Bergdoll, 442 F. Supp. 1308, 1318 n.16 (D.D.C. 1981).

Each count is viewed as a separate indictment whose sufficiency must be determined without reference to any other count. See Dunn v. United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States, 284 U.S. 290 (1932). If a count does not expressly incorporate allegations of another count, such allegations cannot be considered. For example, where count one properly described a controlled substance but count two omitted the numbers "3, 4," describing the same substance, the second count did not state an offense, a defect that could not be cured by reference to the first count. See United States v. Huff, 512 F.2d 66 (5th Cir. 1975). The same result obtained where counts two and four of an indictment incorporated allegations of counts one and three, but the latter did not incorporate the allegations of the former. Allegations necessary to counts one and three could not be supplied from counts two and four. See United States v. Gordon, 253 F.2d 177 (7th Cir. 1958).

Even though a count has been dismissed and is no longer a viable part of the indictment, allegations of such counts may be incorporated by reference in another count. See United States v. Shavin, 287 F.2d 647 (7th Cir.); United States v. Weiner, 578 F.2d 757, 776 (9th Cir. 1978).

9-12.314 Citation of the Statute Violated

Rule 7(c)(1), Federal Rules of Criminal Procedure, provides:

The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

The above provision is limited by paragraph 7(c)(3), Federal Rules of Criminal Procedure:

Harmless Error. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

At the time the Federal Rules of Criminal Procedure were adopted, current law did not regard citation to statutes or regulations as part of the indictment; convictions could, therefore, be sustained on the basis of a statute or rule other than that cited, as in Williams v. United States, 168 U.S. 382 (1897), and United States v. Hutcheson, 312 U.S. 219 (1941). The Court stated in Hutcheson, supra, that the designation of the statute is immaterial. "He [the prosecutor] may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

come within the terms of another statute." Id. at 229. Rule 7(c)(1), Federal Rules of Criminal Procedure, is for the benefit of the defendant, but is likewise not intended to cause a dismissal; it is simply to provide a means properly to inform the defendant without endangering the prosecution. Thus the mis-citation of a statute will not warrant reversal where the language of an indictment makes the charge clear and the defendant can show no prejudice. See United States v. Fekri, 650 F.2d 1044 (9th Cir. 1981). Moreover, the fact that the citation is in the heading rather than in the body of the indictment, unless it misleads the defendant to his/her prejudice, will not affect the indictment. See Huizar v. United States, 339 F.2d 173 (5th Cir. 1964), cert. denied, 410 U.S. 926 (1965). Nor did the erroneous citation of a state statute in setting forth a predicate RICO act prove fatal where the reference to the state offense served to identify generally the kind of activity made illegal by the federal statute. See United States v. Welch, 656 F.2d 1039, 1058 (8th Cir.), cert. denied, 456 U.S. 915 (1982).

Citation of the statute charged should be distinguished from a reference to a statute that is an element of the offense. Here the reference must be sufficient to apprise the defendant of its identity. Thus, where the indictment charges that the defendant unlawfully imported diamonds "contrary to law," the words "contrary to law" refer to legal provisions outside the offense of smuggling that is being charged, and the law must be identified to determine the basis for the prosecution. See Keck v. United States, 172 U.S. 434 (1899).

9-12.315 Grammar, Spelling, and Typographical Errors

The indictment will not be defective merely because the wrong tense of a verb is used or because of similar discrepancies in language. The test of an indictment remains whether it states the elements of the offense intended to be charged with sufficient particularity to enable the defendant to prepare his/her defense and to plead the judgment as a bar to any subsequent prosecution for the same offense. See United States v. Logwood, 360 F.2d 905 (7th Cir. 1966).

An indictment will not be dismissed due to typographical errors unless a defendant can affirmatively show that some prejudice resulted from the errors. See United States v. Rich, 518 F.2d 980, 986 (8th Cir.), cert. denied, 427 U.S. 907 (1976). There was no prejudice to the defendant where an indictment misspelled the word "coca" to read "cocoa" in a distribution of cocaine count, Coppola v. United States, 217 F.2d 155 (9th Cir. 1954); where it was apparent from the face of the indictment that the use of "1972" rather than "1973" was a typographical error,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. Akins, 542 F.2d 70 (9th Cir.), cert. denied, 430 U.S. 908 (1976); or where an indictment omitted the defendant's first name in one count, United States v. Lerma, 657 F.2d 786, 789 (5th Cir. 1981).

One court, though, refused to allow the date of an offense to be amended from "1981" to "1980" where the government only offered the subjective conclusion that the error was attributable to typographical error without any affidavit supporting such an allegation, as required by the local rules. See United States v. Randolph, 542 F. Supp. 11 (E.D. Tenn. 1982).

9-12.320 Sufficiency

Rule 7(c)(1), Federal Rules of Criminal Procedure, provides;

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

The true test of an indictment is not whether it might possibly be made more certain but whether it contains:

Every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in the case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Cochran and Sayre v. United States, 157 U.S. 286, 290 (1895).

The information must conform to the same rules regarding sufficiency as does an indictment. See England v. United States, 174 F.2d 466 (5th Cir. 1949); Southern Ry Co. v. United States, 88 F.2d 31 (5th Cir. 1937).

9-12.321 Elements of the Offense

The first component of the suggested test calls for all of the elements of the offense charged. This is founded upon the Fifth Amendment's requirement that prosecution for an infamous crime be instituted by a grand jury. If an essential element of the offense is omitted from the indictment, it cannot, consistent with the principle

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

underlying the Amendment, be supplied by the prosecutor or by the courts. As stated in Russell v. United States, 369 U.S. 749, 770 (1962):

To allow the prosecution, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

In United States v. Outler, 659 F.2d 1306 (5th Cir. 1981), it was fatal to an indictment which charged a physician with prescribing drugs, in violation of 21 U.S.C. §841(a), not to allege that the prescriptions lacked legitimate medical reasons as an element of the offense. The court acknowledged that this factor was not a statutory element of the violation, that the defendant was clearly aware of the nature of the charges, and that the grand jurors had likely considered the legitimacy issue in returning the indictment. Nonetheless, the Fifth Amendment did not allow the Court to speculate whether the grand jury had considered this omitted element in determining whether there was probable cause for the indictment.

9-12.322 Requirement of Specificity

The second part of the sufficiency test, apprising the defendant of what he/she must be prepared to meet, incorporates the specificity requirement of the Sixth Amendment.

The specificity requirement serves to insure that a defendant only has to answer to charges actually brought by the grand jury and not a prosecutor's interpretation of the charges, that the defendant is apprised of the charges against him/her in order to permit preparation of his/her defense, and that the defendant is protected against double jeopardy. See United States v. Haas, 583 F.2d 216 (5th Cir.), reh'g denied, 588 F.2d 829, cert. denied, 440 U.S. 981 (1978).

An example of indictment which failed this test is provided by United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976). The indictment charged a false pretense violation pursuant to the D.C. Code. It listed the name of each victim, the date of the false representation, the amount each victim lost, and the date the sum was paid to the defendants, but was fatally

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

defective as a consequence of its failure to specify the false representation which induced the victims to pay the money to the defendants.

The indictment, though, need only satisfy a defendant's constitutional right to know what he/she is charged with and not his/her need to know the evidentiary details which will be used to establish her/her commission of the offense. See United States v. Diecidue, 603 F.2d 535, 547 (5th Cir.), cert. denied, Gispert v. United States, 449 U.S. 946 (1979). Therefore, an explicit discussion of a RICO enterprises' effect on interstate commerce was not required since it would contribute nothing to the defendant's understanding of the nature of the offense which was that of conducting an enterprise's affairs through racketeering activity.

9-12.323 Plea of Former Jeopardy

The third ingredient of the test of sufficiency, whether the record shows with accuracy to what extent the defendant may plead a former acquittal or conviction, is, as a practical matter, satisfied by compliance with the essential elements and specificity tests. Moreover, the record of the entire case, not just the indictment, is available when the defense of double jeopardy is raised. See Bartell v. United States, 227 U.S. 427 (1913). As the court pointed out in United States v. Covington, 411 F.2d 1087, 1089 (4th Cir. 1969): "The transcript is available . . . and, should it ever be necessary to do so, it may readily be determined from the transcript whether a newly charged offense was one 'which would have supported a conviction under the earlier indictment.'"

9-12.324 Charging in the Language of the Statute

In United States v. Carll, 105 U.S. 611 (1881), the indictment followed the language of the statute but was found insufficient for failure to allege that the defendant knew that the instruments he uttered were forged or counterfeited. As the Court pointed out, "it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." Id. at 612.

The rule reiterates the Court's views in United States v. Cruikshank, 92 U.S., 542, 558 (1875):

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It is an elementary principle of criminal pleading, that where the definition of the offense, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must descend to particulars."

See also United States v. Simmons, 96 U.S. 360 (1877).

In Russell v. United States, 369 U.S. 749 (1962), the indictments charged defendants with contempt of Congress under 2 U.S.C. §192 in that they failed and refused to answer questions "pertinent to the question under inquiry" before a committee of Congress. The defendants challenged the sufficiency of the inquiry. In holding the indictments insufficient, the Court stated that where "guilty depends so critically upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." See Russell, supra, at 764.

The issue in Russell was raised by a motion to dismiss. The Court viewed the defect in the indictment as being one of specificity rather than omission of an essential element. In this situation the Court might have been expected to follow the rule in Hagner v. United States, 285 U.S. 427 (1932), and to overlook the defect as harmless error. However, the Court held that because of the omission of the subject of the inquiry, the indictments wholly failed to inform the defendants of the nature of the accusation against them and were not salvageable by a bill of particulars. "[I]t is a settled rule that a bill of particulars cannot save an invalid indictment." See Russell, supra, at 770.

In Hamling v. United States, 418 U.S. 87 (1974) the Court considered the sufficiency of an indictment under 18 U.S.C. §1461 making it a crime to mail obscene matter. Defendants challenged the sufficiency of the indictment, which charged them in the language of the statute, for failure to define obscenity. The Court distinguished Russell, supra, holding that the generic term "obscene" is not merely a generic or descriptive term but "a legal term of art," raising a question not of fact, as in Russell, supra, but of law. See Hamling, supra, at 118. See also United States v. Debrow, 346 U.S. 374 (1953). But, reliance on the language of the statute was fatal to an indictment in a case in which the defendant was charged with involuntary manslaughter under 18 U.S.C. §1112. Relevant case law had held that gross negligence and actual knowledge of potential harm were additional elements of the offense. The absence of such allegations in the indictment was not cured by the government's proof at trial of these

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

elements or their inclusion in the court's instructions to the jury. See United States v. Opsta, 659 F.2d 848 (8th Cir. 1981).

9-12.325 Negating Statutory Exceptions

Neither the indictment nor the information is required to negate defensive matter such as the statute of limitations or exceptions to the class of persons or objects set out in the statutes defining the offense.

[I]t has come to be a settled rule...that an indictment or other pleading founded on a general provision defining the elements of an offense, need not negate the matter of an exception made by a proviso or other distinct clause...[I]t is incumbent on one who relies on such an exception to set it up and establish it.

McKelvey v. United States, 260 U.S. 353, 357 (1922); United States v. Cook, 84 U.S. 168 (1872).

Thus, an indictment for assault with a dangerous weapon need not, following the statute, also allege that the assault was "without just cause." See Hockenberry v. United States, 422 F.2d 171 (9th Cir. 1970); United States v. Messina, 481 F.2d 878 (2d Cir. 1973). In United States v. Outler, 659 F.2d 1306 (5th Cir. 1981), the court though, rejected the government's argument that a lack of legitimate medical reason was a statutory exception rather than an essential element of a count charging a physician with prescribing drugs in violation of 21 U.S.C. §841.

9-12.326 Conjunctive and Disjunctive Elements

To avoid uncertainty in charging an offense in which the statute enumerates several different acts in the alternative, the practice is to plead the offense by substituting the conjunction "and" for the disjunctive "or."

When a statute specifies several alternative ways in which an offense may be committed, the indictment may allege the several ways in the conjunctive, and this fact neither makes the indictment bad for duplicity nor precludes a conviction if only one of the several allegations linked in the conjunctive in the indictment is proven.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. McCann, 465 F.2d 147, 162 (5th Cir.), cert. denied, 412 U.S. (1972); Fields v. United States, 408 F.2d 885 (5th Cir. (1969)).

Thus, when the statute punishes taking, carrying away, or concealing, the indictment properly charged taking, carrying away, and concealing. See United States v. Gunter, 546 F.2d 861 (10th Cir.), cert. denied 430 U.S. 947 (1977). Likewise, where the statute reads "prostitution or debauchery," the indictment should be phrased, "prostitution and debauchery." See Bayless v. United States, 365 F.2d 694 (10th Cir. 1966); United States v. Uco Oil Co., 546 F.2d 833 (9th Cir.), cert. denied, 430 U.S. 966 (1976). The consequence of charging in the alternative may lead to rendering the indictment insufficient for uncertainty, as in United States v. MacKenzie, 170 F. Supp. 797, 799 (D. Me. 1959).

It is equally well settled, however that an indictment which alleges the several acts constituting the statutory offense in the disjunctive or alternative lacks the necessary certainty and is wholly insufficient.

See also United States v. Hicks, 619 F.2d 752 (8th Cir. 1980).

9-12.330 Particular Allegations

9-12.331 Time and Date

Except where time is an essential element of the offense, the time allegation is not material to the sufficiency of the indictment if the error or variance in proof is within reasonable limits. Time was material to an indictment charging a willful failure to file an income tax return by the April 15 deadline. Therefore, evidence showing that the defendant had obtained a filing extension until May 7 of that year caused a fatal variance. See United States v. Goldstein, 502 F.2d 526 (3d Cir. 1974). It is well settled that proof of any date, within reason, before the return of the indictment and within the statute of limitations is sufficient. See Russell v. United States 429 F.2d 237 (5th Cir. 1970).

Courts have allowed considerable leeway as to the specificity of the alleged date of an offense in an indictment. One court reasoned that the more specific the time allegation, stronger is the inference that the grand jury was only indicting a defendant for acts occurring on the specific dates charged, whereas use of the qualifying phrase, "on or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

about" indicated a grand jury unwillingness to pinpoint the date of the offense charged. See United States v. Somers, 496 F.2d 723, 745 (3d Cir. 1974). A fatal variance occurred when an indictment charged that the subject extortinate acts occurred "on October 7 and October 8, 1962," but the proof showed such acts occurred on August 10 and October 5, 1962. See United States v. Critchley, 353 F.2d 358 (3d Cir. 1965). In contrast, the court in United States v. Grapp, 653 F.2d 189 (5th Cir. 1981), readily rejected a variance claim where the proof at trial showed that the time of the offense was the middle of 1977 and the indictment charged it had occurred "on or about May 27, 1977."

Citing hornbook law that great generality is allowed as to the alleged date of an offense in an indictment, it was held that a count charging that an alien smuggling offense took place "on or about 1977, the exact date to the grand jury unknown" was within reasonable limits. See United States v. Nunez, 668 F.2d 10 (1st Cir. 1981).

9-12.332 Place of Offense

The indictment or information need not allege a place where the offense occurred. The Appendix of Forms uniformly alleges that the crime took place "in the ... District of ..." but omits any reference to such particulars as state, county, city, or township. Where place is an element of the offense, however, it must be set out. Form 6 illustrates an indictment under 18 U.S.C. §2312, interstate transportation of a stolen motor vehicle, naming the state from which the vehicle was taken and into which it was transported, these being essential to the offense.

Under early English law, when jurors were also witnesses summoned from the vicinage, the sheriff needed to know where the crime was committed in order to summon the proper jury. In this country "most authorities assume that an allegation is sufficient after verdict which shows it [the crime] to have been done within the jurisdiction of the court." See Ledbetter v. United States, 170 U.S. 606, 613 (1898).

An allegation that the bank robbery occurred "in the State and District of New Jersey" met the requirements of an indictment. See United States v. Bujese, 371 F.2d 120 (3d Cir. 1967). Likewise, it was sufficient that acts of bribery occurred in "the Western District of Texas." See United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981). "[I]t is well established that an indictment is not legally insufficient for failure to include such an allegation (place where the crime occurred)." See United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), cert. denied, 95 S. Ct. 1677 (1975). Even when an indictment alleged that

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

a murder took place in the town of Popular instead of Brackton, and the indictment was therefore dismissed by the government after the jury had been impaneled, the indictment was sufficient to support a defense of double jeopardy against the subsequent, corrected indictment. See United States v. LeMay, 330 F. Supp. 628 (D. Mont. 1971).

9-12.333 Means

Rule 7(c)(1), Federal Rules of Criminal Procedure, provides:

It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means.

This provision is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways.

While it is permissible to allege several means in a single count, it is duplicitous to allege more than one offense in a single count. See Fed. R. Crim. P., Rule 8(a). It is therefore essential to distinguish between separate means and separate offenses. A count charging a single continuing offense does not offend the rule against duplicity because more than one means, each of which could constitute an offense standing alone, is joined in a single count. See United States v. Berardi, 675 F.2d 894, 897 (7th Cir. 1982).

A single conspiracy having as its object the commission of numerous offenses is but a single offense. See United States v. Crummer, 151 F.2d 958 (10th Cir. 1945), cert. denied, 327 U.S. 785 (1946). "The allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and this is one, however diverse its objects.'" See Braverman v. United States, 317 U.S. 49, 54, (1942), (quoting in part from Frohwerk v. United States, 249 U.S. 204, 210 (1919)).

9-12.334 Venue

A defendant has a right to be tried in a forum where the crime was committed. See Article III, Section 2, Constitution of the United States; Sixth Amendment, Constitution of the United States; Rule 18, Fed. R. Crim. P. As discussed, infra, this "right" may be waived, but absent a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

waiver, the government's case fails for lack of proof of venue. See United States v. Branan, 457 F.2d 1062, 1065-66 (6th Cir. 1972). The necessity of proving venue, however, does not require it to be alleged in the indictment. Rule 7(c)(1), Federal Rules of Criminal Procedure, does not require venue to be alleged in an indictment: United States v. Votteller, 544 F.2d 1355 (6th Cir. 1976). In fact, the Appendix of Forms referred to in Rule 58, Federal Rules of Criminal Procedure, does provide for a statement of the district in which the offense occurred. See USAM 9-12.332, supra. To avoid the filing of a bill of particulars to discover where the offense was committed, the better practice is to include such information in the indictment. See Hemphill v. United States, 392 F.2d 45, 48 (8th Cir.), cert. denied, 393 U.S. 877 (1968).

Venue must be proved at trial by the government by a preponderance of the evidence, and proof may be by direct or circumstantial evidence. See United States v. Powell, 498 F.2d 890, 891 (9th Cir.), cert. denied, 419 U.S. 866 (1974); United States v. McDonough, 603 F.2d 19 (7th Cir. 1979); United States v. Luton, 486 F.2d 1021, 1023 (5th Cir. 1973), cert. denied, 417 U.S. 920 (1974). A division of a district, however, is not a unit of venue. See United States v. Burns, 662 F.2d 1378 (11th Cir. 1981). Any defect in venue apparent from the indictment will be waived if the defendant fails to object before pleading guilty or before trial. See United States v. Semel, 347 F.2d 228, 229 (4th Cir.), cert. denied, 382 U.S. 840 (1965); United States v. Jones, 162 F.2d 72, 73 (2d Cir. 1947); Fed. R. Crim. P. 12(b)(2). A claim of insufficient evidence to support a finding of venue will be waived if not specifically raised in a motion for acquittal. See United States v. Menendez, 612 F.2d 51 (2d Cir. 1979); United States v. Roberts, 618 F.2d 530 (9th Cir.), appeal after remand, 640 F.2d 225, cert. denied, 452 U.S. 942 (1980).

A number of statutes regulate the venue of particular criminal proceedings in the district courts. See, e.g., 18 U.S.C. §§1073 (flight to avoid prosecution or giving testimony), 3236 (murder or manslaughter), 3237(a) (continuing offenses and offenses committed in more than one district), 3239 (threatening communications).

#### 9-12.335 Intent

It is difficult to formulate a rule of general application that will safely avoid all of the hazards associated with charging scienter. This is because statutes very often do not provide a reliable guide. Traditionally, crime consists of an act coupled with intent. While this is typically the case with conduct that was regarded as criminal at common law, it is not necessarily true of a significant number of offenses that

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

are regulatory in nature. In the case of statutes that do not specify intent, it becomes necessary to determine whether scienter is an element of the offense. This may be difficult. "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." See Morissette v. United States, 342 U.S. 246, 260 (1951).

Where intent is required, the indictment need not contain formal words such as "knowingly," "willfully," "feloniously," or "unlawfully." See United States v. Zarra, 293 F. Supp. 1074 (M.D. Pa. 1969), aff'd, 423 F.2d 1227 (3d Cir.), cert. denied, 400 U.S. 826 (1970). Thus in an indictment for bail jumping, in which "willfully" is a necessary element of the offense, an express allegation that the bail jumping was willful was not required so long as other words or facts contained in the indictment necessarily or fairly imported guilty knowledge. See United States v. McLennan, 672 F.2d 239 (1st Cir. 1982).

An indictment for bank robbery in the language of 18 U.S.C. §2113(a) that the defendant "by force and violence and by intimidation did take" was not fatally defective for failure to charge intent. 18 U.S.C. §2113(a) does not include intent and the court, on a motion to vacate sentence, held that the words used implied intent. See Walker v. United States, 439 F.2d 1114 (6th Cir. 1971). The same issue was raised in United States v. Purvis, 580 F.2d 853 (5th Cir.), reh'g denied, 585 F.2d 520, cert. denied, 440 U.S. 914 (1978), concerning an indictment charging conspiracy to violate constitutional rights in violation of 18 U.S.C. §241. While the statute does not explicitly require specific intent, such intent is nonetheless an essential element of proof to sustain a conviction. The court reviewed the indictment from a common sense viewpoint rather than one of "petty precision, pettifogging technicality" to find that the indictment clearly set forth a charge of specific intent without recitation of the words "knowing," "willful," "intentional," or one of their derivations.

Although the element of criminal intent is not specified in 18 U.S.C. §1711, an indictment for conversion of postal funds must allege criminal intent because the word "convert" itself does not imply that criminal intent is a necessary element of the offense. See United States v. Morrison, 536 F.2d 286 (9th Cir. 1976).

Intent is often not an element of offenses that are regulatory in nature, that is, offenses aimed not so much at punishment of crime as the achievement of some social objective.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Such legislation dispenses with the conventional requirement for criminal conduct--awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

United States v. Dotterweich, 320 U.S. 277, 281 (1943).

Such offenses flow from an exercise of the government's police power to protect public health and safety. Pure food and drug, traffic, and liquor offenses are typical of this class of legislation. But, as indicated by the Court in Morissette, *supra*, there is no certain guide classifying offenses into those which require scienter and those which do not.

This is well illustrated by cases involving impersonation of a federal officer under both parts of 18 U.S.C. §912, that is, (1) acting as such or (2) employing such means in order to obtain money or something of value. Before its revision in 1948, 18 U.S.C. §912 included the phrase "with intent to defraud." The fraudulent intent language was deleted. Subsequently, in Honea v. United States, 344 F.2d 798 (5th Cir. 1965), the Fifth Circuit addressed the issue of the sufficiency of an indictment under 18 U.S.C. §912 that did not allege that the defendant acted with fraudulent intent, an issue first raised by the defendant's motion to dismiss. The Fifth Circuit held that the indictment was fatally defective for failure to allege fraudulent intent. In United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967), the Fourth Circuit, however, held that an allegation of fraudulent intent was unnecessary, distinguishing Honea supra, on the ground that the latter described an offense under the second part of 18 U.S.C. §912. But in United States v. Randolph, 460 F.2d 367 (5th Cir. 1972), the Fifth Circuit reaffirmed its view, holding that an allegation of fraudulent intent was required to charge an offense under both parts of the statute.

The Ninth Circuit followed Guthrie, *supra*, United States v. Mitman, 459 F.2d 451 (9th Cir.), *cert. denied*, 409 U.S. 863 (1972). The Second Circuit at first refused to "enter the fray," United States v. Harmon, 496 F.2d 21 (2d Cir. 1974), but finally did so in United States v. Rose, 500 F.2d 12 (2d Cir. 1974), where it held, following Guthrie, *supra*, that an allegation of fraudulent intent was not required. Forms 8 and 9 of the Appendix of Forms referred to in Rule 58, Federal Rules of Criminal Procedure, allege intent to defraud under both parts of the impersonation statute.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Where intent is not indicated in the statute, the case law and legislative history of the offense must be consulted to determine whether intent should be charged. While a safe general rule might be to charge intent if the issue is in doubt, such a practice in many cases could serve to increase the government's burden of proof. It is believed that most courts would hold allegations of intent to be surplussage where the statute did not require intent as an element of the offense.

9-12.336 Aiding and Abetting

18 U.S.C. §2 provides that whoever "aids, abets, counsels, commands, induces or procures," the commission of an offense against the United States "is punishable as a principal." The statute also punishes as a principal whoever causes an act to be done which if directly performed by him/her or another would be an offense. The statute on principals is not itself a specific criminal offense. The statute abolishes the distinction that formerly existed between principals and accessories before the fact.

Since 18 U.S.C. §2 applies implicitly to all federal offenses, an indictment or information need not include the words "aid and abet" in order to sustain a conviction of that charge. See United States v. Masson, 582 F.2d 961 (5th Cir. 1978). Even though the defendant is charged with commission of the substantive offense, proof that he/she only aided or abetted the commission of the crime will support the indictment. See Latham v. United States, 407 F.2d 1 (8th Cir. 1969); Theriault v. United States, 401 F.2d 79 (8th Cir. 1968); United States v. Trollinger, 415 F.2d 527 (5th Cir. 1969).

9-12.340 Forfeiture

Rule 7(c)(2), Federal Rules of Criminal Procedure, provides:

When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

The Notes of the Advisory Committee on Rules indicate that this provision was added "to provide procedural implementation of the recently enacted criminal forfeiture provisions of the Organized Crime Control Act of 1970

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

. . . .(18 U.S.C. 1963), and the Comprehensive Drug Abuse Prevention and Control Act of 1970. . . .(21 U.S.C. 848 (a))."

The Ninth Circuit in United States v. Hall, 521 F.2d 406 (9th Cir. 1975), however, has ruled that Rule 7(c)(2), Federal Rules of Criminal Procedure, is applicable to prosecutions brought under 18 U.S.C. §545. In Hall, the defendant was indicted for smuggling two diamond rings into the United States in violation of 18 U.S.C. §545. Prior to trial, defendant moved to dismiss the indictment for failure to comply with Rule 7(c)(2), Federal Rules of Criminal Procedure. The District Court ruled that while the indictment was defective, the defect would not vitiate the indictment if the court ruled in advance that the government would be prohibited from instituting forfeiture proceedings. The defendant was subsequently convicted and sentenced to one year's imprisonment but the district judge suspended the sentence of imprisonment and placed defendant on probation on the condition that he would consent to civil forfeiture of the smuggled merchandise. On appeal, the Ninth Circuit reversed on the grounds that the District Court's actions "taken together, deprived Hall of the mandatory notice to which he was entitled under Rule 7(c)(2) and the concomitant opportunity to defend against a forfeiture." See Hall, *supra*. Although the court noted that Rule 7(c), Federal Rules of Criminal Procedure, was added primarily to implement the newly enacted criminal forfeiture penalties contained in 18 U.S.C. §1963 and 18 U.S.C. §848(a)(2), the court stated that since it was written in specific terms for general application, it must be applied to the criminal forfeiture penalty of 18 U.S.C. §545.

On appeal, the primary issue of contention in Hall was whether dismissal of the indictment was the appropriate remedy for a violation of Rule 7(c)(2), Federal Rules of Criminal Procedure. The Criminal Division, after further review of this case, has concluded that not only was the remedy of dismissal inappropriate, but the underlying ruling that Rule 7(c)(2), Federal Rules of Criminal Procedure, is applicable to prosecutions brought under 18 U.S.C. §545 was also erroneous. In all the other provisions in Title 18, United States Code, which contain forfeiture provisions, a separate in rem proceeding is necessary before the property in question is forfeited. Since there is a separate libel proceeding, the defendant is given adequate notice that the government seeks forfeiture of the property and he/she can defend against forfeiture at that time. Furthermore, unlike under 18 U.S.C. §1963 and 21 U.S.C. §848(a)(2) where the property subject to forfeiture is not seized until after the defendant's conviction and imposition of sentence, under the other sections which contain forfeiture provisions, the property is seized before the institution of forfeiture provisions and thus the defendant is put on notice that the property is subject to forfeiture.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The legislative history to the Organized Crime Control Act of 1970, 18 U.S.C. §1961 *et seq.*, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §841 *et seq.*, makes clear that Congress intended that the forfeiture provisions contained in those two acts were to be different from the other forfeiture provisions found in Title 18, United States Code. In a letter to Senator McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures, then Deputy Attorney General Kleindienst, in commenting on the provisions of the Organized Crime Control Act of 1970, stated:

Section 1963 contains criminal penalties for violation of section 1962. These include, in addition to a fine of not more than \$10,000, or imprisonment for not more than 20 years, or both, forfeiture of all interest in the enterprise. The concept of forfeiture as a criminal penalty which is embodied in this provision differs from other presently existing forfeiture provisions under Federal statutes where the proceeding is in rem against the property and the thing which is declared unlawful under the statute, or which is used for an unlawful purpose, or in connection with the prohibited property or transaction, is considered the offender, and the forfeiture is no part of the punishment for the criminal offense. Examples of such forfeiture provisions are those contained in the customs, narcotics, and revenue laws.

Under the criminal forfeiture provision of section 1963, however, the proceeding is in personam against the defendant who is the party to be punished upon conviction of violation of any provision of the section, not only by fine and/or imprisonment, but also by forfeiture of all interest in the enterprise. The concept is derived from the practice well known in the early law where upon conviction of treason and certain other felonies the party forfeited his goods and chattels to the crown. The Palmyra, 12 Wheat. 1, 25 U.S. 1 (1827), opinion of Mr. Justice Storey at 14. According to Blackstone, the only valid reason for this type of forfeiture is that since all property is derived from society, any member of society who violates the fundamental contract of his association by transgressing

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

society's laws forfeits his right to that property, and the state may justly resume that portion of the property which the laws have previously assigned him. Commentaries, Ch. 8, 229-300, XVI.

While there is some indication that this concept of criminal forfeiture was in usage in the colonies, the First Congress by act of April 20, 1790, abolished forfeiture of estate and corruption of blood, including in cases of treason. That statute, as revised, is found in 18 U.S.C. 3563, which states: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." From that date to the present, therefore, no Federal statute has provided for a penalty of forfeiture as a punishment for violation of a criminal statute of the United States. Section 1963(a), therefore, would repeal 18 U.S.C. 3563 by implication.

It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than a constitutional power. See Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957), opinion of Mr. Justice Frankfurter at 441, holding that whether proscribed conduct is to be visited by a criminal prosecution or by other remedies is a matter of legislative choice.

9-12.400 AMENDMENT

9-12.410 Amendment of Information

Since an information is prepared by the prosecuting attorney, he/she should be able to amend it in form or substance, provided the rights of the defendant are not prejudiced. This is recognized by Rule 7(e), Federal Rules of Criminal Procedure, which provides:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Leave of court is required for the prosecutor to amend. However, the court may also amend on its own motion. See United States v. Blanchard, 495 F.2d 1329 (1st Cir. 1974).

9-12.420 Amendment of Indictments

The general rule is that indictments cannot be amended in substance. This follows from the fundamental distinction between the information and the indictment, see USAM 9-12.410, *infra*, which must be returned by a grand jury. If the indictment could be changed by the court or by the prosecutor, then it would no longer be the indictment returned by the grand jury. The Supreme Court, reviewing the history of the grand jury, quotes Lord Mansfield on the subject:

[T]here is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the King's suit. An officer of the Crown has the right of framing them originally; he may, with leave, amend in like manner, as any plaintiff may do.

Ex parte Bain, 121 U.S. 1, 6 (1887).

In Russell v. United States, 369 U.S. 749, 770 (1962), the Court pointed out that a consequence of amending the indictment is that the defendant "could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

In one case, Stirone v. United States, 361 U.S. 212 (1960), the defendant was convicted of unlawful interference with interstate commerce in violation of the Hobbs Act, 18 U.S.C. §1951. The indictment charged that the victim's contract was to supply ready-mix concrete from his Pennsylvania plant to be used in the erection of a steel mill in Allenport, Pennsylvania. Performance of the contract involved, according to the indictment, shipment of sand from various points in the United States to the victim's ready-mix concrete plant. The Court permitted the government to offer evidence of the effect upon interstate commerce not only of the sand thus brought into Pennsylvania but also the interstate

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

shipment of steel from the steel mill to be constructed from the ready-mix concrete.

The Supreme Court reversed the defendant's conviction on the ground that he was convicted of a different crime from that charged, in violation of his Fifth Amendment right to be indicted by a grand jury:

The grand jury which found the indictment was satisfied to charge that Stirone's conduct interfered with interstate shipment of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete....Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same.

Stirone, supra, at 217.

An amendment for the excising of surplussage that has the effect of narrowing a defendant's liability without changing the meaning of the charge as it was presented to the grand jury is permissible. In United States v. Whitman, 665 F.2d 313 (10th Cir. 1981), it was proper for the government to strike the references to overvaluation of property in an 18 U.S.C. §1014 (making false statements to a federally insured bank) count. A similar deletion was approved of in United States v. Ramirez, 670 F.2d 27 (5th Cir. 1982), even though the defendant's theory of defense was thereby altered.

9-12.430 Amendment of Indictments for Offenses That Could Have Been Initiated by Informations

An issue, as yet unresolved, is raised concerning amendment of an indictment for an offense that could have been initiated by an information. In United States v. Goldstein, 502 F.2d 522 (3d Cir. 1974), the Third Circuit considered the issue in the case of an indictment for failure to file an income tax return by April 15, a misdemeanor. The evidence showed that the defendant had obtained an extension until May 7. The government argued that had the offense been prosecuted by information, it could have been amended and therefore similar liberality should apply to the indictment. The court relied in part upon the fact that Rule 7(e), Federal Rules of Criminal Procedure, permitting amendment of informations is silent about indictments and by implication prohibits their amendment. The court also cites United States v. Fischetti, 450 F.2d 34, 39 (5th Cir. 1971), where the Fifth Circuit indicated that having chosen to proceed by

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

indictment, the government is bound by the principles applicable to indictments.

In United States v. Pandilidis, 524 F.2d 644 (6th Cir. 1975), the Sixth Circuit, confronting the issue in virtually an identical case, upheld amendment of the indictment. The indictment alleged a failure to file by April 15 and the government corrected this with a bill of particulars setting out the extensions to file. The Sixth Circuit identified the rights involved as: (1) fair notice under the Sixth Amendment, (2) protection from double jeopardy under the Fifth Amendment, and (3) the right not to be held for an infamous crime except upon an indictment by a grand jury. The court held that the defendant's right to fair notice was not infringed because he was apprised by a bill of particulars before trial of what the government would prove. The same was true of the defendant's right to be protected from double jeopardy, since the record of the case provided full protection. As for the right of the defendant to be indicted by a grand jury, the court pointed out that the defendant had no constitutional right to be indicted except for an infamous crime, which the offense involved was not. "[S]ince the error permitting amendment to the indictment in this case did not reach constitutional dimensions, the appropriateness of reversal must be determined under Rule 52(a) [harmless error]." Pandilidis, supra, at 649.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 14

	<u>Page</u>
9-14.000 <u>REMOVALS AND TRANSFERS</u>	1
9-14.100 <u>RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE</u>	1
9-14.101                Nature Of The Rule	1
9-14.102                Who Is Covered	2
9-14.110 <u>Procedure Under Rule 20</u>	2
9-14.111                        Indictment or Information Pending	2
9-14.112                        Complaint Only Pending	3
9-14.113                        Juveniles	3
9-14.114                        Partial Pleas	4
9-14.115                        Use of Fed. R. Crim. P. 20 and 7 Together	4
9-14.200 <u>RULE 21. TRANSFER FROM THE DISTRICT FOR TRIAL</u>	4
9-14.201                        Nature of The Rule	4
9-14.210 <u>Procedure Under Rule 7</u>	5
9-14.211                        Procedure Factors Determining Transfer	5
9-14.212                        Transfer for Prejudice in the District	6
9-14.213                        Transfer in Other Cases	7

UNITED STATES ATTORNEYS' MANUA  
TITLE 9--CRIMINAL DIVISION

9-14.000 REMOVALS AND TRANSFERS

9-14.100 RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

9-14.101 Nature Of The Rule

Rule 20, Fed. R. Crim. P. providing for the transfer of criminal cases among districts for the limited purposes of acceptance of guilty or nolo contendere pleas and sentencing is intended to accord a defendant an opportunity to be relieved of the hardship of being removed to the district where the prosecution is pending. Advisory Committee on Rules, Note to Rule 20, U.S.C. Hutto v. United States, 309 F. Supp. 489 (S.C. 1970).

Under Rule 20, Federal Rules of Criminal Procedure, the transferee court acquires limited jurisdiction to take a guilty or nolo contendere plea and pronounce sentence only. A plea of not guilty, after transfer, ends the transferee court's jurisdiction and requires transfer of the matter back to the original jurisdiction. However, defendant's statement that he/she wished to plead guilty or nolo contendere shall not be used against him/her. Refusal of transferee court to receive nolo contendere plea does not remove its jurisdiction if defendant then enters plea of guilty. Singleton v. Clemmer, 166 F.2d 963 (D.C. Cir 1948). One court held that only a plea of not guilty can oust the jurisdiction of the transferee court in a Federal Rule of Criminal Procedure 20 proceeding, that a Rule 20 transfer cannot be revoked by the withdrawal by both U.S. Attorneys of consent to transfer even though a plea has not yet been entered by the defendant. United States v. Binion, 107 F. Supp. 680 (D. Nev. 1952). Compare Hutto v. United States, *supra*, where transferee court having jurisdiction after consent of both U. S. Attorneys but before papers transferred or plea received by the transferee court, relinquished jurisdiction by allowing its U. S. Attorney to withdraw consent; see also In re Richard Arvedon, 523 F.2d 914 (1st Cir. 1975) holding that a transferee court may reject an involuntary or improvident plea of guilty, but a guilty plea attributed only to defendant's desire not to return to the indicting district, is, by itself, an impermissible reason to refuse the plea and to return the case.

Federal Rule of Criminal Procedure 20 has been held to be constitutional against challenges that Article 3, Section 2, Clause 3 of the Constitution and the Sixth Amendment both provide that the trial shall be held in the state where the crime has been committed. In each case, place of venue has been held to be a personal privilege which may be waived. Hilderbrand v. United States, 304 F.2d 716 (10th Cir. 1962); Yeloushan v. United States, 339 F.2d 533 (5th Cir. 1964).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-14.102 Who Is Covered

Federal Rule of Criminal Procedure 20 transfers are available to any defendant who is arrested, held, or present in a district other than a district in which there is an indictment, information or complaint against the person. Changes in the Rule have the effect of expanding its formerly narrow coverage, to include persons who are not arrested or otherwise in custody, e.g. persons who turn in themselves in a district other than that in which the matter is pending. (Note of Advisory Committee on Rules, Rules 20, 28 U.S.C.A.) Rule 20 is available in multiple defendant prosecutions. Yeloushan v. United States, supra; Snowden v. Smith, 413 F.2d 914 (7th Cir. 1969).

9-14.110 Procedure Under Federal Rule of Criminal Procedure 20

When an indictment is pending against a person in another district, the person may state in writing that he/she wishes to plead guilty, to waive trial, and consent to a disposition in the district in which he/she finds himself/herself. In this situation, counsel is not necessary to validate the defendant's consent to a transfer, as defendant may, by a not guilty plea, later nullify the proceeding; and the statement in that even may not be used against him. Snowden v. Smith, supra; White v. United States, 443 F.2d 26 (9th Cir. 1971).

After the defendant signs a written election to proceed under Rule 20, the U. S. Attorney in the district in which the defendant is present executes a consent and forwards both documents to the U. S. Attorney in which the indictment is pending. Either U. S. Attorney may, under the Rule, refuse consent, such consent being discretionary. In such a case, the defendant may be proceeded against under Rule 40.

If both U. S. Attorneys consent, the U. S. Attorney in the district in which the indictment is pending should forward the signed consents to the clerk of his/her district court, who will transfer the court file to the district court for the district in which the defendant is present. The case will then proceed to arraignment in that plea is contemplated, the provisions of Rule 11, Federal Rules of Criminal Procedure pertaining thereto apply in the Rule 20 context.

9-14.111 Indictment Or Information Pending

When an indictment or information is pending against a person in another district, the person may state in writing that he/she wishes to plead guilty, or nolo contendere, to waive a trial in the district in which the indictment or information is pending, and consent to a disposition in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the district in which he/she finds him or herself. In this situation, counsel is not necessary to validate the defendant's consent to a transfer, as defendant may, by a not guilty plea, later nullify the proceeding; Snowden v. Smith, supra; Farr v. United States, 166 F.2d 963 (D.C. Cir. 1948).

The indictment or information need not be pending in another district at the time of arrest in order to be subject to a Rule 20 disposition. Hornbrook v. United States, 216 F.2d 112 (5th Cir. 1954); O'Brien v. United States, 233 F.2d 246 (5th Cir. 1956).

After the defendant signs (his) written election to proceed under Rule 20, the U. S. Attorney in the district in which the defendant is present executes a consent and forwards both documents to the U. S. Attorney in the district in which the indictment or information is pending. Either U. S. Attorney may, under the Rule, refuse the consent, such consent being discretionary. In such a case, the defendant may be proceeded against under Rule 40.

If both U. S. Attorneys consent, the U. S. Attorney in the district in which the indictment or information is pending should forward the signed consents to the clerk of his/her district court, who will transfer the court file to the district court for the district in which the defendant is present. The case will then proceed to arraignment in that district for pleading under Rule 11, Federal Rules of Criminal Procedure.

#### 9-14.112 Complaint Only Pending

If a complaint only is pending in another district, Rule 20 may still be used. The person arrested, held or present must state in writing that he/she wishes to plead guilty or nolo contendere, to waive venue and trial in the district in which the warrant was issued, and to consent to disposition of the case in the district where arrested, held, or present, subject to approval of the U. S. Attorney for each district. Upon filing the written waiver of venue in the district in which defendant is present, the prosecution may proceed as if venue were in such district, i.e., charges may be filed there.

#### 9-14.113 Juveniles

A juvenile, as defined in 18 U.S.C. §5031, against whom a criminal matter not punishable by death or life imprisonment is pending, may invoke Rule 20. The juvenile, however, must first be advised by counsel before consenting, in writing, to a Rule 20 proceeding and the district court as well as the U. S. Attorney in each district must consent. Furthermore, unlike the case of an adult defendant, a juvenile must consent before the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

court, after being advised by the court of his/her rights, and of the consequences of his/her consent.

9-14.114 Partial Pleas

The transferee Court, in a Rule 20 proceeding, has jurisdiction to receive a plea of guilty to less than all the counts of an indictment or information and may dismiss the remainder on motion of the U. S. Attorney. Warren v. Richardson, 333 F.2d 781 (9th Cir 1964). Such procedure should be with the approval of the U.S. Attorney in the district of offense.

9-14.115 Use of Fed. R. Crim. P. 20 and 7 Together

he/she → Rule 20 provides that a defendant may state in writing that (he) wishes to plead guilty or nolo contendere, to waive trial in the district in which an indictment or information is pending or in which a warrant was issued, and to consent to the disposition of the case in the district in which he/she is present, subject to the approval of the U.S. Attorney for each district. This statement need not be made in open court. But when the transfer is completed and the defendant may at that time waive indictment in open court as provided in Federal Rule of Criminal Procedure 7(b).

9-14.200 RULE 21. TRANSFER FROM THE DISTRICT FOR TRIAL

9-14.201 Nature Of The Rule

Rule 21, Federal Rules of Criminal Procedure, allows a defendant to initiate a motion, dependent upon the court's discretion, for transfer of a criminal case for trial in another district, if (a) the atmosphere is so prejudicial the defendant cannot obtain a fair and impartial trial within the district in which the action is brought or (b) for the convenience of the parties and witnesses, if in the interest of justice.

Article 3, Section 2, Clause 3, and the Sixth Amendment to the Constitution provide the right of trial in the vicinity of the offense as a safeguard against unfairness and hardship if the accused were prosecuted against his/her will in a remote place; but where venue lies in several districts, the constitutional provisions are not intended to provide a defendant absolute right to be tried in his/her home district or any particular place. Platt v. Minnesota Mining and Manufacturing Co., 376 U.S. 240 (1964); United States v. Hinton, 268 F. Supp. 728 (E.D. La 1967). A Rule 21 motion by the defendant automatically is a waiver of the constitutional right to be tried in the district of offense. United States v. Angiulo, 497 F.2d 440 (1st Cir. 1974), cert. denied, 419 U.S. 896;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

United States v. Marcello, 280 F. Supp. 510 (E.D. La. 1968); Jones v. Gasch 404 F.2d 1231 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029 (1968).

Purpose of the rule is to secure a fair trial to the defendant when circumstances in the district where the action is brought would place an undue risk of unfairness upon the defendant if tried within that district. United States v. Hinton, supra; United States v. Marcello, supra; Sheppard v. Maxwell, 384 U.S. 333 (1965); Jones v. Gasch, supra.

9-14.210 Procedure Under Rule 21

9-14.211 Procedure Factors Determining Transfer

Only the defendant can initiate a motion for transfer to another district. Jones v. Gasch, supra; United States v. Clark, 360 F. Supp. 936 (S.D.N.Y. 1973); United States v. Parr, 17 F.R.D. 512 (S.D.Tex. 1955). If there has been no waiver by the defendant and venue lies elsewhere, the proper course is dismissal. United States v. Hinton, supra; also see, dissent, United States v. Griesa, 481 F.2d 276, 285 (2d Cir. 1973).

The cases are clear that once made, defendant's motion for transfer to another district is directed to the sound discretion of the court, United States v. Garza, 664 F.2d 135 (7th Cir. 1981), cert. denied, 455 U.S. 933; United States v. Noland, 495 F.2d 529 (5th Cir. 1974), cert. denied, 419 U.S. 966; United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120; Jones v. Gasch, supra; including the selection of the district to which the transfer is made, United States v. Hinton, supra; United States v. Holder, 399 F. Supp. 220 (S. Dak. 1975), holding also that a superseding indictment is a new case and transfer of venue is not controlled by a previous order in the original but dismissed indictment.

In a multi-defendant and multi-count criminal action, it is well established that one or more of the defendants may have all or part of the case transferred "as to him," United States v. Choate, 276 F.2d 724 (5th Cir. 1960), 86 ALR 2d 1353; nor can such transfer be denied by a co-defendant's opposition to the transfer, Yeloushan v. United States, supra; nor can non-moving defendants be transferred, United States v. Clark, supra.

Rules 21(a) and 21 (b) are to be considered separately, and local prejudice insufficient for transfer under Rule 21(a) is not to be weighed in determining "in the interest of justice" under Rule P. 21(b), Jones v. Gasch, supra; nor are factors bearing on the ability to get a fair and impartial trial to be considered in determining "the interest of justice," Platt v. Minnesota Mining & Manufacturing Co., supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Initial choice of venue is up to the prosecution, United States v. Lueros, 243 F. Supp. 160 (N.D. Iowa 1965), cert. denied 382 U.S. 956; and see dissent, United States v. Griesa, supra at 285; and defendant must demonstrate substantial inconvenience to nullify the prerogative, though venue may be influenced by congressional interest shown by statute, United States v. Lueros, supra; United States v. Johnson, 323 U.S. 273 (1944); United States v. National City Lines, Inc., 334 U.S. 573 (1948).

9-14.212 Transfer For Prejudice In The District

After motion by defendant under Rule 21(a) is made and once the court is satisfied that a transfer is necessary to insure a fair and impartial trial, the order of transfer may not be revoked by the defendant's change in mind (though the court may have the authority to rescind the transfer in its sound discretion), United States v. Marcello, 423 F.2d 993 (5th Cir. 1970), cert. denied 398 U.S. 959, reh'g. denied 399 U.S. 938; United States v. Anguilo, supra.

The court must be sensitive to prejudicial publicity, Estes v. States of Texas, 381 U.S. 532 (1965); Sheppard v. Maxwell, supra; Rideau v. State of Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); Marshall v. United States, 360 U.S. 310 (1959). But the court may disregard prospective jurors' assurances of impartiality if there is danger of well grounded fear of a prejudicial atmosphere preventing a fair trial, United States v. Marcello, supra; Irvin v. Dowd, supra; Sheppard v. Maxwell, supra.

While a showing of actual prejudice is not a prerequisite, Estes v. State of Texas, supra, there must be showing of identifiable prejudice, United States v. Hinton, supra.

Although many cases suggest that voir dire is the proper time for the court to determine the question of whether a fair and impartial trial can be had because of the claim of prejudice against a defendant in the district, there is no requirement that the determination be made at voir dire, rather whenever the court "is satisfied", United States v. Marcello, supra; United States v. Mandel, 415 F. Supp. 1033 (Md. 1976); United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1968); United States v. Florio, 13 F.R.D. 296 (S.D.N.Y. 1952). However, voir dire helps to confirm the court's decision and buttress the showing of no abuse in the court's decision, Greenhill v. United States, 298 F.2d 405 (5th Cir. 1962), cert. denied, 371 U.S. 830; Bearden v. United States, 320 F.2d 99 (5th Cir. 1963); Murphy v. State of Florida, 363 F. Supp. 1224 (S.D. Fla. 1973) reh'g. denied 497 F.2d 1368; United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973) cert. denied 416 U.S. 936, reh'g. denied, 416 U.S. 1000; Estes v. United States, 335 F.2d 609 (5th Cir. 1964) cert. denied 379 U.S. 964, reh'g. denied 380 U.S. 926; United States v. Green, 373 F. Supp. 149 (E.D. Pa. 1974), aff'd 505 F.2d 731 (3rd Cir. 1974);

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. Mandel, *supra*; Blumenfield v. United States, 284 F.2d 46 (8th Cir. 1960), *cert. denied* 365 U.S. 812. Dismissal on a showing of prejudicial pretrial publicity of the government is not a proper remedy on motion of a transfer nor has voir dire been employed to test whether a fair trial can be held in the district, United States v. Abbott Laboratories, 505 F.2d 565 (4th Cir. 1974), *cert. denied* 420 U.S. 990.

9-14.213 Transfer In Other Cases

As amended in 1966, Rule 21(b) allows the transfer to any district without being limited to transfer to a district in which venue would lie as under the original rule, Jones v. Gasch, *supra*.

The court's determination of the motion to transfer lies in the court's sound discretion, unlike transfer under Rule 21(a) which is mandatory (after the court is satisfied that prejudice makes transfer necessary), (see dissent in United States v. Griesa, *supra* at 284). The trial court's discretion will not be overturned unless clearly abused, Jones v. Gasch, *supra*; United States v. Jessup, 38 F.R.D. 42 (M.D.Tenn 1965); thus defendant carries the burden of showing substantial balance of inconvenience to warrant transfer in the interest of justice, United States v. Jones, 43 F.R.D. 511 (D.C. 1967).

Further, an appellate court cannot substitute its judgment for that of the trial court by exercising de novo examination of the motion to transfer, Platt v. Minnesota Mining & Manufacturing Co., *supra*. And a mandamus action by the government to vacate a transfer order, being an extraordinary action reserved for extraordinary causes, will not prevail except upon a clear showing that the trial court has acted in excess of its authority or clearly abused its discretion, United States v. Clark, *supra*, at 278 suggesting that the 1966 amendment deemphasizing venue in Rule 21(b) transfers should eliminate any occasion for the use of mandamus. Compare, Auerbach v. United States, 347 F.2d 742 (5th Cir. 1965), *cert. denied*, 382 U.S. 958 (1965), in which it was held defendant had no relief from court's order retransferring back the case on its own motion, where the defendant appealed the retransfer order and it was held the order was not final and thus not appealable; also United States v. Garber, 413 F.2d 285 (2nd Cir. 1969); and *see*, Holdsworth v. United States, 179 F.2d 933 (1st Cir. 1950) dismissing defendant's appeal of retransfer order and holding transferee court cannot review transfer order.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 15

	<u>Page</u>
9-15.000 <u>EXTRADITION</u>	1
9-15.001 International Extradition in General	1
9-15.100 PROCEDURES FOR REQUESTING EXTRADITION FROM A FOREIGN COUNTRY TO THE UNITED STATES	1
9-15.110 <u>Determining if Extradition is Possible</u>	1
9-15.111 <u>Treaties in Force Respecting Extradition</u>	3
9-15.120 <u>Provisional Arrest</u>	19
9-15.121 Information Necessary to Institute Provisional Arrest	21
9-15.130 <u>Documents Needed for Extradition</u>	22
9-15.131 <u>Prosecutor's Affidavit</u>	22
9-15.132 <u>Indictment and Warrant</u>	24
9-15.133 <u>Evidence Establishing the Case</u>	25
9-15.140 <u>Transmission of the Completed Documents to Washington, D.C.</u>	27
9-15.150 <u>Presentation of the Extradition Request</u>	28
9-15.160 <u>Arrangements for Taking Custody After Extradition</u>	29
9-15.170 <u>Alternatives to Extradition</u>	30
9-15.180 <u>Sample Documents</u>	30
9-15.181 Certification by Attorney General	31
9-15.182 Certification of Director, Office of International Affairs	32
9-15.183 Affidavit in Support of Extradition Request	33
9-15.184 Complaint and Warrant of Arrest	36
9-15.185 Text of Statutes Cited in Affidavit in Support of Extradition Request	37
9-15.186 Sworn Statement of Witness	40
9-15.187 Sworn Statement of Police Officer	43

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-15.188	Sworn Statement of Medical Examiner	45
9-15.189	Sworn Statement of Witness Attaching Transcript of Grand Jury Testimony	47
9-15.190	<u>Sample Documents (Continued)</u>	52
9-15.191	Affidavit in Support of Extradition	52
9-15.192	Exemplification Certificate	56
9-15.193	Indictment	57
9-15.194	Jury Verdict	63
9-15.195	Warrant of Arrest	64
9-15.196	Sworn Statement of Secret Service Agent	65

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.000 EXTRADITION

9-15.001 International Extradition in General

9-15.100 PROCEDURES FOR REQUESTING EXTRADITION FROM A FOREIGN COUNTRY TO  
THE UNITED STATES

International extradition is the process by which a person found in one country is surrendered to another country for trial or punishment. It is a formal process, regulated by treaty and conducted between the federal government of the United States and the government of a foreign country. Thus, it has a legal basis different from that of interstate rendition (frequently referred to as "interstate extradition"), which is mandated by Article 4, Section 2 of the Constitution, and regulated chiefly by state law and 18 U.S.C. §3182. Every request for international extradition must be approved by the Department of Justice, and formally presented to the foreign government by the Department of State through diplomatic channels. It is important to remember that the terms of an extradition treaty can only be invoked by the Department of State or persons authorized by it to do so. Prosecutors, police officers, or investigators are generally free to communicate directly with their foreign counterparts for the purpose of giving or receiving information on law enforcement matters, but they may not request the arrest of a fugitive for extradition. Unauthorized requests for foreign arrests cause serious diplomatic difficulties, and can subject the requestor to heavy financial liability or other sanctions. Cf. Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979).

9-15.110 Determining if Extradition is Possible

A prosecutor or investigator interested in arranging for extradition should first contact the Office of International Affairs ("OIA"), Criminal Division, Department of Justice, Washington, D.C., telephone number: (202) 724-7600. Extradition specialists in OIA determine whether the extradition request can succeed, taking into account the facts of the particular case, the language of the applicable treaties, and the law of the foreign country involved. In order for OIA to make this determination, the inquirer should be prepared to provide the following information:

A. The country in which the fugitive is believed to be located, and his/her address or location there. OIA will need to know his/her status (i.e., at large, incarcerated for another offense, etc.);

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. The citizenship of the fugitive and whether the fugitive is a citizen of the foreign country from which extradition is contemplated. (It is not enough to determine that the fugitive is a United States citizen, since many persons have dual citizenship);

C. The precise crime for which the fugitive has been charged or convicted, including the citation to the specific statute involved;

D. The full title of the court in which criminal proceedings are pending, the name of the judge, the date on which the indictment or conviction was obtained, and the docket number of the proceedings;

E. A brief description of the specific acts committed in connection with the offense, i.e., who did what to whom, when, where, and why; and

F. A brief description of how the prosecutor intends to prove the violation (e.g., witness testimony, documentary evidence, undercover agents, codefendants who agreed to cooperate with the government). Based on this information, OIA determines whether an extradition request can be made, taking the following factors into account:

1. Whether there is an extradition treaty in force with the country in which the fugitive is located. (A list of the treaties on extradition to which the United States is a party (as of November 1, 1983) will be set out at USAM 9-15.111, infra, in the near future);

2. Whether the treaty provides for extradition for the crime in question;

3. Whether the offense in question is punishable under the law of the requested country;

4. Whether there is sufficient evidence to justify extradition in accordance with the terms of the treaty;

5. Whether the fugitive is a national of the requested country (many foreign countries do not extradite their own citizens); and

6. Whether extradition is in the interests of justice in light of all the circumstances.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.111 Treaties in Force Respecting Extradition July 1, 1982

Afghanistan	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Albania	49 Stat. 3313, TS 902 (1935)
Algeria	No bilateral extradition treaty Single Convention on Narcotics
Antigua	28 UST 227, TIAS 8468 (1977) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Argentina	23 UST 3501, TIAS 7510 (1972) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism Against Diplomats
Australia	27 UST 957, TIAS 8234 (1976) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Austria	46 Stat. 2779, TS 822 (1930) 49 Stat. 2710, TS 873 (1939) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism Against Diplomats
The Bahamas	47 Stat. 2122, TS 849 (1935) TIAS 9185 (1978) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Bahrain	No bilateral extradition treaty Single Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Bangladesh	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Barbados	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Belgium	32 Stat. 1894, TS 409 (1902) 49 Stat. 3276, TS 900 (1935) 15 UST 2252, TIAS 5715 (1964) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Belize	28 UST 227, TIAS 8468 (1982)
Benin	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Bhutan	No bilateral extradition treaty
Bolivia	32 Stat. 1857, TS 399 (1902) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Botswana	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Brazil	15 UST 2093 TIAS 5691 (1964) 15 UST 2112, TIAS 5691 (1964) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Brunei	No bilateral extradition treaty
Bulgaria	43 Stat. 1886, TS 687 (1924) 49 Stat. 3250, TS 894 (1934) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism Against Diplomats

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Burma	47 Stat. 2122, TS 849 (1941) Single Convention on Narcotics
Burundi	No bilateral extradition treaty New York Convention on Terrorism Against Diplomats
Cameroon	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Canada	27 UST 983, TIAS 8237 (1976) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism Against Diplomats
Cape Verde	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Central African Republic	No bilateral extradition treaty
Chad	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Chile	32 Stat. 1850, TS 407 (1902) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
China (PRC)	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
China (Taiwan)	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Colombia	U.S.T. ____, TIAS ____ (1982) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Comorro Islands	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Congo	37 Stat. 1526, TS 561 (1911) 46 Stat. 2276, TS 787 (1929) 50 Stat. 1117, TS 909 (1936)
Costa Rica	43 Stat. 1621, TS 668 (1923) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Cuba	33 Stat. 2265, TS 440 (1905)* 33 Stat. 2273, TS 441 (1905)* 44 Stat. 2392, TS 737 (1926)* Single Convention on Narcotics
Cyprus	47 Stat. 2122, TS 734 (1926) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Czechoslovakia	44 Stat. 2367, TS 734 (1926) 49 Stat. 3253, TS 895 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Denmark	25 UST 1293, TIAS 7864 (1974) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Djibouti	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Dominica	28 UST 227, TIAS 8468 (1982) Single Convention on Narcotics - Amending Protocol
Dominican Republic	36 Stat. 2468, TS 550 (1910) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Ecuador	18 Stat. 199, TS 79 (1873) 55 Stat. 1196, TS 972 (1941) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Egypt	19 Stat. 572, TS 270 (1875) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
El Salvador	37 Stat. 1516, TS (1911) Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Estonia	43 Stat. 1849, TS 703 (1924)* 49 Stat. 3190, TS 886 (1935)*
Ethopia	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Fiji	47 Stat. 2122, TS 849 (1935) 24 UST 1965, TIAS 7707 (1973) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Finland	31 UST 944, TIAS 9629 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
France	37 Stat. 1526, TS 561 (1911) 22 UST 407, TIAS 7075 (1917) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Gabon	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
The Gambia	47 Stat. 2122 TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

E. Germany (Dem.)	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
W. Germany (Fed.)	32 UST 1485, TIAS 9785 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Ghana	47 Stat. 2122, TS 849 (1935) Single Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Greece	47 Stat. 2185, TS 855 (1932) 51 Stat. 357, EAS 1144 (1937) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Grenada	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Guatemala	33 Stat. 2147, TS 425 (1903) 55 Stat. 1097, TS 963 (1941) Single Convention on Narcotics - Amending Protocol
Guinea	No bilateral extradition treaty Single Convention on Narcotics
Guinea Bissau	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
Guyana	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Haiti	34 Stat. 2858, TS 447 (1905) Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
Honduras	37 Stat. 1616, TS 568 (1912) Single Convention on Narcotics - Amending Protocol
Hungary	11 Stat. 691, TS 9 (1856) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Iceland	32 Stat. 1096, TS 405 (1906) 34 Stat. 2887, TS 449 (1906) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
India	47 Stat. 2122, TS 849 (1942) Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
Indonesia	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Iran	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
Iraq	49 Stat. 3380, TS 907 (1936) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Ireland	26 Stat. 1508, TS 139 (1889)* 32 Stat. 1864, TS 391 (1900)* 34 Stat. 2903, TS 458 (1905)* 8 Stat. 572, TS 119 (1842)* Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Israel	14 UST 1707, TIAS 5476 (1963) 18 UST 382, TIAS 6246 (1967) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Italy	26 UST 493, TIAS 8052 (1975) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Ivory Coast	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Jamaica	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics New York Convention on Terrorism against Diplomats
Japan	31 UST 895, TIAS 9625 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Jordan	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Kampuchea (Cambodia)	No bilateral extradition treaty
Kenya	47 Stat. 2122, TS 849 (1935) 16 UST 1866, TIAS 5916 (1965) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Kiribati (Gilbert Islands)	28 UST 227, TIAS 8468 (1977) Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
N. Korea	No bilateral extradition treaty
S. Korea	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Kuwait	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Laos	No bilateral extradition treaty Single Convention on Narcotics
Latvia	43 Stat. 1738, TS 677 (1924)* 49 Stat. 3131, TS 844 (1935)*
Lebanon	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Lesotho	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Liberia	54 Stat. 1733, TS 955 (1939) New York Convention on Terrorism against Diplomats
Libya	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Liechtenstein	50 Stat. 1337, TS 915 (1937) Single Convention on Narcotics
Lithuania	43 Stat. 1835, TS 196 (1924)* 49 Stat. 3355, TS 904 (1936)*
Luxembourg	23 Stat. 808, TS 849 (1935) 49 Stat. 3077 TS 904 (1936) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Madagascar	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Malawi	47 Stat. 2122, TS 849 (1935) 18 UST 1822, TIAS 6238 (1967) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Malaysia	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol
Maldives	No bilateral extradition treaty
Mali	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Malta	47 Stat. 2122, TS 849 (1935)
Mauritania	No bilateral extradition treaty Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Mauritius	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics
Mexico	31 UST 5059, TIAS 9656 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Monaco	Diplomats 54 Stat. 1780, TS (959 1940) Single Convention on Narcotics - Amending Protocol
Mongolia	No bilateral extradition treaty Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Morocco	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Mozambique	No bilateral extradition treaty Single Convention on Narcotics
Nauru	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics
Nepal	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
Netherlands	___ UST ___, TIAS 10733 (1983) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
New Zealand	22 UST 1, TIAS 7035 (1970) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Nicaragua	35 Stat. 1869, TS 462 (1907) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Niger	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Nigeria	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Norway	31 UST 5619, TIAS 9679 (1980) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Oman	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
Pakistan	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Panama	34 Stat. 2851, TS 445 (1905) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Papua New Guinea	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Paraguay	25 UST 967, TIAS 7838 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Peru	31 Stat. 1921, TS 288 (1901) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Philippines	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Poland	46 Stat. 2282, TS 789 (1929) 49 Stat. 3394, TS 908 (1936) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Portugal	35 Stat. 2071, TS 512 (1908) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Qatar	No bilateral extradition treaty
Romania	44 Stat. 2020, TS 713 (1925) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Rwanda	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol New York Convention on Terrorism against Diplomats
St. Lucia	28 UST 227, TIAS 8648 (1977) Single Convention on Narcotics - Amending Protocol
St. Vincent and the Grenadines	No bilateral extradition treaty
San Marino	35 Stat. 1971, TS 495 (1908) 49 Stat. 3198, TS 891 (1935)
Sao Tome and Principe	No bilateral extradition treaty Single Convention on Narcotics
Senegal	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Seychelles	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Sierra Leone	47 Stat. 2122, TS 849 (1935) Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Singapore	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Solomon Islands	28 UST 277, TIAS 8468 (1977) Single Convention on Narcotics - Amending Protocol
Somalia	No bilateral extradition treaty
South Africa	2 UST 884, TIAS 2243 (1951) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Spain	22 UST 737, TIAS 7136 (1971) 29 UST 2283, TIAS 8938 (1978) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Sri Lanka (Ceylon)	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Sudan	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Suriname	26 Stat. 1481, TS 256 (1889) 33 Stat. 2257, TS 436 (1904) Single Convention on Narcotics Hague Convention on Aircraft Hijacking
Swaziland	47 Stat. 2122, TS 849 (1935) 21 UST 1930, TIAS 6934 (1970) Single Convention on Narcotics
Sweden	14 UST 1845, TIAS 5496 (1963) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Switzerland	31 Stat. 1928, TS 354 (1901) 49 Stat. 3192, TS 889 (1935) 55 Stat. 1140, TS 969 (1941) Single Convention on Narcotics Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Syrian Arab Republic	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Tanzania	47 Stat. 2122, TS 849 (1935)
Thailand	16 UST 2066, TIAS 5946 (1965) 43 Stat. 1749, TS 681 (1924) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Togo	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against
Tonga	Diplomats 47 Stat. 2122, TS 849 (1966) 28 UST 5290, TIAS 8628 (1977) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking
Trinidad and Tobago	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Tunisia	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Turkey	____ UST ____, TIAS 9891 (1981) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Tuvalu	28 UST 227, TIAS 8468 (1977) Single Convention on Narcotics - Amending Protocol
Uganda	No bilateral extradition treaty Hague Convention on Aircraft Hijacking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

CSSR	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
United Arab Emirates	No bilateral extradition treaty Hague Convention on Aircraft Hijacking
United Kingdom	28 UST 227, TIAS 8468 (1977) 1/ Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Upper Volta	No bilateral extradition treaty Single Convention on Narcotics
Uruguay	35 Stat. 2028, TS 501 (1908) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Vanuatu	No bilateral extradition treaty
Vatican City	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol
Venezuela	43 Stat. 1698, TS 675 (1923) Single Convention on Narcotics
Vietnam 2/	No bilateral extradition treaty Single Convention on Narcotics Hague Convention on Aircraft Hijacking Hague Convention on Aircraft Hijacking
W. Samoa	No bilateral extradition treaty
S. Yemen	No bilateral extradition treaty Single Convention on Narcotics
Yemen (Sanaa)	No bilateral extradition treaty

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Yugoslavia	32 Stat. 1890, TS 406 (1902) Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Zaire	No bilateral extradition treaty Single Convention on Narcotics - Amending Protocol Hague Convention on Aircraft Hijacking New York Convention on Terrorism against Diplomats
Zambia	47 Stat. 2122, TS 849 (1935) Single Convention on Narcotics
Zimbabwe	28 UST 227, TIAS 8468 (1977) Single Convention on Narcotics

\* The State Department officially considers this treaty to be in force, but does not submit formal extradition requests to the country in question.

1/ Applies to Great Britain, Northern Ireland, the Channel Islands, The Isle of Man, Bermuda, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands and Dependencies, Gibraltar, Hong Kong, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Christopher, Nevis and Anguilla, St. Helena and Dependencies, Sovereign Base Areas of Akrotiri and Dhekelia in the Islands of Cyprus, and the Turks and Caicos Islands.

2/ The listings in Treaties in Force for Vietnam, the Republic of Viet-Nam (South Viet-Nam), the Democratic Republic of Viet-Nam (North Viet-Nam), the provisional Revolutionary Government of the Republic of South Viet-Nam, and the Socialist Republic of Vietnam are based on the last notice received by the United States Government from the depository for treaty or agreement in question. The United States has been informed by the Socialist Republic of Vietnam that "... in the principle, the Government of the Socialist Republic of Vietnam is not bound by the treaties, agreements signed by the former Saigon administration. However... the Government of the Socialist Republic of Vietnam will consider the agreements, on an individual basis, and will examine adherence to those agreements, treaties which are in the interests of the Vietnamese people..."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.120 Provisional Arrest

If OIA concludes that extradition is in order, it is possible in many cases to arrange for the immediate arrest of the fugitive in order to prevent any further flight while the documents and evidence in support of a formal request for extradition are being prepared. This procedure is known as "provisional arrest." Provisional arrest should not be regarded as the ordinary method of initiating extradition proceedings. Rather, it should only be considered in emergency situations, where there is a real danger of the fugitive fleeing further before the extradition documents can be completed. Under some of the newer treaties--for example, those with Canada and Germany--the Department of Justice can arrange provisional arrest directly with the authorities abroad by telephone, telex, or via INTERPOL. In other cases, OIA asks the Department of State to instruct the appropriate U.S. Embassy or consulate to make the request. All requests for provisional arrest should be made to OIA and should be supported by the information called for on the attached form. The request should be in writing, but in urgent cases it can be made by phone with written confirmation immediately thereafter.

Because provisional arrest is reserved for exceptional cases, OIA requires that if the fugitive is wanted for federal charges the Section within the Criminal Division of the Department of Justice which has oversight responsibility for the case must also agree that provisional arrest is appropriate before further action is taken. For example, a request for the provisional arrest of a wanted narcotics trafficker must be approved by the Narcotic and Dangerous Drug Section. If the fugitive is wanted on state or local charges, the state extradition officer must support the request by attesting that the necessary documentation will be submitted on time, and that all of the expenses of the extradition request will be covered.

Please remember that when provisional arrest is effected, the time available to prepare, review, authenticate, translate, and transmit the documents in support of the extradition request is drastically reduced. The maximum period for provisional arrest under most treaties is shown on the following chart:

<u>Time</u>	<u>Country</u>
30 days	Denmark
40 days	Belgium, France, Germany, Guatemala, Sweden
45 days	Argentina, Australia, Canada, Italy, Japan, New Zealand, Paraguay, United Kingdom, Spain

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

<u>Time</u>	<u>Country</u>
60 days	Brazil, Colombia, Haiti, Israel, Mexico, Nicaragua, Turkey, Uruguay
2 months	Albania, Bolivia, Chile, Costa Rica, Czechoslovakia, Dominican Republic, El Salvador, Finland, Greece, Honduras, Liberia, Panama, Peru, South Africa, Switzerland, Venezuela, Yugoslavia
3 months	Austria, Bulgaria, Iraq, Poland

In most countries, the fugitive will be released from custody if the documents do not arrive within a deadline prescribed by treaty, and in some countries the fugitive can never be surrendered or extradited thereafter. Therefore, when provisional arrest is involved the documents must be completed and sent to OIA within 14 days.

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.121 Information Necessary to Institute Provisional Arrest

A. Requesting State/Federal District: \_\_\_\_\_

B. Name of Fugitive: \_\_\_\_\_

C. Description: \_\_\_\_\_

1. Date of Birth: \_\_\_\_\_ 5. Sex: \_\_\_\_\_

2. Place of Birth: \_\_\_\_\_ 6. Eyes: \_\_\_\_\_

3. Height: \_\_\_\_\_ 7. Hair: \_\_\_\_\_

4. Weight: \_\_\_\_\_ 8. Race: \_\_\_\_\_

Other Physical Attributes (tattoos, missing digits, etc.): \_\_\_\_\_

D. Other Identity information (alias, passport number, SS number, etc.): \_\_\_\_\_

E. Present Location (Country/City): \_\_\_\_\_

F. Description of Facts of Case (with date and place of offense): \_\_\_\_\_

G. Criminal Offense for which Extradition is Sought (with statutory citation):

1. \_\_\_\_\_

2. \_\_\_\_\_

3. \_\_\_\_\_

H. Details of indictment or complaint (date, location, file no., court, judge's name): \_\_\_\_\_

I. Details of Arrest Warrant (date, location, file no, court, judge's name): \_\_\_\_\_

J. Reason for Requesting Provisional Arrest: \_\_\_\_\_

K. Extradition Approved (name and phone number of authorizing official): \_\_\_\_\_

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.130 Documents Needed for Extradition

In general, extradition documents are prepared by the federal or state authorities responsible for prosecuting the charges for which extradition is requested. It should be noted that the authority which prepares the papers must also pay all the expenses incurred in connection with the request, including the cost of translating the documents, any cost of legal representation in the foreign country, any charges levied by the asylum country for boarding the fugitive pending extradition, the transportation and other expenses of the escort officers handling the fugitive's physical return to this country, and the cost of transportation for the fugitive to the United States. In federal cases, the U.S. Attorney or Strike Force Office should resolve any questions regarding costs with the Executive Office for U.S. Attorneys in Washington, D.C.

The documents needed for extradition are:

1. An affidavit from the prosecutor describing the case;
2. Authenticated copies of the indictment and arrest warrant;  
and
3. Evidence establishing the crime or proving that the fugitive was convicted, including sufficient evidence to identify the fugitive.

9-15.131 Prosecutor's Affidavit

Every extradition must be accompanied by an affidavit describing the state or federal laws applicable to the case, including the statute of limitations. Since this affidavit is sometimes the only opportunity that any United States authority will have to assist the foreign court in deciding whether extradition should be granted, it should be tailored to serve as a sort of "cover letter," introducing and explaining the rest of the documents.

The affiant (usually the prosecutor assigned to the case) should set forth enough of his/her background to assure foreign authorities that he/she is familiar with the case and with United States criminal law. If the documents are destined for Canada or England, the affiant's goal should be to qualify as an expert on federal criminal law or on the criminal law of his/her state. The affiant then should accomplish three major objectives:

First, he/she must identify and attest to the authenticity of any court papers, depositions, or other documents submitted in support of the extradition request.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Second, he/she should clearly identify the offenses with which the fugitive is charged, and the penalties prescribed for the offenses. He/she should also indicate that the statutes involved were in force when the offenses occurred and are currently in full force and effect. If the laws are not still in effect--e.g., Title 21, United States Code, Sections 173 and 174--an explanation should be given. He/she must also specifically state that the applicable statute of limitations has not expired. The affiant should set forth the text of each statute involved, including the applicable statute of limitations. If the statutes are relatively short ones, they can be set out in the affidavit itself, as shown in USAM 9-15.190, infra. If the statutes are lengthy, the text should be typed (not photocopied from an annotation) and attached as an exhibit to the affidavit. See USAM 9-15.185, infra.

Third, the prosecutor should give a brief description of the facts underlying the charges, indicating in general who is accused of doing what. This description of the crime should not simply track the language of the indictment, the applicable statute, or the treaty.

It is important that the language in the affidavit be as clear and lucid as possible. This is especially true when the extradition request is going to a non-English speaking country, because the papers will have to be translated into the language of that country. Please remember that the translators, who are usually from the State Department Language Services Division, are frequently unfamiliar with the precise meaning of jargon that attorneys take for granted, and hence will be unable to reproduce it accurately in the language of the country of refuge, which may not have an exactly equivalent term anyway. The following pointers are worth remembering:

1. Use plain language;
2. Use short sentences;
3. Avoid legal terms of art, even ones which sound simple in English (e.g., "due process of law");
4. Avoid "alleged," "purported," "aforementioned," "foregoing," "hereinafter," etc.; and
5. Avoid flowery expressions (most of it will be lost in translation anyway).

The prosecutor's affidavit may be executed before any person lawfully authorized to administer oaths, but it is highly desirable that the affidavit be executed before a judge or magistrate. In some jurisdic-

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

tions, judges decline to execute affidavits, and insist that the clerk or deputy clerk of the court perform this task. Where this is the case, the signature of a judicial official must appear somewhere on the affidavit. The preferred method is to have the judge or magistrate sign a jurat attesting to the signature and authority of the clerk or deputy clerk. See USAM 9-15.183, infra. Please make sure that the judge or magistrate certifies the signature that actually appears on the affidavit. Sometimes a deputy clerk signs in place of a clerk, and in such cases the judicial official must certify the signature, title and authority of the deputy clerk--not the clerk. See USAM 9-15.190, infra.

9-15.132 Indictment and Warrant

A fugitive can only be extradited on the basis of a formal criminal charge. Moreover, a person who has been extradited can be prosecuted or punished only for the specific charge for which he/she was surrendered--even if there are other charges which could otherwise have been brought against him/her. See United States v. Rauscher, 119 U.S. 907 (1886); Johnson v. Brown, 205 U.S. 309 (1907). Therefore, it is important to include in the extradition documents a copy of the outstanding indictment or complaint concerning all charges on which the fugitives will be tried or punished after his/her surrender.

The packet should also contain copies of the outstanding warrant of arrest for each offense for which the fugitive is sought. If the fugitive is merely accused of a crime, the outstanding warrant will usually show that it was unexecuted and any contrary indication should be explained. Where the fugitive has already been convicted, it is the outstanding warrant for bond jumping, jail break, etc.--not the executed warrant for the offense underlying the conviction--which must be submitted. Since the original indictment or complaint and warrant usually remain among the records of the court, the copies of those documents included in the extradition packet should show that they are true copies of the original. There are several ways to indicate this fact. The best way is to have the clerk of the court apply a stamp or seal to the document itself authenticating it as a true copy of original court records. Then the document should be attached as an exhibit to the prosecutor's affidavit. Alternatively, federal district court clerks have a standard form, A.O. Form 132, which is frequently used to achieve this end. See USAM 9-15.191, infra. Many state court clerks, too, use a standard form for this task; for example, California State court clerks use DA/8110-P76CL194C-REV.4/76. These forms are usually filled out by a clerk of the court, whose signature, title and authority are certified by the judge of the court.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.133 Evidence Establishing the Case

All of the treaties condition the extradition of an accused person on the presentation of evidence sufficient to justify committal for trial under the law of the requested country. England, Canada and other common law countries usually demand that the documents show a prima facie case. A prima facie case for extradition exists when the court believes that "if the evidence before the (extradition) magistrate stood alone at trial, a reasonable jury properly directed could accept it and find a verdict of guilty." STANBROOK AND STANBROOK, EXTRADITION: THE LAW AND PRACTICE 28 (1980), citing Schtraks v. Government of Israel (1964) AC 556.

The preferred method for demonstrating to the foreign government that this requirement has been satisfied is for the prosecutor to attach to his/her affidavit enough sworn statements from investigating agents, witnesses, co-conspirators, or experts to indicate that each crime in question was committed and that the fugitive committed it. The affidavits, read together, should contain evidence on each charge for which extradition is sought.

Extradition affidavits should be prepared with formal captions showing the title of the case and the court in which the prosecution is pending. Each affiant should clearly and concisely set out the facts which he/she knows, avoiding hearsay if at all possible. The courts in England, Canada and other common law countries do not accept hearsay in extradition proceedings. In other countries, hearsay is admissible, but is accorded considerably less weight than statements based upon personal knowledge. Since the affidavits will be presented as exhibits to the prosecutor's affidavit, it is not absolutely necessary that they be signed by a judge, and they can be executed before any person authorized to administer an oath (including a notary public). It is also not necessary that all of the affidavits be executed within the state or federal district from which the request for extradition emanates. Where a witness resides or is located elsewhere, his/her affidavit can be taken wherever it is most convenient, then forwarded to the prosecutor preparing the request for inclusion in the packet. See, e.g., USAM 9-15.188, infra.

The other method of documenting the case is for the prosecutor to forward excerpts from the grand jury transcripts establishing that the fugitive committed the offense. We try to avoid using grand jury transcripts unless it is impossible to obtain affidavits, because the authorities in many foreign countries do not understand the purpose or function of a grand jury, and tend to accord grand jury transcripts less weight than affidavits or sworn statements containing the same information. Indeed, at least one country--Canada--has occasionally refused to accept grand jury transcripts as evidence. When grand jury transcripts are used, permission from the court for their release is

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

generally required by Rule 6(e), Federal Rules of Criminal Procedure. Grand jury transcripts are best presented as an exhibit accompanying a short affidavit from the witness who testified attesting that the transcript in fact reflects what he/she said before the grand jury. See USAM 9-15.189, infra. Alternatively, the prosecutor who appeared before the grand jury can identify the transcripts and attach them as an exhibit to his/her own affidavit.

When the fugitive has already been convicted in this country, the extradition packet generally need not contain evidence of a prima facie case. Instead, it should contain proof that the fugitive was convicted after having been present at trial, and that he/she is unlawfully at large without having fully served his/her sentence. In federal cases, the Judgment and Committal Order (CR Form 25) is the best proof of conviction and sentence. A copy of that document should be authenticated like the indictment and warrant of arrest and included as an attachment to the affidavit by the prosecutor. A similar judicial document proving conviction is available in state proceedings, and it should be submitted in state cases. Special problems arise when the defendant in a federal case is convicted but becomes a fugitive before any sentence is imposed. Since Rule 43, Federal Rules of Criminal Procedure, requires that the defendant be personally present at sentencing, United States v. Brown, 456 F.2d 1112 (5th Cir. 1972), there is usually no CR Form 25 available in these cases. One solution to this problem is to ask the court to complete the top half of CR Form 25 anyway, crossing out the phrase "and the defendant appeared in person and" in the second line and leaving blank the portion of the form describing the term of imprisonment. Another possible solution is for the court to actually impose sentence in absentia, with the understanding that the sentence will be vacated and the defendant resentenced after he/she is returned to the jurisdiction. See U.S. v. Brown, supra. Still another solution: obtain copies of the jury's verdict forms as proof of conviction. In any event, the prosecutor must explain in his/her affidavit exactly what occurred, and detail the procedural quirk involved, since in most foreign countries the defendant is sentenced immediately upon conviction. See USAM 9-15.190, infra.

Proof that a convicted and sentenced person is unlawfully at large can generally be presented in the form of an affidavit from the warden of the prison from which he/she escaped, or from his/her probation officer. Since some extradition treaties provide that a convicted person need not be surrendered unless a specified minimum period of imprisonment remains to be served, the affidavit should also indicate the portion of the sentence remaining to be served, and how the prisoner came to be at large. Please recall that in cases involving convicted persons the foreign government will still need a clear explanation of what the fugitive was convicted of doing, and since there will be no affidavits from witnesses,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the explanation of the case in the prosecutor's affidavit assumes special importance.

The affidavits or grand jury transcripts must leave no room for any doubt about the identity of the fugitive. "Mistaken identity" is a universally accepted defense to extradition, so it is crucial that the documents establish (1) that the person who is accused or convicted indeed committed the crime, and (2) that the person whose extradition is sought is the person accused or convicted. This is usually done by having the witnesses identify a photograph of the accused, which the foreign authorities can compare to the person arrested for extradition. However, fingerprint cards, photocopies of passports or other identity evidence can be used, provided they are accompanied by sufficient proof to tie them to the accused.

Do not have the witness recount having picked the fugitive's photo out of a photo spread, and do not include an entire photo spread in the extradition documents. The practice of using a photo spread instead of a single photo to avoid unduly suggestive identification wholly is a creature of United States constitutional law, and is inappropriate in the extradition context. Attaching a photo spread simply invites an argument into the extradition proceedings which can and should be avoided. All exhibits should be initialed by the affiant, dated, and attached to the upper left-hand corner of a separate page of the affidavit, in order that the ribbon attaching the certificates containing the State Department's seal may pass through them. The evidence establishing the identity of the fugitive can be included in the same affidavit or grand jury testimony setting out the evidence of the offense.

9-15.140 Transmission of the Completed Documents to Washington, D.C.

In cases prepared by federal prosecutors, the original and four copies of the documents should be sent directly to OIA, which reviews them for sufficiency and arranges for the seal of the Department of Justice to be affixed to them.

In cases prepared by state and local prosecutors, there are two paths the documents can take. In most jurisdictions, the original and four copies of the papers are first sent to the extradition officer for the state. The extradition officer reviews the documents, attaches to them a requisition bearing the seal of the state, and sends them to OIA for review. Alternatively, the original and four copies of the prosecutor's affidavit and its attachments can be sent directly to OIA for review, with a copy sent to the state extradition officer. OIA will then affix the Department of Justice seal to the papers (instead of the seal of the state) before sending them forward to the State Department. This latter

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

procedure is particularly useful when a provisional arrest has been made and it is essential that the documents get to the foreign authorities as soon as possible. Please remember that OIA will not take action on a non-federal extradition case until it receives assurances from the state's extradition officer that the state supports the request and will be responsible for expenses incurred in the case.

Once OIA is satisfied that the documents are in order, it forwards them to the Department of State for final screening (chiefly to detect possible foreign policy or political problems which might stem from the request) and action. The Department of State affixes its seal to the documents, and, if necessary, arranges for translation of the documents, or for authentication of the documents at the foreign country's embassy in Washington. The State Department then sends the documents to the appropriate United States diplomatic post abroad, along with instructions for formally requesting extradition.

9-15.150 Presentation of the Extradition Request

United States diplomatic agents abroad present the documents to the foreign country's equivalent of the Department of State. What happens to the extradition case beyond this point depends upon the extradition laws of the requested country. Usually, the requested country's diplomats forward the case to their country's equivalent of the Department of Justice, which directs the appropriate authorities to make arrangements for the fugitive's arrest.

In most cases, the courts of the requested country must also consider the matter, and judicial proceedings are conducted to determine whether the extradition request should be granted. The United States prosecutor, investigator and witnesses generally do not participate in these proceedings. If the foreign authorities require any evidence in addition to that already submitted, it is supplied by way of authenticated affidavits or depositions. If the court rules in favor of extradition, the fugitive may be able to appeal the decision in a higher court; in other countries, he/she can challenge the decision through habeas corpus or its equivalent; and in a few countries, the fugitive can do both. When the foreign court's approval of an extradition request has survived all review, the request goes back to the Executive authorities of the country where the ultimate decision whether or not to order the fugitive turned over to us is made.

United States embassies abroad are obliged to report all developments in connection with extradition requests to the Department of State, which passes this information on to OIA and the interested prosecutor.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In some countries the United States must retain an attorney to handle the arrangements for the arrest, detention, and extradition of the fugitive. Where this is the case, United States foreign service officers abroad aid in the selection and retention of foreign counsel. (See 22 C.F.R. 92.82) In federal cases, OIA assists the prosecutor in seeing to it that the foreign counsel is compensated by the Department of Justice. State authorities must make their own arrangements--and pay the necessary expenses--in cases involving the extradition of state fugitives.

9-15.160 Arrangements for Taking Custody After Extradition

Once the authorities in the foreign country indicate that they are ready to surrender the fugitive, OIA notifies the prosecutor and coordinates the logistics of the formal surrender. The law in many countries provides that a fugitive found extraditable is freed if he/she is not removed within a specified time. See, e.g., Article 12 of the English Extradition Act of 1870 (two months after committal for extradition); Article 16 of Denmark's Extradition of Offenders Law (Act No. 249, 1967) (30 days after committal for extradition). Several of the newer extradition treaties contain similar provisions. Therefore, these steps must be accomplished as quickly as possible.

First, agents must be selected to go to the foreign country, take custody of the fugitive, and return with him/her to the United States. Since the Marshals Service maintains a cadre of officers with special training and experience in international escort duty of this kind, OIA generally arranges for the Enforcement Operations Division of the United States Marshals Service headquarters in Washington to designate the agents. Usually, at least two escort agents are dispatched for each federal or state fugitive to be guarded. In exceptional circumstances the prosecutor handling the case may request that a state or federal law enforcement officer familiar with the case be permitted to assist the Marshals in the transfer.

Once OIA is notified of the names of the escort agents, it arranges for the Department of State to issue a President's Warrant, the special authorization law enforcement officers need to accept custody of the fugitive on behalf of the United States and to convey the fugitive to his/her place of trial. As the name implies, these warrants were formerly issued by the President of the United States in accordance with 18 U.S.C. §3193. Now they are issued by the Secretary of State pursuant to Executive Order 11517. After the warrant has been signed, arrangements are made for its delivery to the escort agents before their departure.

When all the arrangements have been made, OIA should be informed of the agents' travel plans so that this information can be transmitted to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the foreign government and the relevant United States diplomatic or consular post. This notification assures that the agents will receive the assistance and cooperation of United States officials in the requested country upon their arrival. The agents should plan their return trip to be nonstop if at all possible, since a stop in a third country may provide an opportunity for the fugitive to arrange to have counsel or friends there to obtain a local court order for his/her release and necessitate new extradition proceedings. If a stop in a third country is unavoidable, OIA must be notified so that appropriate arrangements can be made with the authorities in that country. Many extradition treaties contain clauses obliging each country to assist the other in the transit of prisoners being extradited from third states. By properly invoking these provisions, many of the problems of transit can be reduced.

If the foregoing has been handled smoothly, someone from the United States embassy or the investigative agency's liaison office in the requested country will meet the escort agents at the airport, see them through customs, and introduce them to the appropriate authorities in the requested country's law enforcement establishment. Custody of a fugitive is usually handed over at the airport just before the escort agents and their prisoner leave for their return to the United States.

Most treaties provide that evidence or fruits of the offense seized in the course of the fugitive's arrest are to be surrendered when extradition is granted. The agents may be asked to accept custody of such articles at the time the extraditee is surrendered. However, frequently the requested country chooses to make other arrangements, particularly if the articles are of significant value.

9-15.170 Alternatives to Extradition

If extradition is not possible, there are often alternative courses of action which can help bring the fugitive to justice. For example, OIA sometimes can arrange for the fugitive to be deported from the country of refuge to the United States, or to a third country from which extradition is available. If the fugitive is a citizen of the country of refuge, OIA can sometimes persuade that country to prosecute him/her there on the charges developed in the United States, because many countries have jurisdiction over their nationals' extraterritorial offenses.

9-15.180 Sample Documents

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.181 Certification by Attorney General

# United States Department of Justice



Washington, D.C., September 23, 198

To all to whom these presents shall come, Greeting:

I certify that Philip T. White whose name is signed to the accompanying paper, is now, and was at the time of signing the same, Director of International Affairs, Criminal Division, U. S. Department of Justice, Washington, D. C.

*July commissioned and qualified.*

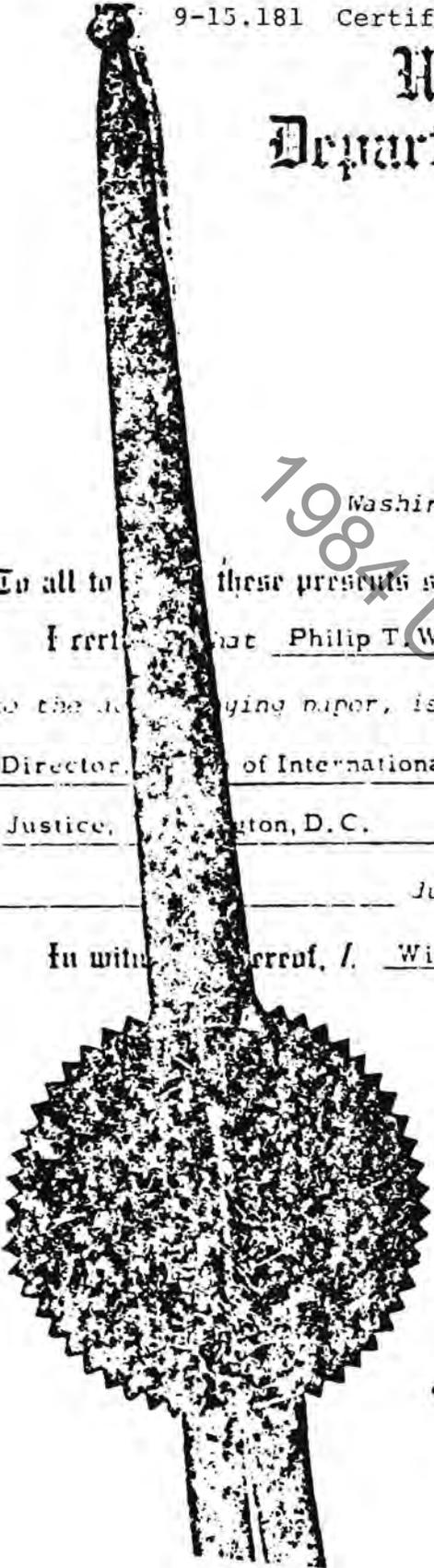
In witness whereof, I, William French Smith

Attorney General of the United States, have hereunto caused the Seal of the Department of Justice to be affixed and my name to be attested by the Deputy Assistant Attorney General for Administration of the said Department on the day and year first above written.

Attorney General

*[Signature]*  
Deputy Assistant Attorney General for Administration

DECEMBER 1, 1985  
Sec. 9-15.181  
Ch. 15, p. 31



1984 USAM (Superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.182 Certification of Director, Office of International  
Affairs

C E R T I F I C A T I O N

I certify that attached hereto is the original Affidavit in Support of Request for Extradition, with attachments A through E, prepared by Assistant United States Attorney Hamilton Burger. A true copy of these documents is maintained in the official files of the United States Department of Justice in Washington, D.C.

Philip T. White, Director  
Office of International Affairs  
Criminal Division  
U.S. Department of Justice

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.183 Affidavit in Support of Extradition Request

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

---

IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A

NO. CR. 82-3456

"MAD DOG"

---

Washington )  
District of Columbia )

HAMILTON BURGER, being duly sworn, deposes and says that:

1. I am a citizen of the United States and a resident of Alexandria, Virginia.

2. I am 31 years old. In June, 1975, I received a Doctor of Law Degree, with Distinction, from Harvard University, and was admitted in that same year to the bar of the Supreme Court of Massachusetts. In September, 1976, I was admitted to the bar of the District of Columbia Court of Appeals. From July, 1976, to July, 1977, I was a law clerk to Judge John Marshall of the District of Columbia Court of Appeals.

3. From July 1977 until the present I have been an Assistant United States Attorney in the District of Columbia. My duties include the prosecution of persons charged with violations of federal and District of Columbia laws. I have personally participated in the preparation and trial of over three hundred cases involving alleged violations of these laws. Based upon my training and experience, I am an expert in the criminal laws and procedures of this District and of the United States.

DECEMBER 1, 1985  
Sec. 9-15.183  
Ch. 15, p. 33

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

4. I am currently assigned to the Superior Court Division of the United States Attorney's Office, and I am responsible for the preparation for trial of felony cases. In the course of my duties I have become familiar with the charges and the evidence in the case of United States v. John Smith, Docket Number 82-3456, and with the contents of the files of the Superior Court and of the United States Attorney's Office regarding this matter.

5. On May 15, 1982 John Smith was formally accused by Complaint of murder while armed with a dangerous and deadly weapon, in violation of Sections 22-2401 and 22-3202 of the District of Columbia Code. Based on these charges, Judge Dresden Black signed a warrant for Mr. Smith's arrest that same day.

6. Basically, the Complaint charges that Mr. Smith murdered one Fred Luckless on April 31, 1982. Mr. Smith is accused of shooting Mr. Luckless in the chest with a pistol after an altercation over admission to a house party at Mr. Luckless' home.

7. It is the practice of the Superior Court of the District of Columbia to retain the original Complaint and Warrant of Arrest on file among the records of the Court. Therefore, I have obtained a true and accurate copy of the Complaint and of the Warrant of Arrest from the Clerk of the Court, marked it Exhibit "A", and attached it to this affidavit.

8. I have also attached to this affidavit as Exhibit "B" a true and accurate copy of the text of Sections 22-2401, 22-2404, and 22-3202 of the District of Columbia Code, which are the statutes cited in the Complaint and applicable to this case. I have thoroughly reviewed these

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

statutes, and attest that each was duly enacted and in force at the time that the offense occurred, at the time that the Complaint was filed, and is currently in full force. A violation of any of these laws is a felony under United States law.

I have also included in Exhibit "B" a true and accurate copy of the text of Title 18, United States Code, Section 3281, which is the statute of limitations on prosecuting the crimes charged in the Complaint. I have thoroughly reviewed this statute, and attest that prosecution of the charges in this case is not barred by the statute of limitations.

9. I have attached to this affidavit a true and accurate copy of the statements of Mr. Charles Bystander (Exhibit C), Metropolitan Police Officer Joseph Friday (Exhibit D), former Assistant Medical Examiner Vinodbhai Patel (Exhibit E), and Mr. Stu L. Pidgeon (Exhibit F). Each of these affidavits was sworn to before a notary public duly and legally authorized to administer an oath for this purpose. I have thoroughly reviewed these statements and the attachments to them, and attest that this evidence indicates that JOHN SMITH is guilty of the offenses charged in the Complaint.

\_\_\_\_\_  
HAMILTON BURGER  
Assistant United States Attorney

Sworn to and subscribed before me  
this \_\_\_\_ day of \_\_\_\_\_, 1982.

\_\_\_\_\_  
JUDGE  
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
DECEMBER 1, 1985  
Sec. 9-15.183  
Ch. 15, p. 35

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.184 Complaint and Warrant of Arrest

LS: 1789-41

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION  
COMPLAINT

The undersigned having made oath before me declared that on 15th day  
of April A.D. 19 82, at the District aforesaid, one  
John Smith a/k/a/ "Mad Dog"  
while armed with a dangerous or deadly weapon  
did then and there unlawfully and feloniously, with purpose, with premeditation and with malice  
aforethought, kill and murder one Fred B. Luckless.

in violation of Title 22, Section 2201 of the District of Columbia Code.

Subscribed and sworn to before me this 15th day of May, A.D. 1982  
Frank Erskine  
Judge District Court

WARRANT

To The United States Marshal or any other authorized federal officer or the Chief of Police of  
the District of Columbia  
WHEREAS the foregoing complaint and affidavit supporting the allegations thereof have  
been submitted, and there appearing probable cause and reasonable grounds for the issuance of  
an arrest warrant for John Smith a/k/a/ "Mad Dog"  
YOU ARE THEREFORE COMMANDED TO BRING THE DEFENDANT BEFORE SAID  
COURT OR OTHER PERSON ENUMERATED IN 18 U.S.C. 3061 forthwith to answer said  
charge.

Issued May 15, 1982  
SEX: Male  
DOB: 02-23-43  
UCR: 366-595  
ID: \_\_\_\_\_  
Charge: Murder 1 (M.D.) while armed  
Date of arrest: as of about  
Officer: Frank Erskine Homicide Div. Date: \_\_\_\_\_  
Badge No.: 557  
OFFICER MUST SIGNATURE RETURN  
Officer's Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

1984 USAM (Superseded)

A TRUE COPY W0060861  
TEST:

Clerk Superior Court of the  
District of Columbia  
By [Signature]  
Clerk

(Exhibit A)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.185 Text of Statutes Cited in Affidavit in Support of  
Extradition Request

Section 22-2401, District of Columbia Code, provides:

§22-2401. Murder in the first degree -- Purposeful killing -- Killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating, or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnaping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapons, is guilty of murder in the first degree.

Section 22-2404, District of Columbia Code, provides:

§22-2404. Punishment for murder in first and second degrees.

The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall impose either a sentence of death by electrocution or life imprisonment.

Notwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.

Whoever is guilty of murder in the second degree shall be imprisoned for life or not less than twenty years.

Cases tried prior to March 22, 1962, and which are before the court for the purpose of sentence or resentence shall be governed by the provisions of law in effect prior to March 22, 1962: Provides, That the judge may, in his sole discretion, consider circumstances in mitigation and in aggravation and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment, in which event he shall sentence the defendant to life imprisonment. Such a sentence of life imprisonment shall be in accordance with the provisions of this Art.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In any case tried under this Act as amended where the penalty prescribed by law upon conviction of the defendant is death except in cases otherwise provided, the jury returning a verdict of guilty may by unanimous vote fix the punishment at life imprisonment; and thereupon the court shall sentence him accordingly; but if the jury shall not thus prescribe the punishment the court shall sentence the defendant to suffer death by electrocution unless the jury by its verdict indicates that it is unable to agree upon the punishment in which case the court shall sentence the defendant to death or life imprisonment.

Section 22-3202, District of Columbia, states:

§22-3202. Committing crime when armed — Added punishment.

(a) Any person who commits a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm (or limitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machinegun, rifle, dirk, bowie knife, butcher knife switchblade knife, razor, blackjack, billy, or metallic or other false knuckles) —

(1) may, if he is convicted for the first time of having so committed a crime of violence in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to life imprisonment; and

(2) shall, if he is convicted more than once of having so committed a crime of violence in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a minimum period of imprisonment of not less than five years and a maximum period of imprisonment which may not be less than three times the minimum sentence imposed and which may be up to life imprisonment.

(b) Where the maximum sentence imposed under this section is life imprisonment, the minimum sentence imposed under subsection (a) may not exceed fifteen years' imprisonment.

(c) Any person sentenced under subsection (a) (2) of this section may be released on parole in accordance with chapter 2 of title 24, at any time after having served the minimum sentence imposed under that subsection.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(d) (1) Chapter 402 of title 18 of the United States Code (Federal Youth Corrections Act) shall not apply with respect to any person sentenced under paragraph (2) of subsection(a).

(2) The execution or imposition of any term of imprisonment imposed under paragraph(2) of subsection(a) may not be suspended and probation may not be granted.

(e) Nothing contained in this section shall be construed as reducing any sentence otherwise imposed or authorized to be imposed.

(f) No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section.

Title 18, United States Code, Section 3281, states:

§ 3281. Capital offenses

An indictment for any offenses punishable by death may be found at any time without limitation except for offenses barred by the provisions of law existing on August 4, 1939.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.186 Sworn Statement of Witness

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

-----  
IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A

NO. CR. 82-3456

"MAD DOG"

-----  
Washington )  
District of Columbia )

CHARLES O. BYSTANDER, being duly sworn, deposes and says that:

1. I am a citizen of the United States and a resident of Washington, D.C.

2. On April 31, 1982 I attended a party given by Fred Luckless at his home at 315 Ninth Street N.W., Washington, D.C. The purpose of the party was to raise money to donate to Fred's church, and the admission fee was six dollars. About thirty people were present.

3. At about 10:00 p.m. JOHN SMITH, whose nickname I know to be "MAD DOG," came to the door and asked to be admitted. "MAD DOG" said that he wanted to come in without paying the six dollars, but Fred would not let him. I saw them scuffle briefly, and saw Fred hit "MAD DOG" in the face. Then "MAD DOG" left.

4. At about 11:30 p.m. "MAD DOG" and three other men I do not know came to the door. One of them had a shotgun. They forced their way in, and one held the shotgun aimed at the guests while the others grabbed Fred and dragged him out on the porch. Though the open doorway:

(Exhibit C)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

I saw the two men hold Fred while "MAD DOG" beat him in the face and chest with his fists. Then "MAD DOG" took a silver colored pistol out of his pocket and held it against Fred's chest. "MAD DOG" said, "This is it buddy, I'll teach you not to say 'no' to a sociopath like me." Then he shot Fred. As Fred fell, the four men ran away.

5. I went immediately to Fred's side, but I could see at once that he was dead. I shouted for someone to call the police.

6. I know JOHN SMITH, or "MAD DOG," quite well because he once lived in the same apartment building I live in. I have signed and dated a photograph of him, and attached it to this affidavit.

Charles Bystander  
CHARLES BYSTANDER

Sworn to and subscribed before me  
this 7 day of June, 1982.

Lowell E. Scintore  
NOTARY PUBLIC

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION



Charles O. Byrd  
6/21/82

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.187 Sworn Statement of Police Officer

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

-----  
IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A

NO. CR. 82-3456

"MAD DOG"

-----  
Washington )  
District of Columbia )

JOSEPH FRIDAY, being duly sworn deposes and says that:

1. I am a citizen of the United States and a resident of Washington, D.C. Since January 1972 I have been employed as a police officer with the Metropolitan Police. I hold the rank of Sargent.

2. At about 11:30 p.m. on April 31, 1982 I was on routine patrol in a police car with my partner, fellow officer Frank Erskine, when we received a radio transmission indicating that shots had been fired in the vicinity of Ninth and "D" Streets N.W. We activated our police lights and siren, and proceeded to the scene. As we arrived, I noticed four males running down Ninth Street in the opposite direction, and radioed for other officers to apprehend them.

3. When we arrived, we found the body of Mr. Fred Luckless sprawled on porch, his wife weeping by his side. There was a large gunshot wound in the body's chest area. I immediately checked the body for a pulse, a heartbeat, or other signs of life, but there were none.

(Exhibit D)

DECEMBER 1, 1985  
Sec. 9-15.187  
Ch. 15, p. 43

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

4. My partner took statements from the people at the house while I escorted the body to the City Morgue and remained with it during autopsy by Dr. V. Patel.

Joseph Friday  
JOSEPH FRIDAY

Sworn to and subscribed before  
this 3 day of July, 1982.

Luell E. Seaborn  
NOTARY PUBLIC

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.188 Sworn Statement of Medical Examiner

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

---

IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A

NO. CR. 82-3456

"MAD DOG"

---

State of New York    )  
County of Queens    )

Vinodbhai Patel, being duly sworn, deposes and says that:

1. I am a Doctor of Medicine fully licensed to practice in the State of New York and the District of Columbia. From January 1975 to May 3, 1982, I was employed as Associate Medical Examiner in the District of Columbia, and was assigned to the City Morgue. I am now retired, and reside in New York City.

2. On April 31, 1982, pursuant to my official duties, I performed an autopsy on the body of Fred Luckless.

(Exhibit E)

---

DECEMBER 1, 1985  
Sec. 9-15.188  
Ch. 15, p. 45

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

3. As a result of this autopsy I determined that Mr. Luckless died at about 11:30 p.m. that evening. I found that the cause of death was an internal hemorrhage, caused by a gunshot wound in the chest resulting severe in trauma to the heart, lung, diaphragm, liver, and stomach. The gunshot was clearly homicidal in nature. A copy of my autopsy report is attached hereto.

Vinodbhai Patel  
Vinodbhai Patel

Sworn to and subscribed before me  
this 3 day of June, 1982.

I M S... ..  
NOTARY PUBLIC

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.189 Sworn Statement of Witness Attaching Transcript  
of Grand Jury Testimony

IN THE SUPERIOR COURT OF DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

-----  
IN THE MATTER OF THE EXTRADITION

OF JOHN SMITH, A/K/A

NO. CR. 82-3456

"MAD DOG"

-----  
Washington )  
District of Columbia )

STEWART L. PIDGEON, being duly sworn, deposed and says that:

1. I am a citizen of the United States and a resident of  
Washington D.C.

2. On May 15, 1982 I testified before a grand jury investigating  
the murder of Fred Luckless. A transcript of the proceedings, which I  
have signed and marked "Exhibit G-1," is attached to this affidavit. I  
attest that this transcript accurately reflects my testimony.

3. A photograph of the man I know as "Mad Dog" and refer to as  
such during my grand jury testimony is signed and marked "Exhibit G-2,"  
and attached to this affidavit.

*Stewart L. Pidgeon*  
\_\_\_\_\_  
Stewart L. Pidgeon

Sworn to and subscribed before me  
this 31 day of June, 1982.

*[Signature]*  
\_\_\_\_\_  
NOTARY PUBLIC

DECEMBER 1, 1985  
Sec. 9-15.189  
Ch. 15, p. 47

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

---

IN RE: POSSIBLE VIOLATION  
OF D.C. CODE 22-2401

---

Grand Jury Room 5  
District of Columbia Superior Court  
Washington, D.C.

June 15, 1982

The testimony of STEWART L. PIDGEON was taken in the presence of a  
full quorum of the Grand Jury before:

HAMILTON BURGER, Esquire  
Assistant United States Attorney

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Whereupon,

STEWART L. PIDGEON was called as a witness, and after being first duly sworn by the Foreman of the Grand Jury, was examined and testified as follows:

By MR. BURGER:

Q: Would you tell the Grand Jury your name, please?

A: Stewart L. Pidgeon.

Q: Mr. Pidgeon, in return for your cooperation in this matter, the Government has promised that you will not be prosecuted for first degree murder; is that correct?

A: Yeah.

Q: Have any other promises been made to you by the Government?

A: No, they have not.

Q: Now, directing your attention to the night of April 31, 1982. Where were you?

A: Look, man, you know all this. At around 11:00 p.m. I was in the Cutthroat Bar and Grill, shooting pool, when Mad Dog comes in, mad as can be.

Q: Wait a minute, who is "Mad Dog?"

A: John Smith.

Q: Where is he now?

A: He got away. I hear he left the country. Anyway "Mad Dog" said some guy embarrassed him by not letting him into a party. Said he wanted to teach the guy a lesson. He gave me and "Fingers" Bailey and Rick Thomas twenty-five bucks apiece to help him.

Q: Did he say what he wanted you to do "to help" him.

A: Naw, but I thought I knew: hold the guy so Mad Dog -- he's kinda short -- could work him over.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Q: Did you agree to this proposal?

A: Yeah.

Q: Did you then proceed to the home of Fred Luckless?

A: Yeah.

Q: What happened when you arrived?

A: It started out fine. "Fingers" held a shotgun on the people in the party, so they wouldn't get any smart ideas, and Rick and I held the dude Mad Dog was after by his arms, and Mad Dog whacked him around a couple of times.

Then Mad Dog pulls out a pistol, says something to the guy, and shoots him. Just like that. I was so surprised I almost died, too.

Q: What happened then?

A: We all ran like hell. The cops picked me up five blocks away, down Ninth Street.

MR. BURGER: I have no further questions. Any questions from the Grand Jury? No? All right, Mr. Pidgeon, thank you very much. You may step outside.

(Witness excused.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION



EXHIBIT 6-1  
Serial 2 of 10

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.190 Sample Documents (Continued)

9-15.191 Affidavit in Support of Request for Extradition

J. WILLIAM HUNTER  
United States Attorney

HAMILTON BURGER  
Assistant United States Attorney

450 Golden Gate Avenue  
San Francisco, California 94102  
Telephone: (415) 556-9508

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, ) NO. CR-80-0462-SC  
 )  
v. ) AFFIDAVIT IN SUPPORT OF  
 ) REQUEST FOR EXTRADITION  
 )  
JOE DEKAS, )  
 )  
Defendant. )

I, HAMILTON BURGER, being duly sworn, depose and state:

1. I am a citizen of the United States, residing in San Francisco, California.
2. I am 31 years old. In June 1973, I received a Doctor of Laws Degree from the University of California, and I was admitted in the same year to the Bar of the State of California. From December 1973, to November 1979, I was employed by the United States Securities and Exchange Commission as an enforcement attorney in San Francisco, California.
3. From November 1979, until the present, I have been employed by the United States Department of Justice as an Assistant United States Attorney for the Northern District of California. My duties are to prosecute persons charged with criminal violations of the laws of the United States.
4. During my practice in the Office of the United States Attorney for the Northern District of California, I have become knowledgeable about criminal statutes and case law of the United States, and more particularly in that area of the criminal law relating to violations of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the Federal Counterfeiting Statutes. I also represented the Government in the case of United States v. Joe Doaks, CR-80-1234-SC (N.D. Cal.). Thus, I am familiar with the evidence and charges in the case, and the contents of the files of the United States District Court and of the Office of the United States Attorney regarding this matter.

5. On November 5, 1980, a grand jury formally accused Joe Doaks of violating the criminal laws of the United States. This indictment was replaced by a new or "superceding" indictment on January 7, 1981.

I have obtained true copies of the two indictments from the Clerk of Court, and attached them to this affidavits as Exhibits A and B.

6. The statutes cited in the indictment and applicable to this case are Title 18, United States Code, Sections 471 and 472.

Section 471 states:

Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

Section 472 states:

Whoever, with intent to defraud, passes, utters, publishes or sell, or attempts to pass, utter, publish or sell, or with like intent brings into the counterfeited, or altered obligations or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

A violation of either of these statutes is a felony under United States law. Each of these statutes was the duly enacted law of the United States at the time that the offenses were committed, at the time that the indictment was filed, and is now in full force.

The statute of limitations on prosecuting these offenses is

Section 3282 of Title 18, United States Code, which states:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Since the applicable statute of limitations is five years, the indictments, which charged criminal violations beginning in July 1980, were filed within the prescribed time.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

7. The superseding indictment charged three offenses. Count one charged that Mr. Doaks manufactured counterfeit obligations of the United States (in this case, money) and did so knowingly, willfully, and with the intent to defraud. Specifically, the indictment charged that Mr. Doaks printed counterfeit United States money appearing to be worth approximately \$462,444.

Count Two charged that on November 6, 1980, Mr. Doaks knowingly and willfully and with intent to defraud, sold approximately \$1,000 of the counterfeit obligations (money) of the United States which he had manufactured to one Roger Able. Roger Able is a Special Agent of the United States Secret Service, the United States government agency responsible for investigating the manufacture and distribution of counterfeit United States money.

Count three charged that on November 7, 1980, the defendant, Joe Doaks, attempted to sell \$100,000 of the counterfeit obligations (money) which he had manufactured to Roger Able.

8. I was present in Court on February 2 through 5, 1981, as Mr. Doaks was tried before presiding Judge Samuel Conti and a jury. Mr. Doaks, who had been released from custody on bail, was present and was represented by his attorney, Joyce Davenport. I saw Mr. Doaks present in Court on each day of trial until the afternoon of February 5, 1981, when the jury began its deliberations. On February 9, 1981, the Court found Mr. Doaks guilty on all three charges of the indictment. I have attached a true copy of the jury's verdict form to this affidavit as Exhibit C.

9. Although he was required to appear in Court on February 5, 6 and 9, 1981, Mr. Doaks did not appear in Court those days, and has not returned for sentencing. Under United States law, a defendant who is present at the beginning of the trial but leaves the jurisdiction of the Court after the evidence in the case has been presented to the jury, and thereafter fails to return to court, can be found guilty by the jury without being personally present. However, under United States law the defendant may not be sentenced unless he is personally present. Accordingly, while Mr. Doaks has been convicted of the offenses as charged in the indictment, he has not been sentenced yet.

**Note:**

Due to the poor quality of the print original, P. 55-66 are not legible, there are typos in the numbering system and names in the contents.

(Digital Services, March 23, 2015)

1984 USAM (superseded)

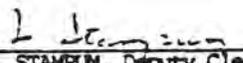
UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

10. When Mr. Doaks failed to appear on February 9, 1981, United States District Judge Samuel Conti ordered the Clerk of the Court to issue a warrant for Mr. Doak's arrest. I have attached a true copy of this warrant to this affidavit as Exhibit D.

11. Attached as Exhibit E is the original affidavit of Richard Baker, Special Agent of the United States Secret Service. This affidavit is sworn to before a Clerk of the United States District Court, Northern District of California, who is a person duly empowered to administer an oath for this purpose. On November 7, 1980, Agent Baker, together with Agent Roger Able, placed Mr. Doaks under arrest shortly after Mr. Doaks attempted to sell the counterfeit money to Agent Able. Mr. Baker transported Mr. Doaks to the Secret Service offices, where he photographed Mr. Doaks and took his fingerprints. Attached as Exhibit 1 to the affidavit of Richard Baker is the photograph of Joe Doaks. Mr. Doak's fingerprints are attached as Exhibit 2 to Richard Baker's affidavit.

  
HAMILTON BURGER  
Assistant United States Attorney  
Northern District of California

SWORN AND SUBSCRIBED TO BEFORE ME  
THIS 11 DAY OF January, 1981.

  
I. STAMPUM, Deputy Clerk  
United States District of Court for the  
Northern District of California

I, NOAH PEALE, Judge of the United States District Court for the Northern District of California, hereby certify that I, STAMPUM, whose name and signature appears on this affidavit, is and was on the date thereof Deputy Clerk of this Court, duly appointed and sworn, and is authorized to administer an oath for general purposes.

This 11 day of January, 1981.

  
\_\_\_\_\_  
Noah Peale

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.192 Exemplification Certificate

A. O. Form 132 (Rev. Dec. 1955)

Plenipotentiary Certificate

**United States District Court**  
for the  
NORTHERN DISTRICT OF CALIFORNIA

I, **WILLIAM L. WHITTAKER**, Clerk of the United States District Court for the Northern District of California, and keeper of the records and seal thereof, hereby certify that the documents attached hereto are true copies of CP50-4625C: Indictment, Superseding Indictment, Jury Verdict, Warrant of Arrest

now remaining among the records of the Court.

In testimony whereof I hereunto sign my name and affix the seal of said Court, in said District,

at San Francisco, Ca., this 2nd day of July, 1981.  
William L. Whittaker  
William L. Whittaker, Clerk.

I, **WILLIAM T. SWEIGERT**, United States District Judge for the Northern District of California, do hereby certify that William L. Whittaker whose name is above written and subscribed, is and was at the date thereof, Clerk of said Court, duly appointed and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation or record thereof, is in due form of law.

7/8 1981  
William T. Sweigert  
United States District Judge,  
William T. Sweigert

I, **WILLIAM L. WHITTAKER**, Clerk of the United States District Court for the Northern District of California, and keeper of the seal thereof, hereby certify that the Honorable **WILLIAM T. SWEIGERT** whose name is within written and subscribed, was on the 6th day of July, 1981, and now is Judge of said court, duly appointed, confirmed, sworn, and qualified; and that I am well acquainted with his handwriting and official signature and know and hereby certify the same within written to be his.

In testimony whereof I hereunto sign my name, and affix the seal of said Court at the city of San Francisco, in said State, on this 9th day of July, 1981.

William L. Whittaker  
William L. Whittaker, Clerk.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.193 Indictment

FILED  
JAN 7 4 25 PM '81  
WILLIAM L. WHITTAKER  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

COURT TRAN

1 G. WILLIAM HUNTER  
2 United States Attorney  
3 Attorney for Plaintiff

4 I hereby certify that the annexed  
5 instrument is a true and correct copy  
6 of the original on file in my office.

7 WILLIAM L. WHITTAKER  
8 U.S. District Court  
9 Northern District of California

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

10

12 *W. L. Whittaker*  
13 Deputy Clerk  
14 Date: *6-29-81*

15 UNITED STATES OF AMERICA, )  
16 Plaintiff, ) CR. NO: 80-0462-SC  
17 ) VIOLATIONS: Title 18, United  
18 ) States Code, Section 471 -  
19 ) Manufacturing Federal Reserve  
20 ) Notes; Title 18, United States  
21 ) Code, Section 472 - Selling  
22 ) Counterfeit Federal Reserve  
23 ) Notes  
24 )  
25 )  
26 )  
27 )

28 SUPERSEDING INDICTMENT

29 CRIME CODE: (Title 18, United States Code, Section 471)

30 The Grand Jury charges, THAT

31 Between on or about July 1, 1980, and on or about  
32 November 7, 1980, in the City of San Francisco, County of San Mateo,  
33 State and Northern District of California,

34 JOE DOAKS,

35 defendant herein, did knowingly, willfully, and with intent to  
36 defraud, falsely make, forge, alter and counterfeit obligations  
37 of the United States. These obligations consisted of approximately  
38 \$463,344 in counterfeited Federal Reserve Notes of the following  
39 denominations and serial numbers, to wit, following amounts:

40	DENOMINATION	SERIAL NO.	NUMBER OF NOTES	VALUE
41	1. \$100	B-71314093-B	1190	\$119,000
42	2. \$100	C-07328017-B	2059	\$205,900
43	3. \$50	B-55557174	311	\$15,550
44	4. \$20	B-42542311-B	26	\$520

EXHIBIT 4

DECEMBER 1, 1985  
Sec. 9-15.193  
Ch. 15, p. 57

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

	<u>DENOMINATION</u>	<u>SERIAL NO.</u>	<u>NUMBER OF NOTES</u>	<u>VALUE</u>
1				
2	5. \$20	L-06487151-B	780	\$ 15,600
3	6. \$20	L-82837057-D	1,149	\$ 22,980
4	7. \$20	F-41836049-A	9	\$ 180
5	8. \$10	C-86950644-B	133	\$ 1,330
6	9. \$10	L-27669675-A	1,211	\$ 12,110
7	10. \$10	L-49182452-A	525	\$ 5,250
8	11. \$5	L-53937360-B	134	\$ 670
9	12. \$5	L-18136473-A	1,205	\$ 6,025
10	13. \$1	L-96630363-F	529	\$ 529

COUNT TWO: (Title 18, United States Code, Section 472)

The Grand Jury further charges: T H A T

On or about November 6, 1980, in the City and County of San Francisco, State and Northern District of California,

**JOE DOAKS,**

defendant herein, did knowingly, willfully, and with intent to defraud, keep in his possession, pass, utter, publish and sell to **Roger Able** approximately one thousand dollars (\$1,000) in counterfeit obligations of the United States. These counterfeit obligations consisted of nine counterfeit \$100 Federal Reserve Notes, Serial Number B-71140091-A, and five counterfeit \$20 Federal Reserve Notes, Serial Number F-42842804-A.

COUNT THREE: (Title 18, United States Code, Section 472)

The Grand Jury further charges: T H A T

On or about November 7, 1980, in the City and County of San Francisco, State and Northern District of California,

**JOE DOAKS,**

defendant herein, did knowingly, willfully, and with intent to defraud, keep in his possession, conceal, and attempt to pass, utter, publish and sell, and did pass, utter, publish and sell to **Roger Able** approximately \$125,740 in counterfeit

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

obligations of the United States. These counterfeited obligations consisted of approximately 1,239 counterfeited \$100 Federal Reserve Notes, Serial No. E-71343093-A; approximately 127 counterfeited \$20 Federal Reserve Notes, Serial Number F-42842804-A; approximately 20 counterfeited \$10 Federal Reserve Notes, Serial Number G-36950644-B; and approximately 20 counterfeited \$5 Federal Reserve Notes, Serial Number L-53937360-B.

A True Bill.

*[Signature]*  
FOREMAN

*[Signature]*  
G. WILLIAM HUNGER  
United States Attorney

(Approved as to Form 10-1)  
DA:RCS

1984 USAAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

FILED  
Nov 25 1981

G. WILLIAM HUNTER  
United States Attorney  
Attorney for Plaintiff

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.  
ATTEST.

WILLIAM I. WHITTAKER  
Clerk U.S. District Court  
Northern District of California

By [Signature]  
Deputy Clerk  
Dated 6-29-81

**COURTRAN**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,  
Plaintiff,

JOE DONAS,  
Defendant.

VIOLATIONS: Title 18, United States Code, Section 471 - Manufacturing Federal Reserve Notes; Title 18, United States Code, Section 472 - Selling Counterfeit Federal Reserve Notes

INDICTMENT

COME WE: (Title 18, United States Code, Section 471)

The Grand Jury charges: T H A T

Between on or about July 1, 1980, and on or about November 6, 1980, in the City of Daly City, County of San Mateo, State and Northern District of California,

**JOE DONAS,**

defendant herein, did knowingly, willfully, and with intent to defraud, falsely make and counterfeit obligations of the United States. These obligations consisted of approximately \$462,444 in counterfeited Federal Reserve Notes of the following denominations and serial numbers, in the following amounts:

<u>DENOMINATION</u>	<u>SERIAL NO.</u>	<u>NUMBER OF NOTES</u>	<u>VALUE</u>
1. \$100	B-71345093-A	1293	\$129,300
2. \$100	L-07028917-A	2058	\$205,800
3. \$50	B-55557474	913	\$ 45,650
4. \$20	F-42042304-A	906	\$ 18,120

INDICT 25 MR

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

	<u>DENOMINATION</u>	<u>SERIAL NO.</u>	<u>NUMBER OF NOTES</u>	<u>VALUE</u>
1				
2	5. \$20	L-06487151-B	780	\$ 15,600
3	6. \$20	L-82837057-D	1,149	\$ 22,980
4	7. \$20	F-41836049-A	9	\$ 180
5	8. \$10	G-86950644-B	133	\$ 1,330
6	9. \$10	L-27669675-A	1,121	\$ 11,210
7	10. \$10	L-48182452-A	525	\$ 5,250
8	11. \$5	L-53937360-B	134	\$ 670
9	12. \$5	L-18136473-A	1,205	\$ 6,025
10	13. \$1	L-96630363-F	529	\$ 529

COURT TWO: (Title 18, United States Code, Section 472)

The Grand Jury further charges: T H A T

On or about November 6, 1980, in the City and County of San Francisco, State and Northern District of California,

**JOE DOAKS,**

defendant herein, did knowingly, willfully, and with intent to defraud, sell to Roger Able approximately one thousand dollars (\$1,000) in counterfeited obligations of the United States. These counterfeited obligations consisted of nine counterfeited \$100 Federal Reserve Notes, Serial Number B-71348093-A, and five counterfeited \$20 Federal Reserve Notes, Serial Number F-42842394-A.

COURT THREE: (Title 18, United States Code, Section 472)

The Grand Jury further charges: T H A T

On or about November 7, 1980, in the City and County of San Francisco, State and Northern District of California,

**JOE DOAKS,**

defendant herein, did knowingly, willfully, and with intent to defraud, sell to Roger Able approximately \$126,740 in counterfeited obligations of the United States. These counterfeited obligations consisted of approximately 1,230 counterfeited \$100 Federal Reserve Notes, Serial No. B-71348093-A;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32

approximately 127 counterfeit \$20 Federal Reserve Notes, Serial Number F-42842804-A; approximately 20 counterfeit \$10 Federal Reserve Notes, Serial Number G-86950644-B; and approximately 20 counterfeit \$5 Federal Reserve Notes, Serial Number L-53937360-B.

A True Bill.

*Thomas H. Hunt*  
\_\_\_\_\_  
FOREMAN

*William J. Hunter*  
\_\_\_\_\_  
G. WASHINGTON HUNTER  
United States Attorney

(Approved as to Form       )  
AUSA/DH

USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.194 Jury Verdict

*6-29-81*

FILED

FEB 5 10 56 AM '81  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

U.S. COURT  
OF DISTRICT OF CA  
UNITED STATES OF AMERICA,

Plaintiff,

v.

JOE DOAKS,

Defendant

No. Crim. 80-0162-SC

*39*

1984 USAM (superseded)

JURY VERDICT

WE, THE JURY, find the defendant at the bar, GUILTY of  
Count One (1) of the indictment.

WE, THE JURY, find the defendant at the bar, GUILTY of  
Count Two (2) of the indictment.

WE, THE JURY, find the defendant at the bar, GUILTY of  
Count Three (3) of the indictment.

*Joseph Mickelson*  
Foreperson

Dated February 9, 1981

EXHIBIT # *C*

I hereby certify that the annexed  
instrument is a true and correct copy  
of the original on file in my office.  
\_\_\_\_\_  
Deputy Clerk  
*6-29-81*

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.195 Warrant of Arrest

**WARRANT OF ARREST**  
UNITED STATES DISTRICT COURT

**INSTRUCTIONS:** Type or legibly print. Forward copies No. 1 through No. 3 intact to the U.S. Marshal or other authorized officer; retain No. 4 copy. If applicable, use No. 4 copy to withdraw warrant. After completion of return, U.S. Marshal will distribute copies No. 1 through No. 3 as appropriate.

NAME OF PERSON TO BE ARRESTED <b>JOE DONNS</b>	DISTRICT OF ISSUE (include City and State) <b>NORTHERN DISTRICT OF CALIFORNIA</b>	MAGISTRATE/CLERK BOOKLET NO. <b>CR-20-0452-50</b>
---	--	--

<input type="checkbox"/> Complaint	<input type="checkbox"/> Indictment	<input type="checkbox"/> Information	<input type="checkbox"/> Probation Violation	<input checked="" type="checkbox"/> OTHER (Specify)
------------------------------------	-------------------------------------	--------------------------------------	--	---

SECTION	BRIEF DESCRIPTION OF CHARGE(S)	BAIL (if applicable)
1 <sup>st</sup> 7190	Defendant was NOT present at time of the return of jury verdict. RE: FAILURE TO APPEAR	Ordered that bail be revoked. No bail set.

DATE OF ISSUE 2/0/81	TITLE OF ISSUING OFFICIAL Clerk	SIGNATURE OF ISSUING OFFICIAL Ray G. Justice
-------------------------	------------------------------------	---

To: ANY U.S. MARSHAL OR ANY OTHER AUTHORIZED OFFICER

- You are hereby commanded to arrest the above named person and bring this individual forthwith before the nearest available United States Magistrate or District Court Judge to answer the above stated charge(s) in the complaint.
- You are hereby commanded to arrest the above named person and bring this individual forthwith before the nearest United States District Court or (if applicable) before the nearest United States Magistrate in the arresting district to answer the above stated charge(s) in the indictment or information.
- You are hereby commanded to arrest the above named person and bring this individual forthwith before the United States District Court or (if applicable) before the United States Magistrate in the issuing district at the location shown above to answer to charges of violation of conditions of probation imposed by the United States District Court.

THE U.S. MARSHAL IN THE DISTRICT OF ARREST IS HEREBY FURTHER AUTHORIZED AND COMMANDED TO TAKE CUSTODY OF THE ABOVE NAMED PERSON. IF AFTER BRINGING THE PERSON BEFORE ANY APPLICABLE JUDICIAL OFFICER IN THE MANNER INDICATED ABOVE, THE INDIVIDUAL FAILS TO FURNISH BAIL FOR APPEARANCE PER ORDERS AND DIRECTIONS OF SUCH JUDICIAL OFFICER, THE U.S. MARSHAL IS AUTHORIZED AND COMMANDED TO KEEP SAFELY THIS INDIVIDUAL UNTIL DISCHARGED IN DUE COURSE OF LAW.

You are hereby commanded to withdraw this warrant and return it immediately to the issuing official with this No. 4 copy.

DATE	SIGNATURE OF ISSUING OFFICIAL	DATE WITHDRAWN	SIGNATURE OF U.S. MARSHAL
------	-------------------------------	----------------	---------------------------

TO U.S. ATTORNEY: ADVISE ON WITHDRAWAL OF WARRANT

CA FORM 9 NORTHERN DISTRICT OF CALIFORNIA

4. ISSUING OFFICIAL

I hereby certify that the above instrument is a true and correct copy.  
Attest:  
WILLIAM L. H. STAKER,  
U.S. Marshal  
6-27-81

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-15.196 Sworn Statement of Secret Service Agent

G. WILLIAM HUNTER  
United States Attorney

HAMILTON BURGER  
Assistant United States Attorney

450 Golden Gate Avenue  
San Francisco, California 94102  
Telephone: (415) 556-9508

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, ) NO. CR-80-0462-SC  
 )  
v. ) AFFIDAVIT OF SPECIAL AGENT  
 ) RICHARD BAKER IN SUPPORT OF  
 ) REQUEST FOR EXTRADITION  
JOE DOAKS, )  
 )  
Defendant. )

I, RICHARD BAKER, being duly sworn, depose and state:

1. I am a citizen of the United States, residing in San Francisco, California.

2. I am a Special Agent with the United States Secret Service. I have been employed by the Secret Service for eleven (11) years. The Secret Service is the United States government agency responsible for protecting the President of the United States of America and other elected officials. In addition, the Secret Service is responsible for enforcement of the laws of the United States relating to the manufacture and distribution of counterfeit United States currency.

2. My duties included assisting Special Agent Roger Able in the investigation of Joe Doaks, suspected of counterfeiting U.S. Currency. On November 6, 1980 I placed on Agent Able a remote monitoring device. I then observed from a distance as Agent Able met with Mr. Doaks (who believed that Agent Able was a prospective purchaser of counterfeit money) and listened at my receiver as they talked. I heard Mr. Doaks brag that he had printed up "nearly half a million dollars" in counterfeit money, which he claimed "is so perfect even Secret Service would be fooled." He then offered to sell Agent Able a sample of the counterfeit money. I then saw him give Agent Able counterfeit bills apparently worth one thousand dollars in return for one hundred dollars

DECEMBER 1, 1985  
Sec. 9-15.196  
Ch. 15, p. 65



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION



(Exhibit 1)

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 16

	<u>Page</u>
9-16.000 <u>PLEAS - RULE 11 - FED. R. CRIM. P.</u>	1
9-16.010 <u>Cases on Pleas</u>	1
9-16.100 ACCEPTING THE PLEA	1
9-16.110 <u>Fed. R. Crim. P. 11(c)</u>	1
9-16.120 <u>Fed. R. Crim. P. 11(d)</u>	2
9-16.130 <u>Youth Correction Act</u>	2
9-16.200 PLEA AGREEMENTS	2
9-16.210 <u>Fed. R. Crim. P. 11(e)</u>	2
9-16.220 <u>Plea of Nolo Contendere - Consent to</u>	6
9-16.230 <u>Approval Required for Certain Agreements</u>	6
9-16.240 <u>Investigative Agency to be Consulted</u>	7
9-16.241 <u>Plea Bargains in Fraud Cases</u>	7
9-16.250 <u>Plea Negotiations with Public Officials</u>	7
9-16.300 INADMISSIBILITY OF PLEAS - FED. R. CRIM. P. 11(e)(6)	10

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-16.000 PLEAS - RULE 11 - FED. R. CRIM. P.

A defendant may plead guilty, not guilty or, with the consent of the court, nolo contendere. If the defendant refuses to plead, or if a defendant corporation fails to appear, the court must enter a plea of not guilty. Fed. R. Crim. P. 11(a). In a criminal case, the plea of nolo contendere has the effect of a guilty plea. United States v. Norris, 281 U.S. 619 (1930). Under Rule 11 a plea of nolo contendere shall be accepted by the court only with its consent and only after it gives due consideration to the views of the parties and the interest of the public in the effective administration of justice. The court does not have the authority to accept either a plea of guilty or a plea of nolo contendere until the court has first determined that the defendant has a requisite understanding and that the plea is voluntary, in accordance with Federal Rule of Criminal Procedure 11(c) and (d). See Boykin v. Alabama, 395 U.S. 238 (1969).

9-16.010 Cases on Pleas

Particularly noteworthy on the subject of pleas are the three cases of North Carolina v. Alford, 400 U.S. 25; United States v. Gray, 438 F. 2d 1160 (9th Cir. 1971); and United States v. (1970) McCarthy, 445 F.2d 587 (7th Cir. 1971). In Alford, the Supreme Court held that the defendant's protestations of innocence did not bar acceptance of a second degree murder guilty plea, made with the advise of counsel, supported by substantial evidence of guilt, and motivated by a desire to avoid the death penalty. The Court, in Gray, held that a plea to a lesser included offense is not proper unless the offense charged has been reduced with the consent of the government. In McCarthy, the Court held that where two counts of a three-count indictment had been dismissed after the defendant pleaded guilty to one count, from which he/she successfully appealed, the government, which did not move to reinstate the dismissed counts until after the statute of limitations had run, was not entitled to reinstate those counts.

9-16.100 ACCEPTING THE PLEA

9-16.110 Rule 11 (c)

Rule 11(c) requires that, before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform (him) of, and determine that (he) understands, the following: (1) ← him/he he/she the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term; (2) if the defendant is not represented by an attorney, that he/she has the right to be represented by an attorney at every stage of the proceeding against him/her and, if necessary, one will be appointed to represent him/her; (3)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

that he/she has the right to plead not guilty or to persist in that plea if it has already been made, and that he/she has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him/her, and the right not to be compelled to incriminate himself/herself; (4) that if his/her plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he/she waives the right to a trial; and (5) that if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which he/she has pleaded, that his/her answers may later be used against him/her in a prosecution for perjury or false statement.

9-16.120 Rule 11(d)

Rule 11(d) requires that the court not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his/her attorney.

9-16.130 Youth Correction Act

United States Attorneys are also urged to be aware, that the defendant be fully advised of the maximum sentence that he/she may receive under the Youth Correction Act, 18 U.S.C. §5005, et. seq., before the defendant makes a guilty plea under such Act. Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963).

9-16.200 PLEA AGREEMENTS

9-16.210 Rule 11(e)

Rule 11(e) recognizes and codifies the concept of plea bargaining. The plea agreement procedure, however, is not mandatory; a court is free to disallow the presentation of the parties' plea agreements. H.R. REP. No. 93-247, 94th Cong., 1st Sess. 6 (1975). To the extent that a court permits plea agreements, Rule 11(e) shall regulate such agreements. Rule 11(e) recognizes the possibility that the attorney for the government and either the attorney for the defendant or the defendant pro se may enter into an agreement whereby the attorney for the government would do any of three listed options upon the defendant's entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Those three listed options of the attorney for the government, included in Rule 11(e)(1)(A)-(C) are as follows: he/she may move for dismissal of other charges; he/she may make a recommendation or an agreement not to oppose the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or he/she may agree that a specific sentence is the appropriate disposition of the case. However, Rule 11(e), though not explicitly stating so, does contemplate that the plea agreement may bind the defendant to do more than just plead guilty or nolo contendere. The plea agreement, for example, may also require that the defendant further co-operate with the prosecution in another case or in another investigation. H.R. REP. No. 93-247, 94th Cong., 1st Sess. 6 (1975). The courts are forbidden under the Rule from participating in discussions looking toward plea agreements.

If the parties reach a plea agreement, the court, under the mandate of Rule 11(e)(2) shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time that the plea is offered. Although there must be a showing of good cause before the court conducts a disclosure proceeding in camera, Rule 11(e)(2) does not address itself to whether the showing of good cause may be made in open court or in camera. That issue is probably left for the courts to solve on a case-by-case basis. H.R. REP. No. 93247, 94th Cong., 1st Sess. 6 (1975).

After the plea agreement has been disclosed, the court may either accept or reject the plea agreement. If the court accepts the plea agreement, the court must inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

As amended in 1982, the Rule requires that the court, in appropriate cases, explain to the defendant the effect of any special parole term. In this regard, the Advisory Committee Note cites with approval the following procedure as recommended in Moore v. United States, 592 F.2d 753 (4th Cir. 1979):

[The defendant must be informed]

(1) that a special parole term will be added to any prison sentence he receives;

← he/she

(2) of the minimum length of the special parole term that must be imposed and the absence of a statutory maximum;

(3) that special parole is entirely different from -- and in addition to--ordinary parole; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

his/her →  
his/her →  
(4) that if the special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term.

This advise must be given on the record by the court prior to accepting the plea. The Assistant U. S. Attorney should make sure that the sentencing judge advises the defendant of the special parole provision in the terms cited above and that the defendant acknowledges a full understanding of the concepts so conveyed. A court's failure to comply will not, however necessarily entitle a defendant to relief. See United States v. Timmreck, 441 U.S. 780 (1979). It is not necessary that every conceivable consequence of sentencing be communicated to the defendant. See Bunker v. Wise, 550 F.2d 1155 (8th Cir. 1977).

his/her →  
This procedure will help to assure the continued viability of pleas entered pursuant to Rule 11. Additionally, it is the better practice for a defendant and his counsel to be advised of the special parole provisions in the course of plea negotiations.

Rule 11(e), Federal Rules of Criminal Procedure, contains an ambiguity that could prove troublesome with respect to plea agreements pursuant to subparagraph (e)(1)(B) in which the prosecutor agrees to "make a recommendation, or ... not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court." Under paragraph (e)(3), if the court "accepts" a plea agreement, it must "embody in the judgment and sentence the disposition provided for in the plea agreement." Under paragraph (e)(4), if the court rejects a plea agreement, it must afford the defendant the opportunity to withdraw the plea and advise him/her that if he/she persists in the plea, "the disposition of the case may be less favorable to [him/her] than that contemplated by the plea agreement."

It may be thought that, since a plea agreement under subparagraph 11 (e)(1)(B) involves merely a recommendation by the prosecutor, there is not the "disposition provided for" in the agreement within the meaning of paragraph (e)(3) 11, so that a court could "accept" the agreement and still impose a greater than recommended sentence, without affording the defendant the opportunity to withdraw his/her plea under paragraph (e)(4) 11.

Although such a scheme would be sensible and was espoused by the Department before Congress, the structure of the rule as enacted, and its legislative history, seem to support the contrary view that an acceptance

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

of a Rule 11(e)(1)(B) agreement obligates the court to impose a sentence no more severe than that recommended or not opposed by the government. See Statement of Representatives of the Judicial Conference of the United States before the Subcommittee on Criminal Justice, House Committee on the Judiciary, March 26, 1975, with respect to the provisions of FED. R. CRIM. P. 11 (e) as submitted to Congress (reprinted in hearings of the subcommittee, at 211); and see H. Conf. REP. No. 94-414, 94th Cong., 1st Sess. characterizing the addition of the phrase in FED. R. CRIM. P. 11 (e)(1)(B) beginning with the words "with the understanding that" as a "nonsubstantive change."

Since many district judges may labor under the impression that they may accept a FED. R. CRIM. P. 11 (b) agreement and yet impose a more onerous sentence upon the defendant than that recommended by the government, without affording the defendant an opportunity to withdraw his/her plea, it is important that prosecutors be aware and, where deemed necessary, advise judges that a subsequent imposition of a greater sentence may lead to a reversal of the conviction and a remand with instruction to permit the defendant the opportunity to replead. Cf. United States v. Hammerman, 528 F.2d 320 (4th Cir. 1975); United States ex. rel. Culbreath v. Rundle, 466 F.2d 730, 735 (3rd Cir. 1975).

The court may be informed that, if it wished to reserve the option of imposing a more severe sentence, the safer course is to follow the procedures of Rule 11(e)(4) in the first instance. The court should "reject" the plea agreement, advise the defendant that if he/she persists in the plea the sentence may be more severe than that recommended, and afford the defendant the opportunity to then withdraw his/her plea. Alternatively, the court may seek a waiver from the defendant of his/her right under Rule 11(e)(4) to object to a greater sentence. In order to be able to later demonstrate an intelligent and voluntary waiver the defendant should be warned of his/her right to withdraw the plea and his/her written or oral waiver thereof should be made to appear on the record.

It should be noted that FED. R. CRIM. P. 11 may be contended by defendants to apply to statements of intention by prosecutors not in the course of plea agreements. For example, a merely informative statement to defense counsel by the prosecutor (after learning of the defendant's intention to plead guilty to the charges) that the prosecutor does not intend to make any recommendation as to sentence may be alleged to be an agreement "not to oppose the defendant's request" within the meaning of Rule 11 (e)(1)(B), even though the general practice in the district is one of non-allocation by the government. Attorneys, therefore, should not indiscriminately convey such information to defendants or their counsel outside the plea bargaining context and should be alert to the need

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

to make an adequate record both to preserve traditional judicial discretion with respect to sentencing (unless the agreement is otherwise) and to prevent successful attacks upon judgments based upon guilty pleas.

If the court rejects the plea agreement, the court is mandated by rule 11(e)(4) to inform the parties of its rejection, on the record, and to advise the defendant either personally in open court or, on a showing of good cause, in camera that the court is not bound by the plea agreement. The court must then afford the defendant the opportunity to withdraw his/her plea, and also must advise the defendant that if he/she persists in his/her guilty plea or plea of nolo contendere, the court may dispose of the case less favorably than what was contemplated by the plea agreement. Again, as in the somewhat similar situation of Rule 11(e)(2), Rule 11(e)(4) does not address itself to whether the showing of good cause is to be made in open court or in camera. As in the situation of Rule 11(e)(2) the issue is better left for the courts to solve on a case-by-case basis. H.R. Rep. No. 93-247, 94th Cong., 1st Sess., 6 (1975).

The court must be notified, except when good cause has been shown, of a plea agreement's existence either at the arraignment or at some other time, prior to trial, as may be fixed by the court. FED. R. CRIM. P. 11(e)(5). Even though the court accepts a guilty plea, it is prohibited under FED. R. CRIM. P. 11(f) from entering a judgment upon that plea unless it first makes a satisfactory inquiry that the plea has a factual basis. See United States v. Rafael Navedo, 516 F. 2d 293 (2nd Cir. 1975); United States v. Bethany, 489 F. 2d 91 (5th Cir. 1974). Rule 11(g) requires that a verbatim record be made of the proceedings at which the defendant enters a plea. In addition, if the plea is one of guilty or nolo contendere, the record must include, without any limitations, the following: the court's advice to the defendant; the inquiry into the voluntariness of the plea including any plea agreement; and the inquiry into the accuracy of a guilty plea. FED. R. CRIM. P. 11(g).

9-16.220 Plea of Nolo Contendere - Consent To

U.S. Attorneys are instructed not to consent to a plea of nolo contendere except in the most unusual circumstances and then only after a recommendation for so doing has been approved by the Assistant Attorney General responsible or by the Office of the Attorney General.

9-16.230 Approval Required for Certain Agreements

U.S. Attorneys should also be cognizant of the sensitive area where plea agreements involve either extradition or deportation. No U.S. Attorney or Assistant has the authority to negotiate regarding an

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

extradition or deportation other in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, U.S. Attorneys or Assistants, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division.

The Department continues to advocate severe penalties for aircraft hijackers as a deterrent to future acts or piracy. Consequently, authorization from the Criminal Division must be obtained by the U. S. Attorney before he enters into any agreement to forego an air piracy prosecution in return for a guilty plea to a lesser offense, or decides to otherwise not to fully prosecute an act of air piracy. ← he/she

9-16.240 Investigative Agency to be Consulted

Although U. S. Attorneys have wide discretion in negotiating guilty pleas in criminal cases, this power should be exercised only after appropriate consultation with the federal investigative agency provided.

9-16.241 Plea Bargains in Fraud Cases

Whenever possible, U. S. Attorneys should require an explicit stipulation of all the facts of a defendant's fraud against the United States government when agreeing to a plea bargain, including acknowledgement of the financial consequences or damages to the government. A good example of this approach and its usefulness in ensuing civil litigation may be found in United States v. Podell, 436 F. Supp. 1039, 1042-1044 (S.D. N.Y. 1977), aff'd. 572 F.2d 31, 36 (2d Cir. 1978). Concerning such pleas, U. S. Attorneys should also be aware of USAM 9-2.159, 4-1.218, 9-42.451, and 9-16.240.

9-16.250 Plea Negotiations with Public Officials

In United States v. Richmond, 550 F. Supp. 144 (E.D. N.Y. 1982), the Chief Judge for the Eastern District of New York questioned the propriety of using the plea bargaining process to negotiate the resignation from office of a Congressman. The Criminal Division believes that this decision is incorrect on the merits. U. S. Attorney personnel are therefore encouraged to continue to consider voluntary offers of resignation from office as a desirable feature in plea agreements with elected and appointed public officials at all levels of government, in accordance with the considerations and procedures described below. ← member of Congress

The Richmond case involved a former Congressman from New York who, during 1982, became the subject of a federal criminal investigation. In an ← member of Congress

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Congress-  
person → effort to dispose of his criminal liability, Congressman Richmond voluntarily agreed to resign his seat in the Congress, and to plead guilty to federal tax, narcotics and conflict of interest offenses. Thereafter, Richmond resigned his seat, took appropriate measures to withdraw his candidacy in the 1982 Congressional election, and entered guilty pleas to the aforementioned charges. At his sentencing a month later, the judge announced that, in his judgment, the resignation and withdrawal conditions of the plea agreement violated the Separation of Powers Doctrine, and infringed upon the constitutional right of the public to select Congressmen of their choosing as articulated in Powell v. McCormack, 395 U.S. 486 (1969).

his/her →  
members  
of  
Congress → The Court's Separation of Powers concern focused on a non-specific fear that a hypothetical future federal prosecutor might maliciously abuse his prosecutorial powers to harass Congressmen into resigning, thereby subverting the sovereign independence of the legislative branch. This same basic argument has been unsuccessfully advanced on numerous prior occasions in support of the proposition that the Separation of Powers Doctrine limits the latitude of federal prosecutors to initiate criminal prosecutions of federal judges and members of Congress. In these instances, the federal courts have consistently and firmly rejected the notion that the Separation of Powers Doctrine protects Congressmen and federal judges against hypothetical prosecutorial overreaching. See e.f. United States, 202 U.S. 344 (1906); United States v. Hastings, 681 F. 2d 706 (11th Cir. 1982); United States v. Myers, 635 F. 2d 932 (2d Cir. 1980); Diggs v. United States, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 466 U.S. 982 (1980). As a practical matter, the power to initiate a criminal charge is more susceptible to abuse than the power to settle a charge already brought. Thus, it follows that if the Separation of Powers Doctrine does not limit the initiation of criminal charges, it also does not limit the disposition of them.

members  
of  
Congress → Powell v. McCormack, supra, involved a refusal by the Congress to seat a properly qualified member-elect who had tendered the requisite proof of his/her election and who desired to be seated. The Supreme Court held that the qualifications for Congressmen listed in the Constitution were exclusive, that the Congress lacked the constitutional authority to add to them, and that it was therefore obliged to seat a member-elect who produced sufficient evidence of his/her election. The McCormack Court did not imply that either the exclusive nature of the list of Congressional qualifications contained in the Constitution, or a Member of Congress' duty to his/her constituents, limit his/her freedom to voluntarily tender his/her resignation for personal reasons attending the settlement of personal criminal liability.

Finally, the Richmond case did not address the propriety of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

negotiating the resignation of defendants who are not Members of Congress of federal judges. In that regard, the controlling authority is United States v. Tonry, 605 F. 2d 144 (5th Cir. 1979), which upheld against a federalism argument the propriety of resignation and non-candidacy conditions involuntarily imposed on a convicted federal defendant by the sentencing judge pursuant to the Federal Probation Act.

Although the Criminal Division considers the Richmond decision to have been incorrectly decided on its merits, the unusual procedural and factual setting of the case foreclosed judicial review in the Second Circuit. In this regard, the District Judge's comments concerning the plea bargaining issue were made after the plea agreement terms dealing with resignation and withdrawal from candidacy had been fully performed by Congressman Richmond, and without the issue having been otherwise raised by the defendant. Since the plea agreement was in all other respects enforced, and since the Court's refusal to "accept" the resignation and non-candidacy terms did not demonstrably impact on the sentence imposed, the issue was moot and not easily amenable to appellate review.

The Richmond case is particularly troublesome from the standpoint of the orderly and efficient discharge of the Justice Department's responsibilities to protect the public from criminal abuse of the public trust by high federal officials. It purports to limit, without adequate legal justification, the latitude of federal prosecutors to reach voluntary settlements with defendants in significant corruption cases which equitably address and protect the important public interests that such prosecutions normally entail.

Accordingly, the following principles shall govern the negotiation of resignation and non-candidacy conditions in plea agreements with defendants in federal public corruption cases:

A. As a general proposition, resignation from office, and/or withdrawal from elective candidacy, remain appropriate and desirable objectives in plea negotiations with public officials who are charged with federal offenses that focus on abuse of the office(s) involved.

B. Resignation and non-candidacy with respect to public positions other than those of Members of Congress or federal judges may be enforced involuntarily against the will of the defendant by a sentencing judge pursuant to the Federal Probation Act. United States v. Tonry, supra.

C. Resignation and non-candidacy with respect to Congressional or federal judicial office may be properly made the subject or plea

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

negotiations, and offers of resignation and/or withdrawal for such offices may be incorporated into plea agreements, with incumbent Members of Congress and judges.

D. Resignation and/or withdrawal from candidacy with respect to Congressional or federal judicial office shall not be imposed involuntarily against the will of the judge or Members of Congress involved. Powell v. McCormack, supra.

5. To assure uniformity and fairness, all proposed plea agreements involving defendants who are Members of Congress, candidates for Congress, or federal judges shall be subject to prior approval by the Public Integrity Section of the Criminal Division.

Questions concerning matters discussed herein should be directed to the Public Integrity Section at FTS: 724-6983.

9-16.300 INADMISSIBILITY OF PLEAS - RULE 11(e)(6)

Rule 11(e) bars the use in evidence of the following (with exceptions) in any civil or criminal proceeding against the person who made them: (1) a plea of guilty which was later withdrawn; (2) a plea of nolo contendere; (3) any statement made in the course of any proceeding under Rule 11 regarding a plea of guilty of nolo contendere; and (4) any statement made in the course of plea discussions with an attorney for the government which discussions do not result in a plea of guilty or result in a plea of guilty later withdrawn. Such evidence is admissible, however; (1) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness to be considered contemporaneously with it; or (2) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel. This is modeled after Rule 410 of the Federal Rules of Evidence.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 17

	<u>Page</u>
9-17.000 <u>SPEEDY TRIAL ACT OF 1974, AS AMENDED</u>	1
9-17.010 <u>Interpreting the Act</u>	1
9-17.100 TITLE I - SPEEDY TRIAL	2
9-17.101 Calendaring	2
9-17.102 Securing the Presence of the Defendant	2
9-17.110 <u>Time Limits</u>	5
9-17.120 <u>The 30-Day Pre-Indictment Interval</u>	5
9-17.121 Arrest	7
9-17.122 Summons	8
9-17.123 Unavailability of Grand Jury	8
9-17.130 <u>The 70-Day Post-Indictment Interval</u>	8
9-17.131 <u>The 30-Day Minimum Preparation Time</u>	9
9-17.132 Commencement of Trial	10
9-17.133 Magistrates' Proceedings	10
9-17.134 Reinstitution of Prosecution	11
9-17.135 Superseding Indictment	11
9-17.136 Indictments Reinstated on Appeal	13
9-17.137 Retrials	13
9-17.140 <u>Excludable Time</u>	14
9-17.141 Other Proceedings Concerning the Defendant	14
9-17.142 Competency Examinations	15
9-17.143 Examinations and Deferred Prosecution Under NARA	15
9-17.144 Trial of Other Charges	16
9-17.145 Interlocutory Appeals	17
9-17.146 Pre-Trial Motions	18
9-17.147 Removal and Transfer Proceedings	19
9-17.148 Transportation of Defendant	20
9-17.149 Consideration of Proposed Plea Agreements	21
9-17.150 <u>Withdrawn Pleas</u>	21
9-17.151 Proceedings Under Advisement	22
9-17.152 Deferred Prosecution (Pre-Trial Diversion)	22
9-17.153 Absence and Unavailability of Parties and Witnesses	23

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-17.154	Physical or Mental Incompetency	24
9-17.155	Commitment Under NARA	24
9-17.156	Recharging after Government Dismissal of Indictment or Information	24
9-17.157	Meaning of "Same Offense or Any Offense Required to be Joined with that Offense"	26
9-17.158	Effect of Joinder and Severance	26
9-17.159	Ends of Justice	27
9-17.160	<u>Defendants Incarcerated Elsewhere</u>	30
9-17.170	<u>Sanctions</u>	31
9-17.171	Waiver	32
9-17.172	Sanctions Apply to Retrials	33
9-17.173	Sanctions Against Attorneys	34
9-17.174	Deferred Effective Date of Sanctions	34
9-17.180	<u>Detainees and "High Risk" Designees</u>	34
9-17.190	<u>Constitutional Aspects</u>	35
9-17.200	TITLE I - SPEEDY TRIAL (CON'T.)	36
9-17.210	<u>The Planning Group</u>	36
9-17.211	Duties and Functions	36
9-17.212	Judicial Emergency	36
9-17.300	TITLE II - PRE-TRIAL SERVICE AGENCIES	37
9-17.310	<u>Pilot Districts</u>	37
9-17.320	<u>Duties and Functions</u>	37
9-17.330	<u>Administration</u>	37
9-17.340	<u>Pre-Trial Service Officer</u>	38
9-17.350	<u>Annual Reports</u>	38
9-17.360	<u>Definitions</u>	38
9-17.400	SPEEDY TRIAL ACT TIMETABLE	38

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.000 SPEEDY TRIAL ACT OF 1974, AS AMENDED

The Speedy Trial Act of 1974, Pub. L. No. 93-619, as amended on August 2, 1979, by the Speedy Trial Act Amendments Act of 1979, Pub. L. No. 96-43, has two titles:

Title I, entitled "Speedy Trial," contains 18 U.S.C. §§3161-3174. It sets forth time limitations within which criminal proceedings must be commenced. It is applicable to all criminal proceedings except prosecutions of petty and military offenses (18 U.S.C. §3172(b)). See United States v. Baker, 641 F.2d 1311, 1319 (9th Cir. 1981). It is inapplicable to juvenile delinquency proceedings, which have their own speedy trial provision. See USAM 9-8.000.

Title II, entitled "Pretrial Agencies," contains 18 U.S.C. §§3152-3156. These sections mandate the creation of pilot agencies in ten judicial districts to supervise persons released pending trial on criminal charges. See USAM 9-17.300, infra.

9-17.010 Interpreting the Act

The case law may be found in West's Federal Practice Digest 2d, Criminal Law, at Key Numbers 577.1-577.16, and we hope at the same Key Numbers in its new Digest 3d.

The Federal Judicial Center has prepared a one volume legislative history of the Act that has been distributed to all U.S. Attorneys' offices. See Partridge, A., Legislative History of Title I of the Speedy Trial Act of 1974 (Federal Judicial Center 1980). Among the Congressional reports incorporated in the one volume legislative history are: S. Rep. No. 1021, 93rd Cong., 2d Sess. (1974); H.R. Rep. No. 1508, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 7401; S. Rep. No. 212, 96th Cong., 1st Sess. (1979); H.R. Rep. No. 390, 96th Cong., 1st Sess., reprinted in 1979 U.S. Code Cong. & Ad. News 805. Bear in mind that the legislation actually enacted is not always precisely the same as the bills discussed in the committee reports.

Useful and persuasive, but not binding, authority may be found in the Guidelines to the Administration of the Speedy Trial Act of 1974 as Amended (Revised December 1979), prepared by the Committee on the Administration of Criminal Law of the Judicial Conference of the United States and distributed to all U.S. Attorneys' offices (Judicial Conference Guidelines), and in the guidelines adopted by the Court of Appeals of the Second Circuit (Second Circuit Guidelines). The Second Circuit Guidelines have been strongly approved by Congress. See S. Rep. No. 212, 96th Cong., 1st Sess. 20 (1979).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.100 TITLE I - SPEEDY TRIAL

9-17.101 Calendaring

18 U.S.C. §3161(a) requires the appropriate "judicial officer" (defined by 18 U.S.C. §3172(a) to include judges and magistrates) as soon as possible to "set the case for trial on a day certain" or place it on "a weekly or other short-term trial calendar," after consulting with defense and government counsel. The government and the district court share the responsibility for speedy trial enforcement and the government is obligated to call the court's attention to defense delays. See United States v. Turner, 725 F.2d 1154 (8th Cir. 1984), United States v. Piteo, 726 F.2d 50 (2d Cir. 1983); United States v. Perez-Reveles, 715 F.2d 1348, 1353 (9th Cir. 1983). The Fourth Circuit has held the Speedy Trial Act constitutional, rejecting an argument that the Act usurps a trial judge's scheduling authority in violation of Article III. United States v. Brainer, 691 F.2d 691 (4th Cir. 1982).

9-17.102 Securing the Presence of the Defendant

After a decision has been made to charge an individual with an offense a variety of procedures are available to secure that person's presence before the court, including one that may trigger the application of the Interstate Agreement on Detainers Act, 18 U.S.C. app. Both this Act and the Speedy Trial Act may affect the choice of the procedure to be used. The principal circumstances in which a defendant may be found and the applicable procedures are:

A. Defendant located within district.

1. Defendant at large. The presence of a defendant located physically within the district may be secured by: arrest on a complaint (see USAM 9-17.121, *infra*); service of a summons on a complaint (see USAM 9-17.122, *infra*); or, for cases initiated by the filing of an indictment or information, provision of notice pursuant to local practice, service of summons, or execution of a warrant. (See Fed. R. Crim. P. 9). For cases initiated by pre-indictment arrest or summons, the 30-day arrest to indictment clock is triggered by the arrest or the service of the summons. For cases initiated by indictment or information, the 70-day post-indictment clock is triggered by the defendant's first appearance before a judicial

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

officer in the district on the case. See USAM 9-17.130, *infra*. Note that where a defendant is arrested on an indictment warrant, the 70-day clock is triggered by any appearance before a judicial officer in the district, including an appearance before a magistrate for bail purposes.

2. Defendant in state custody.

a. Serving term of imprisonment. The Speedy Trial Act requires that where the attorney for the government knows that a defendant charged with an offense is serving a term of imprisonment, the attorney must promptly seek to obtain the presence of the defendant (see 18 U.S.C. §3161(j)(1) and USAM 9-17.160, *infra*). The presence of such a defendant in state custody serving a term of imprisonment may be secured by the use of either a detainer under the Interstate Agreement on Detainers Act, 18 U.S.C. app. (See USAM 9-2.145 and Speedy Trial Act, 18 U.S.C. §3161(j)) and a writ of habeas corpus ad prosequendum, or only a writ of habeas corpus ad prosequendum. A detainer serves to prevent that defendant's release by the state authorities. Relinquishment of the custody of the defendant is obtained by a subsequent written request from your court, ordinarily a writ of habeas corpus ad prosequendum.

However, note that the filing of a detainer automatically invokes the Interstate Agreement on Detainers Act. See United States v. Odam, 674 F.2d 228 (4th Cir. 1982). Under Article III of the Speedy Trial Act, a defendant has a right to demand trial within 180 days and to have disposed all federal charges in the district for which detainers have been lodged, and possibly, the federal charges for which detainers have been lodged in all districts (see USAM 9-2.145). Under the Speedy Trial Act, Article IV, if the prosecutor secures the presence of the prisoner, the trial must commence within 120 days unless good cause is shown for a continuance. In light of the requirements imposed by the Interstate Agreement on Detainers Act, it may be preferable to use only a habeas corpus writ. By itself such a writ does not invoke the Interstate Agreement. See United States v. Mauro, 436 U.S. 340 (1978). In all of the foregoing circumstances it is advisable to consult with the United States Marshal, who ordinarily will be responsible for any service on state authorities and for transporting the defendant.

b. In pre-trial custody. The Interstate Agreement on Detainers Act does not apply to defendants in pre-trial incarceration. See United States v. Reed, 620 F.2d 709, 711 (9th Cir. 1980). Consequently, the formal procedures by which the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

appearance of a defendant in pre-trial state custody may be obtained are use of a writ of habeas corpus ad prosequendum or service of a summons or arrest warrant upon release from custody. Such a writ may not be issued, however, until the state proceedings are completed unless it can be shown that the defendant's absence will not unduly impede the state proceeding. The Supreme Court has stated that "in some circumstances considerations of comity and concerns for the orderly administration of justice requires a federal court to forgo the exercise of its habeas corpus power." Francis v. Henderson, 425 U.S. 536, 539 (1976). The best course of action usually is to await the completion of state proceedings before serving a defendant with federal charges.

To avoid inadvertent release of a defendant in state pre-trial custody against whom federal charges are pending, a detainer may be filed with the state custodial authorities. Such a detainer does not come under the Interstate Agreement on Detainers Act. Rather, it is a recognized but informal procedure, not founded on a specific statute, by which federal authorities request to be notified by state authorities before a defendant is released. See Ridgeway v. United States, 558 F.2d 357, 360 (6th Cir. 1977). State authorities generally honor these detainers.

Where federal charges have been served (through arrest, summons, or arraignment) on a defendant who is in state custody at the time of such service or who is placed in state custody subsequent to such service, the Speedy Trial Act clock will be running. In such cases, an exclusion for the period of state custody should be sought under either Speedy Trial Act 18 U.S.C. §3161(h)(1)(d) (delay resulting from trial on other charges) or 18 U.S.C. §3161(h)(3) (defendant unavailable). See United States v. Garrett, 720 F.2d 705, 707-708 (D.C. Cir. 1983). The trial on other charges provision has been interpreted to cover the entire pre-trial and trial period in another jurisdiction. See United States v. Lopez-Espindola, 632 F.2d 107 (9th Cir. 1980); United States v. Goodwin, 612 F.2d 1103 (8th Cir. 1980); and United States v. Allsup, 587 F.2d 31 (9th Cir. 1978). The Judicial Conference Guidelines, at 30-31, advise that only days actually on trial should be excluded, but this position has not been adopted in the reported decisions.

Under the unavailability of the defendant provision the government has the burden of proof (see 18 U.S.C. §3162(a)(2)). Consequently, a showing

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

must be made to the court that a duly diligent effort was made to secure the defendant's presence. See Lopez-Espindola, supra, at 920, and United States v. Morales, 460 F. Supp. 668 (E.D.N.Y. 1978). It may be advisable to raise with the court, at the time the defendant becomes unavailable, whether the court would issue a writ of habeas corpus ad prosequendum, even though it would disrupt the state proceeding. Unless the possibility is actively explored with the court, the government may have difficulty establishing that the due diligence requirement has been met.

If 18 U.S.C. §3161(h)(3) or (h)(1)(D) exclusions are not available or not allowed, the federal charges can be dismissed until disposition of the state charges.

B. Defendant located outside of district.

1. Defendant at large. A defendant at large outside of the district may be arrested on a warrant, may be served with a summons, or may be provided notice pursuant to local practice. See USAM 9-17.102 A.1., above, for a description of when the Speedy Trial Act clock begins to run in these circumstances.

2. Defendant in state custody. See USAM 9-17.102 A.2., above, with regard to defendant in state custody within district.

C. Defendant in federal custody. The presence in court of a defendant in a federal prison should be obtained by the use of a writ of habeas corpus ad prosequendum, served by the United States Marshals Service. (See also, USAM 9-17.160, *infra*.) The presence of a defendant in federal pre-trial custody in another district should be arranged through consultation with the U.S. Attorney for the other district and the United States Marshal.

D. Defendant in foreign country. The presence of a defendant located in a foreign country may be obtained by the invocation of extradition treaties or by other diplomatic means such as expulsion. The implementation of these procedures is the responsibility of the Office of International Affairs of the Criminal Division. Once a defendant is ready to be returned, transportation ordinarily is managed by the United States Marshals Service.

9-17.110 Time Limits

9-17.120 The 30-Day Pre-Indictment Interval

18 U.S.C. §3161(b) provides that if a defendant has been arrested or served with a summons in connection with criminal charges, an indictment or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

information must be filed within 30 days of the arrest or service of summons. Superseding indictments need not be filed within 30 days of arrest. See United States v. Rabb, 680 F.2d 294, 296-297 (3d Cir. 1982); United States v. Wilks, 629 F.2d 669 (10th Cir. 1980); United States v. Mitchell, 723 F.2d 1040 (1st Cir. 1983).

For purposes of the Speedy Trial Act, an arrest must include the filing of a complaint against the defendant. If an individual is taken into custody, but then released without charging, the 30-day period does not begin to run. See United States v. Peterson, 698 F.2d 921, 923 (8th Cir. 1982). Note, however, that if a complaint is filed the next day, the time limits of the Act begin to run on the day of arrest. The Speedy Trial Act does not cover delay that occurs prior to indictment in a non-arrest case. Any defense based on pre-indictment delay in a non-arrest situation still must be based on the Fifth Amendment. See United States v. Lovasco, 431 U.S. 783 (1977); United States v. Marion, 404 U.S. 307 (1977).

The Speedy Trial Act does not apply to the period between the dismissal of a complaint (provided the 30-day first interval has not been exceeded) and the subsequent return of an indictment against the same individual for the same offense. See United States v. Krynicki, 689 F.2d 289 (1st Cir. 1982); United States v. Alfano, 706 F.2d 739, 741 (6th Cir. 1983). However, in some districts judges have expressed disapproval of the use of dismissal and subsequent indictment as a means of avoiding the 30 day first interval time limit. The practice is seen as not being consistent with the spirit of the Speedy Trial Act. It is Departmental policy to comply with the intentions of the Speedy Trial Act as fully as possible. For this reason, and to avoid possible conflict with judges, it is advisable to invoke exclusions when possible where additional time is needed during the first interval. See United States v. Mitchell, *supra*; United States v. Garrett, 720 F.2d 705, 707-711 (D.C. Cir. 1983). The dismissal-indictment procedure should be employed only where other recourse is not reasonably available.

The excludable time provisions apply to the arrest to indictment interval. See 18 U.S.C. §3161(h). It is important to note that under the "ends of justice" provision 18 U.S.C. §3161(h)(8)(B)(iii), excludable time can extend the 30-day limit if, because of the timing of arrest or because the facts of the case are unusual or complex, it is unreasonable to expect the grand jury to return an indictment within 30 days. See S. Rep. No. 212, 96th Cong., 1st Sess. 23 (1979); see USAM 9-17.159, *infra*; United States v. McGrath, 613 F.2d 361 (2d Cir. 1979), *cert. denied*, 446 U.S. 967 (1980) (voluminous documents; complex factual determinations). An 18 U.S.C. §3161(h)(8) continuance may be appropriate where an arrested

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

defendant cooperates, where investigative or laboratory reports cannot be completed, or where the full scope of the criminal scheme cannot be determined within 30 days. See United States v. Hope, 714 F.2d 1084 (11th Cir. 1983).

Moreover, although the 30-day interval will begin to run where the defendant is arrested outside the district where charges are pending, the time until the defendant's arrival in the district of prosecution will generally be excludable under 18 U.S.C. §3161(h)(G) and (H). See discussion at USAM 9-17.147, and USAM 9-17.148, infra.

9-17.121 Arrest

An arrest by state authorities for proceedings in connection with state charges generally does not constitute an arrest under the Speedy Trial Act. See United States v. Janik, 723 F.2d 537, 542 (7th Cir. 1983); United States v. Manuel, 706 F.2d 908, 914-915 (9th Cir. 1983); United States v. Iaquinta, 674 F.2d 260 (4th Cir. 1982); United States v. Leonard, 639 F.2d 101 (2d Cir. 1981); United States v. Tanu, 589 F.2d 82, 88 (2d Cir. 1979); United States v. Phillips, 569 F.2d 1315 (5th Cir. 1978). An "arrest," however, may be deemed to have taken place when the state arrest was made at the request of federal authorities, and will be deemed to have taken place when a defendant has been transferred from state to federal custody. See Judicial Conference Guidelines, at 3-4; United States v. Shahryar, 719 F.2d 1522 (11th Cir. 1983). But to reiterate, the dismissal sanction for a violation of the 30-day arrest to indictment period does not apply unless the defendant is formally charged in a federal complaint. See 18 U.S.C. §3162(a).

Not all federal arrests will constitute an "arrest" for Speedy Trial Act purposes. If a defendant is arrested for an offense that is not similar to the offense for which he/she is later indicted, then he/she is not deemed to have been under arrest for purposes of indicting within 30 days. See United States v. Lyon, 567 F.2d 777, 781 n.3 (8th Cir.), cert. denied, 436 U.S. 918 (1978) (defendant was indicted for bail jumping more than 30 days after his arrest on a bombing charge. The court refused to dismiss the indictment because the two offenses were different). See also, United States v. Antonio, 705 F.2d 1483, 1485 (9th Cir. 1983); United States v. Krynicki, supra; United States v. Brooks, 670 F.2d 148, 151 (10th Cir. 1982); United States v. DeTienne, 468 F.2d 151, 155 (7th Cir. 1972).

Whether a change in the conditions of incarceration of a prisoner as a result of his/her being accused of an in-prison offense will be considered

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

an arrest for purposes of the Act is uncertain. See United States v. Brooks, *supra*, at 150-151. Compare United States v. Gouveia, 704 F.2d 1116 (9th Cir. 1983) (en banc), cert. granted, (October 17, 1983) (No. 83-128).

9-17.122 Summons

In cases initiated by the service of summons, the 30-day limitation for indictment begins to run on the date of the service of the summons. Thus, the days between the date of service and the initial court appearance count against the 30-day interval. In order to reduce the number of such days that elapse, the United States Marshal should be requested to serve the summons as close as possible to the court date stated on the face of the summons.

9-17.123 Unavailability of Grand Jury

If no grand jury has been in session during the 30-day period succeeding arrest or service of summons upon a felony charge, the time for filing an indictment is extended for another 30 days. It is not clear whether the belated indictment may include or charge only a misdemeanor. Neither is it clear that a delayed indictment may be returned for a felony when the original charge in the complaint was a misdemeanor. It seems fairly clear, however, that where the original charge was for a misdemeanor, 18 U.S.C. §3161(b) does not permit the filing of a belated indictment or information charging a misdemeanor. Plea agreements resulting in such a disposition should be entered into with caution.

9-17.130 The 70-Day Post-Indictment Interval

The 70-day interval between indictment and trial of 18 U.S.C. §3161(c)(1) begins with the filing and publication of the indictment or information, or the defendant's first appearance before a judicial officer in the court where the charge is pending, whichever is later. See United States v. Stafford, 697 F.2d 1368, 1370 (11th Cir. 1983). See also, Judicial Conference Guidelines, at 7-8. Where the defendant has appeared before the court pursuant to an arrest or summons prior to indictment, the 70-day interval should be computed from the date of filing of the indictment or information. If an indictment or information is sealed after filing, the time begins to run from its publication, *i.e.*, its unsealing. See United States v. Villa, 470 F. Supp. 315, 325 (S.D. N.Y. 1979). A superseding indictment that amends the original indictment without adding new charges or defendants does not start the 70-day period anew. See United States v. Brim, 630 F.2d 1307, 1311 (8th Cir. 1980), cert. denied, 452 U.S. 966 (1981).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

If the defendant was not arrested prior to indictment, or was arrested in a different district and did not appear in the charging district prior to indictment, the trial interval does not begin to run until the defendant has appeared before a judicial officer in the district where the indictment or information has been filed. See Judicial Conference Guidelines, at 7-8; see also, United States v. Umbower, 602 F.2d 754, 758 (5th Cir. 1979), cert. denied, 444 U.S. 1021 (1980); United States v. Taylor, 569 F.2d 448 (7th Cir. 1978), cert. denied, 435 U.S. 952 (1978).

9-17.131 The 30-Day Minimum Preparation Time

Unless the defendant signs a written consent, the trial may not start for at least 30 days after the defendant first appears with counsel or waives the right to counsel and elects to proceed pro se. See 18 U.S.C. §3161(c)(2). See United States v. Mers, 701 F.2d 1321, 1332-1335 (11th Cir. 1983). Any pre-trial defense preparation period shorter than 30 days has been found to be inadequate per se. See United States v. Daly, 716 F.2d 1499, 1506 (9th Cir. 1983).

18 U.S.C. §3161(c)(2) was added by the 1979 amendments, and there are a number of uncertain areas concerning its application. For example, some courts hold that a defendant is not automatically entitled to a new 30-day preparation period when a superseding indictment is returned charging the same offenses. Instead, if additional preparation time is needed defense counsel can request a discretionary ends of justice continuance under 18 U.S.C. §3161(h)(8)(b). See United States v. Horton, 676 F.2d 1165 (7th Cir. 1983). The Ninth Circuit has concluded, however, that when a defendant is reindicted after a dismissal on the government's motion, 18 U.S.C. §3161(c)(2) guarantees the defendant an additional 30-day preparation time on the new indictment. See United States v. Arkus, 675 F.2d 245 (9th Cir. 1982); United States v. Harris, 724 F.2d 1452 (9th Cir. 1984), petition for reh'g pending, No. 83-5051. The Solicitor General has taken the position that Arkus and Harris were incorrectly decided. The Solicitor General notes that the courts of appeals have agreed that reindictment after a voluntary dismissal does not trigger a new 70-day indictment to trial period (see, e.g., United States v. Dennis, 625 F.2d 782, 783 (8th Cir. 1980)), and that if the 30-day minimum defense preparation period and the 70-day maximum period are not simultaneous, the 70-day period might expire before a defendant could be brought to trial. See Solicitor General's Brief in United States v. Horton, supra (No. 82-681 OT 1982). This problem, however, could be resolved in a particular case if the trial court grants an ends of justice continuance under 18 U.S.C. §3161(h)(8).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In computing the minimum trial preparation time period, the exclusions provided for under 18 U.S.C. §3161(h) have been found to be inapplicable despite conflicting language in the Senate Report to the 1979 amendments. See United States v. Wooten, 688 F.2d 941, 949-951 (4th Cir. 1982). See also, Judicial Conference Guidelines, at 12-13. It is also stated in the Judicial Conference Guidelines, at 10-11, that when a defendant has appeared with counsel prior to indictment, the 30-day period commences upon the filing of the indictment, rather than the date of the pre-indictment appearance.

9-17.132 Commencement of Trial

For purposes of meeting the 70-day limitation, both the Judicial Conference and Second Circuit Guidelines provide that a jury trial begins when voir dire begins, and that a bench trial begins the day the case is called, provided that some step in the trial procedure immediately follows. See United States v. Whitaker, 722 F.2d 1533, 1535 (11th Cir. 1984); United States v. Howell, 719 F.2d 1258, 1262 (5th Cir. 1983). Judicial Conference Guidelines, at 9; Second Circuit Guidelines, section I E. This reflects the time when a trial is generally deemed to begin, apart from the separate question of when jeopardy attaches. A short delay after the voir dire and the swearing of the jury also does not violate the Speed Trial Act. See United States v. Manfredi, 722 F.2d 519, 524 (9th Cir. 1983); United States v. Howell, *supra*, at 1262. In cases where juries have been selected in advance of trial, the Second Circuit Guidelines, however, do not deem a trial to have commenced until opening statement or the taking of testimony.

9-17.133 Magistrates' Proceedings

Where a defendant consents in writing to trial before a magistrate upon a complaint (28 U.S.C. §636(a)(3); 18 U.S.C. §3401), trial must commence within 70 days of such consent. See 18 U.S.C. §3161(c)(1). Where a defendant consents to trial before a magistrate upon a previously filed indictment or information, the filing date or date of first appearance rather than the date of consent would appear to control. See Judicial Conference Guidelines, at 8.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.134 Reinstitution of Prosecution

As noted, 18 U.S.C. §3161(d)(1) specifically provides that after the dismissal of an indictment or information on defendant's motion or the dismissal of a complaint on the motion of any party, any subsequent charge for "the same offense or an offense based on the same conduct or arising from the same criminal episode" shall be subject to new 30 or 70-day time periods and a new 30-day minimum under 18 U.S.C. §3161(c)(2). See United States v. Dennis, supra.

9-17.135 Superseding Indictment

As we read 18 U.S.C. §3161(d), in conjunction with 18 U.S.C. §3161(h)(6), it provides a different rule when an indictment or information is dismissed on a motion by the government. In this situation, new time limits do not begin to run when a superseding indictment is filed; the time between dismissal of the old indictment and filing of the new one is simply excluded. See the discussion in USAM 9-17.131, infra, about minimum preparation time and USAM 9-17.156, infra, about excludable time resulting from dismissal and recharging. The distinctions are set forth in Frase, The Speedy Trial Act of 1974, 43 U. Chi. L. Rev. 667, 696 (1976), wherein Professor Frase states:

Section 3161(d) provides that the time limits for indictment,... and trial begin to run anew when the original charge is dismissed upon motion of the defendant, or if the original charge was a complaint and it is dismissed by either party or on the court's own motion.

If, however, an information or indictment is dismissed upon motion of the Government, the time limits applicable to any refiled charges apparently do not begin to run anew. Section 3161(h)(6) permits an exclusion under the following circumstances:

If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date that the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge [is excludable].

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

If the period between the dismissal of the first charge and the filing of the second is excludable, this implies that the "clock" is still running.

Since the filing of superseding charges is entirely within the control of the Government, such a rule makes sense: the Government should not be permitted to obtain additional time simply by filing slightly different charges against the same defendant for the same criminal episode. Yet section 3161(d) clearly permits the Government to do just that with respect to charges in a complaint. [Footnote omitted.]

Id. at 696.

Accord United States v. Hillegas, 578 F.2d 453 (2d Cir. 1978), in which the court states:

Taken together, §§3161(d) and (h)(6) make it clear that Congress' purpose was to disregard the period after dismissal of a complaint and prior to the filing of an indictment for the same offense. Although §3161(h)(6), read literally, suspends the running of the Act's time limits upon the Government's dismissal of an indictment, as distinguished from a complaint, it follows a fortiori that upon a voluntary dismissal of a complaint the period thereafter up to the filing of an indictment should be excluded, if not disregarded entirely pursuant to §3161(d). [Footnote omitted.]

Id. at 459. See also United States v. MacDonald, 456 U.S. 1, 7 n.7 (1982).

In summary, if the court on its own or the defendant's motion dismisses an indictment, information or complaint, the clock starts over; if the government obtains the dismissal of the complaint, the clock starts over; if the government moves to dismiss the indictment or information, then the clock does not start over, and when a new indictment or information is filed the number of days used up before dismissal will be considered already elapsed under the new indictment or information. See discussion at USAM 9-17.131, supra, and USAM 9-17.156, infra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.136 Indictments Reinstated on Appeal

18 U.S.C. §3161(d)(2) provides that when an indictment or information dismissed by the trial court is reinstated on appeal, the trial must start within 70 days of the date "the action occasioning the reinstatement becomes final." If trial within 70 days is impractical, the court has discretion to enlarge the period up to 180 days. The date when the reinstatement becomes final should normally be the date the mandate of the court of appeals is filed with the district court. See United States v. Gilliss, 645 F.2d 1269, 1276 (8th Cir. 1981); Judicial Conference Guidelines, at 16; Second Circuit Guidelines, section I, F(3)(b). The courts of appeals, however, have interpreted the quoted phrases differently, making the starting date run from the date the mandate issues to the date that the district court enforces the mandate by vacating the sentence imposed. See United States v. Ross, 654 F.2d 612, 616 (9th Cir. 1981); United States v. Carreon, 626 F.2d 528, 532 n.7 (7th Cir. 1980). See also, United States v. Mack, 669 F.2d 28, 33 (1st Cir. 1982). In addition, the filing of a certiorari petition by the government has been held to stop the retrial clock even though the mandate has issued. See United States v. Dunn, 706 F.2d 153 (5th Cir. 1983). See also, United States v. Villamonte-Marquez, U.S. \_\_\_, 103 S.Ct. 2573, 2584 n.4 (1983) (Brennan, J. dissenting).

The excludable time periods of 18 U.S.C. §3161(h) apply to calculating the 70-day (or longer) period. The dismissal provisions of 18 U.S.C. §3162 also apply. See 18 U.S.C. §3161(d)(2); H.R. Rep. No. 390, 96th Cong., 1st Sess. 11 (1979); S. Rep. No. 212, 96th Cong., 1st Sess. 33 (1979).

9-17.137 Retrials

Pursuant to 18 U.S.C. §3161(e) the government has 70 days to retry a case after a trial judge declares a mistrial or enters an order granting a new trial. A 70-day retrial period will also apply following a defendant's successful appeal or collateral attack. See United States v. Gilliss, *supra*, at 1275-76. The 70-day period begins to run on "the date the action occasioning the retrial becomes final." The meaning of this phrase is uncertain. The Judicial Conference Guidelines, at 17-18, provide that the period begins to run when a mistrial is declared or when an order granting a new trial is entered, and not when the time for filing any appeal has expired. Cf., Second Circuit Guidelines, section I, F. Where retrial follows appeal or collateral attack, the court retrying the case has the discretion to extend the 70-day period up to 180 days if witnesses are unavailable or if "other factors resulting from the passage of time" make retrial within 70 days impractical.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The excludable time provisions of 18 U.S.C. §3161(h) and the sanctions of 18 U.S.C. §3162 apply to retrials. The filing of a timely motion for reconsideration of an order granting a new trial tolls the running of the 70-day period. See United States v. Spiegel, 604 F.2d 961, 971 (5th Cir. 1979).

9-17.140 Excludable Time

18 U.S.C. §3161(h) defines eight periods of time that are excludable when computing elapsed time for the other subsections of 18 U.S.C. §3161. This list is exclusive, according to United States v. Carrasquillo, 667 F.2d 382, 383 (3d Cir. 1981). Paragraphs 1 through 7 of 18 U.S.C. §3161(h) set forth a list of specific events that create excludable time, while paragraph 8 is a catch-all provision providing for the exclusion of delay resulting from a continuance granted by the judge to further the ends of justice. Significant changes in this section were made by the 1979 amendments.

To forestall unnecessary litigation, care should be taken that the record accurately reflects the commencement and termination of any excludable period, the reasons therefore, and any required findings.

In a number of districts, a judicial order is required before a clerk may enter an exclusion in the case docket. This practice appears to be desirable whether or not it is required, since it forestalls the possibility that the judge will subsequently disallow an exclusion that a court clerk and/or Assistant U.S. Attorney thought to be allowable. Such a disallowance could cause the allowable time for a case to be exceeded and the case dismissed.

It may be necessary to establish new procedures with local district courts for the first 30-day time interval in order to obtain judicial rulings on exclusions during that period. The Judicial Conference Model Speedy Trial Plan recommends that these rulings be secured through routine filing of motions with the court.

9-17.141 Other Proceedings Concerning the Defendant

The specific exclusions listed in 18 U.S.C. §3161(h)(1)(A)-(J) are not exhaustive of the proceedings that may be excluded under 18 U.S.C. §3161(h)(1). The section explicitly excludes "any period of delay resulting from other proceedings concerning the defendant, including but not limited to ..." the proceedings listed in paragraphs (A)-(J) of 18

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S.C. §3161(h)(1) (emphasis added). The Judicial Conference Guidelines, at 42-43, provide examples of other proceedings which might be excludable: bail hearings, preliminary examinations, arraignment proceedings, pre-trial conferences, and depositions pursuant to Rule 15, Federal Rules of Criminal Procedure. See United States v. Severdija, 723 F.2d 791,793 (11th Cir. 1984) (bail hearing); United States v. Garrett, 720 F.2d 705, 709 (D.C. Cir. 1983) (bond violation and bail hearing). See also, United States v. Lopez-Espindola, 632 F.2d 107, 110 (9th Cir. 1980) (state probation revocation proceedings); United States v. Bryant, 612 F.2d 806 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980) (habeas corpus proceeding).

9-17.142 Competency Examinations

Paragraph (1)(A) of 18 U.S.C. §3161(h) covers proceedings, including examinations, concerning the defendant's mental and physical competency to stand trial (18 U.S.C. §4244), and sanity (Fed. R. Crim. P. 12.2). See United States v. Crosby, 713 F.2d 1066, 1077-1079 (5th Cir. 1983). The exclusion applies only to court-ordered examinations.

This exclusion, like paragraph (1)(B) of 18 U.S.C. §3161(h), was amended in 1979 to cover "proceedings" and not only examinations. The Judicial Conference Guidelines, at 27-28, provide that the exclusion covers the entire period between the date the competency proceeding is initiated (usually by motion) and the date that the court receives all materials expected before reaching a decision, i.e., the date that the examination report has been received, briefs have been filed, and any hearing has been completed. In a Rule 12.2, Federal Rules of Criminal Procedure, situation, the exclusion would ordinarily end when the examination report is received by the government attorney. Although time taken by the court for decision could arguably be subsumed under this paragraph, for accurate recording purposes such time should be computed under paragraph (1)(J) of 18 U.S.C. §3161(h), which limits automatically excludable time for periods of advisement to 30 days. See also, USAM 9-17.148 (Transportation), infra.

9-17.143 Examinations and Deferred Prosecution Under NARA

Paragraphs (1)(B) and (C) of 18 U.S.C. §3161(h) deal with deferral of prosecution under 28 U.S.C. §2902 (Narcotics Addict Rehabilitation Act). Paragraph (C) of 18 U.S.C. §3161(h) is a new addition under the 1979 Amendments. 28 U.S.C. §2902 provides for civil commitment to treat narcotics addicts. The program is a voluntary one to which the defendant must elect to submit.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The starting date for the exclusion under paragraph (1)(B) of 18 U.S.C. §3161(h) is the date the court advises the defendant he/she may elect to submit to examination under 28 U.S.C. §2902. The ending date is the date the defendant elects not to participate, or, if he/she participates, the latest of the dates the court receives an examination report, the last day of any hearing, or the submission of briefs. See Judicial Conference Guidelines, at 28-29. Since the exclusion as amended refers to "proceeding," rather than "examinations," additional excludable time is also available for making post-hearing submissions, and for the time in which the court has the matter under advisement, 18 U.S.C. §3161(h)(1)(J). See also, USAM 9-17.148 (Transportation), infra.

Paragraph (1)(C) of 18 U.S.C. §3161(h) appears to overlap the exclusion provided in 18 U.S.C. §3161(h)(5). If a commitment for treatment is made it would appear, under 28 U.S.C. §2902(c), that the charges would be dismissed when the court receives notice from the Surgeon General that the defendant has successfully completed the program. If the Surgeon General concludes that the defendant is not being helped by the program, he/she is required to notify the court, and presumably upon this notification the excludable time which began with the commitment order ends, both under paragraph (1)(C) of 18 U.S.C. §3161(h) and 18 U.S.C. §3161(h)(5). See USAM 9-17.155, infra.

All examinations under paragraphs (1)(A) and (B) of 18 U.S.C. §3161(h) must be conducted within a reasonable period of time.

9-17.144 Trial of Other Charges

"Other charges" as covered under paragraph (1)(D) of 18 U.S.C. §3161(h) include all pending state, (see United States v. Bryant, 612 F.2d 806 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980); United States v. Braunstein, 474 F. Supp. 1, 10 (D.N.J. 1979)), and federal charges, as well as any counts that were severed from the indictment or information by the trial court. Under the catch-all phrase "other proceedings" in 18 U.S.C. §3161(h)(1), this exclusion, according to the Second Circuit Guidelines, section II, C, also covers pre-trial motions and trial preparation for the "other charges." See also, United States v. Lopez-Espindola, supra, at 109 (delay between arrest and trial on state charges was excludable under this section). The Criminal Division agrees with this approach. The Judicial Conference Guidelines, at 30-31, however, allow only an exclusion for actual court days, but note that it might be appropriate to exclude preparation time on other charges under 18 U.S.C. §3161(h)(8). Either side should also be entitled under 18 U.S.C. §3161(h)(8) to a reasonable delay after conclusion of the earlier trial. See United States v. Braunstein, supra, at 10.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.145 Interlocutory Appeals

The exclusion in 18 U.S.C. §3161(h)(1)(E), covers appeals taken by the United States under 28 U.S.C. §3731 from decisions or orders excluding evidence or requiring the return of seized property (see United States v. Saintil, 705 F.2d 415, 417 (11th Cir. 1983); United States v. McGrath, 613 F.2d 361 (2d Cir.), cert. denied, 446 U.S. 967 (1980)), and similar appeals by the government under 18 U.S.C. §2518(10)(b) (wire interception). Also included are interlocutory appeals by either party under 28 U.S.C. §1292. See United States v. Tedesco, 726 F.2d 1216 (7th Cir. 1984). See also, United States v. Albert, 595 F.2d 283, 287 (5th Cir. 1979) (Rule 50(b), Federal Rules of Criminal Procedure, Plan). Where the appeal is followed by a timely certiorari petition the exclusion further includes the period during which the case is pending in the Supreme Court. See United States v. Villamonte-Marquez, \_\_\_ U.S. \_\_\_ 103 S.Ct. 2573, 2584 n.4 (1983) (Brennan, J. dissenting). Delay resulting from an application for an extraordinary writ, which is technically not an interlocutory appeal, should be excludable as resulting from "other proceedings under (h)(1), or under the provisions of (h)(8)." See Judicial Conference Guidelines, at 31; Second Circuit Guidelines, at 19.

There is some dispute as to whether appeals from conditions of release under 18 U.S.C. §3147(b) are covered under this paragraph. The Judicial Conference Guidelines, at 31-32, state that such appeals are not covered because they have no bearing on the timing of a trial. The Second Circuit Guidelines are to the contrary. See Second Circuit Guidelines, section II, D.

Excludable time under this section will be measured from the date the notice of appeal is filed in the district court, or the date the application for an extraordinary writ is filed with the court of appeals, to the date the mandate of the court of appeals is filed in the district court. See Judicial Conference Guidelines, at 32. Cf. United States v. Ross, 654 F.2d 612, 616 (9th Cir. 1982); United States v. Gilliss, 645 F.2d 1269, 1276 (8th Cir. 1981). Although the Second Circuit Guidelines (section II, D) state that the ending date is either the date the mandate is filed in the district court, or 21 days following the decision of the appellate court, whichever is later, unless similar local circuit guidelines are adopted, the Criminal Division recommends that any additional time beyond the filing of the mandate be sought under 18 U.S.C. §3161(h)(8).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.146 Pre-Trial Motions

This exclusion, now covered under 18 U.S.C. §3161(h)(1)(F), was expanded in the 1979 amendments. The former section, 18 U.S.C. §3161(h)(1)(E), covered only the time during which hearings on pre-trial motions were held. Now the exclusion encompasses the period of time from the date the motions are filed through the conclusion of the hearings or "other prompt disposition" of such motions. The Senate Report states that the term "other prompt disposition" applies to situations where no hearing is held, and is not intended to permit circumvention of the 30-day "under advisement" provision of 18 U.S.C. §3161(h)(1)(J). See S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979). The Judicial Conference Guidelines, at 32-33, state that the starting date for this exclusion is the date that the motion is filed or made orally, and the ending date is the date on which the court has received everything expected from the parties before reaching a decision--the date on which all anticipated briefs have been filed and any necessary hearing has been completed.

Some circuits have expressed concern that large periods may elapse between the filing and hearing date of a motion and have limited the length of the exclusion to the time that is "reasonably necessary" to process the motion. See, e.g., United States v. Mitchell, 723 F.2d 1040, 1047-1048 (1st Cir. 1983); New York v. Novak, 715 F.2d 810, 820 (3d Cir. 1983); United States v. Cobb, 697 F.2d 38, 44 (2d Cir. 1982). Yet other circuits have placed no such limitation on the length of the exclusion. See, e.g., United States v. Campbell, 706 F.2d 1138, 1143 (11th Cir. 1983); United States v. Stafford, 697 F.2d 1368, 1373 (11th Cir. 1983); United States v. Brim, 630 F.2d 1307, 1312 (8th Cir. 1980). Especially where the defendant is responsible for the delay in processing the motion, a lengthy exclusion should be granted. See, e.g., United State v. Turner, 725 F.2d 1154, 1160 (8th Cir. 1984); United States v. Bufalino, 683 F.2d 639, 646 (2d Cir. 1982).

Note that 18 U.S.C. §3161(h)(8)(B) has also been expanded to cover preparation of motions in those situations where the motions involve novel questions of law or complex facts. See United States v. Molt, 631 F.2d 258, 262 (3d Cir. 1980) (difficult suppression motion); S. Rep. No. 212, 96th Cong., 1st Sess. 34 (1979). The time for preparation of routine motions is not excludable. See USAM 9-17.159, infra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.147 Removal and Transfer Proceedings

The original "proceedings related to transfer from other districts" provision (former section 3161(h)(1)(F)) has been expanded to apply clearly both to "transfer of cases" under Rules 20 and 21, Federal Rules of Criminal Procedure, and "removal of defendants" under Rule 40, Federal Rules of Criminal Procedure. (Commitment to Another District). See 18 U.S.C. §3161(h)(1)(G).

In Rule 20, Federal Rules of Criminal Procedure, proceedings, the exclusion will commence with the execution by the defendant of the consent to transfer, and will usually end with the receipt of the papers in the originating district after return by the transferee district following failure of the proceedings through the refusal of the defendant to plead guilty or the refusal of the court to accept the plea. See Judicial Conference Guidelines, at 36-38. However, it should be noted that the Criminal Division does not agree with the position taken by the Judicial Conference Guidelines that the legislative history of the Speedy Trial Act precludes an exclusion where the transfer proceedings abort through the action of government counsel. In this situation, the exclusion would end with the refusal of one of the U.S. Attorneys to consent to the transfer. In the ordinary course of events, the need for an exclusion will not arise where the transfer is effected and a plea of guilty entered. It should be noted that while it is arguable that the transportation of the defendant to the district where the charge is pending after failure of the Rule 20, Federal Rules and Criminal Procedure, proceedings could be subsumed under the heading of a delay attributable to those proceedings, it would seem more appropriate to attribute it to the Rule 40, Federal Rules of Criminal Procedure, removal proceedings, which is also recognized by paragraph (1)(G) of 18 U.S.C. §3161(h). See United States v. Hendricks, 661 F.2d 38, 42 n. 6 (5th Cir. 1981). Care should be taken that a double exclusion is not recorded. See, e.g., United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984).

In Rule 21, Federal Rules of Criminal Procedure, proceedings, the Judicial Conference Guidelines, at 38-39, state that 18 U.S.C. §3161(h)(1)(G) excludes the time between the date a motion for change of venue is made and the date the court has received everything expected from the parties before making a decision; if the motion is granted, the time between the grant of the motion and the date the transferee district receives the case papers would also be excluded. See United States v. Wilson, 720 F.2d 608, 609-610 (9th Cir. 1983). The Division believes that it would be appropriate to calculate the excludable time for change of venue motions under 18 U.S.C. §3161(h)(1)(F) and (J), and to begin the 18 U.S.C. §3161(h)(1)(G) exclusion only when the motion is granted, to exclude the time needed for transfer of the proceedings. But see, United States v. Atkins, 698 F.2d 711, 714 (5th Cir. 1983). More importantly, the Division

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

believes that the time excludable under the Judicial Conference Guidelines when a change of venue motion is granted is too limited. It would seem appropriate to treat the time until the defendant's appearance in the court to which the case has been transferred as attributable to the transfer proceedings and excludable under 18 U.S.C. §3161(h)(1)(G). Alternatively, the court could be asked to exclude a specific period of time reasonably necessary under the circumstances of the transfer. See Second Circuit Guidelines, section II, F(6).

The exclusion for proceedings under Rule 40, Federal Rules of Criminal Procedure, should ordinarily commence with the arrest of the defendant in the district other than that in which the offense is alleged to have been committed, and extend through his/her appearance before a judicial officer of the charging district.

9-17.148 Transportation of Defendant

18 U.S.C. §3161(h)(1)(H) provides an exclusion for transportation of a defendant from another district or to or from hospitals or places of examination. In many instances, such transportation of the defendant will, be subsumed under another exclusion, such as 18 U.S.C. §3161(h)(1)(A), (B) or (G); in such instances, a separate exclusion under 18 U.S.C. §3161(h)(1)(H) should not be recorded, to avoid double counting.

Under 18 U.S.C. §3161(h)(1)(H) any period greater than 10 days between the date the order is entered directing removal or transportation and the arrival at the destination is presumed to be "unreasonable." The Judicial Conference Guidelines, at 39, state that this is a rebuttable presumption. Even assuming it were rebuttable, relief might nevertheless be available under 18 U.S.C. §3161(h)(8). Once treatment or examination is completed, the 10-day limitation would appear to apply to the return of the defendant as well.

Where transportation is being recorded as a separate exclusion pursuant to 18 U.S.C. §3161(h)(1)(H), the Judicial Conference Guidelines state that the clerk should not record time in excess of 10 days absent a court order. Where the clerk is recording another exclusion which encompasses transportation, more than 10 days transportation time may be recorded as excludable. See Judicial Conference Guidelines, at 39-40. This does not mean that time consumed in transportation in such cases can simply be ignored, however, or that effort should not be made to transport the defendant as quickly as possible. The U.S. Attorney should brief the United States Marshal on the time constraints imposed by the Speedy Trial Act. The attorney in charge of the case should monitor the defendant's whereabouts and the stage of any examination or hearing and make an

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

appropriate memorandum to the file, and, where necessary, a report to the judge or court clerk. Care should be taken in relying on any exclusion encompassing more than the 10 days "one-way" transportation time, since the presumption of unreasonableness contained in 18 U.S.C. §3161(h)(1)(H) may be applied to the transportation component of other exclusions.

9-17.149 Consideration of Proposed Plea Agreements

18 U.S.C. §3161(h)(1)(I) is a new subsection added in the 1979 amendments, and excludes the period of time during which the trial court is considering a proposed plea agreement between the government and the defendant. The exclusion does not apply to negotiations for an agreement to plead guilty but commences only when the agreement is submitted for court approval. The preliminary negotiations may warrant a continuance granted under 18 U.S.C. §3161(h)(8), and 18 U.S.C. §3161(h)(8) may allow the defendant or government further preparation time should negotiations fail or the court reject the plea agreement. But see, United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977); United States v. Roberts, 515 F.2d 642, 645, 647 (2d Cir. 1975).

9-17.150 Withdrawn Pleas

18 U.S.C. §3161(i) provides that when a guilty or nolo contendere plea is withdrawn and a new plea of not guilty entered, the defendant is "deemed indicted" on the day withdrawal is "final and trial must be commenced within 70 days thereafter. See United States v. Davis, 679 F.2d 845, 849-850 (11th Cir. 1982) (withdrawal of a tentative plea). Even when the guilty plea that is withdrawn only involved some of the counts in the indictment, all counts will have the benefit of the new time limits. See United States v. Gilliss, 645 F.2d 1269, 1275-76 (8th Cir. 1981). 18 U.S.C. §3161(e), rather than (i), applies where a plea and resulting conviction is vacated on collateral attack. See United States v. Mack, 669 F.2d 28, 30-34 (1st Cir. 1982).

Where a plea agreement involves dismissal of an entire indictment in exchange for a guilty plea to charges contained in another indictment, 18 U.S.C. §3161(i) may not automatically provide for a new time period. In such a situation, the Judicial Conference Guidelines, at 61, recommend use of 18 U.S.C. §3161(h)(8):

To prevent a miscarriage of justice in the event of withdrawal of the guilty plea, the court should at the time of accepting the guilty plea on the second

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

indictment, grant a continuance under Section 3161(h)(8) with respect to the first indictment if necessary to keep that indictment alive up to the day of sentencing. If the plea should be withdrawn, additional continuances can be granted as appropriate to permit orderly resumption of the prosecution.

9-17.151 Proceedings Under Advisement

The time during which proceedings or pre-trial motions are under advisement is covered under 18 U.S.C. §3161(h)(1)(J). This time period is limited to a maximum of 30 days. Extra time would, under certain circumstances, be available under 18 U.S.C. §3161(h)(8). See United States v. Molt, 631 F.2d 1258 (3d Cir. 1980). The Judicial Conference Guidelines recommend that the starting date be the latter of the last date on which the court has received everything it expects to receive or the hearing date. The ending date would be the earliest of (1) the date the judge's decision is filed, or (2) the date the judge renders his/her decision orally in open court, or (3) the expiration of the 30-day period. See Judicial Conference Guidelines, at 41. Accord, United States v. Mers, 701 F.2d 1321, 1336 (11th Cir. 1983); United States v. Bufalino 683 F.2d 639, 643-644 (2d Cir. 1982).

9-17.152 Deferred Prosecution (Pre-Trial Diversion)

18 U.S.C. §3161(h)(2) covers situations where prosecution is deferred pursuant to a written agreement between the U.S. Attorney and the defendant. This exclusion would apply in cases where the defendant has been arrested or indicted and is subsequently placed on pre-trial diversion. The court must approve the agreement in order to qualify for excludable time. The starting date is the date of court approval, and the ending date is the date of dismissal of the case pursuant to the agreement, or the date the court receives a copy of the U.S. Attorney's notice to the defendant of an intention to resume prosecution. See Judicial Conference Guidelines, at 43; Second Circuit Guidelines, at 18. The time spent considering a defendant's request for pre-trial diversion can be grounds for 18 U.S.C. §3161(h)(8) continuance; the time from submission of an agreement to the court until the date of its approval or disapproval should be excludable under 18 U.S.C. §3161(h)(1)(J).

It should be noted that as a matter of policy the Department opposes pre-trial diversion subject to court approval. Wherever possible, diversion should be accomplished pursuant to the provisions of USAM 9-1.200 and USAM 9-2.022.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.153 Absence or Unavailability of Parties and Witnesses

Any period of delay resulting from the absence or unavailability of the defendant or an essential witness is excludable. See 18 U.S.C. §3161(h)(3)(A). A defendant or witness is considered absent when his/her whereabouts are unknown to the prosecution and, in addition, he/she is attempting to avoid apprehension or prosecution or his/her whereabouts cannot be determined by due diligence. See United States v. Fielding, 645 F.2d 719 (9th Cir. 1981). See also, United States v. Garrett, 720 F.2d 705, 707-708 (D.C. Cir. 1983) (a defendant is not unavailable merely because he/she has violated a condition of his/her bail). See 18 U.S.C. §3161(h)(3)(B). Both the Judicial Conference Guidelines, at 45, and the Second Circuit Guidelines (section II, I) state that when a defendant or essential witness is absent, the excludable time starts on the earlier of the date he/she was required to make an appearance, or the date the court received notice that the whereabouts of the defendant or witness are unknown. The ending date is the date the prosecutor receives notice of the defendant's or witness' whereabouts.

A witness or defendant is unavailable when his/her whereabouts are known, but he/she is either resisting appearing or his/her presence cannot be obtained by due diligence. See 18 U.S.C. §3161(h)(3)(B). See also, United States v. Tedesco, 726 F.2d 1216, 1222 (7th Cir. 1984). Again, both the Judicial Conference Guidelines, at 46-47, and the Second Circuit Guidelines (section II, I) state that the starting date for excludable time in an unavailability situation is the date when the defendant or witness was scheduled to appear. The ending date is the date on which the defendant or witness could have been produced in court by the government. This interpretation of the exclusion will be unduly narrow in many situations, as where the anticipated unavailability of a witness on a particular date causes the trial to be postponed, and an 18 U.S.C. §3161(h)(8) continuance should be sought in such instances. See United States v. Tedesco, supra.

It should be noted that for this exclusion to apply a witness must be "essential." Moreover, either the defendant's or witness' whereabouts must be unknown, despite due diligence, or presence at trial must be unobtainable despite due diligence. See United States v. Marrero, 705 F.2d 652, 656-658 (2d Cir. 1983) (accomplices were essential witnesses who were unavailable because they refused to testify). Appropriate records should be kept to support such findings. In addition, since the government has the burden of proof on this exclusion if a motion to dismiss is made by the defendant, 18 U.S.C. §§3161(a)(2)), 3161(h)(8), rather than this exclusion,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

should be used where defense witnesses are absent or unavailable. See Judicial Conference Guidelines, at 44-45.

9-17.154 Physical or Mental Incompetency

Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial is excluded under 18 U.S.C. §3161(h)(4). The starting date for excludable time under this section is the day that the court determines that the defendant is mentally incompetent or physically unable to stand trial. The ending date is the date the court determines that the defendant is fit to stand trial. See Judicial Conference Guidelines, at 47-48; Second Circuit Guidelines, section II. (The Division disagrees with the Judicial Conference Guidelines statement that the exclusion would end earlier upon notice to the court that the defendant is competent to stand trial.)

9-17.155 Commitment Under NARA

18 U.S.C. §3161(h)(5), like paragraph (h)(1)(C), allows the prosecution to be delayed while the defendant is rehabilitated through civil commitment for narcotics addiction under the Narcotics Addict Rehabilitation Act, 28 U.S.C. §2902. The starting date is the date the court determines that the defendant is an addict and likely to be rehabilitated through treatment. See 28 U.S.C. §2902(c). Preliminary proceedings are excludable under 18 U.S.C. §3161(h)(1)(B). The ending date is the date the court receives from the Surgeon General either a certificate that the defendant has successfully completed the treatment program, or advice that the defendant cannot be treated further. See 28 U.S.C. §2902(c); USAM 9-17.143, supra.

9-17.156 Recharging after Government Dismissal of Indictment or Information

Under 18 U.S.C. §3161(h)(6) the running of the "trial clock" is suspended from the date the information or indictment is dismissed upon motion of the attorney for the government until a charge is filed against the defendant for the same offense, or any offense required to be joined with the offense charged in the original indictment or information. See United States v. Hicks, 693 F.2d 32, 35 (9th Cir. 1982); United States v. Dennis, 625 F.2d 782 (8th Cir. 1980). The operation of this section is well explained in the original Senate Report on the Speedy Trial Act which states:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Subparagraph 3161(h)(6) provides for the case where the Government decides for one reason or another to dismiss charges on its own motion and to then recommence prosecution. Under this provision only the period of time during which the prosecution has actually been halted is excluded from the 60-day time limits. Therefore, under 3161(h)(6) when the Government dismisses charges only the time between when the Government dismisses charges to when it reindicts is excluded from the 60-day time limits. For example, if the Government decides 50 days after indictment to dismiss charges against the defendant then waits six months and reindicts the defendant for the same offense the Government only has 10 days in which to be ready for trial.

S. Rep. No. 1021, 93d Cong., 2d Sess. 38 (1974).

The excludable period starts the day the original indictment or information is dismissed; the date of entry of the order, rather than the date of filing of the motion would appear to control. The time from the filing of the motion to dismiss to the entry of the order is arguably excludable under 18 U.S.C. §3161(h)(1)(F) and (J). The 18 U.S.C. §3161(h)(6) exclusion ends the day the subsequent complaint, information, or indictment is filed. Since the exclusion begins only with the dismissal of the original charges, once a superseding indictment is intended, it is important to obtain dismissal of the original charge as soon as possible in order to stop the clock, unless there is some reason for keeping the original indictment alive. If the original indictment is not dismissed before the superseding indictment is returned, the clock continues to run. See United States v. Novak, 715 F.2d 810, 817 (3d Cir. 1983); United States v. McCown, 711 F.2d 1441, 1446 (9th Cir. 1983).

This section applies only when the government obtains dismissal of charges contained in an indictment or information. If the defendant successfully moves to dismiss the indictment or information (or a complaint is involved), 18 U.S.C. §3161(d) applies and all time limits on the new charges are figured without regard to the existence of the original charge. See United States v. Horton, 676 F.2d 1165, 1170 (7th Cir. 1982). See the discussion of 18 U.S.C. §3161(d) at USAM 9-17.134, supra.

Note also that even where the government obtained dismissal of the original indictment, time limits on new offenses charged in the superseding indictment--i.e. those which are not the "same offense" or "offenses

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

which are required to be joined with" the offense charged in the original indictment--would be computed without reference to the time limits on the original charge. Consequently, where the government dismisses an indictment and returns superseding charges, different time limits for trial will frequently apply to charges within the same indictment, particularly if the superseding indictment adds new defendants. 18 U.S.C. §3161(h)(7) can be used to equalize the trial date for multiple defendants charged in the same indictment. Where multiple charges with different time limits are contained in an indictment against a single defendant, an 18 U.S.C. §3161(h)(8) continuance might be appropriate, to avoid the need for either multiple trials or trial of all charges by the earliest date.

9-17.157 Meaning of "Same Offense or Any Offense Required to be Joined with that Offense"

In the absence of any requirement for compulsory joinder imposed by statute or rule, the phrase "or any offense required to be joined with that offense" may be restricted to constitutional limitations imposed by the Double Jeopardy Clause, including concepts of collateral estoppel. See United States v. Pollock, 726 F.2d 1456, 1462-1463 (9th Cir. 1984); United States v. Novak, *supra*; Ashe v. Swenson, 397 U.S. 436 (1970); see also, United States v. Peters, 434 F. Supp. 357, 360-362 (D.D.C. 1977), *aff'd*, 587 F.2d 1267, 1270-1275 (D.C. Cir. 1978), (where both courts interpret the phrase in a local rule as synonymous with the phrase "offense based on the same conduct or arising from the same criminal episode" appearing in 18 U.S.C. §3161(d)); ABA Standards for Criminal Justice Relating to Speedy Trial §2.2(a); and the concurring opinion of Brennan, J., in Ashe v. Swenson, *supra*, at 453-454.

9-17.158 Effect of Joinder and Severance

A reasonable period of delay is excludable under 18 U.S.C. §3161(h)(7) when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted. A primary application of this exclusion would be in situations where co-defendants have had different periods excluded under other provisions of the Speedy Trial Act. See United States v. Edwards, 627 F.2d 460 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 872 (1980); United States v. McGrath, 613 F.2d 361 (2d Cir.), *cert. denied*, 446 U.S. 967 (1980). According to the Judicial Conference Guidelines, at 50-51, the starting date for this excludable period is the day following the last day for commencement of trial for that defendant for whom the time for trial would otherwise have run. The ending day is the latest permissible date for commencement of trial of any co-defendant, subject to the "reasonableness" limitation. The

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

courts, however, have generally held that there is only one speedy trial clock for all defendants and an exclusion for one defendant is an exclusion for all. See United States v. Tedesco, *supra*; United States v. Yunis, 723 F.2d 795, 797 (11th Cir. 1984). Note that this provision does not apply pre-indictment. United States v. Garrett, 720 F.2d 705, 708 (D.C. Cir. 1984).

9-17.159 Ends of Justice

18 U.S.C. §3161(h)(8) permits a judge, on his/her own motion or at the request of the defendant, his/her counsel, or the attorney for the government, to grant a continuance on the basis of his/her findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant to a speedy trial. The court must set forth, in the record of the case, either orally or in writing, its reasons for such finding. See United States v. Molt, 631 F.2d 258 (3d Cir. 1980) (where there are multiple indictments, reasons need only be noted on one docket sheet); United States v. Bryant, 726 F.2d 510 (9th Cir. 1984) and United States v. Edwards, *supra* (reasons may be noted later). But see, United States v. Janik, 723 F.2d 537, 545 (7th Cir. 1983) (the continuance may not be granted retroactively).

The provision is a basic "safety valve" within the Speedy Trial Act, and permits the court to grant an excludable continuance where, on balance, the interest of justice warrants a later indictment or trial date than would otherwise be permitted by the statutory limits as extended by specific exclusions. The possibility of obtaining an 18 U.S.C. §3161(h)(8) continuance should be considered whenever circumstances not covered by the specific exclusions of the Speedy Trial Act would make indictment or trial within the statutory limits impossible or unreasonable.

18 U.S.C. §3161(h)(8)(B) lists a number of factors which, "among others," are to be considered by the court in determining whether to grant a continuance in the proceeding. Those factors are:

A. Whether the failure to grant such a continuance would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice. See United States v. Furlow, 644 F.2d 764 (9th Cir. 1981) (Mt. St. Helens eruption continuance); United States v. Edwards, *supra*; United States v. Dennis, *supra* (continuance to allow the government to decide whether to appeal an adverse pre-trial ruling); subsection (h)(8)(B)(i) of 18 U.S.C. §3161.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pre-trial proceedings or for the trial itself within the time limits established by this section. See 18 U.S.C. §3161(h)(8)(B)(ii); United States v. Ruggiero, 726 F.2d 913, 925 (2d Cir. 1984). This subsection was amended in 1979 to include the reference to "novel questions of fact or law" and to permit a continuance to be granted for pre-trial motions presenting novel questions of law or complex facts. The time for preparation of routine motions is not excludable. See S. Rep. No. 212, 96th Cong., 1st Sess. 33-34 (1979); USAM 9-17.146, supra.

C. Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in 18 U.S.C. §3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex. See 18 U.S.C. §3161(h)(8)(B)(iii). See United States v. Mitchell, 723 F.2d 1040, 1042-1044 (1st Cir. 1983); United States v. McGrath, supra. This subsection was also amended in 1979, and is specifically directed at delay in the arrest to indictment interval. The section by section analysis of the Senate Committee Report states that the reference to delay caused by an arrest occurring "at such a time that is unreasonable to expect return and filing of the indictment within the period specified in section 3162(b)" was intended to cover instances where an arrest is made shortly before a grand jury, not continuously in session, is due to expire. See S. Rep. No. 212, 96th Cong., 1st Sess. 34-35 (1979). However, earlier in the Report the Committee indicated that the amendment was more broadly intended to clarify that an "ends of justice" continuance may be granted to "cover reasonable periods of delay during which reports from investigative agencies and evidentiary analyses from laboratories are completed..." Id. at 23.

Accordingly, the Division believes that an 18 U.S.C. §3161(h)(8) continuance can and should be sought where it is not possible to indict within 30 days after arrest either because (1) the grand jury expired shortly after the arrest and will not again be in session during the 30-day interval, or (2) the investigation cannot be completed and reports obtained before expiration of the 30-day period. Of course, an 18 U.S.C. §3161(h)(8) continuance would also be appropriate where the grand jury begins but cannot complete its deliberations within the 18 U.S.C. §3161(b) limits, due to the complexity of the case. See USAM 9-17.122, supra.

D. Whether the failure to grant a continuance in a case not meeting the criteria of 18 U.S.C. §3161(h)(8)(B)(ii) would deny the defendant

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

reasonable time to obtain counsel, would unreasonably deny the defendant or the government continuity of counsel, or would deny counsel for the defendant or the attorney for the government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence, 18 U.S.C. §3161(h)(8)(B)(iv). See United States v. Phillips, 630 F.2d 1138 (6th Cir. 1980); United States v. Wilks, 629 F.2d 669, 672-73 (10th Cir. 1980); United States v. Aviles, 623 F.2d 1192 (7th Cir. 1980) (in each case the defendant's motion for a continuance was properly denied).

This subsection is a 1979 addition, allowing additional time for the defendant to obtain counsel and where the government or defense attorneys trying the case have scheduling conflicts or other problems, including illness and long planned vacations. This section also provides for excludable time when there simply is not enough time to prepare for trial, even though the case is neither unusual or complex. A continuance might be appropriate where, for example, additional time is needed to complete transcription of wiretap evidence. In this connection, the Senate Committee Report states:

Third, and most important, the Committee amendment provides the court a basis for a continuance when, after due diligence on the part of counsel for either party, there is simply not enough time to effectively prepare for trial of a case which is neither unusual nor complex, within the meaning of new clause (ii), supra. The Committee intends that the Government would bear a heavy burden under this provision, in cases started by indictment, when it has been preparing a case for a substantial period of time prior to seeking and obtaining return of the indictment. In cases initiated by arrest, however, granting a motion for continuance under this provision should be easier. The original legislative history also stated that a defendant will be entitled to additional time when his attorney has not been diligent in preparing for trial.

S. Rep. No. 212, 96th Cong., 1st Session 35 (1979).

As noted in the Senate Report, the legislative history to the 1974 Act indicated that an "ends of justice" continuance might be appropriate to permit the defense additional time to prepare for trial even where defense counsel has not exercised "due diligence." See H.R. Rep. No. 1508, 93rd Cong., 2d Sess. 33-34 (1974); reprinted in 1974 U.S. Code Cong. & Ad. News 7401, 7426.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It should be noted that the factors listed in subsections (b)(1)-(iv) of 18 U.S.C. §3161(h)(8) are not the only factors that the court may consider in determining whether to grant an excludable continuance. But see, United States v. Fielding, 645 F.2d 719, 721 (9th Cir. 1981). The Second Circuit Guidelines, section III contain an extensive discussion of the circumstances that might warrant an 18 U.S.C. §3161(h)(8) continuance including: emergencies (i.e., natural disasters, transportation strikes, etc.); a defendant's cooperation (see also, USAM 9-17.149, supra); consideration by the government of a defendant's request for pre-trial diversion; absence or unavailability of defense witnesses (see also, USAM 9-17.153, supra); pending court of appeals or Supreme Court decision that would be dispositive of the case. An 18 U.S.C. §3161(h)(8) continuance will also be appropriate in many instances following the termination of a specific automatic exclusion under 18 U.S.C. §3161(h)(1)-(h)(7). See Judicial Conference Guidelines, at 52-59. The only factors that may not be considered as grounds for an 18 U.S.C. §3161(h)(8) continuance are listed in 18 U.S.C. §3161(h)(8)(C) which explicitly forbids the granting of a continuance under paragraph (8)(A) of 18 U.S.C. §3161(h) because of general congestion of the court's calendar (United States v. New Buffalo Amusement Corp., 600 F.2d 368 (2d Cir. 1979)), or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the government.

The Judicial Conference Guidelines, at 58, suggest that an 18 U.S.C. §3161(h)(8) continuance may not be granted until the final day of the 70-day period and that trial must commence as soon as the continuance expires. The Second Circuit Guidelines, at 43-45, disagree and state that an ends-of-justice continuance may fall in the middle of the 70-day period. Thus, if only 40 non-excludable days have been used prior to the expiration of the continuance, the case need not be tried for another 30 days. The legislative history favors the Second Circuit's interpretation. See, e.g., S. Rep. No. 212, 96th Cong., 1st Sess. 17-20, 34-35 (1979); H.R. Rep. No. 390, 96th Cong., 1st Sess. 12 (1979); H.R. Rep. No. 1508, 93d Cong., 2d Sess. 22 (1974); S. Rep. No. 1021, 93d Cong., 2d Sess. 39-40 (1974).

9-17.160 Defendants Incarcerated Elsewhere

18 U.S.C. §3161(j) provides that it is the duty of the attorney for the government when he/she knows that a person charged with an offense is serving a term of imprisonment in any penal institution, to promptly: (1) undertake to obtain the presence of the prisoner for trial; or (2) cause a detainer to be filed with the person having custody of the prisoner and request him/her to so advise the prisoner of his/her right to demand trial.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

See United States v. Roper, 716 F.2d 611, 614 (4th Cir. 1983); United States v. Bryant, 612 F.2d 806 (4th Cir. 1979), cert. denied, 446 U.S. 920 (1980) (demand is a prerequisite to a speedy trial). See also, USAM 9-17.102, supra. The government does not bear the burden of proving that it lacked knowledge of a defendant's incarceration. See United States v. Hendricks, 661 F.2d 38,40 (5th Cir. 1981).

Upon receipt of notice that the defendant demands trial the attorney for the government shall promptly seek to obtain the presence of the prisoner for trial.

Under 18 U.S.C. §3161(b) the applicable time limitation does not begin to run until the defendant is in federal custody.

Note that under 18 U.S.C. §3161(j) the Speedy Trial Act is not called into play until a federal charge has been filed, United States v. Burkhalter, 583 F.2d 389 (8th Cir. 1978), and that the accused must be "serving a term of imprisonment." For cases construing identical language in the Interstate Agreement on Detainers Act, 18 U.S.C. app., see United States v. Roberts, 548 F.2d 665, 670, 671 (6th Cir. 1977); United States v. Harris, 566 F.2d 610 (8th Cir. 1977); United States v. Evans, 423 F. Supp. 528, 531 (S.D.N.Y. 1976), aff'd, 556 F.2d 561 (2d Cir. 1977). Where both the Speedy Trial Act and the Interstate Agreement on Detainers Act apply, effort should be made to comply with the time and other limitations of both. See United States v. Mauro, 436 U.S. 340, 356-357 n.24 (1978).

In view of the "constitutional duty" to make a good faith effort to bring a prisoner to trial imposed on the prosecutor (see Barker v. Wingo, 407 U.S. 514, 527 (1971); Smith v. Hooey, 393 U.S. 374, 383 (1969)), reliance upon filing of a detainer under 18 U.S.C. §3161(j)(1)(B) may be ill-advised. See USAM 9-2.145.

#### 9-17.170 Sanctions

18 U.S.C. §3162(a)(1) provides that if an indictment or information is not timely filed the complaint shall be dismissed or "otherwise dropped." Where the defendant has been arrested but never charged in a complaint the dismissal sanction does not apply. See United States v. Janik, 723 F.2d 537, 542 (7th Cir. 1983); United States v. Sanchez, 722 F.2d 1501, 1509 (11th Cir. 1984). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense, the facts and circumstances of the case which led to the dismissal, and the impact of a re-prosecution on the administration of justice. See United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Bittle, 699 F.2d 1207, 1208 (D.C. Cir. 1983); United States v. Carreon, 626 F.2d 528 (7th Cir. 1980). There is no presumption in favor of a dismissal with prejudice. See United States v. Caparella, 716 F.2d 976, 978-980 (2d Cir. 1983).

Unlike 18 U.S.C. §3162(a)(2), 18 U.S.C. §3161(a)(1) does not explicitly require a motion by the defendant, allocate the burden of proof, or require timeliness. Nevertheless, the legislative history clearly contemplates the same conditions. See H.R. Rep. No. 1508, 93rd Cong., 2d Sess. 23 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7401, 7416. A motion to dismiss that alleges a violation of the 30-day arrest to indictment period is timely if made after indictment. See United States v. Pollock, 726 F.2d 1456 (9th Cir. 1984). See also, 1974 U.S. Code Cong. & Ad. News at 7419 and S. Rep. No. 212, 96th Cong., 1st Sess. 9 (1979); and Rule 12(f), Federal Rules of Criminal Procedure, which provides that defenses and objections based on defects in the institution of prosecution must be raised prior to trial or are waived.

18 U.S.C. §3162(a)(2) provides that if trial is not timely commenced upon an indictment or information it must be dismissed. The defendant has the burden of proof of supporting such motion but the government has the burden of going forward with the evidence in connection with any exclusion of time under 18 U.S.C. §3161(h)(3). See United States v. Fielding, 645 F.2d 719, 723 (9th Cir. 1981).

The denial of a motion to dismiss that alleges a Speedy Trial Act violation is not appealable prior to trial. See United States v. Mehrmanesh, 652 F.2d 766 (9th Cir. 1981); cf. United States v. MacDonald, 435 U.S. 850 (1978). If a motion to dismiss is granted, however, the case should be reported at once to the Appellate Section of the Criminal Division so that the Solicitor General may determine if the sanction applied is appropriate.

9-17.171 Waiver

18 U.S.C. §3162(a)(2) provides that failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section. See United States v. Tercero, 640 F.2d 190, 195 (9th Cir. 1980) (dismissal motions based solely on the Sixth Amendment do not preserve for appeal a claim under the Act); Smith v. United States, 635 F.2d 693, 697 (8th Cir. 1980); United States v. Runge, 593 F.2d 66, 71 (8th Cir. 1979), cf., Fed. R. Crim. P. 12(b), (f). Moreover, a defendant waives a speedy trial claim by pleading guilty unless the plea is conditioned on his/her right to raise the issue on appeal. See United States v. Yunis, 723 F.2d 795, 796 (11th Cir. 1984).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Whether a defendant may execute a valid express waiver of his/her right to move for dismissal is unclear. The Third Circuit has held that a defendant does not waive his/her right to a speedy trial by requesting a postponement. See United States v. Carrasquillo, 667 F.2d 382, 388-390 (3rd Cir. 1981). This decision is predicated on the Senate Committee Report, which states: "in the strongest possible terms that any construction which holds that any of the provisions of the Speedy Trial Act is waivable by the defendant, other than his/her statutory conferred right to move for dismissal as cited above, is contrary to legislative intent and subversive of its primary objective: protection of the societal interest in speedy disposition of criminal cases by preventing undue delay in bringing such cases to trial." See S. Rep. No. 212, 96th Cong., 1st Sess. 29 (1979). This view is in accord with an earlier district court decision. See United States v. Beberfeld, 408 F. Supp. 1119, 1122-23 (S.D.N.Y. 1976); but see, Platt, The Speedy Trial Act of 1974: A Critical Commentary, 44 Brooklyn L. Rev. 757 (1978). The basic argument underlying this position is that the rights conferred by the Speedy Trial Act include a right conferred upon the public which the defendant is incompetent to waive.

The Criminal Division does not believe that either the Senate Committee Report or the arguments it advances are necessarily conclusive of the issue. Despite the public interest in holding trials within the time limits of the Speedy Trial Act, it might be argued that the right to move for dismissal if those limits are exceeded is primarily a right of the defendant which he/she should be competent to waive expressly as well as by procedural default, as in the case of statutes of limitations. See United States v. Wild, 551 F.2d 418 (D.C. Cir. 1977), cert. denied, 431 U.S. 916 (1977).

Nonetheless, there is a substantial risk that attempted defense waivers of the Speedy Trial Act will be held invalid. Moreover, there is little apparent reason why the liberalized automatic exclusions of 18 U.S.C. §3161(h)(1)-(h)(7) and the discretionary "ends of justice" provision of 18 U.S.C. §3161(h)(8) should be insufficient to allow all parties ample time to prepare for trial without resort to mechanisms of questionable validity. Accordingly, it is strongly recommended that government attorneys not initiate or affirmatively seek such waivers, and that they attempt to discourage their courts from exacting them by bringing to the court's attention the Committee statement quoted above.

#### 9-17.172 Sanctions Apply to Retrials

The sanctions of 18 U.S.C. §3162 apply to new trials and retrials under 18 U.S.C. §3161(d) and (e).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.173 Sanctions Against Attorneys

18 U.S.C. §3162(b) provides for sanctions that may be applied against government or defense attorneys for: allowing the case to be set for trial without disclosing the unavailability of a necessary witness; filing a frivolous motion solely for purposes of delay, making a false material statement for the purpose of obtaining a continuance, or otherwise willfully failing to proceed to trial without justification. See United States v. Carlone, 666 F.2d 1112, 1116 (7th Cir. 1981).

The court may punish appointed defense counsel by withholding up to 25% of the payments under the Criminal Justice Act 18 U.S.C. §3162(b)(A), or by fining retained counsel up to 25% of his/her fee, 18 U.S.C. §3162(b)(B). Government counsel can be fined up to \$250, 18 U.S.C. §3162(b)(C). Both defense and government counsel may be barred from appearing before the court for up to 90 days, 18 U.S.C. §3162(b)(D), and reports to appropriate disciplinary committees may be made, 18 U.S.C. §3162(b)(E). In addition, other sanctions such as contempt are unimpaired.

9-17.174 Deferred Effective Date of Sanctions

The 1979 amendments to the Speedy Trial Act delayed imposition of the full dismissal sanctions and sanctions upon attorneys from July 1, 1979, to July 1, 1980. See 18 U.S.C. §3163(c). See United States v. Litton Systems, Inc., 722 F.2d 264, 265 (4th Cir. 1984); United States v. Horton, 646 F.2d 181, 188 (5th Cir. 1981); United States v. Gilliss, 645 F.2d 1769, 1774-1775 (8th Cir. 1981); United States v. Watson, 623 F.2d 1198 (7th Cir. 1980). Prior to the effective date of the mandatory sanctions provision, dismissal was discretionary in some circuits. See, e.g., United States v. Greer, 620 F.2d 1383 (10th Cir. 1980); United States v. Dichne, 612 F.2d 632 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980).

9-17.180 Detainees and "High Risk" Designees

18 U.S.C. §3164(a), as amended in 1979, requires priority of trial for "persons...being held in detention solely because they are awaiting trial," 18 U.S.C. §3164(a)(1); United States v. Furlow, 644 F.2d 764 (9th Cir. 1981)(the 90-day rule does not apply to persons detained on other charges), and persons released pending trial "who have been designated by the attorney for the Government as being of high risk" (18 U.S.C. §3164(a)(2)).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Trial of such persons must be commenced within 90 days of the beginning of continuous detention or risk designation. The 90-day period is subject to the exclusions of 18 U.S.C. §3161(h). See 18 U.S.C. §3164(b).

Failure to timely commence trial of a detainee, without his/her "fault" or that of his/her counsel, and failure to timely commence trial of a designee, without fault of the prosecutor, requires automatic review by the court of the conditions of release. The sanction for failing to meet the limit in the case of a detainee is his/her release (but not dismissal of the case). See Lambert v. United States, 600 F.2d 476 (5th Cir. 1976). In the case of a designee, the nonfinancial release conditions may be modified to assure his/her appearance if the court finds he/she has intentionally delayed his/her trial. See 18 U.S.C. §3164(c).

The term "high risk" is not defined in the Speedy Trial Act. The Senate Report does not explain the term but refers to prototype rules which suggest that the test is danger to self, witnesses or the community. See S. Rep. No. 1021, 93rd Cong., 2d Sess. 44, 45 (1974). The House Report, supported by the text of 18 U.S.C. §3164(c), defines the term exclusively in terms of fugitivity. See H.R. Rep. No. 1508, 93rd Cong., 2d Sess. 39 (1974). The Judicial Conference Guidelines refer only to danger to self, witnesses or the community.

The Speedy Trial Act specifies that the high risk designation is to be made by the U.S. Attorney, but it does not prescribe where, when or how the designation is to be made, or whether it is subject to dispute by the designee, or review and rejection by the court, or revocation by the U.S. Attorney.

#### 9-17.190 Constitutional Aspects

18 U.S.C. §3173 provides that the Speedy Trial Act is not to be construed to bar any claim of denial of the right to a speedy trial guaranteed by the Sixth Amendment. The leading case on the constitutional aspects of speedy trial is Barker v. Wingo, 407 U.S. 514 (1971). See also, Strunk v. United States, 412 U.S. 434 (1973) (mandating dismissal with prejudice when Sixth Amendment rights are violated); Dillingham v. United States, 423 U.S. 64 (1975); United States v. MacDonald, 456 U.S. 1 (1982), (on the triggering of the Sixth Amendment); United States v. Marion, 404 U.S. 307 (1971); United States v. Lovasco, 431 U.S. 783 (1977) (on the Fifth Amendment aspects of pre-charge delay). The interplay of the Speedy Trial Act with Rule 48(b) and Rule 50(b), Federal Rules of Criminal Procedure, is unclear, as nebulous concepts of inherent power are involved. See, e.g., United States v. Novelli, 544 F.2d 800 (5th Cir. 1977).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.200 TITLE I - SPEEDY TRIAL (CON'T.)

9-17.210 The Planning Group

9-17.211 Duties and Functions

18 U.S.C. §3165(a) obligates each district court to study its administration of justice and, with the aid of the Federal Judicial Center and the planning group mandated by 18 U.S.C. §3165(e) to formulate plans for the disposition of criminal cases in accordance with the Speedy Trial Act. The planning group is to advise the court on the formulation of 18 U.S.C. §3165 reports and to consider major reforms (e.g., grand jury system; collateral attacks; pre-trial diversion; excessive federal jurisdiction). See 18 U.S.C. §3168(a), (b). As amended in 1979, a plan must be filed before June 30, 1980, to govern procedures after July 1, 1980. A copy of all plans submitted to meet the 1980 requirement are in file in the Main Library of the Department of Justice.

9-17.212 Judicial Emergency

18 U.S.C. §3174 outlines a procedure to cope with the contingency that a district will be unable to meet the time limitations because of calendar congestion. It requires consultation by the chief judge with the planning group and then application to the judicial council of the circuit, 18 U.S.C. §3174(a). If the council has no other solution, it is authorized to suspend, prospectively only, for no more than one year, and only in cases where the defendant is not in custody awaiting trial, the limitations of 18 U.S.C. §3161(c)(indictment to trial). See, e.g., United States v. Rodriguez-Restrepo, 680 F.2d 920, 921 n.1 (2d Cir. 1982). Accord, United States v. Brainer, 691 F.2d 691, 698 (4th Cir. 1982); United States v. Koger, 646 F.2d 1194 (7th Cir. 1981). In no event may it allow the period from indictment to trial to exceed 180 days. The suspension may not extend the 18 U.S.C. §3161(b) limits (arrest to indictment), nor may it suspend the sanctions of 18 U.S.C. §3162.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-17.300 TITLE II - PRE-TRIAL SERVICE AGENCIES

9-17.310 Pilot Districts

18 U.S.C. §3152 requires the Administrative Office of the United States Courts to establish a pilot pre-trial service agency in ten "representative" districts, other than the District of Columbia, designated by the Chief Justice after consultation with the Attorney General.

9-17.320 Duties and Functions

The agency is supposed to collect, verify, and report relevant release information to the appropriate judicial officer, to make recommendations with respect to release and conditions of release (18 U.S.C. §3154(1)), and to review the release conditions in pending cases (18 U.S.C. §3154(2)). The information is to have limited confidentiality, and be generally inadmissible in legal proceedings (18 U.S.C. §3154(1)). The agency is responsible for supervision of releases (18 U.S.C. §3154(3)), and may be authorized to operate or contract for "appropriate facilities" for care and custody (e.g., half-way houses; narcotic and alcohol treatment centers; counseling)(18 U.S.C. §3154(4)), and must inform the court of violations of conditions and recommend modifications of the conditions of release (18 U.S.C. §3154(5)). It is also supposed to coordinate eligible custodial agencies and inform the court of their capabilities (18 U.S.C. §3154(6)).

The agency is further obligated to assist releases in obtaining "employment, medical, legal, and social services" (18 U.S.C. §3154(7)), to cooperate with the United States Marshal and U.S. Attorney in preparing pre-trial detention reports (18 U.S.C. §3154(8)), and to perform other functions assigned by the court (18 U.S.C. §3154(9)).

9-17.330 Administration

The powers of five of the ten agencies, and the policy making function are vested in the Division of Probation of the Administrative Office of the United States Courts (18 U.S.C. §3153(c)); but, in the remaining five, it is vested in a Board of Trustees, "appointed" by the Chief Judge, consisting of:

- A. A district judge;
- B. The U.S. Attorney;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. Two defense counsel, one of whom must be the public defender, if there is one;

D. The chief probation officer; and

E. Two representatives of community organizations (18 U.S.C. §3153 (b)).

The non-official members serve for three years (18 U.S.C. §3153(c)).

9-17.340 Pre-Trial Service Officer

The agency is to be directed and supervised by a "Pre-trial Service Officer," who is empowered to appoint and fix compensation of his/her subordinates, experts and consultants (see 18 U.S.C. §3153(3)). The Pre-trial Service Officer, in the five districts supervised by the Division of Probation will be a probation officer appointed by the Chief of the Division (see 18 U.S.C. §3153(d)(1); in the remaining five he/she will be appointed by the Board of Trustees, upon the judges' recommendation (see 18 U.S.C. §3153(d)(2)).

9-17.350 Annual Reports

18 U.S.C. §3155(a) obligates the Director of the Administrative Office of the United States Courts to report to Congress annually, and, in his/her fourth report, comprehensively, on the operation and effectiveness of the pilot agencies, with recommendations for future programs. 18 U.S.C. §3155(b) requires a similar comprehensive report with respect to the effect of the Speedy Trial Act as a whole to be filed on or before June 30, 1979.

9-17.360 Definitions

18 U.S.C. §3156 contains differing definitions of "judicial officer" and "offense" for different sections of title 18. See also, 18 U.S.C. §3172(a); USAM 9-17.101, supra.

9-17.400 SPEEDY TRIAL ACT TIMETABLE

August 2, 1979	Effective date of 30/70 time limits. ( <u>See</u> 18 U.S.C. §3161.) Mandatory dismissal sanction suspended until July 1, 1980.
July 1, 1980	Effective date of sanction provisions.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 18

		<u>Page</u>
9-18.000	<u>DEFENSES</u>	1
9-18.100	ALIBI DEFENSES	1
9-18.110	<u>Discovery of Alibi Witnesses</u> <u>(Fed. R. Crim. P. 12.1)</u>	1 1
9-18.120	<u>Practice Under Fed. R. Crim. P. 12.1</u>	1
9-18.121	Unsolicited Disclosure by the Defendant	2
9-18.130	<u>Suggested Form of Demand</u>	2
9-18.200	INSANITY DEFENSE	3
9-18.201	Introduction	3
9-18.202	Mental Competency of an Accused	3
9-18.210	<u>Historical Development of the Insanity Defense</u>	4
9-18.211	<u>M'Naghten's Case: Right-Wrong Test</u>	4
9-18.212	<u>Modified M'Naghten Test - Added Volitional</u> <u>or "Irresistible Impulse" Test</u>	4
9-18.213	<u>Durham Test - Product of Mental Disease</u> <u>or Defect</u>	5
9-18.214	A.L.I. Test	6
9-18.215	<u>Lyons Test</u>	6
9-18.220	<u>The Present Statutory Test: 18 U.S.C. §20(a)</u>	7
9-18.230	<u>Burden of Proving Insanity: 18 U.S.C. §20(b)</u>	7
9-18.240	<u>Scope of Expert Testimony</u>	8
9-18.250	<u>Special Verdict, "Not Guilty Only By Reason</u> <u>of Insanity," and Related Commitment</u> <u>Procedures (18 U.S.C. §4243)</u>	9
9-18.260	<u>Other Commitment Procedures</u>	9
9-18.261	Hospitalization of a Convicted Person Suffering from a Mental Disease of Defect: 18 U.S.C. §4244	10

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-18.262	Hospitalization of an Imprisoned Person Suffering from Mental Disease or Defect: 18 U.S.C. §4245	10
9-18.263	Hospitalization of a Person Due for Release But Suffering from a Mental Disease or Defect: 18 U.S.C. §4246	10
9-18.270	[Reserved]	10
9-18.280	<u>Policy Concerning Application of Insanity Defense Reform Act of 1984 to Offenses Committed Before Date of Enactment</u>	11
9-18.290	<u>Criminal Division Contacts</u>	12
9-18.300	THE DEFENSE OF ENTRAPMENT	12
9-18.310	<u>Introduction</u>	12
9-18.320	<u>Recent Cases</u>	12
9-18.330	<u>Proof of Predisposition to Commit the Crime</u>	13
9-18.400	STATUTE OF LIMITATIONS DEFENSES	14
9-18.401	Introduction	14
9-18.402	Relationship to Constitutional Rights	14
9-18.403	Effect of Legislative Action	14
9-18.404	Period of Limitations	15
9-18.405	Fugitivity	16
9-18.406	Continuing Offenses	17
9-18.407	Conspiracy	17
9-18.408	Assimilative Crimes Act	17
9-18.409	RICO	18
9-18.410	<u>Statute of Limitations Defenses (cont.)</u>	18
9-18.411	Not Appealable Prior to Trial	18
9-18.412	Defective Indictments	18
9-18.413	Waiver	19
9-18.414	Lesser Included Offenses	19
9-18.415	Tax Offenses	19

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-18.000 DEFENSES

9-18.100 ALIBI DEFENSES

9-18.110 Discovery of Alibi Witnesses (Fed. R. Crim. P. 12.1)

Rule 12.1 of the Federal Rules of Criminal Procedure permits pre-trial discovery by the United States of the alibi and alibi witnesses of a criminal defendant. However, where the United States avails itself of such discovery, it must reciprocate by disclosing the names and addresses of its witnesses placing the defendants at the scene of the offense and rebutting defendants' alibi witnesses. Because the rule provides for mutuality of discovery, it should satisfy the constitutional requirements of the Fifth Amendment. See Williams v. Florida, 399 U.S. 78 (1970); Wardius v. Oregon, 412 U.S. 470 (1973). It should be recognized, however, that the constitutionality of excluding the testimony of an important defense witness for a failure to comply with discovery rules has not yet been firmly established. See Taliaferro v. Maryland, \_\_\_ U.S. \_\_\_, 103 S. Ct. 2114 (1983) (White, J., dissenting from denial of certiorari); Wardius v. Oregon, supra, at 472 n.4; Fendle v. Goldsmith, 717 F.2d 1552 (9th Cir. 1983); United States v. Fitts, 576 F.2d 837 (10th Cir. 1978).

9-18.120 Practice Under Fed. R. Crim. P. 12.1

In a case in which it is desired to discover the potential alibi defense of a defendant, the prosecutor must make a written demand on the defense for such disclosure. The demand must state the time, date and place at which the crime was committed. The defendant has 10 days to reply unless the court directs a different time. The reply must include the specific place or places at which the defendant claims to have been, and the names and addresses of the witnesses, other than himself/herself, on whom he/she proposes to rely in establishing his/her alibi. Great care should be exercised in preparing the demand since the specifications contained therein may be treated as a bill of particulars, thereby restricting the government in its proof.

After receipt of the reply, the prosecutor has 10 days to serve on the defendant written notice of the names and addresses of the witnesses on whom the government will rely to establish the defendant's presence at the scene of the crime, and those on whom the government will rely to rebut the testimony of the defense alibi witnesses. Such notice must be served on the defendant at least ten days before trial.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Should additional witnesses be discovered after the service of the notices required by the rule, who, if known, would have been included in the initial disclosure, the party relying on said witnesses is required promptly to notify the other side of the identity of such witnesses.

The court is authorized, in its discretion, to exclude the testimony of a proffered witness where a party fails to observe the requirements of the rule. But see USAM 9-18.110, supra. The court may grant an exception to the rule for good cause shown. However, the rule does not limit the right of the defendant to testify in his/her own behalf.

Evidence of an intention to rely upon an alibi or of statements made in connection with such intention is inadmissible against the defendant in any civil or criminal proceeding in the event the alibi defense is withdrawn. Therefore, it is suggested that caution be exercised prior to employing the rule. If the government makes a demand and the defendant gives notice of an alibi defense, and then the government responds with a list of witnesses, the defendant may still withdraw the alibi defense, having obtained discovery of certain government witnesses.

9-18.121 Unsolicited Disclosure by the Defendant

Discovery under Rule 12.1 of the Federal Rules of Criminal Procedure is designed to be a prosecution-initiated device for the primary benefit of the government. A defendant's unsolicited disclosure of an alibi or alibi witnesses should not, without government consent, trigger the government's reciprocal discovery obligations. See United States v. Bouye, 688 F.2d 471 (7th Cir. 1982); United States v. Ortega-Chavez, 682 F.2d 1086 (5th Cir. 1982).

9-18.130 Suggested Form of Demand

A. Demand for Disclosure of Alibi Defense

To: [Defendant]

Pursuant to Rule 12.1, Federal Rules of Criminal Procedure, you are hereby informed that at \_\_\_ o'clock am/pm on \_\_\_ (day) of \_\_\_\_\_ (month), 198\_\_\_, at \_\_\_\_\_ (street address or other particular description) in the \_\_\_\_\_ District of \_\_\_\_\_, there was committed the crime of \_\_\_\_\_ with which you are charged by (indictment or information).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Demand is hereby made upon you to furnish the U.S. Attorney with a written notice of your intention to offer a defense of alibi within 10 days of receipt of this demand.

In the event you intend to offer a defense of alibi, demand is made upon you further to disclose the specific place or places at which you claim to have been at the time of the offense and the names and addresses of the witnesses upon whom you intend to rely to establish such an alibi.

B. Note:

Federal Rule of Criminal Procedure 12.1 may also be used in cases in which the prosecution seeks notice-of-alibi only with respect to a specific period or incident during the course of a continuing offense. See United States v. Vella, 673 F.2d 86 (5th Cir. 1982). In order to prevent limitation of the government's proof at trial, the Federal Rule of Criminal Procedure 12.1 demand should either include the entire duration of the offense or specify that the period described in the demand does not include the entire time period of the offense.

9-18.200 INSANITY DEFENSE

9-18.201 Introduction

The Insanity Defense Reform Act of 1984, signed into law on October 12, 1984, is the first comprehensive federal legislation governing the insanity defense and the disposition of individuals suffering from a mental disease or defect who are involved in the criminal justice system. The most significant provisions (1) significantly modify the standard for insanity previously applied in the federal courts; (2) place the burden of proof on the defendant to establish the defense by clear and convincing evidence; (3) limit the scope of expert testimony on ultimate legal issues; (4) eliminate the defense of diminished capacity; (5) create a special verdict of "not guilty only by reason of insanity" which triggers a commitment proceeding; and (6) provide for federal commitment of persons who became insane after having been found guilty or while serving a federal prison sentence.

9-18.202 Mental Competency of an Accused

Mental competency of an accused is discussed at USAM 9-9.000. The pertinent statutory provisions under the 1984 Act are 18 U.S.C. §§4241,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

4246 and 4247. The Supreme Court decisions on competency to stand trial, Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975), have little to do with the insanity defense, since the standards are quite different. See Dusky v. United States, 362 U.S. 402 (1960).

9-18.210 Historical Development of the Insanity Defense

9-18.211 M'Naghten's Case: Right-Wrong Test

The foundation of the defense, or excuse, of insanity is laid to the decision in M'Naghten's Case, 10 Cl. & F.200, 8 Eng. Re. 718 (House of Lords, 1843), which held that:

[T]o establish a defense on the grounds of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Id. at 210, 722.

The use of the term "disease of the mind" was significant since it firmly established the relevance of medical testimony. The jury now has a larger role--to evaluate medical testimony in light of the right-wrong criterion.

9-18.212 Modified M'Naghten Test--Added Volitional or "Irresistible Impulse" Test

The next stage after M'Naghten's Case was the widespread adoption of an additional volition test, exculpating a defendant who knew what he/she was doing and that it was wrong but whose actions were deemed, because of mental disease, to be beyond his/her control. This new test was stated by the Supreme Court in Davis v. United States, 165 U.S. 373 (1897), where the Court approved of an insanity charge to a jury which was as follows:

The term "insanity," as used in this defense, means a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

or where, though conscious of it and able to distinguish between right and wrong, and know that the act is wrong, yet his will--by which I mean the governing power of his mind--has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control.

In view of the fact that the above formulation does not require that the abnormality be characterized by sudden impulse as opposed to brooding and reflection, it is more appropriate to term this modified M'Naghten's Case test a "control" or "volitional" test rather than an "irresistible impulse" test.

9-18.213 Durham Test--Product of Mental Disease or Defect

The third stage in the development of the defense of insanity was the repudiation of both M'Naghten's Case and its volitional supplement as contained in Davis, supra, by the decision of Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954) (Bazelon, Ch. J). Durham enunciated the following formulation: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Id. at 864. The primary reason for this new test was that the old formulations had come under attack as permitting too narrow an inquiry into the accused's mental condition, as it precludes doctors from presenting important medical data. The avowed purpose of the new test was to enable the jury "to consider all information advanced by relevant scientific disciplines." Id. at 872.

However, after adoption by the D.C. Circuit, the Durham test was not perceived to be achieving its full function, largely because many people thought that Durham was only an attempt to identify a clearly defined category, and the classifications it has developed for purposes of treatment, commitment, etc., may be inappropriate for assessing responsibility in criminal cases. Upon this premise, in McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962) (en banc), the D.C. Circuit modified the Durham test and decided to give mental illness a legal definition independent of its medical meaning. In McDonald it held that mental illness "includes any abnormal condition of the mind which substantially affects mental or emotional processes and which substantially impairs behavior control." Id. at 851.

After numerous appellate opinions which refined, clarified, expanded, and limited Durham over a period of eighteen years, the D.C. Circuit overruled Durham in United States v. Brawner, 471 F.2d 969 (D.C. Cir.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1972) (en banc), and followed other federal courts in using the A.L.I. test for the standard of deciding how to judge the defense of insanity. For a history and analysis of the Durham decision, see Symposium on United States v. Brawner, 1973 Wash. U.L.Q. 17-154.

9-18.214 A.L.I. Test

While Durham, supra, and its progeny were evolving in the D.C. Circuit, most federal courts (with the exception of the First Circuit), with some modifications and hesitations, had moved from M'Naghten's Case and its volitional modification to the proposal of the American Law Institute's Model Penal Code, which provides that:

- (1) [A] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality [wrongfulness] of his conduct or to conform to the requirements of the law.
- (2) ...[T]he terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Model Penal Code, §4.01 (P.O.D. 1962).

See United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); United States v. Currens, 290 F.2d 751 (3d Cir. 1961); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968) (en banc); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Smith, 404 F.2d 908 (5th Cir. 1969); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710 (9th Cir. 1967); Wade v. United States 426 F.2d 64 (9th Cir. 1970) (en banc); Wion v. United States, 325 F.2d 420 (10th Cir. 1963); United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

9-18.215 Lyons Test

In April of 1984, the Fifth Circuit reconsidered the issue and concluded that the volitional prong of the insanity defense--lack of capacity to conform one's conduct to the requirements of the law--no longer comported with current medical and scientific knowledge. United States v. Lyons, 731 F.2d 243, 248 (5th Cir. 1984). Consequently, they adopted a new standard, holding that "a person is not responsible for criminal conduct on grounds of insanity only if at the time of that

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct."

9-18.220 The Present Statutory Test: 18 U.S.C. §20(a)

The Insanity Defense Reform Act of 1984, signed into law on October 12, 1984, adopted for the first time a uniform federal statutory standard for the insanity defense. This standard, codified at 18 U.S.C. §20(a), provides as follows:

(a) AFFIRMATIVE DEFENSE - It is an affirmative defense under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality of the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

The standard eliminates entirely the volitional prong of the cognitive volitional test of the ALI Model Penal Code, the capacity to conform conduct to the requirements of the law. It also requires that the mental disease or defect be "severe." This concept was added as a committee amendment "to emphasize that non-psychotic behavior disorders or neurosis such as an 'inadequate personality,' 'immature personality,' or a pattern of 'antisocial tendencies' do not constitute the defense." S. Rep. No. 225, Pub. L. No. 98-473, 98th Cong. 1st Sess., p. 229. The explicit provision that mental disease or defect does not otherwise constitute a defense is intended to insure that the requirements of the standard are not circumvented in the guise of showing some other affirmative defense such as "diminished capacity." *Id.* The standard is intended to incorporate the conclusion of existing case law that voluntary use of alcohol and drugs, even if they render the defendant unable to appreciate the nature and quality of the act, does not constitute insanity or any other legally valid affirmative defense. *Id.*

9-18.230 Burden of Proving Insanity: 18 U.S.C. §20(b)

Under 18 U.S.C. §20(b), the burden has been shifted to the defendant to prove the defense of insanity by clear and convincing evidence. This is a change from the previous federal standard set forth in Davis v. United States, 160 U.S. 469 (1895), which required the government, once some evidence of insanity had been introduced by the defendant, to prove

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the defendant's sanity beyond a reasonable doubt. See Davis v. United States, 160 U.S. 469, 486-93 (1895).

The Davis standard was set forth in the exercise of the Supreme Court's supervisory powers over the federal courts and was not of constitutional magnitude. Leland v. Oregon, 343 U.S. 790, 797 (1952). A defendant may constitutionally be required to prove his insanity by a standard as high as beyond a reasonable doubt. Id., at 799. It therefore follows that placing the burden on the defendant to prove the defense of insanity by clear and convincing evidence is constitutional.

9-18.240 Scope of Expert Testimony

Section 406 of the Act amends Federal Rule of Evidence 704 to read as follows:

Rule 704. Opinion on ultimate issue

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

In the past, psychiatrists and other mental health experts were permitted to state opinions as to whether the defendant met the relevant legal test for insanity. This amendment was intended "to eliminate the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact." S. Rep. No. 225, 98th Cong., 1st Sess., p. 230. It is intended that expert testimony be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect, and characteristics of such a disease or defect, if any. Id. While the psychiatrist must be permitted to testify fully, in both clinical and commonsense terms, about the defendant's diagnosis, mental state and motivation at the time of the alleged act, the determination of whether the relevant legal test for insanity has been met is a matter for

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the legal factfinder. Id. at p. 231. The restriction in Rule 704 on ultimate opinion psychiatric testimony extends to any ultimate mental state of the defendant relevant to ultimate legal conclusions to be proved, such as premeditation in a homicide case, or lack of predisposition in entrapment. Id.

9-18.250 Special Verdict, "Not Guilty Only By Reason of Insanity," and Related Commitment Procedures (18 U.S.C. §4243)

If the issue of insanity is raised by notice as provided in Rule 12.2 of the Federal Rules of Criminal Procedure, on motion of either party or the court, the trier of fact shall be instructed to find the defendant (1) guilty, (2) not guilty, or (3) not guilty only by reason of insanity. 18 U.S.C. §4242(b).

Section 4243 of Title 18 sets forth a procedure for commitment of persons found not guilty only by reason of insanity to a facility suitable to provide care and treatment given the nature of the offense and the characteristics of the defendant. Persons found not guilty only by reason of insanity are automatically committed pending hearing, which must be held within 40 days, on his/her present mental state and dangerousness. A psychiatric or psychological examination and report are required prior to the hearing. At the hearing the burden of proof is on the committed person to prove that his/her release would not create a substantial risk to others of bodily injury to, or serious damages to the property of, another person. If the offense for which the defendant was tried involved bodily injury, serious property damage, or a substantial risk thereof, he/she must sustain his/her burden of proof by clear and convincing evidence. With respect to any other offense, the defendant has the burden of proof by the preponderance of the evidence.

The Supreme Court has reviewed a similar District of Columbia statute, and upheld the constitutionality of both mandatory commitment pending a release hearing and placing the burden of proof at the release hearing on a defendant who had the burden of proof on the insanity issue at trial to establish his/her suitability for release by the same standard used at trial. See Jones v. United States, 463 U.S. 354 (1983). Both the mandatory commitment procedures and the release hearing provisions of Section 4243 pass constitutional muster under Jones.

9-18.260 Other Commitment Procedures

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-18.261 Hospitalization of a Convicted Person Suffering from a Mental Disease or Defect: 18 U.S.C. §4244

This section established a new sentencing option for convicted defendants who need care or treatment at a "suitable facility" for mental disease or defect. After a hearing, a convicted defendant found to be in need of treatment is to be committed to the custody of the Attorney General for treatment. This commitment constitutes a provisional sentence for the maximum term authorized for the offense. If the defendant recovers before the expiration of this term, the court is to proceed to final sentencing and may modify the provisional sentence.

9-18.262 Hospitalization of an Imprisoned Person Suffering from a Mental Disease or Defect: 18 U.S.C. §4245

This section provides a new right to a judicial hearing for an imprisoned federal defendant who objects to transfer to a mental treatment facility. The objecting prisoner may not be transferred unless a court finds by a preponderance of the evidence that he/she is presently suffering from a mental disease or defect for which he/she is in need of care or treatment at a "suitable facility"--a term that is meant to include a psychiatric section of a prison.

9-18.263 Hospitalization of a Person Due for Release But Suffering from a Mental Disease or Defect: 18 U.S.C. §4246

This section establishes a federal commitment procedure for mentally ill persons who are due to be released but whose release would create a substantial risk of serious bodily injury or serious property damage to others. It is applicable to any person otherwise due for release because of the expiration of a sentence, because of the expiration of the period of commitment to determine competency to stand trial, or because all criminal charges have been dropped solely for reasons related to the mental condition of the person. It is intended that this provision be used only as a last resort when there are no state authorities willing to accept him/her for commitment. See S. Rep. No. 225, 98th Cong., 1st Sess., at 250.

9-18.270 [Reserved]

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-18.280 Policy Concerning Application of Insanity Defense Reform Act of 1984 to Offenses Committed Before Date of Enactment

Due to ex post facto considerations, the Department has determined that prosecutors should not seek to apply the new statutory standard for the insanity defense and the burden of proof set forth in 18 U.S.C. §20(a) to offenses committed before the date of enactment, October 12, 1984. See Dobbert v. Florida, 432 U.S. 282, 292 (1970), citing Beazell v. Ohio, 269 U.S. 167, 169-70 (1925); United States v. Williams, 475 F.2d 355 (D.C. Cir. 1973) (D.C. statute shifting burden of proof on issue of insanity to defendant cannot be applied retroactively). However, in cases in which the defendant presents clear danger of serious violence, and in which there exists a likelihood of acquittal under the prior judicially-developed standard in the circuit but a likelihood of conviction under the standard recently adopted in the Fifth Circuit, prosecutors should consider arguing that a judicial acceptance of the Fifth Circuit standard is appropriate. See United States v. Lyons, 731 F.2d 243 (5th Cir. 1984). Before making such an argument, however, authorization must be obtained from the Assistant Attorney General for the Criminal Division. Attorneys for the government should telephone the Criminal contacts listed below regarding requests for authorization.

The Department has also concluded that the automatic commitment procedures of new 18 U.S.C. §4243 (and the use of the special verdict of new 18 U.S.C. §4242) should not be applied to persons whose charged conduct occurred before October 12, 1984. This policy is based on the conclusion that the quantum of evidence necessary to produce an insanity acquittal under the prior burden of proof--a reasonable doubt that the defendant was sane--is probably not sufficient under the due process clause to support involuntary commitment. See Jones v. United States, 463 U.S. 354 (1983).

All other provisions of the Insanity Defense Reform Act of 1984, including the amendment to Rule 704 of the Federal Rules of Evidence concerning expert opinion testimony, are immediately applicable to pending cases. 1/

1/ It is the position of the Department of Justice that the release provisions of the new Act are applicable to persons previously committed to St. Elizabeth's Hospital pursuant to D.C. Code §24-301(d) following an insanity acquittal in the United States District Court for the District of Columbia.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-18.290 Criminal Division Contacts

Questions concerning the Insanity Defense Reform Act of 1984 should be directed to the General Litigation and Legal Advice Section at 724-6899 or 724-7083. In addition, copies of significant pleadings and decisions involving the insanity defense should be sent to the General Litigation and Legal Advice Section, 315 9th Street, N.W., Room 504, Washington, D.C. 20530.

9-18.300 THE DEFENSE OF ENTRAPMENT

9-18.310 Introduction

The defense of entrapment is frequently raised by defendants in criminal proceedings. Entrapment can basically be defined as the act of officers or agents of the government in inducing a person to commit a crime not contemplated by him/her, for the purpose of instituting a criminal prosecution against him/her. However, the mere act of an officer in furnishing the accused an opportunity to commit a crime, where the criminal intent was already present in the accused's mind, is not ordinarily entrapment.

9-18.320 Recent Cases

The two most recent Supreme Court cases regarding entrapment are Hampton v. United States, 425 U.S. 484 (1976) and United States v. Russell, 411 U.S. 423 (1973). In Russell, the Court simply reaffirmed the principle of Sorrells v. United States, 287 U.S. 435 (1932), and Sherman v. United States, 356 U.S. 369 (1958), that the entrapment defense focuses on the intent or predisposition of the defendant to commit the crime rather than upon the conduct of the government's agents. In Russell, where it was conceded that a government agent supplied a necessary ingredient in the manufacture of an illicit drug, the court stated, "it is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." See Russell, *supra*, at 436. In Hampton, the defendant was charged with selling to government agents heroin supplied by a government informant who had also arranged the meeting between the agents and the defendant in which the sale occurred. In both Hampton and Russell, government agents were acting in concert with the defendant, *i.e.*, the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

agents played a significant role in enabling the defendant to consummate a criminal act. However, in each case either the jury found or the defendant conceded that he was predisposed to commit the crime for which he was convicted. Thus, because the defense of entrapment turns on the question of predisposition and because the result of governmental activity did not implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission, entrapment did not occur in either Hampton or Russell.

As stated in Sherman, supra, "to determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." See Sherman, supra, at 372. Furthermore, Sorrells and Sherman both recognized, "that the fact that officers or employees of the government merely afforded opportunities or facilities for the commission of the offense does not defeat the prosecution." See Sorrells, supra, at 441; Sherman, supra, at 372. It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play. A finding of predisposition is fatal to a claim of entrapment.

It has been suggested that supervisory powers or due process possibly could bar conviction of a defendant based on outrageous police conduct even though the defendant may have been predisposed to commit the offense. See Hampton v. United States, supra, at 493-95 (Powell, J., concurring). The federal courts have uniformly applied the predisposition test, however, and have declined to reverse convictions where predisposition has been shown. See, e.g., United States v. Ramirez, 710 F.2d 535, 539-41 (9th Cir. 1983); United States v. Williams, 705 F.2d 603, 619-21 (2d Cir. 1983).

9-18.330 Proof of Predisposition to Commit the Crime

Finally, as stated in Sorrells, supra, "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as being upon that issue." See Sorrells, supra, at 451. Predisposition to commit the crime charged may be proven through evidence of other crimes, (i.e., the defendant's admission in Russell, supra, that he had been manufacturing an illegal drug for several months prior to meeting the agent). Evidence of subsequent crimes may also be utilized to rebut an entrapment defendant such as in United States v. Warren, 453 F.2d 738 (2d Cir.), cert. denied, 406 U.S. 944 (1972), where evidence was obtained in a search conducted after the filing of the indictment tending to show acts similar to those charged.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-18.400 STATUTE OF LIMITATIONS DEFENSES

9-18.401 Introduction

Although not known at common law and dependent on legislative enactment for their existence, statutes of limitations are today a part of the criminal law of virtually every state as well as the federal government. See United States v. Cadarr, 197 U.S. 475, 478 (1905); United States v. Marion, 404 U.S. 307, 317-18 (1971).

The primary reasons for restrictions of time revolve around accepted notions that prompt investigation and prosecution insures that conviction or acquittal is a reliable result and not the product of faded memory or unavailable evidence; that time limitations may serve to encourage law enforcement authorities to expedite their investigation and discovery of crimes; that with certain exceptions involving particularly heinous offenses or offenses which are secretive in nature and thus difficult to discover, ancient wrongs should not be resurrected; and that community security and economy in the allocation of enforcement resources require that most effort be concentrated on recent crimes. See Toussie v. United States, 397 U.S. 112, 114-15 (1970).

9-18.402 Relationship to Constitutional Rights

Statutes of limitations are a defendant's primary safeguard against prejudice from preaccusation delay. United States v. Lovasco, 431 U.S. 783, 789 (1977). Protection under a statute of limitations should not be confused with fundamental constitutional rights such as speedy trial or due process. A period of limitation is an arbitrary cutoff point; constitutional rights (or for that matter the right to a prompt indictment under Rule 48(b) of the Federal Rules of Criminal Procedure), may or may not be abridged within the prescribed period. Unlike the bar of the limitation period, due process restrictions involve analysis of actual prejudice to the defendant and reasons for the delay. See United States v. Lovasco, supra.

9-18.403 Effect of Legislative Action

Since the statute of limitations, on expiration of the prescribed period, becomes a vested right, a prosecution once barred cannot be

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

maintained after an amendment to the statute enlarging the period. However, an enlargement of the applicable period prior to the expiration of the shorter period will apply to an offense committed before the enlargement. See Dennis v. United States, 302 F.2d 5, 14 (10th Cir. 1962); Flater v. United States, 23 F.2d 420, 425-26 (2d Cir. 1928).

9-18.404 Period of Limitations

Current federal law contains a single statute prescribing a general period of limitations and a myriad of statutes of specific application.

18 U.S.C. §3282 is the statute of general application. Enacted in 1954, it states that, "[e]xcept as otherwise expressly provided by law," a prosecution for a non-capital offense shall be instituted within five years after the offense was committed. The generally applicable period of limitations was originally two years and was later increased to three years before being expanded to its present term.

18 U.S.C. §3281 deals with capital offenses and provides that an indictment for an offense "punishable by death" may be filed at any time. Despite the invalidity of most current federal statutory death penalty provisions, it is arguable that the unlimited time period remains applicable to those statutes which formerly carried that penalty. See United States v. Helmich, 521 F. Supp. 1246 (M.D. Fla. 1981), aff'd, 704 F.2d 547 (11th Cir. 1983); see also Coon v. United States, 411 F.2d 422, 425 (8th Cir. 1969) (noting but failing to resolve the issue); United States v. Provenzano, 423 F. Supp. 662 (S.D.N.Y. 1976), aff'd, 556 F.2d 562 (2d Cir. 1977) (table). See USAM 9-10.100.

18 U.S.C. §3283 provides a five-year time period for the bringing of prosecutions for violation of the "customs" or "slave trade" laws. Since the period prescribed is the same as that under 18 U.S.C. §3283, the statute is superfluous.

18 U.S.C. §3285 provides that a contempt proceeding under 18 U.S.C. §402 must be instituted within one year of the act complained of. It also provides that such a proceeding is not a bar to further prosecution for the same act. Moreover, court rulings have held that the Double Jeopardy Clause of the Fifth Amendment does not prohibit prosecution for contempt and another substantive offense arising out of the same conduct. See Jurney v. MacCracken, 294 U.S. 125, 151-52 (1935); United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

18 U.S.C. §3286 is similarly directed to a single offense, and provides that a prosecution under 18 U.S.C. §2198 for seduction of a female passenger on board a United States vessel by an employee of the vessel shall be commenced within one year after the vessel arrives at its port of destination.

18 U.S.C. §3291 provides that prosecutions for violations of nationality, citizenship, and passport laws, or a conspiracy to violate such laws, shall be commenced within ten years after the commission of the offense. Section 19 of the Internal Security Act of 1950, 64 Stat. 1005, provides a ten-year limitations period for prosecutions under the espionage statutes, 18 U.S.C. §§792-794.

17 U.S.C. §507(a) provides that no criminal proceeding shall be maintained under Title 17 (relating to copyrights) unless commenced within three years after the cause of action arose.

26 U.S.C. §6531 provides that prosecutions for violation of the internal revenue laws shall be commenced within three years after commission of the offense, except for eight enumerated categories of offenses as to which a six-year limitations period is made applicable. See USAM 9-18.414, infra.

50 U.S.C. §783(e) provides that a prosecution for an offense under that section, part of the Subversive Activities Control Act, shall be instituted within ten years after the commission of the offense.

42 U.S.C. §2278 provides a similar ten-year period for prosecution of restricted data offenses under the atomic energy laws, 42 U.S.C. §§2274-2276.

9-18.405 Fugitivity

Beginning with the first statute of limitations a "person fleeing from justice" was to receive no benefit from the passage of time. Thus, statutes of limitations are tolled during periods of fugitivity. See 18 U.S.C. §3290. Physical absence from the jurisdiction is not required to trigger this tolling provision, but there is a division of authority in the federal courts on whether an intent to avoid justice must be established in order to defeat a plea of statute of limitations. See United States v. Singleton, 702 F.2d 1159 (D.C. Cir. 1983); Jhirad v. Ferrandina, 486 F.2d 442, 444 (2d Cir. 1973).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-18.406 Continuing Offenses

Normally, a statute of limitations begins to run when the offense is completed. This is so even when the acts committed are charged as an offense having characteristics of finality (contempt in the presence of the court) but could have been charged as a continuing offense (obstruction of justice). See United States v. Irvine, 98 U.S. 450 (1878). It is the offense charged in the indictment, not the general nature of the act involved, that governs. A continuing offense involves, as its name implies, attributes of nonfinality. Hence, falsification by scheme, even though the falsifying act was committed beyond the period of limitation, is deemed a continuing offense if the act continued to produce fruits within that period. See Bramblett v. United States, 231 F.2d 489 (D.C. Cir. 1956), cert. denied, 350 U.S. 1015 (1956). Possession-of-contraband offenses are continuing offenses. See Von Eichelberger v. United States, 252 F.2d 184 (9th Cir. 1958). Of course, conspiracy during its life is a continuing offense. A conspirator must terminate his/her association by going to the authorities or communicating to his/her co-conspirators actual disassociation in the venture before the period will begin to run for him/her. See United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965); United States v. Schwensha, 383 F.2d 395 (2d Cir. 1967), cert. denied, 390 U.S. 904 (1968).

9-18.407 Conspiracy

Where conspiracy charges are involved, the statute of limitations begins to run from the date of the last overt act. See Fiswick v. United States, 329 U.S. 211 (1946); United States v. Johnson, 165 F.2d 42 (3d Cir. 1947), cert. denied, 332 U.S. 852 (1948); United States v. Boyle, 338 F. Supp. 1028, 1036-37 (D.D.C. 1972); United States v. Stein, 456 F.2d 844, 850 (2d Cir. 1972), cert. denied, 408 U.S. 922 (1972); United States v. Andreas, 458 F.2d 491 (8th Cir. 1972), cert. denied, 409 U.S. 848 (1972); United States v. Gross, 416 F.2d 1205 (8th Cir. 1969), cert. denied, 397 U.S. 1013 (1970). With regard to conspiracies not requiring proof of an overt act, such as RICO, see USAM 9-18.409, infra.

9-18.408 Assimilative Crimes Act

The Assimilative Crimes Act of 1948 (18 U.S.C. §13) makes punishable in federal courts criminal acts or omissions not made punishable by enactments of Congress if committed within the special maritime and territorial jurisdiction of the United States (18 U.S.C. §7), if the act

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

is a crime under the applicable state law. Only the substantive offenses of a state are assimilated into federal law. Thus, although case authority in this area is slight, a different state period of limitation will not control prosecution under the Act. See Garcia-Guillern v. United States, 450 F.2d 1189, 1192 n.1 (5th Cir. 1972), cert. denied, 405 U.S. 981 (1972); United States v. Andem, 158 F. 996 (D.N.J. 1908) (cited by Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966). Cf. United States v. Licavoli, 725 F.2d 1040, 1046-47 (6th Cir. 1984).

9-18.409 RICO

The Racketeer Influenced and Corrupt Organizations ("RICO") Statute, 18 U.S.C. §1961 et seq., requires that state crimes used as predicate offenses be "chargeable under state law." The federal courts have uniformly held that, regardless of the running of the state statute of limitations, a defendant is still "chargeable" with the state offense within the meaning of 18 U.S.C. §1961(1)(A). See cases cited in United States v. Licavoli, supra. The reference to state law in the statute is simply to define the conduct, and is not meant to incorporate state procedural law.

With respect to conspiracy statutes such as RICO that do not require proof of an overt act, the indictment satisfies the limitation statute if the conspiracy is alleged to have continued into the limitations period. The conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor accomplished. See United States v. Coia, 719 F.2d 1120, 1124 (11th Cir. 1983).

9-18.410 Statute of Limitations Defenses (cont.)

9-18.411 Not Appealable Prior to Trial

Denial of a statute of limitations defense is not appealable by the defendant prior to trial. See United States v. Levine, 658 F.2d 113 (3d Cir. 1981).

9-18.412 Defective Indictments

If an indictment is dismissed because of legal defect or grand jury irregularity, the government may return a new indictment within six months

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the date of dismissal or within the original limitation period (whichever is later). After the original limitation period has expired, a superseding indictment may not broaden the charges made in the first. See 18 U.S.C. §§3288, 3289; see United States v. Grady, 544 F.2d 598 (2d Cir. 1976).

9-18.413 Waiver

A knowing and intelligent waiver of the statute of limitations is valid, see United States v. Levine, 658 F.2d 113, 120 n.8 (3d Cir. 1981); United States v. Wild, 551 F.2d 418 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); a plea of guilty (without expressly reserving the statute of limitations) has been held to waive later assertion of the defense, see United States v. Doyle, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965); United States v. Guerro, 694 F.2d 898 (2d Cir. 1982).

9-18.414 Lesser Included Offenses

Rule 31(c) of the Federal Rules of Criminal Procedure permits a finding of guilty of an offense necessarily included in the offense charged in appropriate evidentiary circumstances. Out of this rule arises the problem whether a conviction for a lesser included offense may be sustained where the lesser offense is barred by the statute of limitations even though the charged parent offense is not. The law in most state jurisdictions, as well as the District of Columbia, is that a conviction under the lesser included offense in these circumstances will not stand. See Chaifetz v. United States, 288 F.2d 133 (D.C. Cir. 1960), rev'd in part but cert. denied on this issue, 366 U.S. 209 (1961); Askins v. United States, 251 F.2d 909 (D.C. Cir. 1958). Although the doctrine may work an injustice in some situations, the underlying rationale seems to be that to permit the opposite result would enable prosecutors to revive barred offenses merely by obtaining an indictment for a greater offense.

9-18.415 Tax Offenses

A special statute of limitations applicable to tax offenses is found in 26 U.S.C. §6531. It provides in part that, if a "complaint is instituted" within the limitations period prescribed (i.e., either three years or six years, depending on the type of internal revenue offense), then "the time shall be extended until the date which is nine months after the date of the making of the complaint." The courts have ruled that, in order to toll the statute of limitations, the complaint must be valid,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

i.e., it must establish probable cause to believe the accused committed an offense. See Jaber v. United States, 381 U.S. 214 (1965); United States v. Bland, 458 F.2d 1, 3-6, (5th Cir. 1972), cert. denied, 409 U.S. 843 (1972); United States v. Miller, 491 F.2d 638, 644-45 (5th Cir. 1974), cert. denied, 419 U.S. 970 (1974).

Aside from continuing offenses and the application of special provisions suspending the running of the statute of limitations (e.g., when a person is a fugitive), statutes of limitations normally begin to run when the offense is complete. In the internal revenue statute, however, Congress has provided that, in the case when a tax return is filed or a tax is paid before the statutory deadline, the limitations period begins to run on the date when the return or payment was due (without regard to any extension of time obtained by the taxpayer). See 26 U.S.C. §6531 and §6513. These statutes are based on the desirability, for purposes of administrative convenience in criminal tax investigations, of a uniform expiration date for most taxpayers despite variations in the dates of actual filing. But see United States v. Habig, 390 U.S. 222, 225, 226 (1968). Habig held that, where an extension of time is secured but the return is filed after the original statutory due date, the period of limitations starts to run when the return is filed rather than on the date (but for the extension) when it was due. Otherwise, the limitation period would begin before the offense was even committed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 20

	<u>Page</u>	
9-20.000	<u>MARITIME, TERRITORIAL AND INDIAN JURISDICTION</u>	1
9-20.001	In General	1
9-20.100	SPECIAL MARITIME AND TERRITORIAL JURISDICTION	1
9-20.110	<u>Territorial Jurisdiction</u>	2
9-20.111	Determining Federal Jurisdiction	4
9-20.112	Proof of Territorial Jurisdiction	5
9-20.113	Assimilative Crimes Act, 18 U.S.C. §13	6
9-20.114	Limited Criminal Jurisdiction over Property Held Proprietorially	8
9-20.115	Prosecution of Military Personnel	9
9-20.120	<u>Maritime Jurisdiction</u>	10
9-20.121	Great Lakes Jurisdiction	12
9-20.122	General Maritime Offenses	12
9-20.130	<u>Aircraft Jurisdiction</u>	13
9-20.200	INDIAN COUNTRY	13
9-20.210	<u>The Reach of 18 U.S.C. §§1152 and 1153</u>	15
9-20.211	Lesser Included Offenses Under 18 U.S.C. §1153	16
9-20.212	Double Jeopardy Considerations	16
9-20.213	Limitations on 18 U.S.C. §1152 Exemption	17
9-20.214	Offenses Against Community Committed by Indians or Non-Indians (Victimless Crimes)	17
9-20.215	Offenses by Non-Indians; Concurrent Federal-State Jurisdiction	19
9-20.220	<u>Investigative Jurisdiction</u>	22
9-20.230	<u>Chart: Crimes in Indian Country</u>	22
9-20.240	<u>Embezzlement and Theft from Tribal Organization</u>	23
9-20.250	<u>Bibliography</u>	24

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-20.000 MARITIME, TERRITORIAL AND INDIAN JURISDICTION

9-20.001 In General

Jurisdiction over most personal and property crimes within our federal system is vested in the states. The federal government enacts criminal laws primarily for the protection of its own functions (e.g., 18 U.S.C. §1001); personnel (e.g., 18 U.S.C. §1114); and property (e.g., 18 U.S.C. §641). It intrudes into the area generally left to the states only where special circumstances warrant its providing auxiliary law enforcement assistance to the states unable to act beyond their borders (e.g., 18 U.S.C. §§659, 2113, 2314). The underlying conduct is based upon or linked to some "nexus," such as use of the mails, 18 U.S.C. §2314, or federal insurance, 18 U.S.C. §2113.

There are, in addition, certain instances in which the special relationship the United States Government bears to the site of the offense provides the rationale and basis for the exercise of plenary criminal jurisdiction. It is with this latter class of offenses that this chapter is concerned.

9-20.100 SPECIAL MARITIME AND TERRITORIAL JURISDICTION

A number of Title 18 sections specifically declare certain conduct to be a federal crime if committed "within the special maritime and territorial jurisdiction of the United States." At present these are: arson, 18 U.S.C. §81; assault, 18 U.S.C. §113; maiming, 18 U.S.C. §114; larceny, 18 U.S.C. §661; receiving stolen property, 18 U.S.C. §662; murder, 18 U.S.C. §1111; manslaughter, 18 U.S.C. §1112; attempted murder or manslaughter, 18 U.S.C. §1113; kidnapping, 18 U.S.C. §1201(a)(2); malicious mischief, 18 U.S.C. §1363; rape, 18 U.S.C. §2031; carnal knowledge, 18 U.S.C. §2032; and robbery 18 U.S.C. §2111. In some instances, the Assimilative Crimes Act, 18 U.S.C. §13, is also applicable. See also 15 U.S.C. §1175; 15 U.S.C. §1243; 16 U.S.C. §3372; 18 U.S.C. §1205.

The term "special maritime and territorial jurisdiction of the United States" is defined in six subsections of 18 U.S.C. §7. They relate to maritime jurisdiction, 18 U.S.C. §§7(1), 7(2); lands and buildings, 18 U.S.C. §7(3); Guano Islands, 18 U.S.C. §7(4); aircraft, 18 U.S.C. §7(5); spacecraft, 18 U.S.C. §7(6); and places outside the jurisdiction of any nation, 18 U.S.C. §7(7). Only subsections (1), (2), (3) and (5) of 18 U.S.C. §7 will be discussed, and Guano Islands are of only historical

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

significance and places outside the jurisdiction of any nation are unlikely to generate concrete issues in the near future.

9-20.110 Territorial Jurisdiction

Of the several categories listed in 18 U.S.C. §7, §7(3) is the most significant. 18 U.S.C. §7(3) provides:

The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

As is readily apparent, this subsection, and particularly its second clause, bears a striking resemblance to the 17th Clause of Article 1, §8 of the Constitution. This clause provides:

The Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, be Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings. [emphasis supplied]

The constitutional phrase "exclusive legislation" is the equivalent of the statutory expression "exclusive jurisdiction." See James v. Dravo Contracting Co., 302 U.S. 134, 141 (1937), citing, Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930).

Until the decision in Dravo, it had been generally accepted that when the United States acquired property with the consent of the state for any of the enumerated purposes, it acquired exclusive jurisdiction by operation of law, and any reservation of authority by the state, other than the right to serve civil and criminal process, was inoperable. See

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Surplus Trading Co. v. Cook, *supra*, at 652-56. When Dravo held that a state might reserve legislative authority so long as that did not interfere with the United States' governmental functions, e.g., the right to levy certain taxes, amendment to 18 U.S.C. §7(3), by addition of the words "or concurrent," was required to restore criminal jurisdiction over those places previously believed to be under exclusive federal legislative jurisdiction. See H. Rep. No. 1623, 76th Cong. 3d Sess. 1 (1940); S. Rep. No. 1788, 76th Cong. 3d Sess. 1 (1940).

Dravo also settled that the phrase "other needful building" was not to be strictly construed to include only military and naval structures, but was to be construed as "embracing whatever structures are found to be necessary in the performance of the functions of the Federal Government." See James v. Dravo Contracting Co., *supra*, at 142-43. It therefore properly embraces courthouses, customs houses, post offices and locks and dams for navigation purposes.

The "structures" limitation does not, however, prevent the United States from holding or acquiring and having jurisdiction over land acquired for other valid purposes, such as parks and irrigation projects. This is because Clause 17 is not the exclusive method of obtaining jurisdiction. Jurisdiction may also be obtained by the United States reserving it when sovereign title is transferred to the state upon its entry into the Union or by cession of jurisdiction after the United States has otherwise acquired the property. See Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 526-27, 538, 539 (1885); James v. Dravo Contracting Co., *supra*, at 142; Collins v. Yosemite Park Co., 304 U.S. 518, 529-30 (1938); Surplus Trading Co. v. Cook, *supra*, at 650-52.

The United States may hold or acquire property within the borders of a state without acquiring jurisdiction. It may acquire title to land necessary for the performance of its functions by purchase or eminent domain without the state's consent. See Kohl v. United States, 91 U.S. 367, 371, 372 (1976). But it does not thereby acquire legislative jurisdiction by virtue of its proprietorship. The acquisition of jurisdiction is dependent on the consent of or cession by the state. See Mason Co. v. Tax Commission, 302 U.S. 186, 197 (1937); James v. Dravo Contracting Co., *supra*, at 141-42.

Such consent may be evidenced by a specific enactment or by general constitutional or statutory provision. Cession of jurisdiction by the state also requires acceptance by the United States. See Adams v. United States, 319 U.S. 312 (1943); Surplus Trading Co. v. Cook, *supra*, at 651-52. Whether or not the United States has jurisdiction is a federal question. See Mason Co. v. Tax Commission, *supra*, at 197.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Prior to February 1, 1940, it was presumed that the United States accepted jurisdiction whenever the state offered it because the donation was deemed a benefit. See Fort Leavenworth R.R. Co. v. Lowe, *supra*, at 528. This presumption was reserved by enactment of the Act of February 1, 1940, codified at 40 U.S.C. §255. This statute requires the head or authorized officer of the agency acquiring or holding property to file with the state a formal acceptance of such "jurisdiction, exclusive or partial . . . as he may deem desirable," and further provides that in the absence of such filing "it shall be conclusively presumed that no such jurisdiction has been acquired. See Adams v. United States, *supra* (district court is without jurisdiction to prosecute soldiers for rape committed on an army base prior to filing of acceptance prescribed by statute). Enactment of 40 U.S.C. §255 did not retroactively affect jurisdiction previously acquired. See Markham v. United States, 215 F.2d 56 (4th Cir.), *cert. denied*, 348 U.S. 939 (1954); United States v. Heard, 270 F. Supp. 198, 200 (W.D. Mo. 1967).

A. Summary

The United States may exercise plenary criminal jurisdiction over lands within state borders:

1. Where it reserved such jurisdiction upon entry of the state into the union;
2. Where, prior to February 1, 1940, it acquired property for a purpose enumerated in the Constitution with the consent of the state;
3. Where it acquired property whether by purchase, gift or eminent domain, and thereafter, but prior to February 1, 1940, received a cession of jurisdiction from the state; and
4. Where it acquired the property, and/or received the state's consent or cession of jurisdiction after February 1, 1940, and has filed the requisite acceptance.

9-20.111 Determining Federal Jurisdiction

When instances are reported to the U.S. Attorney of offenses committed on land or building occupied by agencies of the federal government, unless the crime reported is a federal offense regardless of where committed, such as assault on a federal officer or possession of narcotics, the United States has jurisdiction only if the land or building

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

is within the special territorial jurisdiction of the United States. A convenient method of determining the jurisdictional status is to contact an appropriate attorney with the agency having custody of the land. If the land is other than a military base, the regional counsel's office of the General Services Administration usually has the complete roster of all federal lands and buildings in its region and can frequently provide a definitive answer to jurisdiction. If the land in question is part of a military base, contact with the post Staff Judge Advocate may be helpful. If the military personnel in the field or the field attorneys of the agency having responsibility for the land are unable to render assistance, the General Litigation and Legal Advice Section of the Criminal Division should be called.

9-20.112 Proof of Territorial Jurisdiction

There has been a recent trend to treat certain "jurisdictional facts" that do not bear on guilt (mens rea or actus reus) as non-elements of the offense, and therefore as issues for the court rather than the jury, and, in any event requiring proof by only a preponderance that the offense was committed in the territorial jurisdiction of the court to establish that venue has been properly laid. See United States v. Bowers, 660 F.2d 527, 531 (5th Cir. 1981); Government of Canal Zone v. Burjan, 596 F.2d 690, 694 (5th Cir. 1979); United States v. Black Cloud, 590 F.2d 270 (8th Cir. 1979) (jury question); United States v. Powell, 498 F.2d 890, 891 (9th Cir. 1974). The court in Government of Canal Zone v. Burjan, *supra*, applied the preponderance test to determinations of whether or not the offenses took place within the Canal Zone which established not merely proper venue but subject matter jurisdiction as well. *Id.* at 694-95. Other cases, however, hold that the issue of whether the United States has jurisdiction over the site of a crime is a judicial question, see United States v. Jones, 480 F.2d 1135, 1138 (2d Cir. 1973), but that the issue of whether the act was committed within the borders of the federal enclave is for the jury and must be established beyond a reasonable doubt. See United States v. Jones, *supra*; United States v. Parker, 622 F.2d 298 (8th Cir. 1980). The law of your circuit must be consulted. The decision in Burjan should be viewed with caution. The analogy between territorial jurisdiction for venue has much to recommend it. Nevertheless, it is important to recognize that the two are not of equal importance. As the Burjan court noted, citing Rule 12 Federal Rules of Criminal Procedure, subject matter jurisdiction is so important that it cannot be waived and may be noticed at any stage of the proceeding, see Government of the Canal Zone v. Borjan, *supra*, at 693, and the Ninth Circuit in Powell rested its ruling that venue need be proved by only a preponderance on the relative unimportance of venue as evidenced by its waivability. There is clear

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

distinction between the question of which court of a sovereign may try an accused for a violation of its laws and whether the sovereign's law has been violated at all.

Proof of territorial jurisdiction may be by direct or circumstantial evidence, and at least at the trial level may be aided by judicial notice. See United States v. Bowers, supra, at 530-31; Government of Canal Zone v. Burjan, supra, at 694. Compare Burjan, supra with United States v. Jones, supra, concerning the role judicial notice may play on appeal.

9-20.113 Assimilative Crimes Act, 18 U.S.C. §13

The Assimilative Crimes Act, 18 U.S.C. §13, makes state law applicable to lands reserved or acquired as provided in 18 U.S.C. §7(3), when the act or omission is not made punishable by an enactment of Congress. It provides:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in §7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Prosecutions instituted under this statute are not to enforce the laws of the state, but to enforce federal law, the details of which, instead of being recited, are adopted by reference. In addition to minor violations, the statute has been invoked to cover a number of serious criminal offenses defined by state law such as burglary and embezzlement. However, the Assimilative Crimes Act cannot be used to override other federal policies as expressed by acts of Congress or by valid administrative orders.

The prospective incorporation of state law was upheld in United States v. Sharpnack, 355 U.S. 286 (1957). State law is assimilated only when no "enactment of Congress" covers the conduct. The application of this rule is not always easy. In Williams v. United States, 327 U.S. 711, 717 (1946), prosecution of a sex offense under a state statute with a higher age of consent was held impermissible, but a conviction for a shooting with intent to kill as defined by state law was upheld, despite

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the similarity of provisions of 18 U.S.C. §113. Fields v. United States, 438 F.2d 205 (2d. Cir.), cert. denied, 403 U.S. 907 (1971); but see Hockenberry v. United States, 422 F.2d 171 (9th Cir. 1970). See also United States v. Smith, 574 F.2d 988 (9th Cir. 1978) (sodomy); United States v. Bowers, 660 F.2d 527 (5th Cir. 1981) (child abuse).

The Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. §801 et seq., because of its unlimited applicability, is not considered an "enactment of Congress" within the meaning of 18 U.S.C. §13. See United States v. Walker, 552 F.2d 566 (4th Cir. 1977), cert. denied, 434 U.S. 848 (1977) (drunk driving). See also Franklin v. United States 216 U.S. 559 (1910). Military personnel committing acts on an enclave subject to federal jurisdiction which are not made an offense by federal statutes other than the U.C.M.J. may therefore be prosecuted in district court for violations of state law assimilated by 18 U.S.C. §13, even though they are also subject to court martial. Dual prosecution, it should be noted, is constitutionally precluded by the Double Jeopardy Clause. See Grafton v. United States, 206 U.S. 333 (1907).

18 U.S.C. §13 does not assimilate penal provisions of state regulatory schemes. See United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). Neither does it incorporate state administrative penalties, such as suspension of drivers licenses. See United States v. Rowe, 599 F.2d 1319 (4th Cir. 1979); United States v. Best, 573 F.2d 1095 (9th Cir. 1978).

Federal agency regulations, violations of which are made criminal by statute, have been held to preclude assimilation of state law. See United States v. Adams, 502 F. Supp. 21 (S.D. Fla. 1980) (carrying concealed weapon in federal courthouse); United States v. Woods, 450 F. Supp. 1335 (D. Md. 1978) (drunken driving on parkway).

In Adams, supra, the defendant was charged with carrying a concealed weapon in a United States Courthouse in violation of 18 U.S.C. §13 and the pertinent Florida felony firearms statute. In dismissing the indictment, the Adams court concluded that a General Services Administration (GSA) petty offense weapons regulation (41 C.F.R. §101-20.313), explicitly provided for by statute, 40 U.S.C. §318a, amounts to an enactment of Congress within the meaning of 18 U.S.C. §13 and, therefore, the defendant could not be prosecuted by the assimilation of state law which prohibits the same precise act as the regulation.

It is important to note, however, that a critical provision of the GSA regulations apparently was not considered in Adams. 41 C.F.R. §101-20.315 provides in part:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Nothing in these rules and regulations shall be construed to abrogate any other Federal laws or regulations or any State and local laws and regulations applicable to any area in which the property is situated.

This non-abrogation provision arguably would permit the assimilation of appropriate state firearms laws or other state statutes notwithstanding the existence of the GSA regulations. It appears that this language has never been considered in any reported case. Moreover, no discussion of the meaning of this language appears in the pertinent parts of the Federal Register, 43 Fed. Reg. 29001, July 5, 1978; 41 Fed. Reg. 13378, March 30, 1976. We believe it would be reasonable to interpret this non-abrogation provision as permitting the government, in its discretion, to proceed under 18 U.S.C. §13 and appropriate state firearms laws, rather than under the GSA weapons regulation.

9-20.114 Limited Criminal Jurisdiction over Property Held  
Proprietorially

Although we have continually emphasized in the preceding material that the United States may not exercise criminal jurisdiction over property that it holds only in a proprietorial capacity, it would be more accurate to state that it is not wholly without the power to protect its property and control its use. State jurisdiction "does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what is commonly known as the police power." See Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917) (finding constitutional authority in the Property Clause, Art. IV, §3, cl. 1).

There are a number of specific statutes that are applicable independently of 18 U.S.C. §7(3) and the acquisition of legislative jurisdiction. Among these are 18 U.S.C. §1382 (entering military, naval or Coast Guard property). See United States v. Holmes, 414 F. Supp. 831, 837 n. 9 (D. Md. 1976) and text, finding constitutional authority for 18 U.S.C. §1382 in the Property Clause and/or the military power clauses, Const., Art. I, §8, cls. 12 and 14, aided by the Necessary and Proper Clause, Art. 1, §8, cl. 18.

On occasion, courts have upheld convictions for trespass and minor police offenses in violation of regulations made criminal by statute committed on land and facilities held proprietorially, on authority of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Property Clause and/or the specific constitutional authority for carrying on the function. See, e.g., United States v. Seward, 687 F.2d 1207, 1277 (10th Cir.), cert. denied, 459 U.S. 103 S. Ct. 789 (1983) (conviction for trespass on NRC facility upheld on basis of Property Clause); United States v. Gliatta, 580 F.2d 156 (5th Cir. 1978) (conviction of traffic offenses on postal facility upheld on basis of Property Clause and/or postal power, Art. 1, §8 cl. 7, aided by the Necessary and Proper Clause).

9-20.115 Prosecution of Military Personnel

Many violations of federal criminal law are also violations of the Uniform Code of Military Justice (U.C.M.J.) for which military personnel are subject to court martial (e.g., drug offenses, theft of government property, etc.). The U.C.M.J. also punished a number of acts which are not otherwise specifically declared to be federal crimes, but which may become such when committed on a facility over which the United States exercises legislative jurisdiction as a result of assimilation of state law under the Assimilative Crimes Act. See USAM 9-20.113, supra.

To avoid conflict over investigative and prosecutive jurisdiction, the Attorney General and the Secretary of Defense executed a memorandum of understanding relating to the investigation and prosecution of crimes over which the Department of Justice and Department of Defense have concurrent jurisdiction. The agreement provides generally that all crimes committed on military reservations by individuals subject to the Uniform Code of Military Justice shall be investigated and prosecuted by the military department concerned, with certain exceptions. The agreement permits civil investigation and prosecution in federal district court in any case when circumstances render such action more appropriate. If questions arise concerning the operation of the agreement, the U.S. Attorney should contact the section of the Criminal Division having cognizance over the federal statute apparently violated.

Certain cases hold that military courts have no jurisdiction to punish service personnel for even serious offenses when they entered the service under void enlistment contracts. The memorandum of understanding is not to be read to preclude prosecution in district court of such cases simply because the defendant appeared to be in the military.

In O'Callahan v. Parker, 395 U.S. 258 (1969), the Supreme Court held that a member of the armed services could not be tried by a court martial for a crime that was not "service-connected." Although O'Callahan attempted no definition of "service connection," that case concerned an

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

off-base crime committed against a civilian. For a list of factors to be considered in determining service connection, see Relford v. Commandant, 401 U.S. 355 (1971). The court there held that a member of the armed services charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or property therein may be tried by a court martial.

The U.S. Attorneys should ensure that federal investigative agencies such as the FBI and DEA maintain sufficient liaison with military authorities so that serious crimes committed by persons ruled not subject to military jurisdiction can be considered for prosecution by their office.

9-20.120 Maritime Jurisdiction

18 U.S.C. §7 provides that the "special territorial and maritime jurisdiction of the United States" includes:

(1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

Until recently the term "high seas" was always understood as intending the open and unenclosed waters of the sea beginning at low-water mark. In re Ross, 140 U.S. 453, 471 (1891); Murray v. Hildreth, 61 F.2d 483 (5th Cir. 1932); see also United States v. Rodgers, 150 U.S. 249 (1893) (Great Lakes). Although it has become common of late to use the term to describe waters beyond a marginal belt or "territorial sea" over which a nation claims special rights, see, e.g., United States v. Louisiana, (Louisiana Boundary Case), 394 U.S. 11, 22-23 (1969); United States v. Postal, 589 F.2d 862, 868 (5th Cir. 1979), the classic definition, contemporaneous with this statute's development, is the correct one.

The words of limitation "and out of the jurisdiction of any particular State," do not qualify the "high seas" jurisdiction, but only the "other waters within the admiralty and maritime jurisdiction of the United States." See Murray v. Hildreth, *supra*; Hoopengartner v. United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States, 270 F.2d 465, 470 (6th Cir. 1959); see also United States v. Rodgers, *supra*, at 265-266. Accordingly, the fact that a state fixes its boundary beyond the low-water mark and claims jurisdiction over the marginal sea, while relevant to venue, is immaterial to federal jurisdiction. See Murray v. Hildreth, *supra*. Although states' rights to exercise authority over the marginal sea developed more slowly than that of the nation, see United States v. California, 332 U.S. 19, 32-35 (1946), it cannot be doubted that a state may exercise jurisdiction over the marginal portion of the ocean, provided there is no conflict with federal law or the rights of foreign nations. See Skiriotes v. Florida, 313 U.S. 69 (1941). Indeed, it may, subject to the same limitations, enforce its laws upon its citizens and registered vessels on the high seas beyond its territorial waters. *Id.* at 77. It is usually the policy of the Department to defer to a state where it is prepared to undertake prosecution of conduct violative of both state and federal law.

Despite the apparent universal application of the term "high seas," it was early held that, as a general rule, federal criminal jurisdiction does not attach to offenses committed by and against foreigners on foreign vessels. See United States v. Homles, 18 U.S. (5 Wheat.) 412 (1890); United States v. Palmer, 16 U.S. (3 Wheat.) 281, 288 (1818).

The limitation on federal jurisdiction when the offense takes place on a river or harbor within the admiralty or maritime jurisdiction of the United States but not "out of the jurisdiction of a particular State," applies to offenses by naval personnel on naval vessels. See United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818).

"State" in the context of 18 U.S.C. §7(1) means "State of the United States." Thus, there is federal jurisdiction under this provision for offenses committed on American vessels in the territorial waters, harbors and inland waterways of foreign nations. See United States v. Flores, 289 U.S. 137 (1933). The port nation may also have jurisdiction if the offense disturbs its peace. *Id.* at 157-59.

Vessels have the nationality of the country where they are registered and whose flag they have a right to fly. See United States v. Arra, 630 F.2d 836 (1st Cir. 1980). See United States v. Ross, 439 F.2d 1355 (9th Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972), for methods of proving nationality. Note that under 18 U.S.C. §7(1) jurisdiction attached if the vessel is even partially owned by a citizen of the United States. See United States v. Keller, 451 F. Supp. 631, 636-37 (D.P.R. 1978), *aff'd on other grounds*, United States v. Arra, *supra*.

Venue for maritime offenses committed "out of the jurisdiction of a particular State" is governed by 18 U.S.C. §3238. See United States v. Ross, *supra*, at 1358-59. Where the offense occurred within the boundaries

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of a state, venue lies there. See United States v. Peterson, 64 F. 145 (E.D. Wis. 1894).

Federal prosecution may not be undertaken following a state prosecution for the same conduct without authorization of the Assistant Attorney General as provided by USAM 9-2.142. Prosecution should not be undertaken following a foreign prosecution unless substantial federal interests were left unvindicated.

9-20.121 Great Lakes Jurisdiction

Also included within the "special territorial and maritime jurisdiction of the United States" by 18 U.S.C. §7(2) are the Great Lakes and their connecting waterways. American nationality of the vessel is a prerequisite to jurisdiction under 18 U.S.C. §7(2). See United States v. Tanner, 471 F.2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972). Jurisdiction may, however, attach to foreign vessels on the Great Lakes, under 18 U.S.C. §7(1), unless they are within harbors or waterways in the body of a state. Id., at 141. Federal jurisdiction under 18 U.S.C. §7(2) over American vessels is not affected by the existence of concurrent state jurisdiction. Again, it is usually the policy of the Department to defer to the state where it will undertake prosecution. Jurisdiction follows American vessels into Canadian waters. See S. Rep. 2917, 51st Cong., 1st Sess. 1890; see also United States v. Rodgers, *supra*, reaching the same result under the predecessor of 18 U.S.C. §7(1) in a case involving an offense committed before enactment of the predecessor of 18 U.S.C. §7(2).

Venue for offenses on the open seas and connecting waters of the Great Lakes will be governed by 18 U.S.C. §3238 unless committed within the recognized boundaries of a state. See United States v. Peterson, *supra*.

9-20.122 General Maritime Offenses

There are a number of statutes defining maritime offenses that are not dependent upon 18 U.S.C. §7 and are not affected by the fact that the offense occurred within state jurisdiction. For example, death resulting from criminal negligence of a ship's officer or crew can be prosecuted under 18 U.S.C. §1115 when a manslaughter prosecution under 18 U.S.C. §1112 would be barred because the ship was within a harbor. See United States v. Allied Towing Corp., 602 F.2d 612 (4th Cir. 1979). See also United States v. Tanner, *supra*, affirming a conviction under 18 U.S.C. §2275 (firing a vessel) while reversing one for violation of 18 U.S.C. §1363 (malicious mischief within special maritime and territorial jurisdiction). There are other such statutes to be found in Title 18 and other titles of the United States Code.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-20.130 Aircraft Jurisdiction

The "enclave statutes" are made applicable by 18 U.S.C. §7(5) to American aircraft in flight over the high seas or other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state. This section was enacted in reaction to United States v. Cordova, 89 F. Supp. 298 (E.D.N.Y. 1950), which held that an aircraft was not a "vessel," and that "over high seas" was not the equivalent of "on the high seas," within the meaning of 18 U.S.C. §7(1). Venue is governed by 18 U.S.C. §3238.

It is important to note that most of the "enclave statutes" (18 U.S.C. §§113, 114, 661, 1111, 1112, 1113, 2031, 2032 and 2111) are made applicable to "aircraft within the special aircraft jurisdiction of the United States," by 49 U.S.C. §1472(k)(1), and that "special aircraft jurisdiction," as defined in 49 U.S.C. §1301(38), differs significantly from the jurisdiction defined in 18 U.S.C. §7(5). Venue is governed by 49 U.S.C. §1473(a). See United States v. Busic, 549 F.2d 252 (2d Cir. 1977). For a discussion of "special aircraft jurisdiction," see USAM 9-63.110.

9-20.200 INDIAN COUNTRY

Criminal jurisdiction in "Indian country," 18 U.S.C. §1151, is based on an allocation of authority among federal, state, and tribal courts. Although federal criminal law in Indian country is briefly set forth in 18 U.S.C. §§1151-1165, allocation of authority in particular cases depends in general upon three factors: subject matter, locus, and person. The chart at USAM 9-20.230, infra, is a synopsis of presently applicable law in Indian country and reflects the changes made in the Major Crimes Act, 18 U.S.C. §1153, by Act of May 29, 1976, Pub. L. No. 94-297, §2, 90 Stat. 585, and Act of October 12, 1984, Pub. L. No. 98-473, §1009, 98 Stat. 2141, as well as court decisions and current Department policy.

"Indian country" is defined in 18 U.S.C. §1151 as including (1) federal reservations, including fee land, see United States v. John, 437 U.S. 634 (1978), Seymour v. Superintendent, 368 U.S. 351 (1962); (2) dependent Indian communities, see United States v. Levesque, 681 F.2d 75 (1982), cert. denied, 459 U.S. 1089 (1983); and (3) Indian allotments to which title has not been extinguished, see United States v. Ramsey, 271 U.S. 467 (1926).

Disputes frequently arise as to whether federal reservation status still attaches to lands that were opened to settlement. The resolution is very complex, see Solem v. Bartlett, \_\_\_\_\_ U.S. \_\_\_\_\_, No. 82-1253

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(decided Feb. 22, 1984). The assistance of the Field Solicitor of the Department of Interior should be sought in the first instance.

U.S. Attorneys should attempt to familiarize themselves with the boundaries of their reservations and off-reservations allotments with the assistance of the Field Solicitor. They should also be aware of the extent to which jurisdiction over all or some of the reservations in their districts has been transferred to the state under Pub. L. No. 83-280 as amended by Pub. L. No. 90-284, codified at 18 U.S.C. §1162 and 25 U.S.C. §§1321-1326, and similar legislation, see, e.g., 18 U.S.C. §3243 and Pub. L. No. 80-846.

Under 18 U.S.C. §1152 the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, are extended to Indian country. This section applies to offenses committed in the Indian country by a non-Indian against the person or property of a tribal Indian, and vice versa. The Assimilative Crimes Statute, 18 U.S.C. §13, is also applicable to offenses involving Indians and non-Indians in the Indian country. See Williams v. United States, 327 U.S. 711 (1946).

There is a broad exception in paragraph two of 18 U.S.C. §1152 which provides that the statute:

shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. §1153 grants exclusive jurisdiction to federal courts over Indians who commit any of the listed offenses, regardless of whether the victim is also an Indian. See United States v. John, supra. The offenses are, for the most part, defined by separate federal statutes, except for burglary, involuntary sodomy, and incest which look to the law of the state where the crime was committed for definition and punishment. In paragraph three, Congress has left the door open to apply similar "borrowing" provisions to any other listed offense "not defined and punished by federal law."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-20.210 The Reach of 18 U.S.C. §§1152 and 1153

By the broadest possible reading, 18 U.S.C. §1152 would seem to apply the federal law generally applicable on other federal enclaves to Indian reservations. Thus, federal law with regard to crimes like assault, 18 U.S.C. §113, and arson, 18 U.S.C. §18, would govern, as would the provisions of the Assimilative Crimes Act, 18 U.S.C. §13. The Assimilative Crimes Act has itself been regarded as establishing federal jurisdiction over "victimless" crimes occurring within a federal enclave. See, e.g., United States v. Chapman, 321 F. Supp. 767 (E.D. Va. 1971) (possession of marijuana); United States v. Barner, 195 F. Supp. 103 (N.D. Cal. 1961) (driving under the influence of intoxicants.).

Notwithstanding its broad terms, the Supreme Court has significantly narrowed 18 U.S.C. §1152's reach. In the 1882 case of United States v. McBratney, 104 U.S. 621, the Court held that where a crime is committed on a reservation by a non-Indian against another non-Indian exclusive jurisdiction lies in the state absent treaty provisions to the contrary. Accord, Draper v. United States, 164 U.S. 240 (1896). Subsequent decisions have acknowledged the rule. See, e.g., United States v. Wheeler, 435 U.S. 313, 325 n.21 (1978); United States v. Antelope, 430 U.S. 641, 643 n.2 (1977); Williams v. United States, 327 U.S. 711, 714 (1946).

The precursor to 18 U.S.C. §1152 was section 25 of the Act of June 30, 1834, 4 Stat. 733, and it was not until 1885 that federal legislation was enacted granting federal courts jurisdiction over certain major crimes committed by an Indian against another Indian. Prior to 1885, such offenses were tried in tribal courts. See Ex parte Crow Dog, 109 U.S. 556 (1883). 18 U.S.C. §1153 is predicated on the Act of March 3, 1885, §8, 23 Stat. 385, and former sections 548 and 549, 18 U.S.C. (1940 ed.). Under 18 U.S.C. §1153, federal courts have exclusive jurisdiction of offenses named in the section when committed by a tribal Indian against the person or property of another tribal Indian or other person in Indian country. Legislative history indicates that the words "or other persons" were incorporated in the 1885 Act to make certain the Indians were to be prosecuted in federal court. 48th Cong., 2d Sess., 16 Cong. Rec. 934 (1885).

Although the scheme of felony jurisdiction which has arisen is complex in origin, it is not irrational in light of the historical settings in which the predecessor statutes of 18 U.S.C. §§1152 and 1153 were passed. Major felonies involving an Indian, whether as victim or accused, are matters for federal prosecution. Because of substantial non-Indian populations on many reservations felonies wholly between non-Indians are left to state prosecution. See USAM 9-20.215 *infra*. It is, moreover, significant that the historical practice has been to regard

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

McBratney, supra, as authority for the states' assertion of jurisdiction with regard to a variety of "victimless" offenses committed by non-Indians on Indian reservations. See USAM 9-20.231 infra.

In United States v. Antelope, supra, the Supreme Court in essence upheld the constitutionality of the plan contained in 18 U.S.C. §§1152 and 1153 by rejecting a challenge on equal protection grounds raised against 18 U.S.C. §1153. It was held that the Constitution was not violated by federal prosecution of an Indian for the murder of a non-Indian on the reservation under a theory of felony-murder. Defendant argued that had he been prosecuted in state court under Idaho state law for the same act the felony-murder doctrine would not have applied because Idaho does not recognize it. The Court acknowledged the disparity in treatment, but nonetheless reasoned that the Major Crimes Act, like all federal regulation of Indian affairs, is not based upon an impermissible racial classification, but "is rooted in the unique status of Indians as 'a separate people' with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of Indians."

9-20.211 Lesser Included Offenses Under 18 U.S.C. §1153

In Keeble v. United, 412 U.S. 205 (1973), the Supreme Court held that an Indian defendant charged with a major crime violation under 18 U.S.C. §1153, was entitled to request and receive an instruction on a lesser included offense not enumerated in that section, even though the defendant could not have been charged with such an offense in the first instance. The Court felt this result was compelled by 18 U.S.C. §3242, which provides that Indians charged with violations of 18 U.S.C. §1153 shall be "tried . . . in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States." The three courts of appeals that have addressed the subject have held that, if the jury returns a verdict of guilt upon it, the court has jurisdiction to impose sentence for the lesser offense. See United States v. Bowman, 679 F.2d 978 (9th Cir.), cert. denied, U.S. , 103 S. Ct. 1204 (1983); United States v. John, 587 F.3d 683 (5th Cir. 1979); United States v. Felicia, 495 F.2d 353, 355 (8th Cir.), cert. denied, 419 U.S. 849 (1974).

9-20.212 Double Jeopardy Considerations

The second paragraph of 18 U.S.C. §1152 specifically provides that the section "does not extend" to an Indian "who has been punished by the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

local law of the Tribe." 18 U.S.C. §1153, however, does not contain such a limitation. The Supreme Court has held that the Double Jeopardy Clause, U.S. Const., Amend, V, does not bar successive prosecutions in federal and tribal courts for violations of 18 U.S.C. §1153 and tribal law. It reasoned that the courts are arms of separate sovereigns and prosecution is not "for the same offense." See United States v. Wheeler, 435 U.S. 313 (1978). The Court left open the question whether its "dual sovereignty" ruling would apply to "Courts of Indian Offenses," also known as "CFR Courts." Id. at 327 n.26. A federal prosecution should not, however, be undertaken following a tribal prosecution unless substantial federal interests were left unvindicated.

9-20.213 Limitations on 18 U.S.C. §1152 Exemption

It should be emphasized that the phrase "general laws of the United States" means federal enclave laws. Federal enclave laws are those laws which apply only within the special maritime and territorial jurisdiction of the United States as defined in 18 U.S.C. §7. See United States v. Cowboy, 694 F.2d 1234 (10th Cir. 1982). The exception in the second paragraph of 18 U.S.C. §1152 does not exempt Indians from the criminal laws of the United States that apply to acts that are federal crimes regardless of where committed such as bank robbery, counterfeiting, sale of drugs, and assault on a federal officer. See United States v. Blue, 722 F.2d 383 (8th Cir. 1983); United States v. Smith, 562 F.2d 453 (7th Cir. 1977), cert. denied, 434 U.S. 1072 (1978). Neither does it exempt Indians from the liquor law provisions, 18 U.S.C. §§1154, 1161; United States v. Cowboy, supra.

9-20.214 Offenses Against Community Committed by Indians or Non-Indians  
(Victimless Crimes)

A. Indians

Some crimes committed by Indians on reservations do not really involve offenses against the person or property of non-Indians. Such offenses typically involve crimes against public order and morals. Examples are traffic violations, prostitution, or gambling. Federal prosecutions in these cases can be based on 18 U.S.C. §1152 and the Assimilative Crimes Act (18 U.S.C. §13). See, e.g., United States v. Sosseur, 181 F.2d 873 (7th Cir. 1950); United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). U.S. Attorneys should strongly consider prosecution in such cases where prosecution by the tribe is not forthcoming or inadequate.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Non-Indians

The question of jurisdiction over victimless crimes by non-Indians received considerable attention in the Department following the Supreme Court's holding in Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), that tribal courts do not have jurisdiction over non-Indians. The Office of Legal Counsel (OLC) prepared an extensive memorandum dated March 21, 1979, concluding that in most cases, the states have jurisdiction over victimless crimes by non-Indians. The OLC memorandum was reprinted in the August 1979 issue of Indian Law Reporter (6 ILR K-15ff) and copies are available from the Department. The conclusion of OLC is that in the absence of a true victim, McBratney, supra, would control, leaving the states with jurisdiction. There must be a concrete and particularized threat to the person or property of an Indian or to specific tribal interests (beyond preserving the peace of the reservation) before federal jurisdiction can be said to attach. Thus, most traffic violations, most routine cases of disorderly conduct, and most offenses against morals such as gambling, which are not designed for the protection of a particular vulnerable class, should be viewed as having no real "victim" and therefore to fall exclusively within state competence.

In certain other cases, however, a sufficiently direct threat to Indian persons or property may be stated to bring an ordinarily "victimless" crime within federal jurisdiction. One example would be crimes calculated to obstruct or corrupt the functioning of tribal government. This could include bribery of tribal officials in a situation where state law in broad terms prohibits bribery of public officials. Another example which would adversely affect the tribal community are consensual crimes committed by non-Indian offenders with Indian participants, where the participant, although willing, is within the class of persons which a particular state statute is specifically designed to protect. See Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), cert. denied, 382 U.S. 981 (1966) (prosecution under Assimilative Crimes Act for felony sex offense in violation of state law committed in National Park). Thus, federal jurisdiction will be under 18 U.S.C. §2023 for the statutory rape of an Indian girl, as would a charge of contributing to the delinquency of a minor where assimilated into federal law pursuant to 18 U.S.C. §13.

A third group of offenses which may be punishable under the law of individual states and assimilated into federal law would be cases where an Indian victim is actually indentified. Examples would include reckless endangerment, criminal trespass, riot or rout, and disruption of a public meeting or a worship service conducted by the tribe. In certain other

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

cases, conduct, which is generally prohibited because of its ill effects on society at large and not because it represents a particularized threat to specific individuals, may nevertheless so specifically threaten or endanger Indian persons or property that federal jurisdiction may be asserted. Thus, speeding in the vicinity of an Indian school, homosexual activity in the same area, an obvious attempt to scatter Indians collected at a tribal gathering, or a breach of peace that borders on an assault, may in unusual circumstances be seen as sufficiently serious to warrant federal prosecution.

9-20.215 Offenses by Non-Indians; Concurrent Federal-State Jurisdiction

Although it might be assumed that whoever has jurisdiction over a particular category of crimes may assert it exclusively, the Department has given the matter additional consideration. A substantial case can be made for the proposition that the states are not ousted from jurisdiction over offenses committed by non-Indian offenders which pose a direct and substantial threat to Indian victims, but in their separate sovereign capacities may prosecute non-Indian offenders for violations of applicable state law as well.

The issue is a difficult one. Although McBratney, *supra*, firmly establishes that state jurisdiction is exclusive in the absence of a clear Indian victim, it is the Department's position that despite contrary Supreme Court dicta it does not necessarily follow that state jurisdiction must be ousted where an offense is stated against a non-Indian defendant under federal law.

The exclusivity of federal jurisdiction with regard to the Major Crimes Act, see 18 U.S.C. §1153, was established in United States v. John, 437 U.S. 634, 651 (1978). 18 U.S.C. §1152 has likewise been viewed as ousting state jurisdiction where Indian defendants are involved. See, e.g., United States ex rel. Lynn v. Hamilton, 233 F.2d 685 (W.D.N.Y. 1915); In re Blackbird, 109 F. 139 (W.D. Wis. 1901); Application of Denetclaw, 83 Ariz. 299, 320 P.2d 697 (1958); State v. Campbell, 53 Minn. 354, 55 N.W. 553 (1893); Arquette v. Schneckloth, 56 Wash. 2d 178, 351 P.2d 921 (1960). Supreme Court dicta, moreover, suggests that federal jurisdiction may similarly be exclusive where offenses by non-Indians within the terms of 18 U.S.C. §1152 are concerned. See Washington v. Yakima Indian Nation, 439 U.S. 463, 470 (1979); Williams v. Lee, 358 U.S. 217, 219-20 (1959); Williams v. United States, 327 U.S. 711, 714 (1946).

The Montana and North Dakota supreme courts have held that state jurisdiction is ousted where federal jurisdiction under 18 U.S.C. §1152

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

applied to the unlawful theft or killing of livestock owned by an Indian on a reservation where the perpetrator was non-Indian. See State v. Greenwalt, 663 P.2d 1178 (Mont. 1983) (divided court); State v. Kuntz, 66 N.W. 2d 531 (D. N.D. 1954). But three earlier cases suggest a contrary result, recognizing that, as in McBratney, *supra*, the states have a continuing interest in the prosecution of offenders against state law even while federal prosecution may at the same time be warranted. See State v. McAlhaney, 220 N.C. 387, 17 S.E. 2d 352 (1941); Oregon v. Coleman, 1 Ore. 191 (1855). See also United States v. Barnhart, 22 F. 285, 291 (D. Ore. 1884).

Although it would mean that 18 U.S.C. §1152 could not be uniformly applied to provide for exclusive federal jurisdiction in all cases of interracial crimes, a conclusion that both federal and state jurisdiction may lie where conduct on a reservation by a non-Indian which presents a direct and immediate threat to an Indian person or property constitutes an offense against the laws of each sovereign could not be criticized as inconsistent or anomalous. 18 U.S.C. §1153 was enacted many years after 18 U.S.C. §1152 had been introduced as part of the early Trade and Intercourse Acts; its clear purpose was to provide a federal forum for the prosecution of Indians charged with major crimes, a forum necessary precisely because no state jurisdiction over such crimes was contemplated. Consistent with this purpose, 18 U.S.C. §1152 may properly be read to preempt state attempts to prosecute Indian defendants for crimes against non-Indians as well.

In cases involving a direct and immediate threat by a non-Indian defendant against an Indian person or property, however, a different result may be required. The state interest in such cases, as recognized by McBratney, *supra*, is strong. 18 U.S.C. §1152 itself recognizes that where an Indian is charged with an interracial crime against a non-Indian, federal jurisdiction is to be exercised only where the offender is not prosecuted in his/her own tribal courts. But in no event would the state courts have jurisdiction in such a case absent a separate grant of jurisdiction such as that provided by Public Law No. 280, Act of Aug. 1953, 67 Stat. 588. An analogous situation is presented where a non-Indian defendant is charged with a crime against an Indian victim; the federal interest is not to preempt the state courts, but only to retain authority to prosecute to the extent that state proceedings do not serve the federal interest.

This result follows from the preemption analysis set forth in Williams v. Lee, 358 U.S. 217 (1959), where the Court recognized that, in the absence of express federal legislation, the authority of the states should be seen to be circumscribed only to the extent necessary to protect

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Indian interest in making their own laws and being ruled by them. While significant damage might be done to Indian interests if Indian defendants could be prosecuted under state law for conduct occurring on the reservation, no equivalent damage would be done if state as well as federal prosecutions of non-Indian offenders against Indian victims could be sustained.

Finally, it might be argued that such a result is consistent with principles governing the administration of other federal enclaves. It is generally recognized that a state may condition its consent to a cession of land involving government purchase or condemnation by reserving jurisdiction to the extent consistent with the federal use. See Kleppe v. New Mexico, 426 U.S. 529, 540 (1976); Paul v. United States, 371 U.S. 245, 264-65 (1963). Most Indian reservations are, however, unique because they existed prior to statehood and did not arise as a result of a cession agreement or condemnation proceedings. Nonetheless, the analogy to other federal enclaves may be helpful in building the case for concurrent jurisdiction.

States often retain concurrent jurisdiction except to the extent that it would interfere with the federal use. Accordingly, they may do so here as well by prosecuting non-Indian offenders while federal jurisdiction simultaneously remains as needed to protect Indian victims in the event that a state prosecution is not undertaken or is not prosecuted in good faith. For these reasons, therefore, the Department believes that prosecution may be commenced under state law against a non-Indian even in cases where, as a result of conduct on the reservation which represents a direct and immediate threat against an Indian person or property, federal jurisdiction may also attach.

U.S. Attorneys have a very important role to play in reacting to crimes by non-Indians against Indians. While some states may be willing and able to prosecute, this should never be assumed. The key is close liaison with state officials, either directly or through the Federal Bureau of Investigation (FBI), to make sure that all appropriate cases involving offenses by non-Indians against Indians are prosecuted vigorously. U.S. Attorneys shoulder a heavy responsibility in making sure that the tribal community is protected from crimes by persons over whom the tribe has no jurisdiction. In all cases where the state refuses to prosecute or does so inadequately, U.S. Attorneys should carefully consider federal prosecution, recognizing that a declination means that the offender will go unpunished. A declination in favor of "state prosecution" is not sufficient protection for the tribal community or the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

individual Indian victim if the state will not prosecute for some reason unrelated to the merits of the particular case.

9-20.220 Investigative Jurisdiction

The FBI has investigative jurisdiction over violations of 18 U.S.C. §§1152 and 1153. Frequently by the time the FBI arrives on the reservation some investigation will have been undertaken by tribal or Bureau of Indian Affairs (BIA) police. It is recognized that the ability of the tribal and BIA police can vary from reservation to reservation, and U.S. Attorneys are free to ask for BIA investigation in all cases where it is felt that such is required. However, U.S. Attorneys are encouraged and authorized to accept investigative reports directly from tribal or BIA police and prepare a case for prosecution without FBI investigation in all cases where you feel a sufficient investigation can be undertaken by BIA or tribal law enforcement officers.

9-20.230 Chart: Crimes in Indian Country

18 U.S.C. §§1151-1165 (1976), as amended by Act of May 29, 1976, Pub. L. No. 94-297, §2, 90 Stat. 585, and Act of October 12, 1984, Pub. L. No. 98-473, §1009, 98 Stat. 2141, and Department of Justice Memorandum of March 21, 1979, on Victimless Crimes by Non-Indians.

<u>OFFENDER</u>	<u>VICTIM</u>	<u>APPLICABLE LAW</u>
1. Non-Indian	Non-Indian	State--No federal jurisdiction.
2. Non-Indian	Indian	State law if state prosecutes. If state does not prosecute or does so inadequately United States can prosecute under 18 U.S.C. §1152 and substantive federal offenses, <sup>1/</sup> or 18 U.S.C. §1152, 18 U.S.C. §13 (Assimilative Crimes Act, and state law if no federal statute for the offense).
3. Indian	Non-Indian	If a listed major crime, prosecution by United States under 18 U.S.C. §1153. For all crimes except burglary, involuntary

---

<sup>1/</sup> A substantive federal offense is any of the special jurisdiction offenses such as murder, arson, or rape.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

<u>OFFENDER</u>	<u>VICTIM</u>	<u>APPLICABLE LAW</u> (continued)
		sodomy, and incest, prosecution is under 18 U.S.C. §1153 and substantive federal law (e.g., 18 U.S.C. §113). Burglary, involuntary sodomy, and incest are prosecuted under 18 U.S.C. §1153 but the offenses are defined and punished in accordance with the laws of the state.
		If not a listed major crime, prosecution is by United States under 18 U.S.C. §1152 and substantive federal offense; or 18 U.S.C. §1152 and §13 (Assimilative Crimes Act) and state law if no federal statute for the offense.
4. Indian	Indian	Prosecution can only be undertaken for a listed major offense as in #3 above. An Indian cannot be prosecuted under 18 U.S.C. §1152 for non-major crimes committed against other Indians. Such a crime can only be prosecuted in tribal court. <u>2/</u>
5. Non-Indian	Victimless	State jurisdiction except in very rare situations where federal jurisdiction attaches.
6. Indian	Victimless	Tribal court jurisdiction or federal jurisdiction. Tribal courts handle the vast majority of such offenses.

9-20.240 Embezzlement and Theft from Tribal Organization

18 U.S.C. §1163 makes embezzlement, theft, criminal conversation and wilful misapplication of funds belonging to a tribal organization a crime. It is a felony if the amount taken exceeds \$100. This statute applies to both Indians and non-Indians, and need not be committed on a reservation

---

2/ State courts have no jurisdiction over Indians for any crimes in Indian country.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

or in Indian country. The second paragraph of 18 U.S.C. §1152 does not shield an Indian who has committed the offense on a reservation. See United States v. McGrady, 508 F.2d 13 (8th Cir.), cert. denied, 420 U.S. 797 (1975). Neither is tribal sovereignty a shield against a grand jury investigation and subpoena. See United States v. Boggs, 439 F. Supp. 1050 (D. Mont. 1980).

9-20.250 Bibliography

- A. Cohen, Handbook of Federal Indian Law (Michie 1982);
- B. Felix S. Cohen, Handbook of Federal Indian Law (U. of New Mexico reprint);
- C. Kappler, Indian Affairs: Laws and Treaties (U.S.G.P.O.); Indian Law Reporter.



U.S. Department of Justice

Executive Office for United States Attorneys

---

Washington, D.C. 20530

February 11, 1986  
(Expires July 11, 1986)

TO: Holders of United States Attorneys' Manual Title 9.  
FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Policy Concerning State Jurisdiction over Certain  
Offenses on Indian Reservations

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-20.215

PURPOSE: This bluesheet restates prosecutive policy with respect to concurrent state jurisdiction over certain offenses on Indian reservations.

---

The following replaces USAM 9-20.215:

9-20.215 Offenses by Non-Indians: Concurrent State-Federal Jurisdiction

As noted at USAM 9-20.210, jurisdiction over offenses committed by non-Indians against non-Indians are within the exclusive jurisdiction of the states. United States v. McBratney, 104 U.S. 621 (1882); Draper v. United States, 164 U.S. 240 (1896). Non-Indians are immune from tribal court jurisdiction. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978). Except for those exempted by McBratney, the federal government has jurisdiction over non-Indian offenders. Despite some Supreme Court dicta (and state and federal district court holdings) to the contrary, it is the Department's position that this jurisdiction is not exclusive of state jurisdiction. See Office of Legal Counsel Memorandum, dated March 2, 1979, reprinted at 6 ILR K-155ff (August 1979).

There are only two bases for denying a state jurisdiction over conduct committed in Indian country within its borders:

one is tribal sovereignty and the other is federal preemption. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142-43 (1980); Rice v. Rehner, 463 U.S. 713, 718-19 (1983). Neither ground is sufficient to bar state jurisdiction in these cases.

In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), Chief Justice Marshall wrote that the Cherokee Nation "is a distinct community, occupying its own territory, with boundaries accurately described, in which . . . [state laws] can have no force. . . but. . . in conformity with treaties, and acts of Congress." But this concept of impenetrable reservation borders has not withstood the tests of time. As outlined in Rice v. Rehner, 463 U.S. at 718-20, state law has repeatedly been allowed to penetrate reservation borders. Indeed, the absolute limits of the concept were breached in the context of criminal law in the century-old McBratney case. The core interest which the doctrine is meant to protect is the Indians' right to self-government. As recently stated in Washington v. Yakima Indian Nation, 439 U.S. 463, 470 (1979):

[S]tate law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 219-220 (1959).

But "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interest in the affairs of non-Indians." McClanahan v. Arizona Tax Commission, 411 U.S. 164, 171 (1973). The principle of tribal self-government is surely not offended by a state prosecuting a non-Indian, who, by virtue of Oliphant, is not subject to tribal criminal jurisdiction.

The second objection that may be raised to state jurisdiction over these cases is the doctrine of federal preemption. This doctrine is similar to, but differs from, federal preemption in the state-federal context. Rice v. Rehner, 463 U.S. at 718, citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). For the preemption test to preclude state jurisdiction, it is necessary to find that a balance of federal, Indian and state interests requires sacrifice of the latter. Rice v. Rehner, 463 U.S. at 720. As noted, a tribe can hardly complain of the state's assumption of jurisdiction over one who is beyond its own power. The federal (and tribal) interests in preserving peace in Indian country are likewise not encroached upon by a state undertaking prosecution. The federal government retains concurrent jurisdiction so that it may go forward if it believes its interests or those of its tribal wards have not been satisfactorily vindicated in the prior state proceedings. Cf. Abbate v. United States, 359 U.S. 187 (1959). The state's interest in maintaining law and order within its borders is

obvious and compelling. While a strong case can be made for immunizing Indian defendants from state processes, see United States v. Kagama, 118 U.S. 375, 384 (1886), the same cannot be said for forbidding a state to act against non-Indians and protect its Indian citizens.

An analysis of the authorities containing dicta negating state jurisdiction over these kinds of cases show that they can be traced back to a misstatement of the decision in Donnelly v. United States, 228 U.S. 243 (1913), particularly the interpretation given it in Williams v. United States, 327 U.S. 711 (1945).

In Williams, the defendant, a non-Indian, had had sexual relations with a reservation Indian minor between the ages of 16 and 18. As the federal carnal knowledge statute (now codified at 18 U.S.C. 2032) fixes the age of consent at 16, he could not be charged with violating it. Instead, he was charged in federal court with violating the Arizona statutory rape provision, which fixed the age of consent at 18. The theory of the prosecution was that the Arizona statute was made applicable to the reservation by the Assimilative Crimes Act, 18 U.S.C. 13, and the General Crimes Act, (now codified at 18 U.S.C. 1152). The Supreme Court held that use of the Assimilative Crimes Act was improper since Congress had legislated with regard to the generic offense of sex with minors and deliberately selected the lower age of consent.

Although Williams raised no challenge to the jurisdiction of the federal court to try him, the Court delivered itself of the following dictum summarizing Indian country jurisdiction:

While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian. (Footnotes omitted.) (Emphasis supplied.) 327 U.S. at 714.

In support it cited Donnelly v. United States, *supra*; United States v. Pelican, 232 U.S. 442 (1914); United States v. Ramsey, 271 U.S. 467 (1926); and United States v. Chavez, 290 U.S. 357 (1933). *Ibid.* note 10.

Each of these cases involved offenses committed by non-Indians against Indians, but none of them were state prosecutions in which state jurisdiction was challenged.

Rather, the defendants were challenging the jurisdiction of the federal court, arguing that only the state had jurisdiction. In each case the Court ruled that the situs of the crime was Indian country and that admission to statehood did not divest the federal court of jurisdiction over offenses by or against Indians. In none of them did it hold that federal jurisdiction over the non-Indian defendant was exclusive. Donnelly was the case principally relied on by the other three, and Williams itself recognized Donnelly as the seminal case. See 327 U.S. at 714 n. 10.

In Donnelly the Supreme Court rejected the contention that a non-Indian's offense against an Indian in Indian country fell "within the principle of the McBratney and Draper cases." The "principle" of McBratney and Draper was that federal jurisdiction over non-Indians under the General Crimes Act for offenses against non-Indians was divested when a territory entered the Union as a state, and that state jurisdiction over such offenses was exclusive. Instead, the Court held, the case was governed by the rationale of the Kagama case, which had held that because of the federal trust responsibility, federal jurisdiction over offenses by Indians was not divested by a territory entering into statehood. The same trust obligation required continued federal jurisdiction over non-Indian offenders against Indians. Neither Kagama nor Donnelly, however, held or stated that such jurisdiction was exclusive. The emphasis in Kagama on the need to protect Indians from state prejudice would suggest that federal jurisdiction over Indian defendants should be exclusive, and, indeed the Supreme Court so held many years later in United States v. John, 437 U.S. 634, 654 (1978), with respect to the Major Crimes Act. The federal trust responsibility does not, however, require that its obligation to safeguard the Indian community against non-Indian depredations preempt state action.

An additional argument against state jurisdiction may be based upon disclaimers of jurisdiction over Indian country contained in the state constitution or enabling act. The argument is without merit. As a general rule such a provision is properly construed as a disclaimer of proprietary rather than governmental interest, Kake Village v. Egan, 369 U.S. 60, 69 (1962), and references in such provisions to retention of "absolute jurisdiction" by the federal government are not synonymous with "exclusive jurisdiction." Id., at p. 67-68. This was explicitly held with respect to state criminal jurisdiction over crimes by non-Indians against non-Indians in Draper v. United States, supra. Ibid. See also Rice v. Rehner, 463 U.S., at 723.

Finally, it may be argued that, if states had jurisdiction over non-Indians who committed offenses against Indians, it would have been unnecessary to provide in Public Law 93-280, codified at 18 U.S.C. 1162 and 25 U.S.C. 1321, that state

jurisdiction was, or could be, extended to "offenses committed by or against Indians," since "by" alone would have been effective to divest the United States of exclusive jurisdiction over offenses enumerated in the Major Crimes Act. This argument overlooks the exclusive jurisdiction tribal courts have over offenses, not enumerated in the Major Crimes Act, committed by Indians against Indians. See 18 U.S.C. 1152 ¶2; Ex Parte Crow Dog, 109 U.S. 556 (1883). Public Law 93-280 was designed not only to shift federal responsibility for major crimes to the state, but also to have the state undertake responsibility for minor offenses that the tribes were unable to deal with effectively. See Washington v. Yakima Indian Nation, 439 U.S. at 471, 488 n. 32, 489 n. 33. It was these crimes, not those by non-Indians, that required use of the word "against."

In conclusion, while the United States is obligated by its trust responsibilities to maintain jurisdiction over offenses by non-Indians against Indians in Indian country, there is no statute or Supreme Court case holding that such jurisdiction is exclusive and preemptive of the states. While historically and as a "practical matter," Washington v. Yakima Indian Nation, 439 U.S. at 470 (1979), such offenses are "generally tried in federal courts," Williams v. Lee, 358 U.S. 217, 220 n. 5, neither Indian sovereignty nor preemption forecloses state prosecution.

United States Attorneys have a very important role to play in reacting to crimes by non-Indians against Indians. While some states may be willing and able to prosecute, this should never be assumed. The key is close liaison with state officials, either directly or through the Federal Bureau of Investigation (FBI), to make sure that all appropriate cases involving offenses by non-Indians against Indians are prosecuted vigorously. United States Attorneys shoulder a heavy responsibility in making sure that the tribal community is protected from crimes by persons over whom the tribe has no jurisdiction. In all cases where the state refuses to prosecute or does so inadequately, United States Attorneys should carefully consider federal prosecution, recognizing that a declination means that the offender will go unpunished. A declination in favor of "state prosecution" is not sufficient protection for the tribal community or the individual Indian victim if the state will not prosecute for some reason unrelated to the merits of the particular case.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 21

	<u>Page</u>
9-21.000 <u>PURPOSE AND SCOPE</u>	1
9-21.010 <u>Introduction</u>	1
9-21.020 <u>Scope</u>	1
9-21.100 ELIGIBILITY	1
9-21.110 <u>Informants</u>	3
9-21.120 <u>Utilization of Federal Prisoners in Investigations</u>	3
9-21.130 <u>Prisoner-Witnesses</u>	4
9-21.140 <u>State and Local Witnesses</u>	5
9-21.200 APPROVAL AUTHORITY	5
9-21.210 <u>Approval Procedure</u>	5
9-21.220 <u>Emergency Authorization</u>	5
9-21.300 REQUEST FOR PRE-ENTRY INTERVIEWS	6
9-21.310 <u>Representations and Promises</u>	6
9-21.320 <u>Expenses</u>	6
9-21.330 <u>Psychological Testing and Evaluation</u>	7
9-21.340 <u>Polygraph Examinations for Prisoner-Witness Candidates</u>	7
9-21.400 PROCEDURES FOR SECURING PROTECTION	7
9-21.410 <u>Illegal Aliens</u>	10

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-21.500	RESPONSIBILITIES AND PREROGATIVES OF THE U.S. MARSHALS SERVICE	11
9-21.510	<u>Witness Services</u>	11
9-21.520	<u>Subsistence Guidelines</u>	11
9-21.530	<u>Employment of Protected Witnesses</u>	12
9-21.600	PRISONER-WITNESSES	12
9-21.700	REQUEST FOR WITNESS' RETURN TO DANGER AREA FOR COURT APPEARANCES	15
9-21.800	USE OF RELOCATED WITNESSES AS INFORMANTS	15
9-21.900	MISCELLANEOUS	17
9-21.910	<u>Dual Payments Prohibited</u>	17
9-21.920	<u>Payments of Reward Monies</u>	17
9-21.930	<u>Use of Department of Defense Facilities</u>	18
9-21.940	<u>Special Handling</u>	18
9-21.950	<u>Relocation Site</u>	18
9-21.960	<u>Duty Officers</u>	18
9-21.970	<u>Other Requests</u>	18
9-21.980	<u>Training</u>	19
9-21.990	<u>Continuing Protection Responsibilities</u>	19
9-21.1000	<u>Arrests of Relocated Witnesses</u>	19
9-21.1010	<u>Results of Witnesses' Testimony</u>	19
9-21.1020	<u>Victims Compensation Fund--(18 U.S.C. §3525)</u>	20
9-21.1030	<u>Forms</u>	21
9-21.1031	Psychological Evaluation Form	21
9-21.1032	Polygraph Examination Form	21

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-21.000 PURPOSE AND SCOPE

9-21.010 Introduction

The purpose of this chapter is to provide information and guidance to Department of Justice attorneys with respect to the Witness Security Reform Act of 1984, which is Part F of Chapter XII of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473) and repeals Title V of the Organized Crime Control Act of 1970. This chapter prescribes the procedures for establishing a person as a protected witness.

9-21.020 Scope

These procedures apply to all organizations within the Department of Justice.

The Witness Security Reform Act of 1984 continues the authority of the Attorney General to provide protection and security by means of relocation for witnesses, and their relatives and associates, in official proceedings brought against persons involved in organized criminal activity or other serious offenses if it is determined that an offense described in Chapter 73 (Obstruction of Justice) of Title 18 or a similar state or local offense involving a crime of violence directed at a witness is likely to occur.

28 U.S.C. §524 provides authority to use appropriations of the Department of Justice for the payment of . . . compensation and expenses of witnesses and informants all at the rates authorized or approved by the Assistant Attorney General for Administration. . . ."

9-21.100 ELIGIBILITY

A witness may be considered for the Witness Security Program if the person is an essential witness in a specific case of the following types:

- A. Any offense defined in Title 18 U.S.C. §1961(1) (organized crime and racketeering);
- B. Any drug trafficking offenses described in Title 21 U.S.C.;
- C. Any other serious federal felony for which a witness may provide testimony which may subject the witness to retaliation by violence or threats of violence;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. Any state offense that is similar in nature to those set forth above; and

E. Certain civil and administrative proceedings in which testimony given by a witness may place the safety of that witness in jeopardy.

In order for the Office of Enforcement Operations, Criminal Division, to facilitate the processing of a request for entry of an individual into the Witness Security Program, an application form has been designed to cover the information needed to support the request. This form includes a summary of the testimony to be provided by the witness and other information evidencing the witness' cooperation.

The Witness Security Reform Act of 1984 requires that the Attorney General obtain and evaluate all available information regarding the suitability of a witness for inclusion in the Witness Security Program. This information must include any criminal history and a psychological evaluation for each candidate for the Program and each adult (18 years and older) member of the household. Additionally, the Attorney General is required to make a written assessment of the risk the witness may present to his/her new community. Factors which must be evaluated in the risk assessment include, but are not limited to, the person's criminal record, alternatives other than protection which have been considered, and the possibility of securing the testimony from other sources. If it is determined that the need for prosecution of the case is outweighed by the danger that the witness would pose to the relocation community, the Attorney General is required to exclude the witness from the Program.

To avoid the necessity of making follow up calls, please note the following:

A. In order to make certain that each application for entry of a witness into the Program is both appropriate and timely, the witness should, prior to his/her acceptance into the Program, either appear and testify before the grand jury or in some other manner have committed himself/herself to providing this testimony at trial;

B. As you are aware, the Department is obligated to provide for the safety and welfare of the witness long after he/she has testified. The protection and possible relocation of the witness and his/her family are both expensive and complicated. It is imperative, therefore, that the entry of a witness into the Program be made only after it has been determined by the sponsoring attorney that the witness' testimony is credible, significant, and certain in coming.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Witness Security Program application forms and instructions are available from the Office of Enforcement Operations, Criminal Division, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600.

9-21.110 Informants

Informants are the responsibility of the investigative agency that the informant has assisted. An informant is not eligible for participation in the Witness Security Program unless he/she becomes a witness as defined in 18 U.S.C. §3521 et seq.

9-21.120 Utilization of Federal Prisoners in Investigations

All requests from investigative agencies to utilize federal prisoners (non-Witness Security participants) in investigations, when consensual monitoring devices, furloughs, or extraordinary transfers are necessary must be referred to the Office of Enforcement Operations for review and coordination with the Bureau of Prisons. This also applies to inmates in local halfway houses. The following information must be provided:

- A. Name of prisoner and identifying data, including Bureau of Prisons register number, if known;
- B. Location of the prisoner;
- C. Necessity of utilizing the prisoner in the investigation;
- D. Name(s) of target(s) of the investigation;
- E. Nature of the activity requested;
- F. Security measures to be taken to ensure the prisoner's safety, if necessary;
- G. Length of time the prisoner will be needed in the investigation;
- H. Whether the prisoner will be needed as a witness;
- I. Whether the prisoner will have to be moved to another institution upon completion of the activity; and
- J. Whether the prisoner will remain in the custody of the investigative agency or will be unguarded.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

These requests must be endorsed by the appropriate investigative agency headquarters. Upon completion of the review, the Office of Enforcement Operations will make a recommendation to the Director, Bureau of Prisons. The requestor will be advised of the decision of the Bureau of Prisons by the Office of Enforcement Operations. The Bureau of Prisons will coordinate arrangements for the activity directly with the requestor.

Because of the gravity of the responsibility assumed by the Federal Bureau of Prisons when it consents to the use of its inmates by investigative agencies as informants, new guidelines for approval of such requests will be employed. Effective immediately, all requests for release of an inmate, from the custody of the Bureau of Prisons/United States Marshals Service to the custody of the investigative agency, must be requested by an Assistant Director of the agency. Similarly, all requests to use residents of halfway houses or community treatment centers, or to transfer an inmate from one institution to another to perform informant or undercover activities must also be requested by an Assistant Director. Other requests to use inmates as informants, which do not require release or movement of such inmates may be submitted from the appropriate section chief.

Requests for utilization of federal prisoners in an undercover capacity should be addressed to the personal attention of the Director or the Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600.

In exigent circumstances, the Office of Enforcement Operations will accept requests and pertinent information by telephone. However, confirmation of the request and appropriate supporting information must be submitted as soon thereafter as possible. The information provided will be held in the strictest confidence, and no dissemination of the information will be made without prior approval from the appropriate agency or office.

9-21.130 Prisoner-Witnesses

Prisoners in a state or federal institution are eligible for participation in the Witness Security Program providing all other criteria are met. If the prisoner is in state custody, the state must agree to the prisoner serving his/her sentence in a federal institution. Application should be made as prescribed for other witnesses.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-21.140 State and Local Witnesses

The Witness Security Reform Act of 1984 authorizes the Attorney General to provide protection to state and local witnesses if the state agrees to reimburse the United States for expenses incurred in providing protection, and enters into an agreement in which the state agrees to cooperate with the Attorney General in carrying out the provisions of the Witness Security Reform Act. The terms of the reimbursement agreements will be determined by the U.S. Marshals Service. Requests from local authorities should be directed to the U.S. Attorney or Strike Force Chief and should contain all of the information required in the Witness Security Program application. The U.S. Attorney or Strike Force Chief should review the application and furnish his/her recommendation to the Office of Enforcement Operations for consideration.

9-21.200 APPROVAL AUTHORITY

The Witness Security Reform Act provides that the Attorney General may delegate the authority to place individuals in the Witness Security Program to the Deputy Attorney General, the Associate Attorney General, the Assistant Attorneys General of the Criminal and Civil Rights Divisions, and one other person. By Order No. 1072-84, the Attorney General has specially designated those individuals named above and the Senior Associate Director of the Office of Enforcement Operations, Criminal Division, to authorize applications for witness or prospective witnesses to be admitted into the Witness Security Program. In the absence of the Senior Associate Director, Office of Enforcement Operations, the Director of the Office of Enforcement Operations is authorized to exercise this authority.

9-21.210 Approval Procedure

Approval of requests to use the Witness Security Program will be made by the Director or Senior Associate Director of the Office of Enforcement Operations. The approval will be conveyed to the Director, U.S. Marshals Service and/or the Director, Bureau of Prisons, by memorandum.

9-21.220 Emergency Authorization

Protection of a witness for whom relocation is being requested remains the responsibility of the investigative agency until such time as the Office of Enforcement Operations has reviewed the application and all other relevant information, including the results of the psychological examination, approved admission of the witness into the Program and the U.S.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Marshals Service has had the opportunity to arrange the safe removal of the witness and his/her family.

If it is determined that a witness is in immediate danger and the investigative agency is not able to provide the necessary protection, temporary protection may be provided before making the written risk assessment or entering into the memorandum of understanding. However, the assessment and memorandum of understanding must be completed as soon as possible following the authorization for emergency protection.

9-21.300 REQUEST FOR PRE-ENTRY INTERVIEWS

The U.S. Marshals Service will interview prospective witnesses prior to their entry into the Program. This initial interview will serve two purposes; first, it will ensure that the prospective witness understands what can be expected from the Program; and second, it will allow the U.S. Marshals Service to evaluate potential problems with a view toward resolving them as quickly as possible.

Interviews will be arranged when a request for entry into the Program is received. It will, therefore, be necessary that the Office of Enforcement Operations be advised of the witness' likely entry into the Program as soon as it appears that the individual will be a witness, will be endangered, and will, therefore, need to enter the Witness Security Program.

9-21.310 Representations and Promises

Investigative agents and attorneys are not authorized to make representations to witnesses regarding funding, protection, or other Program services. These matters are for decision by authorized representatives of the U.S. Marshals Service only. Representations or agreements made without authorization will not be honored by the U.S. Marshals Service.

9-21.320 Expenses

Any expenses incurred by investigative agencies or divisions for witnesses and/or their dependents prior to approval by the Office of Enforcement Operations are the responsibility of the concerned agency or division.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-21.330 Psychological Testing and Evaluation

Before authorizing any witness to enter the Program, the Office of Enforcement Operations will arrange for psychological testing and evaluation for each prospective witness and the adult (18 years and older) members of his/her household. This testing will be done by psychologists from the Federal Bureau of Prisons, and will, to the extent possible, determine if the individuals may present a danger to their relocation communities. Since the reports of the psychologists may contain information which is discoverable as Brady material in the criminal prosecution in which the witness is testifying, all materials submitted by the psychologists will be forwarded to the appropriate U.S. Attorney's Office. The consent form will be executed by each individual being evaluated. See Forms, USAM 9-21.971, infra.

9-21.340 Polygraph Examinations for Prisoner-Witness Candidates

A polygraph examination is required of all Program candidates who are incarcerated in order to maintain the security of those individuals who are now, or will be housed in a Bureau of Prisons facility. Authorization for the Witness Security Program may be rescinded if the results of the polygraph examination reflect that the candidate intends to harm or disclose other protected witnesses or information obtained from such witnesses.

The Witness Security candidate will be expected to sign the polygraph examination form acknowledging his/her voluntary submission to the examination. It will be the responsibility of the prosecutor/agent to advise the Witness Security candidate of this requirement prior to submitting the application for the Program. In addition, depending on the location and other pertinent factors the prosecutor/agent or the Bureau of Prisons will be asked to disseminate the form to the prisoner. Copies of this form are available from the Office of Enforcement Operations upon request. See Forms, USAM 9-21.972, infra.

9-21.400 PROCEDURES FOR SECURING PROTECTION

Requests for protection of witnesses must be made as soon as it appears likely the individual will be a witness and will need relocation. A witness is not to be publicly disclosed, thereby endangering his/her life or that of his/her family, without the prior authorization of the Office of Enforcement Operations. It is incumbent upon each U.S. Attorney, his/her assistants, and the investigative agencies to present to the Office of Enforcement Operations at the earliest possible time during the investiga-

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

tive process the request for authorization to place an individual in the Witness Security Program. This will allow time for U.S. Marshals Service preliminary interview, psychological testing, appropriate review, and the actual preparation of assistance by the U.S. Marshals Service and/or the Bureau of Prisons, minimizing the disruption both to the witness and the concerned government agencies.

United States Attorneys and Division Attorneys should transmit requests by memorandum, telecopy, or teletype to the Office of Enforcement Operations. Communications should be addressed to the Director or Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600, or teletyped to the Office of Enforcement Operations, Criminal Division, (telecopy number: FTS 633-5143), (teletype code JCOEO). These requests must be signed by the U.S. Attorney or Criminal Division Field Office Chief. The request must include the following information:

A. Identification of the Witness: Name, address, date and place of birth, sex, race, citizenship, FBI or police numbers of witness. Attach copies of witness' record of arrests and convictions, if any;

B. Significance of the Case(s): Importance of the case and names, locations, and importance of prospective defendants. Describe illegal organization in which the defendants are participants and their respective roles. U.S. Attorney's case number must be included.

Defendant's arrest and conviction record must be attached. If applicable, whether case is or is not a Narcotic Task Force investigation;

C. Expected Testimony of the Witness: A summary of the testimony to be provided by the witness.

Copies of indictments, complaints, prosecutive memoranda, etc., must be attached fully describing the nature of the case. List all cases in which the witness is expected to testify. List all agencies which may make use of the witness' information;

D. Trial Dates: A realistic estimate of the trial date and trial completion (with respect to each trial in which the witness is expected to testify);

E. Other Witnesses: The names of individuals for whom witness protection has previously been approved in connection with the same case; also, the names and locations of any other individuals connected with this case likely to be placed under the Witness Security Program;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

F. Threat: A comprehensive recitation of the danger to the witness. List all individuals known or believed by the U.S. Attorney and investigative agent to pose a threat to the witness. Include complete names and addresses and request the investigative agency to forward photographs of each if available. If not available, so indicate. Include any individuals incarcerated who may pose a threat to the witness in prison and upon their release. Additionally, the investigative agency must submit a report concerning the danger to the witness to its Washington headquarters for review. The headquarters will forward the report, along with its recommendation, to the Office of Enforcement Operations;

G. Members of Witness' Household: List by name, date and place of birth, and relationship to the witness those persons recommended for relocation;

H. Assets and Liabilities: A complete recitation of the witness' financial posture to include real and personal property value, debts, alimony, support payments, mortgages, bank accounts, pensions, securities, income and information concerning monies which the witness receives or expects to receive from other state or federal agencies.

I. Medical Problems: A complete recitation of all medical problems experienced by the witness and members of his/her household including any history of drug or alcohol abuse;

J. Parole/Probation: Indicate any parole or probation restrictions for the witness and members of his/her household. If the witness and/or any household members are on state parole or probation, supervision will be transferred to the Probation Division of the Administrative Office of the U.S. Courts. In order to effect the transfer, the appropriate state authorities must provide written consent to such supervision.

For those state parolees who are released from state institutions (rather than a federal institution) the following documents must be obtained by the requestor and forwarded to the Office of Enforcement Operations before relocation can occur:

1. Pre-sentence or background report detailing the circumstances of the instant offense and prior criminal conviction history;
2. A sentence data record indicating the type and length of sentence imposed by the state court;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

3. A signed parole or release certificate; and
4. All available institutional materials such as progress reports and classification materials.

For state probationers, the following documents must be obtained:

1. Pre-sentence or background report providing a description of the instant offense and prior criminal conviction history;
2. The Order of Probation from the state court indicating the sentence or probation imposed; and
3. Signed conditions of release and any other pertinent materials.

In addition, in order to comply with the provisions of the Witness Security Reform Act of 1984, the following information must be supplied for all witnesses:

- K. The seriousness of the investigation or case;
- L. The possible danger to other persons or property in the relocation area if the witness is placed in the Program;
- M. What alternatives to Program use were considered and why they will not work;
- N. Whether or not the prosecutor can secure similar testimony from other sources;
- O. What the relative importance is of the witness' testimony; and
- P. Whether or not the need for the witness' testimony outweighs the risk of danger to the public.

9-21.410 Illegal Aliens

Upon the submission of a Witness Security Program application for an illegal alien, the sponsoring attorney and/or investigative agency must obtain from the Immigration and Naturalization Service (INS) appropriate documents which authorize the prospective witness and family members to remain in the United States and facilitate relocation by the U.S. Marshals Service out of the state in which they registered. Witness Security candidates who are illegal aliens cannot be relocated by the U.S. Marshals

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Service until all INS requirements are satisfied and necessary documents have been provided to the Office of Enforcement Operations or U.S. Marshals Service. In cases where the INS procedure to legalize the alien status may require a lengthy time period, the sponsor or agent should secure from INS a letter of intent to change the witness' status as part of the requirements for relocation under the Witness Security Program.

9-21.500 RESPONSIBILITIES AND PREROGATIVES OF THE U.S. MARSHALS SERVICE

When it is determined that a witness is to enter the Program the witness and adult members of his/her family will be asked to sign a Memorandum of Understanding. The U.S. Marshals Service will be obligated to satisfy each commitment documented and will not be required to provide amenities not included in the document.

9-21.510 Witness Services

The U.S. Marshals Service will be responsible for providing the witness with one reasonable job opportunity, and will provide a second opportunity when the witness has a persuasive reason for rejecting the first. The U.S. Marshals Service will also provide assistance in finding housing, will provide identity documents for witnesses and family members whose names are changed for security purposes, and will arrange for severely troubled witnesses and family members to receive counseling and advice by psychologists, psychiatrists, or social workers when requested.

In cases in which the Witness Security Program is used to protect government witnesses, sentencing judges should be made aware of the additional cost to the government for their consideration of fines. A report of the amount spent for each witness may be obtained from the U.S. Marshals Service Witness Security Inspector in the district.

Additional information may be obtained from the Office of Enforcement Operations, Criminal Division, FTS 633-3684.

9-21.520 Subsistence Guidelines

The Director, U.S. Marshals Service, shall administer Witness Security Program funds. The Witness Security Division, U.S. Marshals Service, will supervise the administration of subsistence funds under guidelines set forth by the Director based upon Department of Labor cost of living indices.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Witnesses who are able to support themselves and their family and/or household members will not be furnished subsistence funding assistance.

The U.S. Marshals Service will make every effort to assure that protected persons pay debts for which the Department is furnishing funds and return loaned property provided by the government. If necessary, final subsistence allowances will be withheld until all such debts are cleared and loaned property recovered.

Maintenance allowance assistance will normally be provided until the protected witness has obtained employment or is self-sufficient by other means of income. Subsistence shall terminate not later than six months after the first payment, or once employment is secured, whichever is earlier. The prosecutor will be advised of the scheduled termination of a witness' funding and invited to comment.

An extension for no longer than 90 days may be authorized when circumstances beyond the control of the witness so dictate.

9-21.530 Employment of Protected Witnesses

Protected witnesses are expected to become self-sufficient as soon as possible after acceptance into the Program. The U.S. Marshals Service will endeavor to assist the witness to find employment but the witness himself/herself is expected to aggressively seek employment. Under no circumstances will witnesses be considered "entitled" to subsistence payments until they have testified. Failure to aggressively seek employment or rejection of an employment opportunity will be grounds for discontinuance of subsistence payments.

9-21.600 PRISONER-WITNESSES

A. Prosecutor's Responsibility: The prosecutor handling a case, whether an Assistant U.S. Attorney or a division attorney, will be responsible for notifying the Office of Enforcement Operations when a prisoner-witness or potential prisoner-witness is cooperating with the government, and from whom that person should be separated, whether or not the witness is formally in the Witness Security Program. The Office of Enforcement Operations will then coordinate the placement of the prisoner with the Bureau of Prisons, and in conjunction with the Bureau of Prisons, will monitor the movement of cooperating witnesses, including protected witnesses, when they are moved from one federal facility to another or back and forth from federal to state custody (on writs of habeas corpus ad testificandum or otherwise), to make sure that they are not housed even

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

on a temporary basis in facilities where persons from whom they are to be separated are also housed.

The following information concerning prisoner-witnesses must be provided:

1. Name of offender;
2. Date of birth;
3. Race and Sex;
4. Whether state or federal prisoner (if state, reimbursable or nonreimbursable);
5. Current offense;
6. Current sentence (and Judge's name);
7. FBI rap sheet;
8. Outstanding warrants or detainers;
9. Names of all those from whom witness should be separated, FBI numbers and current locations;
10. Pre-sentence investigation and/or prison classification material;
11. Judgment and Commitment papers, and
12. Bail bond status.

From time to time, U.S. Attorneys' Offices may be requested to assist the U.S. Marshals Service in securing appropriate documents for prisoner-witnesses. The U.S. Marshals Service Witness Security Inspector will assure that Judgment and Commitment papers in the prisoner-witness' new name will be delivered to the institution with the prisoner-witness. A second set of Judgment and Commitment papers in the witness' original name will be forwarded to Bureau of Prisons Headquarters in Washington, D.C.

B. Bureau of Prisons: Special prisoner designations will be made by the Bureau of Prisons as they deem necessary. U.S. Marshals Service involvement in these instances will be limited to insuring the proper security when it is necessary for the prisoner to be transported from one

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

institution to another or back to the danger area for interview and/or trial. When the prisoner-witness is released from incarceration, relocation services will be provided if they are deemed necessary by the Office of Enforcement Operations. The Bureau of Prisons has advised that because of the extraordinary difficulty in determining the appropriate institution for the safe housing of a prisoner-witness, it is imperative that they be furnished the following information on all persons who have been identified as posing a threat to the witnesses and who are likely to come into federal custody:

1. Name;
2. Alias;
3. Date of birth;
4. FBI #;
5. Race;
6. Sex;
7. Ethnic origin;
8. Offense/Charge; and
9. State of appeal, fugitive escape, non-incarcerated, etc.

Compliance in providing this information is essential and will enable the Bureau of Prisons to adequately monitor the separation needs of protected prisoner-witnesses.

The information must be provided to the Office of Enforcement Operations at the time witness protection is being requested for a prisoner-witness in accordance with USAM 9-21.000, infra.

C. Metropolitan Correctional Centers (MCC) will be used primarily to house protected prisoner-witnesses during periods of debriefing, grand jury, and trial. Ordinarily, prisoner-witnesses will not serve their sentences at an MCC. Requests to house prisoner witnesses at an MCC must be directed to the Office of Enforcement Operations for consideration.

D. Interviews of Prisoner-Witnesses must be arranged through the Office of Enforcement Operations. Requests must be submitted at least ten (10) working days in advance and must include all the information required for regular witnesses. The Office of Enforcement Operations will coordi-

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

nate all requests with the U.S. Marshals Service and the Bureau of Prisons. The Bureau of Prisons will not allow prisoner-witnesses to be interviewed without prior authorization from the Office of Enforcement Operations.

9-21.700 REQUEST FOR WITNESS' RETURN TO DANGER AREA FOR COURT APPEARANCES

Attorneys should make requests for the appearance of a relocated witness for trial or pre-trial conferences to the U.S. Marshals Service Witness Security Specialist in their district at least TEN (10) WORKING DAYS in advance of the requested appearance date. Requests should include purpose, date, estimated duration of the appearance, place, time, and, if applicable, name of contact person (if other than the requestor).

Investigative agents should make requests for the appearance of a protected witness through the authorized agency channels to the Office of Enforcement Operations, Criminal Division, for approval. Requests should include purpose, date, and estimated duration of the appearance, and if applicable other persons to be present in addition to the requestor. The Office of Enforcement Operations will forward approved requests to the Witness Security Division, U.S. Marshals Service or to the Inmate Monitoring Branch, Bureau of Prisons (whichever is appropriate). The Witness Security Division, U.S. Marshals Service, will determine the place for the meeting and advise the requestor.

Communications should be addressed to Director or Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600. In case of emergency, you may contact the office telephonically at FTS 633-3684. In order to conserve the U.S. Marshals Service's personnel resources however, emergency requests should be avoided. Prosecutors and investigators will be requested to conduct interviews in neutral sites which will substantially reduce the personnel requirements of the U.S. Marshals Service.

During the witness' appearance in the danger area, it will be the responsibility of the prosecutor and the investigative agents to ensure that maximum use is made of the witness' time. In the interests of security and limiting the expense involved, the witness must be returned to the relocation area as soon as possible.

9-21.800 USE OF RELOCATED WITNESSES AS INFORMANTS

A witness, having entered the Witness Security Program, maintains a continuing and unique relationship with the Department. Even after subsistence allowances and other material support are terminated, the residual

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

relationship requires that investigative agencies and attorneys observe certain restraints in dealing with witnesses insofar as investigations and/or new cases are concerned.

The consent of the Office of Enforcement Operations is required before a protected witness or anyone relocated because of a witness' cooperation may be used as an informant. The following list is representative of the type of issues the Office of Enforcement Operations deems important when evaluating requests to use relocated witnesses as informants:

- A. Significance and/or scope of criminal activity and suspects;
- B. Whether or not the witness is successfully relocated and living within Program guidelines; whether new informant activity will result in relocation, if so, whether agency will bear the expense; whether informant activity will require new Witness Security Program application and relocation;
- C. Whether witness represents a poor risk (e.g. witness has caused problems in the past with his/her sponsoring attorney or agency);
- D. Whether witness has been involved in subsequent criminal activity-making him/her less reliable;
- E. Whether the request centers on witness' new criminal involvement and witness expects relief because of his/her informant role; how witness is aware of new criminal activity;
- F. Whether informant activity will require witness to testify;
- G. Whether witness has completed testimony for which he/she was placed in the Program;
- H. Whether other agencies have used witness since relocation;
- I. Whether witness is on probation or parole; whether U.S. Probation Office and U.S. Parole Commission should be notified;
- J. Whether alternatives to informant activity were considered and why they will not work;
- K. Whether witness is incarcerated; if so, whether prosecutor and/or judge should be advised; whether court order is necessary;
- L. Whether witness will be endangered--security and protective measures to be undertaken by the agency;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- M. Why witness will be effective in informant role;
- N. Length of time required by agency for informant activity; and
- O. Cost of the activity and how much money U.S. has expended on witness.

After a request has been granted, the Office of Enforcement Operations requires that status reports be filed with it after the first 45 days an informant is being utilized and thereafter quarterly.

9-21.900 MISCELLANEOUS

9-21.910 Dual Payments Prohibited

The U.S. Marshals Service is authorized to provide for the maintenance and housing of protected witnesses whenever they appear for trial, pre-trial conferences or return to a danger area for other appearances approved by the Office of Enforcement Operations. The U.S. Marshals Service is authorized to pay for the costs of travel and other associated maintenance expenses. Attorneys should not prepare "Fact Witness Certificates" and Fact Witness fees and allowances should not be disbursed to protected witnesses who are under the protection and maintenance of the U.S. Marshals Service. (Witnesses who voluntarily withdraw from participation in the Witness Security Program are exempt from this restriction.)

9-21.920 Payments of Reward Monies

Payment of reward monies to Witness Security Program participants must be authorized by the Office of Enforcement Operations of the Criminal Division.

The appropriate investigative agency headquarters must take a written request to the Office of Enforcement Operations reflecting the reason(s) for the payment and the name of the contact for appropriate coordination with the U.S. Marshals Service and/or the Bureau of Prisons (whichever is applicable) for disbursement of the funds. The Office of Enforcement Operations will advise the requestor in writing (or telephonically depending on the circumstances) of the approval or denial of the request. Neutral site meetings for the sole purpose of disbursing funds to participants of the Witness Security Program are prohibited. Payments must be sent C/O Chief, Witness Security Division, U.S. Marshals Service, One Tysons Corner Center, McLean, Virginia 22102.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-21.930 Use of Department of Defense Facilities

All requests to use Department of Defense facilities for protected witnesses must be made through the Office of Enforcement Operations.

9-21.940 Special Handling

All documents relating to a protected witness or an individual nominated for protection will be accorded special handling to ensure disclosure on a strict "need to know" basis. All documents should be marked with the security designation "Sensitive Investigative Matter."

9-21.950 Relocation Site

The area of relocation must not be known to the case attorney/agent or his/her staff since all contact with the witness should be through the Office of Enforcement Operations. The witness should be instructed to keep secret the area of his/her relocation and all associated matters.

9-21.960 Duty Officers

The U.S. Marshals Service can be reached after hours at (703) 285-1100.

The Office of Enforcement Operations duty officer may be reached at (202) 633-3684 or (202) 633-2000.

The Bureau of Prisons duty officer may be reached at (202) 724-3036 or (202) 633-2000 (after hours).

9-21.970 Other Requests

A. Requests by members of Congress or their staffs shall be forwarded to the Office of Legislative Affairs who in turn will refer the requests to the Office of Enforcement Operations for processing;

B. Requests by the news media or public should be referred to the Office of Public Affairs; and

C. Other inquiries not covered in this Order should be referred to the Office of Enforcement Operations.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-21.980 Training

The Marshals Service, Bureau of Prisons, and Criminal Division will coordinate special training about the Witness Security Program to be given to Deputy Marshals, Bureau of Prisons personnel, investigative agents, Assistant U.S. Attorneys, and Criminal Division attorneys.

9-21.990 Continuing Protection Responsibilities

Witnesses in the Program undertake the duty of providing testimony in criminal investigations and trials. Protection will be provided during the performance of those duties. After the testimony is completed and any relocation is accomplished, the government will have no further obligations to the witness except that if there is clear evidence that the witness is in immediate jeopardy arising out of the former cooperation, through no fault of the witness, further protective services will be provided.

9-21.1000 Arrests of Relocated Witnesses

In accordance with 18 U.S.C. §3521(b)(1)(H), the U.S. Marshals Service, the Federal Bureau of Investigation, and the Office of Enforcement Operations have worked out a mechanism to, when warranted, securely disseminate protected witnesses' arrest records and information in response to legitimate law enforcement requests. It should be noted that no effort will be made to interfere with legitimate legal procedures.

9-21.1010 Results of Witnesses' Testimony

The Office of Enforcement Operations is required to submit a quarterly report to the Deputy Attorney General reflecting the results of the testimony provided by relocated witnesses. Prosecutors and agents will be asked to provide the following information on a monthly basis:

- A. Name of Witness;
- B. Name of case;
- C. Jurisdiction;
- D. Did the witness testify before grand jury? Trial? If the witness did not testify, why not?

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- E. Status of witness in case;
  - 1. Defendant
  - 2. Unindicted co-conspirator
  - 3. Prisoner
  - 4. Victim
  - 5. Other
- F. Names of all defendants;
- G. Statutory violations charged;
- H. Date of indictment;
- I. Date of conviction;
- J. Disposition of the case as to each defendant;
- K. If convicted, details of sentence imposed on each defendant, including fines levied, etc.;
- L. Any information as to significant forfeitures or seizures accomplished because of assistance of witness; and
- M. Any information as to contributions made by this witness to the law enforcement effort, federal, state, and local, in your district and elsewhere, for example, furnishing probable cause for Title III's, search warrants, locations of fugitives, etc.

9-21.1020 Victims Compensation Fund--(18 U.S.C. §3525)

A fund has been established to compensate victims of crimes committed by participants in the Witness Security Program. In general, the fund will, up to a statutory limit, cover expenses for medical and/or funeral costs and lost wages that are not reimbursable from other sources. The fund does not apply to those crimes committed by participants who have been terminated from the Program by the U.S. Marshals Service. The Office of Enforcement Operations has been delegated the authority to administer the operations of the fund and should be contacted if information about the fund and the payment of claims is needed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-21.1030 Forms

9-21.1031 Psychological Evaluation Form

PSYCHOLOGICAL EVALUATION FORM

The Witness Security Reform Act of 1984 requires a psychological evaluation of each individual who is being considered for inclusion in the Witness Security Program.

The suitability of a witness for the Program must be determined before acceptance into the Program. One of the factors which must be considered in determining the suitability of the witness for the Program is the report of the psychological evaluation of the witness.

After a witness has been psychologically evaluated, the examining authority will prepare and submit a report to the Office of Enforcement Operations, Criminal Division, Department of Justice, so that a determination can be made as to the suitability of the witness for the Program.

I, \_\_\_\_\_, certify that I have read and understand the foregoing and that I voluntarily submit to this psychological evaluation. I also understand that my acceptance into the Witness Security Program is not solely dependent upon the results of this psychological evaluation.

I also certify that I have no objection if the contents of the report of my psychological evaluation are disclosed to others in connection with my consideration for the Witness Security Program.

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Witness)

9-21.1032 Polygraph Examination Form

POLYGRAPH EXAMINATION FORM

A polygraph examination is required of all Witness Security candidates who are incarcerated, in order to maintain the security of those indi-



UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 27

	<u>Page</u>
9-27.000 <u>PRINCIPLES OF FEDERAL PROSECUTION</u>	1
9-27.001 Preface	1
9-27.100 GENERAL PROVISIONS	3
9-27.110 <u>Purpose</u>	3
9-27.120 <u>Application</u>	4
9-27.130 <u>Implementation</u>	4
9-27.140 <u>Modifications or Departures</u>	5
9-27.150 <u>Non-Litigability</u>	5
9-27.200 INITIATING AND DECLINING PROSECUTION	6
9-27.210 <u>Generally: Probable Cause Requirement</u>	6
9-27.220 <u>Grounds for Commencing or Declining Prosecution</u>	7
9-27.230 <u>Substantial Federal Interest</u>	9
9-27.240 <u>Prosecution in Another Jurisdiction</u>	13
9-27.250 <u>Non-Criminal Alternatives to Prosecution</u>	15
9-27.260 <u>Impermissible Considerations</u>	16
9-27.270 <u>Records of Prosecutions Declined</u>	16
9-27.300 SELECTING CHARGES	17
9-27.310 <u>Charging Most Serious Offenses</u>	17
9-27.320 <u>Additional Charges</u>	18
9-27.330 <u>Pre-Charge Plea Agreements</u>	21

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

	<u>Page</u>	
9-27.400	ENTERING INTO PLEA AGREEMENTS	21
9-27.410	<u>Plea Agreements Generally</u>	21
9-27.420	<u>Considerations to be Weighed</u>	23
9-27.430	<u>Selecting Plea Agreement Charges</u>	29
9-27.440	<u>Plea Agreements When Defendant Denies Guilt</u>	31
9-27.450	<u>Records of Plea Agreements</u>	33
9-27.500	OPPOSING OFFERS TO PLEAD NOLO CONTENDERE	34
9-27.510	<u>Opposition Except in Unusual Circumstances</u>	34
9-27.520	<u>Offer of Proof</u>	35
9-27.530	<u>Argument in Opposition</u>	36
9-27.600	ENTERING INTO NON-PROSECUTION AGREEMENTS IN RETURN FOR COOPERATION	36
9-27.610	<u>Non-Prosecution Agreements Generally</u>	37
9-27.620	<u>Considerations to be Weighed</u>	41
9-27.630	<u>Limiting Scope of Commitment</u>	43
9-27.640	<u>Agreements Requiring Assistant Attorney General Approval</u>	44
9-27.650	<u>Records of Non-Prosecution Agreements</u>	46
9-27.700	PARTICIPATING IN SENTENCING	46
9-27.710	<u>Participation Generally</u>	47
9-27.720	<u>Establishing Factual Basis for Sentence</u>	47
9-27.730	<u>Conditions for Making Sentencing Recommendations</u>	51

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-27.740	<u>Considerations to be Weighed in Determining Sentencing Recommendations</u>	54
9-27.750	<u>Disclosing Factual Material to Defense</u>	56
9-27.760	<u>Assisting Parole Commission</u>	57

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The following text was originally printed in a booklet which was distributed prior to publication in this Manual. Numbering has been changed and headings have been added within the text for purposes of USAM format. Cross-references within the text have been changed to reflect USAM numbers.

9-27.000 PRINCIPLES OF FEDERAL PROSECUTION

9-27.001 Preface

The publication of these Principles of Federal Prosecution is a significant event in the history of federal criminal justice. It provides to federal prosecutors, for the first time in a single authoritative source, a statement of sound prosecutorial policies and practices for particularly important areas of their work. As such, it should promote the reasoned exercise of prosecutorial authority, and contribute to the fair, evenhanded administration of the federal criminal laws.

The manner in which federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances--recognizing both that serious violations of federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct. Consent to pleas of nolo contendere may affect the success of related civil suits for recovery of damages. Also, the government's contribution during the sentencing process may assist the court in imposing a sentence that fairly accommodates the interests of society with those of convicted individuals.

These Principles of Federal Prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing flexibility.

The availability of this statement of Principles to federal law enforcement officials and to the public should serve two important

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case. The Principles will provide convenient reference points for the process of making prosecutorial decisions; they will facilitate the task of training new attorneys in the proper discharge of their duties; they will contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of the 95 United States Attorney's offices and between their activities and the Department's law enforcement priorities; they will make possible better coordination of investigative and prosecutorial activity by enhancing the understanding of investigating departments and agencies of the considerations underlying prosecutorial decisions by the Department; and they will inform the public of the careful process by which prosecutorial decisions are made.

Important though these Principles are to the proper operation of our federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process. It is with their help that these principles have been prepared, and it is with their efforts that the purposes of these principles will be achieved.

/s/ Benjamin R. Civiletti  
Attorney General

July 28, 1980

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-27.100 GENERAL PROVISIONS

9-27.110 Purpose

A. The principles of federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

1. Initiating and declining prosecution;
2. Selecting charges;
3. Entering into plea agreements;
4. Opposing offers to plead nolo contendere;
5. Entering into non-prosecution agreements in return for cooperation; and
6. Participating in sentencing.

B. Comment

Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. See, e.g., Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Powell v. Katzenbach, 359 F. 2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966). This discretion exists by virtue of his/her status as a member of the Executive Branch, which is charged under the Constitution with ensuring that the laws of the United States be "faithfully executed". U.S. Const. art. II, §3. See Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

Since federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice in the federal system, that all federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Although these principles deal with the specific situations indicated, they should be read in the broader context of the basic responsibilities of federal attorneys: making certain that the general purposes of the criminal law--assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders--are adequately met, while making certain also that the rights of individuals are scrupulously protected.

9-27.120 Application

A. In carrying out criminal law enforcement responsibilities, each Department of Justice attorney should be guided by the principles set forth herein, and each U.S. Attorney and each Assistant Attorney General should ensure that such principles are communicated to the attorneys who exercise prosecutorial responsibility within his/her office or under his/her direction or supervision.

B. Comment

It is expected that each federal prosecutor will be guided by these principles in carrying out his/her criminal law enforcement responsibilities unless a modification of, or departure from, these principles has been authorized pursuant to USAM 9-27.140, infra. However, it is not intended that reference to these principles will require a particular prosecutorial decision in any given case. Rather, these principles are set forth solely for the purpose of assisting attorneys for the government in determining how best to exercise their authority in the performance of their duties.

9-27.130 Implementation

A. Each U.S. Attorney and responsible Assistant Attorney General should establish internal office procedures to ensure:

1. That prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles; and

2. That serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions when warranted, as are deemed appropriate.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Comment

Each U.S. Attorney and each Assistant Attorney General responsible for the enforcement of federal criminal law should supplement the guidance provided by the principles set forth herein by establishing appropriate internal procedures for his/her office. One purpose of such procedures should be to ensure consistency in the decisions within each office by regularizing the decision making process so that decisions are made at the appropriate level of responsibility. A second purpose, equally important, is to provide appropriate remedies for serious, unjustified departures from sound prosecutorial principles. The U.S. Attorney or Assistant Attorney General may also wish to establish internal procedures for appropriate review and documentation of decisions.

9-27.140 Modifications or Departures

A. A U.S. Attorney may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district. Any significant modification or departure contemplated as a matter of policy or regular practice must be approved by the appropriate Assistant Attorney General and the Deputy Attorney General.

B. Comment

Although these materials are designed to promote consistency in the application of federal criminal laws, they are not intended to produce rigid uniformity among federal prosecutors in all areas of the country at the expense of the fair administration of justice. Different offices face different conditions and have different requirements. In recognition of these realities, and in order to maintain the flexibility necessary to respond fairly and effectively to local conditions, each U.S. Attorney is specifically authorized to modify or depart from the principles set forth herein, as necessary in the interests of fair and effective law enforcement within the district. In situations in which a modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted.

9-27.150 Non-Litigability

A. The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

B. Comment

This statement of principles has been developed purely as a matter of internal Departmental policy and is being provided to federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices pursuant hereto creates any rights or benefits. By setting forth this fact explicitly, USAM 9-27.150, *supra*, is intended to foreclose efforts to litigate the validity of prosecutorial actions alleged to be at variance with these principles or not in compliance with internal office procedures that may be adopted pursuant hereto. In the event that an attempt is made to litigate any aspect of these principles, or to litigate any internal office procedures adopted pursuant to these materials, or to litigate the applicability of such principles or procedures to a particular case, the U.S. Attorney concerned should oppose the attempt and should notify the Department immediately.

9-27.200 INITIATING AND DECLINING PROSECUTION

9-27.210 Generally: Probable Cause Requirement

A. If the attorney for the government has probable cause to believe that a person has committed a federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;
2. Commence or recommend prosecution;
3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
4. Decline prosecution and initiate or recommend pre-trial diversion or other non-criminal disposition; or
5. Decline prosecution without taking other action.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Comment

USAM 9-27.210 sets forth the courses of action available to the attorney for the government once he/she has probable cause to believe that a person has committed a federal offense within his/her jurisdiction. The probable cause standard is the same standard as that required for the issuance of an arrest warrant or a summons upon a compliant (see Rule 4(a), Federal Rules of Criminal Procedure), for a magistrate's decision to hold a defendant to answer in the district court (see Rule 5.1(a), Federal Rules of Criminal Procedure), and is the minimal requirement for indictment by a grand jury (see Branzburg v. Hayes, 408 U.S. 665, 686 (1972)). This is, of course, a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions, in deciding upon his/her course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions as well.

9-27.220 Grounds for Commencing or Declining Prosecution

A. The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.

B. Comment

USAM 9-27.220 expresses the principle that, ordinarily, the attorney for the government should initiate or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

and sustain a conviction. Evidence sufficient to sustain a conviction is required under Rule 29(a), Federal Rules of Criminal Procedure, to avoid a judgment of acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand all the evidence upon which he/she intends to rely at trial: it is sufficient that he/she have a reasonable belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence a prosecution though a key witness is out of the country, so long as the witness's presence at trial could be expected with reasonable certainty.

The potential that--despite the law and the facts that create a sound, prosecutable case--the fact-finder is likely to acquit the defendant because of the unpopularity of some factor involved in the prosecution or because of the overwhelming popularity of the defendant or his/her cause, is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt--viewed objectively by an unbiased fact-finder--would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.

Merely because the attorney for the government believes that a person's conduct constitutes a federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution: USAM 9-27.220 notes three situations in which the prosecutor may properly decline to take action nonetheless: when no substantial federal interest would be served by prosecution; when the person is subject to effective prosecution in another jurisdiction; and when there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government whether such a situation exists. In exercising that judgment, the attorney for the government should consult USAM 9-27.230, 9-27.240, or 9-27.250, infra, as appropriate.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-27.230 Substantial Federal Interest

A. In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

B. Comment

USAM 9-27.230 lists factors that may be relevant in determining whether prosecution should be declined because no substantial federal interest would be served by prosecution in a case in which the person is believed to have committed a federal offense and the admissible evidence is expected to be sufficient to obtain and sustain a conviction. The list of relevant considerations is not intended to be all-inclusive. Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

1. Federal Law Enforcement Priorities

Federal law enforcement resources and federal judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus federal law enforcement efforts on those matters within the federal jurisdiction that are most deserving of federal attention and are most likely to be handled effectively at the federal level. In addition, individual U.S.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. In weighing the federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with established priorities.

2. Nature and Seriousness of Offense

It is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature, and what the public attitude is toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute, whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern and the victim is disinterested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

Economic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been made. Care should be taken in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

weighing the matter of restitution, however, to ensure against contributing to an impression that an offender can escape prosecution merely by returning the spoils of his/her crime.

3. Deterrent Effect of Prosecution

Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.

4. The Person's Culpability

Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offense, both in the abstract and in comparison with any others involved in the offense. If, for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.

5. The Person's Criminal History

If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should be considered in determining whether to initiate or recommend federal prosecution. In this connection, particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship if any to the present offense, and whether he/she previously avoided prosecution as a result of an agreement not to prosecute in return for cooperation or as a result of an order compelling his/her testimony. By the same token, a person's lack of prior criminal involvement or his/her previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.

6. The Person's Willingness to Cooperate

A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

determination whether a federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not, by itself, relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the federal interest in prosecuting him/her. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.

7. The Person's Personal Circumstances

In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circumstances peculiar to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to his/her offense; other circumstances, such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.

8. The Probable Sentence

In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him/her in the future will be aware of the risk of releasing him/her on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution," depending on whether the earlier prosecution was federal or nonfederal (see USAM 9-2.142).

Just as there are factors that it is appropriate to consider in determining whether a substantial federal interest would be served by prosecution in a particular case, there are considerations that deserve no weight and should not influence the decision. These include the time and resources expended in federal investigation of the case. No amount of investigative effort warrants commencing a federal prosecution that is not fully justified on other grounds.

9-27.240 Prosecution in Another Jurisdiction

A. In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

1. The strength of the other jurisdiction's interest in prosecution;
2. The other jurisdiction's ability and willingness to prosecute effectively; and
3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

B. Comment

In many instances, it may be possible to prosecute criminal conduct in more than one jurisdiction. Although there may be instances in which a federal prosecutor may wish to consider deferring to prosecution in another federal district, in most instances the choice will probably be between federal prosecution and prosecution by state or local authorities. USAM 9-27.240 sets forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: the strength of the jurisdiction's interest in prosecution; its ability and willingness to prosecute

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

effectively; and the probable sentence or other consequences if the person is convicted. As indicated with respect to the considerations listed in paragraph 3, these factors are illustrative only, and the attorney for the government should also consider any others that appear relevant to him/her in a particular case.

1. The Strength of the Jurisdiction's Interest

The attorney for the government should consider the relative federal and state characteristics of the criminal conduct involved. Some offenses, even though in violation of federal law, are of particularly strong interest to the authorities of the state or local jurisdiction in which they occur, either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by state or local investigators, or some other circumstance. Whatever the reason, when it appears that the federal interest in prosecution is less substantial than the interest of state or local authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a federal prosecution.

2. Ability and Willingness to Prosecute Effectively

In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.

3. Probable Sentence Upon Conviction

The ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. In considering this factor, the attorney for the government should bear in mind not only the statutory penalties in the jurisdiction and sentencing patterns in similar cases, but also the particular characteristics of the offense or of the offender that might be relevant to sentencing. He/she should also be alert to the possibility that a conviction

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

under state law may in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under federal law.

9-27.250 Non-Criminal Alternatives to Prosecution

A. In determining whether prosecution should be declined because there exists an adequate non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

1. The sanctions available under the alternative means of disposition;
2. The likelihood that an appropriate sanction will be imposed; and
3. The effect of non-criminal disposition on federal law enforcement interests.

B. Comment

When a person has committed a federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pre-trial diversion (see USAM 1-12.000).

Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests. It should be noted that referrals for non-criminal disposition, other than to Civil Division attorneys or other attorneys for the government, may not include the transfer of grand jury material unless an order under Rule 6(e), Federal Rules of Criminal Procedure, has been obtained.

9-27.260 Impermissible Considerations

A. In determining whether to commence or recommend prosecution or take other action, the attorney for the government should not be influenced by:

1. The person's race; religion; sex; national origin; or political association, activities, or beliefs;
2. His/her own personal feelings concerning the person, the person's associates, or the victim; or
3. The possible effect of his/her decision on his/her own professional or personal circumstances.

B. Comment

USAM 9-27.260 sets forth various matters that plainly should not influence the determination whether to initiate or recommend prosecution or take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his/her judgment, but in order to make clear that federal prosecutors will not be influenced by such improper considerations. Of course, in a case in which a particular characteristic listed in subparagraph (1) is pertinent to the offense (for example, in an immigration case the fact that the offender is not a United States national, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering it for the purpose intended by the Congress.

9-27.270 Records of Prosecutions Declined

A. Whenever the attorney for the government declines to commence or recommend federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the files of his/her office.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Comment

USAM 9-27.270 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up. This might be done, for example, through the appropriate Federal-State Law Enforcement Committee.

9-27.300 SELECTING CHARGES

9-27.310 Charging Most Serious Offenses

A. Except as hereafter provided, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.

B. Comment

Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. Moreover, selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be both fair and effective.

At the outset, the attorney for the government should bear in mind that at trial he/she will have to produce admissible evidence sufficient to obtain and sustain a conviction or else the government will suffer a dismissal. For this reason, he/she should not include in an information or recommend in an indictment charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribery provisions of 18 U.S.C. §201 require proof of "corrupt intent," while the "gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. §1621 but not under 18 U.S.C. §1623.

USAM 9-27.310 expresses the principle that the defendant should be charged with the most serious offense that is encompassed by his/her conduct and that is likely to result in a sustainable conviction. Ordinarily, this will be the offense for which the most severe penalty is provided by law. This principle provides the framework for ensuring equal justice in the prosecution of federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he/she commits. Of course, he/she may also be charged with other criminal acts (as provided in USAM 9-27.320, *infra*), if the proof and the government's legitimate law enforcement objectives warrant additional charges.

In assessing the likelihood that a charge of the most serious offense will result in a sustainable conviction, the attorney for the government should bear in mind some of the less predictable attributes of those rare federal offenses that carry a mandatory, minimum term of imprisonment. In many instances, the term the legislature has specified certainly would not be viewed as inappropriate. In other instances, however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant's conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.

The exception noted at the beginning of USAM 9-27.310 refers to pre-charge plea agreements provided for in USAM 9-27.330, *infra*.

9-27.320 Additional Charges

A. Except as hereafter provided, the attorney for the government should also charge, or recommend that the grand jury charge, other offenses only when, in his/her judgment, additional charges:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. Are necessary to ensure that the information or indictment:
  - a. Adequately reflects the nature and extent of the criminal conduct involved; and
  - b. Provides the basis for an appropriate sentence under all the circumstances of the case; or
2. Will significantly enhance the strength of the government's case against the defendant or a codefendant.

B. Comment

It is important to the fair and efficient administration of justice in the federal system that the government bring as few charges as are necessary to ensure that justice is done. The bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive--and potentially unfair--exercise of power. To ensure appropriately limited exercises of the charging power, USAM 9-27.320 outlines three general situations in which additional charges may be brought: when necessary adequately to reflect the nature and extent of the criminal conduct involved; when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; and when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant.

1. Nature and Extent of Criminal Conduct

Apart from evidentiary considerations, the prosecutor's initial concern should be to select charges that adequately reflect the nature and extent of the criminal conduct involved. This means that the charges selected should fairly describe both the kind and scope of unlawful activity; should be legally sufficient; should provide notice to the public of the seriousness of the conduct involved; and should negate any impression that, after committing one offense, an offender can commit others with impunity.

2. Basis for Sentencing

Proper charge selection also requires consideration of the end result of successful prosecution--the imposition of an appropriate

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea). What is important is that the person be charged in such a manner that, if he/she is convicted, the court may impose an appropriate sentence. The phrase "all the circumstances of the case" is intended to include any factors that may be relevant to the sentencing decision. Examples of such factors are the basic purposes of sentencing (deterrence, protection of the public, just punishment, and rehabilitation); the penalty provisions of the applicable statutes; the gravity of the offense in terms of its actual or potential impact, or in terms of the defendant's motive; mitigating or aggravating factors such as age, health, restitution, prior criminal activity, and cooperation with law enforcement officials; and any other legitimate legislative, judicial, prosecutorial, or penal or correctional concern, including special sentencing provisions for certain classes of offenders and other post-conviction consequences such as disbarment or disqualification from public office or private position.

3. Effect on Government's Case

When considering whether to include a particular charge in the indictment or information, the attorney for the government should bear in mind the possible effects of inclusion or exclusion of the charge on the government's case against the defendant or a codefendant. If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges. For example, in a case in which a substantive offense was committed pursuant to an unlawful agreement, inclusion of a conspiracy count is permissible and may be desirable to ensure the introduction of all relevant evidence at trial. Similarly, it might be important to include a perjury or false statement count in an indictment charging other offenses, in order to give the jury a complete picture of the defendant's criminal conduct. Failure to include appropriate charges for which the proof is sufficient may not only result in the exclusion of relevant evidence, but may impair the prosecutor's ability to prove a coherent case, and lead to jury confusion as well. In this connection, it is important to remember that, in multi-defendant cases, the presence or absence of a particular charge against one defendant may affect the strength of the case against another defendant.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In short, when the evidence exists, the charges should be structured so as to permit proof of the strongest case possible without undue burden on the administration of justice.

9-27.330 Pre-Charge Plea Agreements

A. The attorney for the government may file or recommend a charge or charges without regard to the provisions of USAM 9-27.310 and 9-27.320, supra, if such charge or charges are the subject of a pre-charge plea agreement entered into under the provisions of USAM 9-27.400, infra.

B. Comment

USAM 9-27.330 addresses the situation in which there is a pre-charge agreement with the defendant that he/she will plead guilty to a certain agreed-upon charge or charges. In such a situation, the charge or charges to be filed or recommended to the grand jury may be selected without regard to the provisions of USAM 9-27.310 and 9-27.320, supra.

Before filing or recommending charges pursuant to a pre-charge plea agreement, the attorney for the government should consult the plea agreement provisions of USAM 9-27.400, infra, and should give special attention to USAM 9-27.430, infra, thereof, relating to the selection of charges to which a defendant should be required to plead guilty.

9-27.400 ENTERING INTO PLEA AGREEMENTS

9-27.410 Plea Agreements Generally

A. The attorney for the government may, in an appropriate case, enter into an agreement with a defendant that, upon the defendant's plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, he/she will move for dismissal of other charges, take a certain position with respect to the sentence to be imposed, or take other action.

B. Comment

USAM 9-27.410 permits, in appropriate cases, the disposition of federal criminal charges pursuant to plea agreements between defendants and government attorneys. Such negotiated dispositions should be distinguished from situations in which a defendant pleads guilty or nolo contendere to fewer than all counts of an information or indictment in the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

absence of any agreement with the government. Only the former type of disposition is covered by the provisions of USAM 9-27.400.

Negotiated plea dispositions are explicitly sanctioned by Rule 11 (e)(1), Federal Rules of Criminal Procedure, which provides that:

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

- (A) Move for dismissal of other charges; or
- (B) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) Agree that a specific sentence is the appropriate disposition of the case.

Three types of plea agreements are encompassed by the language of USAM 9-27.410, agreements whereby, in return for the defendant's plea to a charged offense or to a lesser or related offense, other charges are dismissed ("charge agreements"); agreements pursuant to which the government takes a certain position regarding the sentence to be imposed ("sentence agreements"); and agreements that combine a plea with a dismissal of charges and an undertaking by the prosecutor concerning the government's position at sentencing ("mixed agreements").

It should be noted that the provision relating to "charge agreements" is not limited to situations in which the defendant is the subject of charges to be dismissed. Although this will usually be the case, there may be situations in which a third party would be the beneficiary of the dismissal of charges. For example, one family member may offer to plead guilty in return for the termination of a prosecution pending against another family member, or a corporation may tender a plea in satisfaction of its own liability as well as that of one of its officers. Although plea agreements of this sort are permitted under paragraph 1 they can easily be misunderstood as manifestations of a double standard of justice. Accordingly, they should not be entered into routinely, but only after careful consideration of all relevant factors, including those specifically set forth in USAM 9-27.420, infra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The language of USAM 9-27.410 with respect to "sentence agreements" is intended to cover the entire range of positions that the government might wish to take at the time of sentencing. Among the options are: taking no position regarding the sentence; not opposing the defendant's request; requesting a specific type of sentence (e.g., a fine, probation, or sentencing under a specific statute such as the Youth Corrections Act), a specific fine or term of imprisonment, or not more than a specific fine or term of imprisonment; and requesting concurrent rather than consecutive sentences.

The concession required by the government as part of a plea agreement, whether it be a "charge agreement," a "sentence agreement," or a "mixed agreement," should be weighed by the responsible government attorney in the light of the probable advantages and disadvantages of the plea disposition proposed in the particular case. Particular care should be exercised in considering whether to enter into a plea agreement pursuant to which the defendant will enter a nolo contendere plea. As discussed in USAM 9-27.500, infra, there are serious objections to such pleas and they should be opposed unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of such a plea would be in the public interest.

9-27.420 Considerations to be Weighed

A. In determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh all relevant considerations, including:

1. The defendant's willingness to cooperate in the investigation or prosecution of others;
2. The defendant's history with respect to criminal activity;
3. The nature and seriousness of the offense or offenses charged;
4. The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;
5. The desirability of prompt and certain disposition of the case;
6. The likelihood of obtaining a conviction at trial;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

7. The probable effect on witnesses;
8. The probable sentence or other consequences if the defendant is convicted;
9. The public interest in having the case tried rather than disposed of by a guilty plea;
10. The expense of trial and appeal; and
11. The need to avoid delay in the disposition of other pending cases.

B. Comment

USAM 9-27.420 sets forth some of the appropriate considerations to be weighed by the attorney for the government in deciding whether to enter into a plea agreement with a defendant pursuant to the provisions of Rule 11(e), Federal Rules of Criminal Procedure. The provision is not intended to suggest the desirability or lack of desirability of a plea agreement in any particular case or to be construed as a reflection on the merits of any plea agreement that actually may be reached; its purpose is solely to assist attorneys for the government in exercising their judgment as to whether some sort of plea agreement would be appropriate in a particular case. Government attorneys should consult the investigating agency involved in any case in which it would be helpful to have its views concerning the relevance of particular factors or the weight they deserve.

1. Defendant's Cooperation

The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under Title 18, U.S.C. §§6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

2. Defendant's Criminal History

One of the principal arguments against the practice of plea-bargaining is that it results in leniency that reduces the deterrent impact of the law and leads to recidivism on the part of some offenders. Although this concern is probably most relevant in non-federal jurisdictions that must dispose of large volumes of routine cases with inadequate resources, nevertheless it should be kept in mind by federal prosecutors, especially when dealing with repeat offenders or "career criminals." Particular care should be taken in the case of a defendant with a prior criminal record to ensure that society's need for protection is not sacrificed in the process of arriving at a plea disposition. In this connection, it is proper for the government attorney to consider not only the defendant's past convictions, but also facts of other criminal involvement not resulting in conviction. By the same token, of course, it is also proper to consider a defendant's absence of past criminal involvement and his/her past cooperation with law enforcement officials.

3. Nature and Seriousness of Offense Charged

Important considerations in determining whether to enter into a plea agreement may be the nature and seriousness of the offense or offenses charged. In weighing these factors, the attorney for the government should bear in mind the interests sought to be protected by the statute defining the offense (e.g., the national defense, constitutional rights, the governmental process, personal safety, public welfare, or property), as well as nature and degree of harm caused or threatened to those interests and any attendant circumstances that aggravate or mitigate the seriousness of the offense in the particular case.

4. Defendant's Attitude

A defendant may demonstrate apparently genuine remorse or contrition, and a willingness to take responsibility for his/her criminal conduct by, for example, efforts to compensate the victim for injury or loss, or otherwise to ameliorate the consequences of his/her acts. These are factors that bear upon the likelihood of his/her repetition of the conduct involved and that may properly be considered in deciding whether a plea agreement would be appropriate.

It is particularly important that the defendant not be permitted to enter a guilty plea under circumstances that will allow him/her later to proclaim lack of culpability or even complete innocence.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Such consequences can be avoided only if the court and the public are adequately informed of the nature and scope of the illegal activity and of the defendant's complicity and culpability. To this end, the attorney for the government is strongly encouraged to enter into a plea agreement only with the defendant's assurance that he/she will admit the facts of the offense and of his/her culpable participation therein. A plea agreement may be entered into in the absence of such an assurance, but only if the defendant is willing to accept without contest a statement by the government in open court of the facts it could prove to demonstrate his/her guilt beyond a reasonable doubt. Except as provided in USAM 9-27.440, *infra*, the attorney for the government should not enter into a plea agreement with a defendant who admits his/her guilt but disputes an essential element of the government's case.

5. Prompt Disposition

In assessing the value of prompt disposition of a criminal case, the attorney for the government should consider the timing of a proffered plea. A plea offer by a defendant on the eve of trial after the case has been fully prepared is hardly as advantageous from the standpoint of reducing public expense as one offered months or weeks earlier. In addition, a last-minute plea adds to the difficulty of scheduling cases efficiently and may even result in wasting the prosecutorial and judicial time reserved for the aborted trial. For these reasons, government attorneys should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date well in advance of the trial date. However, avoidance of unnecessary trial preparation and scheduling disruptions are not the only benefits to be gained from prompt disposition of a case by means of a guilty plea. Such a disposition also saves the government and the court the time and expense of trial and appeal. In addition, a plea agreement facilitates prompt imposition of sentence, thereby promoting the overall goals of the criminal justice system. Thus, occasionally it may be appropriate to enter into a plea agreement even after the usual time for making such agreements has passed.

6. Likelihood of Conviction

The trial of a criminal case inevitably involves risks and uncertainties, both for the prosecution and for the defense. Many factors, not all of which can be anticipated, can affect the outcome. To the extent that these factors can be identified, they should be considered in deciding whether to accept a plea or go to trial. In

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

this connection, the prosecutor should weigh the strength of the government's case relative to the anticipated defense case, bearing in mind legal and evidentiary problems that might be expected, as well as the importance of the credibility of witnesses. However, although it is proper to consider factors bearing upon the likelihood of conviction in deciding whether to enter into a plea agreement, it obviously is improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if he/she is not satisfied that the legal standards for guilt are met.

7. Effect on Witnesses

Although the public has "the right to every person's evidence," attorneys for the government should bear in mind that it is often burdensome for witnesses to appear at trial and that, sometimes, to do so may cause them serious embarrassment or even place them in jeopardy of physical or economic retaliation. The possibility of such adverse consequences to witnesses should not be overlooked in determining whether to go to trial or attempt to reach a plea agreement. Another possibility that may have to be considered is revealing the identity of informants. When an informant testifies at trial, his/her identity and relationship to the government become matters of public record. As a result, in addition to possible adverse consequences to the informant, there is a strong likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed. These are considerations that should be discussed with the investigating agency involved, as well as with any other agencies known to have an interest in using the informant in their investigations.

8. Probable Sentence

In determining whether to enter into a plea agreement, the attorney for the government may properly consider the probable outcome of the prosecution in terms of the sentence or other consequences for the defendant in the event that a plea agreement is reached. If the proposed agreement is a "sentence agreement" or a "mixed agreement," the prosecutor should realize that the position he/she agrees to take with respect to sentencing may have a significant effect on the sentence that is actually imposed. If the proposed agreement is a "charge agreement," the prosecutor should bear in mind the extent to which a plea to fewer or lesser offenses may reduce the sentence that otherwise could be imposed. In either event, it is important that the attorney for the government be aware

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the need to preserve the basis for an appropriate sentence under all the circumstances of the case.

9. Trial Rather Than Plea

There may be situations in which the public interest might better be served by having a case tried rather than by having it disposed of by means of a guilty plea. These include situations in which it is particularly important to permit a clear public understanding that "justice is done" through exposing the exact nature of the defendant's wrong-doing at trial, or in which a plea agreement might be misconstrued to the detriment of public confidence in the criminal justice system. For this reason, the prosecutor should be careful not to place undue emphasis on factors which favor disposition of a case pursuant to a plea agreement.

10. Expense of Trial and Appeal

In assessing the expense of trial and appeal that would be saved by a plea disposition, the attorney for the government should consider not only such monetary costs as juror and witness fees, but also the time spent by judges, prosecutors, and law enforcement personnel who may be needed to testify or provide other assistance at trial. In this connection, the prosecutor should bear in mind the complexity of the case, the number of trial days and witnesses required, and any extraordinary expenses that might be incurred such as the cost of sequestering the jury.

11. Prompt Disposition of Other Cases

A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined. This may occur simply because prosecutorial, judicial, or defense resources will become available for use in other cases, or because a plea by one of several defendants may have a "domino effect," leading to pleas by other defendants. In weighing the importance of these possible consequences, the attorney for the government should consider the state of the criminal docket and the speedy trial requirements in the district, the desirability of handling a larger volume of criminal cases, and the workloads of prosecutors, judges, and defense attorneys in the district.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-27.430 Selecting Plea Agreement Charges

A. If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

1. That bears a reasonable relationship to the nature and extent of his/her criminal conduct;
2. That has an adequate factual basis;
3. That makes likely the imposition of an appropriate sentence under all the circumstances of the case; and
4. That does not adversely affect the investigation or prosecution of others.

B. Comment

USAM 9-27.430 sets forth the considerations that should be taken into account in selecting the charge or charges to which a defendant should be required to plead guilty once it has been decided to dispose of the case pursuant to a plea agreement. The considerations are essentially the same as those governing the selection of charges to be included in the original indictment or information.

1. Relationship to Criminal Conduct

The charge or charges to which a defendant pleads guilty should bear a reasonable relationship to the defendant's criminal conduct, both in nature and in scope. This principle covers such matters as the seriousness of the offense (as measured by its impact upon the community and the victim), not only in terms of the defendant's own conduct but also in terms of similar conduct by others, as well as the number of counts to which a plea should be required in cases involving offenses different in nature or in cases involving a series of similar offenses. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. In many cases, this will probably require that the defendant plead to the most serious offense charged. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are likely to result in no greater a potential penalty than is a single offense.

The requirement that a defendant plead to a charge that bears a reasonable relationship to the nature and extent of his/her criminal conduct is not inflexible. There may be situations involving

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

cooperating defendants in which considerations such as those discussed in USAM 9-27.600, infra, take precedence. Such situations should be approached cautiously, however. Unless the government has strong corroboration for the cooperating defendant's testimony, his/her credibility may be subject to successful impeachment if he/she is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates the full extent of the defendant's involvement in the criminal activity giving rise to the prosecution.

2. Factual Basis

The attorney for the government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure conviction after a guilty plea of a person who is not in fact guilty. Moreover, under Rule 11 (f), Federal Rules of Criminal Procedure, a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could be prosecuted independently of the plea under these principles. However, as noted infra, in cases in which Alford or nolo contendere pleas are tendered the attorney for the government may wish to make a stronger factual showing. In such cases there may remain some doubt as to the defendant's guilt even after the entry of his/her plea. Consequently, in order to avoid such a misleading impression, the government should ask leave of the court to make a proffer of the facts available to it that show the defendant's guilt beyond a reasonable doubt.

3. Basis for Sentencing

In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maximum term authorized by statute for the offense to which the guilty plea is entered. Thus, the prosecutor should take care to avoid a "charge

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes, the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject. In addition, if restitution is appropriate under the circumstances of the case, a sufficient number of counts should be retained under the agreement to provide a basis for an adequate restitution order, since the court's authority to order restitution as part of the sentence it imposes is limited to the offenses for which the defendant is convicted, as opposed to all offenses that were committed. See 18 U.S.C. §3651; United States v. Buechler, 557 F.2d 1002, 1007 (3d Cir. 1977); USAM 9-16.210.

4. Effect on Other Cases

In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

9-27.440 Plea Agreements When Defendant Denies Guilt

A. The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his/her innocence with respect to the charge or charges to which he/she offers to plead guilty. In a case in which the defendant tenders a plea of guilty but denies that he/she has in fact committed the offense to which he/she offers to plead guilty, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Comment

USAM 9-27.440 concerns plea agreements involving "Alford" pleas--guilty pleas entered by defendants who nevertheless claim to be innocent. In North Carolina v. Alford, 400 U.S. 25 (1970), the Supreme Court held that the Constitution does not prohibit a court from accepting a guilty plea from a defendant who simultaneously maintains his/her innocence, so long as the plea is entered voluntarily and intelligently and there is a strong factual basis for it. The Court reasoned that there is no material difference between a plea of nolo contendere, where the defendant does not expressly admit his/her guilt, and a plea of guilty by a defendant who affirmatively denies his/her guilt.

Despite the constitutional validity of Alford pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges. Such pleas are particularly undesirable when entered as part of an agreement with the government. Involvement by attorneys for the government in the inducement of guilty pleas by defendants who protest their innocence may create an appearance of prosecutorial overreaching. As one court put it, "the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail." See United States v. Bednarski, 445 F.2d 364, 366 (1st Cir. 1971). Consequently, it is preferable to have a jury resolve the factual and legal dispute between the government and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or unfair. For this reason, government attorneys should not enter into Alford plea agreements without the approval of the responsible Assistant Attorney General.

Apart from refusing to enter into a plea agreement, however, the degree to which the Department can express its opposition to Alford pleas may be limited. Although a court may accept a proffered plea of nolo contendere "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice" (Rule 11(b), Federal Rules of Criminal Procedure), at least one court has concluded that it is abuse of discretion to refuse to accept a guilty plea "solely because the defendant does not admit the alleged facts of the crime." United States v. Gaskins, 485 F.2d 1046, 1048 (D.C. Cir. 1973); but see United States v. Bednarski, *supra*; United States v. Biscoe, 518 F.2d 95 (1st Cir. 1975). Nevertheless, government attorneys can and should discourage Alford pleas by refusing to agree to terminate prosecutions where an Alford plea is proffered to fewer than all of the charges pending. As is the case with guilty pleas generally, if such a plea to fewer than all the charges is tendered and accepted over the

government's objection, the attorney for the government should proceed to trial on any remaining charges not barred on double jeopardy grounds unless the U.S. Attorney or, in cases handled by departmental attorneys, the responsible Assistant Attorney General, approves dismissal of those charges.

Government attorneys should also take full advantage of the opportunity afforded by Rule 11(f) of the Federal Rules of Criminal Procedure in an Alford case to thwart the defendant's efforts to project a public image of innocence. Under Rule 11(f) of the Federal Rules of Criminal Procedure, the court must be satisfied that there is "a factual basis" for a guilty plea. However, the Rule does not require that the factual basis for the plea be provided only by the defendant. See United States v. Navedo, 516 F.2d 293 (2d Cir. 1975); Irizarry v. United States, 508 F.2d 960 (2d Cir. 1974); United States v. Davis, 516 F.2d 574 (7th Cir. 1975). Accordingly, attorneys for the government in Alford cases should endeavor to establish as strong a factual basis for the plea as possible not only to satisfy the requirement of Rule 11(f) of the Federal Rules of Criminal Procedure, but also to minimize the adverse effects of Alford pleas on public perceptions of the administration of justice.

#### 9-27.450 Records of Plea Agreements

A. If a prosecution is to be terminated pursuant to a plea agreement, the attorney for the government should ensure that the case file contains a record of the agreed disposition, signed or initialed by the defendant or his/her attorney.

#### B. Comment

USAM 9-17.450 is intended to facilitate compliance with Rule 11, Federal Rules of Criminal Procedure, and to provide a safeguard against misunderstandings that might arise concerning the terms of a plea agreement. Rule 11(e)(2), Federal Rules of Criminal Procedure, requires that a plea agreement be disclosed in open court (except upon a showing of good cause, in which case disclosure may be made in camera), while Rule 11(e)(3), Federal Rules of Criminal Procedure, requires that the disposition provided for in the agreement be embodied in the judgment and sentence. Compliance with these requirements will be facilitated if the agreement has been reduced to writing in advance, and the defendant will be precluded from successfully contesting the terms of the agreement at the time he/she pleads guilty, or at the time of sentencing, or at a later date. If time does not permit the preparation of a record of the plea agreement in advance, as when the plea disposition is agreed to on the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

morning of arraignment or trial, the attorney for the government should subsequently include in the case file a brief notation concerning the fact and terms of the agreement.

9-27.500 OPPOSING OFFERS TO PLEAD NOLO CONTENDERE

9-17.510 Opposition Except in Unusual Circumstances

A. The attorney for the government should oppose the acceptance of a plea of nolo contendere unless the (Assistant Attorney General with supervisory responsibility over the subject matter) U.S. Attorney concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest.

B. Comment

Rule 11(b), Federal Rules of Criminal Procedure, requires the court to consider "the views of the parties and the interest of the public in the effective administration of justice" before it accepts a plea of nolo contendere. Thus, it is clear that a criminal defendant has no absolute right to enter a nolo contendere plea. The Department has long attempted to discourage the disposition of criminal cases by means of nolo pleas. The basic objections to nolo pleas were expressed by Attorney General Herbert Brownell, Jr., in a departmental directive in 1953:

One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

as far as the public is concerned, persists in his denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.

For these reasons, government attorneys have been instructed for more than twenty-five years not to consent to nolo pleas except in the most unusual circumstances, and to do so then only with departmental approval. However, despite continuing adherence to this policy by attorneys for the government, and despite the continuing validity of the policy's rationale, the federal criminal justice system continues to suffer from misuse of nolo contendere pleas, particularly in white collar crime cases.

As federal prosecutors focus more of their attention on white collar crime activities, greater numbers of defendants seek to dispose of the charges against them by means of nolo pleas, and the frequency with which such pleas are accepted by the courts is increasing. The acceptance of nolo pleas from affluent white collar defendants, as opposed to other types of defendants, lends credence to the view that a double standard of justice exists. Moreover, even though a white collar defendant whose nolo plea is accepted may not be sentenced more leniently than one who is required to plead guilty, such a defendant often persists in his/her protestations of innocence, maintaining that his/her plea was entered solely to avoid litigation and save business expense.

The continued adverse consequences to the criminal justice system of the misuse of nolo pleas--diminished respect for law, impairment of law enforcement efforts, and reduced deterrence--warrant re-examination of the government's response to such pleas. Heretofore, it was believed that a posture of non-consent by government attorneys would prevent the acceptance of nolo pleas except in extraordinary cases. Now the forthright expression of opposition is required. Accordingly, as stated in paragraph A above, federal prosecutors should henceforth oppose the acceptance of a nolo plea, unless the (responsible Assistant Attorney General) U.S. Attorney concludes that the circumstances are so unusual that acceptance of the plea would be in the public interest. Such a determination might be made, for example, in an unusually complex antitrust case if the only alternative to a protracted trial is acceptance of a nolo plea.

9-27.520 Offer of Proof

A. In any case in which a defendant seeks to enter a plea of nolo contendere, the attorney for the government should make an offer of proof

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged.

B. Comment

If a defendant seeks to avoid admitting guilt by offering to plead nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. This should be done even in the rare case in which the government does not oppose the entry of a nolo plea. In addition, as is the case with respect to guilty pleas, the attorney for the government should urge the court to require the defendant to admit publicly the facts underlying the criminal charges. These precautions should minimize the effectiveness of any subsequent efforts by the defendant to portray himself/herself as technically liable perhaps, but not seriously culpable.

9-27.530 Argument in Opposition

A. If a plea of nolo contendere is offered over the government's objection, the attorney for the government should state for the record why acceptance of the plea would not be in the public interest; and should oppose the dismissal of any charges to which the defendant does not plead nolo contendere.

B. Comment

When a plea of nolo contendere is offered over the government's objection, the prosecutor should take full advantage of Rule 11(b), Federal Rules of Criminal Procedure, to state for the record why acceptance of the plea would not be in the public interest. In addition to reciting the facts that could be proved to show the defendant's guilt, the prosecutor should bring to the court's attention whatever arguments exist for rejecting the plea. At the very least, such a forceful presentation should make it clear to the public that the government is unwilling to condone the entry of a special plea that may help the defendant avoid legitimate consequences of his/her guilt. If the nolo plea is offered to fewer than all charges, the prosecutor should also oppose the dismissal of the remaining charges.

9-27.600 ENTERING INTO NON-PROSECUTION AGREEMENTS IN RETURN FOR  
COOPERATION

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-27.610 Non-Prosecution Agreements Generally

A. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

B. Comment

1. In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself/herself implicated in the criminal conduct being investigated or prosecuted. However, because of his/her involvement, the person may refuse to cooperate on the basis of his/her Fifth Amendment privilege against compulsory self-incrimination. In this situation, there are several possible approaches the prosecutor can take to render the privilege inapplicable or to induce its waiver.

a. First, if time permits, the person may be charged, tried, and convicted before his/her cooperation is sought in the investigation or prosecution of others. Having already been convicted himself/herself, the person ordinarily will no longer have a valid privilege to refuse to testify, and will have a strong incentive to reveal the truth in order to induce the sentencing judge to impose a lesser sentence than that which otherwise might be found appropriate.

b. Second, the person may be willing to cooperate if the charges or potential charges against him/her are reduced in number or degree in return for his/her cooperation and his/her entry of a guilty plea to the remaining charges. Usually such a concession by the government will be all that is necessary, or warranted, to secure the cooperation sought. Since it is certainly desirable as a matter of policy that an offender be required to incur at least some liability for his/her criminal conduct, government attorneys should attempt to secure this result in all appropriate cases, following the principles set forth in USAM 9-27.430, supra, to the extent practicable.

c. The third method for securing the cooperation of a potential defendant is by means of a court order under 18 U.S.C. §§6001-6003. Those statutory provisions govern the conditions

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

under which uncooperative witnesses may be compelled to testify or provide information notwithstanding their invocation of the privilege against compulsory self-incrimination. In brief, under the so-called "use immunity" provisions of those statutes, the court may order the person to testify or provide other information, but neither his/her testimony nor the information he/she provides may be used against him/her, directly or indirectly, in any criminal case except a prosecution for perjury or other failure to comply with the order. Ordinarily, these "use immunity" provisions should be relied on in cases in which attorneys for the government need to obtain sworn testimony or the production of information before a grand jury or at trial, and in which there is reason to believe that the person will refuse to testify or provide the information on the basis of his/her privilege against compulsory self-incrimination. (See USAM 1-11.000).

d. Finally, there may be cases in which it is impossible or impractical to employ the methods described above to secure the necessary information or other assistance, and in which the person is willing to cooperate only in return for an agreement that he/she will not be prosecuted at all for what he/she has done. The provisions set forth hereafter describe the conditions that should be met before such an agreement is made, as well as the procedures recommended for such cases.

It is important to note that these provisions apply only if the case involves an agreement with a person who might otherwise be prosecuted. If the person reasonably is viewed only as a potential witness rather than a potential defendant, and the person is willing to cooperate, there is no need to consult these provisions.

USAM 9-27.610 describes three circumstances that should exist before government attorneys enter into non-prosecution agreements in return for cooperation: the unavailability or ineffectiveness of other means of obtaining the desired cooperation; the apparent necessity of the cooperation to the public interest; and the approval of such a course of action by an appropriate supervisory official.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

2. Unavailability or Ineffectiveness of Other Means

As indicated above, non-prosecution agreements are only one of several methods by which the prosecutor can obtain the cooperation of a person whose criminal involvement makes him/her a potential subject of prosecution. Each of the other methods--seeking cooperation after trial and conviction, bargaining for cooperation as part of a plea agreement, and compelling cooperation under a "use immunity" order--involves prosecuting the person or, at least, leaving open the possibility of prosecuting him/her on the basis of independently obtained evidence. Since these outcomes are clearly preferable to permitting an offender to avoid any liability for his/her conduct, the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance.

Another reason for using an alternative to a non-prosecution agreement to obtain cooperation concerns the practical advantage in terms of the person's credibility if he/she testifies at trial. If the person already has been convicted, either after trial or upon a guilty plea, for participating in the events about which he/she testifies, his/her testimony is apt to be far more credible than if it appears to the trier of fact that he/she is getting off "scot free". Similarly, if his/her testimony is compelled by a court order, he/she cannot properly be portrayed by the defense as a person who has made a "deal" with the government and whose testimony is, therefore, suspect; his/her testimony will have been forced from him/her, not bargained for.

In some cases, however, there may be no effective means of obtaining the person's timely cooperation short of entering into a non-prosecution agreement. The person may be unwilling to cooperate fully in return for a reduction of charges, the delay involved in bringing him/her to trial might prejudice the investigation or prosecution in connection with which his/her cooperation is sought, and it may be impossible or impractical to rely on the statutory provisions for compulsion of testimony or production of evidence. One example of the latter situation is a case in which the cooperation needed does not consist of testimony under oath or the production of information before a grand jury or at trial. Other examples are cases in which time is critical, as where use of the procedures of 18 U.S.C. §§6001-6003 would unreasonably disrupt the presentation of evidence to the grand jury or the expeditious

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

development of an investigation, or where compliance with the statute of limitations or the Speedy Trial Act precludes timely application for a court order.

Only when it appears that the person's timely cooperation cannot be obtained by other means, or cannot be obtained effectively, should the attorney for the government consider entering into a non-prosecution agreement.

3. Public Interest

If he/she concludes that a non-prosecution agreement would be the only effective method for obtaining cooperation, the attorney for the government should consider whether, balancing the cost of foregoing prosecution against the potential benefit of the person's cooperation, the cooperation sought appears necessary to the public interest. This "public interest" determination is one of the conditions precedent to an application under 18 U.S.C. §6003 for a court order compelling testimony. Like a compulsion order, a non-prosecution agreement limits the government's ability to undertake a subsequent prosecution of the witness. Accordingly, the same "public interest" test should be applied in this situation as well. Some of the considerations that may be relevant to the application of this test are set forth in USAM 9-27.620, infra.

4. Supervisory Approval

Finally, the prosecutor should secure supervisory approval before entering into a non-prosecution agreement. Prosecutors working under the direction of a U.S. Attorney must seek the approval of the U.S. Attorney or a supervisory Assistant U.S. Attorney. Departmental attorneys not supervised by a U.S. Attorney should obtain the approval of the appropriate Assistant Attorney General or his/her designee, and should notify the U.S. Attorney or Attorneys concerned. The requirement of approval by a superior is designed to provide review by an attorney experienced in such matters, and to ensure uniformity of policy and practice with respect to such agreements. This section should be read in conjunction with USAM 9-27.640, infra, concerning particular types of cases in which an Assistant Attorney General or his/her designee must concur in or approve an agreement not to prosecute in return for cooperation.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-27.620 Considerations to be Weighed

A. In determining whether a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:

1. The importance of the investigation or prosecution to an effective program of law enforcement;
2. The value of the person's cooperation to the investigation or prosecution; and
3. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

B. Comment

This paragraph is intended to assist federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case. Rather, they are meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.

1. Importance of Case

Since the primary function of a federal prosecutor is to enforce the criminal law, he/she should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions. Rather, he/she should reserve the use of such agreements for cases in which the cooperation sought concerns the commission of a serious offense or in which successful prosecution is otherwise important in achieving effective enforcement of the criminal laws. The relative importance or unimportance of the contemplated case is therefore a significant threshold consideration.

2. Value of Cooperation

An agreement not to prosecute in return for a person's cooperation binds the government to the extent that the person carries out his/her part of the bargain. See United States v. Carter, 454 F.2d 426 (4th Cir. 1972); cf. Santobello v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

New York, 404 U.S. 257 (1971). Since such an agreement forecloses enforcement of the criminal law against a person who otherwise may be liable to prosecution, it should not be entered into without a clear understanding of the nature of the quid pro quo and a careful assessment of its probable value to the government. In order to be in a position adequately to assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his/her attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which the cooperation is sought. In doing so, he/she should consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.

3. Relative Culpability and Criminal History

In determining whether it may be necessary to the public interest to agree to forego prosecution of a person who may have violated the law, in return for that person's cooperation, it is also important to consider the degree of his/her apparent culpability relative to others who are subjects of the investigation or prosecution, as well as his/her history of criminal involvement. Of course, it would not be in the public interest to forego prosecution of a high-ranking member of a criminal enterprise in exchange for his/her cooperation against one of his/her subordinates, nor would the public interest be served by bargaining away the opportunity to prosecute a person with a long history of serious criminal involvement in order to obtain the conviction of someone else on less serious charges. These are matters with regard to which the attorney for the government may find it helpful to consult with the investigating agency or with other prosecuting authorities who may have an interest in the person or his/her associates.

It is also important to consider whether the person has a background of cooperation with law enforcement officials, either as a witness or an informant, and whether he/she has previously been the subject of a compulsion order under 18 U.S.C. §§6001-6003 or has

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

escaped prosecution by virtue of an agreement not to prosecute. The latter information may be available by telephone from the Witness Records Unit of the Criminal Division.

9-27.630 Limiting Scope of Commitment

A. In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to:

1. Non-prosecution based directly or indirectly on the testimony or other information provided; or
2. Non-prosecution within his/her district with respect to a pending charge or to a specific offense then known to have been committed by the person.

B. Comment

The attorney for the government should exercise extreme caution to ensure that his/her non-prosecution agreement does not confer "blanket" immunity on the witness. To this end, he/she should, in the first instance, attempt to limit his/her agreement to non-prosecution based on the testimony or information provided. Such an "informal use immunity" agreement has two advantages over an agreement not to prosecute the person in connection with a particular transaction: first, it preserves the prosecutor's option to prosecute on the basis of independently obtained evidence if it later appears that the person's criminal involvement was more serious than it originally appeared to be; second, it encourages the witness to be as forthright as possible since the more he/she reveals the more protection he/she will have against a future prosecution. To further encourage full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution.

Even if it is not practicable to obtain the desired cooperation pursuant to an "informal use immunity" agreement, the attorney for the government should attempt to limit the scope of the agreement in terms of the testimony and transactions covered, bearing in mind the possible effect of his/her agreement on prosecutions in other districts. In United States v. Carter, 454 F.2d 426 (4th Cir. 1972), the court held that a conviction in the Eastern District of Virginia on charges of forgery and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

conspiracy involving stolen Treasury checks must be vacated and the case remanded for an evidentiary hearing to determine whether, in a prior related investigation and prosecution in the District of Columbia involving stolen government checks, a promise had been made to the defendant by an Assistant U.S. Attorney for the District of Columbia that he would not be prosecuted in that district or elsewhere for any related offense if he would plead guilty to one misdemeanor count and cooperate with federal investigators in naming his accomplices. The court indicated that if the facts were as the defendant contended, then the conviction in the Virginia district would have to be reversed and the indictment dismissed. No issue of double jeopardy was involved. The effect of this decision is that a non-prosecution agreement by a government attorney in one district may be binding in other judicial districts even though the U.S. Attorneys in the other districts are not privy to, or aware of, the agreement.

In view of the Carter decision, it is important that non-prosecution agreements be drawn in terms that will not bind other federal prosecutors without their consent. Thus, if practicable, the attorney for the government should explicitly limit the scope of his/her agreement to non-prosecution within his/her district. If such a limitation is not practicable and it can reasonably be anticipated that the agreement may affect prosecution of the person in other districts, the attorney for the government contemplating such an agreement should communicate the relevant facts to the Assistant Attorney General with supervisory responsibility for the subject matter.

Finally, the attorney for the government should make it clear that his/her agreement relates only to non-prosecution and that he/she has no independent authority to promise that the witness will be admitted into the Department's Witness Security program or that the Marshal's Service will provide any benefits to the witness in exchange for his/her cooperation. This does not mean, of course, that the prosecutor should not cooperate in making arrangements with the Marshal's Service necessary for the protection of the witness in appropriate cases. The procedures to be followed in such cases are set forth in USAM 9-21.000, supra.

9-27.640 Agreements Requiring Assistant Attorney General Approval

A. The attorney for the government should not enter into a non-prosecution agreement in exchange for a person's cooperation without first obtaining the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, or his/her designee, when:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. Prior consultation or approval would be required by a statute or by Departmental policy for a declination of prosecution or dismissal of a charge with regard to which the agreement is to be made; or

2. The person is:

a. A high-level federal, state, or local official;

b. An official or agent of a federal investigative or law enforcement agency; or

c. A person who otherwise is, or is likely to become, of major public interest.

B. Comment

USAM 9-27.640 sets forth special cases that require approval of non-prosecution agreements by the responsible Assistant Attorney General or his/her designee. Subparagraph (1) covers cases in which existing statutory provisions and departmental policies require that, with respect to certain types of offenses, the Attorney General or an Assistant Attorney General be consulted or give his/her approval before prosecution is declined or charges are dismissed. See USAM 6-2.410, 6-2.420 (tax offenses); USAM 9-2.111 (bankruptcy frauds); USAM 9-2.132, 9-2.146 (internal security offenses); and USAM 9-2.158 (5), 9-2.134 (air piracy). An agreement not to prosecute resembles a declination of prosecution or the dismissal of a charge in that the end result in each case is similar: a person who has engaged in criminal activity is not prosecuted or is not prosecuted fully for his/her offense. Accordingly, attorneys for the government should obtain the approval of the appropriate Assistant Attorney General, or his/her designee, before agreeing not to prosecute in any case in which consultation or approval would be required for a declination of prosecution or dismissal of a charge.

Subparagraph (2) sets forth other situations in which the attorney for the government should obtain the approval of an Assistant Attorney General, or his/her designee, of a proposed agreement not to prosecute in exchange for cooperation. Generally speaking, the situations described will be cases of an exceptional or extremely sensitive nature, or cases involving individuals or matters of major public interest. In a case covered by this provision that appears to be of an especially sensitive nature, the Assistant Attorney General should, in turn, consider whether it would be appropriate to notify the Attorney General or the Deputy Attorney General.

check  
cites

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-27.650 Records of Non-Prosecution Agreements

A. In a case in which a non-prosecution agreement is reached in return for a person's cooperation, the attorney for the government should ensure that the case file contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialed by the person with whom the agreement is made or his/her attorney, and a copy should be forwarded to the Witness Records Unit of the Criminal Division.

B. Comment

The provisions of this section are intended to serve two purposes. First, it is important to have a written record in the event that questions arise concerning the nature or scope of the agreement. Such questions are certain to arise during cross-examination of the witness, particularly if the existence of the agreement has been disclosed to defense counsel pursuant to the requirements of Brady v. Maryland, 373 U.S. 83 (1965) and Giglio v. United States, 405 U.S. 150 (1972). The exact terms of the agreement may also become relevant if the government attempts to prosecute the witness for some offense in the future. Second, such a record will facilitate identification by government attorneys (in the course of weighing future agreements not to prosecute, plea agreements, pre-trial diversion, and other discretionary actions) of persons whom the government has agreed not to prosecute.

The principal requirements of the written record are that it be sufficiently detailed that it leaves no doubt as to the obligations of the parties to the agreement, and that it be signed or initialed by the person with whom the agreement is made and his/her attorney, or at least by one of them.

A copy of each non-prosecution agreement should be sent to the Criminal Division's Witness Records Unit. The Witness Records Unit will then be able to identify persons who have been the subject of such agreements, as well as to provide federal prosecutors, on request, with copies of the types of agreements used in the past.

9-27.700 PARTICIPATING IN SENTENCING

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-27.710 Participation Generally

A. During the sentencing phase of a federal criminal case, and the initial parole hearing phase, the attorney for the government should assist the sentencing court and the Parole Commission by:

1. Attempting to ensure that the relevant facts are brought to their attention fully and accurately; and
2. Making sentencing and parole release recommendations in appropriate cases.

B. Comment

Sentencing in federal criminal cases is primarily the function and responsibility of the court. This does not mean, however, that the prosecutor's responsibility in connection with a criminal case ceases upon the return of a guilty verdict or the entry of a guilty plea; to the contrary, the attorney for the government has a continuing obligation to assist the court in its determination of the sentence to be imposed and to aid the Parole Commission in its determination of a release date for a prisoner within its jurisdiction. In discharging these duties, the attorney for the government should, as provided in USAM 9-27.720 and 9-27.760, infra, endeavor to ensure the accuracy and completeness of the information upon which the sentencing and release decisions will be based. In addition, as provided in USAM 9-27.730 and 9-27.760, infra, in appropriate cases the prosecutor should offer recommendations with respect to the sentence to be imposed and with respect to the granting of parole.

9-27.720 Establishing Factual Basis for Sentence

A. In order to ensure that the relevant facts are brought to the attention of the sentencing court fully and accurately, the attorney for the government should:

1. Cooperate with the Probation Service in its preparation of the presentence investigation report;
2. Review material in the presentence investigation report that is disclosed by the court to the defendant or his/her attorney;
3. Make a factual presentation to the court when:
  - a. Sentence is imposed without a presentence investigation and report;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

b. It is necessary to supplement or correct the presentence investigation report;

c. It is necessary in light of the defense presentation to the court; or

d. It is requested by the court; and

4. Be prepared to substantiate significant factual allegations disputed by the defense.

B. Comment

1. Cooperation with Probation Service

To begin with, if sentence is to be imposed following a presentence investigation and report, the prosecutor should cooperate with the Probation Service in its preparation of the presentence report for the court. Under Rule 32(c)(2), Federal Rules of Criminal Procedure, the report should contain "any criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court." While much of this information may be available to the Probation Service from sources other than the government, some of it may be obtainable only from prosecutorial or investigative files to which probation officers do not have access. For this reason, it is important that the attorney for the government respond promptly to Probation Service requests by providing the requested information whenever possible. The attorney for the government should also recognize the occasional desirability of volunteering information to the Probation Service; especially in a district where the Probation Office is overburdened, this may be the best way to ensure that important facts about the defendant come to its attention. In addition, the prosecutor should be particularly alert to the need to volunteer relevant information to the Probation Service in complex cases, since it cannot be expected that probation officers will obtain a full understanding of the facts of such cases simply by questioning the prosecutor or examining his/her files.

The relevant information can be communicated orally, or by making portions of the case file available to the probation officer, or by submitting a sentencing memorandum or other written presentation for inclusion in the presentence report. Whatever method he/she uses, however, the attorney for the government should bear in mind that since portions of the report may be shown to the defendant or defense

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

counsel, care should be taken to prevent disclosures that might be harmful to law enforcement interests.

2. Review of Presentence Report

Rule 32(c)(3)(A), Federal Rules of Criminal Procedure, requires the court, upon request, to permit the defendant or his/her counsel to read and comment upon such portions of the presentence report as do not reveal diagnostic opinion, confidential sources of information, or information which if disclosed might result in harm to the defendant or others. Pursuant to Rule 32(c)(3)(C), Federal Rules of Criminal Procedure, any material disclosed to the defendant or his/her counsel must also be disclosed to the attorney for the government. Consequently, if the defense inspects portions of the presentence report, the attorney for the government should not forego his/her opportunity to examine the same material. Such examination may reveal factual inaccuracies in, or omissions from, the report that should be corrected. And even if no inaccuracies or omissions appear, such an examination will enable the attorney for the government to assess the validity of any comments made by the defense and, under Rule 32(a)(1), Federal Rules of Criminal Procedure, to respond appropriately.

3. Factual Presentation to Court

In addition to assisting the Probation Service with its presentence investigation and reviewing the portions of the presentence report disclosed to the defense, the attorney for the government may find it necessary in some cases to make a factual presentation directly to the court. Such a presentation is authorized by Rule 32(a)(1), Federal Rules of Criminal Procedure, which permits the defendant and his/her counsel to address the court and states that "[t]he attorney for the government shall have an equivalent opportunity to speak to the court." It has been suggested that failure to permit the government to address the court after the defense presentation may necessitate a remand for resentencing in order to afford the government its opportunity to speak to the court. See United States v. Jackson, 563 F.2d 1145, 1148 (4th Cir. 1977).

The need to address the court concerning the facts relevant to sentencing may arise in four situations: (a) when sentence is imposed without a presentence investigation and report; (b) when necessary to correct or supplement the presentence report; (c) when necessary in light of the defense presentation to the court; and (d) when requested by the court.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

a. Furnishing Information in Absence of Presentence Report

Rule 32(c)(1), Federal Rules of Criminal Procedure, authorizes the imposition of sentence without a presentence investigation and report, if the defendant consents or if the court finds that the record contains sufficient information to permit the meaningful exercise of sentencing discretion. Imposition of sentence pursuant to this provision usually occurs when the defendant has been found guilty by the court after a non-jury trial, when the case is relatively simple and straightforward, when the defendant has taken the stand and has been cross-examined, and when it is the court's intention not to impose a prison sentence. In such cases, and any others in which sentence is to be imposed without benefit of a presentence investigation and report (such as where a report on the defendant has recently been prepared in connection with another case), it may be particularly important that the attorney for the government take advantage of the opportunity afforded by Rule 32(a)(1), Federal Rules of Criminal Procedure, to address the court, since there will be no later opportunity to correct or supplement the record. Moreover, even if government counsel is satisfied that all facts relevant to the sentencing decision are already before the court, he/she may wish to make a factual presentation for the record that makes clear the government's view of the defendant, the offense, or both.

b. Correcting or Supplementing Presentence Report

As noted above, whenever portions of the presentence report are shown to the defense, the attorney for the government should take advantage of his/her opportunity to examine the same material. If he/she discovers any significant inaccuracies or omissions, he/she should bring them to the court's attention at the sentencing hearing, together with the correct or complete information.

c. Responding to Defense Assertions

Having read the presentence report prior to the sentencing hearing, the defendant or his/her attorney may dispute specific factual statements made therein. More likely, without directly challenging the accuracy of the report, the defense presentation at the hearing may omit reference to the derogatory information in the report, while stressing any favorable information and drawing all inferences beneficial to the defendant. Some degree of selectivity in the defense presentation is probably to be

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

expected, and will be recognized by the court. There may be instances, however, in which the defense presentation, if not challenged, will leave the court with a view of the defendant or of the offense significantly different from that appearing in the presentence report. If this appears to be a possibility, the attorney for the government should respond by correcting factual errors in the defense presentation, pointing out facts and inferences ignored by the defense, and generally reinforcing the objective view of the defendant and his/her offense expressed in the presentence report.

d. Responding to Court's Requests

There may be occasions when the court will request specific information from government counsel at the sentencing hearing (as opposed to asking generally whether the government wishes to be heard). When this occurs, the attorney for the government should, of course, furnish the requested information if it is readily available and no prejudice to law enforcement interests is likely to result from its disclosure.

4. Substantiation of Disputed Facts

In addition to providing the court with relevant factual material at the sentencing hearing when necessary, the attorney for the government should be prepared to substantiate significant factual allegations disputed by the defense. This can be done by making the source of the information available for cross-examination or, if there is good cause for nondisclosure of his/her identity, by presenting the information as hearsay and providing other guarantees of its reliability, such as corroborating testimony by others. See United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978).

9-27.730 Conditions for Making Sentencing Recommendations

A. The attorney for the government should make a recommendation with respect to the sentence to be imposed when:

1. The terms of a plea agreement require him/her to do so; or
2. The public interest warrants an expression of the government's view concerning the appropriate sentence.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Comment

USAM 9-27.730 describes two situations in which an attorney for the government should make a recommendation with respect to the sentence to be imposed: when the terms of a plea agreement require him/her to do so, and when the public interest warrants an expression of the government's view concerning the appropriate sentence. The phrase "make a recommendation with respect to the sentence to be imposed" is intended to cover tacit recommendations (i.e., agreeing to the defendant's request or not opposing the defendant's request) as well as explicit recommendations for a specific type of sentence (e.g., probation, a fine, incarceration); for imposition of sentence under a specific statute (e.g., the Youth Corrections Act, 18 U.S.C. §§5005 et seq., or the Narcotic Addict Rehabilitation Act, 18 U.S.C. §§4251 et seq.); for a specific condition of probation, a specific fine, or a specific term of imprisonment; and for concurrent or consecutive sentences.

The attorney for the government should be guided by the circumstances of the case and the wishes of the court concerning the manner and form in which sentencing recommendations are made. If the government's position with respect to the sentence to be imposed is related to a plea agreement with the defendant, that position must be made known to the court at the time the plea is entered. In other situations, the government's position might be conveyed to the probation officer, orally or in writing, during the presentence investigation; to the court in the form of a sentencing memorandum filed in advance of the sentencing hearing; or to the court orally at the time of the hearing.

1. Recommendations Required by Plea Agreement

Rule 11(e)(1), Federal Rules of Criminal Procedure, authorizing plea negotiations, implicitly permits the prosecutor, pursuant to a plea agreement, to make a sentence recommendation, agree not to oppose the defendant's request for a specific sentence, or agree that a specific sentence is the appropriate disposition of the case. If the prosecutor has entered into a plea agreement calling for the government to take a certain position with respect to the sentence to be imposed, and the defendant has entered a guilty plea in accordance with the terms of the agreement, the prosecutor must perform his/her part of the bargain or risk having the plea invalidated. See Machibroda v. United States, 368 U.S. 487, 493 (1962); Santobello v. United States, 404 U.S. 257, 262 (1971).

2. Recommendations Warranted by the Public Interest

From time to time, unusual cases may arise in which the public interest warrants an expression of the government's view concerning

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the appropriate sentence, irrespective of the absence of a plea agreement. In some such cases, the court may invite or request a recommendation by the prosecutor, while in others the court may not wish to have a sentencing recommendation from the government. In either event, whether the public interest requires an expression of the government's view concerning the appropriate sentence in a particular case is a matter to be determined with care, preferably after consultation between the prosecutor handling the case and his/her supervisor--the U.S. Attorney or a supervisory Assistant U.S. Attorney, or the responsible Assistant Attorney General or his/her designee.

In considering the public interest question, the prosecutor should bear in mind the attitude of the court towards sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation. If he/she has good reason to anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs, he/she may conclude that it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation. For example, if the case is one in which the imposition of a term of imprisonment plainly would be inappropriate, and the court has requested the government's view, the prosecutor should not hesitate to recommend or agree to the imposition of probation. On the other hand, if the responsible government attorney believes that a term of imprisonment is plainly warranted and that, under all the circumstances the public interest would be served by his/her making a recommendation to that effect, he/she should make such a recommendation even though the court has not invited or requested him/her to do so. Recognizing, however, that the primary responsibility for sentencing lies with the judiciary, government attorneys should avoid routinely taking positions with respect to sentencing, reserving their recommendations instead for those unusual cases in which the public interest warrants an expression of the government's view.

In connection with sentencing recommendations, the prosecutor should also bear in mind the potential value in some cases of the imposition of innovative conditions of probation. For example, in a case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the responsible government attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant make full restitution for actual damage or loss caused

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

by the offense of which he/she convicted, that he/she participate in community service activities, or that he/she desist from engaging in a particular type of business.

9-27.740 Considerations to be Weighed in Determining Sentencing Recommendations

A. In determining what recommendation to make with respect to the sentence to be imposed, the attorney for the government should weigh all relevant considerations, including:

1. The seriousness of the defendant's conduct;
2. The defendant's background and personal circumstances;
3. The purpose or purposes of sentencing applicable to the case; and
4. The extent to which a particular sentence would serve such purpose or purposes.

B. Comment

When a sentencing recommendation is to be made by the government--whether as part of a plea agreement or as otherwise warranted in the public interest--the recommendation should reflect the best judgment of the prosecutor as to what would constitute an appropriate sentence under all the circumstances of the case. In making this judgment, the attorney for the government should consider any factors that he/she believes to be relevant, with particular emphasis on the four considerations specifically set forth in USAM 9-27.740: the seriousness of the defendant's conduct; the defendant's background and personal circumstances; the purpose or purposes of sentencing applicable to the particular case; and the extent to which a particular sentence would serve such purpose or purposes. In this connection, the prosecutor should bear in mind that, by offering a recommendation, he/she shares with the court the responsibility for avoiding unwarranted sentence disparities among defendants with similar backgrounds who have been found guilty of similar conduct.

1. Seriousness of Defendant's Conduct

The seriousness of the defendant's conduct should be assessed not only with reference to the type of crime committed and the penalty provided for the offense in the abstract, but also in terms of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

factors peculiar to the commission of the offense in the particular case. Among such factors might be circumstances attending the commission of the offense that aggravate or mitigate its seriousness, such as: the age of the victim; the number of victims; the defendant's motivation and culpability; the nature and degree of harm caused or threatened by the offense, including the reparability or irreparability of any damage caused; the extent to which the defendant profited from the offense; the degree to which the offense involved a breach of special trust, particularly public trust; the complicity of the victim; and public concern generated by the offense.

2. Defendant's Background and Personal Circumstances

In formulating a sentence recommendation, the attorney for the government should always consider the defendant's criminal history, the degree of his/her dependence on criminal activity for a livelihood, and his/her timely cooperation in the investigation or prosecution of others. Beyond these factors, it may also be appropriate to consider the defendant's age, education, mental and physical condition (including drug dependence), vocational skills, employment record, family ties and responsibilities, roots in the community, remorse or contrition, and willingness to assume responsibility for his/her conduct.

3. Applicable Sentencing Purposes

The attorney for the government should consider the seriousness of the defendant's conduct, and his/her background and personal circumstances, in light of the four purposes or objectives of the imposition of criminal sanctions:

- a. To deter the defendant and others from committing crime;
- b. To protect the public from further offenses by the defendant;
- c. To assure just punishment for the defendant's conduct;  
and
- d. To promote the correction and rehabilitation of the defendant.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The attorney for the government should recognize that not all of these objectives may be relevant in every case and that, for a particular offense committed by a particular offender, one of the purposes, or a combination of purposes, may be of overriding importance. For example, in the case of a young first offender who commits a non-violent offense, the primary or sole purpose of sentencing might be rehabilitation. On the other hand, the primary purpose of sentencing a repeat violent offender might be to protect the public, and the perpetrator of a massive fraud might be sentenced primarily to deter others from engaging in similar conduct.

4. Relationship Between Sentence and Purpose of Sentencing

Having in mind the purpose or purposes sought to be achieved by sentencing in a particular case, the attorney for the government should consider the available sentencing alternatives in terms of the extent to which they are likely to serve such purpose or purposes. For example, if the prosecutor believes that the primary objective of the sentence should be to encourage the rehabilitation of the defendant, he/she may conclude that a term of imprisonment would not be appropriate. If, on the other hand, the primary purpose of the sentence is to incapacitate the defendant from committing additional crimes, then a substantial term of imprisonment might be warranted. And, in a case involving neither the need for rehabilitation nor for protection of the public from further criminal acts by the defendant, the objectives of deterrence and just punishment might best be achieved by a substantial fine, with or without a short period of imprisonment.

9-27.750 Disclosing Factual Material to Defense

A. The attorney for the government should disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he/she intends to bring to the attention of the court.

B. Comment

Due process requires that the sentence in a criminal case be based on accurate information. See, e.g., Moore v. United States, 571 F.2d 179,182-184 (3d Cir. 1978). Accordingly, the defense should have access to all material relied upon by the sentencing judge, including memoranda from the prosecution (to the extent that considerations of informant safety permit), as well as sufficient time to review such material and an opportunity to present any refutation that can be mustered. See, e.g.,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. Perri, 513 F.2d 572, 575 (9th Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1229-30 (2d Cir.), cert, denied, 417 U.S. 950 (1974); United States v. Robin, 545 F.2d 775 (2d Cir. 1976). USAM 9-27.750 is intended to facilitate satisfaction of these requirements by providing the defendant with notice of information not contained in the presentence report that the government plans to bring to the attention of the sentencing court.

9-27.760 Assisting Parole Commission

A. If the sentence imposed includes a term of confinement that subjects the defendant to the jurisdiction of the Parole Commission, the attorney for the government should:

1. Forward to the Commission information necessary to ensure the proper application of the Commission's parole guidelines; and

2. Make a recommendation with respect to parole if required to do so by the terms of a plea agreement, or if there exist particularly aggravating or mitigating circumstances that justify a period of confinement different from that recommended in the parole guidelines.

B. Comment

The Parole Commission has authority to set release dates for federal prisoners who have been sentenced to a term of imprisonment for more than one year or who have been incarcerated pursuant to the Narcotic Addict Rehabilitation Act (18 U.S.C. §4251 et seq.) or the Youth Corrections Act (18 U.S.C. §5005 et seq.). The Commission's determination in a particular case is made with reference to parole guidelines that "indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics." See 28 C.F.R. §2.20(b).

The information necessary to determine a prisoner's offense and offender characteristics may be available to the Commission through the presentence report. In some cases there may be no presentence report, however. In other cases the report may not reflect all the facts about the offender or the offense that the prosecutor believes are necessary to the informed application of the Parole Commission's guidelines. For example, the report may not contain an adequate description of the defendant's cooperation with the government, or it may omit information relating to charges that have been or will be dropped as part of a plea agreement. There may also be cases in which the attorney for the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

government does not have access to the presentence report and, consequently, cannot judge its adequacy in terms of the Parole Commission's requirements. Moreover, the prosecutor should bear in mind that the Parole Commission will not know what took place at the sentencing hearing unless one of the parties provides it with a transcript of the proceedings. Finally, if the defendant is released on bail pending appeal, the attorney for the government should bear in mind the possibility that the defendant's post-sentence conduct may be pertinent to the Parole Commission's determination.

To ensure that the Parole Commission has all the information it needs, the attorney for the government should forward to the Chief Executive Officer of the institution to which the defendant will be committed U.S.A. Form 792 ("Report on Convicted Prisoner"), setting forth such information as he/she believes is necessary to ensure the proper application of the parole guidelines (see USAM 9-34.220 and 9-34.221). The Form 792 submission should be made promptly after the sentencing hearing, and may be supplemented thereafter if necessary, since the Commission's initial parole determination ordinarily will be made within a short time after the defendant's incarceration.

In supplying information to the Parole Commission, the prosecutor should bear in mind that the Commission, like the sentencing judge, is permitted to consider unadjudicated charges in assessing the seriousness of an individual's criminal behavior. See Billiteri v. United States Board of Parole, 541 F.2d 938, 944-945 (2d Cir. 1976). Accordingly, the information supplied need not be related solely to the offense or offenses for which the person was convicted, but should reflect the full range and seriousness of the conduct that could have been charged and proved. On the other hand, Commission regulations require that the information it considers meet "a threshold test of reliability." See 44 Fed. Reg. 12692-93 (March 8, 1979). Thus the same standard should be applied to Form 792 submissions as is applied to factual presentations at judicial sentencing hearings and, with respect to contested facts, there should be included a summary of corroborating information sufficient to overcome a denial by the prisoner.

Recommendations by the prosecutor concerning parole should be made when, as a part of a plea agreement, the prosecutor has agreed to make a recommendation, or when the prosecutor concludes, preferably after consultation with his/her supervisor, that the period of confinement recommended in the parole guidelines would be inappropriate in light of particularly aggravating or mitigating circumstances of the case. In the latter situation, the recommendation should be accompanied by a statement of the aggravating or mitigating circumstances and, if the severity rating of the criminal conduct involved is at issue, should specify the severity rating that the prosecutor believes to be applicable.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 34

	<u>Page</u>
9-34.000 <u>PROBATION, PAROLE AND PARDON</u>	1
9-34.100 PROBATION	1
9-34.110 <u>Authority to Grant Probation</u>	1
9-34.120 <u>Restitution as Condition</u>	1
9-34.130 <u>Advantage to Government of Suspending Imposition</u>	2
9-34.140 <u>Termination of Power to Place on Probation</u>	2
9-34.150 <u>Effective Date of Probation</u>	2
9-34.160 <u>Revocation</u>	2
9-34.200 PAROLE	3
9-34.210 <u>Eligibility</u>	3
9-34.211 Exception for Juveniles	3
9-34.212 Eligibility Date Specified by Court	3
9-34.220 <u>Preparation of Reports on Convicted Prisoners for the Parole Commission</u>	4
9-34.221 Duty to Complete the Report	4
9-34.222 Preparation of Form 792	4
9-34.223 Form 792	5
9-34.224 Parole Commission Guidelines	5
9-34.230 <u>Communication With Parole Commission</u>	31
9-34.240 <u>Period of Supervision</u>	31
9-34.250 <u>Mandatory Release</u>	31
9-34.260 <u>Violator Warrants</u>	31
9-34.270 <u>Release on Bail</u>	32
9-34.300 PARDON	32

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-34.400	SENTENCING REFORM ACT OF 1984	33
9-34.410	<u>Introduction</u>	33
9-34.420	<u>The New Sentencing Scheme Policy [Reserved]</u>	33
9-34.430	<u>Criminal Division Contacts</u>	33

1984 USAM (superseded)



U.S. Department of Justice

Executive Office for United States Attorneys

---

Washington, D.C. 20530

August 16, 1985

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Policies Concerning the New Sentencing Scheme  
Scheduled to Take Effect in November 1986

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of USAM Title 9.

AFFECTS: USAM 9-34.600

PURPOSE: This bluesheet implements prosecutive policy with respect to the Sentencing Reform Act of 1984.

---

The following is a new section:

9-34.600 THE NEW SENTENCING SCHEME

The principal goal of the Sentencing Reform Act is to establish a uniform, determinate federal sentencing system that will accomplish the purposes of just punishment, deterrence, incapacitation, and rehabilitation. This goal is to be achieved primarily through the use of sentencing guidelines established by a presidentially-appointed Sentencing Commission, which will be composed of seven members and a staff. At least three members must be active federal judges, who will not be required to resign from the bench to serve on the Commission. The initial set of guidelines is scheduled to be completed in April 1986. In establishing the guidelines, the Commission will examine the offense and offender characteristics that judges now consider in making sentencing determinations, and will determine which of those should be reflected in the guidelines, which ones occur so infrequently that they should not be considered in the guidelines but might justify a departure from the guidelines, and which ones should not affect the sentence at all.

The guidelines will specify a variety of narrow sentencing ranges -- from probation with minimal conditions, to probation with more stringent conditions, to fines of various levels, and then to imprisonment for various terms -- for each offense, depending on the particular history and characteristics of the defendant and the circumstances of the offense. Consequently, a particular offense -- for example bank robbery -- might have a dozen or more suggested sentencing ranges, only one of which would fit a given case.

Under the new guideline system, the presentence report will continue to be prepared by the probation officer. The report will be available to the defendant and the government subject to the provisions of Federal Rule of Criminal Procedure 32(c)(3). The report will identify the characteristics of the offense and the offender and the guideline range that the probation officer believes applicable to the defendant. The sentencing hearing will focus on the accuracy of the probation officer's conclusions and on the question of whether the sentence should be imposed within or outside the applicable guideline range. The judge will then impose sentence, ordinarily within the guideline range.

If the judge thinks it would be inappropriate to impose a sentence within the guideline range he finds to be applicable, because there was a factor that should affect the sentence that was not adequately considered by the Sentencing Commission in developing the guidelines, he may impose a sentence above or below the guideline recommendation. However, the judge must state his reasons for doing so on the record, and preferably in writing. Prosecutors who are asking the court to impose a sentence above the guideline recommendation should consider submitting a proposed statement of findings for the court. A sentence that is below the guideline range is appealable by the government, but by statute the Attorney General or Solicitor General must personally approve the filing of the notice of appeal. No "protective" notices of appeal should be filed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-34.000 PROBATION, PAROLE AND PARDON

9-34.100 PROBATION

9-34.110 Authority To Grant Probation

Upon entering a judgment of conviction of any offense other than offenses punishable by death or life imprisonment, and other than certain violations of the Narcotic Control Act of 1956, the court may, in its discretion, suspend either the imposition or execution of sentence and place the defendant on probation for a period not exceeding 5 years. 18 U.S.C. §3651. Probation may be granted where the offense is punishable only by a fine (United States v. Berger 145 F.2d 888 (2d Cir. 1944)), or by both fine and imprisonment. When the offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. In such case, payment of the fine may be made one of the conditions of probation.

The fact that a statute prescribes a minimum penalty, as is the case in certain of the Internal Revenue statutes relating to liquor violations, is not a bar to suspension of imposition or execution of sentence and the grant of probation. Where the defendant is a corporation, the court may suspend imposition or execution of sentence and place the corporation on probation. ✓

Upon conviction for an offense not punishable by death or life imprisonment, but punishable by imprisonment for more than 6 months, the court may impose a sentence in excess of 6 months; may direct that 6 months or less of such sentence be served in a jail or a treatment institution; or may suspend execution of the remainder of the sentence and place the defendant on probation for such period and upon such conditions as the court deems best. 18 U.S.C. §3651.

9-34.120 Restitution as Condition

The court may not order restitution, as a condition of probation, in excess of the actual damage or loss to the victim of the offense for which conviction is had or to which a plea of guilty is entered. Karrell v. United States, 181 F.2d 981 (9th Cir. 1950), cert. denied., 340 U.S. 891 (1950). Consequently, an order of restitution cannot include sums representing alleged losses caused by offenses which were not charged in the indictment, or which were charged in counts which have been dismissed, or on which the defendant has been acquitted.

9-34.130 Advantage To Government Of Suspending Imposition

If sentence is imposed, its execution suspended, and the defendant placed on probation, the court is without power to increase the sentence if probation is subsequently revoked. On the other hand, if the court suspends imposition of sentence and places the defendant on probation, it has authority, upon revoking probation, to impose any sentence which it could have imposed originally. 18 U.S.C. §3653. Thus, there is ordinarily a distinct advantage in suspending imposition rather than execution of sentence when probation is contemplated. Furthermore, suspension of imposition of sentence may prove to be an incentive to good conduct because of the uncertainty of the extent of punishment which violation of the conditions of probation may incur.

9-34.140 Termination of Power to Place on Probation

The power to suspend execution of sentence and place a defendant on probation is terminated immediately upon imprisonment under such sentence, and is terminated as to all of the sentences composing a single cumulative sentence immediately upon imprisonment for any part of the cumulative sentence. Affronti v. United States, 350 U.S. 79 (1955).

9-34.150 Effective Date Of Probation

Absent a specific direction to the contrary, the probationary period will commence to run at the time the court grants probation. This is true though the defendant is sentenced to imprisonment on another count of the same indictment or is at the time of probation order already serving a state or federal sentence of imprisonment. In such case the period of probation will run concurrently with the prison sentence. Engle v. United States, 332 F.2d 89 (6th Cir. 1964); Sanford v. King, 136 F.2d 106 (5th Cir. 1943). However, the court has power by specific direction to make the probation period take effect upon termination of the prison term. Frad v. Kelly, 320 U.S. 312 (1937); Cosman v. United States, 302 U.S. 617 (1938); Graddis v. United States, 280 F.2d 334 (6th Cir. 1960).

9-34.160 Revocation

If within the period of probation the defendant violates any of the conditions which have been imposed by the court, the order granting probation may be revoked and sentence imposed, or if sentence has been previously imposed, such sentence or any lesser sentence may be ordered executed. An order of revocation may be entered only after hearing upon the alleged violation of probation at which the probationer is entitled to representation by counsel. Counsel will be appointed for those who are

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

financially unable to retain their own counsel. 18 U.S.C. §3006A; Escoe v. Zerbst, 295 U.S. 490 (1935); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

Any warrant for the arrest of the probationer for violation of probation must be issued no later than 5 years from the effective date of the grant of probation. 18 U.S.C. §3653; compare Justras v. United States, 340 F.2d 305 (1st Cir. 1965); Demarois v. Farrell, 87 F.2d 957 (8th Cir. 1937), cert. denied, 302 U.S. 683; United States v. Gernie, 228 F. Supp. 329 (S.D.N.Y. 1964).

9-34.200 PAROLE

9-34.210 Eligibility

Every prisoner, with exceptions outlined below, who is in custody under a federal sentence of more than one year becomes eligible for parole consideration upon serving one-third of the term or terms imposed if he/she has observed the rules of the institution in which he/she is being held. 18 U.S.C. §4205(a). When plural sentences are ordered to run consecutively the aggregate term is the basis for computing parole eligibility. Consecutive sentences are aggregated without regard to their length and no distinction is made as to a term of imprisonment imposed under a felony conviction and another imposed under a misdemeanor conviction. The law also provides that a prisoner serving a life sentence or a term exceeding 30 years shall be eligible for parole consideration after serving 10 years. 18 U.S.C. §4205(a).

9-34.211 Exception for Juveniles

Committed juvenile delinquents and committed youth offenders may be released on parole supervision at any time after commitment. See 18 U.S.C. §5041 and 18 U.S.C. §5017(a), respectively.

9-34.212 Eligibility Date Specified By Court

The court has certain discretionary powers as to parole eligibility upon entering a judgment of conviction if the court pronounces a sentence of more than 1 year, it may designate in the sentence a minimum term at which time the prisoner shall become eligible for parole consideration. Such minimum terms may be less than, but shall not be more than, one-third of the maximum sentence imposed. 18 U.S.C. §4205(b)(1). It provides further that the court may fix the maximum term of imprisonment and specify in the sentence that the prisoner may become eligible for parole consideration at such time as the Parole Commission may determine. 18 U.S.C. §4205(b)(2). If the court imposes a sentence of not less than six months but not more

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

than one year, the court may at the time of sentencing provide for the release of the prisoner as if on parole after service of one-third of the sentence. 18 U.S.C. §4205(f).

9-34.220 Preparation of Reports on Convicted Prisoner for the Parole Commission

All U.S. Attorneys, Assistant U.S. Attorneys, and Criminal Division Attorneys are required to prepare a Form 792 "Report on Convicted Prisoners by United States Attorney" in all cases in which a defendant has been sentenced to a prison term in excess of one year. The completed forms are to be submitted to the Chief Executive Officer of the institution to which the defendant will be committed as soon as the defendant has been sentenced.

9-34.221 Duty to Complete the Report

It is especially important that the Parole Commission be apprised of the specific data it needs for decision making. An attorney's responsibility for the case continues through the sentencing process. All attorney should be familiar with the Principles of Federal Prosecution, which appear in USAM 9-27.000, in particular, Part C6 at pages 55 and 56. That part fully sets forth the responsibilities of federal prosecutors to prepare and submit a completed Form 792.

9-34.222 Preparation Of Form 792

The Parole Commission needs to be fully informed of aggravating and mitigating factors surrounding each offense. To accomplish that end observe the following when preparing Form 792.

A. Describe the details of the offense itself. Include the dollar amounts involved in the crime; this is important to the Parole Commission when it rates the severity of an offense, particularly in income tax, fraud, embezzlement, drug and theft cases. In drug cases, provide information on the quantity and purity of the drugs.

B. Explain the prisoner's role in the offense. The Parole Commission should be told of the nature and severity of the prisoner's involvement relative to that of his/her codefendants; this will prevent unjust disparity in the treatment among codefendants and help the Parole Commission to compare the prison terms of principals and accessories.

C. Outline related charges dismissed upon entry of a guilty plea or not proved at trial. Whatever the government was prepared to prove should be

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

reported fully, because the Parole Commission is entitled to consider unadjudicated charges so long as the prisoner has notice of them.

D. Provide investigative information concerning the prior history of the prisoner and/or the offense (if it was part of an on-going pattern of behavior). The Parole Commission needs specific data on the magnitude and duration of the criminal behavior; considered are the amount of sophistication and/or planning of the offense, and the degree to which the offense was part of a large scale criminal conspiracy or a continuing criminal enterprise. While the prisoner's general reputation is not specific enough for consideration in parole release decision making, his/her criminal reputation should be reported to the Parole Commission so that a determination can be made whether or not to treat his/her case under the original jurisdiction procedure. 28 C.F.R. §217.

The Parole Commission must disclose to the prisoner the reports and documents used in parole release decision making; if materials are considered which fall within the three broad exemptions of 18 U.S.C §4208(c), the Parole Commission need only furnish the prisoner with a summary though the Parole Commission may consider the report in full. Information on Form 792 which falls within these exemptions should be summarized in general terms; the precise exemption chosen need not be revealed or justified. As a standard precaution, the name of the preparing attorney can be deleted from the disclosable copy of the report.

Summaries should be typewritten on a separate page with the heading SUMMARY OF INFORMATION WITHHELD, and should be attached to the copy Form 792 which has been excised for disclosure to the prisoner. Send the original and excised copy to the institution in which the prisoner is confined. If investigative reports are included with the prosecuting attorney's report, the responsibility agency should be requested to provide summaries if any material is deemed by that agency to be exempt from disclosure.

9-34.223 Form 792

A copy of the current Form USA-792 follows. See pages 6 and 7 of this chapter. All previous editions of the form are obsolete and should be destroyed.

9-34.224 Parole Commission Guidelines

All prosecuting attorneys should be familiar with the Parole Commission's guidelines, both in plea negotiations and in completing the Form 792. The Commission's most recent guideline table (full text to appear at 28 C.F.R. §2.20) follows. See pages 8-30 of this chapter.

NAME \_\_\_\_\_

CONVICTED OF \_\_\_\_\_

TERM IMPOSED \_\_\_\_\_

CRIMINAL CASE NO. \_\_\_\_\_

U.S.C. \_\_\_\_\_

DISTRICT \_\_\_\_\_

NOTE: This report must be completed for the use of the U.S. Parole Commission in all cases in which the defendant has received a prison term of more than one year. It is an essential source of information for parole decision-making. Submit the report as soon as the defendant has been sentenced.

I. DESCRIPTION OF THE OFFENSE: Give a full account of the offense and describe any mitigating or aggravating circumstances. Be specific about such matters as total dollar amounts or property values involved, drug quantities and purities, the number of victims and extent of injury, and the overall extent of any joint or on-going criminal conduct. Estimate relative culpability if the offense involved co-defendants.

1987 USAM (superseded)

II. CORROBORATING EVIDENCE: If there are aggravating circumstances not established by the conviction, explain what evidence supports the Government's version.

III. COOPERATION: Was the defendant of assistance to the Government? The Parole Commission will consider substantial cooperation otherwise unrewarded as a possible circumstance in mitigation of punishment.

IV. RECOMMENDATION RELATIVE TO PAROLE: This section is optional. (See the paroling policy guidelines at 28 CFR § 2.20)

DISCLOSURE INSTRUCTIONS (to institution staff):

\_\_\_\_\_ This report may be disclosed to the prisoner.

\_\_\_\_\_ Do not disclose this report under any circumstances and retain it in a secure file. A disclosable copy of this report with deletions, and a summary of deleted material pursuant to 18 U.S.C. 4208 (c) is attached for disclosure to the prisoner. The original is to be shown to the Parole Commission.

NOTIFICATION REQUEST:

\_\_\_\_\_ I wish to be notified of the date and place set for this prisoner's parole hearing.

\_\_\_\_\_ I wish to be notified of the Commission's decision in this case.

For the United States Attorney

\_\_\_\_\_  
DATE

Signed: \_\_\_\_\_

Assistant U.S. Attorney

Disposition of copies: This form is to be completed in triplicate. The original and one copy are to be sent to the Chief Executive Officer of the institution to which the prisoner is committed and a copy retained by the U.S. Attorney. The institution copies should be given to the Bureau of Prisons' Community Program offices for delivery with the prisoner. If not possible, they should be mailed to the institution as soon as possible after sentence is imposed. The CPO will be able to advise of the institution to which the defendant was committed. (The U.S. Marshal can put you in contact with your local CPO.)

**GUIDELINES FOR DECISION-MAKING**  
 [Guidelines for Decision-Making, Customary Total Time to be  
 Served before Release (including jail time)]

OFFENSE CHARACTERISTICS:	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981)			
Severity of Offense Behavior	Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category One <i>[formerly 'low severity']</i>	<=6 months	Adult Range 6-9 months	9-12 months	12-16 months
	(<=6) months	(Youth Range) (6-9) months	(9-12) months	(12-16) months
Category Two <i>[formerly 'low moderate severity']</i>	<=8 months	Adult Range 8-12 months	12-16 months	16-22 months
	(<=8) months	(Youth Range) (8-12) months	(12-16) months	(16-20) months
Category Three <i>[formerly 'moderate severity']</i>	10-14 months	Adult Range 14-18 months	18-24 months	24-32 months
	(8-12) months	(Youth Range) (12-16) months	(16-20) months	(20-26) months
Category Four <i>[formerly 'high severity']</i>	14-20 months	Adult Range 20-26 months	26-34 months	34-44 months
	(12-16) months	(Youth Range) (16-20) months	(20-26) months	(26-32) months
Category Five <i>[formerly 'very high severity']</i>	24-36 months	Adult Range 36-48 months	48-60 months	60-72 months
	(20-26) months	(Youth Range) (26-32) months	(32-40) months	(40-48) months

10/01/83

OFFENSE CHARACTERISTICS:	OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score 1981)			
Severity of Offense Behavior	Very Good (10-8)	Good (7-6)	Fair (5-4)	Poor (3-0)
Category Six [formerly 'Greatest I severity']	40-52 months	Adult Range 52-64 * months		64-78 months
	(30-40) months	(Youth Range) (40-50) months		(50-60) months
Category Seven [formerly included in 'Greatest II severity']	52-80 months	Adult Range 64-92 months		78-110 months
	(40-64) months	(Youth Range) (50-74) months		(60-86) months
Category Eight* [formerly included in 'Greatest II severity']	100+ months	Adult Range 120+ months		150+ months
	(80+) months	(Youth Range) (100+) months		(120+) months

\*Note: For Category Eight, no upper limits are specified due to the extreme variability of the cases within this category. For decisions exceeding the lower limit of the applicable guideline category BY MORE THAN 48 MONTHS, the pertinent aggravating case factors considered are to be specified in the reasons given (e.g., that a homicide was premeditated or committed during the course of another felony; or that extreme cruelty or brutality was demonstrated).

#### U.S. PAROLE COMMISSION OFFENSE BEHAVIOR SEVERITY INDEX

##### CHAPTER ONE. OFFENSES OF GENERAL APPLICABILITY

##### CHAPTER TWO. OFFENSES INVOLVING THE PERSON

- Subchapter A - Homicide Offenses
- Subchapter B - Assault Offenses
- Subchapter C - Kidnaping and Related Offenses
- Subchapter D - Sexual Offenses
- Subchapter E - Offenses Involving Aircraft
- Subchapter F - Communication of Threats

10/01/83

FEBRUARY 13, 1984  
Ch. 34, p.9

- CHAPTER THREE. OFFENSES INVOLVING PROPERTY
- Subchapter A - Arson and Property Destruction Offenses
  - Subchapter B - Criminal Entry Offenses
  - Subchapter C - Robbery, Extortion, and Blackmail
  - Subchapter D - Theft and Related Offenses
  - Subchapter E - Counterfeiting and Related Offenses
  - Subchapter F - Bankruptcy Offenses
  - Subchapter G - Violations of Securities or Investment Regulations and Antitrust Offenses
- CHAPTER FOUR. OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS
- CHAPTER FIVE. OFFENSES INVOLVING REVENUE
- Subchapter A - Internal Revenue Offenses
  - Subchapter B - Customs Offenses
  - Subchapter C - Contraband Cigarettes
- CHAPTER SIX. OFFENSES INVOLVING GOVERNMENTAL PROCESS
- Subchapter A - Impersonation of Officials
  - Subchapter B - Obstructing Justice
  - Subchapter C - Official Corruption
- CHAPTER SEVEN. OFFENSES INVOLVING INDIVIDUAL RIGHTS
- Subchapter A - Offenses Involving Civil Rights
  - Subchapter B - Offenses Involving Privacy
- CHAPTER EIGHT. OFFENSES INVOLVING EXPLOSIVES AND WEAPONS
- Subchapter A - Explosives and Other Dangerous Articles
  - Subchapter B - Firearms
- CHAPTER NINE. OFFENSES INVOLVING ILLICIT DRUGS
- Subchapter A - Heroin and Opiate Offenses
  - Subchapter B - Marihuana and Hashish Offenses
  - Subchapter C - Cocaine Offenses
  - Subchapter D - Other Illicit Drug Offenses
- CHAPTER TEN. OFFENSES INVOLVING NATIONAL DEFENSE
- Subchapter A - Treason and Related Offenses
  - Subchapter B - Sabotage and Related Offenses
  - Subchapter C - Espionage and Related Offenses
  - Subchapter D - Selective Service Offenses
  - Subchapter E - Other National Defense Offenses
- CHAPTER ELEVEN. OFFENSES INVOLVING ORGANIZED CRIMINAL ACTIVITY, GAMBLING, OBSCENITY, SEXUAL EXPLOITATION OF CHILDREN, PROSTITUTION, AND NON-GOVERNMENTAL BRIBERY
- Subchapter A - Organized Crime Offenses
  - Subchapter B - Gambling Offenses
  - Subchapter C - Obscenity
  - Subchapter D - Sexual Exploitation of Children
  - Subchapter E - Prostitution and White Slave Traffic
  - Subchapter F - Non-Governmental Bribery
  - Subchapter G - Currency Offenses
- CHAPTER TWELVE. MISCELLANEOUS OFFENSES

10/01/83

CHAPTER THIRTEEN. GENERAL NOTES AND DEFINITIONS

Subchapter A - General Notes

Subchapter B - Definitions

CHAPTER ONE - OFFENSES OF GENERAL APPLICABILITY

- 101 Conspiracy  
Grade conspiracy in the same category as the underlying offense.
- 102 Attempt  
Grade attempt in the same category as the offense attempted.
- 103 Aiding and Abetting  
Grade aiding and abetting in the same category as the underlying offense.
- 104 Accessory After the Fact\*  
Grade accessory after the fact as two categories below the underlying offense, but not less than Category One.

--- NOTE TO CHAPTER ONE

The reasons for a conspiracy or attempt not being completed may, where the circumstances warrant, be considered as a mitigating factor (e.g., where there is voluntary withdrawal by the offender prior to completion of the offense). *[[Notes and Procedures. In grading unconsummated conspiracy offenses, care must be taken to distinguish the specific and imminent elements of the offense (which are to be considered) from those which are speculative and remote]]*.

CHAPTER TWO - OFFENSES INVOLVING THE PERSON

SUBCHAPTER A - HOMICIDE OFFENSES

- 201 Murder  
Murder\*, or a forcible felony\* resulting in the death of a person other than a participating offender, shall be graded as Category Eight.
- 202 Voluntary Manslaughter\*  
Category Seven.
- 203 Involuntary Manslaughter\*  
Category Four.

SUBCHAPTER B - ASSAULT OFFENSES

- 211 Assault During Commission of Another Offense  
(a) If serious bodily injury\* results or if 'serious bodily injury is clearly intended', grade as Category Seven;  
(b) If bodily injury\* results, or a weapon is fired by any offender, grade as Category Six;  
(c) Otherwise, grade as Category Five.
- 212 Assault  
(a) If serious bodily injury\* results or if 'serious bodily injury is clearly intended', grade as Category Seven;

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

- (b) If bodily injury\* results or a dangerous weapon is used by any offender, grade as Category Five;
- (c) Otherwise, grade as Category Two.
- (d) Exception: If the victim was known to be a 'protected person'\* or criminal justice official, grade conduct under (a) as Category Seven, (b) as Category Six, and (c) as Category Three.

#### SUBCHAPTER C - KIDNAPING AND RELATED OFFENSES

##### 221 Kidnaping

- (a) If the purpose of the kidnaping is for ransom or 'political' terrorism, grade as Category Eight.
- (b) If a person is held hostage in a known place for purposes of extortion (e.g., forcing a bank manager to drive to a bank to retrieve money by holding a family member hostage at home), grade as Category Seven;
- (c) If a victim is used as a shield or hostage in a confrontation with law enforcement authorities, grade as Category Seven;
- (d) Otherwise, grade as Category Seven.
- (e) Exception: If not for ransom or terrorism, and no bodily injury to victim, and limited duration (e.g., abducting the driver of a truck during a hijacking and releasing him unharmed an hour later), grade as Category Six.

##### 222 Demand for Ransom

- (a) If a kidnaping has, in fact, occurred, but it is established that the offender was not acting in concert with the kidnapper(s), grade as Category Seven;
- (b) If no kidnaping has occurred, grade as 'extortion'.

#### SUBCHAPTER D - SEXUAL OFFENSES

##### 231 Forcible Rape or Forcible Sodomy

- (a) Category Seven.
- (b) Exception: If a prior consensual sexual relationship is present between victim and offender, grade as Category Six.

##### 232 Carnal Knowledge\*

- (a) Category Four.
- (b) Exception: If the relationship is clearly consensual, and the victim is at least 14 years old, and the age difference between victim and offender is less than four years, grade as Category One.

#### SUBCHAPTER E - OFFENSES INVOLVING AIRCRAFT

##### 241 Aircraft Piracy Category Eight.

##### 242 Interference with a Flight Crew

- (a) If the conduct or attempted conduct has potential for creating a significant safety risk to an aircraft or passengers, grade as Category Seven;
- (b) Otherwise, grade as Category Two.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

## SUBCHAPTER F - COMMUNICATION OF THREATS

### 251 Communicating a Threat [to kill, assault, or kidnap]

(a) Category Four;

(b) Notes:

- (1) Any overt act committed for the purposes of carrying out a threat in this subchapter may be considered as an aggravating factor.
- (2) If for purposes of extortion or obstruction of justice, grade according to Chapter Three, Subchapter C, or Chapter Six, Subchapter B, as applicable.

## CHAPTER THREE - OFFENSES INVOLVING PROPERTY

### SUBCHAPTER A - ARSON AND OTHER PROPERTY DESTRUCTION OFFENSES

#### 301 Property Destruction by Arson or Explosives

- (a) If the conduct results in serious bodily injury\* or if 'serious bodily injury is clearly intended\*', grade as Category Seven;
- (b) If the conduct (i) involves any place where persons are present or likely to be present; or (ii) involves a residence, building, or other structure; or (iii) results in bodily injury\*, grade as Category Six;
- (c) Otherwise, grade as 'property destruction other than listed above' but not less than Category Five.

#### 302 Wrecking a Train

Category Seven.

#### 303 Property Destruction Other Than Listed Above

- (a) If the conduct results in bodily injury\* or serious bodily injury\*, or if 'serious bodily injury is clearly intended\*', grade as if 'assault during commission of another offense';
- (b) If damage of more than \$500,000 is caused, grade as Category Six;
- (c) If damage of more than \$100,000 but not more than \$500,000 is caused, grade as Category Five;
- (d) If damage of at least \$20,000 but not more than \$100,000 is caused, grade as Category Four;
- (e) If damage of at least \$2000 but less than \$20,000 is caused, grade as Category Three;
- (f) If damage of less than \$2000 is caused, grade as Category One.
- (g) Exception: If a significant interruption of a government or public utility function is caused, grade as not less than Category Three.

### SUBCHAPTER B - CRIMINAL ENTRY OFFENSES

#### 311 Burglary or Unlawful Entry

- (a) If the conduct involves an armory or similar facility (e.g., a facility where automatic weapons or war materials are stored) for the purpose of theft or destruction of weapons or war materials, grade as Category Six;
- (b) If the conduct involves an inhabited dwelling (whether or not a victim is present), or any premises with a hostile confrontation with a victim, grade as Category Five;
- (c) If the conduct involves use of explosives or safecracking, grade as Category Five;
- (d) Otherwise, grade as 'theft' offense, but not less than Category Two.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

- (e) Exception: If the grade of the applicable 'theft' offense exceeds the grade under this subchapter, grade as a 'theft' offense.

#### SUBCHAPTER C - ROBBERY, EXTORTION, AND BLACKMAIL

##### 321 Robbery

(a) Category Five.

(b) Exceptions:

- (1) If the grade of the applicable 'theft' offense exceeds the grade for robbery, grade as a 'theft' offense.
- (2) If any offender forces a victim to accompany any offender to a different location, or if a victim is forcibly detained for a significant period, grade as Category Six.
- (3) Pickpocketing (stealth-no force or fear), see Subchapter D.

(c) Note: Grade purse snatching (fear or force) as robbery.

##### 322 Extortion

(a) If by threat of physical injury to person or property, or extortionate extension of credit (loansharking)\*, grade as Category Five;

(b) If by use of official governmental position, grade according to Chapter Six, Subchapter C.

(c) Exceptions:

- (1) If the grade of the applicable 'theft' offense exceeds the grade under this subchapter, grade as a 'theft' offense;
- (2) If a victim is physically held hostage for purposes of extortion, grade according to Chapter Two, Subchapter C.

##### 323 Blackmail [threat to injure reputation or accuse of crime]

Grade as a 'theft' offense according to the value of the property demanded, but not less than Category Three. Actual damage to reputation may be considered as an aggravating factor.

#### SUBCHAPTER D - THEFT AND RELATED OFFENSES

##### 331 Theft, Forgery, Fraud, Trafficking in Stolen Property\*, Interstate Transportation of Stolen Property, Receiving Stolen Property, Embezzlement, and Related Offenses

(a) If the value of the property\* is more than \$500,000, grade as Category Six;

(b) If the value of the property\* is more than \$100,000 but not more than \$500,000, grade as Category Five;

(c) If the value of the property\* is at least \$20,000 but not more than \$100,000, grade as Category Four;

(d) If the value of the property\* is at least \$2000 but less than \$20,000, grade as Category Three;

(e) If the value of the property\* is less than \$2000, grade as Category One.

(f) Exceptions:

- (1) Offenses involving stolen checks or mail, forgery, fraud, interstate transportation of stolen or forged securities, trafficking in stolen property\*, or embezzlement shall be graded as not less than Category Two;

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

- (2) Theft of an automobile shall be graded as no less than Category Three. Note: where the vehicle was recovered within 72 hours with no significant damage and the circumstances indicate that the only purpose of the theft was temporary use (e.g., joyriding), such circumstances may be considered as a mitigating factor.
- (g) Note: In 'theft' offenses, the total amount of the theft committed or attempted by the offender, or others acting in concert with the offender, is to be used. *[[Notes and Procedures. Example (1): Seven persons in concert commit a theft of \$70,000; each receives \$10,000. Grade according to the total amount (\$70,000). Example (2): Seven persons in concert fraudulently sell stock worth \$20,000 for \$90,000. Grade according to the loss (\$70,000)]]*.

- 332 Pickpocketing [stealth-no force or fear]  
Grade as a 'theft' offense, but not less than Category Three.
- 333 Fraudulent Loan Applications  
Grade as a 'fraud' offense according to the amount of the loan.
- 334 Preparation or Possession of Fraudulent Documents  
(a) If for purposes of committing another offense, grade according to the offense intended;  
(b) Otherwise, grade as Category Two.
- 335 Criminal Copyright Offenses  
(a) If very large scale (e.g., more than 100,000 sound recordings or more than 10,000 audio visual works), grade as Category Five;  
(b) If large scale (e.g., 20,000-100,000 sound recordings or 2,000-10,000 audio visual works), grade as Category Four;  
(c) If medium scale (e.g., 2,000-19,999 sound recordings or 200-1,999 audio visual works), grade as Category Three;  
(d) If small scale (e.g., less than 2000 sound recordings or less than 200 audio visual works), grade as Category Two.

#### SUBCHAPTER E - COUNTERFEITING AND RELATED OFFENSES

- 341 Passing or Possession of Counterfeit Currency or Other Medium of Exchange\*  
(a) If the face value of the currency or other medium of exchange is more than \$500,000, grade as Category Six;  
(b) If the face value is more than \$100,000 but not more than \$500,000, grade as Category Five;  
(c) If the face value is at least \$20,000 but not more than \$100,000, grade as Category Four;  
(d) If the face value is at least \$2000 but less than \$20,000, grade as Category Three;  
(e) If the face value is less than \$2000, grade as Category Two.
- 342 Manufacture of Counterfeit Currency or Other Medium of Exchange\* or Possession of Instruments for Manufacture  
Grade manufacture or possession of instruments for manufacture (e.g., a printing press or plates) according to the quantity printed (see passing or possession)), but not less than Category Five. The term 'manufacture' refers to the capacity to print or generate multiple copies; it does not apply to pasting together parts of different notes.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER F - BANKRUPTCY OFFENSES

- 351 Fraud in Bankruptcy or Concealing Property  
Grade as a 'fraud' offense.

SUBCHAPTER G - VIOLATION OF SECURITIES OR INVESTMENT REGULATIONS AND ANTITRUST OFFENSES

- 361 Violation of Securities or Investment Regulations (15 U.S.C. 77ff,80)  
(a) If for purposes of fraud, grade according to the underlying offense;  
(b) Otherwise, grade as Category Two.

362 Antitrust Offenses

- (a) If estimated economic impact is more than one million dollars, grade as Category Four;  
(b) If the estimated economic impact is more than \$100,000 but not more than one million dollars, grade as Category Three;  
(c) Otherwise, grade as Category Two.  
[[Notes and Procedures: The term 'economic impact' refers to the estimated loss to any victims (e.g., loss to consumers from a price fixing offense).]]

CHAPTER FOUR - OFFENSES INVOLVING IMMIGRATION, NATURALIZATION, AND PASSPORTS

- 401 Unlawfully Entering the United States as an Alien  
Category Two.
- 402 Smuggling of Alien(s) into the United States  
Category Three.
- 403 Offenses Involving Passports  
(a) If making an unlawful passport for distribution to another, possession with intent to distribute, or distribution of an unlawful passport, grade as Category Three;  
(b) If fraudulently acquiring or improperly using a passport, grade as Category Two.
- 404 Offenses Involving Naturalization or Citizenship Papers  
(a) If forging or falsifying naturalization or citizenship papers for distribution to another, possession with intent to distribute, or distribution, grade as Category Three;  
(b) If acquiring fraudulent naturalization or citizenship papers for own use or improper use of such papers, grade as Category Two;  
(c) If failure to surrender canceled naturalization or citizenship certificate(s), grade as Category One.

CHAPTER FIVE - OFFENSES INVOLVING REVENUE

SUBCHAPTER A - INTERNAL REVENUE OFFENSES

- 501 Tax Evasion [income tax or other taxes]  
(a) If the amount of tax evaded or evasion attempted is more than \$500,000, grade as Category Six;

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

- (b) If the amount of tax evaded or evasion attempted is more than \$100,000 but not more than \$500,000, grade as Category Five;
- (c) If the amount of tax evaded or evasion attempted is at least \$20,000 but not more than \$100,000, grade as Category Four;
- (d) If the amount of tax evaded or evasion attempted is at least \$2000 but less than \$20,000, grade as Category Three;
- (e) If the amount of tax evaded or evasion attempted is less than \$2000, grade as Category One.
- (f) Notes:
  - (1) Grade according to the amount of tax evaded or evasion attempted, not the gross amount of income. *[[Notes and Procedures. Example: An offender fails to report income of \$30,000, thus avoiding \$10,000 in taxes; the severity rating is determined by the tax avoided (i.e., \$10,000)]]*.
  - (2) Tax evasion refers to failure to pay applicable taxes. Grade a false claim for a tax refund (where tax has not been withheld) as a 'fraud' offense.

502 Operation of an Unregistered Still  
Grade as a 'tax evasion' offense.

#### SUBCHAPTER B - CUSTOMS OFFENSES

- 511 Smuggling Goods into the United States
- (a) If the conduct is for the purpose of tax evasion, grade as a 'tax evasion' offense.
  - (b) If the article is prohibited from entry to the country absolutely (e.g., illicit drugs or weapons), use the grading applicable to possession with intent to distribute of such articles, or the grading applicable to tax evasion, whichever is higher, but not less than Category Two;
  - (c) If the conduct involves breaking seals, or altering or defacing customs marks, or concealing invoices, grade according to (a) or (b), as applicable, but not less than Category Two.
- 512 Smuggling Goods into Foreign Countries in Violation of Foreign Law  
(re: 18 U.S.C. 546)  
Category Two.

#### SUBCHAPTER C - CONTRABAND CIGARETTES

- 521 Trafficking in Contraband Cigarettes (re: 18 U.S.C. 2342)  
Grade as a tax evasion offense.

### CHAPTER SIX - OFFENSES INVOLVING GOVERNMENTAL PROCESS

#### SUBCHAPTER A - IMPERSONATION OF OFFICIALS

- 601 Impersonation of Official
- (a) If for purposes of commission of another offense, grade according to the offense attempted, but not less than Category Two;
  - (b) Otherwise, grade as Category Two.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

\_\_\_\_\_  
FEBRUARY 13, 1984  
Ch. 34, p.17

SUBCHAPTER B - OBSTRUCTING JUSTICE

611 Perjury

- (a) If the perjured testimony concerns another offense, grade according to the underlying offense, but not less than Category Three;
- (b) Otherwise, grade as Category Three.
- (c) Suborning perjury, grade as perjury.

612 Unlawful False Statements Not Under Oath  
Category One.

613 Tampering With Evidence or Witness, Victim, or Informant

- (a) If the underlying purpose concerns another offense, grade according to the offense involved, but not less than Category Three;
- (b) Otherwise, grade as Category Three.
- (c) Exception: Intimidation by threat of physical harm, grade as not less than Category Five.

614 Misprision of a Felony\*

Grade as if 'accessory after the fact' but not higher than Category Three.

615 Harboring a Fugitive

Grade as 'accessory after the fact' but not higher than Category Three. Use the category of the offense for which the fugitive is wanted as the underlying offense.

616 Escape

If in connection with another federal offense for which a severity rating can be assessed, grade the underlying offense and apply the rescission guidelines to determine an additional penalty. Otherwise, grade as Category Three. *[[Notes and Procedures. Grade as Category Three only if the underlying offense behavior cannot be established in accord with Commission regulations]].*

617 Failure to Appear\*

- (a) In Felony Proceedings. If in connection with an offense for which a severity rating can be assessed, add to the guidelines otherwise appropriate the following: (i)  $\leq 6$  months if voluntary return within 6 days, or (ii) 6-12 months in any other case. Otherwise, grade as Category Three. *[[Notes and Procedures. Grade as Category Three only if the underlying offense behavior cannot be established in accord with Commission regulations]].*
- (b) In Misdemeanor Proceedings. Grade as Category One.
- (c) Note: For purposes of this subsection, a misdemeanor is defined as an offense for which the maximum penalty authorized by law (not necessarily the penalty actually imposed) does not exceed one year."

618 Contempt of Court

- (a) Criminal Contempt. Where imposed in connection with a prisoner serving a sentence for another offense, add  $\leq 6$  months to the guidelines otherwise appropriate.
- (b) Civil Contempt. See 28 C.F.R. 2.10.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

## SUBCHAPTER C - OFFICIAL CORRUPTION

- 621 Bribery or Extortion [use of official position - no physical threat]  
(a) Grade as a 'theft offense' according to value of the bribe, demand, or the favor received (whichever is greater), but not less than Category Three.  
(b) If the above conduct involves a pattern of corruption (e.g., multiple instances over a period exceeding six months), grade as not less than Category Four.  
(c) If the purpose of the conduct is the obstruction of justice, grade as if 'perjury'.  
(d) Notes:  
(1) The grading in this subchapter applies to each party to a bribe.  
(2) The extent to which the criminal conduct involves a breach of public trust, causing injury beyond that describable by monetary gain, may be considered as an aggravating factor.
- 622 Other Unlawful Use of Governmental Position  
Category Two.

## CHAPTER SEVEN - OFFENSES INVOLVING INDIVIDUAL RIGHTS

### SUBCHAPTER A - OFFENSES INVOLVING CIVIL RIGHTS

- 701 Conspiracy Against Rights of Citizens (re: 18 U.S.C. 241)  
(a) If death results, grade as Category Eight;  
(b) Otherwise, grade as if 'assault'.
- 702 Deprivation of Rights Under Color of Law (re: 18 U.S.C. 242)  
(a) If death results, grade as Category Eight;  
(b) Otherwise, grade as if 'assault'.
- 703 Federally Protected Activity (re: 18 U.S.C. 245)  
(a) If death results, grade as Category Eight;  
(b) Otherwise, grade as if 'assault'.
- 704 Intimidation of Persons in Real Estate Transactions Based on Racial Discrimination (re: 42 U.S.C. 3631)  
(a) If death results, grade as Category Eight;  
(b) Otherwise, grade as if 'assault'.
- 705 Transportation of Strikebreakers (re: 18 U.S.C. 1231)  
Category Two.

### SUBCHAPTER B - OFFENSES INVOLVING PRIVACY

- 711 Interception and Disclosure of Wire or Oral Communications (re: 18 U.S.C. 2511)  
Category Two.
- 712 Manufacture, Distribution, Possession, and Advertising of Wire or Oral Communication Intercepting Devices (re: 18 U.S.C. 2512)  
(a) Category Three.  
(b) Exception: If simple possession, grade as Category Two.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

- 713 Unauthorized Opening of Mail  
Category Two.

CHAPTER EIGHT - OFFENSES INVOLVING EXPLOSIVES AND WEAPONS

SUBCHAPTER A - EXPLOSIVES OFFENSES AND OTHER DANGEROUS ARTICLES

- 801 Unlawful Possession of Explosives; or Use of Explosives During a Felony  
Grade according to offense intended, but not less than Category Five.
- 802 Mailing Explosives or Other Injurious Articles with Intent to Commit a  
Crime  
Grade according to offense intended, but not less than Category Five.
- 803 Improper Transportation or Marking (re: 18 U.S.C. 832, 833, 834)  
(a) If resulting in death or serious bodily injury, grade as Category  
Four;  
(b) Otherwise, grade as Category Three.

SUBCHAPTER B - FIREARMS

- 811 Possession by Prohibited Person (e.g., ex-felon)  
Category Three.
- 812 Unlawful Possession or Manufacture of Sawed-off Shotgun, Machine Gun,  
Silencer, or Assassination kit\*  
(a) If silencer or assassination kit\*, grade as Category Six;  
(b) If sawed-off shotgun or machine gun, grade as Category Five.

[[Notes and Procedures. Consider unlawful possession of a weapon  
combined with other offenses under the multiple separate offense procedure of  
Chapter Thirteen]].

- 813 Unlawful Distribution of Weapons or Possession with Intent to Distribute  
(a) If silencer(s) or assassination kit(s)\*, grade as Category Six;  
(b) If sawed-off shotgun(s) or machine gun(s), grade as Category Five;  
(c) If multiple weapons (rifles, shotguns, or handguns), grade as Category  
Four;  
(d) If single weapon (rifle, shotgun, handgun), grade as Category Three.

CHAPTER NINE - OFFENSES INVOLVING ILLICIT DRUGS

SUBCHAPTER A - HEROIN AND OPIATE\* OFFENSES

- 901 Distribution or Possession with Intent to Distribute  
(a) If extremely large scale (e.g., involving 3 kilograms or more of 100%  
pure heroin, or equivalent amount), grade as Category Eight [except as  
noted in (c) below];  
(b) If very large scale (e.g., involving 1 kilogram but less than 3  
kilograms of 100% pure heroin, or equivalent amount), grade as  
Category Seven [except as noted in (c) below];  
(c) Where the Commission finds that the offender had only a peripheral  
role\*, grade conduct under (a) or (b) as Category Six;

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

- (d) If large scale (e.g., involving 50-999 grams of 100% pure heroin, or equivalent amount), grade as Category Six [except as noted in (e) below];
- (e) Where the Commission finds that the offender had only a peripheral role\*, grade conduct under (d) as Category Five.
- (f) If medium scale (e.g., involving 5-49 grams of 100% pure heroin, or equivalent amount), grade as Category Five;
- (g) If small scale (e.g., involving less than 5 grams of 100% pure heroin, or equivalent amount), grade as Category Four [except as noted in (h) below];
- (h) If evidence of opiate dependence and very small scale (e.g., involving less than 1.0 grams of 100% pure heroin, or equivalent amount), grade as Category Three.

902 Simple Possession  
Category One.

SUBCHAPTER B - MARIHUANA AND HASHISH OFFENSES

911 Distribution or Possession with Intent to Distribute

- (a) If extremely large scale (e.g., involving 20,000 pounds or more of marihuana/6,000 pounds or more of hashish/600 pounds or more of hash oil), grade as Category Six [except as noted in (b) below];
- (b) Where the Commission finds that the offender had only a peripheral role\*, grade conduct under (a) as Category Five;
- (c) If very large scale (e.g., involving 2,000-19,999 pounds of marihuana/600-5,999 pounds of hashish/60-599 pounds of hash oil), grade as Category Five;
- (d) If large scale (e.g., involving 200-1,999 pounds of marihuana/60-599 pounds of hashish/6-59.9 pounds of hash oil), grade as Category Four;
- (e) If medium scale (e.g., involving 50-199 pounds of marihuana/15-59.9 pounds of hashish/1.5-5.9 pounds of hash oil), grade as Category Three;
- (f) If small scale (e.g., involving 10-49 pounds of marihuana/3-14.9 pounds of hashish/.3-1.4 pounds of hash oil), grade as Category Two;
- (g) If very small scale (e.g., involving less than 10 pounds of marihuana/less than 3 pounds of hashish/less than .3 pounds of hash oil), grade as Category One.

912 Simple Possession  
Category One.

SUBCHAPTER C - COCAINE OFFENSES

921 Distribution or Possession with Intent to Distribute

- (a) If very large scale (e.g., involving more than 1 kilogram of 100% purity, or equivalent amount), grade as Category Six [except as noted in (b) below];
- (b) Where the Commission finds that the offender had only a peripheral role\*, grade conduct under (a) as Category Five;
- (c) If large scale (e.g., involving 100 grams-1 kilogram of 100% purity, or equivalent amount), grade as Category Five;
- (d) If medium scale (e.g., involving 5-99 grams of 100% purity, or equivalent amount), grade as Category Four;

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

- (e) If small scale (e.g., involving 1.0-4.9 grams of 100% purity, or equivalent amount), grade as Category Three;
- (f) If very small scale (e.g., involving less than 1 gram of 100% purity, or equivalent amount), grade as Category Two.

922 Simple Possession  
Category One.

SUBCHAPTER D - OTHER ILLICIT DRUG OFFENSES\*

- 931 Distribution or Possession with Intent to Distribute
- (a) If very large scale (e.g., involving more than 200,000 doses), grade as Category Six [except as noted in (b) below];
  - (b) Where the Commission finds that the offender had only a peripheral role\*, grade conduct under (a) as Category Five;
  - (c) If large scale (e.g., involving 20,000-200,000 doses), grade as Category Five;
  - (d) If medium scale (e.g., involving 1,000-19,999 doses), grade as Category Four;
  - (e) If small scale (e.g., involving 200-999 doses), grade as Category Three;
  - (f) If very small scale (e.g., involving less than 200 doses), grade as Category Two.

932 Simple Possession  
Category One.

--- NOTES TO CHAPTER NINE

- (1) Grade manufacture of synthetic illicit drugs as listed above, but not less than Category Five.
- (2) 'Equivalent amounts' for the cocaine and opiate categories may be computed as follows: 1 gram of 100% pure is equivalent to 2 grams of 50% pure and 10 grams of 10% pure, etc.

CHAPTER TEN - OFFENSES INVOLVING NATIONAL DEFENSE

SUBCHAPTER A - TREASON AND RELATED OFFENSES

1001 Treason  
Category Eight.

1002 Rebellion or Insurrection  
Category Seven.

SUBCHAPTER B - SABOTAGE AND RELATED OFFENSES

1011 Sabotage  
Category Eight.

- 1012 Enticing Desertion
- (a) In time of war or during a national defense emergency, grade as Category Four;
  - (b) Otherwise, grade as Category Three.

1013 Harboring or Aiding a Deserter  
Category One.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER C - ESPIONAGE AND RELATED OFFENSES

1021 Espionage  
Category Eight.

SUBCHAPTER D - SELECTIVE SERVICE OFFENSES

1031 Failure to Register, Report for Examination or Induction  
(a) If committed during time of war or during a national defense emergency, grade as Category Four;  
(b) If committed when draftees are being inducted into the armed services, grade as Category Three;  
(c) Otherwise, grade as Category One.

SUBCHAPTER E - OTHER NATIONAL DEFENSE OFFENSES

1041 Offenses Involving Nuclear Energy  
Unauthorized production, possession, or transfer of nuclear weapons or special nuclear material or receipt of or tampering with restricted data on nuclear weapons or special nuclear material, grade as Category Eight.

CHAPTER ELEVEN - OFFENSES INVOLVING ORGANIZED CRIME  
ACTIVITY, GAMBLING, OBSCENITY, SEXUAL EXPLOITATION OF  
CHILDREN, PROSTITUTION, AND NONGOVERNMENTAL BRIBERY

SUBCHAPTER A - ORGANIZED CRIME OFFENSES

1101 Racketeer Influence and Corrupt Organizations (re: 18 U.S.C. 1961-63)  
Grade according to the underlying offense attempted, but not less than Category Five.

1102 Interstate or Foreign Travel or Transportation in Aid of Racketeering Enterprise (re: 18 U.S.C. 1952)  
Grade according to the underlying offense attempted, but not less than Category Three.

SUBCHAPTER B - GAMBLING OFFENSES

1111 Gambling Law Violations - Operating or Employment in an Unlawful Business (re: 18 U.S.C. 1955)  
(a) If large scale operation [e.g., Sports books (estimated daily gross more than \$15,000); Horse books (estimated daily gross more than \$4,000); Numbers bankers (estimated daily gross more than \$2,000); Dice or card games (estimated daily 'house cut' more than \$1,000)]; grade as Category Four;  
(b) If medium scale operation [e.g., Sports books (estimated daily gross \$5,000 - \$15,000); Horse books (estimated daily gross \$1,500 - \$4,000); Numbers bankers (estimated daily gross \$750 - \$2,000); Dice or card games (estimated daily 'house cut' \$400 - \$1,000)]; grade as Category Three;

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

- (c) If small scale operation [e.g., Sports books (estimated daily gross less than \$5,000); Horse books (estimated daily gross less than \$1,500); Numbers bankers (estimated daily gross less than \$750); Dice or card games (estimated daily 'house cut' less than \$400)]; grade as Category Two;
- (d) Exception: Where it is established that the offender had no proprietary interest or managerial role, grade as Category One.

1112 Interstate Transportation of Wagering Paraphenalia (re: 18 U.S.C. 1953)  
Category Three.

1113 Wire Transmission of Wagering Information (re: 18 U.S.C. 1084)  
Grade as if 'operating a gambling business'.

1114 Operating or Owning a Gambling Ship (re: 18 U.S.C. 1082)  
Category Three.

1115 Importing or Transporting Lottery Tickets; Mailing Lottery Tickets or Related Matter (re: 18 U.S.C. 1301, 1302)  
(a) Grade as if 'operating a gambling business';  
(b) Exception: If non-commercial, grade as Category One.

#### SUBCHAPTER C - OBSCENITY

1121 Mailing, Importing, or Transporting Obscene Matter  
(a) If for commercial purposes, grade as Category Three;  
(b) Otherwise, Category One.

1122 Broadcasting Obscene Language  
Category One.

#### SUBCHAPTER D - SEXUAL EXPLOITATION OF CHILDREN

1131 Sexual Exploitation of Children\* (re: 18 U.S.C. 2251, 2252)  
(a) Category Six;  
(b) Exception: Where the Commission finds the offender had only a peripheral role (e.g., a retailer receiving such material for resale but with no involvement in the production or wholesale distribution of such material), grade as Category Five.

#### SUBCHAPTER E - PROSTITUTION AND WHITE SLAVE TRAFFIC

1141 Interstate Transportation for Commercial Purposes  
(a) If physical coercion, or involving person(s) of age less than 16, grade as Category Six;  
(b) If involving person(s) of ages 16-17, grade as Category Five;  
(c) Otherwise, grade as Category Four.

1142 Prostitution  
Category One.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

SUBCHAPTER F - NON-GOVERNMENTAL BRIBERY

1151 Bribery not Involving Federal, State, or Local Government Officials

- (a) If the value of the bribe or of the favor received (whichever is greater) is \$20,000 or more, grade as Category Three; otherwise, grade as Category Two.
- (b) If the conduct involves bribery in a sporting contest, grade as Category Three.

SUBCHAPTER G - CURRENCY OFFENSES

1161 Currency Offenses (e.g., laundering money)

- (a) If very large scale (e.g., the estimated gross amount of currency involved is more than \$500,000), grade as Category Six;
- (b) If large scale (e.g., the estimated gross amount of currency involved is more than \$100,000 but not more than \$500,000), grade as Category Five;
- (c) If medium scale (e.g., the estimated gross amount of currency involved is at least \$20,000 but not more than \$100,000), grade as Category Four;
- (d) If small scale (e.g., the estimated gross amount of currency involved is less than \$20,000), grade as Category Three.

CHAPTER TWELVE - MISCELLANEOUS OFFENSES

If an offense behavior is not listed, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed in Chapters One - Eleven. If, and only if, an offense behavior cannot be graded by reference to Chapters One - Eleven, the following formula may be used as a guide.

Maximum Sentence Authorized by Statute [Not necessarily the sentence imposed]	Grading (Category)
< 2 yrs . . . . .	1
2 - 3 yrs . . . . .	2
4 - 5 yrs . . . . .	3
6 - 10 yrs. . . . .	4
11 - 20 yrs. . . . .	5
21 - 29 yrs. . . . .	6
30 yrs - life . . . . .	7

CHAPTER THIRTEEN - GENERAL NOTES AND DEFINITIONS

SUBCHAPTER A - GENERAL NOTES

1. If an offense behavior can be classified under more than one category, the most serious applicable category is to be used.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

2. If an offense behavior involved multiple separate offenses, the severity level may be increased. Exception: in cases graded as Category Seven, multiple separate offenses are to be taken into account by consideration of a decision above the guidelines rather than by increasing the severity level. *[[Notes and Procedures.* In certain instances, the guidelines specify how multiple offenses are to be rated. In offenses rated by monetary loss (e.g., theft and related offenses, counterfeiting, tax evasion) or drug offenses, the total amount of the property or drugs involved is used as the basis for the offense severity rating (e.g., a number of check thefts should ordinarily be treated according to the total loss, rather than as multiple separate offenses). In instances not specifically covered in the guidelines, the decision-makers must exercise discretion as to whether or not the multiple offense behavior is sufficiently aggravating to justify increasing the severity rating. The following chart is intended to provide guidance in assessing whether the severity of multiple offenses is sufficient to raise the offense severity level; it is not intended as a mechanical rule.

#### MULTIPLE SEPARATE OFFENSES

Severity	Points	Severity	Points
Category One	= 1/9	Category Five	= 9
Category Two	= 1/3	Category Six	= 27
Category Three	= 1	Category Seven	= 45
Category Four	= 3		

Examples: 3 Category Five Offenses [3x(9)=27] = Category Six  
 5 Category Five Offenses [5x(9)=45] = Category Seven  
 2 Category Six Offenses [2x(27)=54] = Category Seven

The term 'multiple separate offenses' generally refers to offenses committed at different times. However, there are certain circumstances in which offenses committed at the same time are properly considered multiple separate offenses for the purpose of establishing the offense severity rating. These include (a) unrelated offenses, and (b) offenses involving the unlawful possession of weapons during commission of another offense.

*Examples:*

- (1) An offender commits a robbery (Category Five) in which he steals \$80,000 (Category Four). Because the offenses occurred at the same time and are related, grade in the highest applicable category (Category Five) and not as multiple separate offenses.
- (2) An offender commits a robbery (Category Five) in which shots are fired to scare the bank employees (Category Six). Because the offenses occurred at the same time and are related, grade in the highest applicable category (Category Six) and not as multiple separate offenses.
- (3) An offender when arrested for smuggling three aliens is found also in possession of \$8,000 worth of stolen goods. Even though the offenses were discovered at the same time, they are unrelated; therefore consideration under the multiple separate offenses procedure is appropriate.
- (4) An offender commits two robberies with a sawed-off shotgun. Grade under the multiple offense procedure as 3 Category Five offenses (3 x 9 = 27 points) = Category Six.]]

-----  
 \*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

3. In cases where multiple sentences have been imposed (whether consecutive or concurrent, and whether aggregated or not) an offense severity rating shall be established to reflect the overall severity of the underlying criminal behavior. This rating shall apply whether or not any of the component sentences has expired.
4. The prisoner is to be held accountable for his own actions and actions done in concert with others; however, the prisoner is not to be held accountable for activities committed by associates over which the prisoner has no control and could not have been reasonably expected to foresee. *[[Notes and Procedures. Example: An offender on one occasion steals \$2000 worth of property and sells it to a fence, who is engaged in an ongoing operation. If it is not established that the offender was himself an active participant in the ongoing operation, he is to be held accountable only for the one incident]]*.
5. The following are examples of circumstances that may be considered as aggravating factors: extreme cruelty or brutality to a victim; the degree of permanence or likely permanence of serious bodily injury resulting from the offender's conduct; an offender's conduct while attempting to evade arrest that causes circumstances creating a significant risk of harm to other persons (e.g., causing a high speed chase or provoking the legitimate firing of a weapon by law enforcement officers).
6. The phrase 'may be considered an aggravating/mitigating factor' is used in this index to provide guidance concerning certain circumstances which may warrant a decision above or below the guidelines. This does not restrict consideration of above or below guidelines decisions only to these circumstances, nor does it mean that a decision above or below the guidelines is mandated in every such case.

#### SUBCHAPTER B - DEFINITIONS

1. 'Accessory after the fact' refers to the conduct of one who, knowing an offense has been committed, assists the offender to avoid apprehension, trial, or punishment (e.g., by assisting in disposal of the proceeds of an offense). Note: Where the conduct consists of concealing an offense by making false statements not under oath, grade as 'misprision of felony'. Where the conduct consists of harboring a fugitive, grade as 'harboring a fugitive'.
2. 'Assassination kit' refers to a disguised weapon designed to kill without attracting attention. Unlike other weapons such as sawed-off shotguns which can be used to intimidate, assassination kits are intended to be undetectable in order to make the victim and bystanders unaware of the threat. A typical assassination kit is usually, but not always, a firearm with a silencer concealed in a briefcase or similar disguise and fired without showing the weapon.
3. 'Bodily injury' refers to injury of a type normally requiring medical attention [e.g., broken bone(s), laceration(s) requiring stitches, severe bruises].

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

4. 'Carnal knowledge' refers to sexual intercourse with a female who is less than 16 years of age and is not the wife of the offender.
5. 'Extortionate extension of credit' refers to any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.
6. 'Failure to appear' refers to the violation of court imposed conditions of release pending trial, appeal, or imposition or execution of sentence by failure to appear before the court or to surrender for service of sentence.
7. 'Forcible felony' includes, but shall not be limited to, kidnaping, rape or sodomy, aircraft piracy or interference with a flight crew, arson or property destruction offenses, escape, robbery, extortion, or criminal entry offenses, and attempts to commit such offenses.
8. 'Involuntary manslaughter' refers to the unlawful killing of a human being without malice in the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection of a lawful act which might produce death.
9. 'Misprision of felony' refers to the conduct of one who, having knowledge of the actual commission of a felony, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority. The 'concealment' described above requires an act of commission (e.g., making a false statement to a law enforcement officer).
10. 'Murder' refers to the unlawful killing of a human being with malice aforethought. 'With malice aforethought' generally refers to a finding that the offender formed an intent to kill or do serious bodily harm to the victim without just cause or provocation.
11. 'Opiate' includes heroin, morphine, opiate derivatives, and synthetic opiate substitutes.
12. 'Other illicit drug offenses' include, but are not limited to, offenses involving the following: amphetamines, hallucinogens, barbiturates, methamphetamines, and phencyclidine (PCP).
13. 'Other medium of exchange' includes, but is not limited to, postage stamps, governmental money orders, or governmental coupons redeemable for cash or goods.
14. 'Peripheral role' in drug offenses refers to conduct such as that of a person hired as a deckhand on a marijuana boat, a person hired to help offload marijuana, a person with no special skills hired as a courier of drugs on a commercial airline flight, or a person hired as a chauffeur in a drug transaction. This definition does not include persons with decision-making or supervisory authority, persons with relevant special skills (e.g., a boat captain, chemist, or airplane pilot), or persons who finance such operations.

-----  
\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

15. 'Protected person' refers to a person listed in 18 U.S.C. 351 (relating to Members of Congress), 1114 (relating to certain officers and employees of the United States), 1116 (relating to foreign officials, official guests, and internationally protected persons), or 1751 (relating to presidential assassination and officials in line of succession).
16. 'Serious bodily injury' refers to injury creating a substantial risk of death, major disability or loss of a bodily function, or disfigurement.
17. 'Serious bodily injury clearly intended' refers to a limited category of offense behaviors where the circumstances indicate that the bodily injury intended was serious (e.g., throwing acid in a person's face, or firing a weapon at a person) but where it is not established that murder was the intended object. Where the circumstances establish that murder was the intended object, grade as an 'attempt to murder'.
18. 'Sexual exploitation of children' refers to employing, using, inducing, enticing, or coercing a person less than 16 years of age to engage in any sexually explicit conduct for the purpose of producing a visual or print medium depicting such conduct with knowledge or reason to know that such visual or print medium will be distributed for sale, transported in interstate or foreign commerce, or mailed. It also includes knowingly transporting, shipping, or receiving such visual or print medium for the purposes of distribution for sale, or knowingly distributing for sale such visual or print medium.
19. 'Trafficking in stolen property' refers to receiving stolen property with intent to sell.
20. 'Value of the property' refers to the estimated replacement cost to the victim.
21. 'Voluntary manslaughter' refers to the unlawful killing of a human being without malice upon a sudden quarrel or heat of passion."

---

\*Terms marked by an asterisk are defined in Chapter Thirteen.

10/01/83

---

FEBRUARY 13, 1984  
Ch. 34, p.29

SALIENT FACTOR SCORE (SFS 81)

Item A: PRIOR CONVICTIONS/ADJUDICATIONS (ADULT OR JUVENILE) .....

- None ..... = 3
- One ..... = 2
- Two or Three ..... = 1
- Four or more ..... = 0

Item B: PRIOR COMMITMENT(S) OF MORE THAN THIRTY DAYS.....   
(ADULT OR JUVENILE)

- None ..... = 2
- One or two ..... = 1
- Three or more ..... = 0

Item C: AGE AT CURRENT OFFENSE/PRIOR COMMITMENTS .....

- Age at commencement of current offense
- 26 years of age or more ..... = 2
- 20-25 years of age ..... = 1
- 19 years of age or less ..... = 0

\*\*\*Exception: If five or more prior commitments of more than thirty days (adult or juvenile), place an "X" here \_\_\_\_\_ and score this item ..... = 0

Item D: RECENT COMMITMENT FREE PERIOD (THREE YEARS), .....

- No prior commitment of more than thirty days (adult or juvenile) or released to the community from last such commitment at least three years prior to the commencement of the current offense ..... = 1
- Otherwise ..... = 0

Item E: PROBATION/PAROLE/CONFINEMENT/ESCAPE STATUS .....   
VIOLATOR THIS TIME

- Neither on probation, parole, confinement, or escape status at the time of the current offense; nor committed as a probation, parole, confinement, or escape status violator this time ..... = 1
- Otherwise ..... = 0

Item F: HEROIN/OPIATE DEPENDENCE .....

- No history of heroin/opiate dependence ... = 1
- Otherwise ..... = 0

TOTAL SCORE .....

Note: For purposes of the Salient Factor Score, an instance of criminal behavior resulting in a judicial determination of guilt or an admission of guilt before a judicial body shall be treated as a conviction, even if a conviction is not formally entered.

10/1/83

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-34.230 Communication With Parole Commission

In order to insure that all pertinent information is made available to the Pardon Attorney and the Parole Commission when U.S. Attorneys contact these offices in connection with individuals who are subject to their jurisdictions, it is requested that such contacts be by letter over the signature of the U.S. Attorney, with a copy of the letter forwarded to the Criminal Division. This procedure will enable the Criminal Division to check its files and personnel for other pertinent information which should be considered by the Pardon Attorney or the Parole Commission.

9-34.240 Period of Supervision

A prisoner released on parole remains under supervision to the expiration of the maximum term of sentence. 18 U.S.C. §4201(a). However, the Parole Commission has the power to terminate supervision at an earlier date, 18 U.S.C. §4211(a), and must terminate supervision five years after the parolee's release on parole unless the Commission finds after a hearing that it is likely that the parolee will engage in future criminal conduct. 18 U.S.C. §4211(c).

9-34.250 Mandatory Release

A prisoner who is denied parole serves his/her term less good-time deductions, and is then released under parole supervision for the remainder of his/her maximum term less 180 days. 18 U.S.C. §4164. This form of release is called mandatory release.

9-34.260 Violator Warrants

In the case of a prisoner released on parole, or mandatory release, a summons or a warrant charging violation of the conditions of parole may be issued by the Parole Commission. 18 U.S.C. §4213.

If the misconduct constituting the violation of parole is a new criminal offense punishable by imprisonment and results in a conviction, either state or federal, the revocation of parole causes the parolee to forfeit sentence credit for the time he/she spent on parole. 18 U.S.C. §4210(b)(2); see Harris v. Day, 649 F.2d 755 (10th Cir. 1981). If the misconduct is not also the subject of a separate criminal conviction, however, the time spent on parole is not forfeited.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

A federal court has no power to direct that a sentence shall run concurrently with the time owing as a parole violator under a previous sentence unless the Parole Commission has already ordered that the parole be revoked. 18 U.S.C. §4210. See Zerbst v. Kidwell, 304 U.S. 359 (1938); Tippit v. Squier, 145 F.2d 211 (9th Cir. 1944).

9-34.270 Release on Bail

When a parolee has been arrested as a parole violator, a federal court has no inherent power to order the release of the parolee on bail pending his/her parole revocation hearing. If a prisoner has filed a habeas corpus petition, the court has the power to grant his/her release on bail pending the disposition of the habeas corpus petition, but only upon a showing of extraordinary circumstances. Luther v. Molina, 627 F.2d 71 (7th Cir. 1980); Galante v. Warden, 573 F.2d 707 (2d Cir. 1977).

9-34.300 PARDON

Please refer to USAM 1-3.108 (Office of the Pardon Attorney). With respect to correspondence with the Pardon Attorney, please adhere to USAM 9-34.230, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-34.400 SENTENCING REFORM ACT OF 1984

9-34.410 Introduction

The Sentencing Reform Act of 1984, when it is implemented, will completely reform the federal sentencing system. The new system is intended to promote the goals of fairness--to the public and to defendants --and uniformity in sentencing by (1) providing a comprehensive and consistent statement of the purposes of sentencing and of the sentences available to achieve those purposes; (2) requiring judges to impose sentences pursuant to detailed guidelines established by an independent Sentencing Commission; (3) permitting defense appeals of sentences above the guideline ranges and permitting government appeals of sentences below the guideline ranges; and (4) abolishing parole. Although most of the Act will not become effective until November 1, 1986, the repeal of the Youth Corrections Act took effect on October 12, 1984. See USAM 9-8.200. However, the Department's position is that the Act continues to be applicable to defendants whose offenses were committed before the latter date.

9-34.420 The New Sentencing Scheme, Policy [Reserved]

9-34.430 Criminal Division Contacts

Questions on the sentencing chapter, other than those concerning fine collection, should be directed to attorneys in the General Litigation and Legal Advice Section (FTS 724-7081).

UNITED STATES ATTORNEY'S MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 37

	<u>Page</u>
9-37.000	<u>HABEAS CORPUS</u> 1
9-37.001	Availability of Writ 1
9-37.100	FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES 1
9-37.110	<u>Habeas Corpus Relief of Servicemen Denied Discharge as Conscientious Objectors</u> 1
9-37.111	Exhaustion of Military Judicial Remedies 1
9-37.112	Exhaustion of Military Adminis- trative Remedies 2
9-37.120	<u>Bureau of Prisons Policy Admininstra- tive Remedy Procedure</u> 2
9-37.130	<u>Parole Commission Administrative Appeal Procedure</u> 2
9-37.200	LACK OF PROPER JURISDICTION/VENUE 3
9-37.210	<u>District for Venue Purposes</u> 3
9-37.220	<u>Presumption in Favor of Transfer to Disrict of Confinement</u> 3
9-37.300	HABEAS CORPUS IS NOT A JURISDICTIONAL BASE FOR CIVIL DAMAGE CLAIMS 3
9-37.400	MOOTNESS 3
9-37.500	FEDERAL COURTS WILL NOT REVIEW PRISON AND PAROLE DECISIONS ABSENT A CLEAR ABUSE OF DISCRETION 3

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-37.000 HABEAS CORPUS

9-37.001 Availability of Writ

A federal prisoner may contest the legality of his/her custody (conditions of confinement, duration of sentence) by petitioning the district court for writs of habeas corpus (28 U.S.C. §2241). Such petition must be directed to the court of the judicial district in which the prisoner's custodian (warden or jailer) may be reached by service of process. 28 U.S.C. §2243. See Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 495-501 (1973), (the court distinguishes between the actual custodian for jurisdiction and venue purposes.) The Attorney General, Director of the Bureau of Prisons and the Chairman of the Parole Commission are usually not the custodians of the petitioning prisoner. McCoy v. U.S. Board of Parole, 537 F.2d 962, 964 (8th Cir. 1976).

When a petition is followed by award of the writ or a rule to show cause, and it appears that the identical issue or issues were disposed of on a previous application for a writ, and that the current petition contains no new issue, the U.S. Attorney should file a motion to dismiss on that ground in conjunction with (his) return or answer. Such procedure is proper under authority of 28 U.S.C. §2244. ← his/her

In addition, the defenses set forth in the following USAM sections should be considered in filing a return to a habeas corpus action.

9-37.100 FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

9-37.110 Habeas Corpus Relief of (Servicemen) Denied Discharge as Conscientious Objectors ← Members of the Service

9-37.111 Exhaustion of Military Judicial Remedies

There is no requirement that a (serviceman) exhaust military judicial remedies before seeking habeas corpus relief as a conscientious objector. In other words, the pendency of military courtmartial proceedings has no bearing on the availability of habeas corpus relief for a (serviceman) seeking discharge from the service as a conscientious objector. Parisi v. Davidson, 405 U.S. 34 (1972). The reason for this is that the relief sought by the petitioner, i.e., honorable discharge from the service, would not be available to the petitioner "with reasonable promptness and certainty" ← member of the service ← member of the service

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

through the machinery of the military judicial system..." Parisi v. Davidson, supra at 41-42;

9-37.112 Exhaustion of Military Administrative Remedies

The decision of the military will be deemed ripe for judicial review upon the final action of the Department of the Army, Conscientious Objector Review Board, as delegate of the Secretary of the Army; Chief, Office of Personnel, as delegate of the Commandant of the Coast Guard; Commandant of the Marine Corps; Commander, Naval Military Personnel Command, Department of the Navy; the Director, Secretary of the Air Force/Personnel Council (SAF/PC), in the case of officers, or, in the case of enlisted personnel, action by Chief of Operation Programs, Enlisted Separation Branch (MPC/MPCAKE). Boards for the Correction of Military Records also exist in the various military branches. An application to these military boards is deemed to be an extraordinary remedy. While such procedures remain available, exhaustion of such a remedy should not be insisted on by the government as a precondition to judicial review. See Montgomery v. Rumsfeld, 572 F.2d 250 (9th Cir. 1978); Hayes v. Secretary of Defense, 515 F.2d 668 (D.C. Cir. 1975); Ludlum v. Resor, 507 F.2d 398 (1st Cir. 1974).

9-37.120 Bureau of Prisons Policy Administrative Remedy Procedure

A. The Bureau of Prisons has established a comprehensive administrative procedure to review a prisoner's complaints which relate to any aspect of imprisonment. 28 C.F.R. §542.13.

B. A prisoner should exhaust these administrative procedures before seeking habeas corpus relief. Bradshaw v. Carlson, 682 F.2d 1050, 1052 (3d Cir. 1981); Kyle v. Hansberry, 677 F.2d 1386, 1391 (11th Cir. 1982).

9-37.130 Parole Commission Administrative Appeal Procedure

A. The U.S. Parole Commission has established comprehensive administrative review procedures. See 28 C.F.R. §§2.25, 2.26.

B. Prisoners must exhaust those administrative remedies before seeking habeas corpus relief. Ruwiwat v. Smith, 701 F.2d 844, 845 (9th Cir. 1983); Guida v. Nelson, 603 F.2d 261, 262 (2d Cir. 1979); U.S. ex rel. Saunders v. Arnold, 535 F.2d 848, 851 (3d Cir. 1976).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-37.200 LACK OF PROPER JURISDICTION/VENUE

9-37.210 District for Venue Purposes

The most appropriate district for venue purposes is the one in which the prisoner is confined or where the immediate custodian is located.

A. The jurisdiction of the district court is dependant on the ability of the court issuing the writ to exercise personal jurisdiction over the custodian. 28 U.S.C. §2241(a); Braden v. 30th Judicial Circuit Court, supra.

B. The Board of Parole is not the appropriate party in a habeas corpus case, and venue is best placed in the district where the prisoner is confined. Billiteri v. Board of Parole, 541 F.2d 938, 948 (2d Cir. 1976).

9-37.220 Presumption in Favor of Transfer to District of Confinement

Starnes v. McGuire, 512 F.2d 918 (D.C. Cir. 1974) (en banc).

9-37.300 HABEAS CORPUS IS NOT A JURISDICTIONAL BASE FOR CIVIL DAMAGE CLAIMS

Preiser v. Rodriguez, 411 U.S. 496 (1975).

9-37.400 MOOTNESS

A. Prisons: Preiser v. Newkirk, 422 U.S. 395 (1975).

B. Parole: Weinstein v. Bradford, 423 U.S. 147, 149 (1975) (per curiam).

9-37.500 FEDERAL COURTS WILL NOT REVIEW PRISON AND PAROLE DECISIONS ABSENT A CLEAR ABUSE OF DISCRETION

A. Prisons: Sellers v. Ciccone, 530 F.2d 199, 201-203 (8th Cir. 1976).

B. Parole: Zanniro v. Arnold, 531 F.2d 687, 690 (3d Cir. 1976); Solomon v. Elsea, 676 F.2d 282, 290 (7th Cir. 1982) (per curiam).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A prisoner may attack the legality of the imposition of sentence (as opposed to the legality of the execution of sentence) by filing a motion to vacate, correct or set aside the sentence under 28 U.S.C. §2255. Such a motion should be made in the district where the court imposed the sentences.

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 38

	<u>Page</u>
9-38.000 <u>FORFEITURES</u>	1
9-38.100 OFFERS IN COMPROMISE OF FORFEITURE	1
9-38.110 <u>Authority to Compromise Forfeiture</u>	1
9-38.200 REMISSION OR MITIGATION OF FORFEITURE	2
9-38.210 <u>Procedure</u>	2

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-38.000 FORFEITURES

General materials on criminal and civil forfeiture may be found in the Drug Agents' Guide to Forfeiture of Assets (prepared by the Drug Enforcement Administration (DEA)), which is available for purchase from the Government Printing Office, and in Criminal Forfeitures Under the RICO and Continuing Criminal Enterprise Statutes in the Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress (prepared by the Criminal Division), and in Forfeitures Volume I: Introduction to Civil Statutes (prepared by the Asset Forfeiture Office, Criminal Division). In addition, the Asset Forfeiture Office is planning a new manual on forfeiture procedures with additional discussions of the provisions of the Comprehensive Crime Control Act of 1984 relating to forfeiture and the Department of Justice Assets Forfeiture Fund. In the meantime, attorneys with forfeiture questions are encouraged to contact the Asset Forfeiture Office at FTS 272-6423. Its mailing address is:

Asset Forfeiture Office  
Benjamin Franklin Station  
Post Office Box 521  
Washington, D.C. 20044

9-38.100 OFFERS IN COMPROMISE OF FORFEITURE

9-38.110 Authority to Compromise Forfeiture

Attorney General Order No. 1034-83 and Criminal Division Directive No. 116, effective October 26, 1983, have re delegated the authority of the Assistant Attorney General of the Criminal Division under 28 C.F.R. §§0.160, 0.162, 0.164, and 0.171 to close or compromise civil and criminal forfeiture cases (other than bail bond forfeitures) to the Director of the Asset Forfeiture Office. They also redelegate to the U.S. Attorneys the authority of the Assistant Attorney General to close a forfeiture case or to accept or reject offers in compromise made in relation to some forfeiture cases. U.S. Attorneys are required to "consult" with the Asset Forfeiture Office before accepting or rejecting an offer in compromise or plea bargain in which the difference between the actual value of the property and the proposed settlement is \$60,000 or more. Where the difference between the actual value of the property and the proposed settlement exceeds \$750,000 or 10 percent of the original claim, whichever is greater, approval by the Deputy Attorney General is required in accordance with 28 C.F.R. §§0.160 and 0.161. Authorization requests for such settlements are to be processed through the Asset Forfeiture Office.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

When the agency or agencies involved have objected in writing to the proposed closing or to the acceptance or rejection of an offer in compromise, and the matter cannot be resolved, or when the U.S. Attorney believes that the matter should receive special attention because of a question of law or policy or for any other reason, it must be decided by the Assistant Attorney General. Such matters should be submitted to the Asset Forfeiture Office in the first instance, which will make a recommendation to the Assistant Attorney General.

9-38.200 REMISSION OR MITIGATION OF FORFEITURE

Attorney General Order No. 1034-83 and Criminal Division Directive No. 116, effective October 26, 1983, have redelegated the authority of the Assistant Attorney General of the Criminal Division to grant or deny petitions for remission or mitigation of forfeiture to the Director of the Asset Forfeiture Office.

9-38.210 Procedure

Seized property appraised by the seizing agency at \$100,000 or less when seized is subject to administrative forfeiture by the seizing agency unless a claimant brings the matter into court by filing a claim and a cost bond. Petitions for remission or mitigation of administrative forfeitures should be submitted to the seizing agency. See 28 C.F.R. §9.4. Seized property having an appraised value exceeding \$100,000 when seized and seized property for which a claimant has filed a claim and a cost bond are subject to judicial forfeiture, and petitions for the remission or mitigation of such property, should be submitted to the U.S. Attorney for the judicial district in which the property has been seized. See 28 C.F.R. §9.3. All petitions submitted should conform to the requirements set forth in 28 C.F.R. §§9.3(a) and 9.5(a).

Upon receipt of a petition for remission or mitigation of forfeiture, the U.S. Attorney should direct the seizing agency to investigate and submit a report to him/her on the merits of the petition if such investigation is necessary to determine the merits of the petition. A copy of this report, the petition, and a recommendation from the seizing agency and the U.S. Attorney as to allowance or denial of the petition should be forwarded to the Asset Forfeiture Office, Post Office Box 521, Ben Franklin Station, Washington, D.C. 20044. The telephone number is FTS 272-6423. The Asset Forfeiture Office will not accept a petition in cases where a similar petition has been administratively denied by the seizing

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

agency prior to the referral of the case to the U.S. Attorney for forfeiture proceedings. See 28 C.F.R. §9.3(g). In judicial forfeiture cases other than those under the Internal Revenue liquor laws, the Director of the Asset Forfeiture Office will consider petitions for remission or mitigation until the property is sold, placed in official use, or otherwise disposed of. In judicial forfeitures under the Internal Revenue liquor laws, petitions will be considered only prior to the time a decree of forfeiture is entered; thereafter, district courts have exclusive jurisdiction over the property. See 28 C.F.R. §9.3(h); 18 U.S.C. §3617.

The Asset Forfeiture Office will notify the petitioner or his/her attorney, and the U.S. Attorney, of the disposition of the petition in accordance with 28 C.F.R. §9.3(d) or (e). If the petition is denied, the petitioner has 20 days from the date of the notice to submit one request for reconsideration (based on evidence not previously considered) to the Director of the Asset Forfeiture Office and to submit a copy of such request to the U.S. Attorney. See 28 C.F.R. §§9.3(j) through (m). Upon receipt of a copy of a request for reconsideration, the U.S. Attorney should withhold further action taken on the request by the Director of the Asset Forfeiture Office. If the U.S. Attorney does not receive a copy of the request for reconsideration within 20 days of the date of the notice of denial, he/she should proceed with the forfeiture. See 28 C.F.R. §9.3(k).

Within 3 months after the disposal of forfeited property a petition for restoration of the proceeds of sale (or for value where the property has been retained or delivered for official use) may be submitted in the same manner as a petition for remission or mitigation. In accordance with 28 C.F.R. §9.3(f), petitions for restoration may be submitted only where the petitioner was in circumstances which prevented him/her from knowing of the property's seizure prior to the declaration of forfeiture.



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Washington, D.C. 20530

April 23, 1987

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

wfw  
by  
gk  
7-28-84  
USAM (Superseded)

William F. Weld  
Assistant Attorney General  
Criminal Division

RE: Administrative Forfeiture of Real Property

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at end of Title 9.

AFFECTS: USAM 9-38.211

PURPOSE: This bluesheet sets forth new policy requiring that all real property forfeiture under all laws that allow such forfeitures, including 18 U.S.C. §2245 and 21 U.S.C. §881, shall proceed judicially.

The following is a new section:

9-38.211 Administrative Forfeiture of Real Property

The enactment of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, broadened the categories of real property forfeitable to the United States. For example, 21 U.S.C. §881(a) (7) provides for the forfeiture of real property that was "used or intended to be used . . . to commit or to facilitate the commission of [a felony under title 21 of the United States Code]." In addition, the customs laws that govern most civil forfeiture actions were amended to allow for the administrative forfeiture of property with an appraised value of \$100,000 or less, 19 U.S.C. §1607.

Administrative forfeitures are by definition uncontested and are conducted solely by the investigative agency, primarily the Drug Enforcement Administration and Federal Bureau of Investigation. If a party with an interest in the property seeks to contest the forfeiture, the party must file with the investigative agency a claim to the property and a cost bond. The matter is thereafter referred to the appropriate United States Attorney for initiation of a judicial forfeiture action.

The attendant increase in administrative forfeitures of real property has proved to be a mixed blessing. First, the number of properties forfeited administratively has not been as great as we first expected. Experience has shown that a party with an interest in real property will generally file a claim and bond thereby obtaining a judicial resolution of the forfeiture.

Second, the United States has been unsuccessful in selling for fair market value the real property forfeited administratively. The United States Marshals Service, the agency charged with the disposal of the majority of forfeited real property, seeks to sell property in a number of ways, ranging from auction to a sale negotiated by a real estate broker. Regardless of the method of sale used, in most instances the buyer must obtain financing in order to purchase the property. The procurement of title insurance by the buyer for the protection of the lending institution is a condition precedent to obtaining the requested financing.

It has come to the government's attention that title insurance companies have refused to issue title insurance on real property forfeited administratively. The net result of such refusal is either the stock piling of forfeited real estate resulting in increased expenses for the United States and a deprivation of the proceeds of sale to the Assets Forfeiture Fund, or a cash auction of the property for far less than its fair market value.

Department personnel and various Assistant United States Attorneys have contacted numerous title insurance companies throughout the country in an effort to resolve this problem. Notwithstanding attempts to convince the companies of the legality of administrative forfeitures and assurances that the due process rights of all known parties-in-interest have not been abridged, the United States has been unsuccessful in getting any national title insurance company to agree to issue title insurance on property forfeited to the United States administratively.

When this problem first came to light, the Department suggested the Marshals Service request that the appropriate United States Attorney institute a quiet title action in order to obtain a title acceptable to the title insurance companies. Such actions require notification of the same parties notified in the initial administrative forfeiture action and have often resulted in a rehearing of the forfeiture. Additionally, the Asset Forfeiture Office has been informed that many Assistant United States Attorneys have refused to institute such actions.

In order to resolve this problem, it has been determined that henceforth all real property forfeitures under all laws that allow such forfeitures, including 18 U.S.C. §2254 and 21 U.S.C. §881, shall proceed judicially. It is not anticipated that this policy will result in a significant increase in case load for any United States Attorney's Office.

The Criminal Division has conveyed this change in policy to all Department agencies. In addition, the United States Attorney in each district should contact all applicable law enforcement agencies in that district to ensure that this policy is fully adhered to and disseminated.

All questions regarding this matter should be directed to the Director of the Asset Forfeiture Office, Criminal Division.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 39

	<u>Page</u>
9-39.000 <u>CONTEMPT OF COURT</u>	1
9-39.010 <u>General Definition of Contempt</u>	1
9-39.100 CRIMINAL VERSUS CIVIL CONTEMPT	1
9-39.110 <u>Tests for Distinguishing</u>	1
9-39.111 Nature of the Relief Sought	1
9-39.112 Mechanical Distinction	1
9-39.113 Purging (Doing those acts, whether of a negative or affirmative nature, which were required by the court.)	2
9-39.120 <u>Characterization of the Action When Both Criminal and Civil Contempt Elements are Present</u>	2
9-39.200 INDIRECT VERSUS DIRECT CONTEMPT	3
9-39.300 INDIRECT CRIMINAL CONTEMPT	3
9-39.310 <u>Institution of the Action</u>	3
9-39.311 Federal Jurisdiction and Venue	3
9-39.312 Notice Under Rule 42(b) of the Federal Rules of Criminal Procedure	3
9-39.313 Probable Cause of a Willful Violation	5
9-39.314 Necessity of a Demand for Compliance with the Decree	5
9-39.315 Use of a Single Petition to Institute Both a Civil and Criminal Contempt Action	6
9-39.316 Role of the Grand Jury	6
9-39.317 Persons Against Whom the Action May Be Commenced	6
9-39.318 Role of the Prosecutor	7
9-39.320 <u>Defenses</u>	7
9-39.321 Negation of Essential Elements	7
9-39.322 Statute of Limitations	8
9-39.323 Good Faith Reliance Upon the Advice of Counsel	9

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

	<u>Page</u>
9-39.324	Purging 9
9-39.325	Failure to Attempt to Obtain Compliance Prior to Filing 9
9-39.326	Violation of an Invalid Decree 10
9-39.327	Inability Versus Refusal to Comply 10
9-39.330	<u>Consolidation for Trial of Issues In Civil and Criminal Contempt Proceedings</u> 10
9-39.340	<u>Right to Counsel</u> 11
9-39.350	<u>Privilege Against Self-Incrimination</u> 11
9-39.360	<u>Burden of Proof</u> 11
9-39.400	DIRECT CONTEMPT 11
9-39.410	<u>Witness's Refusal to Obey Court Order To Testify at Trial Versus Witness's Refusal to Obey Court Order to Testify Before a Grand Jury</u> 11
9-39.420	<u>Necessity of Warning of Contemptuous Conduct</u> 12
9-39.430	<u>Summary Punishment at the End of Trial --Judicial Bias</u> 13
9-39.440	<u>Certification of Judge Under Rule 42(a) of the Federal Rules of Criminal Procedure</u> 14
9-39.500	LEAST POSSIBLE POWER RULE 15
9-39.600	TRIAL 15
9-39.610	<u>Jury Trial</u> 15
9-39.620	<u>Public Trial</u> 16
9-39.700	DOUBLE JEOPARDY 16
9-39.800	SENTENCING 16

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-39.810	<u>Effect of 18 U.S.C. §401 on the Appropriate Fine or Imprisonment</u>	16
9-39.820	<u>Discretion with Respect to the Appropriate Fine or Imprisonment</u>	17
9-39.900	APPEAL	17

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-39.000 CONTEMPT OF COURT

9-39.010 General Definition of Contempt

Contempt of court may be generally defined as an act of disobedience or disrespect towards the judicial branch of the Government, or an interference with its orderly process. It is an offense against a court of justice or a person to whom the judicial functions of the sovereignty have been delegated.

9-39.100 CRIMINAL VERSUS CIVIL CONTEMPT

Since different substantive and procedural rules have been held to apply to civil and criminal contempts, distinctions between the two forms of contempt must be noted.

9-39.110 Tests for Distinguishing

9-39.111 Nature of the Relief Sought

A contempt is criminal where punishment by way of fine or imprisonment is deemed imperative to vindicate the authority of the court. In contrast, civil contempt is remedial, rather than punitive, serves only the purpose of the party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance. Shillitani v. United States, 384 U.S. 364, 368-70 (1966); Nye v. United States, 313 U.S. 33, 42 (1941); Gompers v. Bucks Stove and Range Co., 221 U.S. 418, 442 (1911); Carlson Fuel Co. v. United Mine Workers, 517 F.2d 1348, 1349 (4th Cir. 1975); In Re Rumaker, 646 F.2d 870 (5th Cir. 1980); United States v. Powers, 629 F.2d 619 (9th Cir. 1980); United States v. North, 621 F.2d 1255 (3d Cir. 1980), cert. denied, 449 U.S. 866 (1981); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770 (9th Cir. 1983).

9-39.112 Mechanical Distinction

A Proceeding in criminal contempt is a separate and independent proceeding at law from the main cause, with the public on one side and the defendant on the other. Proceedings in civil contempt are usually between the original parties and are instituted and tried as part of the main cause or as a supplemental proceeding thereto. Bray v. United States, 423 U.S.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

73 (1975); Gompers v. Bucks Stove and Range Co., *supra*, 221 U.S. at 444-45; Parker v. United States, 153 F.2d 66, 70 (1st Cir. 1946).

9-39.113 Purging (Doing those acts, whether of a negative or affirmative nature, which were required by the court.)

The general rule is that purging of contempt is not a complete defense in a criminal contempt action. This is for the reason that the primary aim of a criminal contempt action is vindication of the authority of the court and punishment for disobedience already accomplished. Consequently, a person found guilty of criminal contempt may be sentenced to a fixed and definite term of imprisonment, or be required to pay an unconditional fine. United States v. Shipp, 203 U.S. 563 (1906); Skinner v. White, 505 F.2d 685, 689 (5th Cir. 1974).

In a civil contempt action, the issue of purging is determined by whether the action is coercive or compensatory in nature. A "coercive civil" contempt action is one wherein the principal object is respondent's compliance with the court decree. This is to be contrasted with a "compensatory civil" contempt action wherein the principal object is the receipt of an award or compensation. The contemnor in a coercive civil contempt action possesses the "keys to his own cell" since he may not be sentenced to a fixed or definite term of imprisonment or subjected to an unconditional fine. Penfield Co. v. SEC, 330 U.S. 585, 595 (1947); Gompers v. Buck Stove and Range Co., *supra*, 221 U.S. at 441-42; Duell v. Duell, 178 F.2d 683, 685-86 (D.C. Cir. 1949); Parker v. United States, *supra*, 153 F.2d at 70 (1st Cir.); In Re Nevitt, 117 F. 448, 461 (8th Cir. 1902). An unconditional award or fine may, however, be imposed in a compensatory civil contempt action. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); United States v. United Mine Workers of America, 330 U.S. 258, 303-04 (1947); Backo v. Local 281, United Brothers of Carpenters and Joiners, 438 F.2d 176, 182 (2d Cir. 1970), cert. denied, 404 U.S. 858 (1971); Parker v. United States, *supra*, 153 F.2d 66 (1st Cir.).

9-39.120 Characterization of the Action When Both Criminal and Civil Contempt Elements are Present

When a contempt action is not clearly specified as criminal or civil and a single order is entered granting both punitive and remedial relief, the criminal feature of the order is dominant and fixes its character for purposes of review. Penfield Co. v. SEC, *supra*, 330 U.S. at 591; Union Tool Co. v. Wilson, 259 U.S. 107, 110 (1922); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 778 (9th Cir. 1983).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-39.200 INDIRECT VERSUS DIRECT CONTEMPT

A contempt is indirect when it occurs out of the presence of the court, thereby requiring the court to rely upon the testimony of third parties for proof of the offense. It is direct when it occurs under the court's own eye and within its hearing. United States v. Peterson, 456 F.2d 1135, 1139 (10th Cir. 1972); United States v. Marshall, 451 F.2d 372, 373 (9th Cir. 1971); United States v. Willet, 432 F.2d 202, 204 (4th Cir. 1970).

9-39.300 INDIRECT CRIMINAL CONTEMPT

9-39.310 Institution of the Action

9.39.311 Federal Jurisdiction and Venue

Although the courts possess an inherent power to enforce obedience to their orders so that they may properly perform their functions, Myers v. United States, 264 U.S. 95, 103 (1924), Congress has placed statutory limitations upon the exercise of this power. Nye v. United States, *supra*, 313 U.S. at 45. All forms of contempt, whether they be delineated as criminal, civil, indirect or direct, must fall within one of the three categories of misbehavior described in 18 U.S.C. §401. Indirect contempts come within paragraph (2) of 18 U.S.C. §401, paragraph (3) of 18 U.S.C. §401 and the "so near thereto" clause of paragraph (1) of 18 U.S.C. §401. Direct contempts are confined to the "in presence" clause of paragraph (1) of 18 U.S.C. §401.

The court wherein proper venue or federal jurisdiction exists in an 18 U.S.C. §401 proceeding has been generally agreed to be the court which rendered the decree and not the court located in the district where the violation occurred. Myers v. United States, *supra*, 264 U.S. at 101; Stiller v. Hardman, 324 F.2d 626, 628 (2d Cir. 1963); Sullivan v. United States, 4 F.2d 100, 101 (8th Cir. 1925); Dunham v. United States, 289 F. 376, 378 (5th Cir. 1923).

9-39.312 Notice Under Rule 42(b) of the Federal Rules of Criminal Procedure

An indirect criminal contempt action must be instituted pursuant to the notice requirements set forth in FED. R. CRIM.P. 42(b). It need not be instituted by a criminal indictment, Green v. United States, 356 U.S. 165

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(1958); consequently, the sufficiency of a criminal contempt petition filed under FED. R. CRIM.P. 42(b) is not to be tested by the more stringent standards set for an indictment. Bullock v. United States, 265 F.2d 683, 691-92 (6th Cir.), cert. denied, 360 U.S. 909 (1959). Furthermore, notice under FED. R. CRIM.P. 42(b) need not be as precise or as detailed as the certificate which the judge is required to prepare in a summary contempt proceeding under FED. R. CRIM.P. 42(a). United States v. Robinson, 449 F.2d 925, 930 n. 8 (9th Cir. 1971). Formal notice is not required where the defendant has actual knowledge of the nature of the contempt proceedings. In re Sadin, 509 F.2d 1252 (2d Cir. 1975); United States v. Handler, 476 F.2d 709 (2d Cir. 1973). However, rather than risk the possibility of misunderstanding, the notice requirements of FED. R. CRIM.P. 42(b) should be strictly complied with. See Universal City Studios v. N.Y. Broadway International Corp., 705 F.2d 94 (2d Cir. 1983). Cf. United States v. North, 621 F.2d 1255, n. 7 (3d Cir. 1980), cert. denied, 449 U.S. 866 (1981).

In the event a defendant deems the charges made in the criminal contempt petition to be too indefinite his remedy is to move the court for a bill of particulars. Fox v. United States, 77 F.2d 210 (4th Cir. 1935), cert. denied, 298 U.S. 642 (1936); Conley v. United States, 59 F.2d 929, 935 (8th Cir. 1932).

The petition under FED. R. CRIM.P. 42(b) must satisfy the basic requirements of "fair notice." United States v. United Mine Workers of America, supra, 330 U.S. at 298-300. It must also state the "essential facts" constituting the criminal contempt charged. United States v. J. Myers Schine, 260 F.2d 552, 557 (2d Cir. 1958), cert. denied, 358 U.S. 934 (1959); Carlson v. United States, 209 F.2d 209, 218 (1st Cir. 1954). The words "criminal contempt" need not be used in the petition or rule to show cause, so long as the contemnor realizes that a criminal contempt prosecution is contemplated. United States v. Joyce, 498 F.2d 592, 595 (7th Cir. 1974).

Although verification of the petition may be based upon information and belief, United States v. United Mine Workers of America, supra, 330 U.S. at 296, it is considered good practice for the government to file an affidavit with the petition. National Labor Relations Board v. Arcade-Sunshine Co., 122 F.2d 964, 965 (D.C. Cir. 1941).

FED. R. CRIM.P. 42(b) requires that the notice allow a "reasonable time for the preparation of a defense." A "reasonable time" will vary according to the circumstances of each case, but in no event can the time be reduced below the minimum needed adequately to prepare a defense. Nevertheless, a short time can be sufficient time. United States v. Hutchinson, 633 F.2d 754 (9th Cir. 1980); United States v. Hawkins, 501 F.2d 1029 (9th

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Cir.), cert. denied, 419 U.S. 1079 (1974); In Re Sadin, supra; In Re Lewis, 501 F.2d 418 (9th Cir. 1974); United States v. Alter, 482 F.2d 1016, 1023 (9th Cir. 1973).

When the contemnor's defenses raise complex legal issues or there is an indication that an evidentiary hearing may be required to resolve factual issues, the five-day notice period prescribed by FED. R. CRIM.P. 45(d) should be adopted as the standard, absent a showing by the government of some compelling need to shorten time and absent a showing by the contemnor of some reason why a longer time is needed to prepare a defense. Compelling need for reducing time is not shown by the fact alone that the alleged contemnor is a witness in a pending grand jury investigation. In Re Vigil, 524 F.2d 209 (10th Cir. 1975); United States v. Alter, supra, 482 F.2d at 1023 (9th Cir. 1973).

9-39.313 Probable Cause of a Willful Violation

It is unclear as to whether probable cause that a willful violation has occurred is a condition precedent to the commencement of a criminal contempt action. Initially, it should be noted that the vast majority of criminal contempt decisions make no mention of such a requirement. However, in United States v. Kelsey-Hayes Co., 476 F.2d 265 (6th Cir. 1973), the court dismissed the case prior to trial on the basis of its determination that there was a lack of probable cause that a willful violation had occurred. In In Re United Corporation, 166 F.Supp. 343 (D. Del. 1958), it was held to be within the court's discretion to require a showing of probable cause before appointing an attorney to prosecute a criminal contempt action which was initiated by a private party, as opposed to the United States.

9-39.314 Necessity of a Demand for Compliance with the Decree

The prevailing view is that the petitioner is not required to attempt to obtain compliance with the decree before filing a criminal contempt action for the reason that an act of criminal contempt once committed may not be purged. In re Curtis' petition, 240 F.Supp. 475, 483 (W.D. S.C. 1965), aff'd., 362 F.2d 999 (8th Cir.), cert. denied, 386 U.S. 914 (1966). Accordingly, a court may punish a party for criminal contempt even though the party eventually complies with the order. Gompers v. Bucks Stove and Range Co., supra, 221 U.S. at 452. However, in United States v. Kelsey-Hayes Co., supra, the court noted, in the course of granting a motion to dismiss prior to trial, that its decision was prompted in part by what it contended to be the lack of fairness emanating from the failure of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

government to attempt to obtain compliance with the decree prior to commencing the criminal proceeding.

9-39.315 Use of a Single Petition to Institute Both a Civil and Criminal Contempt Action

Although a single petition may be used to institute both a civil and a criminal contempt action directed at the same transaction or series of transactions, it has been held that the better practice is to file the petitions for such actions separately. Monroe Body Co. v. Herzoq, 13 F.2d 705 (6th Cir. 1926), modified, 18 F.2d 578 (1927). The petition, in the event that civil and criminal contempt actions are filed together, must satisfy the requirements of FED. R. CRIM.P. 42(b).

9-39.316 Rule of the Grand Jury

In Green v. United States, supra, 356 U.S. at 187, the Supreme Court held that criminal contempt actions need not be instituted by an indictment within the meaning of the Fifth Amendment of the United States Constitution. Although an indictment by a grand jury is not imperative in order to institute a criminal contempt action, such an action may be instituted by an indictment. United States v. Snyder, 428 F.2d 520, 522 (9th Cir. 1970), cert. denied, 400 U.S. 903 (1970); United States v. Bukowski, 435 F.2d 1094, 1103 (7th Cir. 1970), cert. denied, 401 U.S. 911 (1971); Carlson v. United States, supra, 209 F.2d at 218 (1st Cir.); United States v. Goldfarb, 167 F.2d 735 (2d Cir. 1948). In such a case, however, the indictment must comply with the notice requirements of Rule 42(b). United States v. Mensik, 440 F.2d 1232 (4th Cir. 1971); In re Amalgamated Meat Cutters and Butcher Workmen of N. America, 402 F.Supp. 725 (E.D. Wis. 1975). Cases have indicated that it may be objectionable to proceed by way of indictment because the interjection of an independent body into the contempt process might interfere with or impede judicial disposition of such matters. United States v. Levya, 513 F.2d 774, 775 (5th Cir. 1975).

9-39.317 Persons Against Whom the Action May Be Commenced

To be held in criminal contempt for violation of a court order, the defendant must be an original party, one legally identified with an original party, or an aider and abettor of one of the above enumerated persons. Backo v. Local 281, United Brothers of Carpenters and Joiners, 438 F.2d 176, 180-81 (2d Cir. 1970), cert. denied, 404 U.S. 858 (1971); Reich v. United States, 239 F.2d 134, 137 (1st Cir. 1956); cert. denied, 352 U.S. 1004

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(1957). But see, Manness v. Meyers, 419 U.S. 449 (1975) (attorney giving good faith legal advice not to be found in contempt).

9-39.318 Role of the Prosecutor

Prosecutive participation is ordinarily necessary to assist the court in the presentation of a criminal contempt case. The procedural requirements of FED. R. CRIM.P. 42(b), and those such as trial by jury imposed judicially under due process considerations, give rise to the need for presentation of the evidence by an officer of the court appointed for prosecutive purposes. The U.S. Attorney naturally assumes the role of prosecutor when he initiates an application for a show cause order under FED. R. CRIM.P. 42(b). However, in a number of circumstances involving the disobedience of judicial authority outside the presence of the court, contempt proceedings are initiated sua sponte by the court or by private litigants for whose benefit such orders have issued. In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance by the U.S. Attorney of the court's request to prosecute a mere formality; however, there may be sound reasons in a given case for the U.S. Attorney to decline participation in the proceedings and for the prosecution to be conducted on behalf of the court by private counsel appointed by the court for this purpose. On a case-by-case basis, the U.S. Attorney should evaluate not only the propriety of his/her participation in 18 U.S.C. §401 proceedings, but also the interest of the government as a litigant vis-a-vis the clear duty of the U.S. Attorney to preserve respect for the authority of the federal court upon which most clearly successful law enforcement relies.

he/she

9-39.320 Defenses

9-39.321 Negation of Essential Elements

A. Lack of requisite intent

It is generally agreed that some kind of wrongful intent is required to sustain a criminal contempt conviction. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949); see also, Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 782-783 (9th Cir. 1983). There must be a willful, contumacious, or reckless state of mind to warrant conviction for criminal contempt. In Re Joyce, 506 F.2d 373 (5th Cir. 1975). In many cases it has been held that general criminal intent is all that is required to satisfy the scienter element in a criminal contempt action. United States v. Fidanean, 465 F.2d 755 (5th Cir.), cert. denied, 409 U.S. 1054

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(1972); United States v. Custer Channel Wing Corporation, 376 F.2d 675, 680 (4th Cir. 1967), cert. denied, 389 U.S. 850. That the acts were volitional and done with an awareness that they were unlawful shows a sufficient degree of intent, regardless of motive. See, United States v. Patrick, 542 F.2d 381, 389 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977). On the other hand, authority exists for the proposition that a specific or flagrant intent to violate a decree is essential to a criminal contempt action. United States v. Kelsey-Hayes Company, supra; In Re Floersheim, 316 F.2d 423, 428 (9th Cir. 1963); United States v. Kroger Grocery and Baking Co., 163 F.2d 168, 173-174 (7th Cir. 1947); Kelton v. United States, 294 F. 491, 495 (3d Cir. 1923), cert. denied sub nom., Douglas v. United States, 264 U.S. 590 (1924); Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., 230 F. 120, 132 (5th Cir. 1915).

B. Lack of knowledge with respect to (1) to decree's existence, or (2) the occurrence of conduct violative of the decree.

The lack of knowledge of the decree's existence at the time he/she acted contrary thereto, or the lack of knowledge with respect to the occurrence of the violative acts, ordinarily exonerates the defendant of criminal liability. In Re Joyce, supra; Yates v. United States, 316 F.2d 718, 723 (10th Cir. 1963). It is doubtful, however, whether either of these defenses could be successfully employed if the defendant were an original party, as opposed to an aider and abettor, or if knowledge of a violation of the decree could have been obtained through an exercise of reasonable diligence.

C. Lack of knowledge with respect to the proscribed conduct.

If the decree is ambiguous, the defendant may assert as a defense that there was a lack of fair notice with respect to the proscribed conduct. United States v. Wefers, 435 F.2d 826, 830 (1st Cir. 1970). The "mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible." United States v. Greyhound Corp., 508 F.2d 529, 532 (7th Cir. 1974). This defense is unavailable, however, where the decree is so precise and definite that it could not be misinterpreted by a respondent with knowledge of its existence. In re Home Discount Co., 147 F. 538, 555-56 (N.D. Ala. 1906).

#### 9-39.322 Statute of Limitations

18 U.S.C. §3282 applies a five-year statute of limitations to all criminal contempt actions encompassed by 18 U.S.C. §401. If, however, the contemptuous act constitutes also a criminal offense under any statute of the United States or under the laws of any state in which the act was

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

committed, then the contempt must be prosecuted under 18 U.S.C. §402. By reason of 18 U.S.C. §3285, a one-year statute of limitations applies to contempt actions brought under 18 U.S.C. §402. It should be noted, however, that 18 U.S.C. §402 is inapplicable to "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States."

The "continuing act" concept is applicable to criminal contempt actions. United States v. J. Myer Schine, supra, 260 F.2d at 555-56 (2d Cir.).

9-39.323 Good Faith Reliance Upon the Advice of Counsel

According to the majority view, acting in good faith upon the advice of counsel is not a defense to an action for criminal contempt. United States v. Seavers, 472 F.2d 607 (6th Cir. 1973); United States v. Dimauro, 441 F.2d 428 (8th Cir. 1971); United States v. Snyder, 428 F.2d 520, 522 (9th Cir. 1970), cert. denied, 400 U.S. 903 (1970); United States v. Goldfarb, supra, 167 F.2d at 735 (2d Cir. 1948). Good faith reliance upon the advice of counsel may, however, be considered in mitigation of punishment. United States v. Custer Channel Wing Corp., 247 F.Supp. 481, 503 (D. Md. 1965), aff'd, 376 F.2d 675 (4th Cir.), cert. denied, 389 U.S. 850 (1967); In Re La Varre, 48 F.2d 216, 222 (D. Ga. 1930); Levinstein v. E.I. Dupont DeNemours and Co., 258 F. 662, 665-66 (D. Del. 1919).

Some decisions have held that good faith reliance upon the advice of counsel is a complete defense in a criminal contempt action. In re Eskay, 122 F.2d 819 (3d Cir. 1941); Proudfit Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co., supra, 230 F. at 134 (6th Cir.)

9-39.324 Purgings

(See USAM 9-39.113).

9-39.325 Failure to Attempt to Obtain Compliance Prior to Filing

(See USAM 9-39.314).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-39.326 Violation of an Invalid Decree

A decree which has been erroneously rendered must nonetheless be obeyed until overturned, and violators thereof may be punished for criminal contempt. United States v. United Mine Workers of America, *supra*, 330 U.S. at 293; United States v. J. Myer Schine, *supra*, 260 F.2d at 557 (2d Cir.). A possible exception exists where the order is "transparently" unlawful. Walker v. City of Birmingham, 388 U.S. 307, 315 (1967). See also, Maness v. Meyers, 419 U.S. 449 (1975) (lawyer may not be held in contempt for good faith advice to client to invoke Fifth Amendment).

A contempt proceeding does not open to reconsideration the legal or factual basis of the underlying order; the proceeding is not a retrial of the original controversy. Maggio v. Zeitz, 333 U.S. 56, 69 (1948); United States v. First State Bank, 691 F.2d 332 (7th Cir. 1982). Thus, an issue that could have been raised when the decree was entered cannot be raised for the first time in a contempt proceeding. See generally, United States v. Rylander, \_\_\_ U.S. \_\_\_, 33 Crim. L.Rep. (BNA) 3007 (April 19, 1983).

9-39.327 Inability Versus Refusal to Comply

The good faith inability to comply with a decree, as contrasted with the refusal to do so, is a complete defense to a criminal contempt action. United States v. Joyce, *supra*, 498 F.2d at 596 (7th Cir.); United States v. J. Myer Schine, *supra*, 260 F.2d at 555 (2d Cir.); NLRB v. Bell Oil and Gas Co., 98 F.2d 405, 406 (5th Cir. 1938); In re Home Discount Co., *supra*, 147 F. at 555-56 (N.D. Ala. 1906). But the defendant bears the burden at least after some initial showing, of demonstrating an inability to comply, and defendant cannot invoke the Fifth Amendment as a justification for not meeting the burden. See, United States v. Rylander, \_\_\_ U.S. \_\_\_, 33 Crim. L.Rep. (BNA) 3007 (April 20, 1983); United States v. Hankins, 565 F.2d 1344 (5th Cir.), opinion clarified and rehearing denied, 581 F.2d 431 (1978), cert. denied, 440 U.S. 909 (1979).

9-39.330 Consolidation for Trial of Issues in Civil and Criminal Contempt Proceedings

Consolidation for trial of issues germane to civil and criminal actions involving the same transaction or series of transactions is permitted where the parties stipulate to such. In addition, consolidation without stipulation is generally allowed and appellate courts have not reversed except where there has been substantial prejudice. United States v. United Mine Workers of America, *supra*, 330 U.S. at 298-300; Mitchell v. Fiore, 470 F.2d

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1149, 1153 (3d Cir. 1972), cert. denied, 411 U.S. 938 (1973).

9-39.340 Right to Counsel

A person in criminal or civil contempt may not be sentenced to a term of imprisonment unless he was afforded the right to counsel at the contempt proceeding. Argersinger v. Hamlin, 407 U.S. 25 (1972); In Re Rosahn, 671 F.2d 690, 697 (2d Cir. 1982); In Re Di Bella, 518 F.2d 955 (2d Cir. 1975); In Re Kilgo, 484 F.2d 1215 (4th Cir. 1973); Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973).

9-39.350 Privilege Against Self-Incrimination

The privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution is available in criminal contempt cases. Bloom v. Illinois, 391 U.S. 194, 205 (1968); Gompers v. Bucks Stove and Range Co., supra, 221 U.S. at 444. A corporation or partnership charged with criminal contempt, however, has no privilege against self-incrimination within the meaning of the Fifth Amendment. United States v. Kordel, 397 U.S. 1, 7 (1970); Bellis v. United States, 417 U.S. 85 (1974).

9-39.360 Burden of Proof

In a criminal contempt action the United States has the burden of proving each of the elements of the offense beyond a reasonable doubt. Bloom v. Illinois, supra, 391 U.S. at 205; Gompers v. Bucks Stove and Range Co., supra, 221 U.S. at 444; Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, n.1 (9th Cir. 1983); United States v. Columbia Broadcasting System, 497 F.2d 107 (5th Cir. 1974); United States v. Peterson, supra, 456 F.2d 1135 (10th Cir. 1972).

9-39.400 DIRECT CONTEMPT

9-39.410 Witness's Refusal to Obey Court Order to Testify at Trial Versus  
Witness's Refusal to Obey Court Order to Testify Before a Grand  
Jury.

A witness who refuses to testify at trial after having been granted immunity from prosecution may be summarily convicted of direct criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure. Such

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

refusals to testify are contemptuous of judicial authority because they are intentional obstructions of court proceedings that literally disrupt the progress of the trial and hence the orderly administration of justice. "Rule 42(a) was never intended to be limited to situations where a witness uses scurrilous language, or threatens or creates overt physical disorder and thereby disrupts a trial. All that is necessary is that the judge certify that he 'saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.'" United States v. Wilson, 421 U.S. 309, 315 (1975); Howell v. Jones, 516 F.2d 53, (5th Cir.), cert. denied, 424 U.S. 916 (1976).

In contrast, a witness who refuses to testify before a grand jury on the ground of the privilege against self-incrimination after having been granted immunity from prosecution and ordered to do so by a court, may only be prosecuted for criminal contempt according to the procedures applicable to indirect contempts under FED. R. CRIM.P. 42(b). The witness may not be brought before the court, asked the same questions as were asked by the grand jury and then found in summary criminal contempt for refusing to answer these questions. Harris v. United States, 382 U.S. 162 (1965); United States v. DiMauro, supra. According to the majority view, when a witness is to be held in civil, as opposed to criminal, contempt for refusing to testify or to produce evidence before a grand jury, the procedures of FED. R. CRIM.P. 42(b) must likewise be followed. In re Sadin, supra, 509 F.2d 1252, 1255 (2d Cir. 1975); In re Vigil, supra, 524 F.2d 209, 218-19 (10th Cir. 1975); United States v. Hawkins, 501 F.2d 1029, 1031 (9th Cir. 1974), cert. denied, 419 U.S. 1079 (1974). In re Mintzer, 511 F.2d 471, 472 n. 1 (1st Cir. 1974). Title 28, United States Code, Section 1826(a), which provides for summary civil contempt proceedings whenever a witness refuses without just cause to comply with a court order to testify before a grand jury, therefore, "has no effect upon the procedural ground rules the [Supreme] Court had laid in cases antecedent . . . enactment of the statute--rules which expressly forbade summary proceedings for such contempts." United States v. Alter, supra, 482 F.2d 1016, 1022 (9th Cir.). In the Seventh Circuit, however, a witness who refuses to testify before a grand jury after having been granted immunity and ordered to do so by a court may be summarily held in civil contempt. In re October 1969 Grand Jury, 435 F.2d 350 (7th Cir. 1970).

9-39.420 Necessity of Warning of Contemptuous Conduct

When the defendant's conduct is clearly contemptuous, United States v. Schiffer, 351 F.2d 91 (6th Cir. 1965), cert. denied, 384 U.S. 1003 (1966), or where he is aware of the character of his conduct, United States v. Seale, 461 F.2d 345 (7th Cir. 1972), the court need not warn the defendant

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the fact that his/her conduct is contemptuous prior to summarily holding him/her in criminal contempt although such a warning may be appropriate. United States v. Abascal, 509 F.2d 752, 755 (9th Cir.), cert. denied, 422 U.S. 1027 (1975).

9-39.430 Summary Punishment at the End of Trial--Judicial Bias

"[T]here are two policies which may justify summary contempt proceedings before the trial judge. First, it may be necessary to preserve order in the courtroom in order to protect the authority of the court and the integrity of the trial process--the policy of preserving order. Second, there is a notion that when contemptuous conduct has occurred before the judge in open court, it would be a useless formality and a waste of resources to indulge in a full hearing because the judge, having witnessed the conduct, is competent to interpret the facts and apply the law--the waste of resources justification." United States v. Meyer, 462 F.2d 827, 831 (D.C. Cir. 1972); Cooke v. United States, 267 U.S. 517, 534 (1925). When a summary contempt proceeding is conducted at the end of a trial, the policy of preserving order in the courtroom is inapplicable since the trial has already been terminated. If the judge is biased against contemnor, then the waste of resources justification is absent since the judge will be unable to competently interpret the facts and apply the law. Bias arises when the judge becomes "personally embroiled" with the contemnor, Offutt v. United States, 348 U.S. 11, 17 (1954), when he/she necessarily becomes embroiled in a running controversy with the contemnor so that he/she might naturally be expected to harbor "marked personal feelings," Mayberry v. Pennsylvania, 400 U.S. 455, 464 (1971); Taylor v. Hayes, 418 U.S. 488, 503 (1974), or when he/she is in adversary posture with the contemnor, even if he/she has not been personally attacked. Johnson v. Mississippi, 403 U.S. 212, 215-216 (1971). It should be noted that it is not the contemnor's conduct alone which determines whether there exists bias, but rather the character of the judge's response to such conduct. Taylor v. Hayes, supra, 418 U.S. at 503 n. 10.

During the course of a trial, a judge may impose immediate summary punishment upon a contemnor even if he is biased. The policy of preserving order in the courtroom outweighs the waste of resources justification. Mayberry v. Pennsylvania, supra, at 400 U.S. at 463; United States v. Seale, supra, 461 F.2d at 351 (7th Cir.). Where the judge chooses to act summarily at the end of the trial, when the policy of preserving order in the courtroom is inapplicable, he/she may only do so in the absence of bias. Where bias is present, the judge must disqualify himself/herself and permit another judge to conduct the contempt proceeding pursuant to FED. R. CRIM.P. 42(b). Compare Taylor v. Hayes, supra, 418 U.S. 488; Mayberry v. Pennsylvania, supra, 400 U.S. 455; Offutt v. United States, supra, 348 U.S. 11; United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States v. Meyer, supra, 462 F.2d 827 (D.C. Cir.); In re Dellinger, 461 F.2d 389 (7th Cir. 1972); and United States v. Seale, supra, 461 F.2d 345 (7th Cir.) with Sacher v. United States, 343 U.S. 1 (1952); Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973), cert. denied, 414 U.S. 1161 (1974); United States v. Schiffer, supra, 351 F.2d 91 (6th Cir.); United States v. Galante, 298 F.2d 72 (2d Cir. 1962). In the absence of bias, the preferred procedure is for the judge to act summarily at the end of the trial rather than during the trial where the contemnor is an attorney. Such a procedure minimizes the prejudice to the attorney's client which arises from the contempt action. Taylor v. Hayes, supra, 418 U.S. at 498; Mayberry v. Pennsylvania, supra, 400 U.S. at 463 (policy is not present where defendant is proceeding pro se); Sacher v. United States, supra, 343 U.S. 1.

When a contemnor is to be summarily held in criminal contempt at the end of trial, he/she should be given "an opportunity to speak in his/her own behalf in the nature of a right of allocution." Groppi v. Leslie, 404 U.S. 496, 504 (1972); Taylor v. Hayes, supra, 418 U.S. at 498; Weiss v. Burr, supra.

9-39.440 Certification of Judge Under Rule 42(a) of the Federal Rules of Criminal Procedure

Under FED. R. CRIM.P. 42(a), the judge in a summary criminal contempt action must certify that "he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record." The conduct described in the certificate must in itself constitute contempt. Hallinan v. United States, 182 F.2d 880 (9th Cir. 1950), cert. denied, 341 U.S. 952 (1951). This is because "the function of the certificate is not to give notice to the defendant or to frame an issue to be tried, but solely to permit an appellate court to review the judge's action." United States v. Marshall, 451 F.2d 372, 377 (9th Cir. 1971); In re Williams, 509 F.2d 949 (2d Cir. 1975); United States v. Schrimsher, 493 F.2d 842 (5th Cir. 1974). The certificate must recite the specific factual findings upon which the charges are based. Conclusory allegations are not sufficient. In re Williams, supra, 509 F.2d 949 (2d Cir.); United States v. Schrimsher, supra. The certificate does not meet the requirements of FED. R. CRIM.P. 42(a) if it incorporates the entire trial transcript by general reference, rather than recite specific facts. In re Williams, supra; United States v. Marshall, supra. A judge's failure to make the required certificate does not necessarily call for reversal of the contempt conviction. A remand of the cause to permit an opportunity for the necessary certificate may be a sufficient remedy. United States v. Mars, 551 F.2d 771, affirmed after remand, 553 F.2d 508 (6th Cir. 1977).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-39.500 LEAST POSSIBLE POWER RULE

In a contempt proceeding, the court must exercise the least possible power to obtain the desired result. This rule requires that the trial judge expressly consider the feasibility of obtaining acceptable relief through the imposition of civil contempt before resorting to criminal contempt. Although such a consideration is required, the judge need not in fact impose civil penalties prior to the imposition of criminal penalties. United States v. Wilson, 421 U.S. 309 (1975); Shillitani v. United States, supra, 384 U.S. 364; Baker v. Eisenstadt, 456 F.2d 382 (1st Cir.), cert. denied, 409 U.S. 846 (1972).

Furthermore, this rule requires that summary punishment be reserved for "exceptional circumstances." Harris v. United States, supra, 382 U.S. at 164. But see, United States v. Wilson, supra.

9-39.600 TRIAL

9-39.610 Jury Trial

The Supreme Court has adopted the standard of 18 U.S.C. §1(3) defining a "petty offense," insofar as it has ruled that imprisonment for longer than six months for contempt is constitutionally impermissible without a jury trial, Taylor v. Hayes, supra, 418 U.S. 488. See also, Frank v. United States, 395 U.S. 147 (1969) (sentence of three years probation permissible without jury trial). However, the court has declined to rule that contempt proceedings, at least as to organizations, resulting in fines of greater than \$500 are automatically entitled to jury trials. Muniz v. Hoffman, 422 U.S. 454, 477 (1975).

A court may, during the course of a trial, impose successive summary contempt orders resulting in an aggregate sentence of imprisonment of more than six months in the absence of a jury trial. Such sentencing is permissible so long as no one contempt order carries a sentence of greater than six months. If, however, the court chooses to impose a single finding of contempt at the termination of the trial, imprisonment for longer than six months is constitutionally impermissible without a jury trial, even if the judge calculates the sentence of imprisonment for each contempt at six months or less. Codispoti v. Pennsylvania, 418 U.S. 506 (1974).

If the contempt falls within the purview of 18 U.S.C. §402, contempts constituting crimes, then the contemnor is automatically entitled to a jury trial by reason of 18 U.S.C. §3691.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-39.620 Public Trial

The Sixth Amendment right to a public trial attaches to contempt proceedings. Mayberry v. Pennsylvania, supra, 400 U.S. 455; Bloom v. Illinois, supra, 391 U.S. 194; Sacher v. United States, supra, 343 U.S. 1; In re Oliver, 333 U.S. 257 (1948); In Re Rosahn, 671 F.2d 690 (2d Cir. 1982). The public may, however, be excluded from the courtroom during that portion of the proceeding in which the minutes of a grand jury are read into the record in a contempt action involving the refusal to testify before a grand jury. Levine v. United States, 362 U.S. 610 (1960); In Re DiBella, supra, 518 F.2d 955 (2d Cir. 1975).

9-39.700 DOUBLE JEOPARDY

Summary punishment for contempt of court under Rule 42(a) will not bar a subsequent prosecution for the same act as an independent statutory offense. United States v. Rollerson, 449 F.2d 1000 (D.C. Cir. 1971) (hurling a water pitcher at prosecutor in open court held punishable both as contempt and assault); United States v. Mirra, 220 F.Supp. 361 (S.D. N.Y. 1963).

The court of appeals in Rollerson declined to decide whether the double jeopardy clause would bar a criminal prosecution following a separate contempt hearing pursuant to Rule 42(b). United States v. Rollerson, supra, 449 F.2d at 1005 n. 13. But see United States v. Lederer, 140 F.2d 136, 138 (7th Cir. 1944); which ruled that the power of the Attorney General to subsequently prosecute for an independent regulatory violation does not preclude the right of the court to protect the dignity of its injunction through a contempt prosecution on notice and hearing.

Contumacious refusals by an individual to testify in successive trials can properly be charged as two counts of criminal contempt without subjecting the defendant to double jeopardy or a multitudinous indictment. United States v. Smith, 532 F.2d 158 (10th Cir. 1976).

9-39.800 SENTENCING

9-39.810 Effect of 18 U.S.C. §401 on the Appropriate Fine or Imprisonment.

18 U.S.C. §401 provides that a court may not both fine and imprison a contemnor for a single act of criminal contempt. In re Bradley, 318 U.S. 50, 51 (1943); United States v. Hilburn, 625 F.2d 1177 (6th Cir. 1980);

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. DiGirolomo, 548 F.2d 252 (8th Cir. 1977); MacNeil v. United States, 236 F.2d 149, 154 (1st Cir.), cert. denied, 352 U.S. 912 (1956). This, however, does not prohibit the imposition of a fine and a term of imprisonment when both civil and criminal contempt actions are commenced in regard to the same transaction, Penfield Co. v. SEC, supra, 330 U.S. at 594, with one serving as a punitive exaction and the other as a coercive or compensatory sanction. Mitchell v. Fiore, supra, 470 F.2d at 1154 (3d Cir. 1972).

9-39.820 Discretion with Respect to the Appropriate Fine of Imprisonment

Courts have broad discretion in setting the appropriate fine or imprisonment following a criminal contempt proceeding. See, Frank v. United States, 395 U.S. 147, 149 (1969); United States v. United Mine Workers of America, supra, 330 U.S. at 303; United States v. Ray, 683 F.2d 1116 (6th Cir. 1982), cert. denied, 163 S.Ct. 578 (1983); United States v. Greyhound Corp., supra, 508 F.2d at 541 (7th Cir. 1974); Moore v. United States, 150 F.2d 323, 325 (10th Cir. 1945), cert. denied, 326 U.S. 740 (1945); Brooks v. United States, 119 F.2d 636, 646 (9th Cir.), cert. denied, 313 U.S. 594 (1941). However, the sentence imposed in a criminal contempt is subject to appellate review and modification. Green v. United States, 356 U.S. 165 (1958); United States v. Bukowski, 435 F.2d 1094 (7th Cir.), cert. denied, 401 U.S. 911 (1971).

9-39.900 APPEAL

18 U.S.C. §3731 has been construed to permit appeals by the United States in criminal contempt actions wherein a district court enters what is tantamount to a dismissal of an indictment or an information. United States v. Sanders, 196 F.2d 895, 897 (10th Cir.), cert. denied, 344 U.S. 829 (1952).

The conviction in a criminal contempt action is a final judgment and is immediately appealable. It is stated to be the settled rule that an order which fines or imprisons the contemnor in a civil contempt proceeding is reviewable only on appeal from the final judgment of the main cause of action because a civil contempt proceeding is in effect a continuation of the main proceeding. Carbon Fuel Co. v. United Mine Workers, 517 F.2d 1348 (4th Cir. 1975). However, an order of confinement under 28 U.S.C. §1826 for refusing without just cause to testify or produce other information in response to a court order is immediately appealable. There has been some controversy with respect to the provision in 28 U.S.C. §1826(b) which requires disposition of an appeal from an order of confinement under that section not later than 30 days from the filing of such appeal. The test of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Memo. No. 844, dated January 18, 1977, which deals with this subject is as follows:

"SUBJECT: Civil Contempt Appeals Under 28 U.S.C. §1826(b)

This memorandum deals with the effect of a court of appeals' failure to dispose of an appeal from a civil contempt order within 30 days of its filing. In relevant part, 28 U.S.C. §1826(b) reads: "Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal." The question has been raised as to whether the 30-day provision is jurisdictional.

The Criminal Division's view is that a court of appeals does not lose jurisdiction over a civil contempt appeal which has not been disposed of within the 30-day time period prescribed by 28 U.S.C. §1826(b). It is our position that the sole effect of a court's failure to abide by the time limit is to require the release of any confined contemnor at the expiration of the 30-day period pending disposition of the appeal. Cf. In Re Rosahn, 671 F.2d 690 (2d Cir. 1982) (jurisdiction not affected during period when contemnor is not confined).

28 U.S.C. §1826 was enacted as part of Title III of the Organized Crime Control Act of 1969. The 30-day provision was originally inserted in the bill at the recommendation of this Department to mitigate the absolute no-bail provision which appeared in the bill as drafted. The provision survived as originally proposed notwithstanding the fact that the bail standard was relaxed to the form in which it appears today, i.e., no bail only "if it appears that the appeal is frivolous or taken for delay."

Case law dealing with the failure to dispose of a civil contempt appeal within 28 U.S.C. §1826(b)'s 30-day time limit is not uniform. The Circuit Court, in In Re Melickian, 547 F.2d 416 (8th Cir. 1977), adopted the Criminal Division's position and ruled that "when decision is impossible or unadvisable (sic) within the thirty day period, the procedure followed by this Court which releases the contemnor pending disposition [of the appeal] best reconciles the various issues bound up in the bail issue." The Seventh Circuit has also held that the 30-day period is not jurisdictional. See, In re January 1976 Grand Jury, 534 F.2d 719, 730 n. 11 (7th Cir. 1976). In addition, a number of circuits have retained jurisdiction beyond the 30-day period, consistently with the view that the 30-day limitation is nonjurisdictional. See, e.g., Brown v. United States, 465 F.2d 371, 372 (9th Cir. 1972) (per curiam) ("appellant has been at liberty upon a stay granted by this court, and, accordingly, no one has been prejudiced by the limitations of the thirty-day period set forth in 28 U.S.C. §1826"); Beverly v. United States, 468 F.2d 732, 740-42 (5th Cir. 1972) ("because of a breakdown in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

briefing schedule . . . and taking note of appellant's motion for extension of Section 1826(b)'s thirty-day time limit if necessary to insure thorough consideration . . . , we [extend the time limit]"); United States v. Doe, 460 F.2d 328, 332 n. 3 (1st Cir. 1972), cert. denied sub nom Popkin v. United States, 411 U.S. 909 (1973) ("Although we gave this matter first priority, when faced with the choice of exceeding the statute or sacrificing deliberation, we chose the former"). Other courts, in disposing of appeals within the 30-day period, have apparently regarded it as mandatory and jurisdictional. See, Andretta v. United States, 530 F.2d 681, 682 (6th Cir. 1976) (per curiam); In re Long Visitor, 523 F.2d 443, 445 (8th Cir. 1975); In re DiBella, 499 F.2d 1175, 1176 (2d Cir.), cert. denied, 419 U.S. 1032 (1974); In re Grand Jury Proceedings, 491 F.2d 42, 44 & n. 3 (D.C. Cir. 1974) (per curiam); In re Grumbles, 453 F.2d 119, 121 n. 7 (3d Cir. 1971) (per curiam), cert. denied, 406 U.S. 932 (1972). The Tenth Circuit indeed has stated that compliance with the 30-day provision is mandatory even though this results in a hurried review of transcripts and complex briefs. In re Berry, 521 F.2d 179, 181 (per curiam), cert. denied, 423 U.S. 928 (1975), 28 U.S.C. §1826(b) is mandatory and may not be extended by any waiver, any stay, or release on personal recognizance").

The Criminal Division's position is predicated on the indication in the legislative history that the purpose of the 30-day period in 28 U.S.C. §1826(b) was to protect those appellants incarcerated as a result of the denial of bail pending appeal. See, Hearings on S.30 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., p. 371; Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on S.30 and related proposals, 91st Cong., 2nd Sess., p. 163. Construing 28 U.S.C. §1826(b) to cause loss of jurisdiction by the court of appeals resulting in no review of an order of confinement for civil contempt would defeat the congressional purpose to protect confined contemnors. Alternatively, if as the court of appeals in In re Melickian, supra, assumed, a jurisdictional reading of 28 U.S.C. §1826(b) requires vacation not only of the appeal but of the district court's order of confinement whenever the appeal is not decided within 30 days, the result is equally unsatisfactory since it would completely defeat the coercive purpose of civil contempt. Additionally, courts have expressed concern that a jurisdictional construction of the statute would render it unconstitutional where its effect is to preclude adequate consideration of legal issues. See, In re January 1976 Grand Jury, supra, 534 F.2d at 730 n. 11; Brown v. United States, supra, 465 F.2d at 372.

Although the view of the Criminal Division is that the time limit contained in 28 U.S.C. §1826(b) is not jurisdictional, government attorneys should urge the courts of appeals to dispose of civil contempt appeals within the 30-day period whenever this is possible without sacrificing the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

necessary deliberation. Prompt disposition serves not only to protect contemnors confined pending appeal but also to prevent disruption of the grand jury process and frustration of the purposes of civil contempt where the appellant has been released pending appeal.

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 40

	<u>Page</u>
9-40.000 <u>BANKING FRAUDS</u>	1
9-40.100 EMBEZZLEMENT, ABSTRACTION, PURLOINING OR WILFUL MISAPPLICATION, 18 U.S.C. §§656, 657	1
9-40.110 <u>Applicability</u>	1
9-40.120 <u>Action Proscribed</u>	2
9-40.130 <u>Examples of Misapplications</u>	4
9-40.131 Bad Loans	4
9-40.132 Dummy Loans	4
9-40.133 Brokered Loans	7
9-40.134 Bond Swapping	7
9-40.135 Check Kiting	8
9-40.136 Compensating Balances	8
9-40.140 <u>Elements</u>	9
9-40.150 <u>Loss to the Bank</u>	12
9-40.160 <u>Bank Funds</u>	13
9-40.170 <u>Duplicity In Indictments</u>	14
9-40.180 <u>Aiding and Abetting</u>	16
9-40.190 <u>Conspiracy</u>	17
9-40.200 FALSE STATEMENTS - 18 U.S.C. §1014	18
9-40.210 <u>Elements of Offense</u>	19
9-40.220 <u>Check Kite Cases</u>	22
9-40.300 FALSE ENTRIES--18 U.S.C. §§1005 and 1006	22
9-40.310 <u>Applicability</u>	23
9-40.311 Banking Holding Companies	23

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-40.320	<u>Actions Proscribed</u>	23
9-40.321	False Entries	23
9-40.322	Book, Report, or Statement	25
9-40.323	Intent	25
9-40.324	Unauthorized Transactions	26
9-40.325	Participation	27
9-40.400	BANK FRAUD--18 U.S.C. §1344	28
9-40.410	<u>Applicability</u>	28
9-40.500	BANK BRIBERY--18 U.S.C. §215	29
9-40.510	<u>Investigative Jurisdiction</u>	29
9-40.520	<u>Supervising Section</u>	29
9-40.530	<u>Discussion of the Offense</u>	29
9-40.531	General	30
9-40.532	Corrupt Bank Officer--18 U.S.C. §215(a)	30
9-40.533	Bribe Offerer or Payer--18 U.S.C. §215(b)	31
9-40.534	Definitions--18 U.S.C. §215(c)	31
9-40.535	The Elements of the Offense	33
9-40.536	Intent of the Parties	33
9-40.537	The Defense of "Except As Provided by Law"	34
9-40.538	Penalties	34
9-40.539	Policy Concerning Prosecution	35

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-40.000 BANKING FRAUDS

9-40.100 EMBEZZLEMENT, ABSTRACTION, PURLOINING OR WILFUL MISAPPLICATION,  
18 U.S.C. §§656, 657

These sections differ mainly in the types of financial institutions to which they apply. 18 U.S.C. §656 applies to Federal Reserve banks, member banks, national banks and banks whose deposits are insured by the Federal Deposit Insurance Corporation. 18 U.S.C. §657, insofar as it concerns the banking industry (it also concerns various governmental and quasi-governmental agencies) applies to financial institutions insured by the Federal Savings and Loan Insurance Corporation and the Administrator of the National Credit Union Administration. The following will thus apply to both statutes.

9-40.110 Applicability

The purpose of these statutes is to preserve and protect the assets of banks having a federal relationship. See United States v. Garrett, 396 F. 2d 289 (5th Cir.), cert. denied, 393 U.S. 952 (1968).

However, they apply only to a particular class of individuals, i.e., officers, directors, agents, employees or whoever is connected in any capacity with any of the designated institutions. See United States v. Cooper 464 F. 2d 648 (10th Cir. 1972), cert. denied, 409 U.S. 1107, reh'g denied, 410 U.S. 959 (1973).

The term "connected in any capacity" is necessarily broad to include any person who has such a relationship to the institution that he/she could injure it by committing one or more of the criminal offenses set out in 18 U.S.C. §656 and §657. In the Garrett case, the defendants, who were held to be "connected in any capacity," had purchased a controlling interest in a bank, had exercised control through naming employees and associates to the board of directors, and were active in the affairs of the bank through increasing deposits. In United States v. Edick, 432 F. 2d 350 (4th Cir. 1970), the defendant was the employee of a corporation which handled the proofing and bookkeeping for several banks controlled by a holding company. Because of the defendant's position, the defendant was able to divert bank funds. The defendant's relation to the bank was held to be the same as if the defendant had been a bank employee doing this essential bookkeeping work; and, therefore, the court held that he was at least "connected in any capacity," if not an agent. Similarly, in United States v. Fulton. 640 F. 2d 1104, 1105 (9th Cir. 1981), the defendant-

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

embezzler was covered under the statute even though she worked for a mortgage company which was a wholly-owned subsidiary of a federally insured bank.

One district court in an unreported case has apparently limited the class of persons "connected in any capacity" to those who perform a banking function type of service. United States v. Finnegan (E.D. Va.) (See United States Attorneys' Bulletin, Vol. 6., No. 7, March 28, 1958). In the Finnegan case, a rental agency was authorized to collect rentals from lessees of portions of a building owned by the Savings and Loan Association, and an employee of the rental agency had falsified receipts of the agency. The court ruled that the employee was not "connected in any capacity" with the bank, as proscribed by 18 U.S.C. §1006. This presumably would also apply to 18 U.S.C. §656 and §657.

More recently another district court also in an unreported case has extended the limitation even further and dismissed an indictment charging a bank employee with a violation of 18 U.S.C. §1005 on the grounds that the indictment did not charge the defendant with "either making false entries herself or with causing those entries to be made in her role as a bank employee." United States v. Edwards, (D. Conn. 1983). In the Edwards case, defendant, a teller at a bank, was charged with five counts of depositing worthless checks into her own account, in violation of 18 U.S.C. §1005. The indictment, however, did not allege that the defendant was acting in her capacity as a bank employee in depositing the alleged checks, or that her role as a bank employee played any part in the false entries which allegedly resulted from the check deposits. The district court, in its opinion, stated that "it is clear to the Court that §1005 is intended not simply to apply only to bank officers, directors, agents and employees, but also to reach only such conduct as is performed by such individuals in their capacity as bank officers, directors, agents, or employees."

9-40.120 Actions Proscribed

The term "embezzlement" means the unlawful taking or conversion by a person to his/her own use of the monies, funds or credits which came into his/her custody or possession lawfully by virtue of his/her office or employment. See United States v. Northway, 120 U.S. 327 (1887). If embezzlement is charged, the conversion alleged may not be to some third party other than the embezzler himself/herself. See United States v. Williams, 478 F. 2d 369 (4th Cir. 1973). Rather abstraction or misapplication should be charged where there is a third-party beneficiary.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

But it is a jury question whether or not the defendant had sole access to the funds so as to support a charge of embezzlement. See United States v. Walker, 677 F.2d 1014, 1016 (4th Cir. 1982).

Abstraction is the act of one who, being an officer of a national banking association, wrongfully takes or withdraws monies, funds or credits with the intent to injure or defraud the bank or some other person, and without the bank's knowledge or consent, or that of its board of directors, converts them to the use of oneself or some other person or entity other than the bank. United States v. Breese, 131 F. 915 (W.D.N.C. 1904), rev'd on other grounds, 142 F. 250 (4th Cir. 1906). The word "abstract" has long been a term of certain, simple and unambiguous meaning. See United States v. Archambault, 441 F.2d 281 (10th Cir. 1971); United States v. Northway, supra.

There has apparently been only one case which discussed "purloining" in the context of 18 U.S.C. §656, and the court therein accepted the definition which has applied to other criminal statutes, United States v. Archambault, supra. "Purloining" is a species of larceny which fills the gap between the sometimes doubtful common law definition of larceny and the modern criminal code definition of larceny. See United States v. Archambault, supra, citing, United States v. Handler, 142 F.2d 351 (2d Cir. 1944); Crabb v. Zerbst, 99 F.2d (5th Cir. 1938).

Recently, a majority of the U.S. Supreme Court held that the Federal Bank Robbery Act, which proscribes the "taking and carrying away" of bank property with an intent to steal, 18 U.S.C. §2113(b), is not limited in its application to common-law larcenies and that the statute can also be applied to some instances of obtaining money under false pretenses. See Bell v. United States, 103 S. Ct. 2398 (1983). The majority was careful to point out, however, that the statute would not apply to a false pretenses case where there is no taking and carrying away.

The term "misapplication" means a wilful and unlawful misuse of monies, funds or credit of the bank made with intent to injure or defraud the bank. See Hernandez v. United States, 608 F.2d 1361 (10th Cir. 1979); United States v. Welliver, 601 F.2d 203 (5th Cir. 1979); Garrett v. United States, supra. See also United States v. Moraites, 456 F.2d 435, 441 (3d Cir. 1972).

"The misapplication of funds proscribed by 18 U.S.C. §656 occurs when funds are distributed under a record which misrepresents the true state of the record with the intent that bank officials, bank examiners or the Federal Deposit Insurance Corporation will be deceived." United States v. Twiford, 600 F.2d 1339 (10th Cir. 1979) quoting, United States v. Kennedy, 564 F.2d 1329, 1339 (9th Cir. 1977).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-40.130 Examples of Misapplications

The following fact patterns are examples of misapplication, but not an exhaustive list of possible schemes. See USAM 9-40.131; 9-40.132; 9-40.133; 9-40.134; 9-40.135; 9-40.136, infra.

9-40.131 Bad Loans

The bad loan is probably the most obvious type of misapplication but it should be noted that a bad loan in and of itself might be mere maladministration as opposed to criminal misapplication. See United States v. Giragusian, 349 F.2d 166 (1st Cir. 1965); United States v. Williams, supra; Hernandez v. United States, supra; United States v. King, 484 F.2d 924 (10th Cir. 1973). It can occur by either granting an unsecured loan to a person who is not financially able to repay or by granting a loan on knowingly inadequate or valueless collateral. See Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935), cert. denied, 296 U.S. 658 (1936). The bad loan is often correlated with an interest of a bank officer or employee. See Hargreaves v. United States, 75 F.2d 68 (9th Cir. 1935). The bad loan can be a misapplication, however, without any showing that the bank officer personally benefited from the transaction, if it can be shown that the officer acted in reckless disregard of the bank's interest. See Logsdon v. United States, 253 F.2d 12 (6th Cir. 1958)

In United States v. Hernandez, supra, a conviction of a bank officer was upheld for misapplications involving loans, the issuance of an unauthorized letter of credit and the continued funding of large overdrafts without proof that there was a personal gain to the officer. A conviction for misapplication through continued funding of overdrafts was also upheld in Swingle v. United States, 389 F.2d 220 (10th Cir. 1974); United States v. Mayr, 487 F.2d 67 (5th Cir. 1973), cert. denied, 417 U.S. 914 (1974) (officer funded overdrafts and covered them with signed blank checks left by the borrower on the morning when bank examiners were due to arrive).

9-40.132 Dummy Loans

A misapplication occurs where an officer of a bank knowingly lends money to fictitious or financially insecure borrowers, where the loans are for his/her own benefit and his/her interest in said loans is concealed from the bank. See United States v. Fortunato, 402 F.2d 79 (2d Cir. 1968) cert. denied, 394 U.S. 933 (1969), United States v. Cooper, 464 F.2d 650 (10th Cir. 1972), United States v. Kernodle, 367 F. Supp. 844 (M.D.N.C.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1973). However, when the nominee borrower is financially able to repay the loan or was at the time the loan was made, it may be difficult to establish the requisite intent to injure and defraud the bank. See United States v. Gens, 493 F.2d 216 (1st Cir. 1974). The court there delineates the circumstances where third party loans are in violation of the statute as follows:

(1) where the bank official knew the name debtor was either fictitious or wholly unaware that his/her name was being used;

(2) where the bank official knew that the named debtor was financially incapable of repaying the loan proceeds of which he/she passed on to a third party; and

(3) where the bank officials assured the named debtor, regardless of his/her financial capabilities that they would look for repayment only to the third party, who actually received the loan proceeds.

However, the court went on to indicate that a loan where the named debtor is both financially capable and fully understands that it is his/her responsibility to repay a loan to him/her cannot, absent other circumstances, properly be characterized as a sham or dummy, even if the bank officials know the debtor will turn over the proceeds to a third party. Thus, it may be difficult to establish a misapplication in this situation in the absence of other circumstances.

The court went on to elucidate as to this in a footnote (Id. at 222)

(w)e do not go far as to say that the obligation of a financially responsible party to a bank will in all cases mean that post-loan transfers to a third party will not result in liability for willful misapplication but (i)n the absence of a showing of special circumstances demonstrating injury or risk of injury to the bank, despite the obligation of a financially responsible party to the bank, liability cannot be found.

Subsequent to Gens, the Ninth Circuit in United States v. Dreitzler, 577 F.2d 539 (9th Cir. 1978) and the Tenth Circuit in United States v. Twiford, 600 F.2d 1339 (10th Cir. 1979) specifically rejected the Gens decision. Although the Third Circuit in United States v. Gallagher, 576 F.2d 1028 (3d Cir. 1978) initially accepted the Gens rationale, the court rejected the loan-reloan approach in circumstances where the nominee

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

borrower was turning the proceeds of the loan back over to the bank officer and found that there was misapplication in such circumstances. See United States v. Krepps, 605 F.2d 101 (3d Cir. 1979). In the Krepps case, the defendant, a bank officer, caused the bank to lend money to named debtors who then transferred the funds back to the defendant. The scheme permitted the defendant to obtain loans for himself in excess of the amount prescribed by statute. In reviewing the conviction, the Third Circuit examined the element of wilful misapplication in light of the factual circumstances. The court held that it was of no consequence that the government did not prove that the named debtors lacked either the ability or intent to repay the loans. Whether the debtors were bona-fide borrowers who made subsequent transfers of the loan proceeds to the defendant was not a factual issue of importance. Rather, the element of wilful misapplication was established by the defendant's dual status as loan officer and loan beneficiary.

Recently, the Eighth Circuit has twice followed the Third Circuit's lead in the Krepps case and found a violation of the misapplication statute where the proceeds of the loan were not turned over to a true third party but are turned over to the bank officer. See United States v. Steffen, 641 F.2d 591, 597 (8th Cir.), cert. denied, 452 U.S. 943 (1981), in which the court states:

Gens and the other "bad loan" cases, however, involved bank officials who made loans to certain debtors knowing that the loans would go to third parties. Typically, such loans were to be the result of poor judgment rather than willful misapplication, e.g., United States v. Gallagher, 576 F.2d 1028, 1046 (3d Cir. 1978) and cases cited therein.

A different situation is presented where, as here, a bank officer makes a loan to putative borrowers, with the intent that the proceeds be used for his own benefit. The officer conceals his interest from the bank in order to circumvent the statutory limitations on insider loans. In such cases Courts have held that the financial condition of the putative borrower is irrelevant.

Mere undisclosed self-dealing on the part of the loan officer may not be enough for misapplication. There must be some false pretense or false statement accompanying the transaction. See United States v. Schoenhut, 576 F.2d 1010, 1025 (3d Cir.), cert. denied, 439 U.S. 964 (1978). Nonetheless self-dealing usually generates some false statement or active

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

deception. For example, in United States v. Foster, 566 F.2d 1045, 1050 (6th Cir. 1977), cert. denied, 439 U.S. 917 (1978), the deception was the granting of a loan for a greater amount than was required for the stated purpose in order to fund the loan officer's own contribution to the partnership which received the loan.

In addition to 18 U.S.C. §656 and §657, consideration should also be given to other statutes in connection with third-party loans for the benefit of bank officials. An officer of a national or FDIC insured bank can be prosecuted for receiving directly any benefit from a loan transaction under 18 U.S.C. §215, and an officer of a savings and loan association or credit institution, can be prosecuted under 18 U.S.C. §1006 for participation, directly or indirectly in any loan. Further, if a banking regulation is violated, the participants in the scheme might possibly be prosecuted on the theory of a conspiracy to defraud the United States through a deliberate circumvention of a regulatory program. Finally, consideration may be given to a violation of 18 U.S.C. §1014 if the borrower, even if financially responsible, falsifies the loan application as to the purpose of the loan.

9-40.133 Brokered Loans

Where an agreement either exists or is entered into between the broker and a bank, by which the bank will approve an individual loan if the broker obtains deposits in the amount of the loan a misapplication may occur. The broker generally participates by offering an extra point on certificates of deposit; the additional interest and brokers' fee are paid out of the proceeds of the loan. The brokered loan can only constitute a misapplication if the loan is worthless from inception. The factor distinguishing the brokered loan from a worthless loan is deposits; and, therefore, if there is a misapplication, the broker may be prosecuted as aider and abettor since his/her actions caused the making of the loan.

9-40.134 Bond Swapping

This activity can in some aggravated instances be a misapplication. The fact pattern is essentially the selling by the bank to a broker of one security at a price substantially greater than the prevailing market value and simultaneous purchasing of another security at substantially above the present market value. The detriment to the bank is that the broker receives a better security, i.e., less speculative but with a present low value. This transaction has the effect of deferring the accounting for loss on the sale of the security in excess of the market value at the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

time. The banking community has been advised by their supervisory agencies that this practice is considered to be unsafe and unsound and that prosecution may result from it. It is the feeling of the Department that the regulation of bond swapping practices by banks should be controlled by the regulatory agencies unless the facts of a particular case are so aggravated as to warrant criminal prosecution for fraud or if it can be shown that the bank official personally benefited.

9-40.135 Check Kiting

The check kite, which can be prosecuted as a bank fraud under the recently enacted 18 U.S.C. §1344, provided the activity occurred after October 12, 1984, can be prosecuted as a misapplication under 18 U.S.C. §656. See United States v. Giordano, 489 F.2d 327 (2d Cir. 1973). The courts have held that the knowing use of funds and credits of a bank to further an illegal and fraudulent check kite is a misapplication as that term is used in the statute. See United States v. Rades, 495 F.2d 1166 (3d Cir. 1974); United States v. Giordano, *supra*. Of course, there must be a guilty party within the designated class. To preclude an acquittal on the basis that there was not a guilty principal, it is suggested that there should also be a charge under the mail or wire fraud statute, 18 U.S.C. §§1341 or 1343, or, for activity occurring after October 12, 1984, under the recently enacted bank fraud statute, 18 U.S.C. §1344. If a bank officer, director, agent or employee is involved, a check kiting scheme might come within the scope of 18 U.S.C. §1005. There is also the possibility of charging a violation of interstate transportation of property obtained by fraud under 28 U.S.C. §2314 if it can be shown that the property taken by fraud was so transported.

In United States v. Ness, 665 F.2d 248 (8th Cir. 1981), the defendant bank officer was convicted of misapplication for "check rolling" which occurred when he arranged, in violation of bank procedure, for insufficient checks to be paid out of the banks funds rather than charged to the drawer's account or returned without payment.

9-40.136 Compensating Balances

Misuse of correspondent bank balances can be a misapplication where the facts show a detriment to the bank and a benefit to its officers. In such a scheme, bank officers utilized correspondent accounts of their banks for the purpose of compensating lending banks for loans granted to those officials or their associates. By using these accounts in this manner, the official may be able to obtain a loan at the preferential rate

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

or circumvent other statutes and administrative regulations. Since the borrower maintains these balances as a condition of the loan, the borrower is able to utilize the funds and credits of his/her bank for his/her own benefit. See United States v. Mann, 517 F.2d 259 (5th Cir. 1975), and United States v. Brookshire, 514 F.2d 786 (10th Cir. 1975). It is also possible that these correspondent bank balances could constitute violations of the mail or wire fraud statutes or a conspiracy to defraud the United States by deliberate circumvention of a statutory scheme.

In United States v. Larson, 581 F.2d 664 (7th Cir. 1978), the defendant bank president obtained a personal loan of \$40,000 from another bank at a favorable rate of 7% interest in exchange for his depositing \$50,000 of his own bank funds in a dormant, non-interest bearing account at the lending bank. The court of appeals found that the compensating deposit constituted misapplication.

9-40.140 Elements

The essential elements of the crime are as follows: (1) the accused must be of the designated class of persons (2) of a particular type of federally-connected institution, and (3) he/she must have wilfully misapplied monies, funds or credits of such institution or entrusted to its custody (4) with the intent to injure or defraud the institution. United States v. Vanatta, 189 F. Supp. 939 (D. Hawaii 1960).

The general rule is that since the words "wilful misapplication" have no settled technical meaning, there must be averments to show how the misapplication was made and that it was an unlawful one. United States v. Britton, 107 U.S. 655, 669 (1882). Mulloney v. United States, *supra*. The court in the Britton case distinguished misapplication from maladministration. The honest exercise of official discretion in good faith, without fraud, for the advantage, or supposed advantage of the association is not punishable; but if official action is taken, not in the honest exercise of discretion, in bad faith, for personal advantage and with fraudulent intent, it is punishable. For evidence sufficient to support a finding that the bank president and an attorney acted with sufficient knowledge and intent, see United States v. Fusaro, 708 F.2d 17 (1st Cir.), *cert. denied*, U.S. 104 S.Ct. 524 (1983).

The various circuit courts do not agree on the required averments to allege misapplication. For instance, it is generally necessary to allege that the monies, funds or credits were converted to the use of the accused or to some party other than the bank; however, in the Tenth Circuit if the total charge was embezzlement, abstraction, purloining or misapplication,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

it was held inherent in the indictment that appellant stood accused of Archambault, 441 F.2d 281 (10th Cir. 1971). Misapplication, as distinguished from embezzlement, does not require a showing of prior lawful possession. United States v. Hazeem, 679 F.2d 770 (9th Cir.), cert. denied, 459 U.S. 848 (1982).

An essential element of the crime is that the defendant must be shown to have an intent to injure or defraud the bank. The language "intent to injure or defraud" was omitted from the 1948 revision of 18 U.S.C. §656 because it was thought to be redundant. See United States v. Logsdon, 132 F. Supp. 3 (W.D. Ky. 1955), aff'd., 253 F.2d 12 (6th Cir. 1958). However, the reviser's note specifically states that the language changes were not intended to affect the substantive law.

It has been held that the allegation that a defendant wilfully misapplied the monies of a bank is sufficient to charge the necessary fraudulent intent since such intent is inherent in the term "wilful misapplication." Logsdon v. United States, supra. This position seems to have been adopted by the Ninth Circuit when the rest of the indictment makes clear the existence of fraudulent intent. See Ramirez v. United States, 318 F.2d 155 (9th Cir. 1963). There is an indication in Judge Learned Hands' dictum in United States v. Matot, 146 F.2d 197 (3d Cir. 1944), that wilful misapplication presupposes fraudulent intent. However, it is suggested that an indictment expressly allege that the wilful misapplication "was with intent to injure or defraud" the bank or institution. The District Court of Hawaii held that it was essential to specifically state that the wilful misapplication was with the intent to injure or defraud. United States v. Vannatta, supra. All of the essential elements of the crime must be charged in the indictment. United States v. Cawthon, 125 F. Supp. 419 (M.D. Ga. 1954). Therefore, although there are cases to the contrary, it is advisable to include the specific language "with intent to injure or defraud" the institution. In this regard, see United States v. Adamson, 700 F.2d 953 (5th Cir. 1983) (en banc), cert. denied, U.S. 104 S.Ct 116 (1983), which overruled United States v. Welliver, 601 F.2d 203 (5th Cir. 1979). In the Adamson case, the court in its decision stated that:

[W]e conclude that the appropriate mens rea standard for §656 is knowledge....The trier of the fact may infer the required intent, i.e., knowledge, from the defendant's reckless disregard of the interest of the bank; however, jury instruction should not equate recklessness with intent to injure or defraud....Accordingly, we overrule that portion of United States v. Welliver, 601 F.2d 203 (5th Cir.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1979), which held that the proper mens rea standard for §656 was a reckless disregard of the interests of the bank.

Adamson, supra, at 965.

In reference to proof, fraudulent intent may be inferred from all the circumstances surrounding the transactions in question, and there need not be any direct evidence. See United States v. Daileda, 229 F. Supp. 143 (M.D. Pa. 1964), aff'd, 342 F.2d 218 (3d Cir. 1965); United States v. Acree, 466 F.2d 1114 (10th Cir. 1972) cert. denied, 410 U.S. 913 (1973). The requisite intent was characterized in Logsdon, supra, as a "reckless disregard" for the interest of the bank, and this standard has been held to be the minimum requirement for proof of intent to injure or defraud. See Giragosian v. United States, 349 F.2d 166 (5th Cir. 1965). A person charged with knowledge of the naturally foreseeable consequences of his/her acts and proof of those consequences has been held sufficient to prove criminal intent. United States v. Schmidt, 471 F.2d 385 (3d Cir. 1972); Golden v. United States, 318 F.2d 357 (1st Cir. 1963); United States v. Harper, 33 F. 471 (6th Cir. 1887). The government, however, must show that the acts were done wilfully and intentionally, and were not merely acts of inadvertence or carelessness. Thus, the charge of to the jury that they could find the defendant guilty of embezzlement if he/she "knew or should have known" that his/her act constituted embezzlement was held to be reversible error, as the phrase "should have known" could render one to be guilty for mere negligence. United States v. Williams, supra. For a discussion of the appropriate jury instructions regarding the issue of intent to defraud, see United States v. Hansen, 701 F.2d 1215 (7th Cir. 1983).

Proof that normal loan procedures are circumvented or facts were concealed from other bank officers or the board of directors would be indicative of fraudulent intent. Robinson v. United States, 30 F.2d 25 (6th Cir. 1929). Proof of a failure to obtain sufficient collateral, Mulloney v. United States, supra, and proof of the repeated cashing of NSF checks, Logsdon v. United States, supra, and proof of self-interest on the part of the bank officer or employee in an otherwise questionable transaction, Flickinger v. United States, 150 F.1 (6th Cir. 1906), would all be evidence of intent to injure or defraud. Evidence of prior transactions, involving embezzlements from the same bank and closely related in time to the offense charged, also constituted similar offenses relevant to show knowledge and intent. United States v. Zarra, 298 F. Supp. 1074 (M.D.Pa. 1969), aff'd, 423 F.2d 1227 (3d Cir.), cert. denied, 400 U.S. 826 (1970). Proof of loss to the institution is probative of intent to injure or defraud. United States v. Matsinger, 191 F.2d 1014

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(3d Cir. 1951), and in a case involving an aider and abettor, knowledge of specific acts of concealment would be relevant evidence of intent. United States v. Daileda, *supra*; Benchwich v. United States, 297 F.2d 330 (9th Cir. 1961). Even evidence of a defendant's acts after the period of an indictment charging misapplication, including evidence of gambling to recoup losses, has been held admissible as bearing an intent. Benchwich v. United States, *supra*. Similarly, evidence that the loan was not for the benefit of the apparent borrower but rather to aid another heavily indebted borrower to pay off a loan for which the authorizing officer had been criticized, was sufficient to support a conviction for misapplication. United States v. Luke, 701 F.2d 1104 (4th Cir. 1983).

Defense evidence showing that the defendant was person of means and did meet or could have met a demand for payment has been produced in cases involving overdrafts. Such evidence is probative of intent. United States v. Matot, *supra*; United States v. Broxmeyer, 192 F.2d 230 (2d Cir. 1951); Seals v. United States, 221 F.2d 243 (8th Cir. 1955). However, it is not determinative. Rakes v. United States, 169 F.2d 739 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948). In the Rakes case, the defendant claimed he had assets and intended to pay the money back. The court rejected both of these contentions stating:

Moreover, the fact that a man has assets does not negative an intent to steal;...the fact that he intends to pay it back doesn't negative his intent to misapply in the first instance.

9-40.150 Loss to the Bank

As previously mentioned, a necessary element is a conversion of funds to the use of the defendant or some other person. However, it is not a defense that there was in fact no loss to the institution. See United States v. Fortunato, 402 F.2d 79 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969). United States v. Acree, *supra*. The offense is committed if possession, control or use is lost even though it be only momentary, Rakes v. United States, *supra*; United States v. Matsinger, *supra*; United States v. Kernodle, *supra*; subsequent return of the fund is no defense, United States v. Acree, *supra*. It is not necessary for funds to actually leave the bank, as most banking transactions consist of bookkeeping entries rather than actual transfers of cash. See United States v. Rickert, 459 F.2d 352 (5th Cir. 1972). But see *contra*, Johnson v. United States, 95 F.2d 813 (4th Cir. 1938). In short, it is not necessary for the government to allege or to prove that the bank actually suffered any loss as a result of the defendant's actions. A review of the cases establishes

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

that the requisite intent may be established if the defendant's acts created the "possibility that the bank would suffer injury." United States v. Larson, 581 F.2d 664, 668 (7th Cir. 1978).

It has also been held that the possibility that the bank may benefit from misuse of its funds does not negate the intent to injure and defraud since the wrongdoing was complete at the time the alleged bribe payments were made. United States v. Caldwell, 544 F.2d 691 (4th Cir. 1976). However, the same court held in United States v. Arthur, 544 F.2d 720 (4th Cir. 1976) that the illegal use of bank funds must be for a specific purpose and not merely to create good will. See also United States v. Beran, 546 F.2d 1316, cert. denied, 97 S. Ct. 1330 (1976), where it was held that only probability of loss to the bank is necessary to establish intent to defraud, that neither a possibility to future benefit to the bank nor restitution are defenses to the charge of misapplication. However, see United States v. Riley, 550 F.2d 233 (5th Cir. 1977) where it was held that intent to injure and defraud is an essential element and evidence to disprove this element may not be excluded.

9-40.160 Bank Funds

Funds do not become bank funds solely because one who is an officer of the bank received them, irrespective of the capacity in which the officer does so, and when a bank officer holds funds in a fiduciary capacity for others, they do not become funds of the bank, even though the officer deposits them in his/her own bank. In Golden v. United States, *supra*, the defendant was an officer of a bank which was coadministrator of an estate in Massachusetts. Because of doubt as to whether certain insurance checks were a part of the Massachusetts estate or the Tennessee estate, the defendant was to hold these proceeds apart from the general funds of the estate on deposit with the bank. The court held that the issue whether the insurance proceeds were received by the defendant in the defendant's official capacity as a bank officer or in an individual capacity should have been submitted to the jury. In the Hudson case, the defendant was president of the bank and treasurer of a drainage district. Checks were sent to the defendant in the defendant's capacity as treasurer of the drainage district and not as agent for the bank; therefore, the defendant's use of the funds for personal expenditures did not constitute a misapplication within the statute.

In United States v. Harter, 116 F.2d 51 (7th Cir. 1946), the defendant was convicted of wilful misapplication and embezzlement. As an officer of a trust company, the defendant sold stock which belonged to a customer, and the proceeds of such sales were placed by the broker in an

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

account for the trust company at a correspondent bank. A deposit ticket was made out to indicate a deposit by a corporation as the result of the securities sold. The court stated that these proceeds had been deposited to the credit of the trust company in its correspondent bank, and as between the trust company and the defendant the credit represented funds of the trust company. In Groves v. United States, 343 F.2d 850 (8th Cir. 1965), the defendant was a branch manager who took checks payable to the association from a customer and deposited them to his own account. The defendant then issued spurious passbooks to the customer and represented that the money was properly with the association. The court upheld the conviction for embezzlement over the defendant's claim that the defendant was the customer's agent and that the money never became the property of the association. The court held that the defendant took the checks as agent for the association and noted that the defendant went to great lengths to convince the customer that the funds were deposited with the association.

The funds of a wholly-owned subsidiary belong to the parent bank within the meaning of 18 U.S.C. §657 and there may be a prosecution for misapplication as long as the parent corporation is a federally insured bank or lender. See United States v. Cartwright, 632 F.2d 1290, 1292 (5th Cir. 1980).

9-40.170 Duplicity In Indictments

Banking indictments often charge defendants with "embezzling abstracting, purloining and wilfully misapplying" funds or credits. These offenses are separate and distinct so that the inclusion of all of them in one count has been held to be duplicitous. United States v. Cadwallader, 59 F. 677 (W.D. Wis. 1893). However, there is authority to the contrary. Theobald v. United States, 3 F.2d 601 (8th Cir. 1925). The preferred draftsmanship would be to charge only one of the offenses in a single count.

Another possibly duplicitous allegation that appears in many banking indictments is the charge that the defendant embezzled an amount of the monies, funds and credits of institution. Several cases have held that these terms are not synonymous, each denoting a different form of bank assets, so that charging the embezzlement of all three in one count is duplicitous. See United States v. Greene, 65 F. 488 (E.D. Mo. 1894). In United States v. Westbrook, 114 F. Supp. 192 (W.D. Ark. 1953), it was held by adding the words "to wit, \$1,400" to "money, funds, and credits" the words funds and credits become surplusage and should be disregarded and hence were not duplicitous. Money refers to currency or the circulating

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

medium of the country; the word "funds" refers to government, state, country, municipal or other bonds and to other forms of obligations and securities in which investments may be made; and the word "credit" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it. See United States v. Smith, 152 F.542 (W.D. Ky. 1907).

A series of cases in the Ninth Circuit have upheld such a charge when modified by the statement that "a more particular description of said monies, funds and credits was to the grand jurors unknown." Bower v. United States, 296 F. 694 (9th Cir. 1924); Williams v. United States, 275 F. 129 (9th Cir. 1921); Sheridan v. United States, 236 F. 305 (9th Cir. 1916). The Seventh Circuit has also stated that this phrase can save an indictment. Peck v. United States, 65 F.2d 59 (7th Cir. 1933).

There is also authority for the bald proposition that joining these three items is not duplicitous. Mulloney v. United States, *supra*. This case appears never to have been followed by any other court, perhaps because neither reason nor authority is cited for its conclusion.

It is, therefore, advisable in drafting an indictment to specify the nature of the conversion and that which was converted, or if unable to define the type of asset, to add a phrase to the effect that "a more particular description of the monies, funds and credits is not known by the grand jurors." It would also seem that if the indictment spells out the precise things that were embezzled or misapplied the requirement of notice to the defendant would be satisfied.

The problem of duplicity or multiplicity frequently arises where there has been a series of acts of embezzlement or misapplication. There is then an inclination to combine these violations in one count, setting forth the time period during which they occurred and the total amount embezzled or misapplied, rather than a separate count for each violation, particularly where each violation involves a relatively small amount. Since the courts have not extensively considered this problem in connection with banking violations, reliance must be placed on the general rule that duplicity must be resolved by the test of whether each offense requires proof of an additional fact that the others do not. (See USAM 9-42.220 for a general discussion of duplicity.)

Court considerations of the problem in banking cases are: (1) United States v. Martindale, 146 F. 280, 288-289 (D. Kan. 1903), where the court held that where a sum of a bank's money was fraudulently applied to the payment of three notes, since the misapplications have occurred and should be charged in separate counts. The court also strongly disapproved of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

"general" or "comprehensive" type of count which alleges only that between two dates a total sum of money, funds or credits were abstracted or misapplied from a bank. (2) However, in United States v. Matsinger, *supra*, the court held when two checks are part of one transaction and one misapplication, it is not necessary to have separate counts for each check. See also United States v. Daley, 454 F.2d 505 (1st Cir. 1972) a (non-banking embezzlement case). (3) In United States v. Hale, 468 F.2d 435 (5th Cir. 1972), *reh'g denied*, 475 F.2d 1404 (1973), where the defendant objected to being sentenced on each of six counts of misapplication, the court held that where each count required proof that the others did not, conviction and punishment on each count was proper.

The rule, in the absence of judicial determination to the contrary, appears to be that when a bank officer or employee is moved to embezzle, misapply or abstract bank funds or money, this impulse, even if it results in a series of transactions, constitutes a separate violation and should be charged in a separate count. Each successive impulse, no matter how much it is in common with previous ones, must be the subject of individual counts.

9-40.180 Aiding and Abetting

Since 18 U.S.C. §656 and §657 are class statutes, it is essential that the indictment contain a sufficient factual allegation that the bank official violated the statute, whether or not that official is actually charged in the indictment, if an aider and abettor is to be charged. The mere statement of a conclusion that the bank official violated the statute is not sufficient. See United States v. Tornabene, 222 F.2d 875 (2d Cir. 1955). Essential to the crime of aiding and abetting a bank official in violating 18 U.S.C. §656 and §657 is the guilt of the bank official. See United States v. Pyle, 279 F. 290 (S.D. Cal. 1921); United States v. Giordano, *supra*. While it is necessary to prove the guilt of a principal within the designated class, Giragodian v. United States, *supra*, guilt of the aider and abettor may be established without an actual conviction of the principal. See United States v. Tokoph, 514 F.2d 597 (10th Cir. 1975). In the Tokoph case, the principal pleaded guilty to one count of the indictment, and the remaining counts were dismissed. The conviction of the aider and abettor on the counts that were dismissed as to the principal was upheld, as there was a showing of the principal's guilt as to those counts, even though the principal was not actually convicted on them. Thus, the lack of a conviction of the principal is not fatal, so long as the principal is not actually acquitted.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

An aiding and abetting indictment is sufficient if it substantially followed the language of the statute or uses words of similar import. See United States v. Zarra, 298 F. Supp. 1074 (M.D. Pa. 1969), aff'd 423 F.2d 1227 (2d Cir.), cert. denied, 400 U.S. 826 (1970). The indictment which was held sufficient in the Zarra case charged the defendant with aiding, abetting, counseling, commanding, inducing and procuring Hesse, an officer of the bank, who "wilfully and knowingly and with intent to injure or defraud the bank" embezzled the funds, in violation of 18 U.S.C. §656 and §2. An indictment alleging that a bank officer, together with aiders and abettors, "with intent to defraud did wilfully misapply" bank funds was sufficient to charge intent to injure or defraud, an essential element of the offense. See United States v. Mullins, 355 F.2d 883 (7th Cir. 1966).

Another necessary element of aiding and abetting is that the defendant was in some manner associated with the venture, participated in it as in something the defendant wished to bring about and sought by the defendant's action to make it succeed. See United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967). The defendant need not know the modis operandi of the principal, so long as the defendant shared the principal's criminal purpose to injure and defraud the bank. See Benchwick v. United States, supra. To support a conviction, the aider and abettor must be shown to have knowledge that the officer intended to affect a conversion. See United States v. Docherty, 468 F.2d 989 (2d Cir. 1972). Knowledge that the bank employee was giving the aider and abettor embezzled funds is an essential element, that may be inferred from all the facts and circumstances. See United States v. Johnson, 447 F.2d 31 (7th Cir. 1971).

9-40.190 Conspiracy

The conspiracy statute can also be used to prosecute those conspiring to commit the offenses mentioned herein. There are two distinct types of conspirational action for which 18 U.S.C. §371 provides criminal sanctions. The first involving a conspiracy to "commit any offense" against the United States, concerns conspiracies having as their object the commission of unlawful acts subject to criminal prosecution or suit for penalty. See United States v. Hutto, 256 U.S. 524 (1921). The second prong of the general conspiracy section, involving a conspiracy "to defraud the United States," includes conspiracies having as their purpose impairing, obstructing, or defeating the lawful function of any department of government. Hass v. Henkel, 216 U.S. 426 (1909). Therefore, it appears that a viable theory of prosecution would be to charge a conspiracy to defraud the United States by the deliberate circumvention of a statutory scheme. See United States v. Levinson, 405 F.2d 971 (6th Cir. 1968). In the Levinson case, the indictment charged that the defendants

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

conspired to defraud the United States of its right to have its loan guaranty program administered in accordance with a certain civil regulation. The statutory scheme therein was circumvented by the submission of false documents, and the fact that there was no criminal penalty provided by the regulation was of no consequence. See Hyde v. United States, 225 U.S. 347 (1912); United States v. Keitel, 211 U.S. 370 (1908).

This second prong of the conspiracy statute would appear to be a viable theory for prosecuting misuse of correspondent bank balances. The apparent reason for an officer to place the funds of his/her bank in another bank is to enable him/her to do indirectly that which he/she is precluded from doing directly, and by using the bank's moneys in this manner, the officer may be able to circumvent numerous regulations promulgated to protect the assets of the federally regulated institutions. Certain of these regulations are as follows: 12 U.S.C. §83, which precludes a bank from making a loan secured by its own stock; 12 U.S.C. §84, which sets a lending limit to any one borrower; 12 U.S.C. §371(c), loan limit to affiliates; 12 U.S.C. §248, precludes excessive loans for the speculative carrying of securities; 15 U.S.C. §78ff and §78g, 12 C.F.R. §221, loans on securities in excess of margin limitations; 12 U.S.C. §375z, loans to executive officers. Although all but 15 U.S.C. §78ff and §78g do not carry any criminal penalty, it is felt that they give color to the activities of an officer defendant and evidence that the officer had an ulterior motive in his/her actions.

9-40.200 FALSE STATEMENTS--18 U.S.C. §1014

This section covers the knowing making of false statements or wilfully overvaluing any property or security for the purpose of influencing in any way the action of the enumerated agencies and organizations. Prior to the 1970 amendments to this section the only banking institutions, pertinent to our consideration, which were covered were Federal Savings and Loan Associations and Federal Credit Unions. The amendments added insured state chartered credit unions, and institutions whose deposits are insured by the Federal Savings and Loan Corporation or the Federal Deposit Insurance Corporation. The federal jurisdiction was thus greatly expanded and it was feared that the Assistant U.S. Attorneys would be over burdened by matters which were to a large extent, collection of bad debts. While this has not materialized, Assistant U.S. Attorneys are urged to exercise extreme caution in assuming prosecutive jurisdiction over cases that clearly are more appropriately subject to state or local prosecution. However, the statute should not be overlooked as a tool to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

preserve the integrity of federally insured banking institutions and its use in conjunction with other statutes having the same purpose.

Venue is governed by the general rule under the various false statement and false claim statutes. See United States v. Blecker, 657 F.2d 629, 632 (4th Cir. 1981), cert. denied, 454 U.S. 1150 (1982) (false claim statute). A violation of section 1014 is indictable either in the district where the false statement is prepared and mailed, or where the statement is received. See United States v. Wuagneux, 683 F.2d 1343, 1356 (11th Cir. 1982), cert. denied, U.S. 104 S.Ct. 69 (1983).

Generally the making of a number of false statements to a lending institution in a single document constitutes only one criminal violation under section 1014. See United States v. Sue, 586 F.2d 70, 71 (8th Cir. 1978). See also United States v. Thibadeau, 671 F.2d 75, 79 (2d Cir. 1982). However, in Bins v. United States, 331 F.2d 390 (5th Cir.), cert. denied, 379 U.S. 880 (1964), the court of appeals found duplicity in an indictment that charged the defendant in each count with making false statements on two different FHA forms. In United States v. Canas, 595 F.2d 73, 78 (5th Cir. 1979), the court of appeals distinguished Bins and found that an indictment can properly charge in a single count false statements made on different documents as long as the documents were necessary parts of a loan package meant to obtain a single loan.

9-40.210 Elements of Offense

The elements of the offense are: (1) making a false statement or wilfully overvaluing property or security knowing same to be false, (2) for the purpose of influencing in any way the action, (3) of the enumerated agencies and organizations. Actual damage of reliance is not an essential element of the offense. See Kay v. United States, 303 U.S. 1 (1938); United States v. Sabatino, 485 F.2d 540 (2d Cir. 1973), cert. denied, 415 U.S. 948 (1974); United States v. Kernodle, supra; United States v. Goberman, 458 F.2d 226 (3d Cir. 1972); United States v. Trexler, 474 F.2d 369 (5th Cir.) cert. denied, 412 U.S. 929 (1973). In the Kay case, the court held that it was no defense that the false statements inflating the amount of the mortgage claim were not influential in securing favorable action; the important fact was that the false statements were made for the purpose of influencing action. Furthermore, it is irrelevant whether or not the person making the false statement was to receive or intended to receive the fruits of the misstatement. United States v. Kay, 101 F.2d 270 (2d Cir. 1939), cert. denied, 306 U.S. 660 (1939).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In addition, the statement made must be capable of influencing the enumerated agency or organization. United States v. Simmons, 503 F.2d 831 (5th Cir. 1974).

It should be noted that reliance on the false statement is not an element of a 18 U.S.C. §1014 prosecution. United States v. Tokoph, *supra*. Furthermore, there need not be any actual defrauding of the bank. United States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978). Rather, the statute required that all statements supplied to lending institutions which have the capacity to influence them be accurate or at least not knowingly false. United States v. Goberman, *supra*. In this regard the false statement may have the requisite capacity to influence not only at inception but also over the life of the loan with respect to extending the loan, deferring action upon it or modifying it. The statute does not require that the information be furnished before the debt is incurred. See United States v. Gardner, 681 F.2d 733 (11th Cir. 1982). A false statement under section 1014 includes a statement that a particular party is to be a borrower on a loan when in fact that party is never intended to receive the loan proceeds or have any liability on the loan. United States v. Adamson, 665 F.2d 649, 659 (5th Cir. 1982), *reversed on other grounds*, 700 F.2d 953 (5th Cir. 1983) (*en banc*), *cert. denied*, U.S. 104 S. Ct. 116 (1983).

In Robinson v. United States, 345 F.2d 1007 (10th Cir.), *cert. denied*, 382 U.S. 839 (1965), the court held that it was not a valid defense to assert that the understatement of liabilities was caused by the association manager, who filled in the answers on the application, only asking defendant how much money was owed the bank, and where the defendant was doing business. By signing the application, the defendant attested to the truth of the statement therein. It was also asserted in Robinson that the loan application was not relied upon. The defendant was told by various members of the board that his application would receive a favorable consideration, but the court noted that the loan committee met and gave final approval after the submission of the defendant's application. Also, it is not a defense that the president of a federal savings and loan association knew that certain statements were false, as other members of the board of directors also had to approve the loans, and the false statements were capable of influencing those directors. See United States v. Niro, 338 F.2d 439 (2d Cir. 1964). However, if the officer makes the loan on his/her own authority, knowing the loan application to be false, it would be better to charge 18 U.S.C. §656 and 18 U.S.C. §2, the aiding and abetting of a misapplication of bank funds (assuming a "bad" loan). A charge of 18 U.S.C. §1014 might fail because the false statement is not capable of influencing the bank, as the officer was predisposed to grant the loan anyway.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In United States v. Kramer, 500 F.2d 1185 (10th Cir. 1974), a conviction for violation of 18 U.S.C. §1014 and 18 U.S.C. §2 was reversed because the defendant bank president had unrestricted authority to make the loan. The court said in such case, a false statement concerning the borrower's net worth, where the lending officer had knowledge of its falsity, served no useful or influential purpose. This was so even though the loan in question was also approved by the Board of Directors after one director asked the defendant bank president if the borrower's financial statement warranted the loan. The court said that the directors' approval was on the basis of the president's recommendation, not on the statement itself. This appears erroneous, as the false financial statement, was capable of influencing the board of directors, and presumably was submitted to influence them, whether in fact it did or not. Nonetheless, in such a situation, the better charge, assuming a "bad" loan, would be 18 U.S.C. §656 and 18 U.S.C. §2.

In United States v. Baity, 489 U.S. 256 (5th Cir. 1973), the defendants corroborated on a false financial statement submitted after the loan had been disbursed. The conviction was upheld, on the theory that the false statement could influence the bank in one of the enumerated ways, such as on a renewal or a deferral of action. In United States v. Trexler, *supra*, a conviction was upheld for a false statement to do a future act; the defendant told the bank he would pay the bank money received from the sale of automobiles which he had financed, when in fact, the defendant kept the money. Obviously in such a case, the government must show that the defendant intended to divert the funds at the time the statement was signed.

It has also been held: (1) that defendant was willing to repay the loans and did in fact do so does not negate intent to defraud the bank when loans were obtained on false statements, United States v. Braverman, 522 F.2d 218 (7th Cir.), *cert. denied*, 423 U.S. 985 (1975); (2) the use of forged securities as collateral for loans is a violation of the statute, United States v. Larsen, 526 F.2d 256 (5th Cir. 1976); (3) in an unpublished decision of the 10th Circuit Court of Appeals, November, 1976, United States v. Hubbell, it was held that the statute does not require that the application be written or formal to be the basis of a prosecution; and (4) both oral and written statements are covered by the statute, United States v. Zwego, 657 F.2d 248, 250 (10th Cir. 1981).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-40.220 Check Kite Cases

Until very recently there was a conflict among the various courts of appeals as to whether check kiting was a violation of 18 U.S.C. §1014, on the theory that this was overvaluing property to influence the action of the bank. However, the United States Supreme Court resolved this conflict and held, in a five to four decision, that depositing "bad checks" in federally insured banks was not proscribed by 18 U.S.C. §1014. United States v. Williams, 458 U.S. 279 (1982).

In its opinion the court stated that to obtain a conviction under 18 U.S.C. §1014, the government must demonstrate (1) that the defendant made a "false statement or report," or "wilfully overvalue[d] any land, property or security" and (2) that he/she did so "for the purpose of influencing any way the action of [a described financial institution] upon any application, advance...commitment or loan." The court held that Williams' conviction could not stand because the government had failed to meet the first of these burdens. The court reasoned that, technically speaking, a check is not a factual assertion, and so cannot be characterized as "true" or "false." Hence Williams' deposits of several checks that were not supported by sufficient sums could not be deemed to be "false statements." The court explained that Williams' check did not make any representation about his bank balance, and cited the definition of a check set out in the Uniform Commercial Code, which states that a check is simply "a draft drawn on a bank and payable on demand," U.C.C. §3-104(2)(b), which "contain[s] an unconditional promise or order to pay a sum certain in money," U.C.C. §3-104(1)(b).

For similar reasons, the court concluded that Williams' actions could not be regarded as "overvaluing" property or a security. The court explained that in literal sense, the face amounts of the checks were their "values." Hence forth, this effectively eliminates the use of 18 U.S.C. §1014 in prosecuting check kiting cases.

9-40.300 FALSE ENTRIES--18 U.S.C. §1005 and §1006

18 U.S.C. §1005 and §1006 prohibit false entries and are correlative to 18 U.S.C. §656 and §657. The banks involved in 18 U.S.C. §1005 are the Federal Reserve Bank, Member Bank, National Bank or Insured Bank. The institutions enumerated in 18 U.S.C. §1006 within our consideration are any credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration. Both 18 U.S.C. §1005 and §1006 include offenses for making false entries and the unauthorized issuing of obligations; 18 U.S.C. §1006 also makes it an

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

offense to participate in any way in a transaction or loan of an institution referred to this section. The individuals to whom 18 U.S.C. §1005 and §1006 applies will be discussed in the following applicability section.

A violation of one of 18 U.S.C. §1005 and §1006 is usually involved when there is a violation of 18 U.S.C. §656 or §657 since a false entry is often used to cover up such violation.

9-40.310 Applicability

The individuals included under 18 U.S.C. §1005 are officers, directors, agents or employees, the term "connected in any capacity" does not appear in this section. In 18 U.S.C. §1006 the individuals involved are officers, agents, employees or those connected in any capacity. (In reference to the term "connected in any capacity," see the discussion in connection with 18 U.S.C. §656 and §657.) While 18 U.S.C. §1006 in its entirety is a class statute, 18 U.S.C. §1005 has a class limitation only in its first paragraph. See Edick v. United States, 432 F.2d 350 (4th Cir. 1970). In Edick, the court held that the third clause of 18 U.S.C. §1005 was not limited to the class of persons enumerated in the first clause. The court stated that in looking at comparable statutes when the Congress intended class limitation to carry through to subsequent clauses or paragraphs, it has repeated them.

9-40.311 Banking Holding Companies

Prior to discussion of the actions proscribed as criminal violations, it should be noted that officers, directors, agents and employees of bank holding companies or one bank holding company are subject to the same penalties for false entries as those applicable to bank officers, directors, agents and employees under 18 U.S.C. §1005, 12 U.S.C. §1847.

9-40.320 Actions Proscribed

9-40.321 False Entries

Both 18 U.S.C. §1005 and §1006 prohibit the making of false entries in any book, report, or statement with the intent to defraud the institution or other person or to deceive any officer of the bank, examiner or agent appointed to examine the institution.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The elements of the offense are (1) making a false entry, (2) with intent to defraud or deceive. A false entry includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist. See Agnew v. United States, 165 U.S. 36, 52 (1897). Any entry in which that which has been done by the officers or agents of the bank is correctly set forth in detail is not a false entry. See Coffin v. United States, 156 U.S. 432 (1895). If ostensible borrowers are not liable to the bank on their notes, an entry on the bank's books showing liability could be a false entry under the holding and rationale of United States v. Darby, 289 U.S. 224 (1933). In the Darby case, the court described a false entry as "intentionally made to represent what is not true or does not exist" and held Darby had made a false entry when he recorded his spouse as being liable on a note with full knowledge that her signature was forged. The court noted that the aim of the statute is to give assurance that upon inspection of a bank, public officers and others will find in its books of account a picture of its true condition. It is settled law that if a note representing a sham transaction is entered on the books of a bank as an asset, to give an appearance of credit which in fact was never extended to the maker of the note, such action may be found by a jury to demonstrate intent to injure and defraud the bank within the statute prohibiting knowingly and making false entries. See United States v. Fortney, 399 F.2d 106 (3d Cir.). In United States v. Biggerstaff, 383 F.2d 675 (4th Cir. 1967), cert. denied, 390 U.S. 958 (1963), there was no genuine transaction. Various individuals had signed the necessary papers for an installment loan, and among those papers was a note for which they received nothing. The court held that this was a false entry since there was in reality no substance to the transaction, and the court stated that this was true even though the individuals might possibly have been liable on the note under state law. The court in Biggerstaff distinguished the Coffin case on the ground that the Coffin case involved a true entry of a transaction which was authorized, i.e., that checks of an insolvent were honored and carried on the books as an extension of credit.

In United States v. Mischlich, 310 F. Supp. 669 (D. N.J. 1970), the court upheld the conviction for knowingly causing a false entry to be made upon the books of a national bank. In the Mischlich case, the accounts receivable assigned to the bank purported to arise from sales which had never been made. In Laws v. United States, 66 F.2d 870 (10th Cir. 1933), the cashier had no authority to draw checks on an insurance company and this was known by the bank. The cashier did draw such checks and thereby caused a false entry to be made showing a deflated balance for the insurance company.

Not only does the statute cover the making of the entry or directing someone to make it, but it also covers an entry which the person caused to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

be made. See United States v. Giles, 300 U.S. 41 (1937). In the Giles case, the defendant withheld deposit tickets which in the ordinary course would have been recorded by the bookkeeper. And in the Laws case, the defendant had drawn checks on a customer's account which, having been recorded, indicated a deflated balance in comparison to the actual amount the bank owed the customer.

The crime of making false entries includes entries on books of a bank which are intentionally made to represent what is not true with intent to deceive banks' officers or defraud the association. Hargreaves v. United States, 75 F.2d 68 (9th Cir. 1935) as opposed to the intent to injure or defraud the bank as in misapplication, 257 F.648 (9th Cir. 1918). But see, United States v. Kirkpatrick, 361 F.2d 866 (6th Cir. 1969).

9-40.322 Book, Report, or Statement

It has been held that an FDIC questionnaire signed by a bank officer in reference to loans is a report of the bank within the scope of the false entry statute, and a false answer thereto would constitute a false entry. Crenshaw v. United States, 116 F.2d 737 (6th Cir. 1940), cert. denied, 312 U.S. 703 (1941), cert. dismissed, 314 U.S. 702 (1941). The statute is violated if a bank officer causes minutes of a fictitious meeting to be entered into the bank's records. See United States v. Steffen, 641 F.2d 591 (8th Cir.), cert. denied, 452 U.S. 943 (1981). Also, minute books of an ostensible committee of the board of directors are books as contemplated by the statute and a false entry indicating that loans had been approved is punishable. Lewis v. United States, 22 F.2d 760 (8th Cir. 1927). It should also be noted that any offense which may be chargeable under either 18 U.S.C. §1001 or §1005 in this context should be charged under 18 U.S.C. §1005 as it is the more specifically applicable statute. United States v. Beer, 518 F.2d 168 (5th Cir. 1975). Also it is a violation of 18 U.S.C. §1005 to document a loan for one party when in fact the proceeds of the loan went to another party. United States v. Luke, 701 F.2d 1104, 1108 (4th Cir. 1983).

9-40.323 Intent

18 U.S.C. §1005 requires a specific intent to defraud as an element of the offense. See United States v. Pollack, 503 F.2d 87, 91 (9th Cir. 1974). Contra Harrison v. United States, 279 F.2d 19, 23 (5th Cir.), cert. denied, 364 U.S. 864 (1960). It is not essential, however, that the indictment allege a specific intent to defraud as long as it tracks the statutory language. See United States v. Fusaro, 708 F.2d 17, 23 (1st

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Cir.), cert. denied, U.S. 104 S.Ct. 524 (1983). But a showing of "recklessness" is not a sufficient showing of intent. United States v. Adamson, 665 F.2d 649, 657 (5th Cir. 1982), reversed on other grounds, 700 F.2d 953 (5th Cir. 1983) (en banc), cert. denied, U.S. 104 S. Ct. 116 (1983).

Three criminal intents are expressed disjunctively in 18 U.S.C. §1005 and §1006 in reference to false entries: the intent to injure, the intent to defraud or the intent to deceive. In dismissing the argument that the government must prove an intent to injure or defraud and also the intent to deceive, the court in McKnight v. United States, 97 F.2d 208 (6th Cir. 1899), stated that several intents expressed in the statute are set forth disjunctively; therefore, it is sufficient to prove any one of the intents though all are cumulatively charged in the indictment. See also Billingsley v. United States. 178 F.2d 653 (8th Cir. 1910). With the exception of one old district court case, the courts which have considered duplicity have held that an indictment is not duplicitous because it is alleged that the false entry was made with intent to injure and defraud and to deceive the officers of the bank and Comptroller of the Currency. Boone v. United States, 257 F.2d 963 (8th Cir. 1919); United States v. Mulloney, supra.

The Supreme Court has held that the making of a false entry in the books of the bank with intent to deceive is all that is necessary to bring the act within the statute, and the fact that its falsity may be exposed by an examination of other books of account does not render it any less a false entry made with intent to deceive. See United States v. Britton, 107 U.S. 655, 644 (1882), accord, Phillips v. United States, 406 F.2d 599 (10th Cir. 1969). It is not necessary to prove a motive for the deceit. A person is presumed to intend the natural and probable consequences of his/her acts, and certainly it seems obvious that if false entries are made in the books of a bank, the examiner will be deceived by them. See Dunlap v. United States, 70 F.2d 35 (7th Cir. 1934).

It is not necessary that actual damages be shown in order to constitute fraud. See Baiocchi v. United States, 333 F.2d 32 (5th Cir. 1964); Harrison v. United States, 279 F.2d 19 (5th Cir.), cert. denied, 364 U.S. 864, (1960). The fact that a false entry was made is prima facie evidence of intent to defraud. See Phillips v. United States, 218 F.2d 385 (9th Cir. 1935).

#### 9-40.324 Unauthorized Transactions

Both 18 U.S.C. §1005 and §1006 prohibit the unauthorized making, drawing, issuing, putting forth or assigning any note, debenture, bond or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

other obligation, draft, bill of exchange, acceptance, mortgage, judgment or decree. No specific intent to injure or defraud a bank has been previously required. However, the Ninth Circuit has recently held, United States v. Pollack, 503 F.2d 87 (9th Cir. 1974) that the intent to injure or defraud is a necessary element of all offenses set forth in 18 U.S.C. §1005. As the government has generally alleged and proven intent to injure or defraud and Section 1174(a) of the Department's Proposed Revision of Title 18 of the United States Code would specifically make "intent to deceive or harm another person or a Government" an element of the offense, this decision was not appealed. Accordingly, the intent to injure or defraud should always be alleged.

9-40.325 Participation

The third criminal act in 18 U.S.C. §1006 is not mentioned in 18 U.S.C. §1005. This involves participation to any extent in the proceeds or benefits from any loan or transaction with the institution. The statute is intended to do much more than forbid unsophisticated embezzlement, larceny or theft; it is a typical conflict of interest prohibition. See Beaudine v. United States, 368 F.2d 417 (6th Cir. 1966).

This particular crime with respect to National and FDIC insured banks is partially covered by the bribery statute, 18 U.S.C. §215. There can be no doubt that Congress intended by the enactment of this statute to remove from the path of officials the temptation to enrich themselves at the expense of the borrowers or the bank, and also to prevent improvident loans. See Ryan v. United States, 278 F.2d 836 (9th Cir. 1960).

Participation in reference to indicated bank officials usually constitutes a misapplication under 18 U.S.C. §656. See Garrett v. United States, 396 F.2d 489 (5th Cir. 1968) cert. denied, 393 U.S. 952 (1968). In the Garrett case, the defendants received a fee for causing a bank which they owned to purchase certain mortgages. Participation is analogous to misapplication cases involving loans made for the benefit of the officer.

Intent to defraud only need to be shown to convict under this section. Loss to the institution need not be shown, only that the defendant acted with intent to deceive or cheat, to cause financial loss to another or to bring about financial gain to himself/herself. See United States v. Beaudine, supra; United States v. Weaver, 360 F.2d 903 (7th Cir.), cert. denied, 385 U.S. 825 (1966).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-40.400 BANK FRAUD--18 U.S.C. §1344

Part G of Chapter XI of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2147 (1984), signed into law October 12, 1984, created a new general bank fraud offense, codified at 18 U.S.C. §1344. The new law supplements the existing criminal provisions relating to fraud against federally insured financial institutions.

9-40.410 Applicability

This statute covers any scheme to defraud which is occurring on or after October 12, 1984. The statutory language is modeled directly on the mail fraud statute. It proscribes the use of a scheme or artifice either to defraud a federally chartered or insured financial institution or to obtain any of the monies, funds, credits, assets, securities, or other property owned by, or under the control of, such an institution. The institutions protected by the statute are those chartered under the laws of the United States or insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration.

The new statute was requested by the Department of Justice to correct numerous deficiencies existing in federal criminal banking statutes. Among these deficiencies were the following:

The felony bank fraud statutes, 18 U.S.C. §§656, 657, 1005, and 1006, are class-limited statutes which apply only to persons associated with the financial institution in ownership or operational capacities. This class limitation has, on some occasions, caused prosecutive problems in cases involving aggravated conduct by persons who had no acknowledged affiliation with the institution. The new bank fraud statute has no such class limitation.

The misapplication statutes, 18 U.S.C. §§656 and 657, were subject to differing interpretations in the courts of appeals, particularly as they applied to nominee loan cases in which the nominee borrower had the financial capacity to repay the loan.

The new provision should cure this split among the circuits.

Following the Supreme Court's decision in Williams v. United States, 458 U.S. 279 (1982), which held that 18 U.S.C. §1014--the bank false statement statute--did not apply to check kiting cases, there has been no comprehensive criminal provisions available to prosecute check kiting cases because the industry practice of using courier services in the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

clearing process precluded the use of the mail fraud statute. The legislative history makes it clear that the new bank fraud statute is intended to apply to check kiting cases. See S. Rep. No. 98-225, at 378. Similarly, the legislative history makes it clear that the new statute is intended to supplement 18 U.S.C. §2113 when financial institution property is obtained by false pretenses in the absence of a common law "taking and carrying away" of the property. Id.

In cases involving the victimization of an insured financial institution by the use of a shell or "bogus" offshore bank, the legislative history again specifically asserts congressional intention that the bank fraud provision have extra-territorial reach and that the offender may be prosecuted if present within the United States, even if the fraudulent conduct took place outside the borders of the United States. Id. at 379.

The general bank fraud statute should be viewed as a supplement to, rather than a substitute for, existing criminal provisions relating to frauds perpetrated on insured financial institutions. The choice of offenses to be charged should be made on the basis of the facts of individual cases.

Prosecutions under section 1344 may be analogized to the traditional use of the mail fraud statute to prosecute fraudulent conduct not otherwise the subject of specific criminal statutes. It should be noted, however, that unlike the mail fraud statute, the bank fraud statute is not included as a predicate offense under RICO (18 U.S.C. §1962).

9-40.500 BANK BRIBERY--18 U.S.C. §215

9-40.510 Investigative Jurisdiction

Violations of 18 U.S.C. §215 are within the investigative jurisdiction of the Federal Bureau of Investigation.

9-40.520 Supervising Section

Criminal Fraud Section.

9-40.530 Discussion of the Offense

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-40.531 General

Present 18 U.S.C. §215 was created by Part F of Chapter XI of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, Title II, October 12, 1984). It is the culmination of a ten year effort to improve federal bank bribery laws and replaces former 18 U.S.C. §215 and §216 which were replete with enforcement problems. <sup>1/</sup> The offenses defined by the former sections were only misdemeanors. They did not directly cover the offerer or payer of the bribe. Section 215 only applied where the payment was a quid pro quo or a precondition for a loan. They did not cover all federally insured institutions, and it was not clear that all non-loan transactions of a financial institution were covered.

9-40.532 Corrupt Bank Officer--18 U.S.C. §215(a)

New subsection 215(a) prohibits any officer, director, employee, agent, or attorney of a financial institution, a bank holding company, or a savings and loan holding company, as defined in Section 215(c), except as provided by law, from soliciting or receiving anything of value for or in connection with any transaction or business of the financial institution. <sup>2/</sup> The thing of value can be for the benefit of the official or of any other person or entity (other than the financial institution). Subsection 215(d) states that the salaries or fees paid by the financial institution to its own officers, employees, and agents are not encompassed within the provisions of subsection 215(a) or (b).

---

1/ In this portion of the Manual dealing with section 215, the term "bank" is used generically to cover all federally regulated institutions protected under the statute. Also the terms "employee" or "officer" are meant to cover all individuals affiliated with the protected institutions as recognized by the statute.

2/ There is an apparent technical omission in both subsections (a) and (b). The "in connection with" language includes "financial institution" but omits "bank holding company" or "savings and loan holding company." Under the statute "bank holding company" and "savings and loan holding company" are defined separately from "financial institution." Therefore the statute does not presently cover bribery "in connection with" the business of a "bank holding company" or a "savings and loan holding company." The Department of Justice has proposed technical amendments to the Comprehensive Crime Control Act of 1984 to correct this omission.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The term "in connection with any transaction or business of such financial institution" is more comprehensive in scope than the earlier section 215 and is based on comparable language in former 18 U.S.C. §216. See S. Rep. No. 98-225 at 375. The new section 215 expands the concept of criminal liability beyond the simple quid pro quo formula where the favorable treatment is conditioned upon the actual or promised receipt of the bribe. Section 215 proscribes as well a bank officer's receipt of gratuities given to him/her for or because of his/her bank-related decisions or activity. The scope of section 215, therefore, parallels the scope of the gratuity provisions applicable to federal officials in section 201. 3/

9-40.533 Bribe Offerer or Payer--18 U.S.C. §215(b)

New subsection 215(b) prohibits any person from directly or indirectly giving, offering, or promising anything of value, except as provided by law, to an official of a financial institution, bank holding company or savings and loan holding company for or in connection with any transaction or business of the financial institution. The addition of the subsection fills a major gap in the earlier section 215 which did not directly cover the offerer or payer of the bribe. The thing of value can be for the benefit of the official or of any other person or entity (other than the financial institution). Just as with subsection 215(a), the gratuity provisions of 18 U.S.C. §§201(f) and (g) provide a useful analogy with subsection 215(b).

9-40.534 Definitions--18 U.S.C. §215(c)

New subsection 215(c) contains the definition for "financial institution," "bank holding company," and "savings and loan holding

---

3/ 18 U.S.C. §§201(f) and (g) prohibit the giving or receipt of unlawful gratuities. Sections 201(f) and (g) do not require proof of a quid pro quo or unlawful influence. These subsections require the government to prove merely that something of value was given to a public official for or because of an official act performed or to be performed by him/her. The government does not have the burden of proving, as it does in the case of 18 U.S.C. §§201 (b) and (c), that the gratuity was given for the purpose of influencing that or any other official act. See United States v. Neiderberger, 580 F.2d 63, 68-69 (3d Cir. 1978); United States v. Evans, 572 F.2d 455, 481 (5th Cir.), cert. denied, 439 U.S. 870 (1978); United States v. Brewster, 165 U.S. Appeals D.C., 1, 21, 506 F.2d 62, 82, (1974).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

company." "Financial institutions" includes FDIC and FSLIC insured institutions, credit unions insured by the National Credit Union Administration, and other federally regulated financial institutions, such as small business investment companies, defined in the Small Business Investment Act of 1958, any Federal Home Loan Bank, and any federal land bank or land bank association, the transactions of which it is in the federal interest to safeguard. 4/ See S. Rep. 98-225 at 375-376.

There is an apparent technical omission in subsection 215(d). This subsection states that the thing of value either offered or received by a bank officer or employee shall not include the "payment by a financial institution of the usual salary or director's fee... [or] a reasonable fee paid by such financial institution to such officer, director, employee, agent or attorney for services rendered to such financial institution." In exempting normal salaries and fees paid to bank officers, this subsection failed to include "bank holding company" and "savings and loan holding company." "Financial institution" as defined by the statute does not include holding companies. As a result, the statute on its face fails to exclude from consideration as a thing of value the salary or normal fees the officer, director, or employee receives from a bank holding company or savings and loan holding company. The Department of Justice has submitted technical amendments to the Comprehensive Crime Control Act of 1984 to correct this omission.

It should also be noted that "financial institution" as defined in subsection (c) does not include a Federal Reserve Bank. Therefore bribery of a Federal Reserve Bank officer or employee cannot be prosecuted under section 215. But a Federal Reserve Bank officer or employee is a "public official" under 18 U.S.C. §201 and can be prosecuted for bribery under that statute. See United States v. Hollingshead, 672 F.2d 751, 754 (9th Cir. 1982).

---

4/ Although members of the Federal Reserve System are not expressly covered, any state bank, which handles deposits as part of its normal services and which is a member of the Federal Reserve System, will be insured by the FDIC and, therefore, will be a "financial institution" within the meaning of section 215(c). Similarly, "financial institution" does not expressly cover a "national bank," but every national bank is insured by the FDIC.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-40.535 The Elements of the Offense

There are three basic elements of the offense proscribed by section 215. In the case of subsection 215(a), the government must prove (1) an act of soliciting or receiving a thing of value by an officer or employee of a financial institution, bank holding company, or savings and loan holding company either for himself/herself or a third party (other than the financial institution itself); (2) that the act of soliciting or receiving was done by the officer or employee knowingly and willfully; and (3) that the officer or employee knew that the act of soliciting or receiving was for or in connection with a transaction or business of a financial institution.

In the case of subsection 215(b), the government must prove (1) an act of offering or giving a thing of value to an officer or employee of a financial institution, bank holding company, or savings and loan holding company for the benefit of either the officer or employee himself/herself or a third party (other than the financial institution itself); (2) that the act of offering or giving was done knowingly and willfully; and (3) that the one who offered or gave the thing of value knew that the act of offering or giving was for or in connection with a transaction or business of a financial institution.

9-40.536 Intent of the Parties

Section 215 does not expressly set forth an intent element. The Department of Justice believes that the statute will be interpreted to contain a "general intent" element, namely, that the defendant intend to do the act of soliciting or receiving, offering or giving, knowing that such act was for or in connection with a transaction or business of a financial institution. No specific intent to influence by a bribe or to be influenced by a bribe is necessary. Accordingly, section 215 resembles sections 201(f) and (g) of Title 18. <sup>5/</sup>

In proving that the defendant did the act knowing that such act was done in connection with a financial institution's business, the government

---

<sup>5/</sup> Whereas sections 201(b) and (c)--bribery of a federal official--are specific intent crimes, sections 201(f) and (g)--illegal gratuities--require no specific intent or quid quo pro. See United States v. Standefer, 610 F.2d 1076, 1080 (3d Cir. 1979), (en banc), aff'd, 447 U.S. 10 (1980).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

is required to prove only that the defendant did the act of giving or receiving, knowing that it was done for or because of some financial institution related act--of either a general or specific nature--that the bank officer either has done, will do, or might do in the future. 6/ The facts of a given case, however, may show more than section 215 requires, namely, a specific intent on the part of one or more of the parties to actually influence or be influenced by the offer or receipt of the thing of value. In such a case, the specific intent to influence or be influenced will obviously encompass the lesser intent or mental state of knowing that the act was "in connection with" bank business.

9-40.537 The Defense of "Except As Provided by Law"

Section 215 provides a statutory defense to the charge to the extent that the receipt of the thing of value is or was "provided by law." The legislative history of the statute provides no specific guidance as to what Congress had in mind when it provided this defense.

The absence of such a statutory defense need not be pleaded in the indictment. See USAM 9-12.325 (negating Statutory Exceptions). Any indictment should, however, charge that the conduct was done "unlawfully."

9-40.538 Penalties

Under either subsection 215(a) or (b), if the item offered or given is greater than \$100 in value, the offense is a felony punishable by up to 5 years imprisonment and/or fine of \$5,000 or three times the value of the bribe or gratuity, whichever is greater. If the thing of value is \$100 or less, the offense is a misdemeanor punishable by imprisonment of up to one year and/or a fine of \$1,000. It should be noted that under the provisions of the Criminal Fine Enforcement Act of 1984 (Pub. L. No. 98-596, Oct. 30, 1984), a higher fine may be imposed for offenses committed after December 31, 1984. Pursuant to 18 U.S.C. §3623, (1) an individual may be fined up to \$250,000 for a felony and up to \$100,000 for a misdemeanor

---

6/ "All that was required in order to convict Standefer was that the jury conclude that the gifts were given by him [to the IRS agent] for or because of [the IRS agent's] official position, and not solely for reasons of friendship or social purposes." United States v. Standefer, supra, at 1080.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

which is punishable by imprisonment up to six months and (2) a corporation may be fined up to \$500,000 for a felony and up to \$100,000 for a misdemeanor.

9-40.539 Policy Concerning Prosecution

A. The Priority of Bank Bribery and Bank Fraud Prosecutions

For the past two years the Department of Justice has been concerned with the recent upsurge in bank failures and near failures, especially those brought about by insider fraud and misconduct. In 1984, there were 79 bank failures and 27 failures of savings and loans, an unprecedented number since the advent of federal controls in the 1930's. In the previous year, 1983, there were a total of 48 bank failures and 46 failures of savings and loans.

Congress itself was well aware of the problem. In submissions to the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Government Operations Committee in the summer of 1984, the Justice Department found that in a survey of 75 FDIC-insured banks that failed from January 1, 1980, to June 17, 1983, 61 percent of such failures involved actual or probable criminal misconduct by bank insiders. In its own estimate, the FDIC told the Subcommittee that criminal misconduct was a "major contributing factor" in 45 percent of the same 75 bank failures. Congress recognized that criminality among bank officers rarely springs from a vacuum but often evolves from cozy relationships between bank officer and customer. With this as a backdrop, Congress passed the Comprehensive Crime Control Act of 1984 which, along with other provisions, gave a new and comprehensive scope to the bank bribery statute.

U.S. Attorneys shall place bank fraud and bank bribery prosecutions high on their list of white collar crime enforcement priorities. The health of the nation's banking industry is essential to the health of the nation's economy. Instances of bank bribery and bank fraud, even if directed toward relatively small banks, seriously undermine the confidence and trust that individuals and businesses place in the banking industry as a whole. That confidence and trust will diminish all the more if the public fails to perceive a comprehensive and active federal law enforcement presence in the industry.

B. Prosecutive Policy With Respect to Individual Cases

The purpose of 18 U.S.C. §215 is to deter the payment of bribes or gratuities to officials of financial institutions and thereby protect the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

integrity of such institutions and their transactions. See S. Rep. No. 98-225, at 375-376 (1984). The bribery statute recognizes that officers and employees of federally insured or regulated institutions owe a fiduciary duty of honest services to their employer.

In accordance with section 215's legislative purpose of protecting against corruption in the banking and savings and loan industry, it is the Department of Justice's policy that cases prosecuted under this provision entail breaches of fiduciary duty or dishonest efforts to undermine bank transactions. Because section 215 is intended to reach acts of corruption in the banking industry, it should not be used to prosecute inconsequential conduct. For example, in the banking industry as in other industries, situations can arise that involve insignificant gift giving or entertaining that plainly do not involve a breach of a fiduciary duty or dishonesty. Typical of such situations are the occasional receipt of meals, entertainment, or other gifts of modest or nominal value where the conduct is either authorized by or disclosed to bank management. Moreover, these are situations where the size of the benefit, either offered or received, in relationship to the bank transaction or business either sought or discussed by the customer is inconsequential. Such inconsequential conduct should not form the basis for prosecution under section 215.

The following should be considered in assessing whether there is a defense to a bribery or gratuity allegation or whether the conduct is at most insignificant and does not warrant prosecution.

1. The Applicability of a Bank's Own Standard of Conduct

Various banks on their own initiative have established, and may be expected to establish, certain guidelines or standards of conduct regarding their employees' receipt of benefits such as meals, entertainment, and gifts from bank customers. By adopting such standards a bank implicitly recognizes that a certain amount of entertainment does not amount to a corrupting influence on the bank's transactions. Consequently, a bank officer's compliance with reasonable standards of conduct of his/her own bank would constitute a formidable barrier to successful prosecution if the officer's conduct is ever challenged.

Senior management, however, cannot avoid the bribery statute by simply adopting for itself loose and uninhibited standards of conduct even when full disclosure is made to the bank's board of directors.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The issue is one of "reasonableness." A "reasonable" standard of conduct is one which permits an employee to receive the normal amenities that facilitate the discussion of bank business, such as a business luncheon, but which excludes the receipt of those benefits which serve no demonstrable business purpose, such as a weekend hunting or fishing expedition or the receipt of scarce or expensive tickets to athletic or theatrical events. Clearly, conduct that falls squarely within reasonable standards of behavior presents no corrupting threat and is inappropriate for prosecution.

2. Social and Family Ties of the Banker

It is not uncommon for bankers to have close social or family ties with some of those with whom they do business. Where these ties exist, gifts and entertainment may have more to do with social and family ties than with bank business. Accordingly, prosecutors shall closely examine the relationship between the bank customer and bank officer. For an analogy regarding federal employees and their social family ties, see 28 C.F.R. §45.735-14(c)(1)-(4).

3. The Possibility of a Clarifying Regulation

It appears that the federal supervisory agencies, such as the Federal Home Loan Bank Board, the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Office of Controller of the Currency, or the National Credit Union Administration, through their regulatory powers regarding unsafe or unsound banking practices, may issue regulations that authorize financial institutions to regulate the receipt of nominal gratuities by a code of ethics. Such regulations, if adopted, may help clarify the situations in which, in the view of the supervisory agency, the officers and employees of financial institutions may, without running counter to the purpose of the statute, receive gratuities of nominal value or be modestly entertained by bank customers to facilitate the discussion of bank business.

If such regulations are promulgated, the Department of Justice, in adopting its own prosecutive policy under the statute, will take into account the supervisory agency's expertise and judgment in defining those activities or practices which the agency believes do not undermine an employee's or officer's fiduciary duty to the financial institution.

A similar clarifying regulation was established for federal government employees by President Johnson shortly after the enactment

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the federal gratuity and conflict of interest provisions, 18 U.S.C. §§201-211. See 28 C.F.R. §45.735-14. For example, Executive Order No. 11222, 30 Fed. Reg. 6469 (May 8, 1965), as amended by Executive Order No. 11590, 36 Fed. Reg. 7831 (April 23, 1971), provides in part that:

...it may be appropriate to provide exceptions (1) governing obvious family or personal relationships where the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors--the clearest illustration being the parents, children or spouses of federal employees; (2) permitting acceptance of food and refreshments available in the ordinary course of a luncheon or dinner or other meeting or on inspection tours where an employee may properly be in attendance; or (3) permitting acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgages loans.

C. Conclusion

Each U.S. Attorney is required to decide whether a bank employee's conduct in apparent violation of the statute is serious enough to warrant federal criminal prosecution or whether the case should be declined in favor of civil remedies.

All U.S. Attorneys are encouraged to communicate to state and local authorities, through their respective Law Enforcement Coordinating Committees (LECC), their understanding of the new bank bribery statute. Specifically the LECC should solicit the input of local law enforcement officials, including state regulatory officials, in an attempt to identify which local institutions or officials or which practices, if any, are suitable for investigation.

In dealing with the bank bribery statute, it is likely that U.S. Attorneys or their Assistants will be called upon by local bankers for some guidance concerning what is or what is not acceptable practice under the statute. If this occurs, no advice, formal or informal, may be given other than to respond by stating what is contained in the United States Attorney's Manual.

UNITED STATES ATTORNEY'S MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 41

	<u>Page</u>
9-41.000 <u>BANKRUPTCY FRAUDS</u>	1
9-41.100 18 U.S.C. §152 VIOLATIONS	1
9-41.110 <u>Concealment of Property</u>	2
9-41.120 <u>False Oath Or Account</u>	5
9-41.130 <u>False Claims</u>	7
9-41.140 <u>Fraudulent Receipt Of Property</u>	7
9-41.150 <u>Extortion And Bribery</u>	8
9-41.160 <u>Fraudulent Transfer Or Concealment</u>	9
9-41.170 <u>Fraudulent Treatment Of Documents</u>	10
9-41.180 <u>Fraudulent Withholding of Documents</u>	10
9-41.200 EMBEZZLEMENT AND ABUSE OF POSITION	10
9-41.210 <u>18 U.S.C. §153: Embezzlement By Trustee or Officer</u>	10
9-41.220 <u>18 U.S.C. §154: Adverse Interest And Conduct</u>	11
9-41.230 <u>18 U.S.C. §155: Fee Agreement</u>	12
9-41.300 IMMUNITY PROVISION	13
9-41.400 PLANNED BANKRUPTCY	15
9-41.500 REPORT OF VIOLATIONS	16

9-41.000 BANKRUPTCY FRAUDS

The criminal provisions relating to bankruptcy were enacted to preserve honest administration in bankruptcy proceedings and to ensure the distribution to creditors of as large a portion of the bankrupt's estate as possible. These criminal sanctions are embodied in Title 18, United States Code, Sections 151-155.

Section §151 makes it clear that the following provisions, 18 U.S.C. §§152-155, are applicable not only to bankruptcy proceedings but to any proceeding, arrangement or plan under the Bankruptcy Act, Title 11, United States Code. As defined:

The term "bankrupt" means a debtor by or against whom a petition has been filed under Title 11.

The term "bankruptcy" includes any proceeding, arrangement, or plan to Title 11.

The term "debtor" means a debtor concerning whom a petition has been filed under Title 11.

9-41.100 18 U.S.C. §152 VIOLATIONS

The principal criminal violations in connection with bankruptcy proceedings are set forth in 18 U.S.C. §152, which covers not only a bankrupt but anyone who could possibly attempt to defeat the purpose of the Bankruptcy Act through fraudulent means. The nine paragraphs of the section denounce the following activities:

- A. The concealment of property belonging to the estate of a debtor,
- B. The making of false oaths or accounts in or in relation to any case under Title 11,
- C. The making of a false declaration, certificate, verification or statement under penalty or perjury as permitted under Section 1746 of Title 28 or in relation to any case under Title 11,
- D. The making of false claims against the estate of a debtor,
- E. The fraudulent receipt of property from a debtor,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

F. Bribery and extortion in connection with a case under Title 11,

G. Transfer or concealment of property in contemplation of a case under Title 11,

H. The concealment or destruction of documents relating to the property or affairs of a debtor, and

I. The withholding of documents from the administrators of a case under Title 11.

It should be noted that although 18 U.S.C. §152 creates nine separate crimes, each offense may be charged separately. United States v. Gordon, 379 F. 2d 788 (2d Cir. 1967); United States v. Arge, 418 F. 2d 721 (10th Cir. 1969). However, it is not appropriate to allege two offenses and impose two convictions as a result of one set of facts, all of which are essential elements of each crime. United States v. Ambrosiani, 610 F.2d 65 (1st Cir. 1979).

An essential element in the commission of all offenses under 18 U.S.C. §152 is that they must be committed "knowingly and fraudulently". United States v. Yasser, 114 F.2d 558 (3d Cir. 1940); United States v. Beery, 678 F.2d 856 (10th Cir. 1982). An indictment must charge both terms or their equivalents. United States v. Constock, 161 F. 644 (R.I. Cir. 1908). United States v. Martin, 408 F.2d 949 (7th Cir. 1969), cert. denied, 396 U.S. 824 (1969). Also, a jury must be charged with the importance of the two terms. Hersh v. United States, 58 F.2d 799 (9th Cir. 1934).

9-41.110 Concealment Of Property

Whoever knowingly and fraudulently conceals from the custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under Title 11 any property belonging to the estate of a debtor.

The elements of the offense are as follows: that the act was done "knowingly and fraudulently"; that it was an act of "concealment" of property belonging to the "estate of a debtor" from either an "officer of the court" or "creditors"; and that it was done by a "person". 2 COLLIER ON BANKRUPTCY para. 29.05, p.1156 (14th Ed.).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The term "conceal" is no longer statutorily defined. However, an indictment for concealment of assets must, standing alone, allege time and place, description of property concealed, names or identification of parties from whom concealed, that property was part of bankrupt estate and that acts were committed knowingly and fraudulently, United States v. Arge, supra. United States v. Ivers, 512 F.2d 121 (10th Cir. 1975). Since a bankrupt has a duty to list all of his/her property, the withholding of information is within the definition of conceal. Coghalan v. United States, 147 F.2d 233 (8th Cir. 1945), cert. denied, 325 U.S. 888 (1945); United States v. Zimmerman, 158 F.2d 559 (7th Cir. 1946), United States v. Klupt, 475 F.2d 1015 (2d Cir. 1973). In United States v. Greenbaum, 252 F. 259 (E.D. Mich 1918), reversed on other grounds, 280 F. 474 (6th Cir. 1922), the court stated that the gist of the offense charged is the knowing and fraudulent withholding of property no matter what means were used. It has been held that failing to schedule assets fraudulently transferred prior to the filing of a petition, followed by a failure to reveal the transfer to the trustee, is a concealment. Goetz v. United States, 59 F.2d 511 (7th Cir. 1932), cert. denied, 287 U.S. 649 (1932). It is not necessary for the trustee to make a demand in order to establish concealment. Douchan v. United States, 136 F.2d 144 (6th Cir. 1943), cert. denied, 319 U.S. 773 (1943); United States v. Young, 339 F.2d 1003 (7th Cir. 1964).

For the first paragraph of 18 U.S.C. §152 to apply, there must be a concealment during the bankruptcy proceeding. This does to mean, however, that the initial act of concealing must occur after the filing of the petition; it merely means that the property must remain concealed after the commencement of the bankruptcy proceeding. Early cases found this to be a "continuing concealment". United States v. Cohen, 142 F. 983 (D.N.Y. 1906), affd, 157 F. 65, cert. denied, 207 U.S. 596 (1907); Glass v. United States, 231 F. 65 (3d Cir. 1916). United States v. Arge, supra; United States v. Ivers, supra. This term is still useful in those cases in which there has been a concealment of property prior to bankruptcy and a failure to disclose after a petition has been filed. See United States v. Fallman, 28 F. Supp. 251 (D. Mass. 1939); Sultan v. United States, 249 F.2d 385 (5th Cir. 1957).

It makes no difference where the assets are physically secreted, the act of concealment occurs at the time and place where the bankruptcy proceeding is commenced. United States v. Schireson, 116 F.2d 881 (3d Cir. 1940). The court stated that the offense was not hiding away or secreting

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the property, but rather the withholding knowledge of the property from the trustee. See also United States v. Gordon, 379 F.2d 788 (2d Cir. 1967), cert. denied, 389 U.S. 927 (1967).

There must be a concealment from one of the persons enumerated in the first paragraph of 18 U.S.C. §152. If there is a concealment from more than one of those persons mentioned, it is a separate and independent offense as to each person. The prosecution charging concealment against one will not bar the subsequent indictment charging concealment from another. United States v. Yacht, 135 F. Supp. 911 (S.D.N.Y. 1955). However, regardless of the number of items concealed, there is only one concealment. Where there are multiple items charged the proof of concealment of any one will sustain the charge. Bisno v. United States, 299 F.2d 711 (9th Cir. 1961). But see United States v. Kaldenberg, 429 F.2d 161 (9th Cir.), cert. denied, 400 U.S. 929 (1970) where in a chapter XI proceeding rental payments were withheld from a receiver, the court held that where there are separate and distinct concealments there may be a count for each concealment. See also United States v. Moss, 562 F.2d 155 (2d Cir. 1977).

All the essential elements of the offense must be charged in the indictment. Generally, the indictment is sufficient if it describes the offense in the terms of the statute. There must be an allegation of time and place. But it has been held sufficient if the indictment stated that the concealment took place at a given city "in this district" on a given day. United States v. Greenbaum, 252 F. 259 (E.D. Mich. 1918), rev'd on other grounds, 280 F. 474 (6th Cir. 1922).

The description of the property in an indictment is a most important requirement and one about which there is disagreement. Generally, an indictment is held sufficient if the description is in somewhat general terms, such as "certain goods, wares, money, merchandise, shoes, and personal property." United States v. Schireson, *supra*. The description as assets of a certain value and "assets belonging to the estate in bankruptcy" were held to be too vague in Beitel v. United States, 306 F.2d 665 (5th Cir. 1962); "merchandise commonly sold in a self-service department store" was likewise held not sufficient, United States v. Mathies, 202 F. Supp 797 (W.D. Penn. 1962). It is sufficient to aver that a certain amount of money has been concealed. United States v. Lake, 129 F. 499 (E.D. Ark. 1904). As previously mentioned, it is not necessary to allege the manner of concealment.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Although it is essential that guilt be established beyond a reasonable doubt, the proof may be wholly circumstantial. United States v. Ayotte, 385 F.2d 988 (6th Cir. 1967), rev'd on other grounds, 394 U.S. 310 (1969); Metheany v. United States, 365 F.2d 90, (9th Cir. 1966), United States v. Martin, 408 F.2d 949 (7th Cir. 1969). Unexplained shortages of property of bankruptcy, shown to have been in debtor's possession prior thereto is sufficient to go to the jury. Bisno v. United States, 299 F.2d 711 (9th Cir. 1971); Gunzberg v. United States, 297 F.2d 829 (5th Cir. 1962). However, the jury cannot be charged that this is an inference of guilt, United States v. Stone, 282 F.2d 547 (2d Cir. 1960).

It is for the jury to determine the truth of the defendant's explanation. Cohen v. United States, 67 F.2d 449 (4th Cir 1933); rev'd on other grounds, 280 F. 474 (6th Cir. 1922), United States v. Stone, supra.

9-41.120 False Oath Or Account

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any case under Title 11.

This paragraph sets out the offense of perjury in a bankruptcy proceeding. It was held prior to the 1926 Act that false swearing in bankruptcy proceedings should be charged under the appropriate provision of the Bankruptcy Act and not under the general provision for perjury, which is now 18 U.S.C. §1621, Rosenthal v. United States, 248 F. 684 (8th Cir. 1918). This case may be doubtful authority under the present section. It is to be noted that under the present paragraph of 18 U.S.C. §152 the possible punishment is not greater than the perjury provisions of 18 U.S.C. §1621. It is settled law that a man cannot be convicted under both statutes on the same facts. Rosenthal v. United States, supra.

The offense is more analogous to the false statement statute, 18 U.S.C. §1001, than perjury, however, see, Meer v. United States, 235 F.2d 65 (1956); United States v. Lynch, 180 F.2d 696 (1950), and the strict requirement of perjury prosecutions do not apply; Marachowsky v. United States, 201 F.2d 5 (7th Cir. 1953); Morshium v. United States, 285 F.2d 949 (5th Cir. 1960) and United States v. Curry, 313 F.2d 337 (3d Cir. 1963). The elements of the offense are as follows: that the false oath must be knowingly and fraudulently made; that the oath must be false; that the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

statement is material to the issue; and that the oath is made in any proceeding or in relation to any proceeding under the act. In the indictment, it must be alleged that the statement was false. United States v. Baker, 243 F. 741 (D. R.I. 1917) and United States v. Curry, *supra*. It is suggested that such allegations be made even though there is authority to the contrary. See United States v. Freed, 179 F. 236 (2d Cir. 1910).

In view of the strictness with which indictments are sometimes construed, it is undoubtedly safer to follow the practice of giving complete details concerning the false oath. There should be an allegation that the testimony was material. See however, United States v. Lake, 129 F. 499 (D. Ark. 1904); United States v. Phillips, 606 F.2d 884 (9th Cir. 1979). Ulmer v. United States, 219 F. 641 (6th Cir. 1915) cert. denied 238 U.S. 638 (1915). In proving the crime, it must be shown that the oath was properly administered to the defendant. See Cameron v. United States, 192 F. 548 (2d Cir. 1911), *rev'd on other grounds*, 231 U.S. 710 (1914). Recantation does not in and of itself cure an original false statement under oath in a case under Title 11. United States v. Diorio, 451 F.2d 21 (2d Cir. 1971).

It is well established that the immunity provisions of the Bankruptcy Act do not apply for perjury charges. Glickstein v. United States, 222 U.S. 139 (1911).

A false oath is perjury to the extent that an indictment for subornation of perjury will lie under 18 U.S.C. §1632. Hammer v. United States, 271 U.S. 620 (1926).

18 U.S.C. §152 was amended in November 1978 to read as follows:

Whoever knowingly and fraudulently makes a false declaration certification, verification or statement under penalty (of) perjury as permitted under Section 1746 of Title 28, United States Code, in or in relation to any case under Title 11.

Thus, unsworn declaration made under penalty of perjury in bankruptcy proceedings are to be treated in the same manner as sworn statements. Until the courts rule differently the cases cited under sworn false statement prohibitions may be used as guidelines for matters involving this paragraph.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-41.130 False Claims

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under Title 11, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney.

The obvious purpose of this provision is to prevent fraud by the presentation of inflated or fictitious claims or the use of such claims. The elements of the offense are as follows: the claim must be filed or used with criminal intent; it is necessary to show that the claim was false; and that it was presented or used in any case under Title 11. 2 COLLIER ON BANKRUPTCY para. 29.07 (14th Ed.).

The court ruled in Levinson v. United States, 263 F. 257 (3d Cir. 1920), that the defense of reliance upon the advice of counsel is not a valid defense when apparently the defendant had not told the truth to his attorney. The court allowed evidence that defendant's claim of loan was in reality a purchase of stock. In United States v. Abraham, 347 F.2d 395 (7th Cir. 1965), the court held that even though the bill reflected the customary procedure for billing, it was intentionally inflated and therefore was false and fraudulent as to the bankrupt's estate and its other creditors.

9-41.140 Fraudulent Receipt Of Property

Whoever knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under Title 11 with intent to defeat the provisions of Title 11.

This paragraph is to some extent the counterpart of the first paragraph in that it is aimed at preventing concealment of assets by those who would so assist the debtor. An important difference is that this paragraph also may apply to a creditor.

The essential elements of the offense are as follows: that there was receipt of a material amount of property, from a bankrupt; that this occurred after the filing of a proceeding under the Act; that this was knowingly and fraudulently done with the intent to defeat the Act.

Although it has not been decided what constitutes the material amount, it would appear that this requirement was inserted in the section to

prevent prosecutions for relatively insignificant transfers. The term "property" has been held to include money under the provision of this paragraph. United States v. Wernikove, 206 F. Supp. 407 (E.D. Pa. 1962). In reference to the term "material amount" a conviction has been sustained in which the amount involved was about \$500.00. Knoell v. United States, 239 F. 16 (3d Cir. 1971), writ of error dismissed, 246 U.S. 648 (1918).

Property which was received both physically and legally before the filing is not covered by this paragraph. However, a conspiracy to receive the property could be charged even though physical transfer preceded the petition if further overt acts subsequently occurred, under the authority of Knoell, supra.

The additional intent, to defeat the act, means only that the conduct must have been willful. United States v. Lawson, 255 F. Supp. 261 (D. Minn. 1966). In charging intent to defeat the act, it is not necessary to specify which provision of the act is "intended to be defeated." Lurie v. United States, 20 F.2d 589 (6th Cir. 1927).

#### 9-41.150 Extortion And Bribery

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any case under Title 11.

This paragraph covers any extortion and bribery and any attempt to extort to bribe, and is basically directed at creditors who attempt to gain a preference by forbearing to impede the bankruptcy proceeding.

The two essential elements of the offense are the criminal intent and the bribery or extortion or the attempt to bribe or to extort. The statute in question does not say one shall not extort money from another as a consideration for acting or forbearing to act unlawfully, but for acting or forbearing to act at all. United States v. Dunkley, 235 F. 1000 (D. Cal. 1916), United States v. Weiss, 168 F. Supp. 728 (W.D. Penn. 1958).

Two other statutes may possibly be used in prosecuting bribery violations. Where the attempt is made to bribe a judicial officer, section 210 of Title 18 may be used; this section denounces the attempted bribery of the judicial officer. Section 1503 of Title 18 denounces an intent corruptly to influence any officer of any court of the United States.

9-41.160 Fraudulent Transfer Or Concealment

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under Title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of Title 11 knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation.

This paragraph prohibits the concealment or transfer by anyone acting individually or as an agent or officer of any person or corporation. The elements of the offense are as follows: that it was committed knowingly and fraudulently; that it was committed by an agent or officer of a person or corporation; that the property concealed or transferred belonged to the person or corporation; that the transfer was in contemplation of a proceeding or with intent to defeat the provisions of Title 11. The words "concealed or transferred" are to be read in the disjunctive, and therefore it is not necessary that there be concealment where property has been transferred. United States v. Switzer, 252 F.2d 139 (2d Cir. 1958), cert. denied, 357 U.S. 922 (1958). It is now practically impossible for officers to shift assets about among interrelated corporations and avoid violating the prohibitions of the sixth paragraph merely because the shift is not concealed. 2 COLLIER ON BANKRUPTCY para. 29.10. This paragraph does not name the persons from whom the property must be concealed as is done in the first paragraph; however, it seems logical that in establishing concealment there must be someone who had a right to know about the existence of the property such as that class enumerated in the first paragraph. Establishing a case under this paragraph is similar to establishing one under the first paragraph.

Although it is safe to couple the alternative elements in one count, i.e., "in contemplation of a case under Title 11 and with intent to defeat the provisions of Title 11" "concealed and transferred", it is probably preferable to set out the offenses in separate counts. It need not be alleged that the property was "concealed and transferred", since either the transfer or the concealment is a violation. Burchinal v. United States, 342 F.2d 982 (10th Cir. 1965).

9-41.170 Fraudulent Treatment Of Documents

Whoever after the filing of a case under Title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a debtor.

This paragraph prohibits the concealment, obstruction, mutilation or falsification of a document. It must be shown that this was knowingly and fraudulently done after filing a proceeding or in contemplation of such a filing and that the document related to the property or affairs of debtor. The few prosecutions under this clause have been tied to other counts.

9-41.180 Fraudulent Withholding Of Documents

Whoever after the filing of a case under Title 11 knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer<sup>(2)</sup> of the Court entitled to its possession, any document affecting or relating to the property or affairs of a debtor.

This paragraph covers the withholding of a document from an officer of the court. Prosecutions under the eighth paragraph have been coupled with counts involving other offenses under this section. As with the seventh paragraph, the principal use of the withholding charge may be as an offense on which a jury might convict even though not satisfied that there was a concealment or fraudulent transfer. 2 COLLIER ON BANKRUPTCY para. 29.12.

9-41.200 EMBEZZLEMENT AND ABUSE OF POSITION

Two of the sections proscribing criminal acts in connection with bankruptcy proceedings are directed at court officers, and a third applies to all participants in a case under Title 11.

9-41.210 18 U.S.C. §153: Embezzlement By Trustee Or Officer

Whoever knowingly and fraudulently appropriates to his own use, embezzles, spends, or transfers any

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

property or secretes or destroys any document belonging to the estate of a debtor which came into his charge as trustee, custodian, marshal, or other officer of the court, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. §153 is comprehensive enough to cover every intentional and fraudulent withholding of, or parting with, the property of the estate of a debtor by the court officers enumerated therein. The essential elements of the offense are as follows: that at the time property or documents came into the defendant's possession (he) was an officer of the court in charge of the estate of a debtor; that the property or documents belong to the estate; (however, the indictment need not specifically state that property belonged "to the estate" and the duty imposed continues after the closing of the case under Title 11), United States v. Ivers, 512 F.2d 121 (8th Cir. 1975); that the property was embezzled in one way or another or that the document was secreted or destroyed; and that the activity was done knowingly and fraudulently. United States v. Lynch, 180 F.2d 696 (7th Cir. 1950); United States v. Kaufman, 453 F.2d 306 (2d Cir. 1971).

The Court stated In re Bird, 107 F.2d 386 (2d Cir. 1939), that "[w]hile embezzlement is, indeed, an offense punishable by imprisonment it is not such an offense under the Bankruptcy Act unless the embezzled property came into the charge of the accused as trustee, receiver, custodian, marshal, or other officer of the court." It has been held that although an indictment charging violation of another criminal embezzlement provision (18 U.S.C. §645) is defective, the indictment stands if it alleges facts which will bring it under 18 U.S.C. §153. Pruett v. United States, 3 F.2d 353 (9th Cir. 1925).

This statute is not to be read as concerning itself only with property which property belongs to the estate of the bankrupt, but includes all property which comes into the possession of the court officer by reason of his/her position as such. Meather v. United States, 36 F.2d 156 (9th Cir. 1929).

9-41.220 Section 154: Adverse Interest And Conduct

Whoever, being a custodian, trustee, marshal, or other officer of the court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a case under Title 11; or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so--

Shall be fined not more than \$500, and shall forfeit his office, which shall thereupon become vacant. As amended Nov. 6, 1978, Pub. L. 95-598, Title III, §314(a)(2), (e)(1),(2), 92 Stat. 2676, 2677.

It should be noted that this is only a misdemeanor statute in which the penalty is not more than \$500 and the forfeiture of the office. There are simpler procedures for removing trustees, marshals, or other officers (11 U.S.C. §324), but this statute could be useful if a judge refused to remove such a person(s).

9-41.230 18 U.S.C. §155: Fee Agreement

The final criminal provision applies to all participants in a bankruptcy proceeding. While Title 11 prohibits fee arrangement, (11 U.S.C. §102(c) and (d), 18 U.S.C. §155 provides the criminal sanctions as follows:

Whoever being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them or attorney for any such party in interest, in any receivership, or case under Title 11 in any United States court or under its supervision, knowingly or fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of the estate;

Shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The obvious purpose of this section is the prohibition against the exacting of unreasonable fees for service performed by all those involved in a case under Title 11. In effect it is a safeguard to protect against allowing named participants in a bankruptcy proceeding from dividing up a debtor's estate. However, this section is not intended to prevent a debtor from agreeing to compensate his/her attorney, in any amount agreed upon so long as the compensation was to be paid after the bankruptcy proceedings had been closed. In re Trans-State Oil Co., 24 F. Supp. 454 (Tex. 1938), rev'd on other grounds, 99 F. 658 (5th Cir. 1938).

9-41,300 IMMUNITY PROVISION

Title 11 Section 343 provides,

The debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of the title. Creditors, any indenture trustee, or any trustee or examiner of the case may examine the debtor.

The purpose of the examination is to enable creditors and the trustee to determine if assets have been improperly disposed of or concealed.

Efforts to thwart examinations through the exercise of the privilege against self-incrimination have been met with the enactment of the immunity section (11 U.S.C. §344) which provides,

Immunity for persons required to submit to examination, to testify, or to provide information in a case under this title may be granted under part V of Title 18.

This section carries part V, (section 6001 et seq. of Title 18, Crime and Criminal Procedure), over into bankruptcy cases. Thus, for a witness to be ordered to testify before a bankruptcy court, in spite of a claim of privilege, the U.S. Attorney for the district in which the court sits would have to request the immunity order from that district court. The rule would apply to both debtors, creditors, and any other witnesses in a bankruptcy case. If the immunity were granted, the witness would be required to testify. If not, the witness could claim the privilege against self-incrimination.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Immunity provision of this section prohibits not only evidentiary use of compelled testimony, but its use as an investigatory lead, and bars the use of any evidence obtained by focusing investigation on witness as a result of compelled disclosure. In re Grand Jury Proceedings, 497 F. Supp. 979 (E.D. Pa. 1980).

Under 18 U.S.C. §3057 bankruptcy judges, receivers and trustees are required to report criminal violations to U.S. Attorneys. The following safeguards have been recommended by the Bankruptcy Division, Administrative Office of the United States Courts, in order to protect against inadvertent use of the bankrupt's testimony in developing a criminal case against the bankrupt.

In criminal referrals based upon evidence or leads not directly or indirectly obtained from the testimony of the bankrupt, the existing referral procedures will be followed.

In any case in which the debtor testifies and a criminal investigation is underway or is anticipated, the bankruptcy judge will order that no one shall have access to the transcript of the debtor's testimony without first identifying himself/herself and signing an appropriate record reflecting that he/she has requested and been granted access to the transcript. Adoption of this procedure will assist the government in showing in any subsequent criminal proceeding that the prosecution did not have the benefit of a review of that portion of the debtor record.

In addition, in any case under Title 11 in which the debtor testifies, and a criminal investigation is underway or is anticipated, the bankruptcy judge will appropriately advise trustees, creditors, attorneys, and other persons who heard the debtor's testimony that, in the event they are interviewed concerning criminal aspects of the case, no disclosure should be made concerning the content of the immunized testimony of the debtor.

In any instance in which the only evidence of criminality is developed is the debtor's testimony, the referee will refer the case to the U.S. Attorney for possible criminal investigation without making reference to any information based directly or indirectly upon the debtor's testimony. The U.S. Attorney will request the Federal Bureau of Investigation to conduct a limited investigation, possibly including a review of available books and records and the bankrupt's schedules, to determine whether there is independent evidence upon which a criminal investigation may be predicated.

However, since in Kastigar v. United States, 406 U.S. 441 (1972) the court stated:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.

The Criminal Division recognizes that the argument may be raised that the immunity bars a referral based solely upon the immunized testimony, but it is believed that in cases of significant import, at least, the Department has a responsibility to investigate regardless of this factor.

When the debtor is a corporation, bankruptcy judges will consider the feasibility of clearly designating an individual not suspected of criminal conduct as the person to represent the debtor, thus possibly avoiding a grant of immunity to a prospective criminal defendant. However, if a corporate officer voluntarily testified without being clearly designated to speak for the corporation, it has been held that the immunity provisions are applicable under these circumstances. United States v. Coyne, 587 F.2d 111 (2d Cir. 1978).

Where the bankrupt or officer of a bankrupt corporation designated to represent the corporation is the defendant in a bankruptcy prosecution and has testified at the first meeting of creditors, the burden of proof is on the government to show that its evidence is independent of such testimony; however, such proof is by preponderance of the evidence rather than beyond a reasonable doubt, United States v. Seiffert, 501 F.2d 974 (5th Cir. 1974); (Bloch v. Consino, 535 F.2d 1165 (9th Cir.), cert. denied, 429 U.S. 86 (1976)). It has also been held that the books and records of the debtor and the bankruptcy documents are not subject to the immunity provisions of Title 11. United States v. Seiffert, supra; United States v. Falcone, 544 F.2d 607 (2d Cir. 1979), cert. denied, 430 U.S. 916 (1977).

9-41.400 PLANNED BANKRUPTCY

One aspect of bankruptcy fraud to which particular consideration should be given is the planned bankruptcy or "scam" operation. While the scheme has many variations basically it involves the purchase of merchandise from many creditors, the disposal of the goods for cash, the concealment of the proceeds, and then either claiming bankruptcy or having the creditors force the bankruptcy.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In some instances the perpetrators of this scheme purposely purchase relatively small quantities of merchandise from a large number of suppliers. Since no one creditor suffers a great loss, no complaint may be made unless one or more of the creditors organizes the others to pursue the matter. Since frequently the books and records disappear with the perpetrator, one of the major tasks of the investigation is to find all of the victims.

All of the schemes employed cannot be set forth, a few entail the following:

A. Setting up a new company, with a bank account, a legitimate or apparently legitimate balance sheet, paying initial invoices in full on modest orders, increasing orders and paying less and finally placing large orders which are not paid for, with the merchandise being sold at cost or shipped to other locations, and with the operations of the scheme disappearing with the proceeds or the merchandise.

B. Setting up a company with a name similar to one with an established credit rating with "new" branches, placing large orders and absconding with goods or proceeds.

C. Acquiring control or purchasing a company with a good credit rating and employing the scheme before suppliers become aware of a change in ownership.

In addition to the use of the statute designed to combat bankruptcy frauds as to the concealment and transfer of assets, in these matters consideration should be given to the use of the mail and wire fraud statutes, 18 U.S.C. §1341 and §1343, and the interstate transportation of property obtained by fraud statute, 18 U.S.C. §2314. See United States v. Castellana, 349 F.2d 264 (2d Cir. 1965), cert. denied, 383 U.S. 928 (1966); United States v. Jacobs, 395 F.2d 469 (8th Cir. 1968); United States v. Wolcott, 379 F.2d 521 (7th Cir. 1967); United States v. Dioguardi, 428 F.2d 1033 (2d Cir.), cert. denied, 400 U.S. 825 (1970); United States v. Goodman, 285 F.2d 378 (5th Cir. 1960) and United States v. Harris, 388 F.2d 373 (7th Cir. 1967).

9-41.500 REPORT OF VIOLATIONS

Title 18, United States Code, Section 3057(a) requires the judge, receiver or trustee having reasonable grounds for believing that any violation of laws of the United States relating to insolvent debtors,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

receiverships or reorganization plans have been committed, to report all the facts and circumstances to the appropriate U.S. Attorney. This report has been made mandatory in order that the United States Attorney be apprised of possible violations which ordinarily would not come to (his) attention. Upon receipt of this report, the U.S. Attorney determines whether an FBI investigation should be commenced; and upon completion of this investigation decides whether criminal action is warranted. The judge's report of possible violations is not a condition precedent to the initiation of an FBI investigation. ← his/her

Investigations are often begun as the result of information furnished by creditors or other interested parties, rather than by report pursuant to 18 U.S.C. §3057(a), and it is thus immaterial, when prosecuting an offender under any of the criminal provisions, whether the procedure set forth in 18 U.S.C. §3057(a) has or has not been followed. Dean v. United States, 51 F.2d 481 (9th Cir. 1931); 2 COLLIER ON BANKRUPTCY (14th ed.), 1236. This section does not confer any procedural rights upon a defendant. United States v. Filiberti, 353 F. Supp. 252 (D. Conn. 1973).

The U.S. Attorney, in declining prosecution, should furnish the Department with a cogent and reasonably detailed explanation of (his) reasons for declination, together with specific reference to the facts of the case. The mere conclusion that the facts of the case do not warrant criminal prosecution or that the facts do not indicate that an offense has been committed is not sufficient. This requirement is applicable regardless of the method by which the investigation was initiated and as well to those cases in which a report is received pursuant to 18 U.S.C. §3057(a) and the United States determines that no investigation is necessary. However, where the report is received under 18 U.S.C. §3057(a) the judge should be advised of action taken or declination, although reasons for declination need not be indicated. ← his/her

It is to be noted that the personal opinion of the judge or trustee as to whether a criminal offense has occurred or as to whether criminal proceedings should or should not be commenced is in no way binding on the U.S. Attorney or determinative of the issues involved. Similarly, the decision of an officer of the Bankruptcy Court not to refer a matter to the U.S. Attorney should be determinative in any prosecutive analysis.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 42

	<u>Page</u>
9-42.000 <u>FRAUD AGAINST THE GOVERNMENT</u>	1
9-42.010 <u>Coordination of Criminal and Civil Fraud Against the Government Cases</u>	1
9-42.020 <u>Scope of the General Fraud Against the Government Statutes</u>	4
9-42.100 18 U.S.C. §1001: FALSE STATEMENT, CONCEALMENT	4
9-42.110 <u>Items Not Required to be Proved</u>	5
9-42.120 <u>Jurisdictional Requirements Satisfied</u>	7
9-42.130 <u>Statements Meriting Prosecution</u>	7
9-42.140 <u>Elements of 18 U.S.C. §1001</u>	8
9-42.141 The Making of a False Statement	9
9-42.142 Knowingly and Willfully	9
9-42.143 Materiality	10
9-42.144 False	12
9-42.145 Department or Agency	13
9-42.146 Concealment--Failure to Disclose	15
9-42.150 <u>False Statements as to Future Actions</u>	16
9-42.160 <u>False Statement to a Federal Investigator</u>	17
9-42.170 <u>Corporation--Crimes--Conspiracy</u>	19
9-42.180 <u>False Claim (18 U.S.C. §287)</u>	20
9-42.181 Elements of 18 U.S.C. §287	21
9-42.190 <u>False Statements and the Venue Statute, 18 U.S.C. §3237</u>	23
9-42.200 18 U.S.C. §1001 (CONTINUED)	25
9-42.210 <u>Extraterritoriality 18 U.S.C. §3238</u>	25
9-42.211 Jurisdiction	25
9-42.212 Venue	26

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-42.220	<u>Multiplicity, Duplicity, Single Document Policy</u>	27
9-42.221	Some Specific Problems	28
9-42.230	<u>General versus Specific Statutes</u>	29
9-42.231	Policy	33
9-42.300	18 U.S.C. §371: CONSPIRACY TO DEFRAUD THE UNITED STATES	33
9-42.310	<u>Defrauding the Government of Money or Property</u>	34
9-42.311	Cheating	35
9-42.312	Obstruct or Impair Legitimate Government Activity	35
9-42.313	Government Instrumentality	37
9-42.400	OTHER FRAUDS AGAINST THE GOVERNMENT	38
9-42.410	<u>Commercial Bribery Statute</u>	38
9-42.420	<u>Procurement Frauds</u>	39
9-42.430	<u>Medicare-Medicaid Frauds</u>	40
9-42.431	Plea Bargaining	42
9-42.440	<u>Supplemental Security Income Program</u>	43
9-42.450	<u>AID Frauds</u>	44
9-42.500	REFERRAL PROCEDURES	45
9-42.501	Relationship and Coordination With the Statutory Inspectors General	
9-42.502	Policy Statement of the Department of Justice on Its Relationship and Coordination With the Statutory Inspectors General of the Various Departments and Agencies of the United States	47
9-42.503	Implementation of the Policy Statement	53
9-42.510	<u>Social Security Administration</u>	55
9-42.511	Social Security Violations	55
9-42.520	<u>Department of Agriculture--Food Stamp Violations</u>	57
9-42.530	<u>Department of Defense Memorandum of Understanding</u>	58

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-42.000 FRAUD AGAINST THE GOVERNMENT

9-42.010 Coordination of Criminal and Civil Fraud Against the Government Cases

A. The FBI has been directed to furnish to both the Commercial Litigation Branch of the Civil Division and the Fraud Section of the Criminal Division copies of all reports in all matters in which the reports show that the character of the investigation consists of the following categories:

1. Fraud Against the Government;
2. Federal Housing Administration Matters;
3. Veterans Administration Matters;
4. Small Business Administration Matters;
5. Federally-Insured Student Loan Matters;
6. Medicare Matters;
7. Theft of Government Property;
8. Federal Lending and Insurance Agencies;
9. Bribery; and
10. Conflict of Interest.

Other investigative agencies are required to forward reports in any similar categories to the appropriate U.S. Attorney.

While bribery and conflict of interest matters are not presently within the jurisdiction of the Fraud Section of the Criminal Division (but rather the Public Integrity Section), they are within the jurisdiction of the Commercial Litigation Branch of the Civil Division.

B. The United States has both statutory (e.g., the False Claims Act, 31 U.S.C. §§231-235) and common law rights of action against the government and from the corruption of its officials. Every report of fraud or official corruption should be analyzed for its civil potential before the file is closed. In the first instance, this review should be conducted by the Assistant U.S. Attorney or Departmental attorney assigned to the initial referral. Fraud against the government claims involving

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

more than \$200,000 in single damages plus forfeitures should be referred to the Commercial Litigation Branch.

C. Cases pursued criminally must also be analyzed for civil potential. This analysis should be conducted at the earliest possible stage. Criminal dispositions by plea bargain should not waive or release the government's civil interests, except in return for adequate consideration, as measured by the Department's standards for civil settlements generally. Proposed civil depositions involving over \$200,000 in single damages plus forfeitures must be referred to the Commercial Litigation Branch for approval. See 28 C.F.R. §§0.45(d), 0.160, and Civil Division Directive No. 145-81, 46 Fed. Reg. 52352 (October 21, 1981); 28 C.F.R. Appendix to Subpart Y.

D. The Commercial Litigation Branch of the Civil Division notifies the appropriate U.S. Attorney and other interested offices of the Department of Justice of potential civil actions which come to the Commercial Litigation Branch's attention. The Commercial Litigation Branch coordinates its cases with the U.S. Attorney to assure the pursuit of both civil and criminal redress. This may include the simultaneous initiation of civil and criminal proceedings where the monetary recovery to the government and the deterrent effect will be enhanced, giving due consideration to the risks to the criminal case and the availability of protective orders and stays.

E. The Commercial Litigation Branch of the Civil Division follows the investigation as it develops and, where necessary, requests, in coordination with the U.S. Attorney and other interested offices of the Department of Justice, that investigation be conducted relating to areas such as damages, which are particularly pertinent to civil action.

F. The Commercial Litigation Branch of the Civil Division gives consideration at the earliest possible date to the initiation of civil action. The Commercial Litigation Branch advises the U.S. Attorney and other interested offices of the Department of Justice of any contemplated civil action. Absent a specific, detailed statement that there is a strong likelihood that institution of civil action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to institute civil action is governed solely by the standards specified in 38 Op. Atty. Gen. 98 (1934). This is, the suit is instituted unless there is: (1) doubt as to collectibility; or (2) doubt as to the facts or law.

G. The Commercial Litigation Branch of the Civil Division, in cases in which the investigation warrants the conclusion that dissipation of any substantial amounts of assets is likely, seeks provisional relief, notwithstanding the degree to which the criminal aspects of the matter have been concluded. The Commercial Litigation Branch advises the U.S.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Attorney and other interested offices of the Department of Justice of any provisional action. Such provisional relief is sought unless there is a clear likelihood that efforts to prevent dissipation of assets would materially prejudice criminal prosecution of specific subjects. The criterion for determining "substantial assets" is set at \$50,000, and in cases in which assets of this amount may be dissipated, efforts at provisional relief to secure recovery on behalf of a client agency should, if a conflict exists, be resolved within the Department at the appropriate level.

H. The Commercial Litigation Branch of Civil Division is accorded greater latitude in urging client agencies to withhold payment of claims presented by any subject known to have engaged in fraudulent conduct. The Commercial Litigation Branch advises the U.S. Attorney and other interested offices of the Department of Justice. Absent a specific, detailed statement that action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to withhold is governed by the usual Department of Justice standards. The government's common law right to withhold payment by setoff has been upheld by the Supreme Court, United States v. Munsey Trust Co., 332 U.S. 234 (1947). The right to void tainted claims is granted by statute governing many fraudulently abused programs, e.g., 12 U.S.C. §1709(e). Withholding is an important tool for effecting civil redress, and in recent years the government has successfully defended a number of cases in which client agencies have employed this self-help remedy. See, e.g., Peterson v. Weinberger, 508 F.2d 45 (5th Cir. 1975); Brown v. United States, 524 F.2d 693 (Ct. Cl. 1975); Continental Management, Inc. v. United States, 527 F.2d 613 (Ct. Cl. 1975). The negotiation of favorable settlements in unliquidated matters also may be enhanced by the bargaining leverage which withholding affords. Client agencies also should be urged to withhold pay and retirement benefits to federal employees separated because of evidence of wrongdoing.

The current regulations regarding the withholding or setoff of backpay or retirement benefits are found at 4 C.F.R. Part 101 and 5 C.F.R. §831, respectively;

I. The existing delegations of authority to settle civil fraud claims are set forth in 28 C.F.R. §§0.45(d), 0.160, and Civil Division Directive No. 145-81, 46 Fed. Reg. 52352 (October 27, 1981); 28 C.F.R. Appendix to Subpart Y. They provide for redelegation of the Assistant Attorney General's authority in Civil Division cases to branch directors, unit chiefs, and attorneys in charge of field offices of the Civil Division as follows:

1. Branch directors may compromise, reject offers in compromise, or close claims, in all cases against the government,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

where the amount to be paid by the government pursuant to the offer does not exceed \$150,000 and in all cases involving claims asserted by the government where the difference between the gross amount of original claim and the proposed settlement does not exceed \$150,000;

2. U.S. Attorneys are authorized to compromise, close or file suit in cases in which the sum of single damages and forfeitures under the False Claims Act, if applicable, does not exceed \$200,000;

3. U.S. Attorneys are not authorized to close, compromise, or file suit in cases involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract or exploitation of public office, regardless of amount, without first consulting with the branch directors;

4. U.S. Attorneys are authorized to take all necessary steps to protect the interest of the United States, regardless of the amount claimed, in certain categories of civil actions referred directly to them by concerned agencies.

Inquiries should be directed to:

Director, Commercial Litigation Branch,  
Civil Division, FTS 724-7179

Chief, Fraud Section,  
Criminal Division, FTS 724-7038

9-42.020 Scope of the General Fraud Against the Government Statutes

While Congress has enacted numerous specific statutes to deal with particular types of fraud against the government, enforcement efforts rely principally on three rather general statutes: 18 U.S.C. §§287, 371 (discussed at USAM 9-42.300, *infra*), and 18 U.S.C. §1001 (discussed at USAM 9-42.100 through 9-42.251, *infra*). The scope of 18 U.S.C. §287, which encompasses false claims submitted to the United States is narrow and is discussed in USAM 9-42.180, *infra*. Of fundamental concern is the type of relationship the fraudulent act must have with the federal government in order to warrant federal prosecution.

9-42.100 18 U.S.C. §1001: FALSE STATEMENT, CONCEALMENT

18 U.S.C. §1001 provides:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry . . . .

The operative language of 18 U.S.C. §1001 is "in any matter within the jurisdiction of any department or agency of the United States." An often-raised defense is the claim that because the alleged act or activity has no reasonable relation to the federal government, no federal jurisdiction lies.

In determining the context in which the prohibited conduct must occur to be within the scope of 18 U.S.C. §1001, the courts have had no problem with the validity of a legislative interest to insure the integrity of official functions encompassing utilization of 18 U.S.C. §1001 to protect the government "from the perversion which might result from the deceptive practices described," Bryson v. United States, 396 U.S. 64 (1969); Bramblett v. United States, 348 U.S. 503 (1955); United States v. Gilliland, 312 U.S. 86, 93 (1941).

9-42.110 Items Not Required to be Proved

The courts have held that 18 U.S.C. §1001 does not require:

A. Any financial or property loss to the federal government (though one often exists), Gilliland, *supra*, at 93, Gollaher v. United States, 419 F.2d 520, 526 (9th Cir.), cert. denied, 396 U.S. 960 (1969); United States v. Richmond, 700 F.2d 1183, 1188 (8th Cir. 1983); United States v. Godel, 361 F.2d 21, 24 (4th Cir.), cert. denied, 385 U.S. 838 (1966); United States v. Hawkins, 295 F.2d 837 (6th Cir. 1961).

B. That the false statement be made directly to the federal government, United States v. Richmond, *supra*, at 1187; United States v. Uni Oil Co., 646 F.2d 946, 954-55 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982); United States v. Stanford, 589 F.2d 285, 297 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979), United States v. Krause, 507 F.2d 113, 117 (5th Cir. 1975); United States v. Candella, 487 F.2d 1223, 1227 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. Any favorable agency action, Brandow v. United States, 268 F.2d 559 (9th Cir. 1959); United States v. Quirk, 167 F. Supp. 462 (E.D. Pa. 1958), aff'd, 266 F.2d 26 (3d Cir. 1959).

D. Reliance by the government, United States v. Hicks, 619 F.2d 752, 754-55 (8th Cir. 1980); United States v. Norberg, 612 F.2d 1, 4 (1st Cir. 1979); United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980); United States v. Goldfine, 538 F.2d 815, 820-21 (9th Cir. 1978).

E. Actual knowledge of federal agency jurisdiction, United States v. Yermian, \_\_\_\_\_ U.S. \_\_\_\_\_, 104 S. Ct. 2936 (1984).

In reversing Yermian, 708 F.2d 365 (9th Cir. 1983), the Supreme Court tackled the issue of the scope of knowledge required by 18 U.S.C. §1001, and held, in a sharply divided 5-4 opinion, that the government need not prove that the false statement was made with actual knowledge on the part of the defendant of the federal agency jurisdiction.

A majority of the Supreme Court, looking to the language of the statute, found the phrase "in any matter within the jurisdiction of any department or agency of the United States" to be a jurisdictional requirement only, and that a "natural reading" or the statutory language of 18 U.S.C. §1001 made it "clear that Congress did not intend the term 'knowingly' to apply to the jurisdictional element of 18 U.S.C. §1001," but rather to the falsity of the statement. Dissenters wrote that the language of 18 U.S.C. §1001 is ambiguous, and that the statutory history is likewise unclear on what standard of proof attaches to the jurisdictional issue.

Notwithstanding the importance of this decision, even more interesting is footnote 14, in Yermian, supra, which notes that the Supreme Court need not rule on the necessity or the propriety of the giving of any instruction on culpability--including one of reasonable foreseeability. The language in the footnote is itself ambiguous enough to support arguments in favor of or against the giving of such an instruction. Given the narrowness of the majority position and the position of the dissenting justices, it may be the better part of valor to seek an instruction on reasonable foreseeability in subsequent cases.

See also, United States v. Baker, 626 F.2d 512, 515-516 (5th Cir. 1980); United States v. Stanford, supra, at 246-298; United States v. Lewis, 587 F.2d 854 (6th Cir. 1978).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-42.120 Jurisdictional Requirements Satisfied

Jurisdictional requirements are satisfied if:

A. The agency had the power to act on the statement, United States v. DiFonzo, 603 F.2d 1260, 1264 (7th Cir. 1979); Ogden v. United States, 303 F.2d 724, 743 (9th Cir. 1962), cert denied, 376 U.S. 973 (1964).

B. There is an "intended" relationship between the act and the federal government, United States v. Stanford, supra, at 297; United States v. Krause, supra; United States v. Candella, supra, United States v. Jones, 464 F.2d 1118 (8th Cir. 1972); United States v. Ebeling, supra at 434.

C. The act was calculated to induce government action, United States v. Barbato, 471 F.2d 918, 922 (1st Cir. 1973); United States v. Maenza, 475 F.2d 251, 253 (7th Cir. 1973); United States v. Lee, 422 F.2d 1049, 1051 (5th Cir. 1970); Brandow v. United States, supra; United States v. Allen, 193 F. Supp. 954 (S.D. Cal. 1961); United States v. Quirk, supra.

The Supreme Court has interpreted 18 U.S.C. §1001 broadly. See, e.g., Bryson v. United States, 396 U.S. 64 (1969). The statute is viewed as seeking to protect both the operation and the integrity of the government. A false statement may threaten to obstruct or impair the "honest and faithful operation of some governmental agency and/or the value and integrity of a document or report issued by that government agency." See United States v. Myers, supra at 531.

9-42.130 Statements Meriting Prosecution

Whether or not the relationship between the fraudulent statement and the government is sufficient to warrant prosecution often depends on the context of the false statement. Not all false statements violate 18 U.S.C. §1001. Statements meriting prosecution may be made in at least three ways:

A. Directly to a federal agency, e.g., application form for employment, Alire v. United States, 313 F.2d 31 (10th Cir. 1962); non-communist affidavits with the NLRB, United States v. Pezzati, 160 F. Supp. 787 (D. Colo. 1958).

B. To a private person or institution which implements federal programs, e.g., Medicare fiscal intermediaries, United States v. Kraude, 467 F.2d 37, 38 (9th Cir.), cert denied, 409 U.S. 1076 (1972); FHA and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

VA loans secured initially through local banks which have authority to determine if applicant satisfies statutory requirements for eligibility, United States v. Levinson, 405 F.2d 971 (6th Cir. 1968), cert. denied, 395 U.S. 906, 958 (1968); Preuit v. United States, 382 F.2d 277 (9th Cir. 1967); statements to private employer of number of hours worked, United States v. Giarraputo, 140 F. Supp. 831 (E.D.N.Y. 1956).

C. To one's self, as false statements in business records which may be subject to federal government inspection, Gonzales v. United States, 286 F.2d 118 (10th Cir. 1961), cert. denied, 365 U.S. 878 (1961) (records subject to inspection by Rural Electrification Administration); United States v. Ganz, 48 F. Supp. 323, 325 (D. Mass. 1942) (subject to O.P.A. inspection).

This area may expand as a result of the periodic federal control over wages and prices, with audits being the only means of enforcing compliance.

These various acts have one common feature: they affect either the operation or integrity of the government. All that is necessary for jurisdiction to lie is that the false statement touch on a federal interest; it is not necessary that the statement affect or influence that interest. The only limitation on this rule is that the federal interest must exist at the time the false statement is made; it cannot arise after the defendant has made a false statement, Terry v. United States, 131 F.2d 40 (8th Cir. 1942).

Once it is determined that there is jurisdiction, issues of materiality, knowledge, falsity, etc. arise. See USAM 9-42.140, infra.

9-42.140 Elements of 18 U.S.C. §1001

A. The following acts are prohibited:

1. Making a false statement;
2. Using a false statement;
3. Falsifying;
4. Concealing; and
5. Covering up.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Whether the above acts are criminal depends on whether or not there is an affirmative response to all of the following questions:

1. Was the act material?
2. Was the act within the jurisdiction of the department or agency of the United States?
3. Was the act done knowingly and willfully?

9-42.141 The Making of a False Statement

The false statement may be written or oral, United States v. Beacon Brass Co., 344 U.S. 43, 46 (1952); United States v. Rose, 570 F.2d 1358, 1364 (9th Cir. 1978); United States v. Massey, 550 F.2d 300, 305 (5th Cir. 1977); Hensley v. United States, 406 F.2d 481 (10th Cir. 1968). It may be sworn or unsworn, Eccc Inc. v. Federal Energy Regulatory Commission, 645 F.2d 339 (5th Cir. 1981); United States v. Massey, supra, United States v. Isaacs, 493 F.2d 1124, 1158 (7th Cir.), cert. denied, 417 U.S. 976 (1974); Neely v. United States, 300 F.2d 67, 71-72 (9th Cir.), cert. denied, 369 U.S. 864 (1962); United States v. Stephens, 315 F. Supp. 1008, 1010 n.2 (W.D. Okla 1970). It may be voluntary or required by law, Neely v. United States, supra, at 71; Knowles v. United States, 224 F.2d 168, 172 (10th Cir. 1955); see also cases cited in United States v. Odgen, 303 F.2d 724, 743 n.70 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964). The statement need not be presented, submitted or stated directly to the federal government, United States v. Richmond, 700 F.2d 1183, 1187 (8th Cir. 1983); United States v. Stanford, 589 F.2d 285, 297 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); United States v. Lange, 528 F.2d 1280 (5th Cir. 1976); United States v. Candella, 487 F.2d 1223, 1227 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974).

9-42.142 Knowingly and Willfully

18 U.S.C. §1001 prohibits the knowing and willful commission or omission of certain acts.

A. To commit an act "knowingly" is to do it with knowledge or awareness of the true facts or situation, and not because of mistake, accident or some other innocent reason, United States v. Weatherspoon, 581 F.2d 595, 600-01 (7th Cir. 1978); United States v. Lange, 528 F.2d 1280, 1288 (5th Cir. 1976). Knowledge of the relevant criminal provision governing the conduct is not required, Johnson v. United States, 410 F.2d

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

38, 47 (8th Cir.), cert. denied, 396 U.S. 822 (1969). The false statement need not be made with an intent to deceive if there is an intent to mislead or to induce belief in its falsity, United States v. Lichenstein, 610 F.2d 1272, 1277-78 (5th Cir.), cert. denied, 447 U.S. 907 (1980); United States v. Godwin, 566 F.2d 975, 976 (5th Cir. 1978). Reckless disregard of whether a statement is true or a conscious effort to avoid learning the truth can be construed as acting "knowingly," United States v. Evans, 559 F.2d 244, 244-46 (5th Cir. 1977), cert. denied, 434 U.S. 1015 (1978); United States v. Egenberg, 441 F.2d 441, 444 (2d Cir.), cert. denied, 404 U.S. 944 (1971); United States v. Abrams, 427 F.2d 86, 91 (2d Cir.), cert. denied, 400 U.S. 832 (1970). A defendant cannot be relieved of the consequences of a material misrepresentation for lack of knowledge when the means of ascertaining truthfulness are available, United States v. Weiler, 385 F.2d 62, 65-66 (3d Cir. 1967).

B. An act is done "willfully" if done voluntarily and intentionally and with the specific intent to do something the law forbids, United States v. Malinowski, 472 F.2d 850 (3d Cir.), cert. denied, 411 U.S. 970 (1973); United States v. Clearfield, 358 F. Supp. 564, 574 (E.D. Pa. 1973). There is no requirement of showing evil intent on the part of a defendant in order to prove that he/she acted "willfully," Malinowski, *supra*; Neely v. United States, *supra*, at 72; McBride v. United States, 225 F.2d 249, 253-55 (5th Cir. 1955), cert. denied, 350 U.S. 934 (1965).

#### 9-42.143 Materiality

The Second Circuit requires materiality of the false statement only in the first clause of 18 U.S.C. §1001, United States v. Rinaldi, 393 F.2d 97 (2d Cir.), cert. denied, 393 U.S. 913 (1965); United States v. Aadal, 368 F.2d 962 (2d Cir. 1966), cert. denied, 386 U.S. 970 (1967); United States v. Marchisio, 344 F.2d 653 (2d Cir. 1965). In each of the cases cited, however, the court nevertheless found the false statement to be material. The majority and better view is that the element of materiality pervades the entire statute. See United States v. Adler, 633 F.2d 1287, 1291 (8th Cir. 1980); United States v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980); United States v. DiTongo, 603 F.2d 1260 (7th Cir. 1979), cert. denied, 444 U.S. 1018 (1980); United States v. Valdez, 594 F.2d 725, 728 (9th Cir. 1979); United States v. Johnson, 530 F.2d 52 (5th Cir. 1976); Brethauer v. United States, 333 F.2d 302, 206 (8th Cir. 1964).

Almost every court that has considered the issue has held that the question of materiality of a false statement or a concealed fact under 18

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S.C. §1001 is an issue of law to be decided by the trial court. See United States v. Sinclair, 229 U.S. 263, 298 (1929); United States v. McIntosh, 655 F.2d 80, reh'g denied, 660 F.2d 497 (9th Cir.), cert. denied, 455 U.S. 948 (1982); United States v. Baker, 626 F.2d 512, 514 n.4 (5th Cir. 1980); United States v. Adler, supra, at 1292, United States v. Ivey, 322 F.2d 523 (4th Cir. 1963). But see, United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979), where the Ninth Circuit held materiality to be a question of fact to be submitted to the jury. For a succinct statement of the legal as opposed to factual rationale, see United States v. Ven-Fuel, Inc., 602 F.2d 747, 753 (5th Cir. 1979).

The most often cited test for materiality appears in United States v. Weinstock, 231 F.2d 699, 701 (D.C. Cir. 1956):

"Material" when used in respect to evidence is often confused with "relevant," but the two terms have wholly different meanings. To be "relevant" means to relate to the issue. To be "material" means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material.

The test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made. See United States v. Carrier, 654 F.2d 559, 561 (10th Cir. 1981); United States v. DiFonzo, 603 F.2d 1260, 1266 (7th Cir. 1979), cert. denied, 444 U.S. 1018 (1980), United States v. Valdez, 594 F.2d 725, 728 (9th Cir. 1979); United States v. Cooper, 493 F.2d 473, 474 (5th Cir. 1974); United States v. Jones, 464 F.2d 1118, 1122 (8th Cir. 1972).

It is not part of the test that the government actually be influenced by the false statement or concealment, United States v. Diaz, 690 F.2d 1352 (5th Cir. 1982); United States v. Jones, supra, at 1121-22; Gonzales v. United States, 286 F.2d 118, 122 (10th Cir. 1960), cert. denied, 365 U.S. 878 (1961); United States v. Clearfield, 358 F. Supp. 564, 574 n.23 (E.D. Pa. 1973). Nor is it part of the test that the government actually relies on the statement or concealment. See cases collected at USAM 9-42.110, supra. It is also not necessary that the issue to which the false statement or fact is material be the main issue. The Court in Weinstock v. United States, supra, at 703, held that "the issue to which the false statement is material need not be the main issue; it may be a collateral issue. And it need not bear directly upon the issue but may merely augment or diminish the evidence upon some point. But it must have some weight in the process of reaching a decision."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Whether the agency would have accepted or rejected the cause irrespective of the concealed fact or false statement is not determinative of materiality. See Gollaher v. United States, 419 F.2d 520, 529 (9th Cir.), cert. denied, 396 U.S. 960 (1969). In United States v. Quirk, 167 F. Supp. 462, 464 (E.D. Pa.), aff'd, 266 F.2d 26 (3d Cir. 1959), the defendant's application falsely reciting certain facts was rejected for reasons unrelated to his false statement. The court held that the purpose of 18 U.S.C. §1001 was to prohibit the willful submission of false statements "calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons impossible." See United States v. Quirk, supra, at 464. The court held, citing Freidus v. United States, 223 F.2d 598, 601 (D.C. Cir. 1955), that the test is whether the false statements were, in and of themselves, capable of influencing a governmental function.

The definition of materiality under 18 U.S.C. §1001 is essentially the same as that covered by 18 U.S.C. §§1621 and 1623, which are the perjury statutes. For a brief summary of that definition, see 60 Am. Jur. 2d, Perjury, §11. See also United States v. Gremillion, 464 F.2d 901, 904-05 (5th Cir.), cert. denied, 409 U.S. 1085 (1972), for a discussion of materiality under 18 U.S.C. §1621.

Materiality is best shown by the testimony of expert witnesses, generally those who make the decisions on the application or statements in the particular case as to the influence that defendant's allegedly false statement might have had on the ultimate result of the transaction. Two cases where courts of appeal have reversed convictions on materiality grounds, United States v. Talkington, 589 F.2d 415, 417 (9th Cir. 1978), and United States v. Beer, 518 F.2d 168, 172-73 (5th Cir. 1975), contain discussions of what evidence on materiality was lacking in those cases.

9-42.144 False

18 U.S.C. §1001 requires that the statement or representation be actually false and the government has the burden of establishing the alleged falsity of the statement. Webster's 3d International Dictionary defines the adjective "false" as: "not corresponding to truth or reality." Although a statement may be misleading, unauthorized, or even fraudulent, a conviction under this section cannot be sustained unless the statement is also false. See United States v. Diogo, 320 F.2d 898, 905-09 (2d Cir. 1963) (literally true that defendant married). Where a statement is ambiguous, it is incumbent upon the government to negative any reasonable interpretation that would make the defendant's statement

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

factually correct, Diogo supra, at 907; United States v. Race, 632 F.2d 1114, 1120 (4th Cir. 1980); United States v. Anderson 579 F.2d 455 (8th Cir.), cert. denied, 439 U.S. 980 (1978). The question of whether a literally true statement can be a false representation is an open one. While the Second Circuit in Diogo, supra, has held that a literally true statement cannot be said to be a false representation, the Fifth Circuit has twice held to the contrary, United States v. Rodgers, 624 F.2d 1303, 1310-11 (5th Cir. 1980), cert. denied, 450 U.S. 917 (1981); Peterson v. United States, 344 F.2d 419, 427 (5th Cir. 1965).

This problem can be avoided in part by casting the indictment in terms of a "concealment of a material fact" rather than the making of a false statement or representation, Diogo, supra, at 902.

In United States v. Outer Harbor Dock & Wharf Co., 124 F. Supp. 337 (S.D. Cal. 1954), the government charged that the defendants had falsely represented to the government that they were obligated under a lease with the city of Los Angeles to remove a building erected by the Navy on land leased by the city to the defendants. The Court held that the defendant's company was so obligated, and that therefore there had been no misrepresentation. The Court commented that criminal fraud could not be inferred from a reasonable opinion as to the legal effect of a contract, whether that opinion was erroneous or correct. Id. at 345. This is not to say that criminal fraud may not be inferred where the opinion is made in bad faith.

9-42.145 Department or Agency

18 U.S.C. §1001 requires that the false statement be in a "matter within the jurisdiction of any department or agency." 18 U.S.C. §6 defines department and agency:

As used in this Title:

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

In United States v. Bramblett, 348 U.S. 503 (1955), the Supreme Court stated:

Congress could not have intended to leave frauds such as this without penalty. The development scope and purpose of the section [18 U.S.C. §1001] shows that "department" as used in this context, was meant to describe the executive, legislative and judicial branches of the Government.

United States v. Bramblett, *supra*, involved false statements to the Disbursing Office of the House of Representatives, which is engaged in what could be characterized as administrative functions of the legislature. While it has been suggested that 18 U.S.C. §1001 is limited to administrative and housekeeping chores in connection with the legislative branch of the government, there is no authority for such a restriction.

Several courts have viewed the application of 18 U.S.C. §1001 to the judicial branch more narrowly than Bramblett suggests. In Morgan v. United States, 309 F.2d 234 (D.C. Cir. 1962), *cert. denied*, 373 U.S. 917 (1963), the court limited the application of 18 U.S.C. §1001 to those items which essentially involved the "administrative" or "housekeeping" function of the judiciary and strictly excepted those items which involve the judicial machinery of the court. The court found that representations as to license to practice law were of the administrative or housekeeping type. In United States v. Erhardt, 381 F.2d 173 (6th Cir. 1967), the court applied the Morgan interpretation and held 18 U.S.C. §1001 does not apply to the introduction of false documents in a criminal proceeding. More recently the Fifth Circuit has held that 18 U.S.C. §1001 does not apply to a bail-removal hearing in a criminal proceeding. United States v. Abrahams, 604 F.2d 386 (5th Cir. 1979).

A false statement made to the court in a private civil action has been held to be beyond the scope of the statute. See United States v. D'Amato, 507 F.2d 26 (2d Cir. 1974). The court in D'Amato held that 18 U.S.C. §1001 does not apply where the government is involved in the civil action only by way of its presence as a court deciding a matter in which neither it nor its agencies are involved. Compare United States v. Stephens, 315 F. Supp. 1008 (W.D. Okla. 1970), which upheld a conviction under 18 U.S.C. §1001 for a false statement made in a civil proceeding to vacate a criminal sentence.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Other government departments or agencies which have been held to be "agencies" within the statute are the War Assets Administration, United States v. Todorow, 173 F.2d 439 (9th Cir.), cert. denied, 337 U.S. 925 (1949); the Veterans Administration, Sanchez v. United States, 134 F.2d 279 (1st Cir.), cert. denied, 319 U.S. 768 (1943); the Internal Revenue Service, United States v. Ryan, 455 F.2d 728, 733 (9th Cir. 1972), United States v. Ratner, 464 F.2d 101 (9th Cir. 1972); but see United States v. Bush, 503 F.2d 813 (5th Cir. 1974), and Paternoistro v. United States, 311 F.2d 298, 309 (5th Cir. 1962); the U.S. Tax Court, Stein v. United States, 363 F.2d 587 (5th Cir.), cert. denied, 385 U.S. 934 (1966); the Commodity Credit Corporation, Spivey v. United States, 109 F.2d 181 (5th Cir.), cert. denied, 310 U.S. 631 (1940); Army Post Exchanges, United States v. Brethauer, 333 F.2d 302, 305 (8th Cir. 1964) (this case effectively expanded the term "agency" to include those agencies created by administrative regulation as well as by statute); Bureau of Customs, United States v. Hain, 218 F. Supp. 922, 929-30 (S.D.N.Y. 1963).

Those "agencies" which have been held not to be agencies or departments within the statute are the federal grand jury, United States v. Allen, 193 F. Supp. 954 (S.D. Cal. 1961), and the Federal Bureau of Investigation, United States v. Lambert, 470 F.2d 354 (5th Cir. 1972); Friedman v. United States, 374 F.2d 363 (8th Cir. 1967); contra, United States v. Stark, 131 F. Supp. 190 (D.Md. 1955). See also USAM 9-42.160, infra.

9-42.146 Concealment--Failure to Disclose

18 U.S.C. §1001 is often referred to as a false statement statute, and yet its scope extends beyond statements. 18 U.S.C. §1001 proscribes the acts of making false statements, falsifying, concealing or covering up. Concealment and cover-up are essentially identical concepts. Also a concealment very often is the result of a falsification. These latter acts need not have any relation to a statement. A concealment may involve a failure to disclose or partial disclosures of information required on an application form, Olin Mathieson v. United States, 368 F.2d 525 (2d Cir. 1966); Frasier v. United States, 267 F.2d 62 (1st Cir. 1959); under such a theory, however, the government will have to prove that the defendant had a duty to disclose the facts in question at the time he/she was alleged to have concealed them, United States v. Irwin, 654 F.2d 671, 678-79 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); concealment may also involve a merely physical act of concealment such as transferring inspection stamps, United States v. Steiner Plastics Mfg. Co., 231 F.2d 149 (2d Cir. 1956); changing numbers on bottles to conceal rejection, United States v. Private Brands, 250 F.2d 554 (2d Cir. 1957), cert.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

denied, 355 U.S. 957 (1958); keeping false prescription records thereby concealing use of morphine, United States v. Coil, 343 F.2d 573 (8th Cir.), cert. denied, 382 U.S. 821 (1965); use of false stamp thereby concealing ownership of tobacco, United States v. Ivey, 322 F.2d 523 (4th Cir.), cert. denied, 375 U.S. 953 (1963); omission in financial statement of relevant facts, Neeley v. United States, 300 F.2d 67, 73 (9th Cir.), cert. denied, 369 U.S. 864 (1962); false statement as to existence of a second mortgage, United States v. Hawkins, 295 F.2d 837 (6th Cir. 1961).

Several courts have required that the indictment set forth the essential acts constituting the concealment, Harris v. United States, 217 F. Supp. 86 (M.D. Ga. 1962); see also United States v. Apex Distributing Company, 148 F. Supp. 365 (D.R.I. 1957); United States v. White, 69 F. Supp. 562 (S.D. Cal. 1946), or at least be prepared to prove that the "concealment by trick..." consisted of affirmative acts, United States v. London, 550 F.2d 206 (5th Cir. 1977).

9-42.150 False Statements as to Future Actions

While the falsification which is the subject of prosecution is usually of past or present facts, it need not be so. A present statement as to future intent, e.g., a promise to do that which is not actually intended, is a false statement of an existing intent. See United States v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 466 U.S. 982 (1980); United States v. Elmore 267 F.2d 595 (4th Cir.) cert. denied, 361 U.S. 832 (1959). See also United States v. Grayson, 166 F.2d 863 (2d Cir. 1949). Obviously, it is difficult to demonstrate the defendant's present intent as to the future.

For other in futuro cases, see United States v. Elmore, supra (wheat obtained on promise of intended use); United States v. Corcoran, 229 F.2d 295 (5th Cir. 1956) (Veteran's Administration (VA) home, loan-intent to occupy a home); United States v. Lurie, 222 F.2d 11 (7th Cir.), cert. denied, 350 U.S. 835 (1955) (Veteran's preference in purchase of surplus property--intent to go into oil transporting business); United States v. McCoy, 169 F.2d 776 (9th Cir.), cert. denied, 335 U.S. 898 (1948) (purpose for purchasing); United States v. Rubinstein, 166 F.2d 249 (2d Cir.), cert. denied, 333 U.S. 868 (1948) (statement to draft board that employer needed him); United States v. Grayson, 166 F.2d 863 (2d Cir. 1948). For a restatement of these and other cases, see United States v. Johnson, 284 F. Supp. 273 (W.D. Mo. 1968), aff'd, 410 F.2d 38 (8th Cir.), cert. denied, 396 U.S. 822 (1969) (certification of compliance).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-42.160 False Statement to a Federal Investigator

Quite often the circumstances arise where a false statement has been made in response to an inquiry by an FBI agent or other agency investigator, e.g., Secret Service, HUD, Immigration. The issue arises whether such a statement is within the purview of 18 U.S.C. §1001. While at first blush the cases conflict, they are distinguishable on the basis of the nature of the inquiry and the form of the response.

A. Where the false statement has been made as a result of the questioning of an FBI agent, the preponderance of authority is to the effect that 18 U.S.C. §1001 does not apply, United States v. Schnaiderman, 568 F.2d 1208, 1213 (5th Cir. 1978); United States v. Bedore, 455 F.2d 1109 (9th Cir. 1972); Paternostro v. United States, 311 F.2d 298 (5th Cir. 1962), United States v. Ehrlichman, 379 F. Supp. 291, 292 (D.D.C. 1974), aff'd on other grounds, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977). Where the false statement is volunteered to an FBI agent or U.S. Attorney, however, the courts have generally held that 18 U.S.C. §1001 does apply. See United States v. Lambert, 501 F.2d 943, 945 (5th Cir. 1974); United States v. Adler, 380 F.2d 917 (2d Cir.), cert. denied, 389 U.S. 1006 (1967); United States v. Van Valkenberg, 157 F. Supp. 599 (D. Alaska 1958); contra, Friedman v. United States, 374 F.2d 363 (8th Cir. 1967). The cases appeared distinguishable in that a volunteered false statement results in the government's investigatory machinery being set in motion whereas when the statement is made in response to an FBI inquiry, the investigatory machinery has already been moving, and no injury to the United States occurs.

B. The courts have given other reasons for not applying 18 U.S.C. §1001 to false statements made to the FBI:

1. That the response is not a statement within the purview of 18 U.S.C. §1001, Paternostro v. United States, supra United States v. Davey, 155 F. Supp. 175 (S.D.N.Y. 1957); United States v. Stark, 131 F. Supp. 190 (D. Md. 1955).

2. That the response is not within the jurisdiction of the FBI, Friedman v. United States, supra, United States v. Stark, supra, contra, United States v. Adler, supra; United States v. Lambert, supra.

C. However, a unanimous Supreme court decision in United States v. Rodgers, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1942 (1984), in reversing the Eighth Circuit and its prior reliance on Friedman, supra, held the statutory language clearly encompassed criminal investigations, and its legislative

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

history would not support a more restricted reach. Concluding (1) criminal investigations surely fell within the term "in any matter;" and (2) the Bureau qualified as "department(s) or agencie(s)," the Court said the language "within the jurisdiction" merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body. It is now clear that the term "jurisdiction," defined as the "right to say and the power to act;" Gonzales v. United States, 286 F.2d 118 (10th Cir. 1960), should not be given a narrow or technical meaning, United States v. Fern, 696 F.2d 1269 (5th Cir. 1983), and extends to the "power to investigate."

Although the holding of this case is based upon those instances where an individual knowingly and willfully volunteers false information to a law enforcement or other agency, the language contained therein may be equally applicable to those not targets of an investigation who, when questioned by a law enforcement agency, knowingly provide false information. Such further construction must, in all likelihood, await another prosecution and court decision.

D. The statute has been held to apply where the false response is made to an investigator other than an FBI agent; to IRS, United States v. Ratner, 464 F.2d 101 (9th Cir. 1972); United States v. McCue, 301 F.2d 452 (2d Cir.), cert. denied, 370 U.S. 939 (1962); to S.E.C., United States v. Mahler, 363 F.2d 673 (2d Cir. 1966); to an Army officer, Frasier v. United States, 267 F.2d 62 (1st Cir. 1959); to the immigration authority, Tzantarmas v. United States, 402 F.2d 163 (9th Cir. 1968), cert. denied, 394 U.S. 966 (1969).

E. The problem has also been viewed from another direction--the form of the false statement. Where the statement takes the form of an "exculpatory no," 18 U.S.C. §1001 should not apply irrespective of who asks the question. "In such instances it has been held that where an individual falsely denies the truth of questions submitted to him by government agents, such responses are not 'statements' or 'representations' within the meaning of Section 1001 and therefore are not subject to criminal prosecution under it," United States v. Lambert, 470 F.2d 354, 358 (5th Cir. 1972), vacated, 501 F.2d 943 (1974); United States v. Bush, 503 F.2d 813 (5th Cir. 1974); Paternostro v. United States, supra; United States v. Phillipe, 173 F. Supp. 582 (S.D.N.Y. 1959); United States v. Davey, supra; United States v. Levin, 133 F. Supp. 88 (D. Colo. 1953); United States v. Stark, supra. One other reason for such an approach is the latent spirit of the Fifth Amendment. See Stark, supra, at 207.

The Second and Ninth Circuits in Tzantarmas v. United States, supra; United States v. Adler, supra, and Brandow v. United States, 268 F.2d 559

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(9th Cir. 1959), expressly reject the "exculpatory no" analysis. Those circuits distinguished Paternostro v. United States, *supra*; United States v. Stark, *supra*, and other cases in the same line and went on to disapprove of the strict construction of "jurisdiction" and "statement" in 18 U.S.C. §1001, pointing to the broad language of United States v. Bramblett, 348 U.S. 503 (1955).

F. A useful alternative to 18 U.S.C. §1001 may be 18 U.S.C. §1512, which provides:

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to -

(b) Hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings... shall be fined... or imprisoned... or both.

9-42.170 Corporation--Crimes--Conspiracy

It is well settled that a corporation may be convicted of criminal violations. See New York Central v. H.R.R. Co., 212 U.S. 481, 492 (1909); United States v. Union Supply, 215 U.S. 50, 54-55 (1909); United States v. Cotter, 60 F.2d 689 (2d Cir.), *cert. denied*, 287 U.S. 666 (1932). Corporations have been convicted of making false statements. See United States v. Olin Mathieson Chemical Corp., 368 F.2d 523 (2d Cir. 1966); United States v. Alamo Fence Co. of Houston, 240 F.2d 179 (5th Cir. 1957).

Corporations have been convicted of conspiracy. See New York Central v. H.R.R. Co., *supra*, at 497; United States v. Mininsohn, 101 F.2d 477, 478 (3d Cir. 1939); see also United States v. A.M.A., 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943); United States v. Nearing, 252 F. 223 (S.D.N.Y. 1918). Corporations have been convicted of conspiracy with their officers and agents, Alamo Fence Co., *supra*. See also cases cited in United States v. Kemmel, 160 F. Supp. 718, 720 (M.D. Pa. 1958). While there is some authority for the proposition that a corporation cannot conspire with its own agents. See, e.g., United States v. Nelson Radio, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); United States v. Marion County Co-op Ass'n, 114 F. Supp. 58 (W.D. Ark. 1953), the authority is limited to cases involving anti-trust statutes, which by

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

their very nature demand more than conspiracy between a corporation and its agents.

9-42.180 False Claim (18 U.S.C. §287)

18 U.S.C. §287, the general false claims statute provides:

Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious or fraudulent, shall be fined... or imprisoned... or both.

18 U.S.C. §287, like 18 U.S.C. §1001, had its origin in an 1863 statute which was drafted "in the wake of a spate of frauds upon the government." United States v. Bramblett, 348 U.S. 503, 504 (1955). Originally the statute penalized presentment "for payment or approval" of false claims upon or against the Government... Bramblett, *supra*, at 504. False statements made "for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim" were also proscribed. The Act of June 25, 1948, 62 Stat. 749, divided the sections into 18 U.S.C. §287 and 18 U.S.C. §1001, respectively, United States v. D'Amato, 507 F.2d 26 (2d Cir. 1974). See also the Act of March 2, 1863, 12 Stat. 696.

The purpose of 18 U.S.C. §287, is to protect the government from false, fictitious or fraudulent claims. See United States v. Montoya, 716 F.2d 1340 (10th Cir. 1983); United States v. Computer Science Corp., 689 F.2d 1181 (4th Cir. 1982); *cert. denied*, \_\_\_ U.S. \_\_\_ (1983); United States v. Lewis, 587 F.2d 854 (6th Cir. 1978); United States v. Niefert-White Co., 390 U.S. 228 (1968).

The claim need not be false, fictitious and fraudulent; a claim that is false, fictitious or fraudulent will fall within the purview of 18 U.S.C. §287. The language of the statute is to be considered in the disjunctive. See United States v. Blecker, 657 F.2d 629 (4th Cir. 1981), *cert. denied*, 454 U.S. 1150 (1982); United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); United States v. Milton, 602 F.2d 231 (9th Cir. 1979); United States v. Maher, 582 F.2d 842 (4th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); Johnson v. United States, 410 F.2d 38 (8th Cir. 1969), *cert. denied*, 396 U.S. 822 (1969).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

See Johnson v. United States, *supra*; United States v. Mastros, 257 F.2d 808 (3d Cir. 1958), *cert. denied*, 358 U.S. 830 (1958) (a settlement proposal seeks the collection of money from the government and is a claim under 18 U.S.C. §287).

9-42.181 Elements of 18 U.S.C. §287

A. The essential elements of 18 U.S.C. §287 are:

1. A claim is made,
2. Against or to a department or agency of the United States,
3. For money or property,
4. The claim was false, fictitious or fraudulent and material; and 1/
5. The person must have known at the time that the claim was false, fictitious or fraudulent.

Although it is clear from the case law that specific intent to defraud is not required for a conviction under 18 U.S.C. §287, the circuits are divided on the issue of whether willingness is an essential element of 18 U.S.C. §287. For example, the Tenth, Fifth and Second Circuits have held that willfulness is not an essential element of 18 U.S.C. §287, United States v. Irwin, *supra*; United States v. Cook, 586 F.2d 572 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); United States v. Precision Medical Laboratories, Inc., 539 F.2d 434 (2d Cir. 1978). The Ninth, Eighth and Fourth Circuits have reached decisions that appear to indicate that willfulness is an essential element of 18 U.S.C. §287, United States v. Milton, *supra*; United States v. Maher, *supra*; Johnson v. United States, *supra*.

---

1/ But see, United States v. Irwin, *supra*; United States v. Haynie, 568 F.2d 1091 (5th Cir. 1978), herein discussing materiality as an essential element.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Two critical elements of proof for 18 U.S.C. §287 are:

1. A claim on the United States for money or property, United States v. Neifert - White Co., *supra*; United States v. McNinch, 356 U.S. 595 (1958); United States v. Cohn, 270 U.S. 339 (1926); United States v. Mastros, *supra*. All cited cases define claims as attempts at securing money or property. The money or property which is the subject of the claim must be shown.

2. A presentation of a claim. It must be more than an intention to make a claim. The claim must be presented actually and physically and thereby made to the government, United States ex. rel. Marcus v. Hess, 317 U.S. 537 (1943); Bridgeman v. United States, 140 F.577 (9th Cir. 1905); United States v. Christopherson, 216 F.2d 225 (E.D. Mo. 1919). While the clearest case is presentation directly to the government, it may go through an intermediary. Presentation of a refund check for payment constitutes making a false claim on the United States. See United States v. Branker, 395 F.2d 881 (2d Cir. 1968), *cert. denied sub nom.*, Lacey v. United States, 393 U.S. 1029 (1969); Scolnick v. United States, 331 F.2d 598 (1st Cir. 1964); Dimick v. United States, 116 F. 825 (9th Cir. 1902), *cert. denied*, 189 U.S. 509 (1903).

The Supreme Court in United States ex. rel. Marcus v. Hess, *supra*, held that a person submitting a claim need not submit it directly to an agency or department to be convicted or "causing" a false claim to be made. See United States v. Brogren, 63 F. Supp. 702 (D. Mass. 1945). See also 18 U.S.C. §286, which proscribes conspiracy to defraud the United States with respect to false claim.

18 U.S.C. §287 has a civil counterpart in 31 U.S.C. §3729, known as the False Claims Act, which is administered by the Civil Division. Prosecutors should be certain that all False Claims Act matters, even if declined criminally, are referred for consideration of civil fraud actions to the Civil Division, Commercial Litigation Branch, if more than \$200,000 is involved, otherwise to the Civil Section of the U.S. Attorneys Office. While it is not legally required, United States v. Baker Lackwood, 138 F.2d 48 (8th Cir. 1943), the normal procedure is to pursue the criminal prosecution first. When there is an opportunity to prosecute under either 18 U.S.C. §287 or §1001, the Civil Division benefits more by a prosecution under 18 U.S.C. §187, because 18 U.S.C. §187 and 31 U.S.C. §3729 have much the same elements of proof. This fact allows the Civil Division to take advantage of the doctrines of estoppel by judgment and *res judicata*, Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568-69 (1951); Sealfon v. United States, 332 U.S. 575 (1948).

While it is clear that the materiality of the false statement must be shown in order to obtain a conviction under 18 U.S.C. §1001, United States

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

v. Montemayer, supra; United States v. Voorhees, 593 F.2d 346 (8th Cir. 1979), cert. denied, 441 U.S. 936 (1979), the issue is not as clear under 18 U.S.C. §287. The circuits are split on the issue of whether materiality is an essential element of 18 U.S.C. §287. The Tenth Circuit in United States v. Irwin, supra, has decided that materiality is not an essential element of 18 U.S.C. §287. Dicta in the Fifth Circuit's decision in United States v. Haynie, 568 F.2d 1091 (5th Cir. 1978), indicates approval of the Tenth Circuit's holding on materiality in Irwin. The Eighth Circuit and the Fourth Circuit have held that materiality is an essential element of 18 U.S.C. §287, United States v. Pruitt, 702 F.2d 152 (8th Cir. 1983); United States v. Snider, 502 F.2d 645 (4th Cir. 1974). Finally, neither a false claim nor a false statement need be presented directly to the government to be actionable, United States v. Montoya, supra; United States v. Catena, 500 F.2d 1319 (3d Cir. 1974), cert. denied, 419 U.S. 1047 (1974); Pereira v. United States, 347 U.S. 1 (1954). Also, there is no need to demonstrate that the defendant knew the false claim and false statement would adversely affect federal funds, United States v. Stanford, 589 F.2d 285 (9th Cir. 1978), cert. denied, 440 U.S. 983 (1979); United States v. Lewis, supra.

Although there are differences in the operative language of 18 U.S.C. §1001 and 18 U.S.C. §287 concerning specific intent to defraud, willfulness and materiality, there are instances where criminal conduct will violate both statutes. In that event, either statute may be used to prosecute, United States v. Ruster, 712 F.2d 409 (9th Cir. 1983); United States v. Mackie, 681 F.2d 1121 (9th Cir. 1982).

9-42.190 False Statements and the Venue Statute, 18 U.S.C. §3237

The Supreme Court has cautioned that the venue rules are not to be treated lightly, United States v. Johnson, 323 U.S. 273, 276 (1961). The Sixth Amendment has been interpreted to provide a guarantee of trial in the state and district in which the crime was committed, Salinger v. Loisel, 265 U.S. 224, 232 (1924); Haas v. Henkel, 216 U.S. 462, 473 (1910); United States v. Burton, 202 U.S. 344, 381 (1906); In re Palliser, 136 U.S. 256, 265 (1890). If prosecution is brought in an improper venue, timely objection will result in dismissal of the indictment, Johnson, supra, and the error will prevent further proceedings if the statute of limitations has run, Borow v. United States, 101 F. Supp. 211, 215 (D. N.J. 1951); see also Valenti v. United States, 207 F.2d 242 (3d Cir. 1953). The key statute is 18 U.S.C. §3237.

While venue is prescribed in the United States Constitution, Art. III, Section 2, Congress has the power to define the elements of a crime

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

carefully and give the executive power to prosecute it in one or any of the districts in which the crucial elements of the crime are performed, United States v. Travis, 364 U.S. 631 (1961). 18 U.S.C. §3237(a) provides that venue is proper in multiple district offenses where the offense was "begun, continued, or completed." Of principal concern is determining when a false statement offense has begun.

Where a person merely prepares a false document, clearly no crime has been committed. However, it is not inconsistent to contend that venue is proper in the place of preparation when that person mails or delivers the document to the government, thus committing a crime. This analysis is consistent with 18 U.S.C. §3237, which provides that venue is proper in any district in which a crime began, continued, or was completed, when that crime began in one district and was completed in another.

Several courts have specifically stated that preparation for the commission of the crime is not part of the crime and therefore venue is not proper in the district of preparation. See United States v. Lombardo, 241 U.S. 73 (1916); United States v. Reas, 99 F.2d 752 (4th Cir. 1938); United States v. Borow, 101 F. Supp. 211 (D. N.J. 1951). One court has specifically held that place of preparation is not proper under 18 U.S.C. §1001, United States v. Mischlich, 310 F. Supp. 669 (D. N.J. 1970), aff'd, 445 F.2d 1194 (3d Cir.) cert. denied, 404 U.S. 984 (1971). These courts view preparation as independent from commission. A different result should be reached when the "preparation" is an integral part of the commission of the crime, and it can fairly be said that by doing the act of preparation the defendant "began" the commission of the crime. Once an offense has been completed, 18 U.S.C. §3237 should permit the government the option of bringing prosecution in any proper district as far back as the "beginning" of the crime, as defined by the pertinent statute.

In Travis, supra, the Supreme Court was faced with the interplay of two statutes, 18 U.S.C. §1001 and Section 9(h) of the National Labor Relations Act. The latter statute provides that no action would be taken by the NLRB until certain affidavits were on file in the District of Columbia. The issue was whether venue in the place of mailing of the affidavits was proper. The Court seized on the language in Section 9(h) denying any NLRB action "until" the document was on file and in 18 U.S.C. §1001 requiring that the false statement be made "within the jurisdiction of department or agency." It reasoned that Section 9(h) did not begin to operate until the affidavit was received by the NLRB, and thus, at the time of mailing, the false statement was not within the jurisdiction of any department or agency. The more specific fraud statutes, see USAM 9-42.231, infra, do not have "under the jurisdiction" language. This would seem to indicate that the "under the jurisdiction" language in 18

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S.C. §1001 is not intended to have any venue significance. Because of the peculiar interaction of Section 9(h) with 18 U.S.C. §1001, the government and courts have read Travis restrictively. See United States v. Ruehrup, 333 F.2d 641 (7th Cir.), cert. denied, 379 U.S. 903 (1964); Imperial Meat v. United States, 316 F.2d 435 (10th Cir.), cert. denied, 375 U.S. 820 (1963); see also 10 U.S. Attorney's Bulletin 229 (1962).

With the exception of Travis, the cases hold the place of mailing of a false document to be a proper place for prosecution, United States v. Ruehrup, supra; Imperial Meat v. United States, supra, see United States v. Henslee, 262 F.2d 486 (2d Cir.), cert. denied, 355 U.S. 905 (1957); DeRosier v. United States, 218 F.2d 420 (5th Cir.), cert. denied, 349 U.S. 921 (1955); see also United States v. Candella, 487 F.2d 1223, 1227-28 (2d Cir. 1973); United States v. LaBar, 506 F. Supp. 1267 (M.D. Pa. 1981), aff'd, 688 F.2d 826 (3d Cir.), cert. denied, 459 U.S. 945 (1982); United States v. Downey, 257 F. 366 (D.R.I. 1919), United States v. Bridgeman, 140 F. 577 (9th Cir. 1905).

The other possible place of venue is that of filing which is the most certain place of venue, In re Palliser, 136 U.S. 257 (1890), see also United States v. Candella, supra. It is always proper, with two exceptions: (1) when the place of filing is improper, e.g., a bank officer improperly files his/his client's VA papers in violation of a VA regulation, United States v. Flaxman, 304 F. Supp. 1301 (S.D.N.Y. 1969), (2) when there is a duty to file and defendant is prosecuted for failure to file, proper venue is not place of required filing, but defendant's domicile, United States v. Lombardo, 241 U.S. 73 (1915).

9-42.200 18 U.S.C. §1001 (CONTINUED)

9-42.210 Extraterritoriality 18 U.S.C. §3238

9-42.211 Jurisdiction

Congress has the power to attach extraterritorial effect to criminal statutes. Determining whether it has exercised this power is a problem. In United States v. Bowman, 260 U.S. 94, 97-98 (1922), the Supreme Court held that the nature of the offense is determinative of whether enforcement of the offense will be limited to the territorial United States. The Court recognized the right of the United States "to defend itself against obstruction, or fraud wherever perpetrated." See 18 U.S.C. §§287, 371, 1001. See United States v. Williams, 464 F.2d 599 (2d Cir.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1972), United States v. Pizzarusso, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968) (false statement); United States v. Rivard, 375 F.2d 882 (5th Cir.), cert. denied, 389 U.S. 884 (1967). See also Final Report of the National Commission on Reform of Federal Criminal Laws, Proposed New Federal Criminal Code 208 and Comments (1971). While the principle of extraterritoriality may not be limited to United States citizens, Bowman, supra, where a defendant named in an indictment is not a United States citizen, personal jurisdiction may be secured only if he/she is within the territorial United States.

There are two methods of securing personal jurisdiction over a United States citizen residing in a foreign country: (1) extradition, (2) revocation or expiration of passport. Extradition is feasible if the foreign country is party to a treaty permitting extradition and the offense charged is extraditable. See USAM 9-15.000. An alternative is to indict and await return of the offender. Return of a person under indictment may be expedited by having his/her passport revoked or limited for use to return to the United States.

The applicable regulations are:

22 C.F.R. §51.71 A passport may be revoked, restricted, or limited where:

(a) The applicant would not be entitled to issuance of a new passport under 35.71.

22 D.F.R. §51.70

(a) A passport, except for direct return to the United States, shall not be issued in any case in which:

(1) The applicant is the subject of an outstanding Federal warrant of arrest or felony. . . .

9-42.212 Venue

Under U.S. Const. Art. III, cl. 2, Congress is given the power to establish venue where an offense is not committed within any state. In 18 U.S.C. §3238, Congress provided that the trial of all offenses committed upon high seas or out of the jurisdiction of any state or district shall be in the district in which the offender is arrested or is first brought. If there are two offenders, venue is proper in the district in which any of them is arrested or is first brought. If the offenders are not

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of any offender or if no such residence is known, in the District of Columbia.

9-42.220 Multiplicity, Duplicity, Single Document Policy

The same act can be violative of two statutes and thus, prosecution on two counts for one act is permissible, United States v. Gavieres, 220 U.S. 338 (1910) (same acts and words violated statutes proscribing indecent acts and insulting a public officer.) However, this type of indictment and prosecution is not encouraged and may very well be impractical. The prosecutor is urged to choose the particular statute designed to proscribe the conduct.

A more serious problem arises where the alleged criminal conduct involves a series of activities. The issue is whether the indictment should be constituted of one count encompassing all the acts, or one count for each act. The problem has been framed in two judicial concepts: duplicity and multiplicity.

Duplicity is the joining in a single count of two or more separate offenses. See United States v. Isaacs, 492 F.2d 1124 (7th Cir. 1974); Gerberding v. United States, 471 F.2d 55 (8th Cir. 1973); United States v. Gibson, 310 F.2d 79, 80 (2d Cir. 1962); United States v. Goodman, 285 F.2d 378, 379-80 (5th Cir. 1960), cert. denied, 366 U.S. 930 (1961); United States v. Travis, 247 F.2d 130 (10th Cir. 1957). A count is not duplicitous, however, if it simply charges commission of a single offense by different means. See Rule 7(c), 8(a), Fed. R. Crim. P., United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972); United States v. Murray, 335 F. Supp. 792 (D. Minn. 1970), aff'd, 452 F.2d 503 (8th Cir. 1971), cert. denied, 405 U.S. 935 (1972), United States v. Todorow, 173 F.2d 439 (9th Cir.), cert. denied, 337 U.S. 925 (1949). United States v. Lubomski, 277 F. Supp. 716 (D. Ill. 1967); United States v. Manber, 127 F. Supp. 925, 927 (D. Mass. 1955).

The issue presented is determining the proper unit of prosecution. Two tests are discussed in this connection: (1) identical proof, and (2) legislative intent.

A. The first test simply involves the determination of whether each offense requires proof of an additional fact that the other does not. See United States v. Blockburger, 284 U.S. 299 (1931); United States v. Albrecht, 273 U.S. 1 (1927); United States v. Schrenzel, 462 F.2d 765 (8th Cir.), cert. denied, 409 U.S. 984 (1972); United States v. Doherty,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

193 F.2d 487 (10th Cir. 1951). This test is designed to guard against the possibility that confusion as to basis of the verdict may subject defendant to double jeopardy, United States v. Tanner, *supra*; United States v. Gaviaras, *supra*.

B. The second test is one of legislative intent. See United States v. Prince, 352 U.S. 322 (1956); United States v. Bell, 349 U.S. 81 (1954); United States v. Burton, 202 U.S. 344 (1905); United States v. Bramblett, 231 F.2d 489, 491 (D.C. Cir. 1956). This latter test often involves the determination of whether Congress intended to prohibit each individual act or a course of conduct composed of a series of acts, United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952); Ebeling v. Morgan, 237 U.S. 625 (1914).

A necessary adjunct to rules for determining congressional intent is a guide for resolving issues of multiplicity in the absence of any expressed intent. The courts have adopted a policy of resolving doubts against multiple offenses where an expression of congressional intent is lacking (rule of lenity). See United States v. Enmons, 410 U.S. 396, 411 (1973); Rewis v. United States, 401 U.S. 808, 812 (1971); United States v. Prince, *supra*; United States v. Bell, *supra*; Irby v. United States, 390 F.2d 432 (D.C. Cir. 1967) (*en banc*); United States v. Bramblett, *supra*.

#### 9-42.221 Some Specific Problems

A defendant violates 18 U.S.C. §1001 each time he/she makes a false statement. If the false statements are contained in one document, however, it is the better course to indict on one count only. This policy is in response to expressed judicial displeasure on multi-count indictments based on one document, United States v. Fisher, 231 F.2d 99, 103 (9th Cir. 1956); United States v. Bramblett, *supra* at 491. Further, little is to be gained by multi-count filing in such cases, because in most cases sentences would be concurrent. This policy does not apply to false statements or perjury before a grand jury. See Gebbehart, 422 F.2d 281 (9th Cir. 1970). This limitation should apply only where the false statements are contained in one document. If the same or different false statements appear in more than one document, multiple counts are warranted. See United States v. Adams, 281 U.S. 202 (1929); United States v. Morrison, 43 F.R.D. 516 (N.D. Ill. 1967); United States v. Grossman, 154 F. Supp. 813, 818-19 (D. N.J. 1957). Further, separate but similar false applications are punishable as separate offenses, Cuddeback v. United States 192 F. Supp. 860 (S.D.N.Y. 1961).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

An indictment for conspiracy to commit a substantive crime and for the substantive crime itself is proper only when each offense is alleged in a separate count, and conviction is proper on both counts, United States v. Pinkerton, 328 U.S. 640 (1945); United States v. Doherty, *supra*. An indictment for conspiracy to violate several crimes proscribed under different statutes is proper as a single count. The alleged crime is one conspiracy, therefore, only one offense should be charged, United States v. Braverman, 317 U.S. 49 (1942); United States v. Frohwerk, 249 U.S. 204 (1919); United States v. May, 175 F.2d 994 (D.C. Cir.), *cert. denied*, 338 U.S. 830 (1949); United States v. Manton, 107 F.2d 834 (2d Cir. 1938), *cert. denied*, 309 U.S. 664 (1940). However, where an indictment charges one conspiracy but at trial the government proves numerous conspiracies with one of several defendants as a link, the proof has been held to be prejudicial to his/her co-defendants because it impairs their ability to defend themselves. See United States v. Kotteakos, 328 U.S. 750 (1945). See also United States v. Berger, 295 U.S. 78 (1935), United States v. Butler, 494 F.2d 1246 (10th Cir. 1974); United States v. Canella, 157 F.2d 470 (9th Cir. 1946), United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), *cert. denied*, 405 U.S. 1040 (1972). The issue which most often arises is whether the scheme consisted of multiple conspiracies or one large conspiracy. See United States v. Blumenthal, 332 U.S. 539 (1947); United States v. McQuin, 434 F.2d 391 (8th Cir. 1970), United States v. James, 416 F.2d 467 (5th Cir. 1969); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969).

9-42.230 General Versus Specific Statutes

Issues arise when subsequent to the enactment of a general statute like 18 U.S.C. §1001, Congress passes a more specific statute, e.g., 18 U.S.C. §1010 (false statements in Federal Housing Administration transactions). In such cases it is necessary to determine the effect of the more specific statute on the scope of the more general. Further, it must be determined whether the prosecutor has unlimited discretion to choose the statute under which he/she will prosecute. This problem is to be distinguished from the question of when defendant is entitled to a jury instruction as to lesser included offenses. It is also to be distinguished from the situation where a defendant commits two different crimes proscribed by two different statutes in the same transaction or occurrence.

The initial step is to determine whether Congress has expressed its intent on the relationship of the general and specific statutes. See United States v. Bell, 349 U.S. 81 (1954), United States v. Beacon Brass Co., 344 U.S. 43 (1952), United States v. Kniess, 413 F.2d 752 (9th Cir.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1969); United States v. Roseman, 364 F.2d 18 (9th Cir. 1966), cert. denied, 386 U.S. 918 (1967). Unfortunately, Congress rarely expresses its intent with sufficient clarity. But see 15 U.S.C. §714(m)(e) (1970).

The argument that a specific statute enacted subsequent to a general statute repeals the latter is often advanced, and just as often rejected. See United States v. Borden, 308 U.S. 188 (1939); Washington v. Miller, 235 U.S. 422 (1914); United States v. Matanky, 346 F. Supp. 116 (C.D. Cal. 1972); Mumber v. United States, 127 F. Supp. 925 (D. Mass. 1955); United States v. Cohen, 201 F.2d 386 (9th Cir.), cert. denied, 345 U.S. 951 (1953). However, one court has indicated that where the two statutes clearly "conflict," congressional intent may be determined by looking to the dates of enactment and the statutes' relative specificity; United States v. Roseman, supra at 25.

Often the result is that a prosecutor may choose to proceed under either of two statutes which apply to the same criminal act. This direction is sanctioned in the cases:

U.S. Attorney of the district where a violation of a federal statute occurs is charged with the duty of prosecution and vested with complete control over the proceedings, in the exercise of his discretion. If the facts show a violation of two or more statutes, he may elect under which he will prosecute, in the absence of a prohibitory statute . . .

Deutch v. Anderhold, Warden, 80 F.2d 677, 678 (5th Cir. 1935).

"It is settled law . . . that where a single act violates more than one statute, the government may elect to prosecute under either;" Ehrlich v. United States, 238 F.2d 481, 485 (5th Cir. 1956). "[T]he government has the right to sue under any statute under which it can secure a conviction;" United States v. Morgan 380 F.2d 686, 703 (9th Cir. 1967), cert. denied, 390 U.S. 962 (1968). See also United States v. Burnett, 505 F.2d 815 (9th Cir. 1974), cert. denied, 420 U.S. 966 (1975); United States v. Brown, 483 F.2d 1359 (9th Cir. 1973); United States v. Chakmakis, 449 F.2d 315 (5th Cir. 1971); United States v. Hutcherson, 345 F.2d 964 (D.C. Cir.), cert. denied, 382 U.S. 894 (1965).

The general rule that the prosecutor has absolute discretion is limited by some courts. Where the general and specific statutes provide for the same elements of proof, e.g., certain conduct done knowingly and willfully, some courts hold that the prosecutor has no right to election and may prosecute only under the specific statute. See United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Bates, 429 F.2d 557, 559 (9th Cir.), cert. denied, 400 U.S. 831 ( ), and cases cited therein. However, these cases are clearly distinguishable. They involve a choice between a specific conspiracy statute, 21 U.S.C. §176(a), conspiracy to violate marihuana laws, and 18 U.S.C. §371. In all the cases, the prosecutor chose the more specific statute, and the defendant on appeal complained that because the statute was used he/she lost the possibility of probation. In that circumstance the court heard no complaint that the prosecutor should have chosen the general rather than the specific statute.

Support for this view derives from some ambiguous Supreme Court language and several circuit court decisions. In United States v. Chase, 135 U.S. 255, 260 (1889), the Court stated:

It is an old and familiar rule that where there is, in the same statute a particular enactment and also a general one, which in its most comprehensive sense, would include what is embraced in the former, the general enactment must be taken to affect only such cases within its general language as are not within the provision of the particular enactment.

This rule of construction is limited to situations where the general and specific enactments are in the same statute, however, a later Supreme Court opinion extended the rule to situations where the more specific statute appears "in same or another statute." See United States v. Ginsberg, 285 U.S. 204, 208 (1931); United States v. MacEvoy, 322 U.S. 102, 107 (1943). This authority is suspect because it does not limit the exclusive realm of the specific to situations where the elements of proof are identical and also because of recent circuit court cases which undauntingly affirm the prosecutor's right of election at least where the elements of proof are different.

United States v. Robinson, 142 F.2d 431 (8th Cir. 1944), states the rule that where the general and specific statutes prescribe the same elements, the prosecution is limited to using the specific statute. See also Price v. United States, 74 F.2d 120 (5th Cir. 1934), cert. denied, 294 U.S. 720 (1935). Several circuit courts have agreed with Robinson but have been able to distinguish it by finding the elements of proof in the particular situation to be different. See United States v. Pursley, 431 F.2d 961 (5th Cir. 1971); United States v. Conerly, 350 F.2d 679 (9th Cir. 1965), cert. denied, 382 U.S. 1018 (1966); United States v. Moran, 236 F.2d 36 (2d Cir.), cert. denied, 352 U.S. 909 (1956). See also United States v. Rayer, 204 F. Supp. 486 (S.D. Cal. 1962), reh'g denied, 323 F.2d 519 (9th Cir. 1963), cert. denied, 375 U.S. 993 (1964); Ex Parte United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States v. Berkhoff, 65 F. Supp. 976 (D. Minn. 1946). Two Supreme Court opinions, Rosenberg v. United States, 346 U.S. 273 (1953); (Concur Clark, J.), United States v. Beacon Brass, *supra*, at 45, equivocately stated that at least where the elements of proof are different the prosecution has a choice. One district court, United States v. Lamb, 150 F. Supp. 310 (N.D. Cal. 1957), *aff'd*, 264 F.2d 950 (9th Cir. 1959), treats Robinson and Price as the well established law. The Court is quick to point out, however, that where the elements of proof are different, and where the specific and general cover some acts not encompassed by the other, the prosecutor has the right to elect.

The Robinson rule makes sense for several reasons. First, when Congress enacts statutes with different burdens of proof, the maximum penalty is usually related to the amount of proof required. Thus, where the elements of proof are identical, it would be illogical to suppose that Congress intended to prescribe two different maximum penalties or two different statutes of limitations, use of which is subject to the prosecutor's whim. Further, when Congress punishes the theft of United States mail property by sentence of five years and later punishes the theft of United States postal bags by sentence of only two years, it is expressing a value judgment on the particular interest it seeks to protect.

The second reason Robinson is sound is that it obviates the constitutional arguments of vagueness and uncertainty as to the penalty that might be imposed, excessive delegation of Congress of the power to place limits on the punishment for such conduct, and denial of equal protection of the laws. These contentions have been voiced by two Supreme Court dissenters, United States v. Berra, 351 U.S. 131, 135 (1955) (dissent Black, J.); Roberberg v. United States, 346 U.S. 273, 310 (1953) (dissent Douglas, J.), and by an unsuccessful defendant in United States v. Coppola, 296 F. Supp 903, *reh'g*, 300 F. Supp 932 (D. Conn 1969). While the constitutional arguments have been unsuccessful thus far, *see, e.g., United States v. Escobar*, *supra*, they have not been made in a Robinson situation where they would seemingly carry more weight.

The justification for this section discussing Robinson lies not with the viability of the argument, since statutes fitting it are hard to find, but rather in preparing the U.S. Attorney both to argue the rule is not law and, in the alternative, to distinguish it.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-42.231 Policy

It is the policy of the U.S. Justice Department, Fraud Section, that even where the U.S. Attorney has a choice of statutes it is better to go on the specific statute where possible unless aggravations or special circumstances are present. Examples of specific statutes are as follows:

There are numerous statutes which can be said are the more specific in reference to 18 U.S.C. §1001: 42 U.S.C. §408; 45 U.S.C. §228(m); 15 U.S.C. §645(a); 18 U.S.C. §1010; 18 U.S.C. §1005; 18 U.S.C. §657; 18 U.S.C. §1014; 18 U.S.C. §1006; 18 U.S.C. §658; 15 U.S.C. §§806-17; 15 U.S.C. §714(m); 29 U.S.C. §439; 29 U.S.C. §461, 18 U.S.C. §1546; and 26 U.S.C. §7214(a)(7). These statutes all fail to meet the Robinson test, limiting the prosecutor, thus, the prosecutor may elect to use 18 U.S.C. §1001 where one of these specific statutes also might apply.

9-42.300 18 U.S.C. §371: CONSPIRACY TO DEFRAUD THE UNITED STATES

The conspiracy statute, 18 U.S.C. §371, provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more persons do an act to effect the act of the conspiracy, each shall be . . .  
(emphasis supplied)

The operative language in 18 U.S.C. §371 is "defraud the United States". Although this language is broad, recent cases rely heavily on the definition of "defraud" provided by the Supreme Court in two early cases, Hass v. Henkel, 216 U.S. 462 (1910), Hammerschmidt v. United States, 265 U.S. 182 (1924). See also United States v. Keitel, 211 U.S. 370, 393-95 (1908). While Hammerschmidt attempted to limit the effect of Hass, circuit courts have relied on both attempts at defining "defraud the United States" to justify federal prosecution. See, e.g., United States v. Thompson, 366 F.2d 167 (6th Cir. 1966), cert. denied, 385 U.S. 973 (1966).

In Hass the Court stated

The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government . . . [A]ny conspiracy which is calculated to obstruct or impair . . . [agriculture department] efficiency and destroy the value of its

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

operators and report as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulations.

Hass, supra, at 479-480.

In Hammerschmidt, Chief Justice Taft, writing for the Court, defined "defraud" as follows:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicanery or the overreaching of those charged with carrying out the governmental intention.

Hammerschmidt, supra, at 188.

The general purpose of the statute is to protect governmental functions from frustration and distortion through deceptive practices. See Gilbert, supra, and Ogden, supra. Those activities which courts have held defraud the United States "touch" the government in at least one of three ways:

- 1) They cheat the government out of money or property;
- 2) They interfere or obstruct legitimate Government activity;
- 3) They make wrongful use of a governmental instrumentality.

United States v. Hay, 527 F.2d 990, 997-998 (10th Cir. 1975).

9-42.310 Defrauding the Government of Money or Property

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-42.311 Cheating

Cheating the government of money or property may take many forms, including:

A. The inducement of payment for services or supplies not provided or provided at inflated prices, United States v. Huber, 603 F.2d 387 (2d Cir. 1979), cert. denied, 446 U.S. 917 (1980) (inflated claims on hospital's cost reports filed with Medicare); United States v. Jones, 464 F.2d 1118 (8th Cir. 1972) (overstated invoices), United States v. Burgin, 621 F.2d 1352 (5th Cir.), cert. denied, 449 U.S. 1015 (1980) (Medicare claims); United States v. Young, 575 F.2d 828 (10th Cir. 1978) (conspiracy to defraud VA by submitting false claims for payment of veterans' educational benefits for veterans who were not enrolled or who did not complete the work).

B. The inducement of payment for work for which the government is not responsible, United States v. Vincent, 648 F.2d 1046 (5th Cir. 1981) (a government-funded community action agency used the funds for the personal benefit of its executive director); United States v. Cella, 568 F.2d 1266 (9th Cir. 1978) (expenses for political activity were reflected on a hospital's cost report filed to receive Medicare reimbursement); United States v. Pintar, 630 F.2d 1270 (7th Cir. 1980) (conspiracy to defraud where government-funded employees performed political activity during office hours and then concealed it).

C. The inducement of payment of money or property because of status to which applicant is not lawfully entitled, Hyde v. Shine, 199 U.S. 62 (1905); United States v. Pezzati, 160 F. Supp. 787 (D. Colo. 1958) (communist affiliation).

Proof that the United States has been defrauded does not require any showing of pecuniary or proprietary loss, United States v. Jacobs, 475 F.2d 270 (2d Cir.), cert. denied, 414 U.S. 821 (1973); United States v. D'Andrea, 585 F.2d 1351 (7th Cir. 1978); United States v. Johnson, 383 U.S. 169 (1965); Hyde v. Shine, 199 U.S. 62 (1905); United States v. Thompson, supra. One court noted that 18 U.S.C. §371 requires only "mission attempted," not "mission accomplished." United States v. Root, 366 F.2d 377, 383 (9th Cir.) cert. denied, 386 U.S. 912 (1966). See also, Cross v. United States, 392 F.2d 360 (8th Cir. 1968).

9-42.312 Obstruct or Impair Legitimate Government Activity

This type of fraud may take any of several forms:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

A. Bribery of a government employee, kickbacks to government employees or extortion of money or favors by government employees. See United States v. Peltz, 433 F.2d 48 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971) (conspiracy to defraud United States where defendant conspired with a SEC employee to obtain confidential inside information about matters under consideration by the SEC and use the information for personal profit); United States v. Bernstein, 533 F.2d 775 (2d Cir.), cert. denied, 429 U.S. 998 (1976) (fraud on government when private lender seeking Federal Housing Administration insurance on loans obtained favorable appraisals from the FHA by bribing FHA staff appraisers); Harris v. United States, 367 F.2d 633 (1st Cir. 1966), cert. denied, 386 U.S. 915 (1967) (conspiracy to defraud United States when IRS collection officer and his supervisor took personal payment to satisfy tax); United States v. De Los Santos, 625 F.2d 62 (5th Cir. 1980) (mayor and city manager received payments from contractor when town received HUD-funded community development grant); United States v. Brasco, 516 F.2d 816 (2d Cir. 1975), cert. denied, 423 U.S. 860 (1976) (congressman and his uncle convicted of receiving money to use their influence over Post Office in its award of contracts).

B. Obstructing or impairing a lawful, legitimate government function, e.g., United States v. D'Andrea, 585 F.2d 1351 (7th Cir. 1978) (misrepresentations to FHA to obtain mortgage insurance and false requisition orders for work performed); United States v. Swarek, 656 F.2d 331 (8th Cir.), cert. denied, 454 U.S. 1034 (1981) (fraud on Small Business Administration by misrepresenting company's paid-in capital to obtain SBA-guaranteed funds); United States v. Levinson, 405 F.2d 971 (7th Cir. 1978), cert. denied, 395 U.S. 958 (1969) (conspiracy to defraud based on submissions of VA home loans for automatic VA guaranty); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979) (conspiracy to defraud United States where U.S. Attorney hired owner of voting machine company to aid grand jury investigation of vote fraud and owner agreed to alter report to receive favorable consideration for his company in getting voting machines); United States v. Bernstein, supra, (FHA defrauded by conspiracy to submit false statements on mortgage applications); United States v. Jordan, 627 F.2d 683 (5th Cir. 1980) (conspiracy to defraud where school officials of school participating in National School Lunch Program and dairy owners submitted claims for milk when orangeade was provided); United States v. Shermetaro, 625 F.2d 104 (6th Cir. 1980) (conspiracy to defraud IRS through defendants' operation of a sham company through which kickbacks were funneled and false deductions taken); United States v. Miller, 491 F.2d 638 (5th Cir.), cert. denied, 419 U.S. 970 (1974) (conspiracy to defraud based on defendants' failure to file corporate tax returns, making false representations to IRS agents, and submitting false documents to IRS agents.).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-42.313 Government Instrumentality

The fraud of wrongful use of a government instrumentality is characterized by the lack of threatened or real pecuniary or proprietary loss, or obstruction of governmental activity. Such a scheme is perpetrated through the use of a government whose pride and integrity will not countenance a misuse of itself, United States v. Thompson, supra, (kickback between chief and subcontractor); United States v. Goldsmith, 68 F.2d 5 (2d Cir. 1933) (use of false IRS receipts to defraud private persons of money). Furthermore, the United States has the right to insure that funds be administered in accordance with law and honesty without corrupt influence or bribery, United States v. Thompson, supra, at 171.

Thus, a scheme to "defraud the United States" can range from directly cheating or swindling money or property from the government to simply using the government in a wrongful fashion with the only injury being to the pride and integrity of the government. The limits of "defraud" can best be understood by examining several cases where prosecution proved unsuccessful.

In United States v. Kaiser, 179 F. Supp. 454 (N.D. Ill. 1960), the government prosecuted bridge toll booth operators who were pocketing some of the receipts for violation 18 U.S.C. §371. The government's theory was that when Congress appropriated the money to help build the bridge, it expressed the desire that it be toll free as soon as possible. By pocketing bridge revenues, the defendants were obstructing achievement of that wish. The court found the connection too tenuous and dismissed the indictments. In United States v. Woll, 157 F. Supp. 704 (E.D. Pa. 1957), supervisory personnel took time off to work on the home of their employer and his sister. The court held this was not fraud on the United States because the men were salaried and their salaries were attributed to overhead which the government contracts would bear whether or not the men were sick and did not work.

The cases demonstrate that the federal interest protected by the statute must be more than a congressional desire. Injury to the integrity of the government, however, is sufficient.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-42.400 OTHER FRAUDS AGAINST THE GOVERNMENT

9-42.410 Commercial Bribery Statute

The First Circuit sees the purpose of the Commercial Bribery Act, 41 U.S.C. §§51-54, as identical to that of the bribery statute, 18 U.S.C. §201, which is to protect the public from the evil consequences of corruption in public service, United States v. Howard, 345 F.2d 126 (1st Cir.), cert. denied, 382 U.S. 838 (1965). For analysis of the effect of bribery on government procurement, see United States v. Acme Process Co., 385 U.S. 138 (1966).

There are two parts to 41 U.S.C. §51. The first describes the prohibited activity and the second the civil remedy. 41 U.S.C. §54, the criminal statute, refers back only to the first part of 41 U.S.C. §51, see United States v. Travers, 361 F.2d 753 (1st Cir.), cert. denied, 385 U.S. 834 (1966).

Prosecutions under these statutes must show:

A. That defendant is within a class of persons covered by the statute, United States v. Howard, supra, at 129.

B. A payment of a fee, commission or compensation of any kind or the granting or accepting of any gift or gratuity. Id. (labor and materials); United States v. Grossman, 400 F.2d 951 (4th Cir.), cert. denied, 393 U.S. 982 (1968) (property, corporate stock); United States v. Barnard, 255 F.2d 583 (10th Cir.), cert. denied, 358 U.S. 919 (1958) (washing machine).

C. Payment to be "by or on behalf of a subcontractor as defined by 52." See United States v. Moore, 347 F.2d 942 (9th Cir. 1965).

D. Payment made to a specified group, i.e. "(1) to any officer, partner, employee, or agent of a prime contractor holding a negotiated contract entered into by any department, agency or establishment of the United States for the furnishing of supplies, materials, equipment or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the prime contract, or to any such contractor," 41 U.S.C. §§51-54.

E. The existence of a negotiated contract. Note that before the 1960 Amendment, the Act applied only to cost-reimbursable contracts. The statute now covers all government contracts, including those made before the 1960 Amendment, except those subject to competitive bidding, United States v. Perry, 431 F.2d 1020 (9th Cir. 1970).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

F. That payment was for the purpose of inducing an award of a subcontract, or order, or as an acknowledgement of a subcontract or order previously awarded. Whether a bribe actually induces it or not is irrelevant, United States v. Howard, *supra*, at 128. The crime is completed upon the making of a bribe irrespective of whether it has any effect. As for the giver of the bribe or gratuity, a purpose to induce an award should be shown. The prosecution should show that the offeror of the bribe or gratuity intended to induce an award of federal contracts and that the acceptor of the bribe received it as such, United States v. Howard, *supra*, at 129. It is not enough that defendant contractor have federal contracts; the prosecution must link up the bribe with the federal contract, United States v. Dobar, 223 F. Supp. 8 (M.D. Fla. 1963). The court in United States v. Howard, *supra*, at 129, declined to rule on the issue of whether receiver must be in a position to affect the award.

G. The bribe was made or received with knowledge of the purpose of the bribe, United States v. Grossman, *supra*. Defendant need not know the terms of the government contract, but should know of the existence of the federal contract, United States v. Hanis, 246 F.2d 781 (8th Cir. 1956).

Prosecution for conspiracy (18 U.S.C. §371) to violate the act is available. See United States v. Barnard, *supra*; United States v. Hanis, *supra*; United States v. Thompson, 366 F.2d 167 (6th Cir.), *cert. denied*, 385 U.S. 973 (1966).

9-42.420 Procurement Frauds

18 U.S.C. §§287, 371, 1001; 41 U.S.C. §§51-54 are the statutes most frequently used to prosecute procurement frauds. The common case involves defective material, false representations, deceptive practices, etc. A typical case may involve numerous management and labor employees at all levels.

One of the most persistent problems is showing criminal responsibility on the part of higher management. Where the particular circumstances are appropriate, a grant of immunity to the lower echelon employees is a useful tool.

18 U.S.C. §201(f)(g) is useful where a federal inspector, etc., is involved in the procurement fraud through a bribe or acceptance of gratuities.

A special procurement fraud unit has been established within the Fraud Section to focus on fraud and corruption in the Department of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Defense multi-billion dollar procurement of equipment and services. This Defense Procurement Fraud Unit is composed of Fraud Section attorneys and attorneys representing the Civil Division, the local U.S. Attorney's Office and the Department of Defense Service branches. In addition, agents are detailed from the military investigative organizations and assistance is available from the Defense audit agencies and the FBI. Through the coordination and development of such resources and expertise, the unit works with U.S. Attorneys' Offices across the country to deter fraud by conducting nationally significant fraud investigations and prosecutions, as well as by monitoring referrals and focussing on problems in the area of Defense procurement. Although the unit's primary objective is criminal investigation and prosecution, it also works to incorporate civil and administrative remedies such as suspension and debarment into the enforcement efforts.

The unit is located in Alexandria, Virginia, because the Pentagon and other Defense procurement operations are located in the Eastern District of Virginia. For information and assistance, Richard A. Sauber, Chief of the Defense Procurement Fraud Unit, can be contacted at (FTS) 557-5171.

9-42.430 Medicare-Medicaid Frauds

In 1965 Congress enacted the Social Security Amendments of 1965, Pub. L. 89-97 (July 30, 1965), 79 Stat. 286:

To provide a hospital insurance program for the aged under the Social Security Act with a benefits program and an expanded program of medical assistance to increase benefits under the Old-Age, Survivors, and Disability Insurance System, to improve the Federal-State public assistance programs, and for other purposes.

The Act included two programs popularly known as Medicare, 42 U.S.C. §1395ff (Title 18 of Social Security Act of 1935), and Medicaid, 42 U.S.C. §1396ff (Title 19 of Social Security Act of 1935).

Medicare is administered by the Social Security Administration, Department of Health and Human Services. Investigations involving the medicare programs are conducted by Program Integrity Specialists of the SSA. Medicaid is administered by the Medical Services Administration of the Social and Rehabilitation Service, Department of HHS. Under the programs, the qualified patient is reimbursed a percentage of a fixed amount for particular services for which he/she paid and received. The

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

claim is made on government Form 1492 which also permits the patient to assign his/her claim to the provider of the services who then receives payment directly.

There are two potential actors in Medicare/Medicaid Fraud, the patient and his/her assignees. The assignee may be a doctor, hospital, or ambulance company. The fraud usually involves inflated claims for medical care authorized under either act. The patient may alter the size of a bill to reflect a greater amount charged paid. The doctor may submit a claim of non-existent patients and/or non-existent services. Most substantial Medicare/Medicaid frauds involve doctors' submission of numerous claims inflated slightly, e.g., ten \$1,000 claims instead of one \$10,000 claim. This is an attempt both to avoid detection, which is certain if there is one claim for \$10,000, and to make it worthwhile financially. The applicable statutes are 18 U.S.C. §§287, 371 and 1001.

Hospitals and nursing homes claim reimbursement through filing annual cost reports. These reports may fraudulently overstate amounts due the provider and may be the subject of prosecutions under 18 U.S.C. §§371 and 1001. See, e.g., United States v. Cella, 568 F.2d 1266 (9th Cir. 1978); United States v. Smith, 523 F.2d 771 (5th Cir. 1975), cert. denied 429 U.S. 817 (1976). In one instance, a supplier of goods to hospitals who knew that his inflated invoices would cause the filing of overstated cost reports was prosecuted under 18 U.S.C. §§371 and 1001, United States v. Huber, 603 F.2d 387 (2d Cir. 1979), cert. denied, 446 U.S. 917 (1980).

In addition, 42 U.S.C. §1395nn provides for punishing as a felony the making of false statements or soliciting or receiving kickbacks in connection with the Medicare program while 42 U.S.C. §1396h applies the same prohibitions to the Medicaid program. These amendments to the Social Security Act were made in 1977 and changed the misdemeanor status of these crimes to felonies. For recent cases brought under the kickback portions of these statutes, see United States v. Duz-Mor Diagnostic Laboratory, 650 F.2d 223 (9th Cir. 1981); United States v. Hancock, 604 F.2d 999 (7th Cir., 1979), cert. denied, 444 U.S. 991 (1980); United States v. Pearlstein, 632 F.2d 661 (7th Cir. 1980), cert. denied, 449 U.S. 1084 (1981). For a case brought under the false statement part of the statute, see United States v. Adler, 623 F.2d 1287 (6th Cir. 1980).

Since the people who receive medical treatment under the programs are often in a weakened physical condition, it is advisable to secure more witnesses than normally necessary to guard against the strong possibility of death or infirmities making court appearance impossible. In one Medicare case nearly 50 percent of the potential witnesses proved to be unsuitable for various reasons at the time of trial.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Another question is the number of counts to be included in the indictment. One count for each false claim or false statement is legally justified yet can create tension with trial judges who dislike lengthy indictments. Nevertheless, the use of numerous counts is desirable for several reasons:

- A. It guards against loss of witnesses due to death or infirmities;
- B. It negates the defense that false statements are caused by clerical mistake;
- C. It avoids the problem of trying to offer other false statements not mentioned in the indictment to show state of mind, intent, rebut claim of mistake or inadvertence, repetitious conduct, etc. See United States v. Roe, 316 F.2d 617 (5th Cir. 1963); United States v. Weis, 122 F.2d 675 (6th Cir.) cert. denied, 314 U.S. 687 (1941); and
- D. It maximizes penalty under 18 U.S.C. §408, which judges are inclined to treat lightly.

The Fraud Section has drafted a sample indictment which enables the prosecutor to include enough counts to solve the above difficulties yet satisfy the judiciary's desire for brevity.

#### 9-42.431 Plea Bargaining

A potential problem area has been identified regarding the practice of plea bargaining as it relates to administrative sanctions available to the Health Care Financing Administration, Department of Health and Human Services, in Medicare - Medicaid fraud cases.

Specifically, provision 229 of Pub. L. No. 92-603, enacted on October 30, 1972, amended Sections 1862 and 1866(b) of the Social Security Act to enable the Secretary to deny payment under Title XVIII of the Act if he/she determines that a provider or person has committed fraud or abuse against the Medicare program. Subsequent to such determinations, Section 1903(1)(2) of the Act also prohibits Federal Financial participation (FFP) for payments to these providers or persons in the Medicaid program. In addition, the legislation (Pub. L. No. 95-142, Medicare-Medicaid Anti-Fraud and Abuse Amendments) enacted on October 25, 1977, contains a provision (Section 7) which requires the Secretary to suspend program participation for a physician or individual practitioner convicted of a criminal offense related to his/her involvement in the Medicare or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Medicaid programs. Suspension from program participation is immediate and applicable to both programs. The Section 7 provision is incorporated in the Code of Federal Regulations at 42 C.F.R. §405.315-2 for Title XVIII and at 42 C.F.R. §450.85 for Title XIX.

Since the administrative sanction would generally be effectuated subsequent to any criminal proceedings, future plea bargains including commitments to forego or restrict administrative remedies which the Department of Health and Human Services may elect to pursue pursuant to the aforementioned provisions should be rare and made only after obtaining prior explicit approval from the Criminal Division.

9-42.440 Supplemental Security Income Program

Some U.S. Attorneys have received from the Social Security Administration (SSA), for consideration of prosecution, matters involving violations of the penal provisions of Title XVI of the Social Security Act (42 U.S.C. §1381, et seq.).

The Title in point concerns applications for and payment of general revenue funds as aid to aged, blind, or disabled individuals. Federal administration of such payments was assumed by SSA from the States on January 1, 1974. Over \$5 billion in federal funds will be paid in fiscal 1975 under this program.

Attempts to defraud occur in connection with applications (claims) for aid and documents submitted in support thereof. The most common violations involve false statements about--or concealment of--an individual's financial condition. There are specific misdemeanor statutes covering such violations (42 U.S.C. §1383(1)(2), and (3)). There is also a statute covering the conversion of such payments by a representative payee (42 U.S.C. §1383a(4)); and a statute covering the unauthorized charging of a fee for services in connection with a claim under the title (42 U.S.C. §1383(d)(3)). Of course, felony statutes such as 18 U.S.C. §§287, 371 and 1001 are also applicable.

SSA acknowledges that many apparent violations of Title XVI have little prosecutive appeal because of such factors as the advanced age or illness of the prospective defendants, coupled frequently with a relatively low amount of improper payment. Such matters are referred to U.S. Attorneys with a recommendation against pursuit of the criminal aspects. However, matters in which the factors cited above are either not present or not compelling are referred with a recommendation for prosecution.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Each referral with a recommendation for prosecution contains the name and telephone number of the SSA program integrity specialist familiar with the facts of the case. You are invited to contact that individual for discussion, or additional investigation. Requests for FBI assistance in these welfare fraud prosecutions should be forwarded to the Criminal Division, Fraud Section, for review. The Bureau will supply investigative resources in appropriate matters but only on request of the department. Requests for Bureau assistance should not be directed to FBI field offices.

9-42.450 AID Frauds

The Agency for International Development (AID), is involved in numerous types of economic and aid programs abroad. The applicable federal criminal statutes are the same as those applicable to domestic economic aid programs, 18 U.S.C. §§287, 371, and 1001. In addition, 18 U.S.C. §641 applies to misapplication of AID funds.

Investigative jurisdiction lies with the AID Inspector General, Assistant Inspector General for Investigations and Inspections (AID/II), co-located with the Department of State, Washington, D.C. They have five Regional Inspectors General, co-located with the American Embassies in Abidjan, Ivory Coast; Mairobi, Kenya; Karachi, Pakistan; and Manila, Philippines.

Under the direction of the Inspector General (IG), it is the basic responsibility of Investigations and Inspections (II) to safeguard the reputation and objectives of the AID program; conduct periodic inspection activities to determine whether United States program objectives are being compromised; receive allegations of fraud, impropriety, malfeasance, etc., from any person or organization, especially those paid in whole or in part with AID funds; and conduct investigations to protect both the Agency and all individuals associated with AID.

The functions of II cover a broad range of inspection and investigation activities. These functions include, but are not limited to:

A. Planning and conducting inspections and investigations overseas and in the United States to:

1. Identify possible violations of AID regulations, federal criminal and civil fraud statutes in cases of AID-financed transactions or those involving AID employees; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

2. Uncover and report to management any irregularities in compliance and integrity aspects of Agency operations so that timely action can be taken to correct them.

B. Keeping appropriate AID offices and top management officials informed in the areas of inspections and investigations.

C. Maintaining records of all information, allegations, or complaints in the area of inspections and investigations activity.

D. Coordinating investigation and inspection activities with the Departments of Justice, Agriculture, State, Defense, and any other government agency, as appropriate.

E. Continually advising the IG on the development and implementation of Agency inspection and investigation activities.

AID contract and procurement frauds differ from other agency investigations in that there is an additional consideration--international relations--which must be considered in the decision on whether to prosecute. Questions concerning AID frauds should be directed to the Criminal Division, Fraud Section.

9-42.500 REFERRAL PROCEDURES

9-42.501 Relationship and Coordination with the Statutory Inspectors General

A. Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States.

The investigation and prosecution of fraud and corruption in federal programs is a major priority of the Department of Justice. On June 3, 1981, the Deputy Attorney General issued a "Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States." A copy of this statement appears at USAM 9-42.502, infra. The statement was first announced at a meeting of the President's Council on Integrity and Efficiency and was the result of a combined effort of the Criminal Division, the Federal Bureau of Investigation and the Executive Office for U.S. Attorneys.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The Policy Statement has two principal purposes--early alert system for prosecutors relative to ongoing investigations and increased emphasis on coordination and cooperation between the FBI and the Inspectors General.

Several particular provisions deserve special emphasis. Consistent with the Inspector General's obligation to "report to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of law," the Inspector General is to report to "the United States Attorney in the District where the crime occurred . . ." Simultaneously, the Inspector General is expected to notify the appropriate FBI field office. The FBI is committed to investigating every criminal violation which the prosecutor determines will be prosecuted, if proved.

The timing of the report to the prosecutor is discussed in the Policy Statement. In an ordinary investigation involving completed past events, the Policy Statement simply tracks the Inspector General legislation and requires a report whenever there are reasonable grounds, i.e., some evidence, to believe that a federal crime has occurred. Immediate report is required for crimes of an ongoing nature, as well as organized crime allegations. Such urgent and sensitive matters often require use of sophisticated investigative techniques, and the Inspector General is to make an immediate report upon receipt of the information. The Policy Statement requires the FBI to advise the Inspector General when the Bureau initiates an investigation as well as to keep the Inspector General regularly informed of its progress.

After the report is made to the U.S. Attorney, the Policy Statement places special obligations on the prosecutor to make a variety of decisions, including whether to initiate a grand jury investigation, decline prosecution, or refer the matter for civil or administrative action. In addition, the prosecutor, and the FBI will address whether to ask the Inspector General to conduct a joint investigation with the FBI.

B. Implementation of the Policy Statement

Since the Department issued the June 3, 1981, Policy Statement there have been discussions over its meaning, with requests from various Inspectors General and the Federal Bureau of Investigation for further clarification of their respective investigative responsibilities.

The Department is concerned about the allocation of limited investigative resources and the possibility of competitive and, at times,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

redundant and unproductive relationships among law enforcement agencies generally. The Policy Statement addresses these issues and establishes a structure for early reporting of instances of criminality to the prosecutor. As a further refinement, to set out more clearly Department expectations regarding the use of the limited investigative resources in both the FBI and the Offices of Inspector General, the Policy Statement has been supplemented by the February 19, 1982, Implementation of the Policy Statement (see USAM 9-42.503, infra) which allocates investigative responsibility between the Inspectors General and the FBI with respect to four types of crime in which both have an investigative interest--bribery, significant allegations of fraud involving federal employees, organized crime matters and fraud against the government.

The Department believes this division of investigative responsibility will provide the Inspectors General and the FBI useful predictability on the commitment of resources in these types of investigations and lead to a more efficient use of limited investigative resources.

Implementation of the Policy Statement requires the cooperation and support of the U.S. Attorneys, the FBI, and the Inspectors General. The Fraud Section of the Criminal Division is charged with overseeing the operations of the policy and resolving any uncertainties or differing interpretations which arise in its implementation. Any questions or information should be directed to the Fraud Section's Deputy Chief for operations at FTS 724-7340.

9-42.502 Policy Statement of the Department of Justice on Its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States

A. INTRODUCTION

The serious problem of fraud and waste in federal programs is one of the most important challenges facing the federal law enforcement community, which includes not only the Federal Bureau of Investigation, other investigative agencies and Department of Justice prosecutors but also the audit and investigation staffs of the Inspectors General. To meet this challenge we must effectively use our limited audit, investigative and prosecutorial resources and produce meaningful results. The Department of Justice has high expectations for the Inspectors General, but in the past, in some circumstances, we have not addressed and resolved in any comprehensive way how they are to work in the criminal justice system. The Department has now developed a framework for

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

coordination of its efforts with the Inspectors General, which is outlined below.

**B. LEGAL FOUNDATION**

The implementing statutes place with Inspectors General the responsibility for conducting investigations relating to the programs and operations of their agencies. The statutes also require Inspectors General to "report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there had been a violation of criminal law."

The FBI is charged, in various sections of the United States Code, with the duty of investigating violations of law of the United States, and every Department and Agency head is required to report violations of Title 18 involving officers and employees of the government to the Department of Justice. The Attorney General is the chief law enforcement officer of the United States, and the President's Executive Order 12301 establishing the Council on Integrity and Efficiency recognized "the pre-eminent role of the Department of Justice in matters involving law enforcement and litigation."

**C. GOAL OF POLICY**

The Inspectors General were created in large part in response to the need for increased detection of fraud, waste, abuse and mismanagement in federal programs. In law enforcement, we have come to recognize that the United States is best served by formally initiating matters of possible criminality into the criminal justice system as early as possible. Accordingly, current FBI procedures generally provide for a preliminary prosecutive opinion before the initiation of a full-scale criminal investigation. This early alert system enables the Department of Justice to mount a coordinated and directed investigation and prosecution effort. In addition to enhancing the opportunity for a successful investigation and prosecution, this early review of the case allows for conservation of government resources, as well as for the opportunity to consider alternative or additional remedies such as civil and administrative action.

**D. NOTIFICATION POLICY**

With this as the background the Department offers the following guidance to Inspectors General on how to initiate a matter into the criminal justice system.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. When to Report

The basic rule is that whenever there is reason to believe a federal crime has occurred, the Department of Justice should be advised. There are two subcategories.

One category involves possible crimes which are completed past events and which, although they require prompt investigative and prosecutive attention, are not so urgent, or so sensitive as to suggest accelerated reporting and/or utilization of special law enforcement techniques. This first category of criminal allegations may require further investigation by the Inspector General to confirm, and should be reported whenever there is a reasonable indication, i.e., some evidence, to believe that a federal crime has occurred.

The second category involves possible crimes which are of such an urgent or sensitive nature that upon receipt of the mere allegation, accelerated reporting is required to allow for immediate prosecutive and investigative action. This second category involves allegations such as bribery, conflict of interest, fraud against the government and the like involving federal employees, and, in addition, any criminal conduct of an ongoing nature. Because of the law enforcement sensitivity, this category also includes information pertaining to the element generally known as organized crime. These urgent and sensitive matters necessitate immediate reporting to the Department because the FBI may be called on to employ body recorders, undercover operations, search warrants, Title III and other specialized law enforcement techniques which need FBI expertise and may require Department approval.

The wide variety of criminal matters prevents any more detailed description of these areas. Criminal investigators and prosecutors who are experienced in the criminal justice system generally know the types of allegations that suggest criminality as opposed to program abuse and waste. The differences can be subtle at times. The best guidance the Department can give the Inspectors General at this time is: if the case is close, report it. With experience, guidance will develop which will assist the Inspectors General in drawing the line between criminal matters and matters of abuse and waste more appropriately addressed within their agencies.

2. Where to Report

The Attorney General's interests include not only criminal investigation and prosecution but also the civil interests of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States. To fulfill all these interests and coordinate other actions, the Inspectors General should report the above described possible violations to the prosecutor. This normally will be the U.S. Attorney in the district where the crime occurred or is occurring. In certain circumstances the reporting may be to the appropriate section of the Criminal Division. These situations include matters in which venue is uncertain or headquarters coordination or action is suggested by the nature of the crime or program.

To assist the prosecutor and expedite any investigation by the FBI, the Inspector General should notify the FBI field office simultaneously with the report to the prosecutor concerning either category of allegation. The prosecutor will be responsible for notifying the Civil Division in all cases in which possible civil action is suggested.

3. What and How to Report

The report should generally consist of a written statement of the allegation, the facts developed, the evidence--both documentary and testimonial--supporting the facts, the history and status of the Inspector General investigation. The Criminal Division is developing a recommended reporting format which will identify important questions to be addressed in the report to the prosecutor. To insure that appropriate consideration is given to the Agency's civil fraud claims, however, the Inspector General may wish to make a separate referral to the Civil Division.

Presentation of the written report may be made by mail or in person. In urgent or sensitive cases, the written report should be preceded by a telephone call or personal visit from an authorized representative of the Inspector General immediately upon receipt of the allegation.

E. THE FBI AND PROSECUTOR ROLE

The FBI stands ready to make a total commitment to the investigation of fraud and corruption in federal programs. The FBI, with the primary role in investigating prosecutable violations of federal criminal law, will investigate every criminal violation which the prosecutor advises at the preliminary opinion state will be prosecuted, if proved. To fulfill this total commitment in the fraud and corruption area the FBI is prepared to adjust its investigation priorities, if required.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

At the time of reporting, the prosecutor, consulting with the FBI and the Inspector General, will be called on immediately to make a number of decisions, including whether:

1. To initiate a grand jury investigation,
2. To decline prosecution, or
3. To refer the matter for civil and/or administrative action.

In many circumstances, with the early reporting system, the prosecutor and the FBI will ask the Inspector General to conduct a joint investigation with the FBI or continue the investigation. In any event, the FBI and the prosecutor will often depend on the Inspector General and the agency to provide technical support to the investigation in the form of program expertise, location of documents, application of regulations, audit assistance and the like.

F. DEPARTMENT OF JUSTICE COMMITMENT

The requirement this policy places on the Inspectors General to report matters at an early stage places special obligations on the Department as well. The Department has undertaken substantial new responsibilities:

1. U.S. Attorneys and the Criminal and Civil Divisions will give investigations of Inspector General matters a high priority and make special efforts to keep the Inspectors General informed of the progress of prosecutive actions.
2. The Fraud Section of the Criminal Division will be charged with overseeing the operations of the policy and resolving any uncertainties of differing interpretations which may arise.
3. Recognizing the importance to the Inspectors General of expeditious action and reporting in investigations involving subjects who continue to do business with the agency, or who are federal employees, or who are under consideration for benefits, grants or contracts by the agency, the FBI will keep the Inspectors General regularly informed of the progress of the investigation except in those rare instances where disclosure might endanger FBI agents or adversely affect the investigation.
4. The FBI will notify the Inspector General, at the same time it seeks a preliminary prosecutive opinion, of FBI investigations

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

which are predicated on information or allegations other than an Inspector General report (with the same safety and security of investigation caveat).

5. The FBI will furnish a written summary at the conclusion of an investigation on the nature of judicial action, if any, taken. If administrative action is being considered by the federal agency, the FBI will, upon written request, provide for the exclusive use of the agency Inspector General, existing detailed investigative data less any federal grand jury or other material, the disclosure of which is not deemed to be in the best interest of the FBI operations (such as informant data).

6. The FBI will furnish, at the conclusion of the investigation and upon a written request which identifies the exact data needed, FBI investigative documents and Special Agent testimony for use in administrative proceedings consistent with existing Department regulations.

7. At the conclusion of a case the FBI and the prosecutor will attempt to provide for the Inspector General's use, an analysis of any underlying problems in the federal program or procurement procedures and practices that were uncovered during the course of the investigation and which need corrective action.

8. The FBI will provide the following services:

- a. Appropriate indices checks;
- b. Laboratory examinations;
- c. National Crime Information Center inquiries; and
- d. Identification record searches and other appropriate services.

9. The FBI has completed a major Inspector General/FBI undercover operation and is seeking the support of the Inspectors General in developing other such efforts. Substantial progress has been made in coordinating the prosecutive and investigation planning in this area through the Bureau's Undercover Review Committee. The Department expects to increase the use of this technique in the government fraud and corruption area.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

10. Training is a major and important element to this relationship between the FBI and the Inspectors General. The FBI Academy alone and jointly with the Federal Law Enforcement Training Center will provide relevant training to Inspector General personnel to enhance this new team relationship. A dialogue between FLETC and the Academy has already begun.

G. MEMORANDA OF UNDERSTANDING

As the Department and the Inspectors General gain experience with the principles set forth in this statement, refinements within the framework of the underlying policy will be formulated. It is contemplated that the FBI and the Inspectors General, consultation with the U.S. Attorneys and the Criminal Division will address matters such as local working relationships, joint investigative procedures, threshold reporting requirements, and delegation of investigative responsibility. These may take the form of procedural and operating memoranda of understanding.

H. CONCLUSION

The Department of Justice intends that the new policy statement will enhance the attention given to the problems of fraud and abuse in government programs. This can only be achieved through the cooperative and coordinated efforts of federal investigators, auditors and prosecutors, both civil and criminal. This policy is a first step in insuring that the limited law enforcement resources available to meet the challenges are used to the best advantage.

9-42.503 Implementation of the Policy Statement

Two premises underlie the following allocation of law enforcement investigative resources. First, both the FBI and Inspectors General with overlapping investigative jurisdiction have limited resources. Second, questions of appearance, sensitivity and expertise suggest the FBI is better suited to be primarily responsible for organized crime and corruption matters. The problem to be addressed in this communication is the most advantageous manner in which to direct the available investigative resources of the FBI and the Inspectors General.

With these considerations in mind, the following comments outline the Department of Justice approach with regard to the criminal investigative jurisdiction of the FBI and the Inspectors General. They are designed to implement and be consistent with the Policy Statement of the Department of Justice on Its Relationship and Coordination with the Statutory Inspectors

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

General of the Various Departments and Agencies of the United States issued on June 3, 1981. A copy of this statement appears at USAM 9-42.502, supra.

A. Inspectors General will in all instances notify the FBI of the following criminal investigative matters:

1. Bribery matters;
2. Significant allegations of fraud which culpably involve United States government employees; and
3. Organized crime related matters, including both traditional (La Cosa Nostra) and non-traditional organizations such as other ethnic groups and outlaw motorcycle gangs.

The FBI will have the primary investigative role in these three areas and, as part of the notification, the IG will transfer the investigative file and consequently investigative responsibility to the FBI. The Inspector General simultaneously will notify the prosecutor of the above described matters.

B. The Inspectors General normally will have the responsibility for conducting investigations of fraudulent misconduct involving their respective departments and agencies by non-government personnel. However, the FBI will treat fraud against the government matters as a top priority and, if asked by the prosecutor, will investigate every criminal violation that the prosecutor advises will be prosecuted, if proved. The FBI maintains the right to investigate any criminal allegations which the FBI receives independently and which involve any agency's programs or functions wherein the alleged violations are within the FBI's jurisdiction.

C. The FBI will, given adequate manpower conditions, consider undertaking joint investigations with Inspector General personnel, and encourage joint undercover operations targeted against identified major crime problems.

D. The FBI will accept responsibility for other significant criminal investigative matters, consistent with the availability of investigative resources within the applicable FBI field office. As a general rule, the FBI will not initiate investigations concerning recipient/participant-type frauds, absent indications of a pattern of widespread criminal activity.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The Fraud and Corruption Tracking System is being developed to complement the Policy Statement and will be used to insure all appropriate offices are informed of ongoing investigations.

9-42.510 Social Security Administration

9-42.511 Social Security Violations

The Social Security Number (SSN) is the primary element of identification in the various earnings and benefit payment records maintained by SSA. It is the record identifier used to insure proper payment of benefits in both the Title II and Title XVI programs.

The SSN plays a vital role in electronic enforcement programs and record linkages, such as Project Match, which are designed to identify instances of improper payments. Given this reliance on the SSN, social security programs are susceptible to fraud when multiple numbers are employed by individuals intent on securing duplicate payments or concealing income. Not only would the use of multiple SSN's facilitate initial deceptions but would also inhibit subsequent detection under the various electronic enforcement programs.

The impact of SSN misuse prevades nearly all facets of today's automated record keeping society. The SSN is used as a personal identifier, either in the application or record keeping processes, by most federal and state agencies administering benefit programs, the Internal Revenue Service, many State Departments of Motor Vehicles, credit corporations and insurance companies. Accordingly, the SSN is the key to unlimited opportunities for fraud and abuse. SSA is strengthening its procedures dealing with the issuance of SSN's and has made a firm commitment to vigorously investigate SSN misuse. Although these cases may involve little or no overpayment, U.S. Attorneys are encouraged to prosecute SSN violations whenever possible.

Title XVI of the Social Security Act (42 U.S.C. §1381 et seq.), Supplemental Security Income (SSI) program, provides payments of benefits from general revenues to the needy aged, blind and disabled. Title II of the Act (42 U.S.C. §401 et seq.), provides benefits from trust funds to retired and disabled individuals, their survivors and dependents. Over \$11.5 billion per month to almost 34 million beneficiaries is paid by SSA under these two programs alone.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Attempts to defraud occur in connection with applications (claims) for benefits and documents submitted in support thereof. Most violations under Title XVI involve false statements about--or concealment of--an individual's financial condition (42 U.S.C. §138a (1), (2), and (3)). Most violations under Title II involve false statements about--or concealment of--work activity affecting initial or continuing eligibility for disability benefits, changes in marital status, and misuse of benefits by representative payees (42 U.S.C. §408(a), (b), and (d)). The felony provisions of 42 U.S.C. §408 punish the making of false statements to secure benefits or obtain higher benefits, the conversion of another's benefits, and the use of false Social Security numbers to obtain benefits.

There is also a statute that covers the unauthorized charging of a fee for services in connection with a claim under both Titles (42 U.S.C. §1383 (d) (3) for Title XVI and 42 U.S.C. §406(a) for Title II). Felony statutes such as 18 U.S.C. §§287, 371, and 1001 are also applicable for both programs and have been used successfully.

Pursuant to an agreement reached between the Department of Justice and SSA in April 1977, SSA will not refer matters in which one or more of the factors below is present unless additional aggravated circumstances are present:

- A. The suspect is 75 or more years old;
- B. The suspected violation did not result in improper payment. This exception does not apply in criminal misuse cases such as conversion by a representative payee, SSN misuse or improper disclosure;
- C. There is evidence that the suspect has an illness expected to result in his/her death in the near future; and
- D. The suspected violation is solely a failure to disclose an increase in a pension amount.

The SSA has discontinued their procedure of summarizing each case involving one or more of the aforementioned factors and recommending against further action. SSA will, however, continue to take administrative action directed toward recovering any overpayments in those cases not warranting criminal prosecution. Matters in which the factors cited above are either not present or not compelling will be referred with an appropriate recommendation.

Each referral with a recommendation for prosecution contains the name and telephone number of the SSA Regional Integrity Specialist familiar

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

with the facts of the case. You are invited to contact that individual for discussion, or additional investigation.

9-42.520 Department of Agriculture--Food Stamp Violations

As a result of the growing problem of theft, improper use and illegal trafficking of food stamps in violation of 7 U.S.C. §2024, modified referral procedures concerning fraud cases involving suspected food stamp violations have been established.

These procedures will provide a means of expediting the prosecution of significant cases while permitting latitude for the prompt administrative action by the Department of Agriculture in categories of cases not deemed to warrant prosecution.

The Department of Agriculture will not refer the following categories of food stamp violations for prosecutive consideration:

A. Retailers participating in the program

Routine reports of retailer violations where the only offenses committed or suspected are the sale of ineligible items for food stamps. (Any other violations by retailers, such as case discounting of food stamps, trafficking in stamps or ATP cards, retention of stamps or cards for security or other purposes, will be treated as significant and referred.)

B. Recipients authorized to participate in the program, and applicants for participation

Reports of:

1. False applications or forgery where the report indicates that the state prosecuting authorities are cognizant of these violations, intend to pursue them and there are no additional circumstances suggesting an overriding federal interest, e.g., widespread conspiracies or substantial public loss.

2. False applications where the recipient has made complete restitution.

C. Violations by others not authorized to possess food stamps

Reports of:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1. Thefts of food stamps or ATP cards where the total amount involved or suspected to be involved is small (less than \$100).
2. Thefts where the identity of the thief is unknown.

All other reports containing substantial evidence of 7 U.S.C. §2024 or other food stamp related crimes will be referred to U.S. Attorneys for consideration and prosecution. The same is true of reports falling in the above nonsignificant categories if the Department of Agriculture feels that prosecution is desirable from a program standpoint.

9-42.530 Department of Defense Memorandum of Understanding

In August 1984, Attorney General Smith and Secretary of Defense Weinberger signed a Memorandum of Understanding (MOU) between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Certain Crimes. Because of the breadth of the Memorandum and its application to both investigative and prosecutive jurisdiction, the full text follows. However, special attention is directed to the treatment of investigative jurisdiction of corruption, fraud and theft cases. It is important to note the responsibilities of the prosecutor:

- Concurrence before DOD can initiate any corruption investigation;
- Hold a conference to determine investigative jurisdiction in all fraud and theft matters; and
- Concurrence before DOD can initiate any administrative investigation or actions during the pendency of any criminal investigation.

The MOU was developed with the expectation that the more complex cases require the joint efforts of DOD and DOJ. In this regard a repeated theme of the MOU is the prosecutor's responsibility for coordinating and effectuating the various interests of the United States. The DOD/DOJ Fraud Procurement Unit has developed substantial expertise in these investigations and can assist in structuring and conducting the investigations requiring expertise from the FBI and DOD. Questions concerning the MOU should be directed to the Fraud Section at 724-7038 or the Unit at 557-5171.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

MEMORANDUM OF UNDERSTANDING BETWEEN THE  
DEPARTMENTS OF JUSTICE AND DEFENSE  
RELATING TO THE INVESTIGATION AND  
PROSECUTION OF CERTAIN CRIMES

A. PURPOSE, SCOPE AND AUTHORITY

This Memorandum of Understanding (MOU) establishes policy for the Department of Justice and the Department of Defense with regard to the investigation and prosecution of criminal matters over which the two Departments have jurisdiction. This memorandum is not intended to confer any rights, benefits, privileges or form of due process procedure upon individuals, associations, corporations or other persons or entities.

This Memorandum applies to all components and personnel of the Department of Justice and the Department of Defense. The statutory bases for the Department of Defense and the Department of Justice investigation and prosecution responsibilities include, but are not limited to:

1. Department of Justice: Titles 18, 21 and 28 of the United States Code; and
2. Department of Defense: The Uniform Code of Military Justice, Title 10, United States Code, Sections 801-940; the Inspector General Act of 1978, Title 5 United States Code, Appendix I; and Title 5 United States Code, Section 301.

B. POLICY

The Department of Justice has primary responsibility for enforcement of federal laws in the United States District Courts. The Department of Defense has responsibility for the integrity of its programs, operations and installations and for the discipline of the Armed Forces. Prompt administrative actions and completion of investigations within the two (2) year statute of limitations under the Uniform Code of Military Justice require the Department of Defense to assume an important role in federal criminal investigations. To encourage joint and coordinated investigative efforts, in appropriate cases where the Department of Justice assumes investigative responsibility for a matter relating to the Department of Defense, it should share information and conduct the inquiry jointly with the interested Department of Defense investigative agency.

It is neither feasible nor desirable to establish inflexible rules regarding the responsibilities of the Department of Defense and the Department of Justice as to each matter over which they may have

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

concurrent interest. Informal arrangements and agreements within the spirit of this MOU are permissible with respect to specific crimes or investigations.

C. INVESTIGATIVE AND PROSECUTIVE JURISDICTION

1. CRIMES ARISING FROM THE DEPARTMENT OF DEFENSE OPERATIONS

a. Corruption Involving the Department of Defense Personnel

The Department of Defense investigative agencies will refer to the FBI on receipt all significant allegations of bribery and conflict of interest involving military or civilian personnel of the Department of Defense. In all corruption matters the subject of a referral to the FBI, the Department of Defense shall obtain the concurrence of the Department of Justice prosecutor or the FBI before initiating any independent investigation preliminary to any action under the Uniform Code of Military Justice. If the Department of Defense is not satisfied with the initial determination, the matter will be reviewed by the Criminal Division of the Department of Justice.

The FBI will notify the referring agency promptly regarding whether they accept the referred matters for investigation. The FBI will attempt to make such decision in one (1) working day of receipt in such matters.

b. Frauds Against the Department of Defense and Theft and Embezzlement of Government Property

The Department of Justice and the Department of Defense have investigative responsibility for frauds against the Department of Defense and theft and embezzlement of government property from the Department of Defense. The Department of Defense will investigate frauds against the Department of Defense and theft of government property from the Department of Defense. Whenever a Department of Defense investigative agency identifies a matter which, if developed by investigation, would warrant federal prosecution, it will confer with the U.S. Attorney or the Criminal Division, the Department of Justice, and the FBI field office. At the time of this initial conference, criminal investigative responsibility will be determined by the Department of Justice in consultation with the Department of Defense.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

2. CRIMES COMMITTED ON MILITARY INSTALLATIONS

a. Subject(s) can be Tried by Court-Martial or are Unknown

Crimes (other than those covered by paragraph C.1.) committed on a military installation will be investigated by the Department of Defense investigative agency concerned and, when committed by a person subject to the Uniform Code of Military Justice, prosecuted by the Military Department concerned. The Department of Defense will provide immediate notice to the Department of Justice of significant cases in which an individual subject/victim is other than a military member or dependent thereof.

b. One or More Subjects cannot be Tried by Court-Martial

When a crime (other than those covered by paragraph C.1.) has occurred on a military installation and there is reasonable basis to believe that it has been committed by a person or persons, some or all of whom are not subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will provide immediate notice of the matter to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

3. CRIMES COMMITTED OUTSIDE MILITARY INSTALLATIONS BY PERSONS WHO CAN BE TRIED BY COURT-MARTIAL

a. Offense is Normally Tried by Court-Martial

Crimes (other than those covered by paragraph C.1.) committed outside a military installation by persons subject to the Uniform Code of Military Justice which, normally, are tried by court-martial will be investigated and prosecuted by the Department of Defense. The Department of Defense will provide immediate notice of significant cases to the appropriate Department of Justice investigative agency. The Department of Defense will provide immediate notice in all cases where one or more subjects is not under military jurisdiction unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

b. Crimes Related to Scheduled Military Activities

Crimes related to scheduled military activities outside of a military installation, such as organized maneuvers in which persons subject to the Uniform Code of Military Justice are suspects, shall be treated as if committed on a military installation for purposes of this Memorandum. The FBI or other Department of Justice investigative agency may assume jurisdiction with the concurrence of the U.S. Attorney or the Criminal Division, Department of Justice.

c. Offense is not Normally Tried by Court-Martial

When there are reasonable grounds to believe that a federal crime (other than those covered by paragraph C.1.) normally not tried by court-martial, has been committed outside a military installation by a person subject to the Uniform Code of Military Justice, the Department of Defense investigative agency will immediately refer the case to the appropriate Department of Justice investigative agency unless the Department of Justice has relieved the Department of Defense of the reporting requirement for that type or class of crime.

D. REFERRALS AND INVESTIGATIVE ASSISTANCE

1. REFERRALS

Referrals, notices, reports, requests and the general transfer of information under this Memorandum normally should be between the FBI or other Department of Justice investigative agency and the appropriate Department of Defense investigative agency at the field level.

If a Department of Justice investigative agency does not accept a referred matter and the referring Department of Defense investigative agency then, or subsequently, believes that evidence exists supporting prosecution before civilian courts, the Department of Defense agency may present the case to the U.S. Attorney or the Criminal Division, Department of Justice, for review.

2. INVESTIGATIVE ASSISTANCE

In cases where a Department of Defense or Department of Justice investigative agency has primary responsibility and it requires limited assistance to pursue outstanding leads, the investigative

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

agency requiring assistance will promptly advise the appropriate investigative agency in the other Department and, to the extent authorized by law and regulations, the requested assistance should be provided without assuming responsibility for the investigation.

E. PROSECUTION OF CASES

1. With the concurrence of the Department of Defense, the Department of Justice will designate such Department of Defense attorneys as it deems desirable to be Special Assistant U.S. Attorneys for use where the effective prosecution of cases may be facilitated by the Department of Defense attorneys.

2. The Department of Justice will institute civil actions expeditiously in United States District Courts whenever appropriate to recover monies lost as a result of crimes against the Department of Defense; the Department of Defense will provide appropriate assistance to facilitate such actions.

3. The Department of Justice prosecutors will solicit the views of the Department of Defense prior to initiating action against an individual subject to the Uniform Code of Military Justice.

4. The Department of Justice will solicit the views of the Department of Defense with regard to its Department of Defense-related cases and investigations in order to effectively coordinate the use of civil, criminal and administrative remedies.

F. MISCELLANEOUS MATTERS

1. THE DEPARTMENT OF DEFENSE ADMINISTRATIVE ACTIONS

Nothing in this Memorandum limits the Department of Defense investigations conducted in support of administrative actions to be taken by the Department of Defense. However, the Department of Defense investigative agencies will coordinate all such investigations with the appropriate Department of Justice prosecutive agency and obtain the concurrence of the Department of Justice prosecutor or the Department of Justice investigative agency prior to conducting any administrative investigation during the pendency of the criminal investigation or prosecution.

2. SPECIAL UNIFORM CODE OF MILITARY JUSTICE FACTORS

In situations where an individual subject to the Uniform Code of Military Justice is a suspect in any crime for which a Department of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Justice investigative agency has assumed jurisdiction, if a Department of Defense investigative agency believes that the crime involves special factors relating to the administration and discipline of the Armed Forces that would justify its investigation, the Department of Defense investigative agency will advise the appropriate Department of Justice investigative agency or the Department of Justice prosecuting authorities of these factors. Investigation of such a crime may be undertaken by the appropriate Department of Defense investigative agency with the concurrence of the Department of Justice.

3. ORGANIZED CRIME

The Department of Defense investigative agencies will provide to the FBI all information collected during the normal course of agency operations pertaining to the element generally known as "organized crime" including both traditional (La Cosa Nostra) and nontraditional organizations whether or not the matter is considered prosecutable. The FBI should be notified of any investigation involving any element of organized crime and may assume jurisdiction of the same.

4. DEPARTMENT OF JUSTICE NOTIFICATIONS TO DEPARTMENT OF DEFENSE INVESTIGATIVE AGENCIES

a. The Department of Justice investigative agencies will promptly notify the appropriate Department of Defense investigative agency of the initiation of the Department of Defense related investigations which are predicated on other than a Department of Defense referral except in those rare instances where notification might endanger agents or adversely affect the investigation. The Department of Justice investigative agencies will also notify the Department of Defense of all allegations of the Department of Defense related crimes where investigation is not initiated by the Department of Justice.

b. Upon request, the Department of Justice investigative agencies will provide timely status reports on all investigations relating to the Department of Defense unless the circumstances indicate such reporting would be inappropriate.

c. The Department of Justice investigative agencies will promptly furnish investigative results at the conclusion of an investigation and advise as to the nature of judicial action, if any, taken or contemplated.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

d. If judicial or administrative action is being considered by the Department of Defense, the Department of Justice will, upon written request, provide existing detailed investigative data and documents (less any federal grand jury material, disclosure of which would be prohibited by Rule 6(e), Federal Rules of Criminal Procedure), as well as agent testimony for use in judicial or administrative proceedings, consistent with Department of Justice and other federal regulations. The ultimate use of the information shall be subject to the concurrence of the federal prosecutor during the pendency of any related investigation or prosecution.

5. TECHNICAL ASSISTANCE

a. The Department of Justice will provide to the Department of Defense all technical services normally available to federal investigative agencies.

b. The Department of Defense will provide assistance to the Department of Justice in matters not relating to the Department of Defense as permitted by law and implementing regulations.

6. JOINT INVESTIGATIONS

a. To the extent authorized by law, the Department of Justice investigative agencies and the Department of Defense investigative agencies may agree to enter into joint investigative endeavors, including undercover operations, in appropriate circumstances. However, all such investigations will be subject to Department of Justice guidelines.

b. The Department of Defense, in the conduct of any investigation that might lead to prosecution in Federal District Court, will conduct the investigation consistent with any Department of Justice guidelines. The Department of Justice shall provide copies of all relevant guidelines and their revisions.

7. APPREHENSION OF SUSPECTS

To the extent authorized by law, the Department of Justice and the Department of Defense will each promptly deliver or make available to the other suspects, accused individuals and witnesses where authority to investigate the crimes involved is lodged in the other Department. This MOU neither expands nor limits the authority

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of either Department to perform apprehensions, searches, seizures, or custodial interrogations.

G. EXCEPTION

This Memorandum shall not affect the investigative authority now fixed by the 1979 "Agreement Governing the Conduct of the Defense Department Counterintelligence Activities in Conjunction with the Federal Bureau of Investigation" and the 1983 Memorandum of Understanding between the Department of Defense, the Department of Justice, and the FBI concerning "Use of Federal Military Force in Domestic Terrorist Incidents."

/s/ William French Smith  
Attorney General  
United States Department  
of Justice

/s/ Caspar Weinberger  
Secretary of Defense  
United States Department  
of Defense

Date: August 14, 1984

Date: August 22, 1984

JULY 1, 1985  
Sec. 9-42.530  
Ch. 42, p. 66

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 43

	<u>Page</u>
9-43.000 <u>MAIL FRAUD - 18 U.S.C. §1341</u>	1
9-43.100 PROCEDURES	1
9-43.110 <u>Investigation of Complaints</u>	1
9-43.120 <u>Policy Concerning Prosecutions</u>	2
9-43.200 ELEMENTS OF THE OFFENSE	2
9-43.210 <u>The Scheme and Artifice to Defraud</u>	2
9-43.220 <u>Use of the Mails in Execution of the Scheme</u>	5
9-43.221 In Execution of the Scheme	6
9-43.222 Lulling Letters	9
9-43.230 <u>Representative Schemes</u>	10
9-43.231 Advance Fee Schemes	10
9-43.232 Bankruptcy (Scam) Frauds	10
9-43.233 Chain Referral Selling Schemes	11
9-43.234 Charitable Schemes	11
9-43.235 Check Kiting Frauds	11
9-43.236 Classified Directory Schemes	12
9-43.237 Correspondence and Other School Frauds	12
9-43.238 Credit Card Frauds	12
9-43.239 Franchise Frauds	13
9-43.240 <u>Representative Schemes (cont'd)</u>	13
9-43.241 Insurance Fraud	13
9-43.242 Land Fraud Schemes	14
9-43.243 Medical Frauds	15
9-43.244 Merchandising Frauds - False Financial Statements	15
9-43.245 Oil and Gas Lease Frauds	15
9-43.246 Political and Commercial Corruption	15
9-43.247 Religious Frauds	19
9-43.248 Securities	19
9-43.249 Vending Machine Frauds	19
9-43.250 <u>Representative Schemes (cont'd)</u>	19
9-43.251 Work-At-Home Schemes	20
9-43.252 Miscellaneous Schemes	20
9-43.300 VENUE IN MAIL FRAUD PROSECUTION	20

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 43

	<u>Page</u>
9-43.400	DRAFTING A MAIL FRAUD INDICTMENT <u>22</u>
9-43.410	<u>Scheme and Artifice</u> 22
9-43.420	<u>Charging a Use of the Mails</u> 25
9-43.421	Charging a Placing in the Mails 26
9-43.422	Charging a Taking From the Mails 27
9-43.423	Charging a Delivery by Mail According to the Direction Thereon 27
9-43.424	Sample Mailing Count 28
9-43.500	EVIDENCE 29
9-43.510	<u>Scheme and Artifice to Defraud</u> 29
9-43.511	Intent to Defraud 29
9-43.512	Persons Defrauded 29
9-43.513	False Representations 29
9-43.514	Loss to Victims 30
9-43.515	Impression Testimony 30
9-43.520	<u>Evidentiary Rules of Conspiracy</u> 30
9-43.530	<u>Similar Acts or Conduct</u> 31
9-43.540	<u>Communications to Victims</u> 31
9-43.550	<u>Complaint Letters</u> 31
9-43.560	<u>Parole Evidence Rule</u> 32
9-43.570	<u>Acts Beyond the Statute of Limitations</u> 32
9-43.580	<u>Good Faith</u> 32
9-43.590	<u>Proof of Mailing</u> 33

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 43

		<u>Page</u>
9-43.600	[RESERVED]	33
9-43.700	CONSPIRACY TO VIOLATE THE MAIL FRAUD STATUTE	33
9-43.710	<u>The Agreement to Commit Mail Fraud</u>	33
9-43.720	<u>Participation in the Conspiracy</u>	36
9-43.730	<u>Acts Committed in Furtherance of the Conspiracy</u>	37
9-43.740	<u>Drafting a Conspiracy Count</u>	38

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-43.000 MAIL FRAUD - 18 U.S.C. §1341

The mail fraud statute, 18 U.S.C. §1341, provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

As amended August 12, 1970, effective July 1, 1971.

9-43.100 PROCEDURES

9-43.110 Investigation of Complaints

Complaints involving the use of the mails to defraud, whether intra-state or interstate, are usually investigated by the Postal Inspection Service of the U.S. Postal Service. If securities are involved, the complaint may also be submitted to the Securities and Exchange Commission. Occasionally, investigations by the Federal Bureau of Investigation into violations of statutes within the Bureau's investigative jurisdiction (for example, bankruptcy, ITSP) may also disclose possible violations of the mail fraud statute. In those instances, copies of the investigative reports are furnished both to the appropriate U. S. Attorney and to the Department.

Accordingly, persons making complaints concerning mail fraud violations should be referred to the Postal Inspection Service or the Securities and Exchange Commission (SEC), if securities are involved.

Reports submitted to the U. S. Attorneys by the Postal Inspection Service need not be forwarded to the Department, arrangements having been

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

made with the Chief Postal Inspector for their dissemination in the Department. Generally, SEC criminal reference reports are submitted to the Department, for consideration as to dissemination to U. S. Attorneys.

9-43.120 Policy Concerning Prosecutions

Ordinarily prosecutions should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts. On the other hand, if the scheme is in its nature directed to defrauding a class of persons, or the general public, through the mails, with a substantial pattern of conduct, serious consideration should be given to prosecution.

9-43.200 ELEMENTS OF THE OFFENSE

The essential elements of the offense are (1) the devising of a scheme and artifice to defraud, and (2) the use of the mails in furtherance of the scheme. Pereira v. United States, 347 U.S. 1 (1954); Milam v. United States, 322 F.2d 104 (5th Cir. 1963). It is well settled that the gist of the offense is the use of the mails in furtherance of the scheme to defraud and that each separate use of the mails constitutes a separate and distinct offense. Durland v. United States, 167 U.S. 306 (1896); Badders v. United States, 240 U.S. 391 (1916). An excellent dissertation on mail fraud law is contained in the "Manual of Jury Instructions in Federal Criminal Cases," Part II, Chapter XVI, "Mail Fraud Offenses," adopted by the Seventh Circuit Judicial Conference Committee on Jury Instructions as reported in 36 F.R.D. 600.

9-43.210 The Scheme and Artifice to Defraud

The statute does not define the terms "scheme" or "artifice" and the courts have traditionally been reluctant to offer definitions of either term except in the broadest and most general terms. For example, in United States v. Dexter, 154 F. 890 (N.D. Iowa 1907) the District Court stated that:

A "scheme" may be said to be a design or plan formed to accomplish some purpose. An "artifice" may be said to be an ingenious contrivance or device of some kind, and when used in a bad sense the word corresponds with "trick" or "fraud". Hence a "scheme or artifice" to defraud, within the meaning of this statute, would be to form some plan or devise some trick to perpetrate a fraud upon another. Dexter, supra, at 896.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The fraudulent aspect of the scheme to defraud is to be measured by nontechnical standards and is not restricted by any common-law definition of false pretenses. The law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958). For as Judge Holmes once observed, "the law does not define fraud; it needs no definition; it is as old as falsehood and as versatile as human ingenuity." Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941). The scope of potential schemes or artifices to defraud as those terms are used in the statute is delimited only by man's ingenuity ← one in devising new methods to defraud the community. All that must be shown is that the scheme be one "reasonably calculated to deceive persons of ordinary prudence and comprehension." Silverman v. United States, 213 F.2d 405 (5th Cir. 1954); Gusow v. United States, 347 F.2d 755 (10th Cir. 1965); Blanchly v. United States, 380 F.2d 665, 671 (5th Cir. 1967).

An intent to defraud is indispensable to successful prosecution. Beck v. United States, 305 F.2d 595, 599 (10th Cir. 1962); United States v. Durland, 161 U.S. 306, 313 (1896). However, direct proof of willful intent is not necessary, but can be inferred from the activities of the parties involved. Henderson v. United States, 202 F.2d 400 (6th Cir. 1953); United States v. Bertin, 254 F. Supp. 937 (D. Md. 1966).

A scheme to defraud may involve a plan to obtain money or property by means of false and fraudulent pretenses knowingly made and calculated to deceive persons of ordinary prudence. United States v. Painter, 314 F.2d 939 (4th Cir. 1963); United States v. New South Farm & Home Co., 241 U.S. 64 (1916); United States v. Wimberly, 34 F. Supp. 904 (W.D. La. 1940). It encompasses false representations as to future intentions, as well as existing facts. Durland v. United States, supra. A scheme to defraud may be actionable even though no actual misrepresentations are made. Phillips v. United States, 356 F.2d 297 (9th Cir. 1965); Linden v. United States, 254 F.2d 560 (4th Cir. 1958); Silverman v. United States, 213 F.2d 405 (5th Cir. 1954); Henderson v. United States, 202 F.2d 400 (6th Cir. 1953). The deception need not be premised on the verbalized words alone. The arrangement of the words, or the circumstances in which they are used may serve to convey a false and deceptive appearance. United States v. Burton, 443 F.2d 912, 913 (4th Cir. 1971); Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967); Gusow v. United States, 347 F.2d 755, 756 (10th Cir. 1965); Cacy v. United States, 298 F.2d 227, 229 (5th Cir. 1961). Deception may also, of course, involve the concealment of material fact. Williams v. United States, 368 F.2d 972 (10th Cir. 1966); Blachy v. United States, 380 F.2d 665 (5th Cir. 1967); United States v. Press, 336 F.2d 1003 (2d Cir. 1964); United States v. Bush, 522 F.2d 641, 651 (7th Cir. 1975). It may even take the form of reckless disregard for the truthfulness of the representations made. United States v. Marley, 549 F.2d 561 (8th Cir. 1977) (wire fraud); United States v. Henderson, 446 F.2d 960, 966 (8th Cir. 1971); Gusow v. United States, 347 F.2d 755 (10th Cir. 1965); United States v. Sheiner, 410 F.2d 337, 341 (2d Cir. 1969); Irwin v. United States, 338 F.2d 770 (9th Cir.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1964); United States v. Meyer, 359 F.2d 837 (7th Cir. 1966). No amount of honest belief that an enterprise would eventually succeed can excuse the willful misrepresentations by which the investors' funds are obtained. United States v. Painter, 314 F.2d 939, 943 (4th Cir. 1963). It is not necessary to communicate the false representations to the victims. Kreuter v. United States, 218 F.2d 532, 535 (5th Cir. 1955); United States v. Sylvanus, 192 F.2d 96, 106 (7th Cir. 1951).

The words "to defraud" do not, however, include threat and coercion through fear or force. Accordingly, extortion alone is not within the proscription of the mail fraud statute. Fasulo v. United States, 272 U.S. 620 (1926), overruling Horman v. United States, 116 F. 350 (6th Cir. 1902).

The great weight of authority holds that it is not necessary that the scheme be successful or that anyone was actually defrauded by the scheme. United States v. Pollack, 534 F.2d 964, 971 (D.C. Cir. 1976); United States v. Regent Office Supply Co., 421 F.2d 1174, 1180 (2d Cir. 1970); United States v. George, 447 F.2d 508, 512 (7th Cir. 1973); United States v. Reicin, 497 F.2d 563 (7th Cir. 1974). Cases holding to the contrary were rejected by Judge Blackmun, now Associate Justice, in United States v. Gross, 416 F.2d 1205 (8th Cir. 1969). The mail fraud statute prohibits the use of the mails for the purpose of executing a scheme or artifice to defraud, or attempting to do so. Accordingly, as specifically stated in the statute, attempts as well as consummated crimes are punishable, and the scheme need not be successful.

A scheme to defraud may include the deprivation of a state or other governmental body of its right to the honest and faithful services of its elected or appointed officials. United States v. Caldwell, 544 F.2d 691 (4th Cir. 1976) indictment set out; United States v. Brown, 540 F.2d 364 (8th Cir. 1976) distinguishing United States v. McNieve, 536 F.2d 1245 (8th Cir. 1976); United States v. Craig, 528 F.2d 773 (7th Cir. 1976); United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975); United States v. Bush, 522 F.2d 641 (7th Cir. 1975); United States v. Isaacs (Kerner), 493 F.2d 1124 (7th Cir. 1973); United States v. Faser, 303 F. Supp. 380 (E.D. La. 1969). For additional cases see discussion under USAM 9-43.246, *infra*, Political and Commercial Corruption.

A scheme to defraud may include the obtaining of secret profits by the employee or official. United States v. Faser, *supra*; United States v. Isaacs, *supra*. See also, United States v. Drisko, 303 F. Supp. 858 (E.D. Va. 1969); United States v. Carter, 217 U.S. 286, 308 (1910); United States v. Drumm, 329 F.2d 109, 113 (1st Cir. 1964); United States v. Bowen, 290 F.2d 40, 44-45 (5th Cir. 1961) (civil suits to recover secret profits).

Similarly a scheme to deprive an employer of the honest and faithful services of an employee (commercial bribery) is actionable. United States v. Bryza, 522 F.2d 414 (7th Cir. 1975); United States v. George, 477 F.2d 508 (7th Cir. 1973); United States v. Gerule, 437 F.2d 239 (10th Cir. 1970); United States v. Proctor and Gamble Company, 47 F. Supp. 676 (D. Mass. 1942).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Violation of a fiduciary relationship is also actionable. Post v. United States, 407 F.2d 319 (D.C. Cir. 1968); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962); United States v. Buckner, 108 F.2d 921 (2nd Cir. 1940); United States v. Groves, 122 F.2d 87 (2nd Cir. 1941); United States v. Guterma, 179 F. Supp. 420 (E.D. N.Y. 1959). However, in order to prove a scheme to defraud under the mail fraud statute there must be proof of a scheme embracing actual or active fraud, and proof of a mere constructive fraud is insufficient. Epstein v. United States, 174 F.2d 754 (6th Cir. 1949).

So long as it can be shown that a particular individual participated in one of the schemes described above, it is not necessary to show that he/she was in fact a public official, employee or fiduciary himself/herself. See, United States v. Rauhoff, *supra*; United States v. George, *supra*.

Schemes to defraud a state or other governmental body through material misrepresentation, deceit, or active concealment of fact may be actionable where loss may be shown, as in a scheme to defraud a state of a sales tax revenue, United States v. Brewer, 528 F.2d 492 (4th Cir. 1975); United States v. Melvin, 544 F.2d 767 (5th Cir. 1977); United States v. Mirabile, 503 F.2d 1065 (8th Cir. 1974); United States v. Flaxman, 495 F.2d 344 (7th Cir. 1974); or where the loss may be as intangible as that of the benefits of public office, as in a scheme to defraud a city of an honest election. United States v. States, 488 F.2d 761 (8th Cir. 1973); see also, United States v. Aczel, 219 F.2d 917 (Ind. 1915); United States v. Classic, 35 F. Supp. 457 (E.D. La. 1940); *contra*, United States v. Randle, 39 F. Supp. 759 (W.D. La. 1941). However, prior approval from the Criminal Division's Public Integrity Section is required before instituting prosecutions under the mail fraud statute, 18 U.S.C. §1341, or the fraud by wire statute, 18 U.S.C. §1343, in election fraud cases.

#### 9-43.220 Use of the Mails in Execution of the Scheme

It is not necessary that a scheme to defraud contemplate the use of the mails as an essential element of the offense. Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Young, 232 U.S. 155 (1914). It is necessary, however, that the alleged mailing be "for the purpose of executing the scheme, as the statute requires." Kann v. United States, 232 U.S. 88, 94 (1944); Parr v. United States, 363 U.S. 370 (1960); United States v. Maze, 414 U.S. 395 (1974). Each mailing that forms a basis for a count must be in furtherance of executing the fraudulent scheme. United States v. Keane, 522 F.2d 534 (7th Cir. 1975).

The mailing can be by anyone, and it is not necessary that the defendant himself/herself uses the mails. Pereira v. United States, *supra*; United States v. Calvert, 523 F.2d 895, 903 (8th Cir. 1975); Milam v. United States, 322 F.2d 104, 107 (5th Cir. 1963). It is sufficient if he/she "caused" the mailings. The standard was set forth in United States v. Pereira, *supra*, at 8, as follows: "Where one does an act with knowledge

that use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be use." Each participant in a scheme to defraud is responsible for the use of the mails in furtherance of the scheme. Isaacs v. United States, 301 F.2d 706, 725 (8th Cir. 1962); Steiner v. United States, 134 F.2d 931 (5th Cir. 1943); United States v. Nance, 502 F.2d 615, 619 (8th Cir. 1974).

It is not necessary that false representations themselves were transmitted by mail, or that the defendant received mail from the victim. It is sufficient that the use of the mail was caused by the defendant in furtherance of his/her fraudulent scheme. United States v. Sorce, 308 F.2d 299, 300-301 (4th Cir. 1962), cited with approval in United States v. Lichota, 351 F.2d 81, 89 (6th Cir. 1965). The mailings need not be to or from an intended victim. Pereira v. United States, *supra*.

The mailed matter need not disclose on its face a fraudulent representation or purpose, but need only have some relation to the scheme. Durland v. United States, 161 U.S. 306, 313 (1896). Mailings may be in furtherance of the scheme even though the scheme is unsuccessful. Durland v. United States, *supra*, at 315; Erwin v. United States, 242 F.2d 336, 337 (6th Cir. 1957); Hermansen v. United States, 230 F.2d 173 (5th Cir. 1956); Kreuter v. United States, 218 F.2d 532, 535 (5th Cir. 1955); United States v. Sylvanus, 192 F.2d 96, 105-106 (7th Cir. 1951); Deaver v. United States, 155 F.2d 740, 743 (D.C. Cir. 1945); Norman v. United States, 100 F.2d 905, 907 (6th Cir. 1939). Each use of the mails in furtherance of a fraudulent scheme is a separate offense. Badders v. United States, 240 U.S. 391 (1916). Newspaper advertisements which lure prospective victims can be charged in a mail fraud count, since some copies are mailed in the ordinary course of the newspaper's business to mail subscribers. United States v. Hopkins, 357 F.2d 14, 16 (6th Cir. 1966); Pritchard v. United States, 386 F.2d 760, 765 (8th Cir. 1967); Atkinson v. United States, 344 F.2d 97, 99 (8th Cir. 1965); United States v. Thaw, 353 F.2d 581, 584 (4th Cir. 1965); Weatherby v. United States, 150 F.2d 465, 466 (10th Cir. 1945).

#### 9-43.221 In Execution of the Scheme

As previously indicated, and as provided by the statute, the mailing must be for the purpose of executing the scheme to defraud, Kann v. United States, *supra*, and must be foreseeable. United States v. Pereira, *supra*. Whether these elements are proved depends upon the factual situation involved. An excellent dissertation on whether the mails are used in furtherance of the scheme and are foreseeable is contained in United States v. Shepherd, 511 F.2d 119 (5th Cir. 1975). That case involved a check kiting fraud, wherein the defendant argued that the transmittal of the worthless checks by mail was only an incidental result of the fraudulent scheme, and not within the statute. The Court stated:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

The Shepherds rely on United States v. Maze, 1974, 414 U.S. 395, 94 S.Ct. 645, 38 L. Ed. 2d 603; Parr v. United States, 1960, 363 U.S. 370, 80 S.Ct. 1171, 4 L. Ed. 2d 1277; and Kann v. United States, 1944, 323 U.S. 88, 65 S.Ct. 148, 89 L. Ed. 88, to support the attack on their convictions. Maze set out a two-pronged test to determine the existence of jurisdiction. A fraudulent scheme will constitute a federal crime if the defendant "causes" the mails to be used, and the mailings are "sufficiently closely related" to the scheme. Id. 414 U.S. at 399, 94 S.Ct. 645, 38 L. Ed. 2d 603.

The first prong of this test is clearly satisfied here. As the Court pointed out in Pereira v. United States, 1954, 347 U.S. 1, 9, 74 S.Ct. 358, 98 L. Ed. 435, and recognized in Maze, it is not necessary that the defendant himself place the matter into a mail depository, only that he have a reasonable basis to foresee that the mails will be used. It is apparent that the Shepherds knew that the mails would be used in the check collection process.

Our task, therefore, is to determine whether the mailings in this case are "sufficiently closely related" to the fraudulent scheme. To satisfy this test the mailing must be "for the purpose of executing the scheme," Kann, supra, 323 U.S. at 94, 65 S.Ct. at 151; but [i]t is not necessary that the scheme contemplate the use of the mails as an essential element." Periera, supra, 347 U.S. at 8, 74 S.Ct. at 362. What is crucial is that the mailing be "incident to an essential part of the scheme." Id.

Both Maze and Parr involved the fraudulent use of credit cards. The government asserted that the mailing of invoices subsequent to fraudulent purchases was sufficient to invoke jurisdiction under the mail fraud statute. The Supreme Court rejected the government's position since the fraud had been completed upon the use of the credit cards, when the goods and services had been irrevocably received and the fraudulent scheme had thus reached fruition by the time the mails were used. The mails were not utilized to further the scheme.

Similar to Maze and Parr, but closer factually to the case at hand is Kann which involved the cashing of fraudulent use of credit cards. In Kann, corporate officers set up a dummy corporation to divert profits from the corporation for which they acted in order to pay themselves additional compensation without rendering

services. The officers had the dummy corporation issue checks in their names and cashed the checks. The use of the mails was in the check collection process. The mailings were held to be insufficient to establish jurisdiction. The Court stressed the fact that the scheme had reached fruition upon the cashing of the checks, since the "persons intended to receive the money had received it irrevocably," and therefore "the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it." Id., 323 U.S. at 94, 95, 65 S.Ct. at 151.

In this case, Shepherd did not intend to irrevocably receive the money he fraudulently obtained. The purpose of the scheme was to obtain, for a significant period of time, "forced credit," which he ultimately might repay. The scheme had not reached fruition, but was ongoing.

It was deemed significant in Kann that "[i]t was immaterial to [defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." Id., 323 U.S. at 94, 65 S.Ct. at 151. Shephard's scheme, on the other hand, uniquely depended upon the check collection process. It was the delay that enabled Shepherd to receive the forced credit, and it was the use of the mails that caused the delay.

Kann carefully distinguished its particular fact situation from the factual situation sub judice "where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated." Id., 323 U.S. at 94-95, 65 S.Ct. at 151. We have recently recognized this distinction in United States v. Constant, 501 F.2d 1284 (5th Cir. 1974). There the defendant maintained checking accounts in New Jersey and Florida banks. He would draw a check on the New Jersey account, which contained insufficient funds to cover the check, and immediately depart for Florida to deposit the check in his Florida account. He would then draw a check on the Florida account to deposit in the New Jersey account in order to cover the deficit he created in that account. This practice continued with the amounts of the checks accelerating.

The defendant in Constant, relying on Maze, argued that the scheme had reached fruition when the depository bank credited defendant's account upon the deposit of a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

worthless check. This Court, however, distinguished Maze because the delay which was encountered by the mailing "was a central element" in the scheme. Id. at 1291 of 501 F.2d.

As in Constant, the use of the mails by Shepherd was a central element in the scheme. Shepherd's receipt of forced credit involved a series of deposits of worthless checks to cover the dishonor of prior worthless checks. Consequently, not only did he obtain forced credit during the collection process of the initial checks deposited, but he was able to extend this credit by subsequent deposits of worthless checks. The delay caused by the mails was therefore doubly crucial.

It is thus clear that the use of the mails in this case was "incidental to an essential element of the scheme" and was therefore "for the purpose of executing the fraudulent scheme" as required by the mail fraud statute.

Shepard, supra, at 121-122.

9-43.222 Lulling Letters

It is a well established principle of mail fraud law that use of the mails after money is obtained may nevertheless be "for the purpose of executing" the fraud. This proposition was considered by the Supreme Court in United States v. Sampson, 371 U.S. 75 (1962), in which case salesmen fraudulently obtained applications and advance payments from businessmen and then mailed acceptances to the defrauded victims to lull them into believing the services would be performed. The Court held that such a "lulling" use of the mails was the purpose of executing the fraudulent scheme. After discussing the decisions in Kann, supra, and Parr, supra, the Court in Sampson concluded:

We are unable to find anything in either the Kann or the Parr case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme. Rather the Court found only that under the facts in these cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after Kann have followed the view that subsequent mailings can in some circumstances provide the basis for an indictment under the mail fraud statute.

Sampson, supra, at 80.

Although in Maze, supra, a credit card case, the Supreme Court found the mailings insufficiently closely related to the defendant's scheme to bring his conduct within the statute, the Court reaffirmed the lulling letter concept of Sampson, supra. Thus, post-purchase mailings which are designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are mailings in furtherance of this scheme. United States v. Ashdown, 509 F.2d 793, 800 (5th Cir. 1975); United States v. MacClain, 501 F.2d 1006, 1012 (10th Cir. 1974); United States v. Porter, 441 F.2d 1204, 1211 (8th Cir. 1971); United States v. Blue, 138 F.2d 351, 359 (6th Cir. 1943); Henderson v. United States, 425 F.2d 134, 141 (5th Cir. 1970); Sparrow v. United States, 402 F.2d 826, 829 (10th Cir. 1968); Bliss v. United States, 354 F.2d 456, 457 (8th Cir. 1966); United States v. Pollack, 534 F.2d 964, 972 (D.C. Cir. 1976). There is no rule that the money must change hands after the mailing. United States v. Love, 535 F.2d 1152, 1160 (9th Cir. 1976).

#### 9-43.230 Representative Schemes

##### 9-43.231 Advance Fee Schemes

United States v. Sampson, 371 U.S. 75 (1962); United States v. Comyns, 248 U.S. 349 (1919); Henderson v. United States, 425 F.2d 134 (5th Cir. 1970); Gusow v. United States, 347 F.2d 755 (10th Cir. 1964); Milam v. United States, 322 F.2d 104 (5th Cir. 1963); Butler v. United States, 317 F.2d 249 (8th Cir. 1963); Goodman v. United States, 273 F.2d 853 (8th Cir. 1960); United States v. Uhrig, 443 F.2d 239 (7th Cir. 1971); United States v. Crisona, 416 F.2d 107 (2d Cir. 1969); United States v. Powers, 467 F.2d 1089 (7th Cir. 1972); United States v. Strauss, 473 F.2d 1262 (3d Cir. 1972); United States v. Waldo, 470 F.2d 1359 (10th Cir. 1972) (wire fraud); Wolpa v. United States, 85 F.2d 35 (8th Cir. 1936).

##### 9-43.232 Bankruptcy (Scam) Frauds

A planned bankruptcy (scam) scheme is one to obtain supplies on credit, make quick sales, collect the proceeds, make no payments to creditors, and allow the company to fall into bankruptcy, making off with such loot as might meanwhile have been gathered. Kaplan v. United States, 7 F.2d 594, 595 (2d Cir. 1925). Prosecutions may be instituted:

A. Under the Bankruptcy Act, 18 U.S.C. §152: United States v. Dioguardi, 428 F.2d 1033 (2d Cir. 1970); United States v. Piccini, 412 F.2d 591 (2d Cir. 1969); United States v. Harris, 388 F.2d 373 (7th Cir. 1967); United States v. Castellano, 349 F.2d 264 (2d Cir. 1965); United States v. Ayotte, 385 F.2d 988 (6th Cir. 1967); United States v. Vida, 370 F.2d 759 (6th Cir. 1966); Kaplan v. United States, supra.

B. Under the mail fraud statute: United States v. Crockett, 534 F.2d 589 (5th Cir. 1976); United States v. Stull, 521 F.2d 687 (6th Cir. 1975);

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

United States v. Owen, 492 F.2d 1100 (5th Cir. 1974); United States v. Cobb, 397 F.2d 416 (7th Cir. 1968); United States v. Payne, 474 F.2d 603 (9th Cir. 1973); Jacobs v. United States, 395 F.2d 469 (8th Cir. 1968); Demetre v. United States, 461 F.2d 971 (6th Cir. 1972).

C. Under both statutes: United States v. Spencer, 412 F.2d 798 (5th Cir. 1969); United States v. Goodman, 285 F.2d 378 (5th Cir. 1961); United States v. Wolcoff, 379 F.2d 521 (7th Cir. 1967).

9-43.233 Chain Referral Selling Schemes

United States v. Ammons, 464 F.2d 414 (8th Cir. 1972) and cases cited therein; New England Enterprises v. United States, 400 F.2d 58 (1st Cir. 1969); Romuntio v. United States, 400 F.2d 618 (10th Cir. 1968); Glazerman v. United States, 421 F.2d 547 (10th Cir. 1970); United States v. Beitscher, 467 F.2d 269 (10th Cir. 1972).

9-43.234 Charitable Schemes

See United States v. Kline, 221 F. Supp. 776 (D. Minn. 1963) aff'd sub nom, Koolish v. United States, 340 F.2d 513 (8th Cir. 1965) (Sister Kenny Foundation); United States v. Kram, 247 F.2d 830 (3d Cir. 1957); United States v. Brandt, 198 F.2d 653 (2d Cir. 1952); United States v. Beall, 126 F. Supp. 363 (N.D. Cal. 1954).

9-43.235 Check Kiting Frauds

See United States v. Street, 529 F.2d 226 (6th Cir. 1976); United States v. Shepherd, 511 F.2d 119 (5th Cir. 1975), citing United States v. Constant, 501 F.2d 1284 (5th Cir. 1974), in which the Circuit Court concluded that the decision in United States v. Maze, 414 U.S. 395 (1974), does not preclude prosecution of check kite schemes under the mail fraud statute.

See United States v. Bessen, 445 F.2d 463 (7th Cir. 1971), and cases cited therein, discussing good faith defense concerning expectation that sufficient funds would be deposited in account to pay insufficient fund checks when presented for payment.

See United States v. Alper, 449 F.2d 1223 (3d Cir. 1971); United States v. Jones, 425 F.2d 1048 (9th Cir. 1970); Suhl v. United States, 390 F.2d 547 (9th Cir. 1968); United States v. Gross, 416 F.2d 1205 (8th Cir. 1969); United States v. Broxmeyer, 192 F.2d 230 (2d Cir. 1951); Williams v. United States, 278 F.2d 535 (9th Cir. 1960); Deschenes v. United States, 224 F.2d 688 (10th Cir. 1955); Federman v. United States, 36 F.2d 441 (7th Cir. 1929); United States v. Froman, 265 F.2d 702 (2d Cir. 1959); United States v. Lowe, 115 F.2d 596 (7th Cir. 1940); Stevens v. United States, 227 F.2d 5

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(8th Cir. 1955); United States v. Scoblick, 124 F. Supp. 881 (M.D. Pa. 1954); United States v. Pihakis, 224 F.2d 898 (3d Cir. 1955); United States v. Gilliam, 273 F. Supp. 507 (C.D. Cal. 1967); United States v. Citrin, 58 F. Supp. 766 (S.D. N.Y. 1945). United States v. Gilliam, 273 F. Supp. 507 (C.D. Cal. 1967).

When the facts warrant, and where a participating bank official or employee is involved, violations of 18 U.S.C. §656, for misapplication of the bank's assets, may also be charged, as in United States v. Scoblick, *supra*, and United States v. Broxmeyer, *supra*.

9-43.236 Classified Directory Schemes

See Silverman v. United States, 213 F.2d 405 (5th Cir. 1954); United States v. Patterson, 455 F.2d 264 (9th Cir. 1972); United States v. Leopold, 418 F.2d 247 (4th Cir. 1969); Linden v. United States, 254 F.2d 560 (4th Cir. 1958).

9-43.237 Correspondence And Other School Frauds

See Babson v. United States, 330 F.2d 662 (9th Cir. 1964) (airline); Wood v. United States, 321 F.2d 699 (5th Cir. 1963) (airline); Grell v. United States, 112 F.2d 861 (8th Cir. 1940) (civil service); Adams v. United States, 347 F.2d 665 (5th Cir. 1965) (nursing); Friedman v. United States, 347 F.2d 697 (8th Cir. 1965) (dance studio); Hemphill v. United States, 120 F.2d 115 (9th Cir. 1941) (mechanical engineering); United States v. Brunet, 227 F. Supp. 766 (W.D. Wisc. 1964), (in which an indictment charging a typical correspondence course scheme is fully set out).

9-43.238 Credit Card Frauds

A. The Mail Fraud Statute, 18 U.S.C. §1341

The Supreme Court, in United States v. Maze, 414 U.S. 395 (1974), decided that the forwarding by mail of credit card vouchers to credit card issuers for payment subsequent to the receipt of merchandise through the unauthorized use of a credit card did not constitute a use of the mails in furtherance of a fraudulent scheme so as to sustain prosecution under the mail fraud statute. Accordingly, mail fraud prosecutions in the credit card area are now limited to those instances (a) involving fraud in obtaining the credit card, with the use of the mail being prior to the receipt of the goods and services, Green v. United States, 494 F.2d 820 (5th Cir. 1974); King v. United States, 494 F.2d 353 (6th Cir. 1975); United States v. Woods, 535 F.2d 255 (4th Cir. 1974); United States v. Stein, 500 F.2d 687 (9th Cir. 1974); United States v. Arnold, 543 F.2d 1224 (8th Cir. 1977), or (b) involving a dishonest merchant who has knowledge that the use is unauthorized. In the latter instance, the forwarding of the voucher for

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

payment is an integral part of the scheme, since the merchant has not yet been paid. United States v. Adamo, 534 F.2d 31 (3d Cir. 1976).

B. 15 U.S.C. §1644 - Fraudulent Use Of A Credit Card

Prosecutions may be instituted under 15 U.S.C. §1644, as amended October 28, 1974, which (1) prohibits, in transactions affecting interstate commerce, the obtaining of goods and services aggregating \$1,000 in a single year through the use of stolen or fraudulently obtained credit cards, United States v. Mikelberg, 517 F.2d 246 (5th Cir. 1975), (2) prohibits the use of facilities of interstate commerce in the sale or transportation of stolen credit cards, United States v. Nichols, 534 F.2d 202 (9th Cir. 1976), (3) prohibits "fencing" activities involving stolen credit cards, (4) prohibits the sale or transportation of tickets for interstate travel having a value of \$500 or more obtained through the use of stolen credit cards, and (5) prohibits merchants from furnishing merchandise or services through the use of stolen credit cards with knowledge that the cards were stolen.

Investigation into violations of 15 U.S.C. §1644 is conducted by the Postal Inspection Service.

9-43.239 Franchise Frauds

See United States v. Serlin, 538 F.2d 737 (7th Cir. 1976) (appliances); United States v. Hildebrand, 506 F.2d 406 (5th Cir. 1975) (hot food machines); United States v. Nance, 502 F.2d 615 (8th Cir. 1974) (rack distributor-Bardahl products); United States v. Bessesen, 433 F.2d 861 (8th Cir. 1970) (trading stamps); Mesch v. United States, 407 F.2d 1286 (10th Cir. 1969) (swimming pools); Pritchard v. United States, 386 F.2d 760 (8th Cir. 1967) (paints); Brown v. United States, 328 F.2d 652 (5th Cir. 1964) (film vending machines); Irwin v. United States, 338 F.2d 770 (9th Cir. 1964) (mail order); Cacy v. United States, 298 F.2d 227 (9th Cir. 1953) (various products); United States v. Jones, 237 F.2d 493 (7th Cir. 1956) (coin TV devices).

9-43.240 Representative Schemes (cont'd)

9-43.241 Insurance Fraud

A. Planned accident schemes: see Everitt v. United States, 306 F.2d 839 (5th Cir. 1962); Glenn v. United States, 303 F.2d 536 (5th Cir. 1962); Barnard v. United States, 342 F.2d 309 (9th Cir. 1965); United States v. Perez, 489 F.2d 51 (5th Cir. 1973); United States v. Britton, 500 F.2d 1257 (8th Cir. 1974); United States v. Kaplan, 470 F.2d 100 (7th Cir. 1973); United States v. Hutul, 416 F.2d 607 (7th Cir. 1969).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. False claims: see United States v. Kenofskey, 243 U.S. 440 (1917); Mishan v. United States, 345 F.2d 790 (5th Cir. 1965); United States v. Perkal, 530 F.2d 604 (4th Cir. 1976); United States v. Sylvanus, 192 F.2d 96 (7th Cir. 1951); United States v. Minkin, 504 F.2d 350 (8th Cir. 1974); United States v. Joyce, 499 F.2d 9 (7th Cir. 1974); United States v. Bornstein, 447 F.2d 742 (7th Cir. 1971); United States v. Seasholtz, 435 F.2d 4 (10th Cir. 1970); United States v. Reicin, 497 F.2d 563 (7th Cir. 1974) (set out indictment in full at p. 575); United States v. Calvert, 523 F.2d 895 (8th Cir. 1975); United States v. Wolfish, 525 F.2d 457 (2nd Cir. 1975); United States v. Trutenko, 490 F.2d 678 (7th Cir. 1973); United States v. Shavin, 287 F.2d 641 (7th Cir. 1961); United States v. Russo, 480 F.2d 1228 (6th Cir. 1973); United States v. Pisciotta, 469 F.2d 329 (10th Cir. 1972); United States v. Pope, 415 F.2d 685 (8th Cir. 1969); Sachs v. United States, 412 F.2d 357 (8th Cir. 1969); Blackwell v. United States, 405 F.2d 625 (5th Cir. 1969) (arson); United States v. Sternback, 402 F.2d 353 (7th Cir. 1968).

9-43.242 Land Fraud Schemes

See United States v. New South Farm and Home Company, 241 U.S. 64 (1916); Cowl v. United States, 35 F.2d 794 (8th Cir. 1929); Harris v. United States, 261 F.2d 792 (9th Cir. 1958); Hoffman v. United States, 353 F.2d 188 (10th Cir. 1965); Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967); Phillips v. United States, 356 F.2d 297 (9th Cir. 1965); Golubin v. United States, 393 F.2d 590 (10th Cir. 1968); United States v. Pilnick, 267 F. Supp. 791 (S.D. N.Y. 1967); Reisman v. United States, 409 F.2d 789 (9th Cir. 1969); Windsor v. United States, 384 F.2d 535 (9th Cir. 1967); United States v. Shewfelt, 455 F.2d 836 (9th Cir. 1972); United States v. Diamond, 430 F.2d 688 (5th Cir. 1970); Worthington v. United States, 64 F.2d 936 (7th Cir. 1933); Huteson v. United States, 67 F.2d 731 (7th Cir. 1933); Armstrong v. United States, 65 F.2d 853 (10th Cir. 1933); Lathrop v. United States, 2 F.2d 497 (9th Cir. 1924).

In instances where land subdivisions fall within the proscriptions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 et seq., prosecution can be instituted under 15 U.S.C. §§1703, 1717. See United States v. Steinhilber, 484 F.2d 386 (8th Cir. 1973); United States v. Del Rio Springs, Inc., 392 F. Supp. 226 (D. Ariz. 1975); Schenker v. United States, 529 F.2d 96 (9th Cir. 1976), (defendants can be prosecuted for both mail fraud and violations of the Act). United States v. Pocono International Corporation, 378 F. Supp. 1265 (S.D. N.Y. 1974), aff'd in, United States v. Goldberg, 527 F.2d 165 (2d Cir. 1975). United States v. AMREP Corporation, 545 F.2d 797 (2d Cir. 1976).

Investigations into possible violations of the Act are conducted by the Office of Interstate Land Sales Registration, Department of Housing and Urban Development, Washington, D.C.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-43.243 Medical Frauds

See United States v. Andreadis, 366 F.2d 423 (2d Cir. 1966); United States v. Taller, 394 F.2d 435 (2d Cir. 1968); Zovluck v. United States, 448 F.2d 339 (2nd Cir. 1971); United States v. DeWelles, 345 F.2d 387 (7th Cir. 1965); Smith v. United States, 321 F.2d 427 (9th Cir. 1963); Hughes v. United States, 231 F.2d 50 (5th Cir. 1916); Holsman v. United States, 248 F. 193 (9th Cir. 1918); United States v. Smith, 222 F. 165 (E.D. Pa. 1915); Oesting v. United States, 234 F. 304 (9th Cir. 1916); Freeman v. United States, 243 F. 353 (9th Cir. 1917).

9-43.244 Merchandising Frauds - False Financial Statements

See United States v. Young, 232 U.S. 155 (1914); Levinson v. United States, 5 F.2d 567 (6th Cir. 1925); Krotkiewitz v. United States, 19 F.2d 421 (6th Cir. 1927); Lewy v. United States, 29 F.2d 462 (7th Cir. 1928); United States v. Newbauer, 250 F.2d 838 (8th Cir. 1958); United States v. Eskow, 422 F.2d 1060 (2d Cir. 1970); Bass v. United States, 409 F.2d 179 (5th Cir. 1969); United States v. Richman, 369 F.2d 465 (7th Cir. 1966) (advertising); United States v. Kyle, 257 F.2d 559 (2nd Cir. 1958) (mail order); United States v. Farmer, 218 F.2d 929 (S.D. N.Y. 1914) (rare books); United States v. Sheiner, 410 F.2d 337 (2nd Cir. 1967) (coins); United States v. Calvert, 498 F.2d 409 (6th Cir. 1974); United States v. Caine, 441 F.2d 454 (2nd Cir. 1971) (gasoline additive); United States v. Munchak, 443 F.2d 531 (2nd Cir. 1971) (transistors); Mullins v. United States, 487 F.2d 581 (8th Cir. 1973) (magazine subscriptions); United States v. Shultz, 482 F.2d 1197 (6th Cir. 1973) (sound tapes); United States v. Gaskill, 491 F.2d 981 (8th Cir. 1974) (coupon redemption).

9-43.245 Oil And Gas Lease Frauds

See United States v. Grayson, 166 F.2d 863 (2d Cir. 1948); Abbott v. United States, 239 F.2d 310 (5th Cir. 1956); Buie v. United States, 420 F.2d 1207 (5th Cir. 1969); Von Feldt v. United States, 407 F.2d 95 (8th Cir. 1969); Henderson v. United States, 202 F.2d 400 (6th Cir. 1953); United States v. Wolf, 645 F.2d 23 (10th Cir. 1981); United States v. Zang, 703 F.2d 1186 (10th Cir. 1982).

9-43.246 Political And Commercial Corruption

A. COMMERCIAL BRIBERY

A scheme to defraud an employer of the honest and faithful services of an employee (often referred to as "commercial bribery") is actionable under the mail fraud statute. Two of the earliest cases in this area are United States v. Proctor & Gamble Co., 47 F. Supp. 676 (D. Mass. 1942) (company paid bribes to the employees of a competitor to obtain confidential business information), and Abbott v. United States, 239 F.2d 310 (5th Cir. 1956)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(defendant paid employee to furnish valuable geophysical maps belonging to his employer). In 1973 the Seventh Circuit found in United States v. George, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827 (1973), that a purchasing agent who received kickbacks from a supplier and failed to disclose them to his/her employer could be prosecuted for mail fraud. Other cases followed. See i.e., United States v. Bryza, 522 F.2d 414, 421-423 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976) (a purchasing agent with International Harvester received kickbacks from suppliers); United States v. Reece, 614 F.2d 1259, 1261 (10th Cir. 1980) (purchasing agent of wholesome grocery received "brokerage fees" from suppliers); United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980), cert. denied, 447 U.S. 928 (1981) (an insurance manager for a company extracted kickbacks from the insurance broker). In United States v. Barta, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981), the Second Circuit upheld a mail fraud indictment against an employee of a securities firm who had engaged in bond trading using the firm's credit. More recently, the Second Circuit upheld the use of the mail fraud statute against a non-employee, a securities broker, who passed on confidential information received from trusted employees of an investment banking firm for the purpose of enabling his co-schemers, including the employees, to purchase stock in companies subject to mergers and acquisitions. United States v. Newman, 664 F.2d 12 (2d Cir. 1981).

In analyzing these instances of commercial bribery, the courts have recognized that not every breach of a fiduciary duty by an employee amounts to criminal fraud. See, United States v. George, 477 F.2d at 512 and United States v. Barta, 635 F.2d at 1005-07. The breach of fiduciary duty must be accompanied by some misrepresentation of or failure to disclose material information. In United States v. Ballard, 663 F.2d 534, 540-541 (5th Cir. 1981), modified, 680 F.2d 352 (5th Cir. 1982), the Fifth Circuit recently analyzed the employee's breach of fiduciary duty coupled with his failure to disclose material information. The Ballard court explained that:

A breach of fiduciary duty can constitute an illegal fraud under §1341 only when there is some detriment to the employer. The possible detriment here is that one of the alleged deprivations of an employee's faithful and honest service may have involved a violation of the employee's duty to disclose material information to the employer. . . Our focus shall thus be on the duty to disclose, which may be imposed by state or federal statute or may arise from the employment relationship itself. . . and on materiality, which exists whenever an employee has reason to believe the information would lead a reasonable employer to change its business conduct.

Id.

Therefore, the test is whether or not the employer upon learning that an employee is receiving kickbacks, brokerage fees, or has an interest in a related company, or some other comparable fact, would change his/her business practice in any significant way. If so, the information is material

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

and the employee is perpetrating a fraud on the employer by failing to disclose it.

Commercial bribery can also be prosecuted under the Travel Act, 18 U.S.C. §1952. See Perrin v. United States, 444 U.S. 37, 46 (1979). Commercial bribery prosecutions are also possible under 18 U.S.C. §2314. See Abbott v. United States, 239 F.2d 310, 312 (5th Cir. 1956).

B. FIDUCIARY FRAUDS

Violations of a fiduciary relationship are also prosecutable under the mail fraud statute. One of the earliest cases was United States v. Buckner, 108 F.2d 921 (2nd Cir.), cert. denied, 309 U.S. 669 (1940), in which a trustee was prosecuted for expropriating trust funds. In Post v. United States, 407 F.2d 319 (D.C. Cir. 1968), cert. denied, 393 U.S. 1092 (1969), promoters in a country club endeavor were prosecuted for mail fraud because of their failure to disclose to stockholders and subscribers their interests in leased land and construction contracts. In United States v. Bronston, 658 F.2d 920 (2nd Cir. 1981), cert. denied, 456 U.S. 915 (1982), an attorney was successfully prosecuted for mail fraud for his continued representation of a client despite warnings from his law partners that such representation amounted to a serious conflict of interest in light of the law firm's current representation of a competing client. In United States v. Curry, 681 F.2d 406 (5th Cir. 1982), the chairman of a political action committee was prosecuted for converting to his own use political contributions. The Curry court found the evidence sufficient for mail fraud but reversed and remanded in light of the court's failure to give a good faith instruction. In United States v. Boffa, 688 F.2d 919 (3d Cir. 1982), cert. denied, 103 S.Ct. 1272 and 1280 (1983), the defendants engaged in a "labor switch" scheme whereby the proprietors of a trucking company, in secret cooperation with a union official, withdrew their hauling contract for the purpose of firing union drivers and then resubmitted a new hauling contract in the name of an ostensibly different company enabling them to hire nonunion drivers. The Boffa court upheld the mail fraud theory of the case to the extent that the scheme deprived the union drivers of their contractual rights and their intangible rights in the honest and loyal services of their union representative but was forced to reverse the mail fraud counts because the scheme in the language of the indictment too broadly criminalized the actions of the defendants for depriving the union drivers of their rights "secured by section 7 of the National Labor Relations Act."

C. POLITICAL CORRUPTION

A scheme to defraud may include the deprivation of a state or local governmental body of its right to the honest and faithful services of its elected or appointed officials. Some of the earliest cases in this area involve public officials receiving bribes or kickbacks. See Shushan v. United States, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941) (local officials were bribed in order to further scheme to refund local bonds at exorbitant rates) and Bradford v. United States, 129 F.2d 274 (5th Cir.), cert. denied, 317 U.S. 683 (1942) (city officials bribed in order to have the city pay an exorbitant price for buses). See also, United States

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

v. Caldwell, 544 F.2d 691 (4th Cir. 1976) (banker paid kickbacks to state treasurer in order to secure state funds deposited into non-interest bearing accounts); United States v. Brown, 540 F.2d 364 (8th Cir. 1976) (city building commissioner extracted kickbacks from building contractors); and United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975) (defendants convicted of scheme to bribe the Illinois Secretary of State in order to procure and retain contracts for the production of license plates). However, in United States v. McNeive, 536 F.2d 1245 (8th Cir. 1976), the Eighth Circuit reversed a mail fraud conviction of a city plumbing inspector who received by mail small unsolicited gratuities for the performance of ministerial tasks and who accorded no preferential treatment to the payors of the gratuities. The McNeive court found no "scheme to defraud."

The Seventh Circuit in United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976), held that a breach of a fiduciary duty by a public official standing alone is not a sufficient fraud for the mail fraud statute. In Bush the defendant who was the press secretary to the late Mayor Richard Daley held a hidden interest in a company which had an exclusive contract with the city for display advertising at Chicago's O'Hare International Airport. The Bush court found sufficient evidence of a fraud "only when [the defendant's] failure to provide honest and faithful services [was] combined with his material misrepresentations... and his active concealment... Id. The Bush court also pointed out that the government was not obligated to show any actual loss of money to the city. As the court stated:

Much was said at trial about the fact that the city did not lose money on the contract and that it was one of the best in the country. However, that argument is not convincing. First of all, if the city had known of Bush's interest it might have been able to obtain a better contract. Secondly, the mail fraud statute seeks to prohibit fraudulent conduct regardless of ultimate loss or damage to the victims of the crime. United States v. Reicin, 497 F.2d 563 (7th Cir.), cert. denied, 419 U.S. 996, 95 S.Ct. 309, 42 L.Ed.2d 269 (1974). Since 1961 Bush made a profit of over \$200,000 from his hidden interest in the airport advertising contract. If the citizens of Chicago and other public officials had known of Bush's interest they could have rightfully negotiated an advertising contract which might have earned those profits for the city. The net result was that Bush, through his scheme, made a deal with the city by which the city profited. The deal may have been a good one for the city; the problem is that Bush deprived the city and its officials of making a better deal, of the best deal possible, in order that he might share in the profits.

Id.

See also, United States v. Isaacs, 493 F.2d 1124 1151 (7th Cir.), cert. denied, 417 U.S. 976 (1974) (Governor Kerner of Illinois failed to disclose interest in racetrack) and United States v. Mandel, 591 F.2d 1347 (4th Cir.), aff'd in relevant part of reh'g en banc, 602 F.2d 653 (4th Cir. 1979) cert. denied, 445 U.S. 961 (1980) (Governor Mandel failed to disclose to the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Maryland legislature his business associates' interest in a racetrack at the time of pending legislation affecting additional racint dates).

The most recent extension of the mail fraud statute in the area of political corruption comes from the Second Circuit in United States v. Margiotta, 688 F.2d 108 (2nd Cir. 1982), cert. denied, 103 S.Ct. 1891 (1983). Margiotta was Republican Committee Chairman of Nassau County, Long Island and the Town of Hempstead. Margiotta was convicted of carrying forward a scheme involving the distribution of insurance commissions on municipal properties to his political associates. Although Margiotta did not occupy public office, the court of appeals found that he was a de facto government leader who owed a fiduciary duty to the citizens and had an obligation to disclose the insurance agreement to the public even though he himself did not receive any of the insurance commission proceeds.

9-43.247 Religious Frauds

See United States v. Ballard, 322 U.S. 78 (1940); Brink v. United States, 202 F.2d 4 (10th Cir. 1953); New v. United States, 245 F. 710 (9th Cir. 1917); Jeffers v. United States, 392 F.2d 749 (9th Cir. 1968).

9-43.248 Securities

See United States v. Tallent, 547 F.2d 1291 (5th Cir. 1291); United States v. Gentile, 530 F.2d 461 (2nd Cir. 1976); United States v. Ashdown, 509 F.2d 793 (5th Cir. 1975); Sanders v. United States, 415 F.2d 621 (5th Cir. 1969); United States v. Benjamin, 328 F.2d 854 (2nd Cir. 1964); United States v. Dioguardi, 492 F.2d 70 (2nd Cir. 1974); United States v. Mackay, 491 F.2d 616 (10th Cir. 1973); United States v. Crosby 294 F.2d 928 (2d Cir. 1961); United States v. Dardi, 330 F.2d 316 (2nd Cir. 1964). In the above cases, both mail fraud counts and Securities Act counts were included in the indictments, as authorized in Edwards v. United States, 312 U.S. 473, 483-484 (1941).

9-43.249 Vending Machine Funds

See Reistroffer v. United States, 258 F.2d 379 (8th Cir. 1958) (coffee, candy); United States v. Garrison, 280 F.2d 493 (7th Cir. 1960) (razor blades); Anderson v. United States, 369 F.2d 11 (8th Cir. 1966) (cigars); Raftis v. United States, 364 F.2d 948 (8th Cir. 1966) (aspirin); Krueger v. United States, 331 F.2d 283 (8th Cir. 1964) (cigarettes); Schaefer v. United States, 265 F.2d 750 (8th Cir. 1959) (razor blades); United States v. Main, 28 F. Supp. 550 (S.D. Tex. 1939) (confections, nuts).

9-43.250 Representative Schemes (cont'd)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-43.251 Work-At-Home Schemes

See United States v. Baren, 305 F.2d 527 (2nd Cir. 1962) (sewing machines); Slocum v. United States, 325 F.2d 465 (8th Cir. 1963) (sewing machines); Beck v. United States, 305 F.2d 395 (10th Cir. 1962) (knitting machines); United States v. Rabinowitz, 327 F.2d 62 (6th Cir. 1964) (knitting machine, same scheme as in Beck, but with opposite conclusion concerning fraud); Irwin v. United States, 338 F.2d 770 (9th Cir. 1964) (mail order business); United States v. Rosenblum, 339 F.2d 473 (2d Cir. 1964) (newspaper clipping service).

9-43.252 Miscellaneous Schemes

Contest: United States v. Johnston, 318 F.2d 288 (6th Cir. 1963), Gregory v. United States, 253 F.2d 104 (5th Cir. 1958); United States v. Bloom, 237 F.2d 158 (2nd Cir. 1956), Sprinkle v. United States, 244 F. 111 (4th Cir. 1917). Mortgage milking: Shale v. United States, 388 F.2d 616 (5th Cir. 1968); United States v. Platt, 435 F.2d 220 (7th Cir. 1970). Ponzi scheme: Dunham v. United States, 125 F.2d 895 (5th Cir. 1942). Savings and loan fraud: United States v. Hopps, 331 F.2d 332 (4th Cir. 1963); United States v. Sorce, 308 F.2d 299 (4th Cir. 1962); United States v. Grow, 394 F.2d 182 (4th Cir. 1968). Judge Baker scheme: Londos v. United States, 240 F.2d 1 (5th Cir. 1957). Debt consolidation scheme: United States v. Bertin, 254 F. Supp. 937 (D. Md. 1966). Matrimonial: Pereira v. United States, 347 U.S. (1953); Lindsay v. United States, 322 F.2d 688 (9th Cir. 1964) (wire fraud). Divorce mill: United States v. Edwards, 458 F.2d 875 (5th Cir. 1972). Illegal horse betting scheme: United States v. Bagdasian, 291 F.2d 163 (4th Cir. 1961) (wire fraud). Fraudulent financing of home improvement contracts: United States v. Schall, 371 F. Supp. 912 (W.D. Pa. 1974).

9-43.300 VENUE IN MAIL FRAUD PROSECUTIONS

The constitutional requirement regarding venue relates to the locality of the offense and not the personal presence of the offender. Since the gravamen of the offense of mail fraud is the use of mails, the place where the scheme is conceived or put into motion is immaterial. Kreuter v. United States, 218 F.2d 532 (5th Cir. 1955); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962). The criminal act according to 18 U.S.C. §1341 may be prosecuted in any district where one who, for the purpose of executing or attempting to execute a scheme or artifice to defraud, "places in any post office or authorized depository for mail matter, any matter or thing to be sent or delivered by the Postal Service," or "takes or receives therefrom, any such matter or thing," or "knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing." Accordingly, the mail fraud statute has its own "built-in" venue provisions.

Venue, then, must be charged in one of the following districts: (1) the district in which the count letter was placed in the mail by the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

defendant; see Irvin v. United States, 338 F.2d 770 (9th Cir. 1964); Marvin v. United States, 279 F.2d 451 (10th Cir. 1960); Holdsworth v. United States, 179 F.2d 933 (1st Cir. 1950); Kaufman v. United States, 163 F.2d 404 (6th Cir. 1947); Bozel v. United States, 139 F.2d 153 (6th Cir. 1943); (2) the district in which the defendant took or received the count letter from the mails; see, United States v. Cobb, 397 F.2d 416 (7th Cir. 1968); United States v. Sorce, 308 F.2d 299 (4th Cir. 1962); Marvin v. United States, 279 F.2d 451 (10th Cir. 1960); United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971); (3) the district in which the defendant knowingly caused a letter to be delivered according to the direction thereon; see, Hagner v. United States, 285 U.S. 427 (1931); Kreuter v. United States, 218 F.2d 532 (5th Cir. 1955); United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971); Nemec v. United States, 191 F.2d 810 (9th Cir. 1951); Gates v. United States, 122 F.2d 571 (10th Cir. 1941). Of course allegations and proof that defendant caused a letter to be placed in or taken from an authorized depository for mail matter is tantamount to alleging and proving that he/she did the act himself. Pereira v. United States, 347 U.S. 1 (1954); Marvin v. United States, 279 F.2d 451 (10th Cir. 1960); United States v. Brandom, 320 F. Supp. 520 (W.D. Mo. 1970).

Several decisions have held that venue for mail fraud prosecutions also lies in any district through which the count letter passed, citing as authority the provisions of 18 U.S.C. §3237(a). United States v. Fassoulis, 445 F.2d 13 (2d Cir. 1971); United States v. Sorce, 308 F.2d 299 (4th Cir. 1962); United States v. Inches, 253 F. Supp. 312 (D. Ariz. 1966); United States v. Duma, 228 F. Supp. 755 (S.D. N.Y. 1964); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962); Hesse v. United States, 187 F. Supp. 375 (E.D. N.Y. 1960). (Of the foregoing cases, Duma is the only one where the mailings charged were in districts through which the mails passed. The other all charged mailings in the district where the mail was deposited or in the district wherein the mails were delivered.) 18 U.S.C. §3237(a) provides in relevant part that any offense involving the use of the mails is a continuing offense and ". . . except as otherwise expressly provided by enactment of Congress . . ." may be prosecuted in any district from, through or into which such mail matter moves.

An application of 18 U.S.C. §3237(a) to 18 U.S.C. §1341 would significantly broaden venue possibilities to include any district through which a letter or other matter deposited in the mails passes on its way from the place of sending to the place of delivery. 18 U.S.C. §3237(a) must, however, be read in light of the constitutional requirements and the explicit provisions of 18 U.S.C. §1341. The locus of the offense under 18 U.S.C. §1341 has been carefully specified; and only the acts of "placing", "taking" and "causing to be delivered" at a specified place have been penalized. Venue, therefore, should be placed according to the specific prohibitions of 18 U.S.C. §1341, irrespective of 18 U.S.C. §3237(a). See Travis v. United States, 364 U.S. 631, 636-37 (1960), wherein the Supreme Court points out that "venue should not be made to depend upon the chance use of the mails, when Congress has so carefully indicated the locus of the crimes." The locus for mail fraud prosecutions is specifically set forth in 18 U.S.C. §1341; since Congress has "otherwise expressly provided", 18 U.S.C. §3237 is inapplicable to mail fraud. In view

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the foregoing, it is the Criminal Division's view that those cases authorizing prosecutions under 18 U.S.C. §1341 in districts through which the mails merely pass are incorrectly decided.

9-43.400 DRAFTING A MAIL FRAUD INDICTMENT

9-43.410 Scheme And Artifice

An indictment under 18 U.S.C. §1341 must sufficiently charge the two necessary elements of an offense within the statute: (a) that the accused devised and intended to devise a scheme and artifice to defraud, and (b) used or caused the use of the mails in execution or attempted execution of the scheme. United States v. Young, 232 U.S. 155 (1914). It is insufficient to charge the violation in the language of the statute. United States v. Hess, 124 U.S. 483, 488-489 (1888); United States v. Mercer, 138 F. Supp. 288 (N.D. Cal. 1955). The indictment must contain a reasonably detailed description of the particular scheme the defendant is charged with devising. United States v. Curtis, 506 F.2d 985 (10th Cir. 1974). Subsequent to retrial on a superseding indictment, the conviction of Curtis was affirmed. United States v. Curtis, supra. United States v. Bagdasian, 291 F.2d 163 (4th Cir. 1961); United States v. Faser, 303 F. Supp. 380 (E.D. La. 1969); United States v. Berlin, 254 F. Supp. 937 (D. Md. 1966).

In drafting a mail fraud substantive charge, it is not necessary to allege: (a) that the scheme or artifice contemplated a use of the mails in its execution, United States v. Young, supra; Wolpa v. United States, 86 F.2d 35 (8th Cir. 1936); (b) that anyone was actually defrauded, United States v. Gross, 416 F.2d 1205 (8th Cir. 1969); or (c) that anyone suffered a loss because of the scheme; United States v. George, 477 F.2d 508 (7th Cir. 1973); Hass v. United States, 93 F.2d 427 (8th Cir. 1938); United States v. Rowe, 56 F.2d 747 (2nd Cir. 1932); Linn v. United States, 234 F. 543 (7th Cir. 1916); United States v. McKay, 45 F. Supp. 1007 (W.D. Mich. 1942). While an intent to defraud is essential for conviction, it is not necessary to charge it where such an intention is apparent from the very nature of the scheme alleged. Hass v. United States, supra; Kriebel v. United States, 3 F.2d 692 (7th Cir. 1925).

Where the scheme was devised with an intent to defraud one or more specific individuals, whose identities are known, their names should be stated in the indictment. If their names are unknown, it is advisable to allege that the names of such persons are unknown to the grand jurors. See generally, Durland v. United States, 161 U.S. 306 (1896); United States v. Strauss, 443 F.2d 986 (1st Cir. 1971); Hyney v. United States, 44 F.2d 134 (6th Cir. 1930); Berry v. United States, 15 F.2d 634 (5th Cir. 1926). Where the scheme is aimed at the defrauding of a class of persons, it is sufficient to give a general description of the class. Butler v. United States, 317 F.2d 249 (8th Cir. 1963); United States v. Unger, 295 F.2d 889 (7th Cir. 1961); Belvin v. United States, 273 F.2d 583 (5th Cir. 1960);

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Wolpa v. United States, supra; Hyney v. United States, 44 F.2d 134 (6th Cir. 1930).

Where an important element of the scheme lies in the knowing use of false and fraudulent pretenses and representations for the purpose of obtaining money or property, the indictment should detail the pretenses and representations along with an allegation regarding their falsity and the knowledge of the accused regarding that fact. United States v. Comyns, 248 U.S. 349 (1919); Roper v. United States, 54 F.2d 845 (10th Cir. 1931); Krotkiewicz v. United States, 19 F.2d 421 (6th Cir. 1927); Kercheval v. United States, 12 F.2d 904 (8th Cir. 1926). It is not necessary to allege the manner or respect in which the misrepresentations were false, and the failure to so allege is not defective pleading. Chew v. United States, 9 F.2d 348, 352 (8th Cir. 1925); United States v. Schecter, 35 F.2d 11 (E.D. Pa. 1940); United States v. Womack, 98 F.2d 742, 744 (7th Cir. 1939); United States v. Curtis, 506 F.2d 985 (10th Cir. 1974). While false representations concerning value are often key features of the scheme and properly chargeable as such damage to a victim is not an essential element of the offense. It is not necessary to allege that the intended victims were to receive something worth less than they were to pay for it. United States v. New South Farm & Home Co., 241 U.S. 64 (1916); Moore v. United States, 2 F.2d 839 (7th Cir. 1924); Wilson v. United States, 275 F. 307 (2d Cir. 1921).

Where the making of false promises constitutes an element of the scheme and artifice, the indictment should allege it in the description of the scheme with details of the promises or promissory representations relied on. United States v. Comyns, supra; Durland v. United States, 161 U.S. 306 (1896). Fraudulent intent may appear either by allegations that the defendant had no intention of performing such promises and representations or by other sufficient allegations. United States v. Comyns, supra; Durland v. United States, supra; United States v. Rowe, 56 F.2d 747 (2d Cir. 1932); Kriebel v. United States, 8 F.2d 692 (7th Cir. 1925); Tucker v. United States, 224 F. 833 (6th Cir. 1915). Along these lines, it should be noted that in the description of the scheme in the indictment it is not necessary to set out verbatim written or printed matter. United States v. Suchman, 206 F. Supp. 688 (D. Md. 1962); Freeman v. United States, 244 F. 1 (7th Cir. 1917).

The precise time when the scheme was devised is not material so long as it is made to appear that it was devised prior to the use of the mails alleged to have been made in its execution or attempted execution. Bauman v. United States, 156 F.2d 534 (5th Cir. 1946); Hyney v. United States, supra; Chew v. United States, supra. No date, therefore, need be set, and if stated it is not binding on the prosecution. Fournier v. United States, 58 F.2d 3 (7th Cir. 1932); Munch v. United States, 24 F.2d 518 (5th Cir. 1928).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

An indictment is not necessarily duplicitious because it charges the devising of a scheme and artifice to defraud and for obtaining money and property by false and fraudulent pretenses, representations and promises. McLendon v. United States, 14 F.2d 12 (5th Cir. 1926); United States v. Culver, 224 F. Supp. 419, 424 (D. Md. 1963). Allegations which are unnecessary to the validity of the indictment, and which may therefore be disregarded as surplusage, include averments as to consummation of the scheme, Norcott v. United States, 65 F.2d 913 (7th Cir. 1933); United States v. Clark, 125 F.2d 913 (M.D. Penn. 1943); or as to a particular of execution; Cowl v. United States, 33 F.2d 794 (8th Cir. 1919); Silkworth v. United States, 10 F.2d 711 (2nd Cir. 1926); or as to ownership, Matthews v. United States, 15 F.2d 139 (8th Cir. 1926); Nelson v. United States, 16 F.2d 71 (8th Cir. 1926); Brady v. United States, 26 F.2d 400 (8th Cir. 1928); Hartzell v. United States, 72 F.2d 569 (8th Cir. 1934).

It is not necessary that the indictment identify each defendant with the particular role that he/she is to take in the execution of the scheme. Alexander v. United States, 95 F.2d 873 (8th Cir. 1938); see also, Moore v. United States, 2 F.2d 839 (7th Cir. 1924).

Because descriptions of the scheme are frequently quite lengthy, it is suggested that those descriptive paragraphs set out in full in one count be adopted and incorporated into another count by suitable reference pursuant to the provision of Rule 7(c), Federal Rules of Criminal Procedure. United States v. Garrison, 280 F.2d 493 (7th Cir. 1960); see also, Nichols v. United States, 48 F.2d 46 (5th Cir. 1931); Bartholomew v. United States, 177 F. 902 (6th Cir. 1910). Although the count in which such matters is set forth may be deficient in other respects, such fact does not destroy its validity for reference purposes. Crain v. United States, 162 U.S. 625, 633 (1895); United States v. Shavin, 287 F.2d 647 (7th Cir. 1961); Muench v. United States, 96 F.2d 332 (8th Cir. 1938); Robinson v. United States, 33 F.2d 238 (9th Cir. 1929). The courts have held that introductory paragraphs not part of another count and specifically referring to the counts involved are considered part of the numbered counts following them. United States v. McGuire, 381 F.2d 306, 318 (2d Cir. 1967) (SEC violations), citing, United States v. Taylor, 207 F.2d 437 (2d Cir. 1953). The essential allegations of a count may be supplied by reference to the matters set forth in the introductory parts of an indictment. United States v. Vanderpool, 528 F.2d 1205 (4th Cir. 1975). Several courts have held that the scheme need not be repeated in subsequent counts if a use of the mail is furtherance of the "aforesaid scheme" is charged in those counts, Nichols v. United States, 48 F.2d 46 (5th Cir. 1931); Clark v. United States, 298 F.2d 293 (8th Cir. 1924). However, we recommend against such draftmanship.

The following cases discuss the sufficiency of indictments charging particular schemes and may be of some use in drafting particular

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

indictments. United States v. Comyns, 248 U.S. 349 (1919) (service); United States v. New South Farm & Home Co., 241 U.S. 64 (1916) (land); Durland v. United States, 161 U.S. 306 (1896) (investment); Stokes v. United States, 157 U.S. 187 (1895) (mercantile); United States v. Unger, 295 F.2d 889 (7th Cir. 1961) (insurance); United States v. Bagdasian, 291 F.2d 163 (4th Cir. 1961) (bookie); United States v. Womack, 98 F.2d 742 (7th Cir. 1938) (insurance); Armstrong v. United States, 65 F.2d 853 (10th Cir. 1933) (service); Norcott v. United States, 65 F.2d 913 (7th Cir. 1933) (stock sales); Butler v. United States, 53 F.2d 79 (8th Cir. 1931) (worthless paper); Cochran v. United States, 41 F.2d 193 (8th Cir. 1929) (stock sales); Giles v. United States, 34 F.2d 110 (8th Cir. 1929) (trained dogs); Silkworth v. United States, 10 F.2d 711 (2nd Cir. 1926) (bucket shop); Snell v. United States, 2 F.2d 251 (5th Cir. 1924) (bucket shop); United States v. Bunker, 290 F. 207 (M.D. Tex., 1923) (stock sales); Bartholomew v. United States, 117 F. 902 (6th Cir. 1910) (forgery); Betts v. United States, 132 F. 228 (1st Cir. 1904) (bucket shop); United States v. Faser, 303 F. Supp. 380 (W.D. La. 1969) (breach of trust); United States v. Bertin, 254 F. Supp. 937 (D. Md. 1966) (debt consolidation); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962) (breach of trust); United States v. McKay, 45 F. Supp. 1007 (W.D. Mich. 1942) (breach of trust); United States v. Wimberly, 34 F. Supp. 904 (W.D. La. 1940) (breach of trust); United States v. Brunet, 227 F. Supp 766 (W.D. Wis. 1964) (correspondence school); United States v. Reicin, 497 F.2d 563 (8th Cir. 1974) (insurance indictment set out in text).

9-43.420 Charging A Use Of The Mails

Since the use actually made of the mails constitutes the gist of the offense, such use must be pleaded with certainty of time, place and circumstances. United States v. Cobb, 397 F.2d 416, 417 (7th Cir. 1968); United States v. DeWelles, 345 F.2d 387 (7th Cir. 1965); McNear v. United States, 60 F.2d 861 (10th Cir. 1932); Colburn, v. United States, 223 F. 590 (8th Cir. 1915); United States v. Culver, 224 F. Supp. 419 (D. Md. 1963). Whether the particular use made of the mails be placing in the mails, taking from the mails or causing delivery of a letter or other communication, it is essential to allege that the act was "for the purpose of executing and attempting to execute" the scheme. Robinson v. United States, 33 F.2d 238 (9th Cir. 1929); Krotkiewicz v. United States, 19 F.2d 421 (6th Cir. 1927); Moore v. United States, 2 F.2d 839 (7th Cir. 1924).

The allegation that the use made of the mails was "for the purpose of executing and attempting to execute the scheme" described is generally sufficient unless it appears from the face of the communication that it could not possibly have any effect in furthering or carrying out the scheme. United States v. Sampson, 371 U.S. 75 (1962); United States v. Brickey, 296 F. Supp. 742 (W.D. Ark. 1969); United States v. Pilnick, 267 F. Supp. 791 (S.D. N.Y. 1967); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962). The particular communication charged need not be one to or from an intended victim. Pereira v. United States, 347 U.S. 1 (1953).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Allegations as to the time and place of using the mails in violation of the statute are essential. Hagner v. United States, 285 U.S. 427 (1931); Durland v. United States, 161 U.S. 306 (1896); United States v. Cobb, 397 F.2d 416 (7th Cir. 1968); Bauman v. United States, 156 F.2d 534 (5th Cir. 1946). This burden is met, however, where the mailing is charged as occurring on or about a stated date, prior to the return of the indictment, within the statutory period of limitations and during the existence of the scheme. United States v. Kenofsky, 243 U.S. 440 (1917); Whiteside v. United States, 346 F.2d 500, 503-504 (8th Cir. 1965); Jacobs v. United States, 395 F.2d 469, 478 (8th Cir. 1968); United States v. Guest, 74 F.2d 730 (2nd Cir. 1935); Chew v. United States, 9 F.2d 348 (8th Cir. 1925). Allegation as to place of deposit or delivery is sufficient where it states a definite location showing venue within the jurisdiction of the court. Salinger v. United States, 272 U.S. 542 (1926); United States v. Sorce, 308 F.2d 299 (4th Cir. 1962); Holdsworth v. United States, 179 F.2d 933 (1st Cir. 1950).

The particular communication, whether a letter, postal card, package, writing, circular, pamphlet, or advertisement, should be particularly identified and described. United States v. Cobb, 397 F.2d 416 (7th Cir. 1968); Tenenbaum v. United States, 11 F.2d 927 (5th Cir. 1926); United States v. Suchman, 206 F. Supp. 688 (D. Md. 1962); United States v. Garrison, 168 F. Supp. 622 (E.D. Wis. 1958). It is not necessary, however, to allege that it contained any false pretense or representation. Tenenbaum v. United States, 11 F.2d 927 (5th Cir. 1926); United States v. Culver, 224 F. Supp. 419 (D. Md. 1963); nor how it would aid or was intended to aid in execution of the scheme. Durland v. United States, 161 U.S. 306 (1896); Muench v. United States, 96 F.2d 332 (8th Cir. 1938); Chew v. United States, 9 F.2d 348 (8th Cir. 1925).

Each mailing in furtherance of the scheme and artifice to defraud is a separate offense. Badders v. United States, 240 U.S. 391 (1916). Accordingly, proper draftsmanship requires that only one mailing should be alleged in each count, otherwise the count would be duplicious. However, in that case the proper relief is not dismissal of the indictment, but an election by the government as to which mailing it will proceed on. United States v. Goodman, 285 F.2d 378, 379 (5th Cir. 1961).

It is very important that the draftsman charged the proper method of violation of the statute. For example, if the count letter is mailed to the district of indictment, from another district, be sure to charge a taking from the mails, or delivery according to the direction thereon, rather than a placing in the mail. Conversely, charge a placing in the mail in the district of indictment of a letter addressed to someone outside that district. See, Hagner v. United States, 285 U.S. 427 (1931), which points up the problems incident to inept pleading of the use of the mails in furtherance of the scheme.

9-43.421 Charging A Placing In The Mails

Where the act relied on is the mailing of a communication in execution of the scheme, such act is properly and sufficiently charged by alleging in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the words of the statute that the accused "placed" (or, caused to be placed) the described communication in a named post office or in "an authorized depository for mail matter" in a named city and state, "to be sent and delivered by the United States Postal Service" to a named person at a named place. Irwin v. United States, 338 F.2d 770 (9th Cir. 1964); Marvin v. United States, 279 F.2d 451 (10th Cir. 1960); Holdsworth v. United States, 179 F.2d 933 (1st Cir. 1950); United States v. Herziq, 26 F.2d 487 (D.C. Cir. 1928). Where the act of mailing is so alleged it is not necessary to allege that the communication was enclosed in an envelope; that such envelope was addressed; that postage was prepaid; or, if there is more than one defendant, which of them committed the act. Wolpa v. United States, 86 F.2d 35 (8th Cir. 1936); Hyney v. United States, 44 F.2d 134 (6th Cir. 1930); Chew v. United States, 9 F.2d 348 (8th Cir. 1925). It is unnecessary to charge that the defendant "wilfully" caused to be placed in the mails, or "wilfully" caused to be taken and received from the mails. Parr v. United States, 265 F.2d 894, 901 (5th Cir. 1959); United States v. Suchman, 206 F. Supp. 688, 689 (D. Md. 1962). See also, United States v. Gerhart, 275 F. Supp. 443, 454 (S.D.W. Va. 1967).

9-43.422 Charging A Taking From The Mails

When dealing with the taking and receiving of a communication from the mails, such act is properly and sufficiently charged by an allegation under the statute that the defendant did take and receive (or, cause to be taken and received) the described communication from the mails. United States v. Cobb, 397 F.2d 416 (7th Cir. 1968); United States v. Sorce, 308 F.2d 299 (4th Cir. 1962); Marvin v. United States, 279 F.2d 451 (10th Cir. 1960); Finnegan v. United States, 231 F. 561 (6th Cir. 1916); United States v. Wolfson, 322 F. Supp. 798 (D. Del. 1971).

9-43.423 Charging A Delivery by Mail According To The Director Thereon

Where the act relied on is the delivery by mail of a communication in execution of the scheme, such act is properly and sufficiently charged by alleging in the words of the statute that the defendant did "knowingly cause" the described communication "to be delivered by mail" to a named person at a named place within the jurisdiction, "according to the direction thereon," or "at the place at which it was directed to be delivered by the person to whom it was addressed." Kreuter v. United States, 218 F.2d 532 (5th Cir. 1955); Nemec v. United States, 191 F.2d 810 (9th Cir. 1951); Gates v. United States, 122 F.2d 571 (10th Cir. 1941); Hartzell v. United States, 72 F.2d 569 (8th Cir. 1934); Hyney v. United States, supra.

Where it is charged that the accused caused delivery of a letter or other communication in violation of the third clause of the statute, it is necessary to allege that he/she did so knowingly. United States v. Richman, 369 F.2d 465 (7th Cir. 1966); Glenn v. United States, 303 F.2d 536 (5th Cir. 1962); Hyney v. United States, supra. This is not necessary where it is

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

charged that the defendant placed something in the mails or took something therefrom in violation of the first or second clauses since the statute does not use the word "knowingly" in those connections. Benham v. United States, 13 F.2d 558 (6th Cir. 1926); United States v. Bunker, 290 F. 207 (N.D. Tex. 1923); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962). The element established by "knowingly", when a causing to be delivered is charged, can be satisfactorily described by the phrase "for the purpose of executing the aforesaid scheme and attempting to do so" so that a lack of the specific charge of "knowingly" is not necessary fatal. Stevens v. United States, 306 F.2d 834 (5th Cir. 1962); Glenn v. United States, *supra*. However, good draftsmanship dictates that "knowingly" be expressly charged in order to obviate an attack on the indictment.

9-43.424 Sample Mailing Count

*drafts-person* → The following sample mailing charge can be tailored to fit the appropriate factual situation. In a multiple count indictment, the draftsman should not forget to incorporate by reference in subsequent counts the scheme and artifice charged in the first count. This might appropriately be accomplished as follows:

COUNT II

1. The grand jury alleges and incorporates by reference herein all paragraphs of Count I of this Indictment, excepting the last paragraph thereof (the mailing charge), as constituting a scheme and artifice to defraud.

2. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the District of \_\_\_\_\_, (name the defendants), the defendants herein, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did

(a) place and cause to be placed in an authorized depository for mail matter, a letter addressed to \_\_\_\_\_ from \_\_\_\_\_, to be sent and delivered by the Postal Service, or

(b) take and receive, and cause to be taken and received, from the mails a letter addressed to \_\_\_\_\_ from \_\_\_\_\_, or

(c) knowingly cause to be delivered by mail, according to the direction thereon, a letter addressed to \_\_\_\_\_ from \_\_\_\_\_ in violation of 18 U.S.C. §1341. It is unnecessary to charge that the defendant "wilfully" caused to be placed in the mails, or "wilfully" caused to be taken and received from the mails. Parr v. United States, 265 F.2d 894, 901 (5th Cir. 1959); United States v. Suchman, 206 F. Supp. 688, 689 (D. Md. 1962). See also, United States v. Gerhart, 275 F. Supp. 443 (S.D. W. Va. 1967).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

See also, Appendix of Forms, Rules of Criminal Procedure, Form 3: Indictment for Mail Fraud; Index, Federal Rules of Criminal Procedure, Rules 1 to 14.

9-43.500 EVIDENCE

9-43.510 Scheme And Artifice To Defraud

9-43.511 Intent to Defraud

It is indispensable in proving the existence of a scheme to defraud (although not a specific intent to use the mails) on the part of defendants. Durland v. United States, 161 U.S. 306, 313 (1896); United States v. Porter, 441 F.2d 1204 (8th Cir. 1971); United States v. Seasholtz, 435 F.2d 4 (10th Cir. 1970); United States v. Rabinowitz, 327 F.2d 62 (6th Cir. 1964); Beck v. United States, 305 F.2d 595, 599 (10th Cir. 1962). Direct proof of willful intent is not necessary but can be inferred from the activities of the parties involved. Golubin v. United States, 393 F.2d 590 (10th Cir. 1968); United States v. Andreadis, 366 F.2d 423 (2nd Cir. 1966); United States v. Hopkins, 357 F.2d 14 (6th Cir. 1966); Gusow v. United States, 347 F.2d 755 (10th Cir. 1964); Babson v. United States, 333 F.2d 662 (9th Cir. 1964); Henderson v. United States, 202 F.2d 400 (6th Cir. 1953); United States v. Bertin, 254 F. Supp. 937 (D. Md. 1966).

9-43.512 Persons Defrauded

In the absence of an express allegation that the accused planned to defraud everyone who dealt with him/her it is not necessary to prove such an intent. Myers v. United States, 223 F. 919 (2d Cir. 1915). See also, Stephens v. United States, 41 F.2d 400 (9th Cir. 1930); Levinson v. United States, 5 F.2d 567 (6th Cir. 1925).

9-43.513 False Representations

Where false representations are charged, the government is not required to prove all representations alleged but only one or more or a sufficient number to show that the scheme was actually set up and that the defendant intentionally acted in some way to further its operation with knowledge that it included the making of falsifications. Schafer v. United States, 265 F.2d 750, 753 (8th Cir. 1959); Kaplan v. United States, 18 F.2d 939, 943 (2d Cir. 1927); Holmes v. United States, 134 F.2d 125, 133 (8th Cir. 1943); Havener v. United States, 49 F.2d 196 (10th Cir. 1931); Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941); Anderson v. United States, 369 F.2d 11, 15 (8th Cir. 1966).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

sales-  
persons → Where the scheme to defraud included making sales by means of certain false representations conveyed through salesmen, proof of the same representations being made at widely different places to different persons by numerous agents in the same period is evidence that the scheme existed and that the particular salesman was carrying it on. Reistroffer v. United States, 258 F.2d 379, 387 (8th Cir. 1958). Although such testimony is hearsay, and therefore inadmissible unless it falls within an exception to the hearsay rule, such statements are permitted if they have been expressly or impliedly authorized, or have been ratified by the person against whom they are offered. Beck v. United States, 305 F.2d 595, 600 (10th Cir. 1962) and cases cited therein; Pritchard v. United States, 386 F.2d 760 (8th Cir. 1967); Fabian v. United States, 358 F.2d 187, 191 (8th Cir. 1966).

9-43.514 Loss To Victims

The government is not required to prove that anyone was actually defrauded or actually sustained a loss. United States v. Gross, 416 F.2d 1205 (8th Cir. 1969); United States v. Bush, 552 F.2d 641 (7th Cir. 1975); United States v. George, 477 F.2d 508 (7th Cir. 1973); Shale v. United States, 388 F.2d 616 (5th Cir. 1968); United States v. Andreadis, 366 F.2d 423 (2nd Cir. 1966); New England Enterprises, Inc. v. United States, 400 F.2d 58, 72 (1st Cir. 1968). But evidence of the success of the scheme or loss on the part of the victim is admissible to show an intent to defraud. United States v. Meyer, 359 F.2d 837 (7th Cir. 1966); Farrell v. United States, 321 F.2d 409 (9th Cir. 1963).

9-43.515 Impression Testimony

Impression testimony, that is, testimony of victims as to how they had been misled by defendants, is admissible to show an intent to defraud. The leading case on impression testimony is Phillips v. United States, 356 F.2d 297, 307 (9th Cir. 1965). See also, Farrell v. United States, supra; United States v. Burton, 443 F.2d 912 (4th Cir. 1971); Lustiger v. United States, 386 F.2d 132 (9th Cir. 1967); Linden v. United States, 254 F.2d 560 (4th Cir. 1958); Silverman v. United States, 213 F.2d 405 (5th Cir. 1954).

9-43.520 Evidentiary Rules Of Conspiracy

Where a scheme and artifice to defraud is shared by two or more, it becomes a conspiracy to defraud; the rules of evidence are the same as where a conspiracy is charged, and the acts of each party in furthering the common scheme are the acts of all. Pinkerton v. United States, 328 U.S. 640, 647 (1945); Blue v. United States, 138 F.2d 351, 358 (6th Cir. 1943); Isaacs v. United States, 301 F.2d 706 (8th Cir. 1965); United States v. Joyce, 499 F.2d 9, 16 (7th Cir. 1974); United States v. Perkal, 530 F.2d 604 (4th Cir. 1976). Although joining a conspiracy subjects the later joiner to some of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the consequences of earlier activity by others, an individual cannot be criminally liable for substantive offenses committed by coconspirators or coschemers before that individual joined the scheme or after he/she had withdrawn from it. United States v. Knippenberg, 502 F.2d 1056, 1059 (7th Cir. 1973); Gradsky v. United States, 376 F.2d 993, 997 (5th Cir. 1967). Accordingly, he/she is not criminally responsible for the substantive mailings by coschemers before he/she joined or after he/she withdrew from the fraudulent scheme. Glazerman v. United States, 421 F.2d 547, 551 (10th Cir. 1970).

See discussion of conspiracy to violate the mail fraud statute in USAM 9-51.700, infra.

9-43.530 Similar Acts Or Conduct

Evidence of other act or conduct of a like or similar nature will not be admitted to prove a character of a person in order to show he/she acted in conformity therewith. However, such evidence is admitted for other purposes such as proof of motive, opportunity, intent, plan, scheme, knowledge, modus operandi, or absence of mistake or accident. United States v. Nunez, 483 F.2d 453 (9th Cir. 1973); United States v. Pitman, 475 F.2d 1335 (9th Cir. 1973). Evidence of other offenses not charged in the indictment is admissible to show intent. Goodman v. United States, 273 F.2d 853, 857 (8th Cir. 1960). Other similar transactions, before and after acts charged in the indictment, are admissible as proof of intent. United States v. Mancuso, 444 F.2d 619, 695 (5th Cir. 1971); McConkey v. United States, 444 F.2d 788 (8th Cir. 1971) (wire fraud); United States v. Prionas, 438 F.2d 1049 (8th Cir. 1971); New England Enterprises, Inc. v. United States, 400 F.2d 58, 70 (1st Cir. 1969); United States v. Rosenblum, 339 F.2d 473 (2nd Cir. 1964); Fabian v. United States, 358 F.2d 187, 193 (8th Cir. 1966).

9-43.540 Communication To Victims

Since success of the scheme is not essential to completion of the offense, it is not necessary to prove communication of the alleged false representations to the victims. United States v. Sylvanus, 192 F.2d 96, 106 (7th Cir. 1951); Kreuter v. United States, 218 F.2d 532 (5th Cir. 1955). Since it is the use of the mails in furtherance of the fraudulent scheme that is prohibited rather than fraud upon any recipient of material sent through the mails, the testimony of a victim is admissible to prove the scheme even though there has been no use of the mails in defrauding him/her. Frank v. United States, 202 F.2d 559, 563 (10th Cir. 1955); United States v. Schaefer, 299 F.2d 625, 629 (7th Cir. 1962); Atkinson v. United States, 344 F.2d 97, 99 (8th Cir. 1965); Henderson v. United States, 202 F.2d 400, 405 (6th Cir. 1953).

9-43.550 Complaint Letters

Complaint letters received by defendants are admissible as relevant to the issue of intent to defraud. The inference might readily be drawn that,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

since the defendant knew victims were being misled by solicitation literature and other representations, the continued operation of the business despite this knowledge showed the existence of a scheme defraud. United States v. Middlebrooks, 431 F.2d 299, 301 (5th Cir. 1970); United States v. Press, 336 F.2d 1003, 1011 (2nd Cir. 1964); United States v. Sheehan, 428 F.2d 67 (8th Cir. 1970).

9-43.560 Parole Evidence Rule

The parole evidence rule regarding executed contracts does not make inadmissible the oral testimony of victims to show fraud in the transaction, Mesch v. United States, 407 F.2d 1286 (10th Cir. 1969); Shale v. United States, 388 F.2d 616 (5th Cir. 1968); Nickles v. United States, 381 F.2d 258 (10th Cir. 1967); Gibson v. United States, 268 F.2d 568 (D.C. Cir. 1959).

9-43.570 Acts Beyond The Statute Of Limitations

Proof of transactions and events occurring more than five years prior to the return of the indictment is admissible if part of the scheme. The gist of the offense is the use of the mails; if the prohibited use of the mails was within the period, the prosecution is timely. It is no defense that the scheme was found earlier, and proof running back is admissible to show the scheme and intent if it is connected up with the scheme existing when use of the mails occurred. United States v. Blosser, 440 F.2d 697, 699 (10th Cir. 1971); United States v. Brandom, 479 F.2d 830 (8th Cir. 1973). The fact that a scheme may extend back beyond the limitation period does not outlaw an offense committed in furtherance of the scheme within the period. United States v. Gross, 416 F.2d 1205, 1210 (8th Cir. 1969); United States v. Andreas, 458 F.2d 491 (8th Cir. 1972); United States v. Ashdown, 509 F.2d 793, 797 (5th Cir. 1975); United States v. Brandom, *supra*.

9-43.580 Good Faith

Good faith is a complete defense to a charge of mail fraud. Beck v. United States, 305 F.2d 595, 599 (10th Cir. 1962); United States v. Baren, 305 F.2d 527, 533 (2d Cir. 1962); Harris v. United States, 261 F.2d 792, 796 (9th Cir. 1958); Silverman v. United States, 213 F.2d 405, 407 (5th Cir. 1954); Rabinowitz v. United States, 327 F.2d 62 (6th Cir. 1964). Evidence of similar transactions carried out honestly tends to show good faith. United States v. Shavin, 287 F.2d 647 (7th Cir. 1961). Proof of an expectation of performance must, however, be more than evidence of a mere hope. Williams v. United States, 278 F.2d 535 (9th Cir. 1960). No amount of honest belief on the part of the defendant that the enterprise promoted by him/her will ultimately make profits for investors in such an enterprise will excuse false representations made to obtain money for the enterprise. Foshay v. United States, 68 F.2d 205, 210 (8th Cir. 1933); United States v. Painter, 314 F.2d 939, 943 (4th Cir. 1963).

9-43.590 Proof of Mailing

The fact of mailing is a necessary element of the offense of mail fraud. But such a mailing can be proved circumstantially. The use of the mails can be proved circumstantially by a witness who testifies that the specific item would have been mailed as a matter of routine or custom as part of an office's practice and procedure. United States v. Scott, 668 F.2d 384, 388 (8th Cir. 1981); United States v. Ledesma, 632 F.2d 670, 675 (7th Cir.), cert. denied, 449 U.S. 998 (1981); United States v. Brackenridge, 590 F.2d 810, 811 (9th Cir.), cert. denied, 440 U.S. 985 (1979); United States v. Joyce, 499 F.2d 9, 15 (7th Cir.), cert. denied, 419 U.S. 1031 (1974); United States v. Flaxman, 495 F.2d 344, 349 (7th Cir.), cert. denied, 419 U.S. 1031 (1974).

9-43.600 [RESERVED]

9-43.700 CONSPIRACY TO VIOLATE THE MAIL FRAUD STATUTE

The federal conspiracy statute, 18 U.S.C. §371, makes it an offense to conspire to commit, inter alia any offense against the United States. In proving such a conspiracy, it must be shown that (a) an agreement to violate a federal statute existed, (b) the defendant was a party to the agreement, and (c) an overt act to effect the object of the conspiracy was performed. Ingram v. United States, 360 U.S. 672 (1959). An excellent discussion of conspiracy law is contained in the "Manual of Jury Instructions in Federal Criminal Cases", Part II, Chapter X, "Conspiracy Offense", adopted by the Seventh Circuit Judicial Conference Committee on Jury Instructions as reported in 36 F.R.D. 502 et seq. It is not the purpose here to develop conspiracy law; however, a few observations relating specifically to conspiracies to commit mail fraud should be noted.

9-43.710 The Agreement to Commit Mail Fraud

In order to sustain a conviction for conspiracy to violate the mail fraud statute, 18 U.S.C. §1341, it must be alleged and proved that the conspirators intended to commit the substantive offense prohibited. Since the use of the mails is the substantive violation under 18 U.S.C. §1341, the indictment must allege, and the proof show, that the conspirators intended to utilize the mails in furtherance of a fraudulent scheme. Pereira v. United States, 347 U.S. 1 (1954); Farmer v. United States, 223 F. 903, 907 (2d Cir. 1915); Blue v. United States, 138 F.2d 351, 360 (6th Cir. 1943). An averment of intent is accomplished by merely alleging that the defendants "conspired" to use the mails in furtherance of the unlawful scheme. See generally, Williams v. United States, 208 F.2d 447 (5th Cir. 1953). Direct proof of an explicit agreement is not necessary to show conspiracy, which is usually proved by circumstantial evidence. The acts of conspiracy, taken by themselves, are rarely of an unequivocally guilty character, and they can only properly be estimated when connected with all the surrounding circumstances. Blue v. United States, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

When applying the conspiracy statute (18 U.S.C. §371) to mail fraud schemes involving two or more people, the question arises whether the government must prove a higher level of scienter on the part of the conspirator than it would have to prove if it simply charged the conspirator (as a co-schemer) with substantive mail fraud. With substantive mail fraud, the government is not required to prove actual intent to use the mails as long as it can prove that the defendant co-schemer could have reasonably foreseen a use of the mails in furtherance of the fraud. Pereira v. United States, *supra*; United States v. Johnston, 547 F.2d 282, 284 (5th Cir. 1977), *cert. denied*, 431 U.S. 942 (1978); United States v. Curtis, 537 F.2d 1091, 1095 (10th Cir.), *cert. denied*, 429 U.S. 962 (1976). But the circuits have apparently divided in recent years (without recognizing the division) on whether or not actual intent to use the mails is required when a conspiracy charge is added to substantive mail fraud. Pereira clearly holds that a conspiracy to commit mail fraud requires an "agreement to use the mails." Pereira v. United States, *supra*, at 12. Although the opinion does not say so, the facts in Pereira suggest that "an agreement to use the mails" is established when an actual use of the mails occurs which was reasonably foreseeable to the conspirators.

However, in 1976 the Eighth Circuit in United States v. Donahue, 539 F.2d 1131, 1135 (8th Cir. 1976), held that "where the charge is conspiracy to violate [the mail or wire fraud statutes], the government must also show that the scheme contemplated the use of the medium in question." Donahue relied principally on Blue v. United States, *supra*, an opinion ten years prior to Pereira in which the question was raised with earlier but nearly identical versions of the mail fraud and conspiracy statutes. Blue specifically held that with the charge of conspiracy to commit mail fraud, as opposed to substantive mail fraud, "the Government has to sustain a heavier burden of proof as to the intent of the conspirators—not only to defraud, but also to defraud by use of the mails." *Id.*, at 360. See also, Fisher v. United States, 324 F.2d 775, 780 (8th Cir. 1963), *cert. denied*, 377 U.S. 999 (1964) and Guardalibini v. United States, 128 F.2d 984, 985 (5th Cir. 1942).

But in United States v. Reed, 721 F.2d 1059, 1060 (6th Cir. 1983), the Sixth Circuit overruled Blue on this very point and held that the level of scienter necessary to prove conspiracy to commit mail fraud is no different than that necessary to prove substantive mail fraud, namely, a "reasonably foreseeable" use of the mails. Accordingly, the Eighth Circuit's Donahue opinion has become less convincing.

In 1977 the Seventh Circuit addressed the issue at length and, without mentioning any of the cases cited above except for Pereira, held that in the case of conspiracy to commit mail fraud, it is not necessary for the government to prove that a defendant agreed to join the conspiracy with knowledge that the conspiracy contemplated the unlawful use of the mails or that the defendants conspired intending to use the mails. United States v. Craig, 573 F.2d 455, 485-86 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). The Craig court relied in part on United States v. Mauro, 501 F.2d

45, 51 (2nd Cir. 1974), in support of the proposition "that the mental state required for a conspiracy conviction is not greater than that necessary to commit the underlying substantive offense." United States v. Craig, *supra*, at 485. Mauro in turn is based principally on United States v. Feola, 420 U.S. 671, 694-95 (1974). In Feola, the court upheld the convictions of the appellants for conspiring to assault a federal officer even though there was no proof that the appellants knew the "federal" status of the victim. As the Seventh Circuit explained in United States v. Craig, *supra*, at 486:

proof of the offense of mail fraud requires a showing of a scheme to defraud and a mailing which was caused by a schemer for purposes of executing the scheme. In a mail fraud prosecution, there is no need to prove the intent of the defendant to use the mails. United States v. Tenebaum, 327 F.2d 210 (7th Cir.), *cert. denied*, 377 U.S. 905, 84 S.Ct. 1165, 12 L.Ed. 2d 177 (1964). It is sufficient to show that the mailings were in furtherance of the scheme, and were caused by the defendants. Hence, culpability for conspiracy to commit the offense of mail fraud requires only that one agree with others to commit the acts which constitute the substantive offense of mail fraud, i.e. one must agree to participate in a scheme to defraud in which the reasonably foreseeable use of the mails in furtherance of the scheme is caused by a co-schemer/co-conspirator.

Conspiracy to commit a crime is a different offense from the crime which is the object of the conspiracy. Pereira v. United States, *supra*, at 11; Morris v. United States, 7 F.2d 785 (8th Cir. 1925). Accordingly, a conspiracy to violate the mail fraud statute can be accomplished without mailing a letter. Blue v. United States, *supra*, at 360; Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926).

Care must be taken to distinguish between the development of a single overall conspiracy encompassing a scheme to defraud and the development of several separate and variant conspiracies, since a variation in proof may be fatal. Kotteakos v. United States, 328 U.S. 750 (1946); Blumenthal v. United States, 322 U.S. 539 (1947); Isaacs v. United States, 301 F.2d 706 (8th Cir. 1962). United States v. Perez, 489 F.2d 51 (5th Cir. 1973).

The answer to the question whether there is a single conspiracy, therefore, depends on whether there is a single agreement. If there is but one conspiracy. A test whether the activities of the defendant constitute a single conspiracy is whether there is a common purpose underlying the separate acts, whether the same objective is being pursued in each instance, and whether there is concerted action to achieve this end. It follows hence that the fact that the conspirators undertook to commit several crimes does not necessitate

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the conclusion that there are several conspiracies. A conspiracy may be likened to a wheel, with the hub constituting the central figure, the spokes forming its various branches and ramifications, all being held together by the rim, which represents the agreement.

United States v. Speed, 78 F. Supp. 366, 368-369 (D. D.C. 1948), cited with approval in Hayes v. United States 329 F.2d 209, 213 (8th Cir. 1964); Koolish v. United States, 340 F.2d 513, 524 (8th Cir. 1965); Friedman v. United States, 347 F.2d 697, 708 (8th Cir. 1965).

If an overall conspiracy is proved, it is immaterial whether or not there were minor conspiracies or schemes inside the overall conspiracy, and that some of the defendants participated in these inner or smaller schemes, but not in all of them. Koolish v. United States, supra, at 525, cited with approval in United States v. McKuin, 434 F.2d 391 (8th Cir. 1970). See also, United States v. Perez, 489 F.2d 51 (5th Cir. 1973).

#### 9-43.720 Participation in the Conspiracy

"Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose may be inferred from a 'development and a collocation of circumstances'." Glasser v. United States, 315 U.S. 60, 80 (1942). Once there is satisfactory proof of the existence of a conspiracy, slight evidence connecting a defendant with the conspiracy may be sufficient. The question of a particular defendant's connection with it may be merely a matter of "whether the stick fits so natural into position in the fagot as to convince that it is part of it." Phelps v. United States, 160 F.2d 858, 867 (8th Cir. 1947). It is not necessary that conspirators be aware of each other's existence, or their respective roles in carrying out the conspiracy. Isaacs v. United States, 301 F.2d 706, 725 (8th Cir. 1962); United States v. Gilboy, 160 F. Supp. 442 (M.D. Pa. 1958).

A conspiracy, especially one which contemplates a continuity of purpose and a continued performance of acts, is presumed to continue until there has been an affirmative showing that it has terminated; and its members continued to be conspirators until there has been affirmative showing that they have withdrawn. Hyde v. United States, 225 U.S. 347, 366-67 (1962); Pinkerton v. United States, 328 U.S. 640 (1946); Blue v. United States, 138 F.2d 351, 360 (5th Cir. 1943); Marino v. United States, 91 F.2d 691 (9th Cir. 1937); United States v. Etheridge, 424 F.2d 951, 964 (6th Cir. 1970); United States v. Goldberg, 401 F.2d 644, 648 (8th Cir. 1969); United States v. Serlin, 538 F.2d 737, 743 (7th Cir. 1976), and cases cited therein.

The indictment may name some conspirators who are not charged in the indictment as defendants, and may allege conspirators who are unknown to the grand jury. Romontio v. United States, 400 F.2d 618 (10th Cir. 1968); Herman v. United States, 289 F.2d 362 (5th Cir. 1961). Such an allegation, when proper, may prevent unnecessary dismissals of conspirators where their other named co-conspirators are acquitted. Romontio v. United States, supra, at 619; United States v. Sparrow, 470 F.2d 885 (10th Cir. 1972). But

see, Worthington v. United States, 64 F.2d 936 (7th Cir. 1933) regarding the necessity that there is a person capable of being a conspirator.

9-43.730 Acts Committed in Furtherance of the Conspiracy

Once a conspiracy has been established, the acts and declarations of each conspirator are the acts and declarations of all, United States v. Garrison, 168 F. Supp. 622 (E.D. Wis. 1958), provided, of course, that the defendants against whom the acts are admitted were knowingly participants in the agreement. Phillips v. United States, 356 F.2d 297 (9th Cir. 1965). Although joining a conspiracy subjects the late joiner to some of the consequences of earlier activity by others in furtherance of the conspiracy, an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined the conspiracy or after he/she had withdrawn from it. United States v. Knippenberg, 502 F.2d 1056, 1059 (7th Cir. 1973); Gradsky v. United States, 376 F.2d 993, 995 (5th Cir. 1967). Accordingly, he/she is not responsible for the substantive mailings by his/her coconspirators before he/she joined or after he/she withdrew from the conspiracy. Glazerman v. United States, 421 F.2d 547, 551 (10th Cir. 1970).

As stated in Yates v. United States, 364 U.S. 298, at 334: "It is not necessary that an overt act be the substantive crime charged in the indictment as the object of the conspiracy. Pierce v. United States, 252 U.S. 239, 224; United States v. Rabinowich, 238 U.S. 78, 86. Nor, indeed, need such an act, taken by itself, even be criminal in character. Braverman v. United States, 317 U.S. 49. The function of an overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work', Carlson v. United States, 187 F.2d 366, 370, and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence.

See also, Holmes v. United States, 134 F.2d 125, 134 (8th Cir. 1943). All conspirators need not join in the commission of an overt act, for, if one of the conspirators commits an overt act in furtherance of the conspiracy, it becomes the act of all. Marino v. United States, 91 F.2d 691, 695 (9th Cir. 1937). United States v. Brown, 335 F.2d 170, 172 (2nd Cir. 1964). The government is not limited to overt acts pleaded in proving the conspiracy. It may show other acts of the conspirators occurring during the life of the conspiracy. United States v. Perez, 489 F.2d 51, 70 (5th Cir. 1973). Substantive offenses can be charged as overt acts. Pinkerton v. United States, 328 U.S. 640, 644 (1946).

Acts of concealment in furtherance of the objects of the conspiracy can be charged as overt acts. United States v. Littman, 421 F.2d 981 (2nd Cir. 1970); Walters v. United States, 256 F.2d 840 (9th Cir. 1958). But acts subsequent to attaining the conspiratorial objects, which do not further the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

objective, cannot support a conviction. See, Grunewald v. United States, 352 U.S. 391 (1957); Krulewitch v. United States, 336 U.S. 440 (1949); Lutwak v. United States, 344 U.S. 604 (1953).

9-43.740 Drafting a Conspiracy Count

The indictment must allege and the proof show that the conspirators agreed with each other to utilize the mails in furtherance of a fraudulent scheme. Accordingly, the indictment should charge that the defendants conspired to use the mails in furtherance of a scheme to defraud, rather than that they conspired to devise a scheme and artifice to defraud. The latter pleading is fatally defective. See United States v. Strauss, 283 F.2d 155 (5th Cir. 1960). But as indicated in USAM 9-43.710, supra, there appears to be a division of authority on whether or not a conspiracy to commit mail fraud requires proof of an actual intent to use the mails as opposed to requiring only a reasonably foreseeable use of the mails.

Set forth below is a suggested form for use in charging a conspiracy to violate the mail fraud statute, in which the scheme and artifice set forth in a substantive count is incorporated by reference into the conspiracy count.

Commencing on or about (date) and continuing to (date) or return of this indictment), in the \_\_\_\_\_ District of \_\_\_\_\_ and within the jurisdiction on this court (name defendants in capital letters), the defendants herein, did wilfully and knowingly conspire, combine, confederate and agree together and with each other, and with other persons to the Grand Jury unknown, to commit offenses against the United States, that is to say, to use the mails and cause the use of the mails in furtherance and execution of a scheme and artifice to defraud is set for obtaining money and property by means of false and fraudulent pretenses, representations and promises, which said scheme and artifice to defraud is set forth more fully in paragraphs (all paragraphs except the charging mailing paragraph) of Counts 1 of this indictment, all of which are incorporated by reference herein as if fully set forth herein, the object of said conspiracy being violations of Title 18, United States Code, Section 1341.

In furtherance of the conspiracy, and to effect the objects thereof, the defendants did commit, among others, the following overt acts in the \_\_\_\_\_ District of \_\_\_\_\_ and elsewhere:

OVERT ACTS

(LIST OVERT ACTS)

All in violation of 18 U.S.C. §371.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
CHAPTER 44

	<u>Page</u>
9-44.000	<u>FRAUD BY WIRE, RADIO OR TELEVISION - 18 U.S.C. §1343</u> 1
9-44.100	INVESTIGATION OF COMPLAINTS 1
9-44.200	ELEMENTS OF THE OFFENSE 1
9-44.210	<u>The Scheme and Artifice to Defraud</u> 2
9-44.220	<u>Use of a Wire Communication in Interstate or Foreign Commerce</u> 2
9-44.221	In Execution of the Scheme and Artifice 3
9-44.222	Lulling Telegrams or Telephone Calls 3
9-44.230	<u>Representative Schemes</u> 3
9-44.231	Generally 3
9-44.232	Fraud on the Media (Telephone Company) 3
9-44.300	VENUE IN FRAUD BY WIRE PROSECUTIONS 4
9-44.400	DRAFTING A FRAUD BY WIRE INDICTMENT 4
9-44.410	<u>Scheme and Artifice to Defraud</u> 4
9-44.420	<u>Charging an Interstate or Foreign Transmission</u> 5
9-44.500	EVIDENCE 5
9-44.510	<u>Evidentiary Rules of Conspiracy</u> 6
9-44.520	<u>Wire Transmission in Interstate Commerce</u> 6
9-44.521	Fact of Actual Transmission 6
9-44.522	Authentication 6

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-44.000 FRAUD BY WIRE, RADIO OR TELEVISION, 18 U.S.C. §1343

The Fraud by wire statute, 18 U.S.C. §1343, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

(As amended July 11, 1956.)

9-44.100 INVESTIGATION OF COMPLAINTS

Primary investigative jurisdiction into possible violations of the fraud by wire statute is vested in the Federal Bureau of Investigation. In some instances, where securities are involved, complaints may be investigated by the Securities and Exchange Commission. In other instances investigations conducted by the Postal Inspection Service of the United States Postal Service may disclose possible violations of the fraud by wire statute. In both instances, the investigations are usually continued by the agency initiating the investigation. Reports of investigation are disseminated directly to the appropriate United States Attorney.

9-44.200 ELEMENTS OF THE OFFENSE

The essential elements of the offense are (1) the devising of a scheme and artifice to defraud, and (2) a transmittal in interstate or foreign commerce by means of wire, radio or television communication of writings, signs, signals, pictures or sounds for the purpose of executing the scheme and artifice to defraud. Huff v. United States, 301 F.2d 760, 765 (5th Cir. 1962); Lindsey v. United States, 332 F.2d 688, 690 (9th Cir. 1964); United States v. O'Malley, 535 F.2d 589, 592 (10th Cir. 1976) and cases cited therein; United States v. Freeman, 524 F.2d 337, 339 (7th Cir. 1974); United States v. Patterson, 534 F.2d 1113 (5th Cir. 1976); United States v. Wise, 553 F.2d 1173 (8th Cir. 1977).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-44.210 The Scheme and Artifice to Defraud

Since the fraud by wire statute was patterned after the mail fraud statutes, United States v. Mercer, 133 F. Supp. 288 (N.D. Calif. 1955), mail fraud principles (see generally USAM 9-43.210, *infra.*), have been applied to fraud by wire prosecutions. As in mail fraud law, it is not necessary that the victim of the scheme be actually deceived or suffer a loss. Lindsey v. United States, *supra*; Huff v. United States, *supra*; United States v. Jackson, 451 F.2d 281, 283 (5th Cir. 1971); United States v. O'Malley, *supra*; Pollack v. United States, 534 F.2d 964, 971 (D.C. Cir. 1976); United States v. Patterson, *supra*. Reckless disregard for the truthfulness of the representations made is actionable. United States v. Marley, 549 F.2d 561 (8th Cir. 1977).

9-44.220 Use of a Wire Communication in Interstate or Foreign Commerce

Since the statute requires a transmission in interstate or foreign commerce, an intrastate transmission does not constitute an offense. Borfuff v. United States, 310 F.2d 918 (5th Cir. 1962). It has long been clear that the mail fraud statute reaches schemes in which the defendant did not personally place any matter in the mails; it is sufficient to show that he or she "caused" the mailings. See USAM 9-43.220, *infra.* The scope of the fraud by wire statute is equally broad. United States v. Calvert, 523 F.2d 895 (8th Cir. 1975). While it is necessary to show that a defendant caused the use of a wire, it is not necessary to establish that the defendant directly participated in the use of the wire. United States v. Wise, 553 F.2d 1173 (8th Cir. 1977). It is sufficient if some communication was the foreseeable result of the act. United States v. Jones, 554 F.2d 251 (5th Cir. 1977); United States v. Snyder, 505 F.2d 595, 601 (5th Cir. 1974), citing United States v. Boulihan, *supra*, wherein the Circuit Court concluded there is no requirement that the accused know that instrumentalities of interstate communications are used or foresee that such instrumentalities may be used.

Each use of the interstate instrumentality constitutes a separate offense. Sibley v. United States, 344 F.2d 103 (5th Cir. 1965); Henderson v. United States, 425 F.2d 138 (5th Cir. 1970); United States v. Calvert, *supra* at 903. The gist of the offense is not the scheme to defraud, but the use of the interstate wire communication. United States v. Garland, 337 F. Supp. 1, 3 (N.D. Ill. 1971).

As in mail fraud law, see USAM 9-43.221, *infra.*, it is not necessary that the victim be the originator of the wire communication, United States v. Hancock, 268 F.2d 205 (2d Cir. 1959) or the recipient of the wire

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

communication. United States v. Freeman, *supra*, and cases cited therein; United States v. Auler, 539 F.2d 642 (7th Cir. 1976); or even a participant in the communication. United States v. Goldstein, 532 F.2d 1035, 1316 (9th Cir. 1976); United States v. Wise, *supra*, at 1174.

9-44.221 In Execution of the Scheme and Artifice

As provided by the statute, the interstate or foreign wire transmission must be for the purpose of executing the scheme and artifice to defraud. United States v. Pollack, *supra*; United States v. Calvert, *supra*; United States v. Holmes, 390 F. Supp. 1077 (W.D. Missouri 1975). The decision in United States v. Maze, 414 U.S. 395 (1974) has no adverse impact on fraud by wire prosecutions where the scheme has not reached fruition. United States v. Pollack, *supra*, at 971; United States v. Calvert, *supra*, at page 904. See also generally, USAM 9-43.221, *infra* discussing the use of the mails in execution of a fraudulent scheme. A wire use after the scheme has come to an end is not within the statute. Battaglia v. United States, 349 F.2d 556, 561 (9th Cir. 1965); United States v. West, 549 F.2d 545, 556 (8th Cir. 1977).

9-44.222 Lulling Telegrams and Telephone Calls

Telegrams sent for the purpose of conveying assurances to the victim of the fraud and to prevent action on his or her part which might interfere with the carrying out of the scheme are actionable under the fraud by wire statute. Wiltsey v. United States, 222 F.2d 600 (4th Cir. 1955). See also USAM 9-43.222, *infra* (lulling letters).

9-44.230 Representative Schemes

9-44.231 Generally

The representative schemes set forth in USAM 9-43.230 *et seq.*, *supra*, (mail fraud) are equally amenable to fraud by wire prosecution, provided interstate or foreign wire communication or transmission is used to execute the scheme.

9-44.232 Fraud on the Media (Telephone Company)

The fraudulent use of telephone credit cards to obtain service without charge is actionable under 18 U.S.C. §1343. United States v. Fincke, 437

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

F.2d 856 (2d Cir. 1971); United States v. Jones, 554 F.2d 251 (5th Cir. 1977). See also, United States v. Beckley, 259 F. Supp. 567 (N.D. Ga. 1965); Scott v. United States, 448 F.2d 581 (5th Cir. 1971).

Schemes to defraud the telephone company of its revenues through so-called "blue boxes" and "black boxes" are also actionable. United States v. Hanna, 260 F. Supp. 430 (S.D. Fla. 1966), aff'd 404 F.2d 405 (5th Cir. 1968); Brandon v. United States, 382 F.2d 607 (10th Cir. 1967); United States v. Jaworski, 343 F. Supp. 406 (D. Minn. 1972); United States v. Scaramuzzo, 505 F.2d 102 (9th Cir. 1974); United States v. De Leeuw, 368 F. Supp. 426 (E.D. Wisc. 1974); United States v. Shah, 371 F. Supp. 1170 (W.D. Pa. 1974); United States v. Ewert, 372 F. Supp. 734 (E.D. Wisc. 1974); United States v. Freeman, supra; United States v. Klegg, 509 F.2d 605 (5th Cir. 1975); United States v. Douglas, 510 F.2d 266 (9th Cir. 1975); United States v. Sorota, 515 F.2d 573 (5th Cir. 1975); United States v. Glanzer, 521 F.2d 11 (9th Cir. 1975); United States v. Patterson, 528 F.2d 1037 (5th Cir. 1976); United States v. Goldstein, supra; United States v. Patterson, 534 F.2d 1113 (5th Cir. 1976); United States v. Auler, supra; United States v. Harvey, 540 F.2d 1345 (8th Cir. 1976); United States v. Manning, 542 F.2d 685 (6th Cir. 1976).

9-44.300 VENUE IN FRAUD BY WIRE PROSECUTION

Unlike the mail fraud statute, see discussion of venue in mail fraud prosecutions, USAM 9-43.300, supra, the fraud by wire statute makes no reference to the venue of the offense. Accordingly, the provisions of 18 U.S.C. §3237(a) apply, and prosecutions may be instituted in any district in which an interstate or foreign telephone call, telegram, radio or television, writing, sign, signal, picture or sound was issued or terminated. United States v. Fassoulis, 185 F. Supp. 138 (S.D. N.Y. 1960); Boruff v. United States, 310 F.2d 918 (5th Cir. 1962), and United States v. Spiro, 385 F.2d 210 (7th Cir. 1967). Since the statute specifically requires an interstate transmission, an intrastate transmission does not constitute an offense. Boruff v. United States, supra.

9-44.400 DRAFTING A FRAUD BY WIRE INDICTMENT

9-44.410 Scheme and Artifice to Defraud

An indictment under 18 U.S.C. §1343 must sufficiently charge the two necessary elements of an offense within the statute; (a) that the accused devised and intended to devise a scheme and artifice to defraud and (b) transmitted by means of wire, radio or television communication in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme. It is insufficient to charge the violation in the language of the statute. United States v. Mercer, *supra*. As in mail fraud, the indictment must contain a reasonably detailed description of the particular scheme the defendant is charged with devising. United States v. Garland, 337 F. Supp. 1, 3 (N.D. Ill. 1971); United States v. Bagdasian, 291 F.2d 163 (4th Cir. 1961). Where specific representations are charged, it is not necessary to aver the manner or respect in which these misrepresentations were false. United States v. Bagdasian, *supra*. The comments relating to charging a scheme to defraud in a mail fraud indictment, as set forth in USAM 9-43.410, *supra*, apply also to fraud by wire indictments. It is not necessary to allege that the scheme contemplated the use of the wires in its execution; United States v. Snyder, *supra*, or that anyone suffered a loss, Huff v. United States, *supra*.

9-44.420 Charging an Interstate or Foreign Transmission

Set forth below is a suggested form for charging an interstate telephone conversation under 18 U.S.C. §1343:

On or about (date) in (your district) John Doe, the defendant herein, did transmit and cause to be transmitted by means of wire communication in interstate commerce certain signs, signals and sounds, to wit, a telephone conversation between (name) in (your district) and (name) in (district in another state) for the purpose of executing the said scheme and artifice to defraud. ← John/Jane Doe

For cases in which the charging paragraph is set out, see, United States v. Jackson, 451 F.2d 281 (5th Cir. 1971) (telephone); United States v. Fassoulis, 185 F. Supp. 138 (S.D. N.Y. 1960) (telephone); Huff v. United States, *supra* (telephone); Wentz v. United States, 244 F.2d 172 (9th Cir. 1957) (telegram); United States v. Garland, *supra* (telephone). It is not necessary to set out in the indictment in haec verba the telephone conversation itself. United States v. Garland, *supra*.

9-44.500 EVIDENCE

See generally, USAM 9-43.500, *supra* (mail fraud).

9-44.510 Evidentiary Rules of Conspiracy

Under 18 U.S.C. §1343, where a scheme and artifice to defraud is shared by two or more, it becomes a conspiracy to defraud. The rules of evidence are the same as where a conspiracy is charged, and the acts of all. Kumpe v. United States, 250 F.2d 125 (5th Cir. 1957); United States v. Conte, 349 F.2d 304 (6th Cir. 1965).

9-44.520 Wire Transmission in Interstate Commerce

9-44.521 Fact of Actual Transmission

An inter state communication must be proved. Boruff v. United States, 310 F.2d 918 (5th Cir. 1962); United States v. Marino, 421 F.2d 640 (2d Cir. 1969). Generally, the communication is proved by introduction of records of the Western Union, in the case of telegrams, United States v. Sparrow, 470 F.2d 885 (10th Cir. 1972), or by telephone company records. See, United States v. Jones, 554 F.2d 251 (5th Cir. 1977) United States v. Green, 295 F.2d 280 (6th Cir. 1961). Parties to the telephone conversation may also provide evidence of the fact of communication, particularly where they placed the long distance calls.

9-44.522 Authentication

The burden of proof is on the government to prove the content of the telephone conversations charged as offenses under the statute. Osborne v. United States, 371 F.2d 913 (9th Cir. 1967). It is well settled that telephone calls may be authenticated by circumstantial evidence as well as by direct recognition of the person calling. United States v. Alper, 449 F.2d 1223, 1229 (4th Cir. 1971), citing, United States v. Frank, 290 F.2d 195 (3d Cir. 1961). Recognition of the voice is not necessary to identification of the person with whom the conversation is alleged to have been had. Like any other ordinary fact, it may be established by direct evidence or circumstances. Andrews v. United States, 78 F.2d 274 (10th Cir. 1935). See also the following cases discussing the circumstantial evidence which established the identity of the voice in question. United States v. Zweig, 467 F.2d 1217 (7th Cir. 1972); Cwach v. United States, 212 F.2d 520, 524-525 (8th Cir. 1954); United States v. Platt, 435 F.2d 220, 223 (7th Cir. 1970); Spindler v. United States, 336 F.2d 678, 681 (9th Cir. 1964); United States v. Benjamin, 328 F.2d 854, 861 (2d Cir. 1964); United States v. Johnston, 318 F.2d 288 (6th Cir. 1963); Palos v. United States, 416 F.2d 438, 440 (5th Cir. 1969); Wiltsey v. United States, 222 F.2d 600 (4th Cir. 1955); Lewis v. United States, 295 F.2d 411 (1st Cir.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1924); McCormick, Evidence §218 et seq., particularly §326, p. 553. The ultimate question of authenticity is for the jury to decide. United States v. Zweiz, supra, at 1220. In Carbo v. United States, 314 F.2d 718, 743 (9th Cir. 1963), the Ninth Circuit stated the standard which a trial judge should apply in determining whether a telephone conversation has been adequately authenticated.

The issue of authenticity, the identity of the author of a particular piece of evidence such as a document or phone call, is for the jury once a prima facie case of authorship is made out by the proponent of the evidence. The connection between a telephone call and the caller may be established circumstantially. The issue for the trial judge in determining whether the required foundation for the introduction of the evidence has been established is whether the proof is such that the jury, acting as reasonable men, could find its authorship as claimed by the proponent.

1987 USAM (superseded)

---

FEBRUARY 8, 1984

Ch-44, p-7

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 46

	<u>Page</u>
9-46.000 <u>PROGRAM FRAUD AND BRIBERY</u>	1
9-46.100 18 U.S.C. §666	1
9-46.110 <u>Investigative Jurisdiction</u>	1
9-46.120 <u>Discussion of Offense</u>	1
9-46.130 <u>Policy Considerations</u>	2
9-46.140 <u>Criminal Division Contact</u>	3

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-46.000 PROGRAM FRAUD AND BRIBERY

9-46.100 18 U.S.C. §666

9-46.110 Investigative Jurisdiction

The FBI has primary jurisdiction over investigations of bribery of officials involved in administering federal funds and over investigations of theft or misapplication by agents of organizations receiving more than \$10,000 annually in federal funds, all as set out in 18 U.S.C. §666. However, each Department or Agency with an Inspector General has concurrent jurisdiction over violations affecting the relevant programs.

9-46.120 Discussion of Offense

Part C of Chapter XI adds a new section 666 to Title 18 dealing with embezzlement and bribery by agents of state and local governments or private organizations that receive federal funds. Three types of offenses are denoted in section 666. Subsection (a) prohibits the embezzlement, stealing, purloining, misapplication, obtaining by fraud or otherwise unauthorized conversion to one's own use or that of another, of property having a value of \$5,000 or more by an agent, typically an employee, of an organization or of a state or local government agency that receives \$10,000 or more annually in federal funds. Subsection (b), which also applies only to agents of state or local government agencies or of organizations receiving \$10,000 or more annually in federal funds, prohibits them from soliciting or accepting a bribe because of their conduct in a transaction or matter of their agency or organization involving \$5,000 or more. Subsection (c) applies to anyone, and proscribes the offering of a bribe for such a purpose to an agent of an organization or of a state or local government agency receiving \$10,000 or more annually in federal funds. The maximum penalty is imprisonment for ten years and a fine of the greater of \$100,000 or twice the amount obtained, solicited, or given in violation of the section.

The new section is designed to facilitate the prosecution of persons who steal money or otherwise divert property or services from state and local governments or private organizations--for example, universities, foundations and business corporations--that receive large amounts of federal funds. Under prior law, with minor exceptions, thefts from such governments or organizations could be prosecuted only under the general theft statute, 18 U.S.C. §641. Use of this statute was often precluded

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

because title to the property stolen had passed from the federal government before it was stolen or the funds were so commingled that their federal character could not be shown. With respect to bribery, there was a question whether 18 U.S.C. §201, which punished corrupt payments to federal public officials, covers payments to a person employed by a private or state organization receiving federal funds. Cases such as United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975), and United States v. Loschiavo, 531 F.2d 659 (2d Cir. 1976), reversed convictions under 18 U.S.C. §201 where the bribee, technically an employee of the City of New York, was the assistant administrator of a Model Cities program which was funded 100% by the United States Department of Housing and Urban Development, which also paid 80% of the program employees' salaries. The Second Circuit held that notwithstanding such heavy federal involvement in the Model Cities program, the bribee was not a "public official" for purposes of 18 U.S.C. §201. But in Dixon v. United States, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1172 (1984), the Supreme Court affirmed 18 U.S.C. §201 bribery convictions of two executives of a private nonprofit corporation, unaffiliated with the federal government, which had contracted with a city to administer federal block grant funds. The Supreme Court's rather ill-defined new "public official" test for 18 U.S.C. §201 is whether the person occupies a position of public trust with official federal responsibilities. Thus, Dixon provides under 18 U.S.C. §201 a prosecutive tool which might reach conduct left uncovered by 18 U.S.C. §666, but fully warranting federal prosecution.

The legislative history of the new 18 U.S.C. §666 demonstrates that this section should be construed broadly, consistent with its purpose of protecting the vast sums of money distributed through federal programs from theft, fraud and undue influence by bribery. This same legislative history, however, further demonstrates that the concept of "Federal program" is not unlimited, and that "there must exist a specific statutory scheme authorizing the federal assistance in order to promote or achieve certain policy objectives. Thus, not every federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than \$10,000 in equipment from a supplier, it is not the intent of this section to make a theft of \$5,000 or more from the supplier a Federal crime." S. Rep. No. 98-225, 98th Cong., 1st Sess. 370 (1983).

9-46.130 Policy Considerations

Local prosecutors will often have a strong incentive as well as the ability to prosecute crimes involving local programs receiving federal funding. Consequently, the advisability of a federal prosecution under 18 U.S.C. §666 should be carefully weighed against the likelihood that state

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prosecution will be sufficient to protect federal interests. Until further notice, consultation with the Public Integrity Section of the Criminal Division is required prior to using the bribery provisions (subsection (b) or (c) of Section 666. Likewise, potential prosecutions involving the Dixson theory should be discussed with the Public Integrity Section before prosecution is undertaken.

9-46.140 Criminal Division Contact

Questions regarding cases that involve federal, state or local officials should be referred to the Deputy Chief, Public Integrity Section (724-8983). Questions regarding any other cases, and general questions concerning the fraud and theft provisions of 18 U.S.C. §666, should be directed to the Deputy Chiefs, Fraud Section at FTS 724-7340 or 724-7288.

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 47

	<u>Page</u>
9-47.000 <u>FOREIGN CORRUPT PRACTICES ACT OF 1977: 15 USC §78m(b) (2)-(3); 15 USC §78dd-1; 15 USC §78dd-2</u>	1
9-47.010 <u>Corporate Recordkeeping</u>	1
9-47.020 <u>Foreign Corrupt Practices By Issuers</u>	2
9-47.030 <u>Foreign Corrupt Practices by Domestic Concerns</u>	5
9-47.100 PROCEDURES	9
9-47.110 <u>Investigation of Complaints</u>	9
9-47.120 <u>Policy Concerning Criminal Prosecutions</u>	10
9-47.130 <u>Civil Injunction Actions</u>	10
9.47.140 <u>Foreign Corrupt Practices Act Review Procedure</u>	11

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-47.000 FOREIGN CORRUPT PRACTICES ACT OF 1977: 15 USC §78m(b) (2)-(3);  
15 USC §78dd-1; 15 USC §78dd-2.

9-47.010 Corporate Recordkeeping

The Foreign Corrupt Practices Act of 1977 (P.L. 95-213; 91 Stat. 1494) was signed into law by the President on December 19, 1977. Section 102 of the Act amends Section 13(b) of the Securities Exchange Act of 1934 to require the maintenance of accurate records by corporations which are subject to the jurisdiction of the Securities and Exchange Commission. Section 102 (15 USC §78m(b) (2)-(3)) provides:

(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 14(d) of this title shall--

(A) make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that--

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

A willful violation of the provisions of Section 102 of the Foreign Corrupt Practices Act is a criminal act punishable, pursuant to the provisions of Section 32 (a) of the Securities Act of 1934, 15 USC §78ff(a) by a fine of not more than \$10,000, or imprisonment of not more than five years.

It should be emphasized that the willful falsification of an issuer's books, records, or accounts in violation of Section 102 of the Foreign Corrupt Practices Act is a criminal offense whether or not such falsification is related to a foreign corrupt practice proscribed by Sections 103 and 104 of the Foreign Corrupt Practices Act (see USAM 9-47.020 and 9-47.030, *infra*). Such a falsification of the corporate records for any domestic purpose, unrelated to foreign bribery, may be the basis for a criminal charge.

9-47.020 Foreign Corrupt Practices By Issuers

Section 103 of the Foreign Corrupt Practices Act amends the Securities Exchange Act of 1934 to proscribe and establish criminal penalties for

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

certain foreign corrupt practices by corporations subject to the jurisdiction of the Securities and Exchange Commission and by the officers, directors, employees agents and stockholders of such corporations. Section 103 of the Foreign Corrupt Practices Act provides in pertinent part:

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing or having reason to know that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of--

(A) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, including a decision to fail to perform his or its official functions;

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) As used in this section, the term 'foreign official' means any officer or employee of a foreign

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

15 U.S.C. §78dd-1

15 U.S.C. §78ff(c) provides:

(1) Any issuer which violates (this) section ...shall, upon conviction, be fined not more than \$1,000,000.

(2) Any officer or indirector of an issuer, or any stockholder acting on behalf of such issuer, who willfully violates (this) section... shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.

(3) Whenever an issuer is found to have violated (this) section,... any employee or agent of such issuer who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder of such issuer), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of an issuer, such fine shall not be paid, directly or indirectly, by such an issuer.

15 U.S.C. §78ff(c)

9-47.030 Foreign Corrupt Practices By Domestic Concerns

Section 104 of the Foreign Corrupt Practices Act creates a new criminal offense, proscribing the same type of foreign corrupt practices when committed by United States citizens or certain commercial entities which are not subject to the jurisdiction of the Securities and Exchange Commission. Section 104 of the Foreign Corrupt Practices Act provides:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

(a) It shall be unlawful for any domestic concern, other than issuer which is subject to section 30A of the Securities Exchange Act of 1934, or any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A) influencing any act or decision of such foreign official in his official capacity, including a decision to fail to perform his official functions; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) influencing any act or decision of such party, official, or candidate in its or his official capacity, including a decision to fail to perform its or his official functions; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

affect or influence any act or  
decision of such government or  
instrumentality,

in order to assist such domestic concern in obtaining  
or retaining business for or with, or directing  
business to, any person; or

(3) any person, while knowing or having  
reason to know that all or a portion of such  
money or thing of value will be offered,  
given, or promised, directly or indirectly,  
to any foreign official, to any foreign  
political party or official thereof, or to  
any candidate for foreign political office,  
for purposes of—

(A) influencing any act or decision  
of such foreign official,  
political party, party official, or  
candidate in his or its official  
capacity, including a decision to  
fail to perform his or its official  
functions; or

(B) inducing such foreign official,  
political party, party official, or  
candidate to use his or its  
influence with a foreign government  
or instrumentality thereof, to  
affect or influence any act or  
decision of such government or  
instrumentality,

in order to assist such domestic concern in obtaining  
or retaining business for or with, or directing  
business to, any person.

(b)(1)(A) Except as provided in subparagraph (B),  
any domestic concern which violates subsection (a)  
shall, upon conviction, be fined not more than  
\$1,000,000.

(B) Any individual who is a  
domestic concern and who willfully  
violates subsection (a) shall, upon

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.

(2) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.

(3) Whenever a domestic concern is found to have violated subsection (a) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than \$10,000, or imprisoned not more than five years, or both.

(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, stockholder, employee, or agent of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

(c) Whenever it appears to the Attorney General that any domestic concern, or officer, director, employee, agent, or stockholder thereof, is engaged, or is about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing a permanent or temporary injunction or a temporary restraining order shall be granted without bond.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

(d) As used in this section:

(1) The term 'domestic concern' means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) The term 'foreign official' means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. Such term does not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are essentially ministerial or clerical.

(3) The term 'interstate commerce' means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof. Such term includes the intrastate use of (A) a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

9-47.100 PROCEDURES

9-47.110 Investigation of Complaints

Allegations of violation of the provisions of Sections 102 (Recordkeeping) and 103 (Issuers) of the Foreign Corrupt Practices Act will usually be investigated by the Securities and Exchange Commission. Investigations of alleged violation of Section 104 (Domestic Concerns) will be conducted by the Federal Bureau of Investigation.

9-47.120 Policy Concerning Criminal Prosecutions

The investigation and prosecution of particular allegations of violation of this new Act will raise complex enforcement problems abroad as well as difficult issues of jurisdiction and statutory construction. For example, part of the investigation may involve interviewing witnesses in foreign countries concerning their activities with high-level foreign government officials. Additionally, relevant accounts maintained in United States banks and subject to subpoena may be directly or beneficially owned by senior foreign government officials. Close coordination of such investigations and prosecutions with the Department of State, the Securities and Exchange Commission and other interested agencies is essential. Moreover, pursuant to a Presidential directive, the Criminal Division has established a Foreign Corrupt Practices Act Review Procedure modeled after the Antitrust Division's Business Review Procedure. As part of this procedure, which is administered by the Fraud Section, the Assistant Attorney General for the Criminal Division reviews proposed business conduct which may constitute a violation of the Act and makes a binding decision on whether or not the Department will take an enforcement action if the transaction proceeds further. For all these reasons, the need for close centralized supervision of investigations and prosecutions under the Foreign Corrupt Practices Act is compelling. Consequently, unless otherwise agreed upon by the Assistant Attorney General for the Criminal Division, prosecutions of alleged violations of Sections 103 and 104 of the Foreign Corrupt Practices Act will be conducted by attorneys from the Criminal Division in Washington. Prosecutions of alleged violations of Section 102, when such violations are related to a violation of Section 103 or 104, will also be conducted by Criminal Division attorneys, unless otherwise directed by the Assistant Attorney General.

Any information relating to a possible violation of the Foreign Corrupt Practices Act should be brought immediately to the attention of the Criminal Division by contacting the Chief of the Fraud Section, who can be reached at (FTS) 724-7038. Even when such information is developed during the course of an apparently unrelated investigation, the Section Chief should be notified immediately.

9-47.130 Civil Injunction Actions

The Securities and Exchange Commission has authority to obtain civil injunctions against future violations of Sections 102 and 103 of the Foreign Corrupt Practices Act. Civil injunctions against violations of Section 104 of the Foreign Corrupt Practices Act (Section 104(c)) by Domestic Concerns shall be instituted by attorneys from the Criminal Division in cooperation with the appropriate U. S. Attorney, unless otherwise directed by the Assistant Attorney General.

9-47.140 Foreign Corrupt Practices Act Review Procedure

On March 20, 1980, the Attorney General signed Order No. 878-80 establishing the Foreign Corrupt Practices Act Review Procedure. The Review Procedure permits any party covered under Sections 103 and 104 of the Foreign Corrupt Practices Act to seek a statement from the Criminal Division of the Department's present enforcement intention with respect to those sections. The Review Procedure will not apply to Section 102 of the Foreign Corrupt Practices Act which deals with the maintenance of accurate books and records by corporations which are subject to the jurisdiction of the Securities and Exchange Commission.

Section 50.18, which has been added to Part 50, Chapter I, Title 28, Code of Federal Regulations, provides:

Although the Department of Justice is not authorized to give advisory opinions to private parties, the Criminal Division is willing, in certain circumstances, to review proposed conduct and state its present enforcement intention under sections 103 and 104 of the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd-1, 78dd-2, but not including section 102 of the Foreign Corrupt Practices Act, 15 U.S.C. §§78m(b) (2), (3). The conditions for such review are set forth below:

(a) A request for a Foreign Corrupt Practices Act (FCPA) review letter must be submitted in writing in an original and five copies to the Assistant Attorney General in charge of the Criminal Division, Attention: FCPA Review Group. The mailing address is P.O. Box 7814, Benjamin Franklin Station, Washington, D.C. 20044. The address for hand-delivery is 8th floor, Federal Triangle Building, 315 9th Street, N.W., Washington, D.C. 20530.

(b) The entire transaction which is the subject of the review request must be an actual transaction but need not involve only proposed conduct. The Criminal Division will not consider a request, however, unless that portion of the transaction for which clearance is sought involves only proposed conduct.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

(c) The Criminal Division will consider a review request only when submitted by a party or parties to the transaction which is the subject of the review request.

(d) The Criminal Division may, in its discretion, refuse to consider a review request.

(e) An FCPA review letter shall have no application to any party which does not join in the request therefor.

(f) A review request shall be specific and contain in detail all relevant and material information bearing on the conduct for which review is requested and on the circumstances of the proposed conduct. A review request must be signed on behalf of each requesting party by an appropriate senior officer with operational responsibility for the conduct which is the subject of the review request and who has been designated by the chief executive officer to sign the review request. In appropriate cases, the chief executive officer of each requesting party may be required to sign the review request. The person signing the review request must certify that it contains a true, correct and complete disclosure with respect to the proposed conduct and the circumstances of the conduct.

(g) Each party shall provide the Criminal Division with any additional information or documents the Division may thereafter request in order to review a matter. Any information furnished orally shall be promptly confirmed in writing, signed by the same person who signed the initial review request and certified by him to be a true, correct and complete disclosure of the requested information. In connection with any request for review, the Criminal Division will also conduct whatever

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

independent investigation it believes is appropriate.

(h) After review of a request submitted hereunder, the Criminal Division may: state its present enforcement intention under sections 103 and 104 of the FCPA with respect to the proposed business conduct; decline to state its present enforcement intention; or take such other position or action as it considers appropriate.

(i) The Criminal Division will make every reasonable effort to respond to any review request within 30 days after receipt of the review request and of any requested additional information and documents.

(j) No oral clearance, release or other statement purporting to limit the enforcement discretion of the Department of Justice may be given. The requesting party or parties may rely only upon a written FCPA review letter signed by the Assistant Attorney General in charge of the Criminal Division or his delegate.

(k) Each FCPA review letter can be relied upon by the requesting party or parties to the extent the disclosure was accurate and complete and to the extent the disclosure continues accurately and completely to reflect circumstances after the date of issuance of the review letter.

(l) An FCPA review letter will not bind or obligate any other agency; nor will it affect the obligations of the requesting party or parties to any other agency, nor under any statutory or regulatory provision other than those specifically cited in the particular review letter.

(m) Neither the submission of a request for an FCPA review, its pendency, nor the issuance of an FCPA review letter, shall in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

any way alter the responsibility of the party or parties to comply with the accounting requirements of section 102 of the Foreign Corrupt Practices Act 15 U.S.C. §§78m(b) (2), (3).

(n) If the business conduct for which review is requested is subject to approval by a regulatory agency, a review request shall be considered before agency approval has been obtained only where it appears that exceptional and unnecessary burdens might otherwise be imposed on the requesting party or parties, or where the agency specifically requests that the party or parties first seek review from the Criminal Division. However, any FCPA review letter issued in these as in any other circumstances, will state only the Department's present enforcement intention under section 103 and 104 of the Foreign Corrupt Practices Act. Such FCPA review letter shall in no way be taken to indicate the Department's views on the legal or factual issues that may be raised before the regulatory agency, or in an appeal from the regulatory agency's decision.

(o) (1) The requesting party or parties may ask the Division to delay or to refrain from ever making publicly available parts of a review request, and part or all of any information or documents submitted in support of the review request. Any request for nondisclosure must be made at the time of submitting the review request or the information or documents to the Division. The requesting party or parties must: (i) specify precisely those parts of the request, information or documents that it asks not be made publicly available; (ii) state the minimum period of time during which nondisclosure is considered necessary; and (iii) justify the request for nondisclosure, both as to content and time, by showing that the material is exempt from mandatory public disclosure because it consists of trade

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

secrets or commercial and financial information that is privileged and confidential is received from a person, 5 U.S.C. §552 (b)(4), or because it is otherwise exempt pursuant to any other provision of 5 U.S.C. §552 (b). If the Department determines that such grounds for nondisclosure exist, then except as provided by subparagraph (2) of this paragraph the material shall not be made publicly available unless release is ordered by a court of competent jurisdiction. If the Department determines that such grounds for nondisclosure do not exist, and the Department receives a request for disclosure of the material pursuant to the Freedom of Information Act, notice of the Department's determination that there are no grounds for nondisclosure will be given to the party or parties submitting the FCPA review request at least 7 days before any release to the Freedom of Information Act requester.

(o) (2) Nothing contained in subparagraph (1) of this paragraph shall limit the Division's right to issue, at its discretion, a release describing the identity of the party or parties submitting an FCPA review request, the general nature and circumstances of the proposed conduct, and the action taken by the Department in response to the FCPA review request. Where the Department determines such information to be exempt from mandatory disclosure, such a release shall not disclose: (i) the identity of the foreign country in which the proposed conduct is to take place; (ii) the identity of any foreign sales agents; or (iii) other types of identifying information. The Division shall index such release and place it in a file available to the public upon request.

(o) (3) This paragraph reflects a policy determination by the Department of Justice and is subject to any limitations on public disclosure and any required public disclosure

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

arising from statutory restrictions, Executive Order, or the national interest.

(p) Any requesting party or parties may withdraw a review request at any time. The Division remains free, however, to submit such comments to the requesting party or parties as it deems appropriate. Failure to take action after receipt of a review request, documents or information, whether submitted pursuant to this procedure or otherwise, shall not in any way limit or stop the Division from taking any action at such time thereafter as it deems appropriate. The Division reserves the right to retain any review request, documents and information submitted to it under this procedure or otherwise and to use them for all governmental purposes.

For further information, contact the Deputy Chief, Fraud Section, Criminal Division, Washington, D.C. 20530 (202) 724-7340.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 48

		<u>Page</u>
9-48.000	<u>COMPUTER FRAUD</u>	1
9-48.100	18 U.S.C. §1030	1
9-48.110	<u>Discussion of Offenses</u>	1
9-48.111	18 U.S.C. §1030(a)(1): Computer Espionage	1
9-48.112	18 U.S.C. §1030(a)(2): Obtaining Financial or Credit Information from a Computer	1
9-48.113	18 U.S.C. §1030(a)(3): Interfering with the Operation of a Government Computer	2
9-48.120	<u>Reporting Requirements</u>	4

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-48.000 COMPUTER FRAUD

9-48.100 18 U.S.C. §1030

In 1984, Congress enacted legislation which for the first time specifically defines several computer-related offenses. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2190-2192 (1984). Section 1030 of Title 18, United States Code, makes it a crime to knowingly access a computer without authorization and thereby: (1) obtain certain classified information; (2) obtain certain information contained in the records of a financial institution or in the files of a consumer reporting agency; or (3) if the computer so accessed is a government computer, to use, modify, destroy, or disclose the information therein, or prevent the authorized use of the computer. The law also punishes attempts and conspiracies to commit these offenses.

9-48.110 Discussion of Offenses

9-48.111 18 U.S.C. §1030(a)(1): Computer Espionage

See USAM 9-90.330.

9-48.112 18 U.S.C. §1030(a)(2): Obtaining Financial or Credit Information from a Computer

18 U.S.C. §1030(a)(2) punishes persons who knowingly access a computer without authorization, or who exceed their authorization, and obtain certain information which is defined under the Right to Financial Privacy Act or the Fair Credit Reporting Act.

The statute prohibits access by a person, knowing the access is unauthorized, to a computer maintained by a financial institution, and who thereby obtains information contained in a financial record. The term "financial institution" includes any office of a bank, savings bank, industrial loan company, trust company, savings and loan, building and loan, homestead association (including cooperative banks), credit union, consumer finance institution, or person/organization which issues credit cards, located in the United States or its territories. See 12 U.S.C. §§3401(1) - (2); 15 U.S.C. §1602(n).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

However, the financial records protected by this statute are very limited under the narrow definitions of the Right to Financial Privacy Act. Only access to the accounts of individuals and partnerships of five or fewer individuals is prohibited. See 12 U.S.C. §§3401(4) - (5). Business and employment records of a financial institution are not covered, nor are corporate, trust and large partnership accounts.

The statute also prohibits unauthorized access to information contained in a file of a consumer reporting agency on a consumer. The protected information under the Fair Credit Reporting Act includes all credit, personal and other information on individuals (consumers) recorded and retained by a consumer reporting agency, regardless of how the information is stored. A credit reporting agency is defined as any person which regularly assembles and evaluates consumer credit information and provides "consumer reports" to third parties, and uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. (15 U.S.C. §§1681(c), (d), (f) and (g)).

In order to prove a violation of 18 U.S.C. §1030(a)(2), it is necessary to show that the defendant knew the access to the computer was not authorized or that it was not within the scope of a previous authorization. Once it is proven that the defendant accessed the computer without authorization, the term "obtain" can be interpreted broadly to cover the situation where the person obtained control over the data to change records in a computer without physically removing any information from the computer. There is no requirement in the statute that the intruder intend to do anything with that information.

This provision does not reach information obtained incidentally or the use of information that has been obtained legitimately. The statute exempts from prosecution under 18 U.S.C. §1030(a)(2) persons who exceed authorized use of a computer simply to use the computer for purposes to which the authorization does not extend (for example, to do homework or play video games).

9-48.113 18 U.S.C. §1030(a)(3): Interfering with the Operation of a Government Computer

18 U.S.C. §1030(a)(3) punishes anyone who, without authorization or in excess of his or her authorization, knowingly accesses a computer that is "operated for or on behalf of the Government of the United States" and knowingly "uses, modifies, destroys, or discloses information in or prevents authorized use of" that computer if such conduct affects the operation of the government.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

This section proscribes two types of conduct:

A. Trespassing by a person who has no authorization whatsoever to enter the computer. This person could be guilty of any of the conduct specified in this section. The term "use" is intended to prohibit a trespasser such as this from reading government data files or changing records in the computer without physically removing any information from the computer.

B. Access by a person who has authorization to use the computer but who knowingly exceeds such authorization or acts outside the scope of a prior authorization. This person would violate the statute only if he or she modified, destroyed, or disclosed information in or prevented authorized use of the computer. The statute exempts from prosecution under 18 U.S.C. §1030(a)(3) persons who exceed authorized use of a computer simply to use the computer for purposes to which the authorization does not extend (for example, to do homework or play video games).

In addition, the offense of accessing a government computer and "disclos[ing] information in" such computer without authorization was not intended to be used to prosecute "whistleblowers" who attempt to expose fraud and abuse in government. Assuming these individuals have lawful access to the information, they are not trespassers to the information and do not violate the statute even if they do not have authority or approval to disclose that information. See 130 Cong. Rec. H 12074 (Daily ed. Oct. 10, 1984) (remarks of Rep. Hughes).

In the case of a computer that is being operated only part-time for the government, it is only the unauthorized access to the information related to the government operation that is proscribed. The expression "and such conduct affected such operation" indicates that some consequences to the government from the defendant's conduct must be proven.

Pertinent legislative history may be found in a report which accompanied H.R. 5616, proposed legislation which preceded the enactment of this statute but essentially tracked the language of the provisions that were passed. See House Committee on the Judiciary, Report on Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, H.R. Rep. No. 894, 98th Cong., 2d. Sess. (1984). (H.R. 5616 consisted of five substantive provisions proposed as Sections 1030(a)(1) - (a)(5). Proposed §§1030(a)(1) and (a)(4) (which were based on language in the mail and wire fraud statutes) were not enacted. Section 1030(a)(2) and (a)(3) were passed as §§1030(a)(1) and (a)(2), and §1030(a)(5) was passed as §1030(a)(3).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The bill includes several new concepts not found in the statutes traditionally used to prosecute fraud cases. The Report sheds some light on the meaning of certain of its provisions. Section 1030 deals with an "unauthorized access" concept of computer fraud rather than the mere use of a computer. Thus, the conduct prohibited is analagous to that of a trespass (breaking and entering) rather than using a computer (similar to the use of a gun) in committing the offense. Ibid. at 20.

The FBI will conduct investigations of cases under 18 U.S.C. §1030(a)(2) involving institutions defined by the Right to Financial Privacy Act of 1978, i.e., the banking system. The FBI will handle cases that fall primarily within its traditional jurisdiction, including matters pertaining to organized crime, terrorism, and foreign counterintelligence. The Secret Service will investigate cases involving consumer reporting agencies as defined by the Fair Credit Reporting Act.

Responsibility for investigations of cases under 18 U.S.C. §1030(a)(3) will be divided among the FBI, Secret Service, Postal Service and the Inspectors General on a case by case basis. Assignments will be made as is appropriate for the offense and not otherwise exempted as traditional jurisdiction or a prior division of responsibility under this law.

9-48.120 Reporting Requirements

Copies of all indictments alleging violations of 18 U.S.C. §1030 should be provided to the Fraud Section and will be available as a resource to other offices. Information about prosecutions under this section must be compiled and reported by the Attorney General to Congress during the first three years following enactment of the statute.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 49

	<u>Page</u>
9-49.000 <u>CREDIT CARD FRAUD</u>	1
9-49.100 18 U.S.C. §1029	1
9-49.110 <u>Prohibited Conduct Under the New Act</u>	1
9-49.120 <u>Penalties</u>	2
9-49.130 <u>Definitions and Legislative History</u>	2
9-49.140 <u>Investigative Agencies</u>	3
9-49.150 <u>Reporting Requirements</u>	3
9-49.160 <u>Fraudulent Use of Credit Cards and Debit Instruments-Prosecutions under 18 U.S.C. §1029 and Statutes in Title 15</u>	4

1984 U.S.M. (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-49.000 CREDIT CARD FRAUD

9-49.100 18 U.S.C. §1029

The Credit Card Fraud Act of 1984 expands 15 U.S.C. §1644 (fraudulent use of credit cards) and 15 U.S.C. §1693n (fraudulent use of debit instruments). Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2183-4 (1984). The most significant provisions of 18 U.S.C. §1029: (1) broaden the definitions of credit card and debit instrument to include any "access device," such as an account number; (2) increase penalties in terms of both potential incarceration and potential fines; and (3) contain a substantial repeat offender provision.

Congress passed this legislation to give federal prosecutors a broad jurisdictional base to prosecute effectively a variety of credit card fraud schemes. However, certain jurisdictional thresholds were established to ensure that federal involvement is concentrated on the activities of major offenders. It is assumed that the bulk of the prosecutions for credit card fraud will continue to be handled by state and local law enforcement authorities.

9-49.110 Prohibited Conduct Under the New Act

18 U.S.C. §1029(a)(1) prohibits the production, use, or trafficking in counterfeit access devices. There is no requirement that the offender have direct contact with the person who is ultimately defrauded. For example, a counterfeiter may deal with a distributor who is fully aware that counterfeit cards are involved, and therefore is not a victim of fraud. However, the value of the manufacturer's illegally obtained product clearly indicates an intention to defraud an innocent party.

18 U.S.C. §1029(a)(2) prohibits the trafficking in or use of one or more unauthorized access devices during any 12-month period in which property aggregating \$1,000 or more is obtained.

18 U.S.C. §1029(a)(3) prohibits the possession with intent to defraud of 15 or more counterfeit or unauthorized access devices. Any combination of counterfeit or unauthorized access devices would be sufficient to meet the 15 device requirement.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

18 U.S.C. §1029(a)(4) prohibits the fraudulent production, trafficking, and/or possession of device-making equipment, with the intent that such equipment be used in the production of a fraudulent access device. The offender need not intend that he/she will personally use the equipment to defraud but merely intend that the equipment will be used to defraud. As long as the offender has control over the equipment in the possession of another person, he/she is not required personally to have physical possession of it.

18 U.S.C. §§1029(b)(1) and (b)(2) prohibit attempts and conspiracies to commit an offense under this section.

9-49.120 Penalties

The statute provides the following maximum penalties for violations of the substantive provisions:

A. 18 U.S.C. §1029(a)(2) and (a)(3): a fine of not more than the greater of \$10,000 or two times the value of the goods obtained or not more than 10 years imprisonment or both.

B. 18 U.S.C. §1029(a)(1) and (a)(4): a fine of not more than the greater of \$50,000 or two times the value of the goods obtained or not more than 15 years imprisonment or both. (See USAM 9-120.600 for a discussion of the new fine levels and procedures for collection.)

18 U.S.C. §1029(b)(1) provides that an attempt to commit an offense under this section is punishable in the same manner as if the offense had been successfully completed.

18 U.S.C. §1029(b)(2) prohibits a conspiracy to commit any of the above described offenses and provides a penalty equal to the maximum fine for the commission of the offenses or one-half the maximum period of incarceration set out above or both.

The statute also provides enhanced penalties for repeat offenders convicted under 18 U.S.C. §1029(a). A defendant previously convicted under one of these sections faces a maximum fine of not more than the greater of \$100,000 or two times the value of the property obtained or not more than 20 years incarceration or both.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-49.130 Definitions and Legislative History

Instead of using the term "credit card," or "debit instrument," the term "access device" is used in the statute and is defined broadly as any "card, plate, code, account number, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds...." The only limitation, *i.e.*, "other than a transfer originated solely by paper instrument, excludes activities such as passing forged checks.

Pertinent legislative history may be found in a report which accompanied H.R. 5616, proposed legislation which preceded the enactment of and was identical to this statute. It provides a detailed explanation of the definitions in the statute, and emphasizes the intended broad coverage of its provisions. House Committee on the Judiciary, Report on Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, H.R. Rep. No. 894, 98th Cong., 2d. Sess. (1984).

The legislative history defines the terms "knowing state of mind" and "with the intent" as used in the 18 U.S.C. §1029(a). See United States v. Bailey, 444 U.S. 394, 404 (1976). The report discusses the concept of "willful blindness" and the proof required for such a defense to succeed. See United States v. Jewell, 532 F.2d 697, 700 n.7. (9th Cir.), cert. denied, 426 U.S. 951 (1976).

Congress intended that prosecutions for the use of "unauthorized access devices" be directed to activity involving a criminal or an organized crime ring that traffics in fraudulent credit cards. Offenses involving a valid card owner who knowingly uses an expired or revoked card should be handled by state and local authorities or in civil actions by the credit card companies.

9-49.140 Investigative Agencies

The statute gives authority to the Secret Service, in addition to any other agency having jurisdiction such as the Federal Bureau of Investigation (or the U.S. Postal Service under Title 15), to investigate offenses under this new section. The Secret Service and the Federal Bureau of Investigation (FBI) have established guidelines to delineate their investigative authority where both agencies have concurrent jurisdiction. Generally, responsibility will be divided consistent with the traditional jurisdictional interests of the two agencies.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The FBI will conduct investigations of cases involving the banking system, or which include violations of the bank fraud and embezzlement statutes, fraud by wire, and bribery of bank officers and employees. The FBI will handle cases that fall primarily within its traditional jurisdiction, including matters pertaining to organized crime, terrorism, and foreign counterintelligence. The Secret Service will investigate violations of the statute in cases not involving banks, such as counterfeiting or misuse of credit cards or access devices of major credit card companies, telephone companies, and department stores, etc.

9-49.150 Reporting Requirements

Copies of all indictments alleging violations of 18 U.S.C. §1029 should be provided to the Fraud Section and will be available as a resource to other offices. Information about prosecutions under this section must be compiled and reported by the Attorney General to Congress during the first three years following enactment of the statute.

9-49.160 Fraudulent Use of Credit Cards and Debit Instruments-  
Prosecutions under 18 U.S.C. §1029 and Statutes in Title 15

Although 18 U.S.C. §1029 effectively replaces both 15 U.S.C. §1644 and §1693n, the latter statutes have not been repealed. Thus, prosecutions are possible under either the new or old statute. Where possible, however, prosecution should be initiated under the new statute because of its broader scope, more severe penalties and because of the opportunity for enhanced penalties for repeat offenders. The misuse of account numbers, previously not covered in Title 15 and prosecutable only as a wire fraud, is now covered by 18 U.S.C. §1029.

A. 15 U.S.C. §1644 (the Truth in Lending Act) proscribes certain uses of any "counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card" in transactions in or affecting interstate or foreign commerce.

B. 15 U.S.C. §1644(a) prohibits the use, or attempts and conspiracies to use such credit card to obtain anything having a value aggregating \$1,000 or more within a one year period.

C. 15 U.S.C. §1644(b) prohibits the transportation, or attempts and conspiracies to transport such credit card in interstate or foreign commerce, knowing the card to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. 15 U.S.C. §1644(c) prohibits the use of interstate or foreign commerce to sell or transport such credit card, knowing the card to be counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained.

E. 15 U.S.C. §1644(d) prohibits the receipt, concealment, use or transportation of anything having a value aggregating \$1,000 or more within a one year period (except tickets for interstate or foreign transportation) which has moved in interstate or foreign commerce and was obtained with such credit card.

F. 15 U.S.C. §1644(e) prohibits the receipt, concealment, use, sale or transportation of one or more tickets for interstate or foreign transportation having a value of \$500 or more and which were purchased or obtained with such card(s).

G. 15 U.S.C. §1644(f) prohibits furnishing money or anything having a value aggregating \$1,000 or more within a one year period through the use of such card.

H. A companion statute, 15 U.S.C. §1693n(b)(1)-(b)(6) (the Electronic Fund Transfer Act), proscribes the same uses of any "counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained debit instrument" in transactions in or affecting interstate or foreign commerce. The term "debit instrument" is defined as "a card, code, or other device, other than a check, draft, or similar paper instrument, by the use of which a person may initiate an electronic fund transfer."

Both statutes provide maximum penalties of a \$10,000 fine or imprisonment for ten years or both for conviction of these offenses.

Judicial construction of these statutes has significantly limited their coverage. The Ninth Circuit, in United States v. Callihan, 666 F.2d 422 (1982), held that only misuse of the card, not the card number, is prohibited by the statute. However, the Fourth Circuit has held to the contrary, United States v. Bice-Bey, 701 F.2d 1086, 1091-92 (1983). The term "fraudulently obtained credit card" in 15 U.S.C. §1644(a) has been interpreted not to reach transactions in which a credit card is originally obtained without fraudulent intent from an issuing company but is subsequently transferred to another person with the knowledge that it will be used fraudulently. See United States v. Kasper, 483 F. Supp. 1208 (E.D. Pa. 1980).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 60

	<u>Page</u>
9-60.000 <u>PROTECTION OF THE INDIVIDUAL</u>	1
9-60.100 KIDNAPPING (18 U.S.C. §§1201-1202)	1
9-60.110 <u>Federal Jurisdiction</u>	1
9-60.120 <u>Investigative Jurisdiction</u>	1
9-60.130 <u>Special Consideration</u>	1
9-60.131 24 Hours Rebuttable Presumption	1
9-60.132 "Willful" Transportation in Interstate or Foreign Commerce	1
9-60.133 Penalty Provisions	2
9-60.134 Allegations of "Mental Kidnapping" or "Brainwashing" by Religious Cults	3
9-60.135 "Deprogramming" of Religious Sect Members	3
9-60.140 <u>Use of the Fugitive Felon Act in Parent/Child Kidnappings</u>	3
9-60.150 <u>FBI Assistance in Missing Persons Cases</u>	4
9-60.160 <u>Investigative Policy-Kidnapping vis a vis Missing Persons Complaints</u>	4
9-60.170 <u>Application of the Hobbs Act (18 U.S.C. §1951)</u>	4
9-60.200 THE CRIMINAL SANCTIONS AGAINST ILLEGAL ELECTRONIC SURVEILLANCE (18 U.S.C. §§2510-2513 and 47 U.S.C. §605)	5
9-60.201 Introduction	5
9-60.202 Purpose	5
9-60.203 Legislative History	6
9-60.204 Importance of Enforcement	6
9-60.205 Division Assistance	7

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-60.210	<u>Definitions Applicable to 18 U.S.C. §2511 et seq.</u>	7
9-60.211	"Wire Communication"	7
9-60.212	"Communication Common Carrier"	7
9-60.213	"Oral Communication"	7
9-60.214	"Intercept"	8
9-60.215	"Electronic, Mechanical, or Other Device" (18 U.S.C. §2510(5))	8
9-60.216	Hearing Aid Exception	8c
9-60.217	"Person"	8d
9-60.218	"Contents"	8d
9-60.219	"Endeavor"	9
9-60.220	"Willfully"	9
9-60.230	<u>18 U.S.C. §2511</u>	9
9-60.231	Scope of Prohibitions	9
9-60.232	Constitutional Basis	11
9-60.240	<u>Exceptions to the Prohibition Against Intercepting Communications</u>	12
9-60.241	Interceptions by Common Carrier Personnel	12
9-60.242	Law Enforcement Interceptions Accomplished Consensually	12
9-60.243	Other Consensual Interceptions	12
9-60.244	Other Exceptions	14
9-60.250	<u>Proof of 18 U.S.C. §2511(1) Violations</u>	14
9-60.251	Lesser Offenses	14a
9-60.260	<u>Prosecutive Policy - 18 U.S.C. §2511</u>	14b
9-60.261	State Laws	14b
9-60.262	Overall Prosecutive Policy	15
9-60.263	Vigorous Enforcement	15
9-60.264	Domestic Relations Disputes	16
9-60.265	Disturbed Persons	16
9-60.266	Law Enforcement Agencies	16
9-60.267	Use of Immunity	17
9-60.268	Law on Interspousal Wiretaps	17
9-60.269	Applicability of Section 2511 to the Interception of Radio Communications	17

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-60.270	<u>Use of the Contents of Illegally Intercepted Communications Against the Interceptor</u>	18
9-60.271	Electronic Surveillance in Prisons	19
9-60.280	<u>18 U.S.C. §2512</u>	20
9-60.281	Scope of Prohibitions	20
9-60.282	Exceptions to 18 U.S.C. §2512	
	Prohibitions	21
9-60.283	Prosecutive Policy	22
9-60.290	<u>Miscellaneous</u>	22
9-60.291	Interception of Radio Communications: 47 U.S.C. §605	23
9-60.292	Unauthorized Reception of Cable Service 47 U.S.C. §553	24
9-60.300	INTERSTATE EXTORTION: COMMUNICATIONS AND THREATS (18 U.S.C. §§875-877)	24
9-60.310	<u>Description</u>	25
9-60.320	<u>Jurisdictional Requirements of 18 U.S.C. §875</u>	25
9-60.330	<u>Investigative Jurisdiction</u>	25
9-60.340	<u>Supervisory Jurisdiction</u>	25
9-60.350	<u>Special Considerations</u>	26
9-60.360	<u>Obscene or Harassing Telephone Calls</u>	27
9-60.370	<u>Bomb Threats</u>	27
9-60.380	<u>Threats Against the President, Certain other Federal Officials, and Certain Foreign Officials</u>	27
9-60.400	CRIMINAL SANCTIONS AGAINST ILLEGAL ELECTRONIC SURVEILLANCE--THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA), 50 U.S.C. §1809	27
9-60.401	Introduction	27
9-60.402	Investigative Jurisdiction and Supervisory Responsibility	28

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-60.410	<u>50 U.S.C. §1809: Elements of the Offense</u>	29
9-60.411	The Intent Requirement	29
9-60.412	Prohibited Acts	30
9-60.413	Electronic Surveillance	30
9-60.414	Computer Data Transmissions	32
9-60.415	Pagers	32
9-60.420	<u>Persons Covered by 50 U.S.C. §1809(a)</u>	34
9-60.430	<u>Penalties</u>	34
9-60.500	CRIMINAL SOLICITATION	35
9-60.501	Overview	35
9-60.510	<u>Investigative Jurisdiction</u>	36
9-60.520	<u>Supervisory Jurisdiction</u>	36
9-60.530	<u>Elements</u>	36
9-60.531	Intent	36
9-60.532	Conduct	37
9-60.540	<u>Violent Felony</u>	37
9-60.550	<u>First Amendment Implications</u>	38
9-60.560	<u>Penalty</u>	38
9-60.570	<u>Affirmative Defense--Renunciation</u>	38
9-60.580	<u>Culpability of Solicitee</u>	39
9-60.590	<u>Merger</u>	39
9-60.600	FELONY MURDER	39
9-60.601	Overview	39
9-60.602	Legislative History	40
9-60.610	<u>Federal Jurisdiction</u>	40
9-60.620	<u>Investigative Jurisdiction</u>	40
9-60.630	<u>Supervisory Jurisdiction</u>	41

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-60.640	<u>Elements</u>	41
9-60.650	<u>Conspiracy, Aiding and Abetting and Unintended Victims</u>	41
9-60.700	HOSTAGE TAKING (18 U.S.C. §1203)	41
9-60.710	<u>Investigative Jurisdiction</u>	41
9-60.720	<u>Supervisory Jurisdiction</u>	42
9-60.730	<u>Prosecutive Policy</u>	42
9-60.740	<u>Discussion of the Offense</u>	42
9-60.741	General	42
9-60.742	Hostage Taking	42
9-60.743	Offense--18 U.S.C. §1203(a)	42a
9-60.744	Jurisdictional Conditions--18 U.S.C. §1203(b)	43
9-60.745	Penalty	43
9-60.750	<u>Legislative History</u>	44
9-60.760	<u>Effective Date</u>	44
9-60.800	SPECIAL FORFEITURE OF COLLATERAL PROFITS OF CRIME ("Son of Sam") (18 U.S.C. §3671 and §3672)	44
9-60.801	Summary of Forfeiture Statute	44
9-60.810	<u>Legal Discussion</u>	45
9-60.811	Procedural Due Process of Law	46
9-60.812	The First Amendment	46
9-60.813	The Government's Right to Forfeit the Proceeds	47
9-60.820	<u>Supervisory Jurisdiction</u>	50
9-60.830	<u>Pertinent Policy Considerations</u>	51

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.000 PROTECTION OF THE INDIVIDUAL

9-60.100 KIDNAPPING (18 U.S.C. §§1201-1202)

9-60.110 Federal Jurisdiction

Federal jurisdiction over kidnapping extends to the following motions: (1) kidnappings in which the victim is willfully transported in interstate or foreign commerce; (2) kidnappings within the special maritime and territorial jurisdiction of the United States; (3) kidnappings within the special aircraft jurisdiction of the United States; and (4) kidnappings in which the victim is a foreign official, an internationally protected person, or an official guest as those terms are defined in 18 U.S.C. §1116(b).

9-60.120 Investigative Jurisdiction

Investigative jurisdiction is vested in the Federal Bureau of Investigation.

9-60.130 Special Considerations

9-60.131 24 Hours Rebuttable Presumption

The rebuttable presumption set forth in 18 U.S.C. §1201(b) does not create a presumption of kidnapping. Rather, it creates a presumption of transportation in interstate or foreign commerce in cases where an actual kidnapping has been established. The presumption was added to the statute to give the FBI jurisdiction to investigate. In a federal prosecution under 18 U.S.C. §1201(a)(1), actual interstate or foreign transportation must be proved. See United States v. Moore, 571 F.2d 76 (2d Cir. 1978).

9-60.132 "Willful" Transportation in Interstate or Foreign Commerce

The original Federal Kidnapping Act, enacted in 1932, used the phrase "knowingly transport. . . in interstate or foreign commerce." Several changes in the Act were made in 1972 by Pub. L. No. 92-539, an "[a]ct for the Protection of Foreign Officials and Official Guests of the United States."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The jurisdictional base was extended to include kidnappings in the special and maritime and territorial jurisdictions, the special aircraft jurisdiction, and situations where the victim is a "foreign official" or "official guest." Further, the statute was amended to direct its sanctions against those who "willfully" transported their victims in interstate or foreign commerce.

These changes were made to make the kidnapping itself the gist of the offense, rather than the transportation of the victim in interstate commerce and to facilitate in extraditing kidnappers from foreign countries. H. Rep. No. 92-1268, p. 10. See also S. Rep. No. 92-1105, p. 8. Discussion of the change from "knowingly" to "willfully" is absent from the legislative history. However, the section analysis in both the House and the Senate Reports states "jurisdiction to punish kidnapping is provided when (1) the victim is transported in interstate or foreign commerce (as under existing law)." H. Rep. No. 92-1268, p. 16; S. Rep. No. 92-1105, p. 17. This language militates against the view that Congress intended to change the intent requirements then existing under the kidnapping statute.

Several cases have discussed the intent requirements under the old law. In United States v. Powell, 24 F. Supp. 161 (E.D. Tenn. 1938), the court held that it was not an essential element of the offense that the defendant have knowledge of the crossing of state lines or intent to go from one state to another with such knowledge. The court in Eidson v. United States, 272 F.2d 684 (10th Cir. 1959), stated that it was not essential for the government to prove as an element of the offense that the defendant had specific knowledge of the exact location of the state line at the time he crossed it. "It is enough to show affirmatively that he knowingly set in motion the interstate trip; that he intentionally went to the place of his own selection; and that in doing so, he crossed the state line with the kidnapped victim in his custody." Eidson v. United States, supra at 687. Had Congress intended a higher degree of intent by its inclusion of the term "willfully" in the new law, it is extremely doubtful it would have done so without any discussion of the change for specific intent would make federal jurisdiction exceedingly difficult to prove. In accord, United States v. Bankston, 603 F.2d 528 (5th Cir. 1979); United States v. Napier, 518 F.2d 316 (9th Cir. 1975), cert. denied, 423 U.S. 895 (1975).

9-60.133 Penalty Provision

Public Law No. 92-539 deleted the then existing death penalty provision and provided for a penalty of "imprisonment for any term of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

years or for life" for kidnapping, 18 U.S.C. §1201(a) or conspiracy to kidnap, 18 U.S.C. §1201(c).

In 1976, Pub. L. No. 94-467 further extended the scope of the statute to cover situations in which the victim is a "foreign official, an internationally protected person, or an official guest," (see USAM 9-65.830), and provided for a penalty of not more than 20 years imprisonment for an attempted kidnapping of such individuals (18 U.S.C. §1201(d)).

9-60.134 Allegations of "Mental Kidnapping" or "Brainwashing" by Religious Cults

In recent years, we have received numerous complaints alleging that members of various religious sects are victims of "brainwashing," "mind-control," or "mental kidnapping" by leaders of these groups. A typical allegation is that new members are subjected to intensive indoctrination accompanied by inadequate amounts of food and sleep, with the result that they become "programmed" to obey the wishes and commands of their leader and cease to think for themselves. As a general rule in these situations, there is no information or allegation that the "brainwashed" sect member has been physically restrained from leaving the sect.

It is our position that an allegation of "brainwashing" accompanied by interstate travel would not support a prosecution under the federal kidnapping statute. We are brought to this conclusion by the statute and its judicial interpretation. In Chatwin v. United States, 326 U.S. 455 (1946), defendants, members of a Mormon cult, persuaded a 15-year old mentally retarded girl that a "celestial" or plural marriage was essential to her salvation, and she was taken interstate to consummate such a marriage. Subsequently, defendants were convicted under the federal kidnapping statute. The Supreme Court, in reversing the convictions, concluded that there was no evidence the victim had been confined against her will or that she lacked the mental capacity to understand the concept of celestial marriage and to exercise her own free will in this regard. In short, the purpose of the statute is to prohibit interstate kidnapping rather than general transgressions of morality involving the crossing of state lines. Therefore, in our view, a prosecution under the kidnapping statute could not be sustained based on evidence that an adult of normal intelligence was "brainwashed" into continued association with a religious sect. For cases involving possible violations of the peonage or involuntary servitude statutes (18 U.S.C. §§1581, 1583 and 1584) you should consult with the Involuntary Servitude Coordinators, Civil Rights

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Division, Criminal Section (FTS 633-3204), before making a prosecutive determination.

9-60.135 "Deprogramming" of Religious Sect Members

The Criminal Division has received a substantial number of complaints from members of various religious sects alleging that they have been abducted by their parents or persons acting on behalf of their parents for the purpose of "deprogramming," a process that purports to free the sect member from the influence of the sect. If these complaints indicate a possible violation of the federal kidnapping statute, the Federal Bureau of Investigation conducts an appropriate investigation. If investigation determines that prosecution may be warranted, the matter is presented to the appropriate U.S. Attorney's office.

Although there have been a number of successful state prosecutions of "deprogrammers," the only reported federal prosecution resulted in an acquittal. See United States v. Patrick, 532 F.2d 142 (9th Cir. 1976). Quite often in these "deprogramming" situations, the parents of the young adult cult member previously obtained an ex parte court order appointing the parents as temporary guardians or conservators for their adult son or daughter. Although the legality of these ex parte court orders may be questionable, the existence of such a court order would weigh heavily against a criminal prosecution.

It is a general policy of the Department not to become involved in situations which are essentially domestic relations controversies. If a parent abducts his/her adult child from a religious sect, accompanies the child throughout the "deprogramming," and there is no violence or other aggravating circumstances, these facts would weigh against federal involvement. An aggrieved individual in this situation can pursue civil remedies against his/her parents or others to obtain money damages or other relief. See, e.g., Ward v. Connor, 657 F.2d 45 (4th Cir. 1981). However, if violence or aggravating circumstances exist, particularly where professional "deprogrammers" are involved, criminal prosecution should be pursued if the evidence warrants.

9-60.140 Use of the Fugitive Felon Act in Parent/Child Kidnappings

See discussion of the Fugitive Felon Act, 18 U.S.C. §1073, with reference to parental kidnappings at USAM 9-69.421, and the Fugitive Felon Act generally at USAM 9-69.400.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.150 FBI Assistance in Missing Persons Cases

In a missing person case, as a matter of cooperation, the FBI will, at the request of a state or local law enforcement agency, make available the facilities of the FBI Identification Division and the FBI Laboratory.

The FBI Identification Division will check its files for any current information, and will conduct any fingerprint comparisons that the local police agency requests. If a fingerprint record is available, a missing persons stop will be filed by the Identification Division at the request of a local police agency. Subject to certain conditions, missing persons stops also will be filed by the Identification Division at the request of a relative, other governmental agencies, and social service organizations, such as Red Cross and the Salvation Army, when acting on behalf of the relative of a missing person.

The FBI Laboratory will conduct certain technical examinations at the request of law enforcement authorities. These services include examinations of hair, clothing, and soil, as well as chemical and metallurgic examinations.

Information pertaining to certain categories of missing persons, including missing children, may be entered into the missing person file of the FBI operated National Crime Information Center (NCIC). Usually such entries are made by the local law enforcement agency which received the missing person complaint. However, since passage of the Missing Children Act (Pub. L. No. 97-292, amending, 28 U.S.C. §534) the FBI will receive

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

information directly from parents of missing children for entry into NCIC, if the local law enforcement agency will not do so.

9-60.160 Investigative Policy-Kidnapping vis a vis Missing Persons Complaints

For some time it has been the FBI's policy that, except in parental kidnapping matters, every reported kidnapping in which circumstances indicate that an actual abduction has taken place is afforded an immediate preliminary investigation to determine if a full investigation under the federal kidnapping statute is warranted.

Clearly, under these guidelines, the typical teenage runaway complaint would not be investigated as a federal kidnapping. Recently, however, some controversy has arisen as to the adequacy of the investigative guidelines in situations where much younger children are missing. With regard to missing children of very tender years, we believe that in many cases an abduction may be assumed so as to warrant an immediate preliminary kidnapping investigation by the FBI.

The Criminal Division has established a policy whereby this Division reviews any decision by the FBI not to conduct an investigation in those missing persons cases wherein the facts indicate possible violations of the federal kidnapping statute. Under this policy, the FBI will refer information concerning questionable missing person cases to the Criminal Division. The Division will thoroughly review such information, and if deemed warranted, will request the FBI to commence a kidnapping investigation.

U.S. Attorneys who become aware of a missing person case in their district which may involve a kidnapping should insure that such information is brought to the attention of the Criminal Division. Questions concerning this policy should be directed to attorneys of the General Litigation and Legal Advice Section (FTS) 724-7526, 724-6971.

9-60.170 Application of the Hobbs Act (18 U.S.C. 1951)

See discussion of the Hobbs Act with reference to the Federal Bank Robbery Statute, USAM 9-61.690, and Hobbs Act generally, USAM 9-131.000.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.200 THE CRIMINAL SANCTIONS AGAINST ILLEGAL ELECTRONIC SURVEILLANCE  
(18 U.S.C. §§2510-2513 and 47 U.S.C. §605)

9-60.201 Introduction

The statutes prohibiting illegal electronic surveillance are found primarily in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Those statutes are:

A. 18 U.S.C. §2510 which defines the terms used throughout the remainder of the chapter;

B. 18 U.S.C. §2511 which prohibits the interception of wire and oral communications and the subsequent disclosure or use of illegally intercepted communications;

C. 18 U.S.C. §2512 which prohibits the manufacture, possession, advertisement, sale, and transportation in interstate or foreign commerce of devices that are primarily useful for the surreptitious interception of communications; and

D. 18 U.S.C. §2513 which provides for the forfeiture of any device which is used, manufactured, or possessed in violation of 18 U.S.C. §§2511 or 2512.

9-60.202 Purpose

In enacting Title III, Congress prohibited all interceptions of wire and oral communications except as specifically provided. The evidence is overwhelming that no hidden exceptions exist in the statute.

A. 18 U.S.C. §2511(1)(a) is clear. It prohibits, "[e]xcept as otherwise specifically provided," the willful interception of wire and oral communications.

B. The Senate Judiciary Report pertaining to Title III shows again and again that 18 U.S.C. §2511 prohibits all electronic surveillance except as specifically authorized. See S. Rep. No. 1097, 90th Cong., 2d Sess. 27-28 (1968) ("Title III prohibits all wiretapping and electronic surveillance" except as authorized); *id.* at 66 ("To assure the privacy of oral and wire communications, Title III prohibits all wiretapping and electronic surveillance" except as authorized); *id.* at 89 ("[A]ll unauthorized interception of [wire and oral] communications should be prohibited. . ."); *id.* at 91 ("Section 2511 of the new chapter prohibits,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

except as otherwise specifically provided in the chapter itself, the interception and disclosure of all wire or oral communications.")

C. Each Senator speaking of the electronic surveillance prohibition thought that it prohibited interceptions of communications except as specifically authorized. 114 Cong. Rec. 13200, 14469, 14724, 14747, 14762 (1968) (comments by Senators Scott, McClellan, Cooper, Mundt, and Percy).

D. As the foundation for the criminal provisions of Title III, Congress made several findings. One such finding clearly shows the intention to prohibit all unauthorized interceptions of communications:

In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings and to prevent the obstruction of interstate commerce, it is necessary for Congress . . . to prohibit any unauthorized interception of such communications . . .

82 Stat. 211 (1968).

D. The Supreme Court has stated that, "[e]xcept as expressly authorized in Title III . . . all interceptions of wire and oral communications are flatly prohibited. Unauthorized interceptions and the disclosure or use of information obtained through unauthorized interceptions are crimes, 18 U.S.C. §2511(1) . . ." Gelbard v. United States, 408 U.S. 41, 46 (1972); see United States v. Giordano, 416 U.S. 505, 514 (1974).

#### 9-60.203 Legislative History

There is an extensive survey of the case law as it existed in 1968 pertaining to electronic surveillance and a cogent statement of congressional intent in S. Rep. No. 1097, 90th Cong., 2d Sess. 88-108, reprinted in, 1968 U.S. Code Cong. & Adm. News 2177.

#### 9-60.204 Importance of Enforcement

The criminal prohibitions against illegal wiretapping and eavesdropping are part of the same act which permits federal law enforcement officers to engage in court-authorized electronic surveillance. Congress viewed the criminal sanctions and the court

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

authorization provisions as two sides of the same coin. The retention of the government's authorization to engage in court-authorized electronic surveillance may depend on its vigorous enforcement of the sanctions against illegal wiretapping and eavesdropping. Accordingly, nothing less than vigorous enforcement, consistent with the policy guidance set forth below, will suffice.

9-60.205 Division Assistance

18 U.S.C. §§2510-2512 and 47 U.S.C. §605 are assigned to the General Litigation and Legal Advice Section of the Criminal Division. Attorneys responsible for these statutes may be reached at FTS 724-7144.

9-60.210 Definitions Applicable to 18 U.S.C. §2511(1) et seq.

9-60.211 "Wire Communication" (18 U.S.C. §2510(1))

The definition of "wire communication" is found in 18 U.S.C. §2510(1). It is intended to include all communications carried by a communications network.

9-60.212 "Communication Common Carrier" (18 U.S.C. §2510(10))

The definition of "communication common carrier" in 18 U.S.C. §2510(10) adopts the definition of "common carrier" in 47 U.S.C. §153(h). In essence, a "communication common carrier" is a company engaged as a common carrier for hire in interstate or foreign wire communications.

9-60.213 "Oral Communication" (18 U.S.C. §2510(2))

The term "oral communication" is defined in 18 U.S.C. §2510(3) to mean any verbal communication uttered by a person having a justifiable expectation of privacy. The legislative history indicates that an expectation of privacy would normally be justifiable in one's own home (citing Silverman v. United States, 365 U.S. 505 (1961)) or office (citing Berger v. New York, 388 U.S. 41 (1967)) but would not be justifiable in a jail cell (citing Lanza v. New York, 370 U.S. 139 (1962)) or an open field (citing Hester v. United States, 265 U.S. 57 (1924)). See S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968). A trespasser would not have justifiable expectation of privacy. Cf. United States v. Pui Kan Lam, 483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.214 "Intercept" (18 U.S.C. §2510(4))

The word "intercept" is defined in 18 U.S.C. §2510(4) to mean the "aural acquisition of the contents of any wire or oral communication through the use of" a device. The word "aural," of course, limits the kinds of interceptions covered by Title III. Non-aural interceptions by pen registers (see United States v. New York Telephone Company, 434 U.S. 159 (1977)); S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968)) or call-tracing devices are not covered by the statute.

9-60.215 "Electronic, Mechanical, Or Other Device" (18 U.S.C. §2510(5))

The term "electronic, mechanical, or other device" is defined in 18 U.S.C. §2510(5) to mean any device or apparatus which can be used to intercept communications. Two exceptions exist.

The first exception is for telephone instruments which are furnished by a communications common carrier and are being used in the ordinary course of business by the subscriber. The legislative history suggests that the genesis of the wording of the provision is found, in part, in the testimony of Hubert L. Kertz, Vice President of Operations, American Telephone and Telegraph Company (AT&T):

We would suggest [that the definitions] be revised to exclude from the definition of the term "electronic, mechanical, or other device," not only extension telephones, but all telephone instruments, equipment or facilities, or components thereof, used by a communications common carrier or any of its subscribers.

Hearings on the Right of Privacy Act of 1967, Before a Subcomm. of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. 586 (1967). Mr. Kertz noted that supervisory observing equipment is supplied to airlines, newspapers, and department stores. Id. at 587. He stated that AT&T insists in writing that employees be notified of the interceptions. Id. at 587 and 588. The equipment is only provided to businesses for insuring "that the quality of service that is provided . . . be good and that the airline or the department store is most interested in seeing to it that the employees at the switchboard or at the answering console are courteous and provide satisfactory service to their customers." Id. at 588. Responding to the question whether a notice should be placed on each

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

telephone instrument subject to monitoring, Mr. Kertz replied, "I think we have got in our practices adequate protection for the privacy of the employees." Id.

Mr. Kertz does not provide the final word on what became 18 U.S.C. §2510(5)(a)(1). His proposal would have exempted absolutely from the definition of "electronic, mechanical, or other device" all telephone equipment and facilities installed by a communications common carrier in the ordinary course of its business. Instead, the provision exempts only such telephone facilities "used . . . in the ordinary course of business. . . ."

There are three possible precreators for the "ordinary course" exemption. The first is Federal Communications Commission (FCC) Commissioner Loevinger. He testified that the FCC believed that criminal liability should not depend on the origin of the extension telephone instrument. Instead of the proposed exemption for "telephone instruments furnished to the subscriber or user in the ordinary course of its business," he proposed an exemption for "an extension telephone in normal use by the subscriber or user." Id. at 518. The difficulty with giving credit to Mr. Loevinger for the provision is that his suggestion was ultimately rejected: 18 U.S.C. §2510(5)(a)(1) requires both installation by a communications common carrier and ordinary usage to qualify for the exemption.

In Simpson v. Simpson, 490 F.2d 803, 809 n.17 (5th Cir.), cert. denied, 419 U.S. 897 (1974), the court finds the genesis of the "ordinary use" language in the testimony of Professor Herman Schwartz in Hearings on the Anti-Crime Program Before a Subcomm. of the House Comm. on the Judiciary, 90th Cong., 1st Sess. 989 (1967). Since the eavesdropping legislation ultimately came from the Senate, we have examined the Senate hearings in which Professor Schwartz also testified. There he objected to the unqualified exclusion for telephone extensions and highlighted three instances that concerned him: (1) an eavesdropper might break into a building and listen on an extension, (2) the police might coerce someone into permitting them to listen on an extension, and (3) someone might obtain improper authority to listen on the extension. Senate Hearings, supra, at 395. But Professor Schwartz cannot be given all the credit for the "ordinary use" language. More than anyone else, we suspect that the credit belongs to Mr. Joseph A. Beirne, President of the Communications Workers of America. Mr. Beirne testified strongly against the entire concept of supervisory observing. Senate Hearings, supra, 466-68 and 476-78.

It thus appears that the "ordinary use" provision is a compromise between Kertz's position of permitting everything and Beirne's position

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

permitting nothing. The key must be that the "ordinary use" provision was designed to protect privacy. The testimony of both Professor Schwartz and Mr. Beirne strongly supports this conclusion.

Supervisory observing equipment is designed for surreptitiously intercepting communications. Thus it may be argued that an "ordinary use" of supervisory observing equipment is to intercept communications without regard to privacy. However, such a view ignores the legislative history of 18 U.S.C. §2510(5)(a)(i). Rather than accepting Mr. Kertz's proposal for the blanket exception of telephone equipment, including supervisory observing facilities, Congress limited the exception to "ordinary use." Both Mr. Beirne's and Professor Schwartz's testimony shows that "ordinary use" must be read in privacy terms. Thus supervisory observing equipment is not exempted by the "ordinary use" provision unless at least one party has been notified of the existence and use of such equipment. Not only is this notification requirement found in Mr. Kertz's testimony in 1967, but it is part of present AT&T policy, at least as it pertains to subscriber use of such equipment. In a letter dated September 8, 1975, to the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, William Caming, Attorney for AT&T, wrote:

It is Bell System policy to furnish supervisory observing and service training assistance equipment solely to assist business subscribers in better evaluating the quality of telephone service being rendered by those of its employees handling calls placed "to the business." The implementation of this policy relies on adherence to administrative practices and intrastate tariff provisions which, in general, impose restrictions and conditions on the provision of this service, such as the following:

- Furnished only to business subscribers;
- Subscriber shall inform its employees their business telephone contacts are subject to observation;
- Service provided solely for purpose of determining the need for training or improving the quality of service rendered by employees in the handling of telephone calls to the subscriber of an impersonal business nature;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- Limitation of use to administrative lines only in connection with hotel, motel, club or like service involving public use, and may not be used for observing conversations between guest rooms or between guest rooms and other locations involving use of the message telephone network;
- Observing equipment may not be used for any other purpose;
- Subscriber shall not use service in manner contrary to tariff or law;
- Subscriber shall agree in writing to use the equipment solely for the purpose stated above, and to fully inform all affected employees.

Staff Studies and Surveys, National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, 510-11 (1976).

In short, the "ordinary use" of supervisory observing equipment, which is required to bring it within the 18 U.S.C. §2510(5)(a)(i) exception, is installation and use for the purposes described above, plus notice. See James v. Newspaper Agency Corporation, 591 F.2d 579 (10th Cir. 1979). However, we know of no instance where a criminal prosecution was brought because a business misused such equipment.

The courts of appeals do not agree on the scope of the 18 U.S.C. §2510(5)(a)(i) exception as it pertains to telephone extensions. In our view, the better reasoning is found in United States v. Harpel, 493 F.2d 346 (10th Cir. 1974). In that case the court held that "a telephone extension used without authorization or consent to surreptitiously record a private telephone conversation is not used in the ordinary course of business. This conclusion comports with the basic purpose of the statute, the protection of privacy . . . ." Id. at 351. But cf. Briggs v. American Air Filter, Inc., 630 F.2d 414 (5th Cir. 1980); Anonymous v. Anonymous, 558 F.2d 677 (2d Cir. 1977).

9-60.216 Hearing Aid Exception

18 U.S.C. §2510(5)(b) excludes from the definition of "electronic, mechanical, or other device" a hearing aid used to correct subnormal

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

hearing to not better than normal. As a theoretical matter, use of an aid to hear sound that would otherwise be inaudible to a person with normal hearing in the same circumstances does not fall within this exception.

9-60.217 "Person" (18 U.S.C. §2510(6))

The term "person" is defined in 18 U.S.C. §2510(6) to mean any individual person as well as natural and legal entities. It specifically includes United States and state agents. According to the legislative history, "Only the governmental units themselves are excluded." S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968).

9-60.218 "Contents" (18 U.S.C. §2510(8))

The term "contents" is defined in 18 U.S.C. §2510(8) to mean "any information concerning the identity of the parties [to a] communication or the existence, substance, purport, or meaning of that communication . . ." Even the "fact of the communication" is intended to fall within the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

definition. S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). In United States v. New York Telephone Company, *supra*, the Supreme Court held that a pen register, which discloses only the telephone numbers dialed, does not "intercept" (as that term is defined in 18 U.S.C. §2510(4)) the "contents" (as that term is defined in 18 U.S.C. §2510(8)) of communications since it does "not hear sound" and does not disclose whether the call was completed.

9-60.219 "Endeavor" (18 U.S.C. §2511(1))

The term "endeavor," used in section 2511(1)(a)-(d), is defined to mean any effort to accomplish the acts that the statute was intended to prevent. The word "endeavor" is intended to be broader in scope than the word "attempt." See Osborn v. United States, 385 U.S. 323 (1966); United States v. Russell, 255 U.S. 138, 143 (1921).

9-60.220 "Willfully" (18 U.S.C. §2511(1))

The word "willfully" as used in 18 U.S.C. §2511(1)(a)-(d) and §2512(1) is defined in its legislative history by a reference to United States v. Murdock, 290 U.S. 389 (1933). See S. Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968). Nevertheless, two courts have held that a mistaken belief that eavesdropping is legal is no defense to a charge under 18 U.S.C. §2511. See United States v. McIntyre, 582 F.2d 1221, 1224-25 (9th Cir. 1978); United States v. Schilleci, 545 F.2d 519, 526 (5th Cir. 1977).

9-60.230 18 U.S.C. §2511

9-60.231 Scope of Prohibitions

18 U.S.C. §2511 prohibits the unauthorized interception, disclosure, and use of wire and oral communications. The prohibitions are absolute, subject only to the specific exemptions in Title III. Consequently, unless an interception is specifically authorized, it is impermissible and, assuming existence of the requisite criminal intent, violates 18 U.S.C. §2511. See 9-60.202, *supra*.

18 U.S.C. §2511(1)(a) is a blanket prohibition against the willful interception, endeavor to intercept, or procurement of another person to intercept or endeavor to intercept any wire or oral communication. Although in a prosecution for illegally intercepting oral communications, the Fourth Circuit Court of Appeals found that 18 U.S.C. §2511(1)(a) has as an essential element proof of "some basis for federal jurisdiction,"

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. Burroughs, 564 F.2d 1111, 1115 (4th Cir. 1977), the Criminal Division believes that case was incorrectly decided. Nevertheless, unless a compelling case is presented for charging otherwise, 18 U.S.C. §2511(1)(b) should be charged in interception of oral communications cases.

Unlike 18 U.S.C. §2511(1)(a), paragraph (b) of 18 U.S.C. §2511(1) is applicable only to oral communications. It is less pervasive than the prohibition against the interception of oral communications contained in 18 U.S.C. §2511(1)(a) and was included because of the question concerning the constitutionality of paragraph (a). See S. Rep. No. 1097, 90th Cong., 2d Sess. 92 (1968); United States v. Burroughs, *supra*, at 1115. Although the interception of an oral communication may violate more than one subparagraph of 18 U.S.C. §2511(1)(b), a person may be convicted of only one offense under the section. See S. Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968).

18 U.S.C. §2511(c) and (d) provide additional penalties for the disclosure and use of illegally intercepted communications. The use or disclosure must be accompanied by knowledge or reason to know that the information concerned was obtained through an interception which violated 18 U.S.C. §2511(1). The legislative history shows that the phrase "knowing or having reason to know" is understood by referring to the case of Pereira v. United States, 347 U.S. 1 (1954). See S. Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968). That case suggests that the knowledge element of a criminal offense can be satisfied either when the subject has actual knowledge or when the occurrence of the element "can reasonably be foreseen." Pereira v. United States, *supra*, at 9.

Once the contents of an intercepted communication have become "public information" or "common knowledge," disclosure or use of the contents of the communication is no longer prohibited. See S. Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.232 Constitutional Basis

Congress recited various findings and legislative conclusions in support of its enactment of Title III of the Omnibus Crime Control and Safe Streets Act. 82 Stat. 211-12 (1968) (see historical note in 18 U.S.C.A. §2510). These findings, as well as the specified jurisdictional elements in 18 U.S.C. §2511 and §2512 leave no doubt of the statute's constitutionality except, perhaps, to the extent that it applies to the interception of oral communications. See, e.g., Weiss v. United States, 308 U.S. 321 (1939), cited in, S. Rep. No. 1097, 90th Cong., 2d Sess. 92 (1968).

With respect to the interception of oral communications, Congress found that the contents of such communications were being used by persons whose activities affect interstate commerce and were being intercepted by devices whose possession, manufacture, distribution, advertising, and use were facilitated by interstate commerce. 82 Stat. 211 (1968). These findings, once it is accepted that a rational basis exists for them (see Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964); Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 94-95 (1961)), show that the interception of oral communications is a "class of activities" which can be appropriately regulated by the Congress. And once the "class of activities" is appropriately regulated, Congress may legislate under the Commerce Clause to reach individual instances of electronic eavesdropping in which the nexus with interstate commerce is lacking:

Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class.

Perez v. United States, 402 U.S. 146, 154 (1971).

In addition to the exercise of its Commerce Clause powers, Congress intended to assert its power under the fifth clause of the Fourteenth Amendment to the Constitution in prohibiting the unauthorized interception of oral communications. See S. Rep. No. 1097, 90th Cong., 2d Sess. 92 (1968) (citing United States v. Guest, 383 U.S. 745 (1966)). However, the Solicitor General has in the past declined to allow the Criminal Division to rely on this constitutional rationale.

9-60.240 Exceptions to the Prohibition Against Intercepting Communications

9-60.241 Interceptions By Common Carrier Personnel

18 U.S.C. §2511(a) (a) (1) permits employees of communication common carriers to intercept, disclose, or use wire communications in the normal course of employment while engaged in any activity which is necessarily incident to the rendition of service or to the protection of the rights or property of the carrier of the communication. Interception, divulgence, or use for other purposes is not permitted. The provision allows telephone companies to combat "blue box" toll fraud by intercepting portions of telephone calls which have been completed by circumventing the companies' billing systems. See United States v. Auler, 539 F.2d 642 (7th Cir. 1976); United States v. Clegg, 509 F.2d 605 (5th Cir. 1975).

9-60.242 Law Enforcement Interceptions Accomplished Consensually

18 U.S.C. §2511 (2)(c), a person who is acting under color of law may intercept communications when he/she is a party to a communication or when a communicating party consents to the interception. Cf. United States v. White, 401 U.S. 745 (1971).

9-60.243 Other Consensual Interceptions

When not acting under color of law, a person who intercepts a communication with the consent of a party does not violate 18 U.S.C. §2511(1) unless he/she intercepts for a criminal, tortious, or other injurious reason. 18 U.S.C. §2511(2)(d). The language concerning criminal, tortious, or other injurious acts was added as a floor amendment to Title III by Senator Hart. He explained the amendment by stating that:

one party [consensual interceptions are] also prohibited when the party acts in any way with an intent to injure the other party to the conversation . . . . For example the secret consensual recording may be made for the purpose of blackmailing the other party, threatening him, or publicly embarrassing him. The provision would not, however, prohibit such activity when the party records information of criminal activity by the other party with the purpose of taking such information to the police as evidence.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Nor does it prohibit such recording in other situations when the party acts out of a legitimate desire to protect himself and his own conversations from later distortions or other unlawful or injurious uses by the other party.

114 Cong. Rec. 14694 (1968). See S. Rep. No. 1097, 90th Cong., 2d Sess. 175-76 (1968) (additional views of Senator Hart).

The legislative history indicates that consent may be expressed or implied. Indeed, "[s]urveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to." S. Rep. No. 1097, 90th Cong., 2d Sess. 94 (1968).

The implied-consent provision has not been treated expansively by the courts. Indeed, in Campiti v. Walonis, 611 F.2d 387, 396 (1st Cir. 1979), the court, apparently unaware of the appropriate legislative history, stated that "there is no implied consent exemption under the federal statute." Moreover, in Crooker v. United States Department of Justice, 497 F. Supp. 500, 503 (D. Conn. 1980), the court found that an inmate's knowledge of the fact that interceptions were occurring coupled with the prison administration's need for engaging in such monitoring were insufficient to establish consent.

In our view, a more thoughtful analysis can be found in Watkins v. L. M. Berry & Company, 704 F.2d 577 (11th Cir. 1983). In Watkins, the company for which plaintiff worked had a policy of monitoring employee sales calls as part of its regular training program. Employees were informed of the monitoring but told that personal calls would not be monitored except as necessary to determine whether a particular call was made for personal or business reasons. Nevertheless, a plaintiff's supervisor monitored a personal call, although how much of the call she heard was not clear. The district court granted summary judgment for the defendant. During the appeal, the defendants argued that plaintiff's acceptance of employment, knowing of the monitoring policy, constituted consent for the interception of the call.

The court of appeals noted that "consent is not to be cavalierly implied," but found that the plaintiff consented to the interception of business but not personal calls. Consequently, it reversed the district court.

The Criminal Division is convinced that consent can be implied in appropriate circumstances. Tying together the threads of Title III's legislative history and case law, we believe that there is a three-pronged

test for implied consent. First, the communication (i.e. something akin to institutional or personal protection). Second, the intercepting party must limit the interception to the minimum necessary to fulfill that interest. And third, the intercepting party must notify a communicating party that his/her communications are subject to interception.

#### 9-60.244 Other Exceptions

In addition to the authorized interceptions discussed above, the remaining two major kinds of authorized interceptions are (1) court-authorized or emergency interceptions conducted pursuant to 18 U.S.C. §2516 et seq., and (2) electronic surveillance conducted pursuant to the Foreign Intelligence Surveillance Act (50 U.S.C. §1801 et seq.).

#### 9-60.250 Proof of 18 U.S.C. §2511(1) Violations

It is important to remember that in any prosecution based on the interception of wire communications, the government must establish, pursuant to the definition of a wire communication in 18 U.S.C. §2510(1), that the intercepted communications were made in whole or in part through the facilities of a communication common carrier engaged in providing facilities for the transmission of interstate or foreign communications. Proof that a telephone facility is operated by a common carrier can normally be established through judicial notice. However, failure to seek such notice can be fatal to the government's case. See United States v. Jones, 580 F.2d 219 (6th Cir. 1978); United States v. Blattel, 340 F. Supp. 1140 (D. Iowa 1972). But cf. United States v. Lentz, 624 F.2d 1280 (5th Cir. 1980).

The essential elements of a 18 U.S.C. §2511 (1)(a) violation are: (1) the act or acts of intercepting, endeavoring to intercept, or procuring any other person to intercept or endeavor to intercept a wire or oral communication and (2) the doing of such act or acts willfully. These elements contain sub-elements. A wire communication, as noted above, must be made through facilities for the transmission of wire communications by the aid of cable or other like connection furnished or operated by a communication common carrier in providing or operating such facilities for the transmission of interstate or foreign communications (18 U.S.C. §2510(1)). An oral communication must be uttered by a person having a justifiable expectation of privacy (18 U.S.C. §2510(2)).

The essential elements of a 18 U.S.C. §2511(1)(b) violation are: (1) the act or acts of using, endeavoring to use, or procuring another person

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

to use or endeavor to use an electronic, mechanical, or other device or its method of operations or communication; (2) the device or its method of operation or target meets one of the criteria specified in 18 U.S.C. §2511(1)(b)(1)-(v); and (3) the doing of such act or acts willfully.

The essential elements of a violation of 18 U.S.C. §2511(1)(c) are: (1) the act or acts of disclosing or endeavoring to disclose to another person the contents of a wire or oral communication; (2) the doing of such act or acts knowing or having reason to know that the information was obtained through an illegal interception of a wire or oral communication; and (3) the doing of such act or acts willfully.

The essential elements of a violation of 18 U.S.C. §2511(1)(d) are: (1) the act or acts of using or endeavoring to use the contents of a wire or oral communication; (2) the doing of such act or acts knowing or having reason to know that the information was obtained through an illegal interception of a wire or oral communication; and (3) the doing of such act or acts willfully.

#### 9-60.251 Lesser Offenses

There are two lesser offenses which, in limited circumstances, overlap with 18 U.S.C. §2511.

A. The first is 47 U.S.C. §502 which prohibits the willful violation of Federal Communications Commission regulations. Two pertinent regulations are found at 47 C.F.R. §2.701 and §15.11 which prohibit the use of radio devices to intercept or record conversations unless all parties to the conversation first consent. Since the penalty for a violation of 47 U.S.C. §502 is merely a maximum fine of \$500 for each day on which a violation occurs, a charge under the section for a nonconsensual interception seems unduly lenient and would rarely be appropriate.

B. The second misdemeanor violation is 18 U.S.C. §242 which penalizes persons acting under color of law who deprive individuals of their civil rights. The statute is administered by the Civil Rights Division and prior authorization from that Division is required before a prosecution can be brought. Although 18 U.S.C. §242 may technically be available, law enforcement violators of the electronic surveillance prohibitions represent high priority targets for prosecution. Consequently, only in the most compelling circumstances should a charge or a plea to a charge under 18 U.S.C. §242 be considered.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.260 Prosecutive Policy--18 U.S.C. §2511

9-60.261 State Laws

Title III does not preempt the authority of the states to legislate concerning the interception of communications. Cf. S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968) ("The proposed provision [concerning court-authorized interceptions] envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.") The protection of privacy is as much a matter for local concern as protection of persons and property. Accordingly, the

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

efforts of federal law enforcement personnel should supplement, not supplant, local action.

U.S. Attorneys should review the applicable statutes in their states. When there is no statute or when the existing statutes are inadequate, U.S. Attorneys should work through their federal-state law enforcement committees to obtain the enactment of appropriate legislation. When suitable state legislation exists but is not sufficiently used by local prosecutors, U.S. Attorneys should make efforts to stimulate local enforcement.

9-60.262 Overall Prosecutive Policy

The Department's overall prosecutive policy under 18 U.S.C. §2511 is to focus primarily on persons who engage or procure illegal electronic surveillance as part of the practice of their profession or as incident to their business activities. Less emphasis should be placed on the prosecution of persons who, in the course of transitory situations, intercept communications on their own without the assistance of a professional wiretapper or eavesdropper. This does not mean that such persons are never to be prosecuted, but simply that this type of prosecution is not a major thrust of the Department's enforcement program.

Most illegal interceptions fall into one of five categories: (1) domestic relations, (2) industrial espionage, (3) political espionage, (4) law enforcement, and (5) intrabusiness. The largest number of interceptions, more than 75 percent, are in the domestic relations category.

9-60.263 Vigorous Enforcement

It is the Department's policy to vigorously investigate and prosecute illegal interceptions of communications which fall within the industrial and political espionage, law enforcement, and intra-business categories. Generally such violations will have interstate ramifications which will make federal prosecution preferable to state prosecution. Nevertheless, in cases where the federal interest is slight, it may be appropriate to defer to state prosecution.

9-60.264 Domestic Relations Disputes

Illegal interceptions arising from domestic relations disputes generally present less of a federal interest and, therefore, local prosecution is more appropriate. However, this does not mean that federal prosecutors should abdicate responsibility for prosecuting such interceptions. Indeed, in view of the preponderance of this kind of interception, no enforcement program can be effective without the initiation of some prosecutions for deterrence purposes. U.S. Attorneys should develop effective liaison with local prosecutors in order to convince them to shoulder their share of the burden.

Within the category of domestic relations violations, primary attention should be given to those instances in which a professional is involved, e.g., private detective, attorney, moonlighting telephone company employee, and supplier of electronic surveillance devices. U.S. Attorneys should feel free to pursue these cases or refer them to local prosecutors; however, no professional should escape prosecution when a prosecutable case exists.

Domestic relations violations which do not involve a professional interceptor are the lowest priority cases for federal prosecution. While local prosecution is normally preferable, when local prosecutors are unwilling to pursue the case, resort to federal prosecution may be appropriate. Nevertheless, violations of this type will sometimes prove to be of insufficient magnitude to warrant either federal or state prosecution. In such cases, other measures may prove sufficient, for example, a civil suit for damages (18 U.S.C. §2520), suppression of evidence (18 U.S.C. §2515), or forfeiture of the wiretapping or eavesdropping paraphernalia (18 U.S.C. §2513).

9-60.265 Disturbed Persons

Disturbed persons often suspect that they are the victims of illegal interceptions. Consequently, a complaint, which is based solely on suspicious noises heard on the telephone, normally does not merit further investigation if the initial line check fails to produce independent evidence of a tap.

9-60.266 Law Enforcement Agencies

In the investigation of electronic surveillance allegations made against law enforcement agencies, U.S. Attorneys should monitor closely every aspect of the investigation to assure a vigorous effort.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.267 Use of Immunity

The clandestine nature of unlawful electronic surveillance often presents a formidable obstacle to successful investigation and prosecution. For this reason the need for a grant of immunity from prosecution, issued pursuant to 18 U.S.C. §§6001 *et seq.*, sometimes proves indispensable. When necessary, consideration should be given to immunizing the least culpable "nonprofessional" person or persons who are necessary to develop a prosecutable case against an involved professional interceptor or supplier of interception devices.

9-60.268 Law on Interspousal Wiretaps

In Simpson v. Simpson, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974), the Fifth Circuit Court of Appeals held that the civil-remedies portion of Title III of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. §2520) does not permit recovery by a wife in a suit against her husband for his wiretapping the telephone in the marital home. Unfortunately the Simpson decision suggests that such interspousal wiretapping is not a crime. Since domestic relations wiretapping is the preponderant kind of electronic surveillance, the Simpson case represents a significant inroad into the blanket prohibition contained in 18 U.S.C. §2511. (Fortunately, even the Simpson court suggested that no derivative spousal immunity exists to protect third parties who act at the behest of a spouse. Simpson v. Simpson, *supra*, 490 F.2d at 809; see United States v. Rizzo, 583 F.2d 907, 910 (7th Cir. 1978)).

The Criminal Division believes that Simpson, *supra*, where it finds that interspousal wiretapping does not violate Title III, is incorrectly decided. Indeed, the weight of judicial authority indicates that the Simpson court erred. See United States v. Jones, 542 F.2d 661 (6th Cir. 1976); Flynn v. Flynn, 560 F. Supp. 922 (N.D. Ohio 1983); Heymann v. Heymann, 548 F. Supp. 1041 (N.D. Ill. 1982); Kratz v. Kratz, 477 F. Supp. 463 (E.D. Pa. 1979); *cf.* Anthony v. United States, 667 F.2d 870 (10th Cir. 1982).

9-60.269 Applicability of 18 U.S.C. §2511 to the Interception of Radio Communications

If Title III and its legislative history are viewed from an overall perspective, then it is clear that radio communications are a third kind of communication, different from either wire or oral communications.

Under this view, point-to-point radio communications must be governed exclusively by 47 U.S.C. §605. Unfortunately, confusion is created by the anomalous reference in 18 U.S.C. §2511 (2)(b) to an "oral communication transmitted by radio," which was cited by the court in United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973), in holding that point-to-point radio communications are a form of oral communication falling within the purview of 18 U.S.C. §2511. Nevertheless, even if we accept the rationale in Hall, it would appear that the interception of an unscrambled point-to-point radio communication would not violate 18 U.S.C. §2511 since there can be no justifiable expectation of privacy in the communication. See United States v. Rose, 669 F.2d 23 (1st Cir. 1983). (It should be noted that the interception of the radio portion of a mobile to land-line telephone call can violate 18 U.S.C. §2511 since the definition of a "wire communication" in 18 U.S.C. §2510(1) includes any communication made "whole or in part" through the use of wire facilities. Wire communications, of course, need not be accompanied by a justifiable expectation of privacy, see, e.g., United States v. Hall, supra, 488 F.2d at 196).

9-60.270 Use of the Contents of Illegally Intercepted Communications Against the Interceptor

18 U.S.C. §2515 prohibits use of the contents of illegally intercepted communications as evidence in judicial proceedings. No exception is contained on the face of the statute for the use of the contents, when necessary, as evidence in a prosecution against the interceptor. Nevertheless, the legislative history of Title III indicates that "in certain limited situations disclosure and use of illegally intercepted communications would be appropriate to the proper performance of the officers' duties." See S. Rep. No. 1097, 90th Cong., 2d Sess. 99 (1968). The example given is the use and disclosure of illegally intercepted communications "in the investigation and prosecution of an illegal wiretapper himself." Id. at 99-100.

At least when the victims of the interceptions consent, the contents of the communication may be used against the interceptors. See United States v. Bragan, 499 F.2d 1376 (4th Cir. 1976). However, when the victims object, at least when the contents of the illegally intercepted communications are not necessary to prove the charges, one court has held that such contents may not be introduced at trial. See United States v. Liddy, 12 Cr. L. Rep. 2343 (D.C. Cir., Jan. 19, 1973)(otherwise unreported), rev'd, United States v. Liddy, 354 F. Supp. 217 (D.D.C. 1973).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.271 Electronic Surveillance in Prisons

Electronic surveillance within prisons generally involves the interception of oral, as opposed to wire, communications. Even when a visitor and prisoner are separated by a shield and speak over a "telephone," the communications are usually "oral" because the lines lack the requisite interstate nexus to be wire communications. See 18 U.S.C. §2510(1). Thus, prisoner-to-prisoner and visitor-to-prisoner oral communications in a prison are protected by Title III only in those instances in which the communicating parties have a justifiable expectation of privacy.

The Senate Report relevant to Title III states that an expectation of privacy "would clearly be unjustified in certain areas; for example, a jail cell. . ." See S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968). In support of the proposition, it cites Lanza v. New York, 370 U.S. 139 (1962), a case in which the conversations of an inmate and his brother were intercepted. Therefore, it is doubtful that the interception by prison officials of communications between prisoners and visitors, other than attorneys, would form an appropriate basis for a prosecution under 18 U.S.C. §2511. See Christman v. Skinner, 468 F.2d 723 (2d Cir. 1972).

The willful interception of a communication between a prisoner and an attorney must be analyzed differently. The need for privacy during an attorney-client communication is so weighty and the recognition of the attorney-client privilege is so widespread, that even in prison, an attorney-client communication should normally be attended by a justifiable expectation of privacy. See Lanza v. New York, supra, 370 U.S. 143-44. Consequently, a prosecution under 18 U.S.C. §2511 could be maintained for the willful interception of a communication between an inmate and an attorney.

While "oral communications" are defined to include an expectation of privacy requirement (18 U.S.C. §2510(2)), "wire communications" are defined to include no such element (18 U.S.C. §2510(1)). See, e.g., Briggs v. American Air Filter Company, Inc., 630 F.2d 414, 417 & n.4 (5th Cir. 1980). Thus, the fact that a communicating inmate has no justifiable expectation of privacy when he or she communicates on the telephone does not necessarily result in the conclusion that interceptions of prisoner telephone communications are permissible. See Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979). In drawing the line between legal and illegal interceptions of prisoner telephone calls, the courts distinguish between calls intercepted pursuant to established prison regulations and accompanied by notice, which are legal, see United States v. Paul, 614

F.2d 115 (6th Cir. 1980); Crooker v. Department of Justice, 497 F. Supp. 500 (D. Conn. 1980), and other interceptions, which are illegal, see Campiti v. Walonis, supra, 611 F.2d 387.

9-60.280 18 U.S.C. §2512

9-60.281 Scope of Prohibitions

18 U.S.C. §2512 provides penalties for conduct concerning devices which are "primarily useful for the purpose of the surreptitious interception of wire and oral communications." It prohibits sending such devices through the mail or in interstate or foreign commerce. See 18 U.S.C. §2512(1)(a). It prohibits manufacturing, assembling, possessing, or selling such devices when a device or component has been sent through the mail or in interstate or foreign commerce. See 18 U.S.C. §2512(1)(b). Finally, it prohibits the publication of an advertisement (1) concerning any device if the advertisement promotes the use of the device for the purpose of surreptitious interceptions or (2) concerning devices which are primarily useful for the surreptitious interceptions of communications.

The legislative history indicates that the statutory prohibition applies to:

a relatively narrow category of devices whose principal use is likely to be for wiretapping or eavesdropping. . . . The prohibition will thus be applicable to, among others, such objectionable devices as the martini olive transmitter, the spike mike, the infinity transmitter, and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler, or cigarette pack . . . . By banning these devices, a significant source of equipment highly useful for illegal electronic surveillance will be eliminated.

See S. Rep. No. 1097, 90th Cong., 2d Sess. 95 (1968). This list shows that there are two broad proscribed categories of devices: (1) devices which are disguised and (2) devices which are designed to intercept communications occurring at a distance from the listener (e.g., spike mike and infinity transmitter). The legislative history anticipates the use of expert testimony "in close cases." See S. Rep. No. 1097, 90th Cong., 2d Sess. 95 (1968). However, the history specifically exempts parabolic and other directional microphones "ordinarily used by broadcasters at sports events" from the reach of the statute. Id.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It is worthy of note that 18 U.S.C. §2512(1)(c)(ii) prohibits the advertisement of any device for "surreptitious interception." Such advertising is prohibited although the device itself may not be primarily useful for surreptitious interceptions and although the interceptions promoted are surreptitious, one-party consensual interceptions permissible under 18 U.S.C. §2511 (2)(d). See United States v. Bast, 495 F.2d 138 (D.C. Cir. 1974).

9-60.282 Exceptions to 18 U.S.C. §2512 Prohibitions

Except for advertising, the 18 U.S.C. §2512 prohibitions do not apply to communication common carriers acting in the normal course of their business, see (18 U.S.C. §2512 (2)(a)); to the United States, States, or political subdivisions acting in the normal course of their activities, see (18 U.S.C. §2512(2)(b)); or to persons acting under contract with such carriers or governmental entities. The exceptions are necessary to effect the electronic surveillance authority given to common carriers, see (18 U.S.C. §2511(2)(a)(i)) and to law enforcement agencies, see (18 U.S.C. §2516). Consequently, the meaning of the phrases "normal course of . . . business" and "normal course of . . . activities" in 18 U.S.C. §2512 is best understood by referring to the interception authority found elsewhere in Title III.

As noted above, the statute exempts persons "under contract with" communications common carriers and government agencies from its possession and sale prohibitions. This does not mean that a manufacturer can keep an inventory of prohibited devices in anticipation of a privileged sale; he/she must be "under contract." Moreover, not even the legitimate dealer is exempt from the advertising prohibitions.

An issue that deserves discussion is whether police forces in states, whose legislatures have not enacted appropriate statutes enabling law enforcement officials to engage in court-authorized electronic surveillance (see 18 U.S.C. §2516(2)), may possess equipment which is primarily useful for intercepting communications without the consent of any communicating party. It is not in the "normal course of . . . activities" of the law enforcement agency to engage in nonconsensual electronic surveillance; therefore, possession of 18 U.S.C. §2512 devices for nonconsensual interception purposes cannot be excused by 18 U.S.C. §2512 (2)(b). Absent such an offending purpose, possession of such equipment is not necessarily illegal. Police agencies in non-authorization states are authorized to engage in consensual

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

interceptions, 18 U.S.C. §2511(2)(c), and some of the offensive surveillance equipment may be suitable for consensual interceptions. For example, in a meeting between an undercover agent and a suspect in a motel room, a law enforcement agency might prefer to use a spike microphone to record the conversation rather than use a body recorder which is subject to discovery during a search of the undercover agency. But cf. United States v. Padilla, 520 F.2d 526 (1st Cir. 1975). Consequently, the possession of a device like a spike microphone by a police force in a non-authorization state would be permissible under 18 U.S.C. §2512(2)(b) as long as its use was limited to consensual interceptions.

9-60.283 Prosecutive Policy

Flagrant violators of 18 U.S.C. §2512 should be prosecuted vigorously, especially violators who possess such devices in order to engage in electronic surveillance as a business.

Less culpable first offenders and those who violate the statute because of ignorance of the law may be appropriate subjects for more lenient disposition. In some cases a warning may be sufficient. Nevertheless, in all cases except, perhaps, for minor advertising violations, the U.S. Attorney's office should require that the prohibited device either be surrendered voluntarily to the FBI or forfeited pursuant to 18 U.S.C. §2513.

9-60.290 Miscellaneous

Any device used in a violation of 18 U.S.C. §2511 or sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of 18 U.S.C. §2512 may be seized and forfeited to the United States pursuant to 18 U.S.C. §2513. The legislative history of the statute shows that 18 U.S.C. was intended to "impose an additional penalty on the individual who violates the provisions of sections 2511 and 2512. . ." S. Rep. No. 1097, 90th Cong., 2d Sess. 95 (1968).

When a prosecution is concluded or when prosecutive action is declined, all devices which have been used in violation of 18 U.S.C. §2511 and all devices sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2512, if their value is less than \$10,000, should be delivered to the United States Marshal for the district in which the seizure was made for forfeiture. See 28 C.F.R. §8.2. If the value of the devices exceeds \$10,000, then the U.S. Attorney should institute proceedings for their forfeiture. See 19 U.S.C. §1607 and §1610.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.291 Interception of Radio Communications: 47 U.S.C. §605

The first sentence of Section 605 of Title 47, United States Code, prohibits persons, who transmit or receive wire or radio communications, from divulging such communications except to authorized persons. According to the legislative history, the provision "is designed to regulate the conduct of communications personnel." S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). The section also prohibits either the unauthorized interception and divulgence or interception and use of radio communications.

The nature of radio communications is such that there is the potential for a multitude of petty 47 U.S.C. §605 violations which do not warrant the initiation of federal prosecutions. Consequently, the proper use of federal law enforcement resources usually requires that investigation and prosecution of 47 U.S.C. §605 violations be reserved for those cases in which there is a continuing, repeated, and flagrant violation of the law despite the application of lesser measures. It should be noted that the Cable Communications Policy Act of 1984 carved out an exception for the interception of satellite cable programming by an individual for private viewing. Prior to the Act, such an interception and use was, arguably, a violation of the law.

The work "person" in 47 U.S.C. §605 does not include a law enforcement officer acting in the usual course of his or her duties. See United States v. Hall, 488 F.2d 193 (9th Cir. 1973); S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). Consequently, not only is 47 U.S.C. §605 inapplicable to interceptions by law enforcement agents, it is also inapplicable to the instance where a person, who is not acting under color of law, intercepts a radio communication and divulges it only to a law enforcement officer acting in the normal course of his or her duties. However, if the intercepted transmission is the radio portion of a wire communication, then the felony prohibitions in 18 U.S.C. §2511 are applicable not only to the disclosure, but to the interception also. See United States v. Hall, *supra*.

It is here worth discussing the case of United States v. Rose, 669 F.2d 23 (1st Cir. 1983). In that case, an employee of the Federal Communications Commission intercepted a suspicious radio transmission and listened for five hours. He then turned the information over to the United States Coast Guard which intercepted further and then dispatched a cutter to where two vessels were transferring bales of marijuana. At their trial on drug charges, defendants moved to suppress the marijuana

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

because, they alleged, their communications were intercepted unlawfully. The First Circuit Court of Appeals refused to reverse the district court's decision admitting the evidence, since, the appellate court found, 47 U.S.C. §605 not violated unless the communicating parties have both a subjective and reasonable expectation of privacy.

To understand Rose, one must begin with the case of United States v. Hall, 488 F.2d 193 (9th Cir. 1973). The court in Hall incorrectly found that there are only two kinds of communications for the purpose of analysis under Title III of the Omnibus Crime Control and Safe Streets Act of 1968: wire communications and oral communications. Therefore, radio communications must necessarily be oral communications. Rose, apparently agreeing that radio communications are oral communications, read a justifiable-expectation-of-privacy requirement into 47 U.S.C. §605 (cf. 18 U.S.C. §2510(2)).

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The Rose and Hall analysis fails if we view the entire universe of Title III communications as composed of three kinds of communications: (1) wire, (2) oral, and (3) radio. If viewed thus, there is no justification for grafting the definition of "oral communication" onto Section 605. Indeed, the Criminal Division believes that 47 U.S.C. §605 has no justifiable-expectation-of-privacy element.

While the reasoning of Rose is incorrect, the result is proper. Since Coast Guard officials were acting in a law enforcement capacity, the disclosure of the radio communication to them and interception and use of other portions of the communication by them was not prohibited by 47 U.S.C. §605.

9-60.292 Unauthorized Reception of Cable Service: 47 U.S.C. §553

The Cable Communications Policy Act of 1984 added a new section, 47 U.S.C. §553. This section prohibits receiving cable communications service without permission of the operator, thereby prohibiting the theft of commercial cable communications.

The Act provides for both criminal and civil penalties for violations of this section. Willful violation for personal use is punishable by a fine of not more than \$1,000 and/or imprisonment for not more than six months. Willful violation for commercial advantage or private financial gain is punishable by a fine of not more than \$25,000 and/or imprisonment for not more than one year for the first offense. For subsequent willful violations for commercial advantage or private financial gain, the penalty is doubled. The victim of an interception may bring a civil action in federal court for an injunction, damages, and costs, including reasonable attorney's fees. Since there is a civil remedy for violations of 47 U.S.C. §553, U.S. Attorneys should consider whether this civil remedy is an adequate alternative to prosecution.

9-60.300 INTERSTATE EXTORTION: COMMUNICATIONS AND THREATS (18 U.S.C. §§875-877)

9-60.310 Description

18 U.S.C. §875 prohibits the transmission in interstate commerce of: (1) any demand or request for ransom or reward for the release of any kidnapped person; (2) a threat to kidnap or injure any person, either with or without the intent to extort; or (3) with intent to extort, a threat to

---

MARCH 1, 1986  
Sec. 9-60.291-.310  
Ch. 60, p. 24

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

injure the property or reputation of any person, including the reputation of a deceased person, or a threat to accuse any person of a crime.

18 U.S.C. §876 prohibits causing the mailing by the Postal Service, or the depositing for mail, of matter which contains: (1) a demand or request for ransom or reward for the release of any kidnapped person; (2) a threat to kidnap or injure any person either with or without the intent to extort; or (3) with intent to extort, a threat to injure the property or reputation of any person or deceased person, or threat to accuse any person of a crime.

18 U.S.C. §877 prohibits the mailing, in a foreign country for final delivery by the Postal Service within the United States of any communication containing: (1) a demand or request for ransom or reward for the release of any kidnapped person; (2) a threat to kidnap or injure any person, either with or without the intent to extort; (3) with intent to extort, a threat to injure the property or reputation of any person, including the reputation of a deceased person, or a threat to accuse any person of a crime.

9-60.320 Jurisdictional Requirements of 18 U.S.C. §875

This section applies only to interstate telephone calls or other communications that cross state lines. See United States v. Oxendine, 531 F.2d 957 (9th Cir. 1976).

9-60.330 Investigative Jurisdiction

Investigative jurisdiction for these statutes is vested in the FBI, with the following exception: the Postal Service investigates the depositing for mail, or causing to be so delivered, of any threat to injure the reputation of any person or to accuse any person of a crime.

√9-60.340 Supervisory Jurisdiction

Supervisory jurisdiction for these statutes is vested in the General Litigation and Legal Advice Section of the Criminal Division, FTS 724-6948.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.350 Special Considerations

A threat has been defined as "an avowed present determination or intent to injure presently or in the future." See United States v. Dysart, 705 F.2d 1247, 1256 (10th Cir. 1983); United States v. Marino, 148 F. Supp. 75, 77 (N.D. Ill. 1957). See also 2 E. Devitt and C. Blackmar, Federal Jury Practice Instructions, §66.04; (3d ed. 1977). Most courts have held that the government need not prove that the defendant actually intended to carry out the threat. See, e.g., United States v. Dysart, *supra*, at 1257; United States v. Hall, 493 F.2d 904, 905 (5th Cir. 1974), *cert. denied*, 422 U.S. 1044 (1975); United States v. Kelner, 534 F.2d 1026, 1025 n.6 (2d Cir. 1976), *cert. denied*, 429 U.S. 1022 (1977) (collecting cases). *Contra*, United States v. Patillo, 438 F.2d 13, 16 (4th Cir. 1971) (en banc). These decisions require only that the government prove that the defendant had the specific intent to communicate, by means of a facility of interstate commerce, a threat to injure. See, e.g., United States v. Kelner, *supra*, at 1023. The issue of defendant's intent in uttering particular words (e.g., whether an alleged threat was made seriously or merely in jest), is a question of fact to be determined by the jury upon consideration of the words themselves and the circumstances surrounding their use. See United States v. Carrier, 672 F.2d 300, 304-06 (2d Cir.), *cert. denied*, 457 U.S. 1139 (1982); United States v. Lincoln, 589 F.2d 379, 381-82 (8th Cir. 1979); United States v. Maisonet, 484 F.2d 1356, 1358 (7th Cir. 1973) (if reasonable recipient familiar with context of communications would interpret communications as a threat, the issue should go to jury).

There is no requirement that the government prove that the defendant had the present ability to carry out his/her threat, United States v. Lincoln, 589 F.2d at 1023, or that the threat actually induced fear in the mind of the recipient. See United States v. Holder, 302 F. Supp. 296 (1969), *aff'd*, 427 F.2d 715 (9th Cir. 1970). Further, a threat may be communicated to persons others than the person to whom the threat is directed. See, e.g., United States v. Cooper, 523 F.2d (6th Cir. 1975) (threats to injure fictitious person made during calls to radio station). See also United States v. Kelner, *supra* (defendant threatened during television interview to assassinate foreign leader).

The Ninth Circuit has stated that, as a general rule, the truth of damaging allegations underlying a threat to injure the reputation of another is no defense to a charge of extortion. See United States v. Vander Linden, 561 F.2d 1340, 1341 (9th Cir. 1977), *cert. denied*, 435 U.S. 974 (1978).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.360 Obscene or Harassing Telephone Calls

The making of certain obscene or harassing calls is a violation of 47 U.S.C. §223. See USAM 9-63.400, infra.

9-60.370 Bomb Threats

The use of the mails, telephone, telegraph or other interstate commerce to make a threat or to maliciously convey false information concerning an alleged or actual attempt to injure any person or property by means of an explosive is a violation of 18 U.S.C. §844. See USAM 9-63.900, infra.

9-60.380 Threats Against the President, Certain other Federal Officials, and Certain Foreign Officials

Separate sections of Title 18 make it a crime to threaten the President, 18 U.S.C. §871, see USAM 9-65.200, infra; certain federal candidates and officials, 18 U.S.C. §879; and specified foreign guests and officials, 18 U.S.C. §878, see USAM 9-65.800, infra.

9-60.400 CRIMINAL SANCTIONS AGAINST ILLEGAL ELECTRONIC SURVEILLANCE--THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA), 50 U.S.C. §1809

9-60.401 Introduction

In the past sixteen years Congress has enacted two separate statutes governing electronic surveillance. Beginning in 1968, with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 et seq., and continuing with the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §1801 et seq., Congress has established a comprehensive body of law regulating this area.

These two statutes share several common characteristics. Both prescribe authorization procedures which must be followed before surveillance can be conducted. Compare 18 U.S.C. §§2516-17 with 50 U.S.C. §§1802-05. These procedures include judicial approval of surveillance applications; minimization of interceptions by surveilling officials; and limitations on the use of intercepted information. Moreover, both statutes impose civil and criminal sanctions on unauthorized surveillance

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

activities. Compare 18 U.S.C. §§2511 (criminal penalties) and 2520 (civil sanctions) with 50 U.S.C. §§1809 (criminal penalties) and 1810 (civil sanctions).

Yet there are also significant differences between these two statutes. Title III of the Omnibus Crime Control and Safe Streets Act and the Foreign Intelligence Surveillance Act were designed to reach different types of activity. Thus, forms of surveillance which are encompassed by one statute may not be included under the other. The differences between Title III and FISA are most dramatically illustrated by the criminal provisions of the two statutes. The criminal section of the Foreign Intelligence Surveillance Act, 50 U.S.C. §1809, is at the same time both broader and narrower than the corresponding provisions of Title III. As discussed below, section 1809 covers a wider range of surveillance activities than does Title III. Yet, the criminal sanctions of that section apply to a much narrower class of individuals.

These differences have obvious significance for federal prosecutors. A full appreciation of the differences between the criminal provisions of FISA and Title III is necessary to the effective enforcement of either statute. 18 U.S.C. §§2511 and 2512, the criminal sections of Title III, are already discussed in detail in this Manual. See USAM 9-60.200 et seq. Accordingly, the purpose of these sections is to describe 50 U.S.C. §1809, the criminal provision of the Foreign Intelligence Surveillance Act. These sections will focus particularly on the elements of an offense under 50 U.S.C. §1809. Specific topics discussed include: the intent requirement for section 1809; the types of surveillance prohibited by that section, and the persons to whom FISA applies. These sections will also highlight, where appropriate, the differences between section 1809 and the complementary provisions of Title III.

#### 9-60.402 Investigative Jurisdiction and Supervisory Responsibility

Investigative jurisdiction over violations of 50 U.S.C. §1809 rests with the Federal Bureau of Investigation. Supervisory responsibility for prosecutions involving section 1809 rests with the General Litigation and Legal Advice Section of the Criminal Division. Prior authorization of the Criminal Division is not required for instituting these prosecutions. U.S. Attorneys with questions regarding the application of section 1809 are encouraged, however, to contact the General Litigation and Legal Advice Section for assistance.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-60.410 50 U.S.C. §1809: Elements of the Offense

50 U.S.C. §1809(s) provides that:

A person is guilty of an offense if he intentionally -

(1) engages in electronic surveillance under color of law except as authorized by statute; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute.

Like all criminal statutes, section 1809(a) defines what is prohibited in terms of both actions and intent. It is this coupling of a specific act with a particular state of mind which constitutes a crime. Therefore, in considering the elements of an offense under section 1809 it is appropriate to examine separately the intent required for an offense and the acts prohibited by the law. These two basic elements are described below.

9-60.411 The Intent Requirement

Section 1809(a) forbids any person from "intentionally" engaging in unauthorized electronic surveillance under color of law or using information obtained from such surveillance, knowing or having reason to know that the surveillance was not authorized. The use of the term "intentionally" suggests that violations of 50 U.S.C. §1809(a) are specific intent crimes.

This suggestion is made explicit by the legislative history to section 1809(a) which states that:

"The word 'intentionally' was carefully chosen. It is intended to reflect the most strict standard for criminal culpability. What is proscribed is an intentional violation of an order or one of the specified (statutory) provisions, not just intentional conduct. The Government would have to provide (sic) beyond a reasonable doubt that the conduct engaged in was in fact a violation and that it was engaged in with 'a conscious objective or desire' to commit a violation."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

H.R. Rep. No. 1283, 95th Cong., 2d Sess. 1, 97 (1978). Thus, it is clear that section 1809 is a specific intent crime which reaches only purposeful or deliberate efforts to engage in unauthorized surveillance or to use information obtained from unauthorized electronic surveillance.

9-60.412 Prohibited Acts

Under 50 U.S.C. §1809(a) a person violates the law when he/she engages in unauthorized electronic surveillance under color of law or discloses or uses information obtained under color of law through unauthorized electronic surveillance. 50 U.S.C. §1809(a)(1) and (2). Thus, section 1809(a) reaches two distinct acts. These are: (1) engaging in unauthorized electronic surveillance under color of law or (2) using or disclosing information obtained under color of law through unauthorized electronic surveillance.

In either event, however, the conduct proscribed by the statute involves unauthorized "electronic surveillance." Therefore, the term "electronic surveillance" in large measure defines the scope of this criminal sanction. For this reason, any understanding of the scope of section 1809(a) requires some consideration of this term.

9-60.413 Electronic Surveillance

Under the Foreign Intelligence Surveillance Act, "electronic surveillance" is defined to include "the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs within the United States . . . ." 50 U.S.C. §1809(f)(2). The "contents" of wire communications are, in turn, defined to include "any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication." 50 U.S.C. §1801(n). By defining electronic surveillance to include the receipt of information concerning the identity of parties to a wire communication or the existence of that communication, the statute suggests that the surveillance covered by FISA includes more than simply intercepting the verbal contents of some communication.

The legislative history of the Foreign Intelligence Surveillance Act confirms that this broad definition of electronic surveillance was intended to reach beyond verbal interceptions to other activities. In fact, the House Report on the Act expressly states that:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The surveillance covered by paragraph (2) [of 50 U.S.C. §1801(f)] is not limited to the acquisition of the oral or verbal contents of a wire communication. It includes the acquisition of any other contents of the communication, for example, where computerized data is transmitted by wire. Therefore, it includes any form of 'pen register' or 'touchtone decoder' device which is used to acquire, from the contents of a wire communication, the identities or locations of the parties to that communication.

H.R. Rep. No. 1283, 95th Cong., 2d Sess. 51 (1978); see S. Rep. No. 701, 95th Cong., 2d Sess. 35 (1978).

By defining electronic surveillance to include interception of nonverbal information, FISA extends the protection of the law beyond that previously provided by either Title III or the Constitution. See Smith v. Maryland, 442 U.S. 735 (1979) (Fourth Amendment does not apply to pen registers); United States v. New York Telephone Co., 434 U.S. 157 (1977) (Title III does not apply to pen registers). This change has particular significance for criminal law enforcement. It means that FISA's criminal sanctions reach activities which would be permitted under Title III. For example, the legislative history of the Foreign Intelligence Surveillance Act reflects a clear congressional intent that 18 U.S.C. §1809 limit the ability of law enforcement officers to use nonconsensual, warrantless pen registers. As the House Report explains:

[50 U.S.C. §1809(a)(1)] carries forward the criminal provisions of chapter 119 [of Title III of the Omnibus Crime Control Act] and makes it a criminal offense for officers or employees of the United States to intentionally engage in electronic surveillance under color of law except as specifically authorized in chapter 119 of Title III and this title. Since certain technical activities--such as the use of pen registers--fall within the definition of electronic surveillance under this title, but not within the definition of wire or oral communications under chapter 119, the bill provides an affirmative defense to a law enforcement or investigative officer who engages in such an activity for law enforcement purposes in the course of his official duties, pursuant to a search warrant or court order.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

H.R. Rep. No. 1283, 95th Cong., 2d Sess. 96 (1978) [emphasis added]. Thus, unlike Title III, FISA prohibits surveillance which does not involve interception of the verbal contents of any wire communication. Therefore if some surveillance device identifies the parties to a wire communication or the fact that such communication has occurred, it is encompassed by FISA. Under section 1809(a) the unauthorized use of such a device could constitute a criminal offense.

While the legislative history of section 1809 only refers to pen registers, it seems clear that the statute would prohibit other warrantless, nonverbal interceptions as well. The broader scope of FISA is illustrated by the following examples.

9-60.414 Computer Data Transmissions

Computers frequently rely upon wire communications to exchange data. These data transmissions are not verbal communications, yet through these transmissions a great deal of information is exchanged. Computer data transmissions provide yet another example of the broad reach of the Foreign Intelligence Surveillance Act. Title III would not prohibit the interception of computerized data carried by wire, since that interception would not involve "the aural acquisition of the contents of (a) wire . . . communication . . . ." 18 U.S.C. §2510(4) [emphasis added]. In contrast, interception of computer data transmissions would fall within the definition of "electronic surveillance" under FISA. Indeed, the legislative history of the Foreign Intelligence Surveillance Act specifically states that the Act reaches "the acquisition of any other contents of (a wire) communication, for example, where computerized data is transmitted by wire." H.R. Rep. No. 1283, 95th Cong., 2d Sess. 51 (1978).

9-60.415 Pagers

Another device which illustrates the differences between Title III and FISA is the pager. A pager is a device which informs individuals of telephone messages when they are away from a telephone. All pagers receive radio signals, alerting their users to incoming telephone calls. The form of these radio transmissions may vary, however.

There are three common types of pagers. The first type is the "tone only" pager. This device emits a sound--usually a "beep"--upon receipt of a radio transmission when the user receives a telephone call. The user of the "tone only" pager must then contact his/her office or answering

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

service to obtain the message left by the caller. A more sophisticated type of pager is the "display pager." This device will record and display a digital message to its user when a call is received. Finally, an even more sophisticated pager is the "tone and voice pager." This device receives a short verbal message from the caller.

With respect to the "tone only" pagers, Title III and FISA apply in the same way. Neither statute reaches the interception of the radio signals transmitted to a "tone only" pager. Title III would not apply since the contents of a communication are not overheard. See 18 U.S.C. §2510(4). Nor would FISA apply. FISA only prohibits the interception of radio communications when the communications are made "under circumstances in which a person has a reasonable expectation of privacy." 50 U.S.C. §1801(f)(1). Since the message transmitted by a "tone only" pager is not a communication over which there would be a reasonable expectation of privacy, FISA should not prohibit its interception.

Similarly, both FISA and Title III would apply to the verbal messages transmitted by "tone and voice" pagers. Since the communication transmitted by this type of pager is in part verbal and was sent in part by wire, it would be protected under either statute.

"Display pagers," however, would be treated differently under FISA and Title III. Title III would not apply to such pagers because the acquisition of a digital message is not an aural acquisition. See 18 U.S.C. §2510(4). Yet FISA may prohibit the interception of digital radio signals since these signals are transmitted under circumstances which may give rise to a reasonable expectation of privacy.

In short, because of its broader reach, prosecutors must be sensitive to FISA's applicability in any case involving wire interception. Indeed, the broader reach of section 1809(a) has a dual significance for federal law enforcement. At the outset it means that prosecutions can be based on conduct, such as the use of pen registers, which does not violate Title III. But section 1809(a) also affects the way in which investigations are conducted. While the warrantless use of pen registers and other similar devices is permitted under Title III and the Fourth Amendment, section 1809 suggests that unauthorized use of these devices may be forbidden. Therefore, law enforcement officers who fail to obtain court authorization may be exposed to civil or criminal liability under the Act. See 50 U.S.C. §§1809 and 1810.

For this reason it is the policy of the Department of Justice to require federal law enforcement officers in every case to obtain a court order authorizing the installation and use of a pen register or other

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

similar device. Procedures for obtaining such orders are described in USAM 9-7.231.

9-60.420 Persons Covered by 50 U.S.C. §1809(a)

Yet another significant difference between 50 U.S.C. §1809 and the complementary sections of Title III involves the persons who are subject to these criminal sanctions. While FISA extends to a broader range of surveillance activities than does Title III, its criminal sanctions apply to a much smaller class of people. The criminal provision of Title III, 18 U.S.C. §2511, forbids "any person" from willfully intercepting oral or wire communications. Thus, Title III prohibits unlawful interception both by law enforcement officials, United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978), and by private individuals, United States v. Jones, 542 F.2d 661 (6th Cir. 1976).

In contrast, 50 U.S.C. §1809(a) only applies to those who engage in surveillance under color of law or use information obtained under color of law through electronic surveillance. By defining criminal liability in terms of acts taken "under color of law," section 1809(a) suggests that only persons cloaked with some governmental authority can violate this section. Thus, electronic surveillance conducted exclusively by private individuals would not violate 50 U.S.C. §1809.

The scope of 50 U.S.C. §1809 is further limited by subsection (d) of that statute, which provides that: "(t)here is federal jurisdiction over an offense under this section if the person committing the offense was an officer or an employee of the United States at the time the offense was committed." Thus, jurisdiction exists over violations of section 1809(a) only if the person acting under color of law was also a federal officer or employee. The addition of this subsection to the Act has the practical effect of limiting criminal liability under FISA to the actions of federal officials. See H. R. Rep. No. 1283, 95th Cong., 2d Sess. 96 (1978) (50 U.S.C. §1809 "makes it a criminal offense for officers or employees of the United States to engage in electronic surveillance under color of law except as authorized in . . . Title III and this title.")

9-60.430 Penalties

Violations of 50 U.S.C. §1809 are punishable by as much as five years imprisonment, a \$10,000 fine, or both. 50 U.S.C. §1809(c). The same penalty is imposed under Title III for violations of its criminal provisions. 18 U.S.C. §§2511(1) and 2512(1).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In many instances electronic surveillance may violate both 50 U.S.C. §1809 and 18 U.S.C. §2511. For example, any intentional unauthorized interception of wire communications done by federal officials could violate both statutes. Yet it is clear that Congress did not intend for a single act to be punished under both statutes. The legislative history of section 1809 expressly addresses this issue. In its report on section 1809 the House Permanent Select Committee on Intelligence stated that:

Theoretically, because the definition of electronic surveillance in this title includes most activities encompassed within the term "interception of wire or oral communication" in (Title III), a single offense could violate both (50 U.S.C. §1809) and the criminal provision of (Title III). The committee intends that in such cases the Government proceed under only one of the provisions, not both.

H. R. Rep. No. 1283, 95th Cong., 2d Sess. 97 (1978).

Thus, the legislative history of section 1809 unambiguously states that the same act may not be punished as a violation of both FISA and Title III of the Omnibus Crime Control and Safe Streets Act. Indeed, given this clear expression of legislative intent, it would seem that cumulative punishment of one act under both statutes would violate the Double Jeopardy Clause of the Fifth Amendment. See Missouri v. Hunter, 459 U.S. 359 (1983) (legislative intent determines whether two crimes are the same "offense" for purposes of the Double Jeopardy Clause).

9-60.500 CRIMINAL SOLICITATION

9-60.501 Overview

Section 373 of Title 18, United States Code, defines and punishes the offense of solicitation to commit a federal crime of violence. Congress believes that a person who makes a serious effort to induce another person to commit a crime of violence is a clearly dangerous person and that this act deserves criminal sanctions whether or not the crime of violence is actually committed. The purpose of section 373 is to allow law enforcement officials to intervene at an early stage where there has been a clear demonstration of an individual's criminal intent and danger to society. If the solicited crime of violence is actually carried out, the solicitor is punished as an aider and abettor. See Senate Report No. 225, 98th Cong., 1st Sess. 308-310 (1983).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.510 Investigative Jurisdiction

The Federal Bureau of Investigation has investigative jurisdiction. Where the underlying felony is within the investigative jurisdiction of another federal law enforcement agency, it may be appropriate for that other agency to be involved in or assume responsibility for investigating the solicitation. This issue is to be resolved on a case by case basis.

9-60.520 Supervisory Jurisdiction

Supervisory jurisdiction is exercised by the General Litigation and Legal Advice Section.

9-60.530 Elements

18 U.S.C. §373 contains two essential elements. First, the offender must have the intent that another person engage in conduct constituting a federal felony that has as an element the use, attempted use, or threatened use of violence against the person or property of another. That intent must be manifested by circumstances strongly corroborative of its existence. Second, he/she must command, entreat, induce, or otherwise endeavor to persuade that other person to engage in such conduct.

9-60.531 Intent

Expressly included in the first element is a requirement that the circumstances show that the offender is serious in his/her intention. The existence of strongly corroborating circumstances is a question of fact for the jury. Certain circumstances would be highly probative of the seriousness of the individual's intent, including but not limited to:

A. The fact that payment of some other benefit was offered to commit the offense;

B. The fact that reasonably apprehended harm or other detriment was threatened if the offense were not committed;

C. The fact that there were repeated solicitations to the same or different individuals to commit the offense; or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. The fact that express credible protestations of seriousness were made in the solicitation.

The legislative history indicates that it is appropriate and desirable for the court to instruct the jury that circumstances such as those listed above tend to corroborate the existence of the required intent, and should be considered by the jury in making its determination. Similarly, it is appropriate for the court to instruct the jury concerning pertinent circumstances that tend to cast doubt on the existence of an intention that a violent felony be committed.

9-60.532 Conduct

The second element of the offense is that the offender engage in conduct characterizable as commanding, entreating, inducing, or endeavoring to persuade. For example, an order to commit an offense made by a person who stands in a relation of influence or authority over another constitutes a "command;" and threatening another if he/she will not commit an offense, or offering to pay him/her if he/she will, constitutes an "inducement." The phrase "otherwise endeavors to persuade" is intended to apply to any situation where a person seriously seeks to persuade another person to commit a violent felony. It is not intended, however, to reach the situation where an attempt to communicate a solicitation to another person is made, but the communication never reaches the intended recipient.

9-60.540 Violent Felony

It is significant the Congress did not merely refer to 18 U.S.C. §16 in defining the types of offenses of which solicitation is made criminal. 18 U.S.C. §16 defines a crime of violence as:

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
- (b) any other offense that is felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. §373 is limited to solicitations of federal felonies that have as an element the use, attempted use, or threatened use of physical force.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

See 18 U.S.C. §16(a). Consequently, the solicitation of a felony which meets the criteria of 18 U.S.C. §16(b), such as burglary, would not be a violation of 18 U.S.C. §373. The force may be against the person, e.g., assault, or against property, e.g., arson, but it must be the "property of another." Thus solicitation to commit arson of the solicitor's building is not proscribed. The concept of "property of another," in this context would be broad enough to encompass mortgaged property of the defendant where the mortgagee has only a security interest, as well as where title is vested in the mortgagee. See S. Rep. No. 307, 97th Cong., 1st Sess. 711-713 (1981), commenting on §§111 and 1731 of S. 1630 (the Criminal Code Reform Act of 1981). Reliance upon S. 1630 and its legislative history is appropriate inasmuch as the definition of "crime of violence" in the new 18 U.S.C. §16 is taken from that source. S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983). This history does not indicate whether the interest of an insurer would be covered. The force can be "threatened," as in extortion. 18 U.S.C. §373 does not penalize solicitation of violent misdemeanors.

9-60.550 First Amendment Implications

While 18 U.S.C. §373 prohibits words of instigation, the legislative intent is clear that what is made criminal is legitimately proscribable incitation to criminal activity, and not the mere advocacy of ideas, which is protected by the First Amendment. See S. Rep. No. 225, supra, at 309.

9-60.560 Penalty

18 U.S.C. §373 sets the penalty for solicitation as not more than one-half the maximum term of imprisonment or fine or both fixed for the crime solicited. It also provides that if the crime solicited is punishable by death, the maximum penalty for its solicitation is twenty years imprisonment.

9-60.570 Affirmative Defense--Renunciation

Subsection (b) of 18 U.S.C. §373 provides for an affirmative defense of renunciation. The defendant bears the burden of proving, by a preponderance of the evidence, that he/she voluntarily and completely abandoned his/her criminal intent and that he/she actually prevented the commission of the crime solicited. To be voluntary and complete, the renunciation must not be motivated by a decision to postpone the crime or to substitute another victim or objective. In addition, the defendant

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

must actually prevent the crime; a mere effort or attempt to prevent the crime is not sufficient to meet the requirements of the defense.

9-60.580 Culpability of Solicitee

Solicitation is an offense whether or not the solicited crime is committed. The fact that the solicitee can not be convicted of the violent felony is not a defense to a prosecution for criminal solicitation, any more than it is in a prosecution for aiding and abetting the substantive offense. A person is not less guilty of the commission of a crime because he used the overt behavior of an innocent or irresponsible agent. See Nigro v. United States, 117 F.2d 624 (8th Cir. 1941); United States v. Brandenburg, 155 F.2d 110 (8th Cir. 1946). The solicitee's lack of responsibility or capacity may be relevant, however, in determining the seriousness of the solicitor's intent since an entreaty to a very young child or an incapacitated person may indicate a lack of serious purpose. In addition, the refusal by the solicitee of a proposal or the fact that his/her agreement was feigned is also no defense.

9-60.590 Merger

The purpose of this statute is to allow law enforcement officials to intervene as early as possible to prevent criminal behavior. Consequently, if the solicitee successfully completes the criminal act, the solicitor may be prosecuted as an aider and abettor of the solicited act. S. Rep. No. 225, supra, at 308. The solicitation merges into the completed offense. See R. Perkins, Perkins on Criminal Law, 2d. Ed. (1969), at 584.

9-60.600 FELONY MURDER

9-60.601 Overview

Section 1111(a) of Title 18, United States Code, defines and prohibits murder in the first and second degree. First degree murders are divided into three categories: those which are premeditated, those which occur in the perpetration of, or the attempt to perpetrate, certain enumerated felonies, and those in which the death of an unintended victim results from a premeditated design to kill another. The enumerated felonies are arson, rape, burglary, robbery, escape, murder, kidnapping, treason, espionage, and sabotage.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.602 Legislative History

At common law, any killing which occurred during the commission of a felony was considered to have been committed with sufficient malice to warrant punishment as first degree murder. As the number of felonies expanded there was an increasing tendency to statutorily limit application of the felony murder rule to the original common law felonies or to those felonies deemed deserving of the harshest treatment. The most recent amendment to 18 U.S.C. §1111(a) is consistent with this history, adding to the list an offense which was treated as a felony under the common law (murder) and some offenses which are generally conceded to be among the most dangerous to society (kidnapping, escape, treason, espionage and sabotage). 18 U.S.C. §1111(a) contains a provision, unchanged by the recent amendments, which directs that an unintentional killing of a third person, committed in the course of an attempted or completed premeditated murder, be treated as first degree murder.

Murder has been included in the amended list to cover the situation in which the defendant acts in the heat of passion to kill A, but instead kills B. The Senate Judiciary Committee was of the view "that the danger presented to innocent persons in this situation is so severe that a defendant should be charged with first degree murder." See Senate Report No. 225 on S. 1762, 98th Cong., 1st Sess. 311 (1983).

9-60.610 Federal Jurisdiction

There is no federal jurisdiction unless the act which inflicts the fatal injury occurs on the federal enclave. 18 U.S.C. §§1111(b), 3236; United States v. Parker, 622 F.2d 298 (8th Cir.), cert. denied, 449 U.S. 851 (1980). However, there would appear to be jurisdiction of a homicide committed on an enclave even when the underlying felony occurred wholly outside the federal enclave, as where the killing occurs while the defendant is fleeing the crime scene. See W. LaFave and A. Scott, Criminal Law, 109-110, 118-121 (1972).

9-60.620 Investigative Jurisdiction

The Federal Bureau of Investigation normally has investigative jurisdiction. Where the underlying felony is within the investigative jurisdiction of another federal law enforcement agency, it may be appropriate for that other agency to be involved in or assume responsibility for investigating the homicide. This issue is to be resolved on a case by case basis.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.630 Supervisory Jurisdiction

Supervisory jurisdiction is exercised by the General Litigation and Legal Advice Section, 724-6971 and 7526.

9-60.640 Elements

There are two essential elements. First, a felony must be perpetrated or attempted. All elements of the underlying felony or the attempt to commit the underlying felony must be proved. See United States v. Herman, 576 F.2d 1139 (9th Cir. 1978); United States v. Lilly, 512 F.2d 1259 (9th Cir. 1975). Second, a killing must have resulted. The killing must occur during the res gestae of the felony but it may occur before, during, or after the felony. See United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977); United States v. Bolden, 514 F.2d 1301 (D.C. Cir. 1975); R. Perkins, Criminal Law 94-95 (2d ed. 1968).

9-60.650 Conspiracy, Aiding and Abetting, and Unintended Victims

The doctrines of conspiracy and aiding and abetting apply fully to prosecutions under the murder statute. See United States v. Sampol, 636 F.2d 621, 675 (D.C. Cir. 1980). The murder statute permits prosecution for the murders of unintended victims. However, thorny problems are presented where the unintended victim--a bystander or a codefendant--has been killed by law enforcement authorities attempting to apprehend the defendant. There is no federal case law on these issues. Persuasive authority can be found in state court decisions, and guidance can be found in LaFave and Scott, supra, 548-554, and Perkins, supra, 720-722. Additional authority can be found under the federal bank robbery statute, 18 U.S.C. §2113(e), although it must be remembered that under the federal bank robbery statute the killing need not be part of the res gestae of the offense. See, e.g., United States v. Delay, 500 F.2d 1360 (8th Cir. 1974) (bank president and his family murdered in an attempt to avoid apprehension for bank robbery).

9-60.700 HOSTAGE TAKING (18 U.S.C. §1203)

9-60.710 Investigative Jurisdiction

The Federal Bureau of Investigation has investigative jurisdiction over violations of 18 U.S.C. §1203.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.720 Supervisory Jurisdiction

General Litigation and Legal Advice Section.

9-60.730 Prosecutive Policy

It is the view of the Department of Justice that most hostage taking matters that arise within the United States can best be handled by state and local authorities. However, there may at times be situations in which federal involvement is appropriate (e.g., if the hostage is a federal official or an international guest, the third party is the United States, the perpetrators are international terrorists, etc.). Because of the strong preference for state and local handling of hostage taking matters within the United States, attorneys for the government should discuss a proposed prosecution with the Criminal Division prior to its initiation. In cases of hostage taking outside the United States, other factors, such as legal issues regarding the exercise of extraterritorial jurisdiction, foreign policy considerations, and costs, are involved; therefore, it is mandatory that attorneys for the government seek approval from the Criminal Division prior to the initiation of a proposed prosecution.

9-60.740 Discussion of the Offense

9-60.741 General

18 U.S.C. §1203 is intended to implement fully the International Convention Against the Taking of Hostages. See International Legal Materials, Vol. XVIII, No. 6, November 1979, at 1457-1463.

9-60.742 Hostage Taking

Under the Convention, hostage taking is the seizing or detaining of an individual coupled with a threat to kill, injure, or continue to detain that individual in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the detained individual. It is clearly the intent of the Congress that the statutory phrase "third person or a governmental organization" include everything covered by the term "third party" used in the Convention. The term "government organization"

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

covers national, state, and local governments as well as international governmental organizations. See 18 U.S.C. §831(f)(2). The term "person" covers "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." See 1 U.S.C. §1.

9-60.743 Offense--18 U.S.C. §1203(a)

Subsection 1203(a) makes it a federal crime to engage in hostage taking when the jurisdictional conditions in subsection 1203(b) are present.

1984 USAM (superseded)

---

NOVEMBER 5, 1985  
Sec. 9-60.742-.743  
Ch. 60, p. 42a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.744 Jurisdictional Conditions--18 U.S.C. §1203(b)

Subsection 1203(b) sets forth the limits on federal jurisdiction over the crime of hostage taking.

A. Offenses Committed Outside the United States

If the hostage taking occurs outside the territorial jurisdiction of the United States, subsection 1203(b)(1) provides for federal jurisdiction in three circumstances: (a) if the perpetrator or one of the hostage victims is a national of the United States; (b) if the perpetrator, regardless of his/her nationality or the nationality of the hostage victim, is subsequently found in the United States; or (c) if the United States Government is the third party which the hostage taker is attempting to compel to take certain action. Under the Convention, the United States is obligated to make hostage taking a federal crime in all of these situations except when the victim is an American, in which case the Convention permits, rather than requires, coverage. The Congress chose to provide such protection for Americans by utilizing the permissive authority of the Convention and the "passive personality" (i.e., nationality of the victim) basis for extraterritorial jurisdiction under international law.

B. Offenses Committed Within the United States

Article 13 of the Convention states that the Convention "shall not apply where the offense is committed within a single state [i.e., country], the hostage and the alleged offender are nationals of that state, and the alleged offender is found in the territory of that state." Subsection 1203(b)(2) reflects the treaty limitations contained in article 13 by stating that it is not an offense if the crime occurred in the United States, all participants and victims are United States nationals, and all alleged offenders are found in the United States, unless the hostage taking is to compel action by the United States Government. In practical terms, this means that an American robber who seizes an American cashier at a convenience store in a city in the United States, and who makes a demand upon a third party other than the United States Government, and who is caught in the United States, cannot be prosecuted federally under section 1203(a).

9-60.745 Penalty

The penalty set forth in 18 U.S.C. §1203 is imprisonment for any term of years or for life. Moreover, under new 18 U.S.C. §3623 (Alternative

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Fines), effective for offenses occurring on or after January 1, 1985, a fine up to \$250,000 is also possible. (See Sections 6 and 10 of the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, October 30, 1984.)

9-60.750 Legislative History

18 U.S.C. §1203 was a complete revision--written in the closing days of the 98th Congress by the Subcommittee on Crime of the House Judiciary Committee--of the Administration's bills on hostage taking (H.R. 5689, 98th Cong., 2d Sess. and S. 2624, 98th Cong., 2d Sess.). There is no congressional report on the rewritten version. For an explanation of H.R. 5689 and S. 2624, as introduced, see the Message from the President of the United States Transmitting Four Drafts of Proposed Legislation to Attack the Pressing and Urgent Problem of International Terrorism, House Document 98-211, 98th Cong., 2d Sess. S. 2624 passed the Senate as introduced. See 130 Cong. Rec. S. 14360-14361 (daily ed. October 11, 1984).

9-60.760 Effective Date

18 U.S.C. §1203 became effective on January 6, 1985, when the United States became a party to the Convention after having deposited its instrument of ratification of the Convention with the United Nations on December 7, 1984.

9-60.800 SPECIAL FORFEITURE OF COLLATERAL PROFITS OF CRIME ("Son of Sam")  
(18 U.S.C. §§3671 and 3672)

9-60.801 Summary of Forfeiture Statute

On October 12, 1984, the Comprehensive Crime Control Act of 1984 was signed by the President and became Public Law No. 98-473. In Chapter XIV of that Act, Congress provided for victim compensation and assistance in what may be cited as the "Victims of Crime Act of 1984." Included in that Chapter is section 1406(a) which amends Title 18 of the United States Code by adding a new chapter (232) entitled "Special Forfeiture of Collateral Profits of Crime." This anti-profits of crime law is designed to forfeit the proceeds due a convicted defendant from his/her sale of literary rights about his/her violent crime. This so-called "Son of Sam" anti-profits of crime law contains two sections, numbered 3671 and 3672.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

New 18 U.S.C. §3671 authorizes the U.S. Attorney at any time after a conviction of a defendant for an offense against the United States resulting in physical harm to an individual, upon notice to interested parties (the defendant, the person with whom the defendant has contracted, any transferee of proceeds due the defendant, and any person physically harmed as a result of the offense for which the defendant has been convicted), to move for the entry of an order of forfeiture to capture the proceeds of any contract relating to a depiction of such crime or the expression of the defendant's thoughts, opinions or emotions regarding such crime. The court must grant the motion if it determines that the interests of justice or an order of restitution so requires. Once a forfeiture order is entered the U.S. Attorney shall, in the detail required by section 3672, give newspaper notice of the entry of such order. The notice informs victims that the proceeds may be used to satisfy a judgment obtained against the defendant by a victim of an offense for which the defendant has been convicted.

Under 18 U.S.C. §3671, upon the entry of a forfeiture order the person with whom the defendant has contracted must pay all proceeds due under the contract to the Attorney General. Any proceeds paid to the Attorney General must be held in escrow for five years in the Crime Victims Fund established under section 1402 of the Act. During this five-year period the proceeds can be levied on to satisfy a money judgment rendered by a United States district court in favor of a victim of an offense of which the defendant has been convicted. The funds may also be levied upon to satisfy a fine imposed by a court of the United States. Also, when ordered by the court in the interests of justice, the proceeds may be used to satisfy a money judgment rendered in any court in favor of an injured victim of any violent crime for which the defendant has been convicted. The proceeds may also be used to pay for the legal representation of the defendant in matters arising from the offense for which the defendant has been convicted (but no more than 20 percent of the total proceeds may be so used). At the end of the five-year escrow period, the court shall direct the disposition of any remaining proceeds, and may require that this residue be paid into the Crime Victims Fund in the Treasury.

9-60.810 Legal Discussion

There are three interrelated constitutional issues likely to be raised in any "Son of Sam" enforcement proceeding. These involve procedural due process of law, the First Amendment and the government's right to forfeit the proceeds. The floor statements with respect to these

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

issues are to be found in the Cong. Rec. S. 14209, (daily ed. October 11, 1984) and Cong. Rec. H. 12086-7, (daily ed. October 10, 1984).

9-60.811 Procedural Due Process of Law

The procedures specified for the entry of a forfeiture order and disposition of the proceeds would appear to satisfy the Fifth Amendment's requirements of procedural due process of law inasmuch as the order is entered by a court only after a judicial hearing with notice to all interested parties, (see North Georgia Fishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); and Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)), although in appropriate circumstances it would seem permissible for the government to seek a temporary restraining order to prevent a transfer of the proceeds until there has been a hearing on a pending motion for a forfeiture order. See Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

9-60.812 The First Amendment

To the extent that First Amendment rights (of the defendant, the press and the public) are implicated, it will be a matter for the court to balance the overall interest of society and the specific interests of the victims of the defendant's crimes in ensuring that no federal felon profits from any depiction of his/her crime with the asserted First Amendment rights of the defendant, the person contracted with, and the public to speak and to know. These first amendment issues are discussed extensively in Note, Publication Rights Agreements in Sensational Criminal Cases: A Response to the Problem, 68 Cornell L. Rev. 686 (1983); Comment, In Cold Type, Statutory Approaches to the Problem of the Offender as Author, 71 Journal of Crim. Law and Criminology, Northwestern Univ. School of Law 255 (1980); Note, Compensating the Victim from the Proceeds of the Criminal's Story--The Constitutionality of the New York Approach, 14 Columbia Journal of Law and Social Problems 93 (1978), and Note, Criminals--Turned--Authors: Victims' Rights v. Freedom of Speech, 54 Ind. L. Jour. 443 (1978), and in the interests of brevity will not be repeated here except to say that if the forfeiture (as distinguished from the attachment) nature of the statute is deemed to impermissibly impinge upon protected First Amendment interests, the court should be encouraged to exercise its discretion and return any residue to the defendant after the payment of all restitution orders, civil judgments, and allowable attorneys' fees.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.813 The Government's Right to Forfeit the Proceeds

Any substantive contentions of the defendant with respect to the issuance of the forfeiture order, the various levies and payments thereunder and the ultimate transfer of any unlevied upon or unused proceeds to the Crime Victims Fund will also have to be resolved by the court. To assist the court in the resolution of these issues, the court should be informed that twenty-five states currently have "Son of Sam" statutes. They fall into three basic types.

A. The first type, modeled after the New York statute (Exec. Law §632-a) has been adopted by sixteen states: Alaska (§18.67.165); Georgia (§17-14-31); Idaho (§19-5301); Illinois (70 §401-410); Iowa (§910.15); Kentucky (§346.165); Massachusetts (Ch. 258A §8); Minnesota (§299B.17); Nebraska (§§81-1836 - 81-1840); New Mexico (§31-22-22); Pennsylvania (71 P.S. §180-7.18); South Carolina (§§15-59-40 - 15-59-80); Tennessee (§§29-13-201 - 29-13-206); Texas (Rev. Civil Statutes, Art. 8309-I §§16-18); and Washington (§§7.68.200 - 7.68.915). These are attachment statutes wherein at the end of the escrow period all unlevied upon moneys remaining in the escrow account are returned to the defendant.

B. Five states, using the second type, depart from the New York statute in the matter of disposing of the unlevied upon moneys remaining in the escrow account. In these states: Alabama (§§41-9-80 - 41-9-84); Arizona (§13-4202); Connecticut (§54-218); Louisiana (§§1832-1836); and Oklahoma (22 §17), the unlevied upon residue reverts to the state and is paid into the state's Crime Victims Fund.

C. The third type is a mix of the first two, and the remaining four states with "Son of Sam" statutes have some form of return to the defendant and payment to the state. In Florida (§944.512) there is automatically taken from the proceeds twenty-five percent for the defendant's dependents. Twenty-five percent is set aside for the satisfaction of victims' claims and up to fifty percent can be levied upon by the state to compensate it for the costs of prosecuting and confining the defendant. However, the residue, if any, goes to the defendant. In Indiana (§16-7-3.7-1 - 16-7-3.7-6) only ninety percent of the payments due the defendant is placed in an escrow account and the residue, in the discretion of the violent crime compensation division, "may" be paid into the violent crime victims compensation fund. In Nevada (§217.265) one-half of the money received by the offender based on his/her notoriety must be paid into the fund for the compensation of victims of crime and there is no provision for the return of any of this amount to the offender. And in South Dakota (§§23A-28A-1 - 23A-28A-14) if there is no claim against the escrow account by victims of the crimes committed by the defendant,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the escrow account is available to satisfy civil judgments obtained by any governmental entity incurring prosecutorial or confinement costs with respect to the defendant. Here, too, the residue goes to the defendant.

Thirteen states which follow the New York statute (Alaska, Georgia, Idaho, Iowa, Kentucky, Minnesota, Nebraska, New Mexico, Pennsylvania, South Carolina, Tennessee, Texas, and Washington) maintain the escrow account for five years or until all actions pending against the defendant under the statute are terminated. They also provide that the statute of limitations for such actions does not commence to run until the escrow account has been established. The other two states which otherwise follow the New York statute generally have reduced both the duration of the escrow account waiting period and the duration of the limitations period to two years (Illinois) or three years (Massachusetts).

In those states which depart from New York in the matter of disposing of the residue, four states (Alabama, Arizona, Connecticut and Oklahoma) follow New York and allow five years for the bringing of the action with recovery from the escrow account. One state, however (Louisiana), has reduced these periods to three years.

In those four states which mix the two types of statutes Florida differs the most because the victims do not have to file suit and their identity and the extent of their damages is determined by the court in the lien enforcement proceedings. In Indiana the victim may claim against the fund only to the extent that his/her damage judgment exceeds the defendant's assets and upon completion of the criminal proceedings any moneys in the escrow account are transferred to the violent crime victims compensation fund if two years have elapsed from the commission of the offense and there are no civil actions pending. In Nevada, as noted above, there is no escrow account provision. And in South Dakota the five year escrow and limitations periods are in effect, but after four years any state governmental entity may bring its own action for money damages against the defendant to recover its costs of prosecution and imprisonment.

In six states (Florida, Iowa, Massachusetts, Minnesota, Nevada, and Tennessee) the "Son of Sam" statutes are limited to persons convicted of crime, whereas in the remaining nineteen states they cover persons accused of or convicted of crime (although in Washington only after a hearing). And in five states (Connecticut, Illinois, Nevada, New Mexico, and Oklahoma), the statutes are limited to violent crimes, while in the other twenty states they apply to any crime (although Alabama, Florida, and Indiana specifically provide that such crimes be felonies).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Thus the federal statute is similar to the Florida, Iowa, Massachusetts, Minnesota, Nevada and Tennessee statutes in that it is limited to convicted persons; is similar to the Connecticut, Illinois, Nevada, New Mexico, and Oklahoma statutes in that it is limited to violent crimes; is similar to the Washington statute in that it captures proceeds only after notice and hearing; and is similar to the Indiana statute in that it contains a provision allowing, but not requiring, that any residue from the escrow account be paid into the Crime Victims Fund.

The theories upon which the state statutes rely for the ultimate taking by the government of the unlevied upon residue in the escrow accounts vary. In Alabama it is provided that the residue "shall revert to the state." In Arizona the concept is that every contract for re-enactment of crime "is contrary to public policy and void unless the contract provides for the payment to the commission of any monies which would be paid to the accused for such information or rights." In Florida the statute asserts a "state lien" and the "Department of Legal Affairs is authorized and directed to take such legal action as is necessary to perfect and enforce the lien created by this section." In South Dakota the governmental entity incurring the cost of prosecuting and convicting the accused or incurring the cost of his/her incarceration is authorized "to bring a civil action in a court of competent jurisdiction and recover (a) money judgment for damages" against the accused for "reimbursement for actual costs of prosecution and imprisonment." No theory of recovery is articulated in the Connecticut, Indiana, Louisiana, and Oklahoma statutes.

The federal statute serves two separate purposes. It establishes an escrow account to hold the proceeds of the defendant's contract for five years to satisfy fines and restitution orders and to allow victims to satisfy their civil judgments from the fund. It also limits the amount of moneys payable to attorneys from the fund to twenty percent. (Payments to attorneys is discussed in depth in the Cornell Law Review note referenced in USAM 9-60.812, supra.) The other purpose is to provide funding for the Crime Victims Fund.

No great difficulty should be had with the escrow account concept since it is only an attachment statute, with no transfer (except possibly via a TRO) prior to notice to all interested parties and a hearing thereon. Only the five-year duration is subject to controversy. But given the uncertainty of getting notice to victims of the existence of the escrow account and the need to afford victims a reasonable period after receiving such notice to prepare and commence their damage actions against the defendant, the consensus of most states with "Son of Sam" statutes that five years is reasonable should be sustained.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The second purpose of the federal statute is to create a source of funding for the Crime Victims Fund. Federal forfeiture statutes generally reflect the view that contraband, and instrumentalities or proceeds of crime are subject to forfeiture and these statutes have been consistently upheld against constitutional challenges. Thus on November 1, 1983, the Supreme Court upheld the forfeiture of the "profits" obtained in racketeering activity, Russello v. United States, 52 U.S.L.W. 4003 (No. 82-472), and on June 25, 1984, the Sixth Circuit in United States v. Premises Known as 8584 Old Brownsville Road, 736 F.2d 1129 (6th Cir. 1984), upheld the forfeiture of both real and personal property as "proceeds" traceable to the exchange of things of value for controlled substances. And while normally the events which give rise to criminal or civil forfeiture occur concomitantly with the criminal offense (e.g., the criminal forfeiture of the "profits" obtained in illegal drug enterprises and the civil forfeiture of the moneys recieved from the sale of contraband), post-offense events are operative in these areas, such as the civil forfeiture of a vehicle which was purchased with drug proceeds. Here the proceeds are directly traceable to the criminal act since they are merely a description or portrayal of that act or the defendant's thoughts with respect to such crime. The forfeiture is but a collateral consequence of the conviction. Since Congress could have made all such contracts illegal, compare United States v. Ferber, 458 U.S. 747 (1982) (state statutes forbidding child pornography are constitutional), and Veritimos v. United States, 404 F.2d 1030, 1032, n.4 (1st Cir. 1968) ("Congress could have prohibited the transfer of firearms altogether"), Congress can forfeit the proceeds of such contracts. As was stated in Barrett v. Wojtowicz, 66 A.D. 2d 604, 615 (N.Y. Sup. Ct., 2d Dept., Mar. 12, 1979), "(A)ny judgment that may be recovered by plaintiff should be deemed one in rem and be limited by the court to a recovery of the pro rata amount which is found to be payable to him from the escrow account held by the Crime Victims Compensation Board for the benefit of all the victims of the defendant's crime and such judgment should not be deemed a judgment in personam against any other assets of the defendant." [Emphasis in original.]

9-60.820 Supervisory Jurisdiction

General Litigation and Legal Advice Section. Questions about this statute may be directed to attorneys at FTS 724-7035.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-60.830 Pertinent Policy Considerations

Strong policy considerations favor sua sponte application by the U.S. Attorney for a section 3671 order of special forfeiture whenever the U.S. Attorney is made aware of the existence of a contract relating to the depiction of an offense against the United States resulting in physical harm to an individual. Not only does such an order advance the federal policy of denying the convicted defendant an opportunity to exploit for profit his/her wrongdoing, it creates a fund which can be variously used: (1) to satisfy civil judgments obtained in federal and state courts in favor of a victim, or his/her legal representative, of an offense resulting in physical harm to such victim of which the defendant has been convicted; (2) to satisfy criminal fines imposed by federal courts upon the defendant; (3) to satisfy orders of restitution imposed by federal courts pursuant to the provisions of 18 U.S.C. §3579, and (4) to provide additional funding for the Crime Victims Fund. The fund can also be used to pay for the defendant's legal representation (but no more than 20 percent of the total proceeds may be so used). The fund may also be available to satisfy state criminal fines and state restitution orders. Thus, consideration should be given prior to seeking a forfeiture order to deferring to state action where local statutes permit, state authorities express an intention to act, and considerations of federal-state comity indicate that in the particular circumstances the state has the greater interest in controlling the distribution of the proceeds.

Since section 3671 specifically permits a ". . . motion . . . made at any time after conviction of a defendant . . . to forfeit all or any part of proceeds received . . . by that defendant . . . from a contract," such motion may be made with respect to any moneys owed under the contract after the passage of the Victims of Crime Act notwithstanding that the contract may have been executed prior to the passage of the Act (October 12, 1984). See Agron v. Crime Victims Compensation Board (N.Y. Sup. Ct., 1st Judicial Dist., Justice Nadel), reported in New York Law Journal, Friday, March 27, 1981. Money paid under a contract prior to passage of the Act would not be recoverable; nor would money received prior to conviction under a contract entered into subsequent to the passage of the Act. The phrase "any time after conviction" not only governs the timing of the motion but the res to be forfeited as well.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 61

	<u>Page</u>
9-61.000	<u>CRIMES INVOLVING PROPERTY</u> 1
9-61.100	NATIONAL MOTOR VEHICLE THEFT ACT-- DYER ACT (18 U.S.C. §§2311-2313) 1
9-61.101	Scope 1
9-61.110	<u>Investigative Jurisdiction</u> 1
9-61.120	<u>Supervising Section</u> 1
9-61.130	<u>Policy Concerning Prosecution</u> 1
9-61.131	Organized Rings and Multi-Theft Operations 2
9-61.132	Individual Thefts--Exceptional Circumstances 2
9-61.133	Individual Thefts--Not Prosecuted Federally 3
9-61.134	Notification Requirements if Federal Prosecution is Declined for an Individual Theft Matter 3
9-61.140	<u>Discussion of the Offense</u> 4
9-61.141	Legislative History 4
9-61.142	Stolen 4
9-61.143	Definitions 5
9-61.144	Elements of 18 U.S.C. §2312 6
9-61.145	Elements of Former 18 U.S.C. §2313 7
9-61.146	Elements of New 18 U.S.C. §2313 7
9-61.147	18 U.S.C. §2312 and §2313 are Predicate Offenses for a RICO Prosecution 8
9-61.150	<u>Forms of Indictments</u> 8
9-61.151	Form Indictment for 18 U.S.C. §2312 8
9-61.152	Form Indictment for Former 18 U.S.C. §2313 9
9-61.153	Form Indictment for New 18 U.S.C. §2313 9
9-61.160	<u>Venue</u> 9
9-61.170	<u>Use of 18 U.S.C. §5001 to Surrender Motor Vehicle Theft Perpetrators Under 21 Years of Age to State Authorities</u> 10

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

	<u>Page</u>
9-61.180	<u>Additional Research Sources</u> 10
9-61.200	NATIONAL STOLEN PROPERTY ACT--18 U.S.C. §§2311, 2314 and 2315 11
9-61.210	<u>Investigative Jurisdiction</u> 11
9-61.220	<u>Supervising Section</u> 11
9-61.230	<u>Policy Concerning Prosecution</u> 11
9-61.240	<u>Discussion of the Offense</u> 12
9-61.241	General 12
9-61.242	Legislative History 13
9-61.243	Goods, Wares, Merchandise 14
9-61.244	Securities 16
9-61.245	Money 19
9-61.246	Tax Stamp 19
9-61.247	Value 19
9-61.248	Stolen, Converted and Taken by Fraud 21
9-61.249	Falsely Made, Forged, Altered, and Counterfeited 21
9-61.250	<u>Discussion of the Offense (Cont'd.)</u> 24
9-61.251	Forged Endorsements 24
9-61.252	Tracing 25
9-61.253	Exceptions to 18 U.S.C. §§2314 and 2315 (Proviso Clause) 26
9-61.260	<u>Elements of the Offenses Under 18 U.S.C. §§2314 and 2315</u> 26
9-61.261	First Paragraph of 18 U.S.C. §2314 26
9-61.262	Second Paragraph of 18 U.S.C. §2314 27
9-61.263	Third Paragraph of 18 U.S.C. §2314 28
9-61.264	Fourth Paragraph of 18 U.S.C. §2314 29
9-61.265	Fifth Paragraph of 18 U.S.C. §2314 30
9-61.266	First Paragraph of 18 U.S.C. §2315 30
9-61.267	Second Paragraph of 18 U.S.C. §2315 31
9-61.268	Third Paragraph of 18 U.S.C. §2315 32
9-61.270	<u>Forms of Indictments</u> 32
9-61.271	First Paragraph of 18 U.S.C. §2314 32
9-61.272	Second Paragraph of 18 U.S.C. §2314 33

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-61.273	Third Paragraph of 18 U.S.C. §2314	33
9-61.274	First Paragraph of 18 U.S.C. §2315	33
9-61.275	Second Paragraph of 18 U.S.C. §2315	34
9-61.280	<u>Venue</u>	34
9-61.290	<u>Additional Research Sources</u>	34
9-61.300	THEFT FROM INTERSTATE SHIPMENT (18 U.S.C. §659)	35
9-61.310	<u>Investigative Jurisdiction</u>	35
9-61.320	<u>Supervising Section</u>	35
9-61.330	<u>Policy Concerning Prosecution</u>	35
9-61.340	<u>Discussion of Offense</u>	36
9-61.341	General	36
9-61.342	State Prosecution a Bar	37
9-61.343	Interstate or Foreign Commerce Aspect of Shipment	37
9-61.344	Retention of Stolen Character	38
9-61.350	<u>Venue</u>	39
9-61.360	<u>Evidence</u>	39
9-61.361	Proof of Shipment	39
9-61.362	Proof of Value	39
9-61.370	<u>Drafting Indictments</u>	39
9-61.371	Facility from Which the Goods Were Taken	39
9-61.372	Election Required Between Theft and Possession	40
9-61.380	<u>Forms of Indictments</u>	40
9-61.381	Form for First Paragraph of 18 U.S.C. §659	40
9-61.382	Form for Second Paragraph of 18 U.S.C. §659	41
9-61.383	Form for Third Paragraph of 18 U.S.C. §659	41
9-61.390	<u>Additional Research Sources</u>	42
9-61.400	CRIMINAL REDISTRIBUTION OF STOLEN PROPERTY (FENCING)	42

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-61.410	<u>Definition</u>	42
9-61.420	<u>Prosecutive Policy</u>	42
9-61.430	<u>Indictment</u>	43
9-61.500	SWITCHBLADE KNIFE ACT: 15 U.S.C. §§1241-1244; 18 U.S.C. §1716(h)	43
9-61.510	<u>Investigative Jurisdiction</u>	43
9-61.520	<u>Supervisory Section</u>	43
9-61.530	<u>Discussion of the Offense</u>	43
9-61.600	BANK ROBBERY	44
9-61.601	<u>Disclosure of Information</u>	44
9-61.610	<u>Investigative Jurisdiction</u>	44
9-61.620	<u>Supervising Section</u>	44
9-61.630	<u>Prosecutive Policy</u>	45
9-61.640	<u>Special Considerations</u>	45
9-61.641	Aggravated Bank Robbery, 18 U.S.C. §2113(a)	46
9-61.642	Federally Protected Financial Institutions	48
9-61.650	<u>Merger and Separate Offenses</u>	49
9-61.651	Merger	49
9-61.652	Possession Offenses	51
9-61.660	<u>Imposition of Concurrent Sentences for Multiple Simultaneous Violations of Various Subsections of 18 U.S.C. §2113 Is Improper</u>	53
9-61.670	<u>Lesser Included Offenses--Guilty Pleas</u>	53
9-61.671	Rule 30, Federal Rules of Criminal Procedure--Instructions. Rule 31(c), Federal Rules of Criminal Procedure-- Verdict, Conviction of Less Offense	54
9-61.680	<u>Problems with Robberies of</u>	54

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-61.681	Bank Messengers, Armored Truck Services	54
9-61.682	Night Depositories	55
9-61.683	Automated Teller Machines (Off Premises)	56
9-61.690	<u>Hobbs Act Problems</u>	56
9-61.691	Extortion--Applicability of the Hobbs Act (18 U.S.C. §1951) to Extortionate Demands Made Upon Banks and Airlines	56
9-61.692	Interstate Commerce	59
9-61.700	LIVESTOCK OFFENSES	59
9-61.701	Overview	59
9-61.702	Investigative Jurisdiction	60
9-61.703	Supervisory Jurisdiction	60
9-61.710	<u>Definitions</u>	60
9-61.711	Livestock	60
9-61.712	Stolen	60
9-61.713	Obtains or Uses	61
9-61.714	With Intent to Deprive the Other of a Right to the Property	61
9-61.720	<u>Jurisdiction</u>	61
9-61.800	COUNTERFEITING AND FORGING OF STATE AND CORPORATE SECURITIES--18 U.S.C. §511	61
9-61.810	<u>Investigative Jurisdiction</u>	61
9-61.820	<u>Supervising Section</u>	61
9-61.830	<u>Prosecutive Policy</u>	61
9-61.840	<u>Discussion of the Offenses</u>	62
9-61.841	General	62
9-61.842	Offenses	64
9-61.843	Definitions	65
9-61.850	<u>Legislative History</u>	66
9-61.900	MOTOR VEHICLE THEFT LAW ENFORCEMENT ACT OF 1984	67
9-61.901	Summary	67

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-61.910	<u>Investigative Jurisdiction</u>	68
9-61.920	<u>Supervising Section</u>	68
9-61.930	<u>Title I--Improved Identification for Motor Vehicle Components</u>	68
9-61.931	Mandatory Theft Prevention Standard	69
9-61.932	Voluntary Theft Prevention Standard	69
9-61.933	Required Records and Reports	69
9-61.934	Insurance Reports	70
9-61.935	Vehicle Theft Studies	70
9-61.940	<u>Title II--Anti-Fencing Measures</u>	70
9-61.941	18 U.S.C. §511--Altering or Removing Motor Vehicles Identification Numbers	70
9-61.942	18 U.S.C. §512--Forfeiture of Certain Motor Vehicles and Motor Vehicle Parts	71
9-61.943	18 U.S.C. §2320--Trafficking in Certain Motor Vehicles or Motor Vehicle Parts	72
9-61.944	18 U.S.C. §2311--Motor Vehicle Titles as "Securities"	73
9-61.945	18 U.S.C. §2313--Sale or Receipt of Stolen Motor Vehicles	73
9-61.946	18 U.S.C. §1961(1)--Racketeering Activity	74
9-61.950	<u>Title III--Importation and Exportation Measures</u>	74
9-61.951	18 U.S.C. §553--Importation or Exportation of Stolen Motor Vehicles, Off-Highway Mobile Equipment, Vessels, or Aircraft	74
9-61.952	19 U.S.C. §1627--Unlawful Importation or Exportation of Certain Vehicles and Equipment	75
9-61.960	<u>Effective Dates</u>	77
9-61.970	<u>Policy Considerations</u>	78
9-61.980	<u>Legislative History</u>	79
9-61.990	<u>Form Indictments for 18 U.S.C. §§511, 2320, and 553 and Discussions of Such Indictments</u>	80
9-61.991	Form Indictment for 18 U.S.C. §511	81
9-61.992	Discussion of an Indictment for 18 U.S.C. §511	81

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-61.993	Form Indictment for 18 U.S.C. §2320	83
9-61.994	Discussion of Indictment for 18 U.S.C. §2320	83
9-61.995	Form Indictment for 18 U.S.C. §553(a)(1)	84
9-61.996	Form Indictment for 18 U.S.C. §553(a)(2)	84
9-61.997	Discussion of an Indictment for 18 U.S.C. §553	84

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.000 CRIMES INVOLVING PROPERTY

9-61.100 NATIONAL MOTOR VEHICLE THEFT ACT--DYER ACT (18 U.S.C. §§2311-2313)

9-61.101 Scope

The National Motor Vehicle Theft Act relates to offenses involving the interstate and foreign transportation of stolen motor vehicles and aircraft (18 U.S.C. §2312 and §2313). The Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, 98 Stat. 2754 (1984), expanded federal criminal jurisdiction to other acts involving stolen "road" motor vehicles (i.e., automobiles, trucks, vans, motorcycles, etc.) and "off-highway" mobile equipment. Activities now criminally prohibited include the removal or falsification of the identification number for a road motor vehicle or a road motor vehicle part (18 U.S.C. §511); trafficking in road motor vehicles or road motor vehicle parts with removed or falsified identification numbers (18 U.S.C. §2320); and the exportation or importation of stolen road motor vehicles and off-highway mobile equipment (18 U.S.C. §553). See USAM 9-61.900, infra.

9-61.110 Investigative Jurisdiction

Violations of the National Motor Vehicle Theft Act (Dyer Act), as amended (18 U.S.C. §§2311-2313), are within the investigative jurisdiction of the Federal Bureau of Investigation.

9-61.120 Supervising Section

General Litigation and Legal Advice Section.

9-61.130 Policy Concerning Prosecution

To achieve uniform application of the statute in all judicial districts and to keep Dyer Act prosecutions in proper perspective with other prosecutions, the following guidelines should be followed in determining whether a stolen motor vehicle report is to be investigated and prosecution instituted.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

While it may occasionally be advantageous to prosecute certain thefts or criminal receipt of vehicles or aircraft under 18 U.S.C. §2314 or §2315, so as to make available electronic surveillance under 18 U.S.C. §2516, or the enhanced penalties of 18 U.S.C. §1961 (RICO), prosecutions under those statutes must follow these guidelines.

Because of an aircraft's normally large monetary value and its ability to be used to commit other serious criminal offenses, such as drug smuggling, each interstate or foreign transportation of a stolen aircraft should be judged on its own individual prosecutive merits.

9-61.131 Organized Rings and Multi-Theft Operations

Consistent with available resources, organized ring cases and multi-theft operations of motor vehicles involving an interstate or foreign aspect should be federally investigated and prosecuted. To the extent possible, the investigation and prosecution of this type of professional criminal activity should be conducted in coordination and cooperation with state and local authorities. If the local or state authorities are unable to prosecute the jointly investigated cases, federal prosecution should be undertaken insofar as is consistent with available resources. For purposes of this policy the phrase "organized ring cases and multi-theft operations" (hereinafter referred to as "ring") means organized criminal activity involving at least two or more individuals who steal three or more motor vehicles and dispose of them in some fashion for their own economic profit. Where limitations on prosecutive resources preclude federal prosecution of all ring cases not pursued by state or local authorities, the following are among the factors which should be considered in choosing which cases to pursue: the involvement of elements of organized crime; the number of individuals involved in the ring; the number of vehicles believed to have been stolen; the aggregate monetary value of the stolen vehicles; the type of business used to facilitate the illegal activity; the presence of any corruption of public officials; the duration and geographical scope of the criminal endeavor; and the past criminal records of the prospective defendants.

9-61.132 Individual Thefts--Exceptional Circumstances

Except as precluded by USAM 9-61.133, *infra*, individual interstate and foreign motor vehicle theft cases involving exceptional circumstances may be considered for federal prosecution if the local or state authorities are justifiably unable to institute a successful prosecution. Because of various other federal prosecutive priorities, only a portion of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the individual theft cases involving exceptional circumstances will qualify for federal prosecution. In determining whether "exceptional circumstances" justifying federal prosecution are present, the following examples may be considered illustrative but not exhaustive:

A. The stolen vehicle is used in the commission of a separate felony for which punishment less than for the Dyer Act would be expected from local courts;

B. The stolen vehicle is demolished, sold, transported or exported to a foreign country, heavily stripped or grossly misused;

C. An individual steals more than one vehicle in such a manner as to form a pattern of conduct; and

D. The stolen vehicle constitutes heavy commercial vehicle or construction or farming equipment, such as a tractor truck, a farm tractor or a bulldozer.

9-61.133 Individual Thefts--Not Prosecuted Federally

Except in situations where 18 U.S.C. §5001 is to be utilized or there are indications that organized ring activity may be involved, federal process should not be filed against an individual, regardless of local prosecutive decisions, in the following instances where a stolen motor vehicle has been transported in interstate or foreign commerce:

A. Cases involving joy-riding;

B. Cases in which the individual to be charged is a juvenile (i.e., under 18 years of age); and

C. Cases in which the individual to be charged is at least 18 but less than 21 years of age and cannot be defined as a recidivist. A "recidivist" for purposes of this policy is a person who has on at least two prior occasions been arrested for motor vehicle thefts and on one or more occasions has been convicted for motor vehicle theft or another criminal offense.

9-61.134 Notification Requirements if Federal Prosecution is Declined for an Individual Theft Matter

When federal prosecution is declined for an individual Dyer Act violation, the Assistant U.S. Attorney making such decision shall notify

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the investigative agency of such decision and the reasons therefor. The Assistant U.S. Attorney shall also advise the investigative agency if exceptional circumstances were present in the matter. In addition, the Assistant U.S. Attorney shall remind the investigative agency of the provisions of 18 U.S.C. §5001, if such may be applicable. The Assistant U.S. Attorney shall request the investigating agency to notify the appropriate local authorities, including the appropriate local prosecutive office where a prosecutable case may be present, of his/her prosecutive determination and request, in those situations involving exceptional circumstances, to be notified by the investigative agency as to what prosecutive action is being undertaken by the local authorities. If the local authorities do not prosecute a matter involving exceptional circumstances the investigative agency shall so notify the federal prosecutor. Upon receipt of such notification the U.S. Attorney should review the matter in accordance with these guidelines, the present caseload of his/her office, the availability of witnesses and sufficient evidence, and the agreements and understandings reached as a result of the Law Enforcement Coordinating Committee for his/her District to determine whether federal prosecution is warranted.

9-61.140 Discussion of the Offense

9-61.141 Legislative History

The Dyer Act was enacted by Congress on October 29, 1919. (See ch. 89, 41 Stat. 324). In 1945, aircraft were added to the statute. (See ch. 383, 59 Stat. 536.) In 1984, the federal jurisdictional basis in 18 U.S.C. §2313 was altered by section 203 of the Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, 98 Stat. 2754 (1984). The former language in 18 U.S.C. §2313 of "moving as, or which is a part of, or which constitutes interstate or foreign commerce" was stricken and inserted in lieu thereof was "which has crossed a State or United States boundary after being stolen." The 1984 amendment also added to 18 U.S.C. §2313 the offense of possession. See USAM 9-61.146, infra.

9-61.142 Stolen

The term "stolen" should not be construed in the technical sense of common law larceny. Stolen covers all theft offenses regardless of whether such was in the nature of larceny, embezzlement, or false

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

pretenses. See United States v. Turley, 352 U.S. 407 (1957); see also Bell v. United States, 462 U.S. 356 (1983). What is required is a felonious taking or conversion of another's property right in the vehicle regardless of how the perpetrator may originally have come into possession of the vehicle. While property interests obviously include the concepts of "title" and "possession," a financial company's "secured interest" in the vehicle has been deemed a sufficient property interest in the vehicle when the owner disposed of the vehicle contrary to the loan agreement. See United States v. Bunch, 399 F. Supp. 1156 (D. Md.), aff'd, 542 F.2d 629 (4th Cir. 1976). However, the statute does not cover situations where a person, engaging in a fraud upon the insurance company in concert with the vehicle's owner, disposes of a vehicle and the owner reports the vehicle as stolen since the insurance company had no property interest in the vehicle at the time it was disposed of. See United States v. Bennett, 665 F.2d 16 (2d Cir. 1981). Moreover, the vehicle must retain its stolen character during the transportation under 18 U.S.C. §2312 or the receipt, concealment, storing, bartering, selling or disposal under 18 U.S.C. §2313. Total recovery by law enforcement or the owner's agent, in contrast with merely being placed under observation by law enforcement, will terminate the stolen character. See United States v. Muzii, 676 F.2d 919 (2d Cir. 1982); United States v. Dove, 629 F.2d 325 (4th Cir. 1980).

9-61.143 Definitions

The terms "motor vehicle" and "aircraft" are defined in 18 U.S.C. §2311. Motor vehicle includes road vehicles (i.e., automobiles, vans, motorcycles, trucks, etc.) as well as self-propelled construction and farming equipment. See United States v. Straughan, 453 F.2d 422 (8th Cir. 1972); United States v. McGlamory, 441 F.2d 130 (5th Cir. 1971). Accordingly, the definition of motor vehicle is broader for 18 U.S.C. §§2312 and 2313 than it is for 18 U.S.C. §§511, 512, 553, and 2320. In the latter four sections the term covers only road vehicles. See section 2 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. §1901 (15)). The missing of a key part, e.g., the motor, does not mean that the vehicle ceases to be a motor vehicle. See United States v. McKlemurry, 461 F.2d 651 (5th Cir. 1972). Vehicles rebuilt by combining major parts of stolen motor vehicles with parts of other vehicles have been held to constitute a stolen motor vehicle. See United States v. Neville, 516 F.2d 1302 (8th Cir. 1975).

While a trailer is not a motor vehicle under 18 U.S.C. §§2312 or 2313 since it is not self-propelled, a trailer is "goods, wares or merchandise" under 18 U.S.C. §§2314 and 2315. See United States v. Kidding, 560 F.2d 1303 (7th Cir. 1977). (A trailer is, however, a "motor vehicle" for purposes of 18 U.S.C. §§511, 512, 553, and 2320. See 18 U.S.C. §511(c)(2)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

and 15 U.S.C. §1901(15).) If a stolen motor vehicle was "chopped" into its key parts and some of the stolen parts (e.g., doors, fenders, engine, front-end assembly, etc.) were subsequently transported in interstate or foreign commerce, there would be no violation of 18 U.S.C. §2312 or §2313, but there may be a violation of 18 U.S.C. §2314 or §2315 if the stolen parts had a value of \$5,000 or more. Shipments of such stolen parts which have a sufficient relationship may be aggregated to reach the \$5,000 amount (see USAM 9-61.247, infra). The removal or falsification of an identification number of a road motor vehicle or road motor vehicle part may violate 18 U.S.C. §511, and trafficking in such road vehicles or parts may violate 18 U.S.C. §2320. See USAM 9-61.900, infra.

A title for a motor vehicle is a security under 18 U.S.C. §2314 and §2315 (see USAM 9-61.244, infra). A title for a motor vehicle is also a security under the new counterfeiting provision, 18 U.S.C. §511 (Securities of the States and private entities), added by Part D of Chapter XI of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2144 (1984), as a motor vehicle title is an instrument issued by a state evidencing ownership of goods, wares or merchandise (see 18 U.S.C. §511(c)(3)(B)). See USAM 9-61.800, infra.

9-61.144 Elements of 18 U.S.C. §2312

The elements of a violation under 18 U.S.C. §2312 are that the defendant:

- A. Unlawfully transports or causes to be transported in interstate or foreign commerce;
- B. A stolen motor vehicle or aircraft; and
- C. Knowing the same to be stolen.

The term "unlawfully" means contrary to law, i.e., the absence of lawful justification. For example, a person voluntarily returning stolen property to its lawful owner would not violate the statute. The term "causes to be" comes from 18 U.S.C. §2(b). See Pereira v. United States, 347 U.S. 1 (1953). Interstate or foreign transportation commences when the journey begins. See United States v. McElroy, 455 U.S. 642 (1982); United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980); Barfield v. United States 229 F.2d 936 (5th Cir. 1956).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.145 Elements of Former 18 U.S.C. §2313

The elements under former 18 U.S.C. §2313 are that the defendant:

- A. Receive, conceal, store, barter, sell, or dispose of;
- B. A stolen motor vehicle or aircraft;
- C. Which is moving as, which is a part of, or which constitutes interstate or foreign commerce; and
- D. Knowing the same to have been stolen.

The statute requires that the stolen vehicle retain its interstate or foreign commerce character at the time the defendant does one of the enumerated acts. The courts have clearly held that such commerce character does not terminate upon the arrival of the vehicle in another state and that it remains until the purpose of the transportation has been accomplished. See United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979); United States v. Tobin, 576 F.2d 687 (5th Cir. 1978); United States v. Pichany, 490 F.2d 1073 (7th Cir. 1973). Hence, since transportations of stolen motor vehicles are often to fences, it can be argued that the commerce character remains until the fence disposes of the vehicle to a user. See Roberson v. United States, 237 F.2d 536 (5th Cir. 1956).

The question of whether the commerce character was continuing is a jury question. See Corey v. United States, 305 F.2d 232 (9th Cir. 1962). The defendant does not have to know of the continuing commerce character as that is only a jurisdictional element. See United States v. Beil, 577 F.2d 1313 (5th Cir. 1978); United States v. Smith, 461 F.2d 246 (10th Cir. 1972); Katz v. United States, 281 F.2d 124 (6th Cir. 1922). See also United States v. Feola, 420 U.S. 671 (1975). It has been held that changing the vehicle's identification numbers amounts to a concealing. See Donaldson v. United States, 82 F.2d 680 (7th Cir. 1936).

9-61.146 Elements of New 18 U.S.C. §2313

18 U.S.C. §2313 was amended by section 203 of the Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, 98 Stat. 2754 (1984). The elements under new 18 U.S.C. §2313 are that the defendant:

- A. Receive, possess, conceal, store, barter, sell or dispose of;
- B. A stolen motor vehicle or aircraft;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. Which has crossed a state or United States boundary after being stolen; and

D. Knowing the same to have been stolen.

The purposes of the 1984 amendments to 18 U.S.C. §2313 were to add the offense of possession and to remove the need for the prosecutor to prove a continuing commerce nexus after the stolen vehicle had been taken across a state or international boundary. See H.R. Rep. No. 1456 on H.R. 4178, 96th Cong., 2d Sess. 26 (1984); see also 125 Cong. Rec. 12244 (1979). 18 U.S.C. §2313 now continues federal criminal jurisdiction over a stolen vehicle after it has crossed a state or international boundary. Federal jurisdiction remains until the stolen vehicle is recovered. See USAM 9-61.142, *supra*. Since possession is itself now an offense, 18 U.S.C. §2313 may prove more useful in prosecuting the fences of motor vehicles stolen in a different state.

9-61.147 18 U.S.C. §2312 and §2313 are Predicate Offenses for a RICO Prosecution

Section 205 of the Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, 98 Stat. 2754 (1984), amended Section 1961(1) of Title 18, United States Code, to include violations of 18 U.S.C. §2312 and §2313 as predicate acts for a RICO prosecution. The use of the RICO provisions against professional theft rings utilizing legitimate businesses to engage in their illegal activities could have a significant impact in reducing motor vehicle theft activity. All RICO prosecutions must be submitted to the Organized Crime and Racketeering Section for review and authorization. See USAM 9-110.100 - 9-110.413. For guidance on RICO prosecutions involving stolen motor vehicles and related offenses, contact the Organized Crime and Racketeering Section (633-8594).

9-61.150 Forms of Indictments

9-61.151 Form Indictment for 18 U.S.C. §2312

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the defendant, \_\_\_\_\_, did unlawfully transport in interstate commerce a stolen motor vehicle, that is, a (give an adequate identifying description of the vehicle) from the State of \_\_\_\_\_ to \_\_\_\_\_, State of \_\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, knowing the same to be stolen.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.152 Form Indictment for Former 18 U.S.C. §2313

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the \_\_\_\_\_  
District of \_\_\_\_\_, the defendant, \_\_\_\_\_  
\_\_\_\_\_, did sell and dispose of a stolen motor vehicle, that is, a  
(give an adequate identifying description of the vehicle), which was  
moving as, was a part of, and constituted interstate commerce between the  
State of \_\_\_\_\_ and the State of \_\_\_\_\_, knowing  
the same to be stolen.

9-61.153 Form Indictment for New 18 U.S.C. §2313

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the \_\_\_\_\_  
District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did  
possess and store a stolen motor vehicle, that is, a (give an adequate  
identifying description of the vehicle), which vehicle had crossed a State  
boundary after being stolen, to wit, said vehicle being stolen on (date)  
in (city and state) and subsequently brought into the State of \_\_\_\_\_,  
knowing the same to have been stolen.

9-61.160 Venue

Prosecutions brought under this Act should normally be instituted in the district into which the stolen motor vehicle was last brought. However, in regard to ring cases the prosecution, in accordance with the provisions of 18 U.S.C. §3237, may be initiated in the judicial district in which the motor vehicle was stolen, transported through, or last brought depending upon the facts of the case. In ring cases, the U.S. Attorney exercising jurisdiction should contact the other U.S. Attorneys who might have jurisdiction and advise them of his/her actions.

With reference to individuals involved in non-ring cases who by definition are considered to be recidivists (see USAM 9-60.133C, supra), if the theft occurred in the place of the residence of a recidivist and local authorities in both the place of apprehension and the place of theft will not institute local charges, federal proceedings, if any, should be instituted at the place of the theft. Before instituting any prosecution of any such recidivist (i.e., non-ring participant), an effort must be made to persuade local authorities in both the jurisdiction of the theft and apprehension to institute local prosecution. In connection with such effort, local authorities should be notified of the provisions of 18

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S.C. §5001 (see USAM 9-60.170, *infra*), which authorizes the return of youthful motor vehicle theft offenders to the place where the offense was committed at federal expense when certain conditions have been met.

Prosecution under 18 U.S.C. §2313 (receiving, concealing, selling, etc.) can be instituted only in the district in which those violations occur.

9-61.170 Use of 18 U.S.C. §5001 to Surrender Motor Vehicle Theft Perpetrators Under 21 Years of Age to State Authorities

In regard to any motor vehicle theft involving an interstate aspect where the perpetrator is less than 21 years of age, the provisions of 18 U.S.C. §5001 are available to assist the local authorities where the theft occurred to obtain the return of the perpetrator by the United States Marshals Service at federal expense to that jurisdiction in order to face criminal process brought by that jurisdiction. The Federal Bureau of Investigation should advise the United States Marshals Service of possible 18 U.S.C. §5001 situations in order that proper arrangements can be made. The filing of a federal complaint in order to acquire jurisdiction for the use of 18 U.S.C. §5001 is an appropriate and necessary federal prosecutive action. After the perpetrator is removed to the requesting local jurisdiction pursuant to the requirements of 18 U.S.C. §5001, any outstanding federal process should be dismissed.

9-61.180 Additional Research Sources

There are several authorities that can be consulted when researching various issues under the Dyer Act. (Be sure to check the pocket supplement, if any.) Some of these include the following:

A. 56 A.L.R. 2d 1309--Validity and Construction of National Motor Vehicle Theft Act;

B. 15 A.L.R. Fed. 19--What Constitutes "Motor Vehicle" Within Meaning of the National Motor Vehicle Theft Act (Dyer Act) (18 U.S.C. §2311- 2313);

C. 15 A.L.R. Fed. 856--Presumptions and Inferences Arising in Prosecutions under National Motor Vehicle Theft Act (Dyer Act) (18 U.S.C. §§2312, 2313) from Unexplained Possession of Stolen Motor Vehicle;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. 15 A.L.R. Fed. 888--Requirements as to Interstate Character of Offense Under Provision of National Motor Vehicle Theft Act (Dyer Act) (18 U.S.C. §2313) Making it Offense to Receive, Conceal, Store, Barter, Sell, or Dispose of Stolen Motor Vehicle Moving as, or Which is Part of or Constitutes, Interstate Commerce;

E. 45 A.L.R. Fed. 370--Construction and Application of Word "Stolen" in National Motor Vehicle Theft Act (Dyer Act) (18 U.S.C. §§2311-2313); and

F. Devitt and Blackmar, Federal Jury Practice and Instructions (3d ed) Chapter 45, Interstate Transportation of Stolen Property - Motor Vehicle (Dyer Act, etc.) (18 U.S.C. §§2312, 2314, 2315).

9-61.200 NATIONAL STOLEN PROPERTY ACT--18 U.S.C. §§2311, 2314, 2315

9-61.210 Investigative Jurisdiction

Cases involving violations of this Act are investigated by the Federal Bureau of Investigation.

9-61.220 Supervising Section

General Litigation and Legal Advice Section.

9-61.230 Policy Concerning Prosecution

Prosecutions under the first two paragraphs of 18 U.S.C. §2314 and the first paragraph of 18 U.S.C. §2315 should be governed by the same factors that determine whether other non-governmental thefts or frauds (e.g., mail frauds or wire frauds) should be prosecuted federally. The \$5,000 figure, originally adopted in 1934, was selected to limit federal involvement to significant cases. If the \$5,000 figure had been indexed for inflation the comparable value in 1984 would be slightly under \$40,000. (It should be realized that the penalty provision of \$10,000 has also not been increased since its enactment and hence, while the amount of stolen property covered by the statute has been increasing with the passage of time, the monetary penalty in terms of its real value has been diminishing.) These figures are cited in order to provide a historical perspective for these sections. Of course, violations involving less than \$40,000 should be prosecuted federally where the situation warrants.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The monetary figures are more important when considering prosecution under the "falsely made, forged, altered and counterfeit" securities provisions of 18 U.S.C. §2314 and §2315 which do not require any specific monetary amount to invoke federal jurisdiction. However, prosecutive judgments under all provisions of 18 U.S.C. §§2314 and 2315 should be balanced. While the "forgery" provisions permit federal jurisdiction for one forged security, prosecutive discretion should be exercised in favor of those instances where there is some compelling reason to bring the matter in federal courts. Hence, with regard to forged, falsely made, altered, or counterfeited securities under 18 U.S.C. §2314 or §2315, the Department's position is that such offenses are primarily within the purview of state law and should be prosecuted by state authorities where feasible, even though the requisites of federal jurisdiction under the Act are present. However, federal prosecution is recommended where particularly appropriate, as where the broad scope of defendant's activities (e.g., interstate "paper hangers") suggests a need for federal investigative facilities or appears to render inadequate the punishment imposed under state law, or where it is desirable that the charge be brought in conjunction with other federal charges, or where successful state prosecution appears precluded or the state fails or refuses to entertain prosecution.

9-61.240 Discussion of the Offense

9-61.241 General

The definitions for the terms "money," "securities," "tax stamp," and "value" are set forth in 18 U.S.C. §2311.

18 U.S.C. §2314, the "transportation" offense, consists of five different paragraphs. The first paragraph relates to the interstate or foreign transportation of the proceeds of a theft or a fraud where the proceeds have a value of \$5,000 or more. The second paragraph relates to causing the interstate transportation of a victim to defraud the victim of \$5,000 or more of money or property. The third paragraph relates to the interstate and foreign transportation of falsely made, forged, altered, or counterfeited securities or tax stamps. The fourth paragraph relates to the interstate or foreign transportation of a traveler's check bearing a forged countersignature. The fifth paragraph relates to the interstate or foreign transportation of the implements and tools used to falsely make, forge, alter, or counterfeit securities or tax stamps.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

18 U.S.C. §2315, the receipt and "fencing" offense, consists of three different paragraphs. The first paragraph relates to the receipt and disposition of the proceeds of a theft or fraud having a value of \$5,000 or more while such proceeds still have an interstate or foreign commerce character. It also prohibits the pledging or accepting as security for a loan such stolen property of a value of \$500. The second paragraph contains similar elements as the first paragraph except it relates to falsely made, forged, altered, or counterfeited securities or tax stamps and does not require a stated monetary value. Likewise, the third paragraph is comparable to the second paragraph except that it relates to the tools or implements used to falsely make, forge, alter, or counterfeit securities or tax stamps.

The penalties for both sections include a fine of not more than \$10,000, imprisonment of not more than ten years, or both. For offenses occurring on or after January 1, 1985, the possible fine can be \$250,000. See 18 U.S.C. §3623 (Alternative fines). In the last paragraph of both 18 U.S.C. §§2314 and 2315, there is a "proviso" clause which exempts certain governmental securities from the scope of the sections (see USAM 9-61.252, *infra*). The counterfeiting and forging of state and corporate securities is also covered by 18 U.S.C. §511 (Securities of the States and private entities). See USAM 9-61.800, *infra*. There is no statutory requirement under 18 U.S.C. §511 that such corporate and state securities be transported or have been transported in interstate or foreign commerce.

#### 9-61.242 Legislative History

The National Stolen Property Act was originally enacted on May 22, 1934 (see ch. 333, 48 Stat. 794). At first it contained what is now the first paragraphs of 18 U.S.C. §2314 and §2315. The purpose of the Act was to extend the provisions of the National Motor Vehicle Theft Act (*i.e.*, the Dyer Act (see ch. 89, 41 Stat. 324, now 18 U.S.C. §§2311-2313)) to other forms of stolen property. Congress decided to require that such property have a value of \$5,000 or more in order not to burden the resources of the Department of Justice. (There is nothing in the legislative history to indicate that a "motor vehicle" which also happened to have a value of \$5,000 or more could not be prosecuted under the new Act. At that time, however, few motor vehicles were of that value.) In 1939 Congress expanded the act to include falsely made, forged, altered and counterfeit securities (see ch. 413, 53 Stat. 1179). These changes are reflected in present paragraphs three and five in 18 U.S.C. §2314 and paragraphs two and three in 18 U.S.C. §2315. In 1948, the National Stolen Property Act as well as the National Motor Vehicle Theft Act were recodified in 18 U.S.C. as §§2311-2315 (see ch. 645, 62 Stat. 806). In

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1956, the second paragraph in 18 U.S.C. §2314, relating to transporting the victim of a fraud in interstate commerce, was added (see ch. 519, 70 Stat. 507). In 1961, the term "tax stamps" was added to the third and fifth paragraphs of 18 U.S.C. §2314 and the first and second paragraphs of 18 U.S.C. §2315 (see Pub. L. No. 87-371, 75 Stat. 802). In 1968 the fourth paragraph of 18 U.S.C. §2314 was added to deal with the rationale of the decision in Streett v. United States, 331 F.2d 151 (8th Cir. 1964), as it applied to the countersignature on a traveler's check (see Pub. L. No. 90-535, 82 Stat. 885) (see USAM 9-61.250, *infra*). In 1984 the definition of "security" was amended to include a "valid or blank motor vehicle title." (See section 202 of the Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, 98 Stat. 2754 (1984).)

9-61.243 Goods, Wares, Merchandise

Although it is called the National Stolen Property Act, the term "property" itself appears only in the second paragraph of 18 U.S.C. §2314 (which was added in 1956) and can be interpreted in that paragraph as including all forms of property, both personal and real. However, in the first paragraphs of 18 U.S.C. §2314 and §2315 the statutory language utilized is "goods, wares, merchandise, securities or money." The latter two terms will be discussed below (see USAM 9-61.244 and 9-61.245, *infra*). Since the gist of the offense under 18 U.S.C. §2314 is the interstate or foreign transportation, the types of property intended to be covered by the first paragraphs of 18 U.S.C. §§2314 and 2315 are those types of property which can be transported. Hence, the term "goods, wares, merchandise" appears to have been selected to represent all forms of personal property (other than securities or moneys) which could be transported. The term "goods, wares, merchandise" is not defined. It has been interpreted to be a "general and comprehensive designation of such personal property or chattels as are ordinarily a subject of commerce." See United States v. Seagraves, 265 F.2d 876 (3d Cir. 1959). It therefore includes those products sold in commerce (e.g., books, clothes, gasoline, oil, trailers, computers, televisions, food, vehicle parts, etc.)

It has also been held to cover information involving such trade secrets as manufacturing processes, see United States v. Bottone, 365 F.2d 389 (2d Cir. 1966); geological maps, United States v. Seagraves, 265 F.2d 876 (3d Cir. 1959); and chemical formulas, United States v. Greenwald, 479 F.2d 320 (6th Cir. 1973).

In the area of copyrighted works the Ninth Circuit and some other circuits have found the term to also be applicable. See United States v. Belmont, 715 F.2d 459 (9th Cir. 1983); United States v. Berkwith, 619 F.2d

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

649 (7th Cir. 1980); United States v. Whetzel, 589 F.2d 707 (D.C. Cir. 1978); United States v. Atherton, 561 F.2d 749 (9th Cir. 1977); United States v. Drebin, 557 F.2d 1316 (9th Cir. 1977) (the seminal copyrighted works case); United States v. Gallant, 570 F. Supp. 303 (E.D. N.Y. 1983); United States v. Sam Goody, Inc., 506 F. Supp. 380 (E.D. N.Y. 1981). However, the Fifth Circuit in United States v. Smith, 686 F.2d 234 (5th Cir. 1982), rejected the argument that copyrighted works were "goods, wares, or merchandise." The split in the circuits was resolved by the Supreme Court in favor of the view that the interstate transportation of infringing copies of a copyrighted work that was itself lawfully obtained does not violate 18 U.S.C. §2314. Dowling v. United States, \_\_\_\_\_ U.S. \_\_\_\_\_, 53 U.S.L.W. 4978 (June 28, 1985). For a further discussion of what aspects of copyright violations may still be covered by 18 U.S.C. §2314, see USAM 9-71.260, infra.

While the vast majority of personal property covered by the term "goods, wares, merchandise" will be tangible and subject to transportation, any stolen intangible property which in some fashion can be and is reduced to some tangible form prior to, during, or before the completion of the interstate or foreign transportation should be reachable under the first paragraphs of 18 U.S.C. §§2314 and 2315, especially in view of the broad purpose of the statute and the tracing doctrine which has developed under the statute (see USAM 9-61.251, infra). However, in attempting to expand the reach of the statute to its outer limits, the dictum of the Second Circuit in Bottonne, supra, at 393, should be borne in mind:

To be sure, where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that "goods" had been stolen and transported within the meaning of section 2314; the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed.

Nevertheless, the broad definition of interstate commerce enunciated by the Supreme Court in United States v. McElroy, 455 U.S. 642 (1982), the tracing doctrine, and the broad legislative purposes of the statute may, under certain egregious facts surrounding the acquisition of the information, convince a court of its applicability to stolen information not necessarily embodied in a tangible object at the time the stolen information crossed a state boundary as long as such stolen information

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

was placed into a tangible object prior to the termination of the interstate transportation.

It should be remembered that while certain written instruments may be deemed not to be "securities" under 18 U.S.C. §§2314 or 2315, they nevertheless may still be "goods, wares, merchandise" if there is some commercial market for them. See United States v. Gallipoli, 599 F.2d 100 (5th Cir. 1979) (airline tickets); United States v. Jones, 432 F. Supp. 801 (E.D. Pa. 1977), aff'd sub nom; United States v. Moore, 571 F.2d 154 (3d Cir. 1978) (theater tickets).

It is possible to consider a "motor vehicle" to be "goods, wares, or merchandise" under 18 U.S.C. §§2314 and 2315, provided the policy considerations set forth in USAM 9-61.130, supra, are complied with. There is nothing in the legislative history of the National Stolen Property Act to indicate that theft or receipt of motor vehicles having a value of \$5,000 or more could not be prosecuted under 18 U.S.C. §§2314 and 2315. Because 18 U.S.C. §2312 and 18 U.S.C. §2314 have different elements they pass the test that "each provision required proof of a fact which the other does not." See Blockburger v. United States, 284 U.S. 299 (1932). Successful prosecutions for stolen motor vehicles and aircraft have been brought under 18 U.S.C. §§2314 or 2315. See United States v. Dove, 629 F.2d 325 (4th Cir. 1980); United States v. Runge, 593 F.2d 66 (8th Cir. 1979); United States v. Headid, 565 F.2d 1029 (8th Cir. 1977); United States v. Vicars, 465 F.2d 720 (6th Cir. 1972). In United States v. Grenagle, 588 F.2d 87 (4th Cir. 1978), the government prosecuted the defendant for the interstate transportation of a stolen van under 18 U.S.C. §2312 and then also tried to use the value of the van plus the value of the goods inside the van to reach the \$5,000 figure for an 18 U.S.C. §2314 violation. The Fourth Circuit, in dismissing the conviction for the 18 U.S.C. §2314 count, stated that the government could have used either section but having used 18 U.S.C. §2312 for the van it could not also use the van for a 18 U.S.C. §2314 count. The clear teaching of Grenagle, supra, is that a 18 U.S.C. §2314 count by itself would be permissible.

9-61.244 Securities

The definition of "securities" is set forth in 18 U.S.C. §2311. It is beneficial in understanding its scope to divide it into several groupings. Accordingly, the term "securities" includes:

- (a) any note, stock certificate, bond, debenture, check, draft, warrant, traveler's check,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

letter of credit, warehouse receipt, negotiable bill of lading, evidence of indebtedness;

(b) certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate;

(c) valid or blank motor vehicle title;

(d) certificate of interest in property, tangible or intangible;

(e) instrument or document or writing evidencing ownership of goods, wares, and merchandise, or transferring or assigning any right, title, or interest in or to goods, wares, and merchandise;

(f) in general, any instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, warrant, or right to subscribe to or purchase any of foregoing; or

(g) any forged, counterfeited, or spurious representation of any of the foregoing.

Except for the change in 1984 relating to motor vehicle titles, the definition has remained the same since its original enactment in 1934 when the National Stolen Property Act consisted of what is only the first paragraphs of present 18 U.S.C. §§2314 and 2315. The use of the word "includes" indicates the great breadth which should be given to the term. Group (g) seems to have been intended to relieve the government of any requirement to prove that the stolen securities were in fact genuine (e.g., a theft victim may have been holding unbeknownst to himself/herself counterfeit or forged securities.)

Group (a) represents the forms of securities that are most commonly encountered under 18 U.S.C. §§2314 and 2315. The term "evidence of indebtedness" appears to be the most elastic but the courts have been reluctant to expand its scope to such things as credit card charge slips, United States v. Canton, 470 F.2d 861 (2d Cir. 1972); airline tickets, United States v. Jones, 450 F.2d 523 (5th Cir. 1971); or department store scrip certificates, United States v. Dunlap, 573 F.2d 1092 (9th Cir.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1978). Money orders, which are not specifically mentioned in the definition, are covered. United States v. Rochon, 575 F.2d 191 (8th Cir. 1978); United States v. Buckles, 562 F.2d 967 (5th Cir. 1977). Sight drafts are securities; United States v. Bass, 562 F.2d 967 (5th Cir. 1977).

Even before the 1984 amendment, securities were held to include automobile titles. See United States v. Elliott, 571 F.2d 880 (5th Cir. 1978); United States v. Dickson, 462 F.2d 184 (4th Cir. 1972); United States v. Rudge, 474 F. Supp. 360 (D. Iowa 1979). Other documents held to be securities include, equipment leases, United States v. Wexler, 621 F.2d 1218 (2d Cir. 1980); and quit claim deeds, United States v. Speidel, 562 F.2d 1129 (8th Cir. 1977). The definition is therefore not limited to securities normally considered securities by the commercial and financial community and is broader than the definition of security under the Securities and Exchange Act (15 U.S.C. §77b).

Blank traveler's checks are securities because they have all the indicia of bearer instruments. See United States v. Petti, 168 F.2d 221 (2d Cir. 1948); Peoples Savings Bank v. American Surety Co., 15 F. Supp. 911 (W.D. Mich. 1936). By the 1984 amendment, blank motor vehicle titles are now securities. As a general rule, most other blank forms for securities, however, are not in themselves securities. See United States v. Jackson, 576 F.2d 749 (8th Cir. 1978) (blank stock certificates are not securities). However, a blank form for a security may become a security, even though not fully filled out, when sufficient attributes of that type of instrument have been placed thereon. See United States v. Webb, 443 F.2d 308 (5th Cir. 1971) (unsigned payroll check); United States v. Anderson, 359 F. Supp. 61 (D. Ark. 1973) (counterfeit corporate bonds).

Under 18 U.S.C. §§2314 and 2315 a security, once it has been generated, must remain a security during the activity prohibited by these sections. Hence, any cancellation or voiding of a security by the issuer or its agent, evidenced on the document itself, would terminate its status as a "security." See United States v. Teresa, 420 F.2d 13 (4th Cir. 1969).

While there appears to be a split in authorities, the safer rule seems to be that whether a particular document is security under 18 U.S.C. §§2314 and 2315 is a factual question for the trier of fact and not a legal question for the court. See United States v. Johnson, 718 F.2d 1317 (5th Cir. 1983) (en banc), reversing prior panel decision at 700 F.2d 163.

While some courts have held that credit card invoices are "securities," the weight of the cases has caused the Department to take the position that a stolen or fraudulently obtained credit card is not a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

security nor a tool or thing fitted to be used in falsely making or counterfeiting a security within the meaning of the statute, and that a charge slip executed by means of or in connection with a credit card so obtained is not a security within 18 U.S.C. §§2314 or 2315. However, the misuse of such credit cards may be covered by 15 U.S.C. §1644 or 18 U.S.C. §1029 or §1341 (see USAM 9-43.238).

9-61.245 Money

"Money" is defined in 18 U.S.C. §2311 to mean "the legal tender of the United States or of any foreign country, or any counterfeit thereof." Hence, the term appears limited to what would amount to be currency, and does not encompass the broader concepts of "funds" or "credits." While credits or funds on deposit in a bank may not be "money," their mode of transportation in interstate or foreign commerce may be accomplished by means of instruments covered within the concepts of "securities" or "goods, wares, merchandise."

9-61.246 Tax Stamp

"Tax stamp" is defined in 18 U.S.C. §2311 and it includes "any tax stamp, tax token, tax meter imprint, or any other form of evidence of an obligation running to a State, or evidence of the discharge thereof."

9-61.247 Value

"Value" is defined in 18 U.S.C. §2311 to mean "face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

For purposes of 18 U.S.C. §§2314 and 2315 the value of the stolen property which must be proven is at least \$5,000, except for pledging under 18 U.S.C. §2315 where the amount is only \$500. The value of the stolen property is a jury question. See United States v. Williams, 657 F.2d 199 (8th Cir. 1981). And the value must be proven in terms of United States dollars. See United States v. Dior, 671 F.2d 351 (9th Cir. 1982). The value of the different types of property may be proven in different ways.

In addition to market value, the value of securities can be proven through the security's face value, see United States v. Sarkision, 545

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

F.2d 1237 (9th Cir. 1976), or its par value, United States v. Neary, 552 F.2d 1184 (7th Cir. 1977). Basically, the courts agree that any reasonable method of determining value is permissible. See United States v. Tauro, 362 F. Supp. 688 (W.D. Pa.), aff'd, 493 F.2d 1402 (3d Cir.1973). If the goods were stolen from a retail merchant, the value is its retail value; while if stolen from a wholesale merchant the value is its wholesale value. See United States v. Robinson, 687 F.2d 359 (11th Cir. 1982). The value may be determined at the time of theft or its transportation for prosecutions under 18 U.S.C. §2314, United States v. McMahan, 548 F.2d 712 (7th Cir. 1977), and at time of theft or at anytime during its receipt, concealment, or disposition under 18 U.S.C. §2315. See United States v. Luckey, 655 F.2d 203 (9th Cir. 1981); United States v. Reid, 586 F.2d 393 (5th Cir. 1978); United States v. McClain, 545 F.2d 988 (5th Cir. 1977).

While the definition of value appears to permit the aggregation of the total amount in an indictment, it has been held that what is meant is that each count must allege the \$5,000 threshold amount. See United States v. Markus, 721 F.2d 442 (3d Cir. 1983). Transactions involving less than \$5,000 can be aggregated and combined into a single count if there is enough relationship between the transactions or they are part of a single plan or conspiracy. See Schaffer v. United States, 362 U.S. 511 (1960); United States v. Honey, 680 F.2d 1228 (8th Cir. 1982); United States v. Perry, 638 F.2d 862 (5th Cir. 1981); Andrews v. United States, 108 F.2d 511 (4th Cir. 1939).

Market value is the means by which the value of most goods, wares, and merchandise will be established. This can be demonstrated by many methods. The value that the thief asks for the stolen goods and the value he/she actually sells them for can prove the value. See United States v. Simpson, 577 F.2d 78 (9th Cir. 1978). The value the insurance company paid for the theft claims may show the value. See United States v. Wegerman, 549 F.2d 1192 (8th Cir. 1977). Of course, the basic rule of what a willing seller and willing buyer will pay can also be used. Often times the thieves market value can be used to show the value. See United States v. Jackson, 576 F.2d 749 (8th Cir. 1978); United States v. Moore, 571 F.2d 154 (3d Cir. 1978); United States v. Tyers, 487 F.2d 828 (2d Cir. 1973); United States v. Ditata, 469 F.2d 1270 (7th Cir. 1972); Churder v. United States, 387 F.2d 825 (8th Cir. 1968); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

At times a thief or possessor of stolen property may do something to it to increase its value. The statutory amount requirement may be satisfied by the enhanced value provided such accretion does not alter or change the nature of the property but merely fulfills it. See United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States v. Jones, 432 F. Supp. 801 (E.D. Pa. 1977), aff'd sub nom., United States v. Moore, 571 F.2d 154 (3d Cir. 1978) (stolen blank ticketron tickets were subsequently imprinted with dates of performances and value.)

9-61.248 Stolen, Converted and Taken by Fraud

The terms "stolen, converted, and taken by fraud" are intended to cover all forms of theft offenses regardless of whether such "taking" was in the nature of common law larceny, an embezzlement, or false pretenses. United States v. Lyda, 279 F.2d 461 (5th Cir. 1960). See also United States v. Truley, 352 U.S. 407 (1957) (under 18 U.S.C. §2312); and Bell v. United States, 462 U.S. 356 (1983) (under 18 U.S.C. §2113). The term covers the felonious taking or conversion of another's property right in the particular object. Hence, the term covers any deprivation of one's title, United States v. McClain, 545 F.2d 988 (5th Cir. 1977), or rightful possession, United States v. Zepin, 533 F.2d 279 (5th Cir. 1976). There must be a deprivation of an existing property right and the movement of one's own money out of state to avoid general creditors would not constitute such a taking. See United States v. Carman, 577 F.2d 556 (9th Cir. 1978).

While a forged endorsement may not constitute a violation of the third paragraph of 18 U.S.C. §2314 (see USAM 9-61.250, infra) such false endorsement of a security having the value of \$5,000 or more would make the security "converted or taken by fraud" within the meaning of the first paragraph of 18 U.S.C. §§2314 and 2315. See United States v. Tyson, 690 F.2d 9 (1st Cir. 1982).

The property must retain its stolen character during the transportation under 18 U.S.C. §2314 or the receipt, concealment, storing, bartering, selling, disposing of, pledging, or accepting as a security for a loan under 18 U.S.C. §2315. Full recovery by the owner or his/her agents, including law enforcement officials, will terminate the stolen character. On the other hand, if the stolen property is not in the sole possession and under their "surveillance" the stolen character remains. See United States v. Muzil, 676 F.2d 919 (2d Cir. 1982); United States v. Dove, 629 F.2d 325 (4th Cir. 1980).

9-61.249 Falsely Made, Forged, Altered, and Counterfeited

While the terms "altered" and "counterfeited" are reasonably comprehensible, the concepts "falsely made" and "forged" are very complex

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

under existing case law interpreting 18 U.S.C. §§2314 and 2315. The term "altered" obviously applies to those situations where a perpetrator changes a material fact on an existing security (e.g., increases the amount from \$500 to \$50,000, substitutes another name for that of the original payee, etc.). And the term "counterfeit" normally encompasses the unauthorized reproduction of some existing document.

While there is a considerable split within the circuits as to the differences between "falsely made" and "forged," the better view is that they constitute different means or methods of violating the statute. See United States v. Hagerty, 561 F.2d 1197 (5th Cir. 1977); United States v. Tucker, 473 F.2d 1290 (6th Cir. 1973); Stinson v. United States, 316 F.2d 554 (5th Cir. 1963); Pines v. United States, 123 F.2d 825 (8th Cir. 1941). And while there is considerable disagreement as to the type of conduct encompassed within each term standing by itself (see 4 A.L.R. Fed. 793), there is general agreement that they comprehend falsity in the execution or making on the face of the writing rather than falsity of any facts set forth on the face of the writing. In other words, the document was actually issued by a person who was without the authority to so issue or it was issued contrary to his/her authority to issue. See United States v. Simpson, 577 F.2d 78 (9th Cir. 1978); Streett v. United States, *supra*. "Forgery" generally relates to the unauthorized use of the purported maker's signature while the term "falsely made" relates to any execution of a document drawn on either an existing or non-existing entity where there is no authority to so issue. See United States v. Lipscomb, 546 F.2d 787 (8th Cir. 1975); Pines v. United States, *supra*. Hence, when a person fills out a stolen blank money order, he/she is falsely making the security. See United States v. Smith, 426 F.2d 275 (6th Cir. 1970). As noted previously, there is no minimum monetary value for a falsely made, forged, altered, or counterfeit security or tax stamp.

The following situations have been held not to constitute a violation of that portion of the statute dealing with falsely made or forged securities:

A. Where a check is drawn by the maker in his/her own name on a bank in which he/she has no funds or no account (i.e., true name check). See United States v. Melvin, 316 F.2d 647 (7th Cir. 1963); Hall v. United States, 372 F.2d 603, 607 (4th Cir. 1967). Hence, insufficient funds check cases are exclusively within the province of state laws. (Note: If the fraudulently obtained property had a value of \$5,000 or more and was subsequently transported in interstate or foreign commerce, there would be a violation of the first paragraph of 18 U.S.C. §2314.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Where a fictitious name is used by the drawer, but it is the name by which he/she generally is known or by which he/she is known to the payee, and in drawing the check in this manner he/she does not intend to falsify his/her identity. See United States v. Gallagher, 94 F. Supp. 640 (W.D. Pa. 1950); United States v. Greever, 116 F. Supp. 755 (D. D.C. 1953).

C. Where the signature itself shows the signer is acting in the capacity of agent or trustee. See 41 A.L.R. 229; Gilbert v. United States, 370 U.S. 650 (1962).

D. Where a validly executed instrument contains a forged indorsement. See Prussian v. United States, 282 U.S. 675 (1931); Streett v. United States, *supra*, United States v. Roby, 499 F.2d 151 (10th Cir. 1974). The Streett case held that the countersignature on a travelers check is, in effect, a first endorsement and that a travelers check issued for value to a purchaser does not thereafter become a forged security by reason of forgery of the purchaser's countersignature. (See USAM 9-61.250 *infra*.)

A "blank" traveler's check is a security as it has on it all the necessary indicia prior to issuance. In the past it was the practice of traveler's check companies to require the purchaser to sign the traveler's check in the presence of the issuing clerk at time of issuance. Hence, when blank traveler's checks were stolen and a thief subsequently filled in a name (whether his/her own or someone else's), it has been held that such an instrument was falsely made and forged since the perpetrator lacked the authority to issue the check. See United States v. Law, 435 F.2d 1264 (5th Cir. 1970); United States v. Franco, 413 F.2d 282 (5th Cir. 1969). However, in recent years some traveler check issuers no longer require that the purchaser sign the checks in the presence of the issuing clerk. Apparently, this new procedure was adopted for the convenience of purchasers (e.g., either wife or husband could sign the check just before using and then place the countersignature (i.e., the second signature) on the check in the presence of the accepting merchant). Consequently, some traveler's checks are now issued in blank (i.e., no specified payee) and are bearer instruments at the time of issuance. It may be hard to distinguish between traveler's checks stolen before issuance and those stolen after issuance. Moreover, because of change in business procedures, the rationale of the Streett case (18 U.S.C. §2314 covers only the false making of the instrument, not its false indorsement) and the holder-in-due-course doctrine for bearer securities, courts may be less likely to hold that the false filling in of the payee's signature (i.e., original purchaser) is presently covered by the statute.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.250 Discussion of the Offense (Cont.)

9-61.251 Forged Indorsements

While there has been universal agreement that falsely made and forged securities certainly relate to the unauthorized execution of the face of a document, there has been considerable dispute whether a forged indorsement is covered by the third paragraph of 18 U.S.C. §2314. Relying in part upon the Supreme Court holding in Prussian v. United States, 282 U.S. 675 (1931), that a forged indorsement on a United States government security was not a forged obligation of the United States (as an indorsement can only be an obligation of the indorser), the courts starting with Streett v. United States, *supra*, have generally held, when specifically addressing the issue, that forged indorsements are not encompassed within the purview of the third paragraph of 18 U.S.C. §2314. United States v. Tyson, 690 F.2d 9 (1st Cir. 1982); United States v. Sciortino, 601 F.2d 680 (2d Cir. 1979); United States v. Simpson, *supra*. While these holdings ignore the argument that a forged indorsement may itself be a "security" and the similarity of fraudulent intent by the false maker and the false indorser, the logic of these holdings plus the passage by Congress of the fourth paragraph of 18 U.S.C. §2314 in 1968 (Pub. L. No. 90-535, 82 Stat. 885) relating to countersignatures on traveler checks undercuts prior arguments. While the Department has not taken the position that forged indorsements can never be covered by the third paragraph of 18 U.S.C. §2314, we note the futility of such recent attempts United States v. Tyson, *supra*, United States v. Sciortino, *supra*, and United States v. Simpson, *supra*. Moreover, in view of the general prosecutive policy for these offenses (see USAM 9-61.230, *supra*) and the fact that securities with forged indorsements are "converted or taken by fraud" (United States v. Tyson, *supra*) and the ability to aggregate converted checks having a sufficient relationship to reach the \$5,000 figure (see USAM 9-61.247, *supra*) under the first paragraph of 18 U.S.C. §2314, the absence of coverage of forged indorsements per se under the third paragraph may not be that detrimental to matters warranting federal prosecution.

It should be noted that the forged indorsement on state or corporate securities is now expressly covered by new 18 U.S.C. §511 (Securities of the State and private entities). See USAM 9-61.800, *infra*.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.252 Tracing

In passing the National Stolen Property Act, Congress intended to aid the states in the detection and prosecution of perpetrators who commit thefts or frauds in one jurisdiction and then flee that jurisdiction with the proceeds, and to keep the channels of interstate and foreign commerce free from the pollution of stolen and fraudulently taken proceeds. See United States v. Turley, 352 U.S. 407, 415 (1957); United States v. Sheridan, 329 U.S. 379, 384 (1946). To effectuate these legislative purposes, the courts, utilizing the principles of equity, have created a tracing doctrine for the proceeds of such thefts or frauds. Basically, if the proceeds actually transported in interstate or foreign commerce can be traced to the actual property stolen or taken by fraud and the proceeds are in the form of "goods," "wares," "merchandise," "securities," or "money," at the time of their interstate or foreign transportation the statute has been held applicable. The seminal case is United States v. Walker, 176 F.2d 504 (2d Cir. 1949). Walker involved the fraudulent acquisition by the perpetrator of checks sent by a mortgagee to the victim. The perpetrator exchanged the mortgagee's checks for two bank checks of \$10,000 and \$7,000, respectively, \$3,000 in traveler checks, and \$6,000 in cash. The defendant then exchanged the \$10,000 bank check for 100 additional traveler's checks. The defendant was prosecuted for transporting more than \$5,000 of the traveler checks taken feloniously by fraud in interstate commerce. The indictment was upheld. Walker, supra, at 566. The change in form doctrine has been recognized and followed in other cases. See United States v. Davis, 608 F.2d 555 (5th Cir. 1979); United States v. Levy, 579 F.2d 1332 (5th Cir. 1978); United States v. Pomponio, 558 F.2d 1172 (4th Cir. 1977); United States v. Poole, 557 F.2d 531 (5th Cir. 1977). In Poole, supra, however, one count of the defendant's conviction was reversed because the government failed to prove that the check actually transported in interstate commerce represented the proceeds of the fraud. In Poole, supra, the defendant defrauded a victim out of a check and deposited the victim's check in the perpetrator's local checking account. The victim's check never left the state. The perpetrator then sent his own personal check for the amount of the fraud to an out of state account of his. However, because the perpetrator had sufficient funds in his checking account, besides those obtained by fraud from the victim, to cover his personal check, the court held that the government did not establish that \$5,000 or more of the fraudulently obtained funds were actually transported in interstate commerce. The Poole decision shows the need to specifically trace and identify the proceeds of the theft or fraud. If commingling of "good" funds with "stolen" funds occurs, such tracing can be difficult.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.253 Exceptions to 18 U.S.C. §2314 and §2315 (Proviso Clause)

In the last paragraph of both 18 U.S.C. §2314 and §2315, there is a proviso clause that makes these sections inapplicable to certain falsely made, forged, altered, or counterfeit securities. While the language of the proviso clause is confusing, the legislative intent is clear. In enacting in 1939 what is now the third and fifth paragraphs of 18 U.S.C. §2314 and the second and third paragraphs of 18 U.S.C. §2315, Congress intended to exclude from the coverage of these provisions those securities already protected by existing federal counterfeit laws. These securities are all governmental or quasi-governmental in nature. They include all securities and obligations issued by the United States government (see, e.g., 18 U.S.C. §§471, 472, 500). See United States v. Galardi, 476 F.2d 1072 (9th Cir. 1973). They also include those foreign securities covered originally by the Act of May 16, 1884, (ch. 52, 23 Stat. 22). See United States v. Arjona, 120 U.S. 479 (1887). These provisions are now codified in 18 U.S.C. §§478, 479, 480, 481, 482 and 483, 18 U.S.C. §478 covers the counterfeiting of the obligations of the foreign government itself. 18 U.S.C. §4812 covers the counterfeiting of bank notes issued by foreign banks or corporations, which notes are intended by law or usage of such foreign countries to circulate as currency. 18 U.S.C. §§479 and 481 are the uttering offenses for the securities described in 18 U.S.C. §§478 and 481, respectively. 18 U.S.C. §480 is the possession offense for the securities described in 18 U.S.C. §§478 and 481 respectively. See Forlini v. United States, 12 F.2d 681 (1926). (In the recodification in 1948, 18 U.S.C. §480 was moved, without any explanation being given, from what was its original fifth position in the Act of May 16, 1884, to its present third position.) An analysis of the legislative history clearly shows that it is only the bank notes intended by law or usage to circulate as money issued by foreign banks or corporations that are excluded by the proviso clause. Hence, checks, money orders, and other securities issued by foreign banks or corporations which are not intended to circulate as currency are within the reach of 18 U.S.C. §§2314 and 2315. See United States v. Burger, 728 F.2d 140 (2d Cir. 1984); United States v. Noe, 634 F.2d 860 (5th Cir. 1981); United States v. Ortiz, 444 F. Supp. 81 (W.D. Tex. 1977).

9-61.260 Elements of the Offenses Under 18 U.S.C. §§2314 and 2315

9-61.261 First Paragraph of 18 U.S.C. §2314

The elements of a violation under the first paragraph of 18 U.S.C. §2314 are that the defendant:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. Unlawfully transports or causes to be transported in interstate or foreign commerce;

B. Goods, wares, merchandise, securities, or money having a value of \$5,000 or more which are stolen, converted or taken by fraud; and

C. Knowing the same to be stolen, converted or taken by fraud.

The gist of this offense is transportation. The property must have value of \$5,000 or more. The defendant does not have to be the actual thief, although he/she could be. The term "unlawfully" means contrary to law, i.e., the absence of lawful justification. For example, a person voluntarily returning property stolen, converted, or taken by fraud to its lawful owner would not violate the statute. The term "causes to be" comes from 18 U.S.C. §2(b). See Pereira v. United States, 347 U.S. 1 (1953). Interstate or foreign transportation commences when the journey begins. See United States v. McElroy, 455 U.S. 642 (1982); United States v. Ajlouny, 629 F.2d 830 (2d Cir. 1980).

18 U.S.C. §2314 may be applicable to certain check kiting schemes where a float has been created and the perpetrator is transporting in interstate or foreign commerce by means of securities (usually the perpetrator's own checks) the funds which he/she has been taking by fraud from the banking institution. See United States v. Flick, 516 F.2d 489 (7th Cir. 1975). The fact that he/she is using his/her own check to transport the bank's funds does not preclude prosecution as the statute permits tracing where the form of the "stolen" property is changed. (See USAM 9-61.251, supra.)

9-61.262 Second Paragraph of 18 U.S.C. §2314

The elements of the second paragraph of 18 U.S.C. §2314 are that defendant:

A. Devises or intends to devise a scheme to defraud or obtain money or property by false or fraudulent pretenses, representations, or promises.

B. Transports or causes to be transported or induces any person to travel in or be transported in interstate commerce; and

C. In the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of \$5,000 or more.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The gist of this offense is the interstate transportation of the victim. It does not require an actual loss of property by the victim. See United States v. Benson, 548 F.2d 42 (2d Cir. 1977). The provision does not require a specific intent to defraud a chosen individual as it requires only proof of a general intent to defraud. See United States v. Kelly, 569 F.2d 928 (5th Cir. 1978). The government does not have to prove that the victim relied on the false representations and was deceived by them. See United States v. Reina, 446 F.2d 16 (9th Cir. 1971). While the provision only covers interstate transportation, the courts have held in those situations where the victim has been induced to travel to a foreign country that there is interstate travel if he/she crossed into another state before his/her departure to the foreign country. See United States v. Kelly, *supra*; Charron v. United States, 412 F.2d 657 (9th Cir. 1969).

9-61.263 Third Paragraph of 18 U.S.C. §2314

The elements of the third paragraph of 18 U.S.C. §2314 are that the defendant:

- A. With unlawful or fraudulent intent;
- B. Transports or causes to be transported in interstate or foreign commerce;
- C. A falsely made, forged, altered, or counterfeit security or tax stamps; and
- D. Knowing the same to have been falsely made, forged, altered, or counterfeited.

A forged security does not have to be actually forged before the security crosses a state boundary provided that the forging takes place before the completion of the interstate journey. See United States v. McElroy, 455 U.S. 642 (1982). In most cases the defendant by negotiating the security will cause the receiver to send the security back to the issuer for collection. If the issuer is out of state, the defendant has caused its interstate transportation. See Pereira v. United States, 347 U.S. 1 (1953); 18 U.S.C. §2(b). The defendant does not have to know of the interstate transportation as that is only a jurisdictional element. See United States v. Ludwig, 523 F.2d 705 (8th Cir. 1975). See also United States v. Feola, 420 U.S. 671 (1975).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

When a perpetrator transports several counterfeit or forged securities at the same time he/she commits only one offense. See United States v. Squires, 581 F.2d 408 (4th Cir. 1978). However, when he/she negotiates a forged check at each of three different merchants, he/she commits three separate offenses. Amer v. United States, 367 F.2d 803 (8th Cir. 1966). On the other hand, if he/she negotiates three forged checks at the same time, he/she commits only one offense as it is presumed that the forged securities entered the stream of commerce together. See Cabbell v. United States, 636 F.2d 246 (8th Cir. 1980). While there is some case law to indicate that if the defendant can establish that, if the separately negotiated forged securities happened to travel together in the interstate banking channels, the separate offenses would merge, Ketchum v. United States, 327 F.Supp. 768 (D. Md. 1971), the better view would be that such happenstance occurrences should not control the purposes of the statute as each offense was started at a different time with a different victim. The fact that such securities "took the same plane" should be immaterial and the perpetrator, having assumed the risk of separate offenses, should face the possibility of consecutive sentences if the court deems such punishment to be warranted.

9-61.264 Fourth Paragraph of 18 U.S.C. §2314

The elements of the fourth paragraph of 18 U.S.C. §2314 are that defendant:

- A. With unlawful or fraudulent intent;
- B. Transports or causes to be transported in interstate or foreign commerce; and
- C. A traveler's check bearing a forged countersignature.

This provision is limited to the forged countersignature on traveler's checks (i.e., the second signature by the purchaser). It was sought by the traveler's check industry to overcome the problem concerning forged indorsements caused by the decision in Streett v. United States, 331 F.2d 151 (8th Cir. 1964). In view of recent practices by some traveler's check companies to issue their checks in blank and the basic holder-in-due-course doctrine for bearer securities, it is questionable whether a fourth paragraph violation can occur if the purchaser of the traveler's check does not sign the traveler's check before such checks are stolen from him/her.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.265 Fifth Paragraph of 18 U.S.C. §2314

The elements of the fifth paragraph of 18 U.S.C. §2314 are that the defendant:

- A. With unlawful or fraudulent intent;
- B. Transports or causes to be transported in interstate or foreign commerce; and
- C. Any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp or any part thereof.

This provision covers the tools and implements which can be used to falsely make, forge, alter, or counterfeit securities or tax stamps. In view of the breadth of the provision as to counterfeiting instrumentalities, the unlawful intended use of the tool for counterfeiting purposes will obviously have to be proven.

9-61.266 First Paragraph of 18 U.S.C. §2315

The elements under the basic offense of the first paragraph of 18 U.S.C. §2315 are that the defendant:

- A. Receive, conceal, store, barter, sell, or dispose of;
- B. Goods, wares, merchandise, securities or money stolen, converted or taken by fraud having the value of \$5,000 or more;
- C. Which are moving as, which are a part of, or which constitute interstate or foreign commerce; and
- D. Knowing the same to have been stolen, converted, or taken by fraud.

The first paragraph also prohibits the pledging or accepting as security for a loan any goods, wares, merchandise, or securities stolen, converted, or taken by fraud, having the value of \$500 or more which are moving as, which are a part of, or which constitute interstate or foreign commerce, knowing the same to be stolen, converted, or taken by fraud.

This paragraph requires that the stolen property still retain its interstate or foreign commerce character at the time the defendant does

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

one of the enumerated acts. The courts have clearly held that such commerce character does not terminate upon the arrival of the property in another state and that it remains until the purpose of the transportation has been accomplished. See United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979); United States v. Tobin, 576 F.2d 687 (5th Cir. 1978); United States v. Pichany, 490 F.2d 1073 (7th Cir. 1973). As long as the property is in the hands of a fence versus a user (i.e., consumer) of the property, it can be argued that the commerce character remains. See Roberson v. United States, 237 F.2d 536 (5th Cir. 1956).

The question of whether the commerce character was continuing is a jury question. See Corey v. United States, 305 F.2d 232 (9th Cir. 1962). The defendant does not have to know of the continuing commerce character as such is only a jurisdictional element. See United States v. Beil, 577 F.2d 1313 (5th Cir. 1978); United States v. Smith, 461 F.2d 246 (10th Cir. 1972). See also United States v. Feola, 420 U.S. 671 (1975). While the statutory language of the first paragraph of 18 U.S.C. §2315 uses the word "taken" and not the words "taken by fraud," it has been held that "taken by fraud" is what was intended by Congress. See United States v. McClintic, 570 F.2d 685 (8th Cir. 1978).

9-61.267 Second Paragraph of 18 U.S.C. §2315

The elements for a violation of the second paragraph of 18 U.S.C. §2315 are that the defendant:

- A. Receive, conceal, store, barter, sell, dispose of, or pledge or accept as security or for a loan;
- B. A falsely made, forged, altered, or counterfeit security or tax stamp;
- C. Which is moving as, which is a part of, or which constitutes interstate or foreign commerce; and
- D. Knowing the same to have been falsely made, forged, altered, or counterfeited.

The discussion in USAM 9-61.266, supra on the retention of a security's interstate or foreign commerce character should be consulted.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.268 Third Paragraph of 18 U.S.C. §2315

The elements for a violation of the third paragraph of 18 U.S.C. §2315 are that the defendant:

A. Receive in interstate or foreign commerce or conceal, store, barter, sell, or dispose of;

B. Any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp or any part thereof;

C. Which is moving as, which is part of, or which constitutes interstate or foreign commerce; and

D. Knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp or part thereof.

The counterfeiting instrumentalities must retain their commerce character. (See USAM 9-61.266, supra.)

9-61.270 Forms of Indictments

9-61.271 First Paragraph of 18 U.S.C. §2314

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the defendant, \_\_\_\_\_, did unlawfully transport in interstate commerce from \_\_\_\_\_, State of \_\_\_\_\_, to \_\_\_\_\_, State of \_\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, stolen goods, wares and merchandise, that is, \_\_\_\_\_, of the value of \$5,000 or more, knowing the same to have been stolen.

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the defendant, \_\_\_\_\_, did unlawfully transport in interstate commerce from \_\_\_\_\_, State of \_\_\_\_\_, to \_\_\_\_\_, State of \_\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, a security taken by fraud, to wit, (describe the security), of the value of \$5,000 or more, knowing the same to have been taken by fraud.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.272 Second Paragraph of 18 U.S.C. §2314

I. [Set out the scheme and artifice to defraud and obtain money and property by means of false and fraudulent pretenses, etc., as in a mail fraud (18 U.S.C. §1341).]

II. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the defendant, \_\_\_\_\_, having devised and intended to devise the aforesaid scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, did transport (name of victim) from \_\_\_\_\_, State of \_\_\_\_\_, to \_\_\_\_\_, State of \_\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, in the execution of the aforesaid scheme and artifice to defraud (name of victim) of property having a value of \$5,000 or more, that is, (describe the property).

9-61.273 Third Paragraph of 18 U.S.C. §2314

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the defendant, \_\_\_\_\_, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from \_\_\_\_\_, State of \_\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, to \_\_\_\_\_, State of \_\_\_\_\_, a falsely made and forged security, that is, (describe the security), knowing the same to be falsely made and forged.

Note: You may wish to attach a copy of the falsely made and forged security to the indictment. The "cause to be transported" comes from 18 U.S.C. §2(b). See Pereira v. United States, 347 U.S. 1 (1953).

9-61.274 First Paragraph of 18 U.S.C. §2315

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did receive and conceal certain stolen securities, that is, (describe the securities) of a value of \$5,000 or more, which were moving as, were a part of, and constituted interstate commerce from the State of \_\_\_\_\_ to the State of \_\_\_\_\_, knowing the same to have been stolen.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.275 Second Paragraph of 18 U.S.C. §2315

On or about the \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did receive and conceal certain counterfeit securities, that is, (describe the securities), which were moving as, were part of, and constituted interstate commerce from the State of \_\_\_\_\_ to the State of \_\_\_\_\_, knowing the same to have been counterfeited.

9-61.280 Venue

Venue for offenses under 18 U.S.C. §2314 are governed by the provisions of 18 U.S.C. §3237. In other words, the defendant may be prosecuted in any district where the interstate transportation was begun, continued, or completed. While the gist of the offense under the second paragraph of 18 U.S.C. §2314 is the interstate transportation of the victim and hence venue would be in any district that the victim began, continued, or completed his/her interstate journey, see United States v. Coppola, 486 F.2d 882 (10th Cir. 1973), since the statute also prohibits acts of inducement, venue probably also exists where such acts were made or had their effect. (Compare with venue under the obstruction of justice statutes in USAM 9-69.180, infra.)

Venue for an offense under 18 U.S.C. §2315 would be where one of the enumerated acts was performed.

9-61.290 Additional Research Sources

There are several authorities that can be consulted when researching various issues under the National Stolen Property Act. (Be sure to check the pocket supplement, if any.) They include:

A. 41 A.L.R. 231--Genuine Making of Instrument for Purpose of Defrauding as Constituting Forgery.

B. 87 A.L.R. 1169--Filling in Terms Other Than Authorized in Paper Executed with Blanks, as Forgery.

C. 91 L Ed. 371--Transportation or Causing to be Transported Within the Meaning of the National Stolen Property Act.

D. 4 A.L.R. Fed. 793--What Constitutes A "Falsely Made, Forged, Altered, or Counterfeited" Security Within Meaning of 18 U.S.C. §2314, Making Transportation of Such Securities a Criminal Offense.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

E. 6 A.L.R. Fed. 194--What are "Goods, Wares, Merchandise or Securities" Within Meaning of 18 U.S.C. §2314, Making Transportation of Stolen Goods a Criminal Offense.

F. 15 A.L.R. Fed. 336--Determination of Value of Stolen Property Within Meaning of Provisions of 18 U.S.C. §2314 Proscribing Interstate or Foreign Transportation of Stolen Goods, Wares, Merchandise, Securities, or Money of Value of \$5,000 or More.

G. 45 A.L.R. Fed. 527--Sufficiency Of Evidence To Satisfy "Interstate Or Foreign Commerce" Requirement of 18 U.S.C. §2315, Making Sale or Receipt of Stolen Goods, Securities, Money, or Fraudulent Tax Stamps Criminal Offense.

H. 48 A.L.R. Fed. 570--Necessity In Prosecution Under 18 U.S.C. §2314 for Interstate Transportation of Securities Obtained by Fraud That Specific Securities Have Moved in Interstate Commerce.

I. Devitt and Blackmar, Federal Jury Practice and Instructions, (3rd ed), Chapter 45, Interstate Transportation of Stolen Property--Motor Vehicle (Dyer Act, etc.) [18 U.S.C. §§2312, 2314, 2315].

9-61.300 THEFT FROM INTERSTATE SHIPMENT (18 U.S.C. §659)

9-61.310 Investigative Jurisdiction

Violations of the Theft from Interstate Shipment statute (18 U.S.C. §659) are within the investigative jurisdiction of the Federal Bureau of Investigation.

9-61.320 Supervising Section

General Litigation and Legal Advice Section.

9-61.330 Policy Concerning Prosecution

Thefts from interstate shipment should be prosecuted under federal laws where: (1) there is difficulty in establishing venue for state prosecution, (2) the thefts are systematic or widespread, (3) another related federal offense is charged against the defendant, or (4) federal prosecution would be advantageous to the administration of justice, such as in the detection, prevention, or prosecution of crimes generally.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Major theft cases and cases involving repeat offenders should be given priority attention under 18 U.S.C. §659. Since theft from interstate shipment is a concurrent offense, prosecutive agreements with state and local law enforcement authorities are appropriate.

The Criminal Division has no objection to a U.S. Attorney's preference that the FBI present to him/her cases involving the theft of goods or chattels having a certain minimum value (e.g., \$100 or \$250) and only those cases involving the theft of property valued at less than such figure where unusual circumstances are present. In establishing monetary amounts, however, U.S. Attorneys should fully realize that shippers and carriers often are subject to a series of minor thefts which in their combined loss value can account for more than 80% of cargo thefts. While federal resources do not permit the investigation or prosecution of each minor individual theft, when a pattern of thefts is evident or can be demonstrated an investigative effort by the FBI, which may also involve state or local law enforcement agents, should be considered. This would be especially appropriate where security officials of the carrier are willing to assist in the investigation.

Where cargo theft is perceived as a significant problem in the district, the U.S. Attorney is encouraged to have his/her Law Enforcement Coordinating Committee address the issue. If the district has an area-wide cargo security committee composed of persons in the private sector and law enforcement officials concerned about preventing cargo thefts in their geographical area, the U.S. Attorney is encouraged to participate in such voluntary effort.

9-61.340 Discussion of Offense

9-61.341 General

18 U.S.C. §659 proscribes the embezzlement of, theft of, or unlawful taking of, from certain listed facilities, including pipelines, railroad cars, motor trucks, depots, aircraft, aircraft terminals, vessels and wharves, goods or chattels which are moving as, are part of or constitute an interstate or foreign shipment. Similar acts with regard to the baggage in the possession of a common carrier for interstate or foreign transportation or of any property of a passenger in interstate or foreign transportation are also prohibited by the section. 18 U.S.C. §659 also prohibits the buying, receiving, or possession of such goods or chattels by a person knowing them to have been embezzled or stolen.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The term "goods or chattels" covers all forms of personal property. The interstate or foreign shipment can be by a carrier or by the owner of the goods. See United States v. Gollin, 166 F.2d 123 (3d Cir. 1948); Marifian v. United States, 82 F.2d 628 (8th Cir. 1936). The carrier does not have to be licensed and a transfer between one carrier to another carrier does not terminate the shipment.

A penalty of not more than ten years imprisonment or fine of not more than \$5,000 of both is specified. Where, however, the value of the goods does not exceed \$100 the theft is punishable as a misdemeanor (i.e., a fine of up to \$1,000 and/or imprisonment of one year.) As to offenses occurring on or after January 1, 1985, the possible fine for the felony was increased to \$250,000 and the possible fine for the misdemeanor was increased to \$100,000. See 18 U.S.C. §3623 (Alternative fines).

9-61.342 State Prosecution a Bar

18 U.S.C. §659 provides that a judgment of conviction or acquittal on the merits under the laws of any state shall be a bar to any federal prosecution under the section for the same act or acts.

9-61.343 Interstate or Foreign Commerce Aspect of Shipment

The interstate or foreign commerce aspect of 18 U.S.C. §659 relates to the time of theft, not to the time of the defendant's receipt or possession of stolen property. See United States v. Tyers, 487 F.2d 828 (2d Cir. 1973). Actual knowledge by the defendant of the interstate or foreign commerce character of the stolen goods is not required as that is only a jurisdictional requirement. See United States v. Zarattine, 552 F.2d 753 (7th Cir. 1977); United States v. Houle, 490 F.2d 167 (2d Cir. 1973); United States v. Tyers, supra.

18 U.S.C. §659 states three ways in which the commerce requirement can be met: the goods can (1) be moving as an interstate or foreign shipment, (2) be part of an interstate or foreign shipment, or (3) constitute an interstate or foreign shipment. The use of the conjunction "or" between these clauses suggests that the criteria are disjunctive rather than conjunctive. See United States v. Astolas, 487 F.2d 275 (2d Cir. 1973). The test for determining whether a shipment is in interstate or foreign commerce is a practical one, and depends upon the relationship between the sender, the receiver, and the carrier, the indicia of interstate or foreign commerce (i.e., waybills, shipping documents, etc.), at the time the theft occurs, and preservation of Congressional intent. No single factor is conclusive in the determination. See United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Wills, 593 F.2d 285 (7th Cir. 1979); United States v. Gates, 528 F.2d 1045 (5th Cir. 1976). Shipments begin, continue, and eventually terminate. A shipment which is being sent from one place in a state to another place in the same state can be an interstate shipment if during its travel it will pass or does pass through another state before it reaches its destination. See Yohn v. United States, 28 F. 511 (2d Cir. 1922); United States v. Moynihan, 258 F. 529 (3d Cir. 1919).

An interstate or foreign shipment basically commences when the shipper identifies the goods to be shipped, separates them from his/her other inventory, and has them ready for shipment. Often the goods are loaded into a trailer or railroad car, or affixed with shipping labels. See United States v. Wills, *supra*; United States v. Astolas, *supra*; United States v. Parent, 484 F.2d 726 (7th Cir. 1973); United States v. Sherman, 171 F.2d 619 (2d Cir. 1948); United States v. Gollin, 166 F.2d 123 (3d Cir. 1948). Once the shipment begins, its interstate or foreign character remains during the transfer to an intrastate carrier, to an interstate carrier, and back again to an intrastate carrier. The necessary commerce character continues until the shipment reaches its destination and is delivered to the receiver (i.e., consignee) and the receiver accepts and takes complete dominion and control over the goods. See United States v. Luman, 622 F.2d 490 (10th Cir. 1980); United States v. Gates, *supra*; United States v. Astalos, *supra*; Winer v. United States, 228 F.2d 944 (6th Cir. 1956); Chapman v. United States, 151 F.2d 740 (8th Cir. 1945); O'Kelly v. United States, 116 F.2d 966 (8th Cir. 1941). If the carrier is the actual owner of the goods, the arrival and delivery to the destination site, regardless of an actual acceptance by the owner's destination agents, may terminate the shipment for purposes of 18 U.S.C. §659. See United States v. Marshall, 501 F. Supp. 348 (N.D. Ga. 1980).

9-61.344 Retention of Stolen Character

During a receipt or possession offense the stolen goods or chattels must still be in a stolen status. Full recovery by the owner or his/her agents, including law enforcement officials, will terminate the stolen character. On the other hand, if the stolen property is not in the sole possession and control of the owner or law enforcement agents and is only under their "surveillance" the stolen character remains. See United States v. Muzii, 676 F.2d 19 (2d Cir. 1982); United States v. Dove, 629 F.2d 325 (4th Cir. 1980).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.350 Venue

18 U.S.C. §659 provides that the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the goods.

9-61.360 Evidence

9-61.361 Proof of Shipment

The statute provides that to establish the interstate or foreign commerce character of a shipment the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which the shipment was made. Additionally, the removal of property from a pipeline system which extends interstate shall be prima facie evidence on the interstate character of the shipment of the property.

9-61.362 Proof of Value

In order to establish a felony under 18 U.S.C. §659, it must be proven that the value of the stolen goods, chattels, money or baggage exceeds \$100. While normally the proof of the value of the stolen property can be readily established by the shipper, at times the value of certain stolen goods or chattels (e.g., the blanks of money orders, checks, stock certificates, etc.) may be more difficult. In these situations the thieves' market value is often used to show their value. See United States v. Jackson 576 F.2d 749 (8th Cir. 1978); United States v. Moore, 571 F.2d 154 (3d Cir. 1978); United States v. Tyers, *supra*, United States v. Ditata, 469 F.2d 1270 (7th Cir. 1972); Churder v. United States, 387 F.2d 825 (8th Cir. 1968); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961).

9-61.370 Drafting Indictments

9-61.371 Facility from Which the Goods Were Taken

A split in the circuits exists on the issue of whether the indictment must specifically allege the facility from which the goods were taken. The court in United States v. Manuszak, 234 F.2d 421 (3d Cir. 1956) held that an indictment which does not specify the facility from which the merchandise was taken is fatally defective. Other courts have disagreed

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

reasoning that the purpose of the statute is to protect every conceivable instrumentality of interstate transportation thus obviating a need to specify the particular facility involved. See United States v. Wora, 246 F.2d 283 (2d Cir. 1957); United States v. Spivey, 448 F.2d 390 (4th Cir. 1971); Dunson v. United States, 404 F.2d 447 (9th Cir. 1968). To avoid appellate issues, indictments should allege the facility from which the goods were taken.

9-61.372 Election Required Between Theft and Possession

The literal terms of 18 U.S.C. §659 proscribe as separate offenses theft and possession or receipt of stolen goods. Judicial construction of similar offenses under the federal bank robbery and theft of government property statutes prohibits conviction of both theft and receipt or possession of the same goods. See Gaddis v. United States, 424 U.S. 544 (1976); Milanovich v. United States, 365 U.S. 551 (1961). It is the Department's view that the rationale of these cases is equally applicable to 18 U.S.C. §659 thus requiring an election between theft and receipt or possession under the statute.

9-61.380 Forms of Indictments

9-61.381 Form for First Paragraph of 18 U.S.C. §659

On or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_ the defendant \_\_\_\_\_ unlawfully, wilfully and knowingly, and with intent to convert to his/her own use, did embezzle, steal, take and carry away from a New York railroad car, No. \_\_\_\_\_, at the terminal of the Railway Express Agency, Inc., \_\_\_\_\_, goods and chattels of a value in excess of \$100, that is two \_\_\_\_\_ cameras, Model \_\_\_\_\_, Serial No. \_\_\_\_\_, which were moving as, were a part of, and constituted an interstate shipment of freight and express from the \_\_\_\_\_ Company at \_\_\_\_\_ in the State of \_\_\_\_\_, to \_\_\_\_\_, Inc., at \_\_\_\_\_ in the State of \_\_\_\_\_.

Notes: 1/ The identity of the stolen goods and the place or vehicle from which they were stolen must be sufficiently identified. Cf. United States v. Linderman, 20 F.R.D. 459, 460 (D. Mont. 1957); United States v. McCulloch, 6 F.R.D. 559, 560 (N.D. Ind. 1947). See also United States v. Pile, 256 F.2d 954 (7th Cir. 1958); United States v. Eisenberg, 238 F.2d

**DISCLAIM**

The original print copy is missing page Ch. 61 P. 41-42.

Digital Services, DOJ Libraries, May 5, 2015, 2015

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

cultivated to provide information about fencing operations. The use of court-authorized electronic surveillance may often be necessary in such investigations. See 18 U.S.C. §2516(c). Where appropriate, consideration should be given to the use of the RICO statute (18 U.S.C. §1961 et seq.) where the fence operates through a legitimate business.

9-61.430 Indictment

When preparing indictments against subjects involved in the redistribution of stolen property particular attention should be given to the provisions of 18 U.S.C. §§659, 2312, 2313, 2314, 2315, 2320, and 1961 et seq. Other statutes may, of course, be relevant.

9-61.500 SWITCHBLADE KNIFE ACT: 15 U.S.C. §§1241-1244; 18 U.S.C. §1716(h)

9-61.510 Investigative Jurisdiction

Violations arising under the mailing provisions of the Switchblade Knife Act (18 U.S.C. §1716(h)) are investigated by the Postal Service. Violations arising under the commerce provisions of the Act (15 U.S.C. §1242) are investigated by the Federal Bureau of Investigation.

9-61.520 Supervisory Section

Questions regarding the Switchblade Knife Act should be directed to the General Litigation and Legal Advice Section of the Criminal Division.

9-61.530 Discussion of the Offense

The Switchblade Knife Act prohibits the introduction, transportation, or distribution in interstate commerce of any switchblade knife. The term "switchblade knife" includes any knife having a blade which opens automatically by hand pressure applied to a button or other device in the handle of the knife or by operation of inertia, gravity, or both. Manufacture, sale, or possession of switchblade knives within the special and maritime jurisdiction of the United States as well as within Indian Country is also prohibited. Exempted from the operation of the Act are common carriers which handle switchblade knives in the ordinary course of business, members of the Armed Forces acting in the performance of their

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

duty, sale to the Armed Forces pursuant to contract, and one-armed individuals.

The Act also amends 18 U.S.C. §1716 so as to add switchblade knives to its declaration of non-mailable articles. The Act does, however, permit the mailing of such knives to the Armed Forces or procurement officers of state and local governments pursuant to postal regulations.

9-61.600 BANK ROBBERY

9-61.601 Disclosure of Information

It is requested that Department of Justice personnel not release information revealing amounts of monies taken in any bank robbery until it becomes a matter of public record by virtue of indictment.

Bankers have indicated that such news releases tend to advertise the movement of replacement monies designated for victim banks and the funds routinely kept on hand at such institutions. Likewise they indicate that this tends to promote the branch as a repeater victim. Additionally, such news releases appear to suggest that bank robberies may be a successful and lucrative venture.

The amounts of money taken should not be volunteered in news releases at any time, and should be made only in response to a specific question after indictment. Accordingly, statements revealing the amounts taken should be connected with the indictment and apprehension of the offender so as to reflect the unsuccessful character of the robbery. In any event, the amount taken should be played down to avoid misunderstanding.

9-61.610 Investigative Jurisdiction

Investigative jurisdiction is vested in the Federal Bureau of Investigation.

9-61.620 Supervising Section

General Litigation and Legal Advice. FTS 724-6971.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.630 Prosecutive Policy

Through their Law Enforcement Coordinating Committees, U.S. Attorneys and FBI SAC's should meet with their state and local counterparts to arrive at a proper allocation of investigative and prosecutive resources. It is the present policy of the Department to lessen federal involvement in the bank robbery area, and make deliberate progress toward maximum feasible deferral of the bank robbery matters to those state and local law enforcement agencies which are prepared to handle them. However, no case should be deferred in favor of state investigation or prosecution where the state will not adequately handle it.

9-61.640 Special Considerations

A recurring problem in bank robbery prosecutions concerns transactions involving coin roll artists, short change schemes, and misrepresentations of identity. This type of problem can be expected to occur more frequently as a result of computer related crimes directed at banking institutions.

Until recently, there had been a split in the circuits on the issue of whether the federal bank theft statute, 18 U.S.C. §2113(b), applied only to the offense of larceny as that crime is defined at common law, or whether the statute also encompassed the taking of bank funds by false pretenses. A taking by false pretenses is not a form of common law larceny, as is larceny by trick. False pretenses is characterized by false representations to induce a willing transfer of possession and title, whereas larceny by trick induces only a willing transfer of possession but not title.

This split in authority appears to have been resolved by the Supreme Court in Bell v. United States, 462 U.S. 356 (1983). In Bell, the defendant forged an indorsement on an apparently stolen check and deposited it into his account at a Federal Savings and Loan Association. Bell later withdrew the entire sum from his account, and he subsequently was convicted of violating the bank theft statute, 18 U.S.C. §2113(b). In affirming the conviction, the Supreme Court held that 18 U.S.C. §2113(b) is not limited to common law larceny, but that it also applies to cases of obtaining bank property by false pretenses so long as there is a taking and carrying away.

The opinion of the Court in Bell, however, expressly states that 18 U.S.C. §2113(b) may not cover the full range of theft offenses and that it does not apply to a case of false pretenses in which there is not a taking

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

and carrying away. This qualifying language creates some uncertainty as to the precise scope of the statute. Clearly, the statute covers an obtaining by false pretenses where, as in Bell, the defendant appears at the bank in person, and takes and carries away the money. There is, however, at least some question as to whether the statute would apply in a situation in which the defendant did not personally appear at the bank and where the taking occurred by means of a negotiable instrument or electronic funds transfer. We note, however, that there is at least one reported case which resulted in a conviction under 18 U.S.C. §2113(b) based on the taking of bank funds which occurred by means of negotiable instruments and where the defendant apparently did not appear personally at the bank. United States v. Posner, 408 F. Supp. 1145 (D. Md. 1976), aff'd without opinion, 551 F.2d 310 (4th Cir.), cert. denied, 434 U.S. 837 (1977).

9-61.641 Aggravated Bank Robbery, 18 U.S.C. §2113(d)

18 U.S.C. §2113(d) provides:

Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both.

Although subsection (d) commonly is referred to as armed bank robbery, there had been some question as to whether the words "use of a dangerous weapon or device," modified the words "assaults any person," as well as the words "puts in jeopardy the life of any person." In dictum, the Supreme Court apparently has adopted the view that the phrase "by use of a dangerous weapon or device" must be read, regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision. Simpson v. United States, 435 U.S. 6, 11 n.6 (1976). In view of this language in Simpson, a bank robbery involving an assault and battery resulting in serious injury, but where no dangerous weapon or device is used, apparently could not be prosecuted successfully under 18 U.S.C. §2113(d).

In addition, there is uncertainty as to what constitutes putting life in jeopardy by use of a dangerous weapon or device under 18 U.S.C. §2113(d). There seems to be no question that the use of a loaded, operable firearm amounts to putting life in jeopardy. However, considerable confusion arises where, for example, the dangerous weapon or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

device turns out to be a toy gun, a simulated bomb, an unloaded or inoperable firearm, or where law enforcement officers fail to recover the weapons.

It would appear that the intent of Congress was that 18 U.S.C. §2113(d) cover instances in which simulated weapons are employed in the commission of a robbery. Section 2113(d) was amended in 1934 to ensure the inclusion of such situations after the following debate:

MR. DOCKWEILER. May I say that a man might go into a bank with intent to rob and use a gas bomb, which would not in itself be dangerous.

MR. BLANTON. Yes; or he may use one of those new kind of Indian six shooters carved out of a piece of wood with a pocket knife.

\* \* \* \*

MR. SUMNERS of Texas. The committee is perfectly willing to have inserted in line 6 page 3, after the word "weapon," the words "or device."

MR. BLANTON. I believe that would help the situation.

MR. DOCKWEILER. I can conceive of a lot of devices which are not dangerous. I would suggest the use of words indicating something intended to instill fear.

MR. SUMNERS of Texas. What would the gentlemen suggest adding?

MR. DOCKWEILER. I would suggest adding "device or such instrumentality intended to instill fear."

MR. BLANTON. "Device" would cover the situation.

73 Cong. Rec. 8123 (1934)

In opposing the petition for certiorari in Cooper v. United States, 462 F.2d 1343 (5th Cir.), cert. denied, 409 U.S. 1009 (1972), the Department expressed the view that since subsection (a) of 18 U.S.C. §2113 defines the offense of bank robbery as a taking by "force and violence" or by "intimidation," aggravated bank robbery under subsection (d) requires something more. The additional element of subsection (d) is satisfied when the assault is accompanied "by the use of a dangerous weapon or device" (18 U.S.C. §2113(d)). The use of any such device, whether

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

actually lethal or not, creates a sense of grave peril which aggravates the robbery and reasonably distinguishes it from a simple robbery accomplished by force, violence, or intimidation (18 U.S.C. §2113(a)).

On the question of putting life in jeopardy by use of a dangerous weapon or device, the circuits are in disarray. Some circuits have fashioned an objective test while other circuits apply a subjective test.

Under the more restrictive objective test, the question essentially is whether the victim's life actually was placed in jeopardy by use of a dangerous weapon or device, not merely that the victim thought he/she was in danger. See United States v. Marshall, 427 F.2d 434 (2d Cir. 1970); United States v. Roach, 321 F.2d 1 (3d Cir. 1963); United States v. Thomas, 521 F.2d 76 (8th Cir. 1975); Smith v. United States, 309 F.2d 165 (9th Cir. 1962). In circuits applying the subjective test, however, the government need not prove that the weapon or device was capable of putting lives in actual, as opposed to apparent, jeopardy. See United States v. Bennet, 675 F.2d 596 (4th Cir.), cert. denied, 456 U.S. 1011 (1982); United States v. Beasley, 438 F.2d 1279 (6th Cir.), cert. denied, 404 U.S. 866 (1971); United States v. Shannahan, 605 F.2d 539 (10th Cir. 1979).

Even circuits applying the objective test have not required direct evidence that a firearm was operable and loaded to establish a violation of subsection (d). These courts will permit the fact finder to infer from circumstantial evidence that a gun is loaded and/or operable. See United States v. McAvoy, 574 F.2d 718 (2d Cir. 1978); Morrow v. United States, 408 F.2d 1390 (8th Cir. 1969). Moreover, some circuits, which purport to apply the objective test, apparently would uphold convictions under 18 U.S.C. §2113(d) in situations where the weapon was an unloaded firearm or a simulated explosive device. See Baker v. United States, 412 F.2d 1069 (5th Cir. 1969); United States v. Cooper, 462 F.2d 1343 (5th Cir.), cert. denied, 409 U.S. 109 (1972); United States v. Richardson, 562 F.2d 476 (7th Cir. 1977). See generally What Constitutes "Puts In Jeopardy" Within Enhanced Penalty Provisions of Federal Bank Robbery Act, R.J. Davis, 32 A.L.R. Fed. 279.

9-61.642 Federally Protected Financial Institutions

It is essential to allege and prove the federal character of the victim financial institution. The terms "bank," "savings and loan association," and "credit union" are defined in 18 U.S.C. §2113(f), (g), and (h).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It has been held that a reference to 18 U.S.C. §2113 in an indictment is sufficient to charge that a savings and loan association is federally insured because the statutory definition of savings and loan association includes institutions covered by the FSLIC. See United States v. Coleman, 656 F.2d 509 (9th Cir. 1981). Nevertheless, it is preferable to specifically allege in the indictment the federally insured nature of the victim financial institution.

We note that there is some authority for the proposition that judicial notice may be taken of the federal character of a bank which carries the word "National" in its name. See King v. United States, 426 F.2d 278 (9th Cir. 1970); United States v. Mavro, 501 F.2d 45 (2d Cir. 1974). Clearly, however, the prudent course of action would be to establish the federal character of the financial institution by appropriate documentary and testimonial evidence.

Many, if not most, bank robbery prosecutions are predicated on the federally insured status of the victim institutions. Proof of such status can be adequately established by the certificate of insurance, the cancelled check representing payment of the insurance premium, and testimony of an appropriate bank official to authenticate these documents. See United States v. Hadley, 671 F.2d 1112 (8th Cir. 1982).

9-61.650 Merger and Separate Offenses

Prosecutors should be aware of two particular problem areas relative to the use of this statute: (1) merger of offenses; and (2) the separate offense status of possession offenses.

9-61.651 Merger

With the exception of 18 U.S.C. §2113(c) (receiving or possessing the proceeds of a bank robbery), and the second and third portions of 18 U.S.C. §2113(e) (killing or kidnapping in avoiding apprehension or confinement for bank robbery) the various subsections of the federal bank robbery statute simply state different degrees of the crime of bank theft/robbery. In the eyes of the sentencing judge, the defendant is ultimately guilty of only one of these violations, even where two or more are charged, because the less aggravated offense merges into the more aggravated offense when the evidence establishes the latter. See Prince v. United States, 352 U.S. 332 (1957); see also United States v. Gaddis, 424 U.S. 544 (1976).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A single count, even where two or more could be charged, may be appropriate as long as the violation charged is the greatest (in terms of aggravation and penalty) which can be established by the evidence. See USAM 9-61.652, infra, for further discussion of 18 U.S.C. §2113(c) (possession offenses).

Where separate counts seem more appropriate, care should be exercised that the sentence is imposed only on the greatest offense. If a concurrent sentence is imposed on two or more of these counts, the sentence is illegal under Prince, supra. Consequently, where separate counts of subsections (a), (b), or (d) are charged under 18 U.S.C. §2113, it is recommended that a jury instruction be requested which mandates initial consideration of the greatest offense charged. If the jury finds the defendant guilty on the most serious charge, no verdict would be necessary on the less serious counts. This approach was outlined in O'Clair v. United States, 470 F.2d 1199 (1st Cir. 1972). 18 U.S.C. §2113(e) prohibits killing and kidnapping in three bank robbery related situations:

- A. In the commission of any offense defined in 18 U.S.C. §2113;
- B. In avoiding or attempting to avoid apprehension for the commission of such an offense; and
- C. In freeing oneself or attempting to free oneself from arrest or confinement for such offense. The penalty is a minimum term of imprisonment of ten years.

A killing or kidnapping in the commission of any offense defined in 18 U.S.C. §2113 is not a separate offense. The less aggravated forms of bank robbery merge into the killing or kidnapping offense. See United States v. Atkins, 558 F.2d 133 (3d Cir. 1977), and cases cited therein. In United States v. Faleafine, 492 F.2d 18 (9th Cir. 1974), the Ninth Circuit indicated that the proper way to charge such violations is in a single count under 18 U.S.C. §2113(e) which fixes the penalty.

With regard to situations involving (B) and (C), above, there is a conflict in the circuits as to whether a killing or kidnapping to avoid apprehension or confinement constitutes a separate offense from the underlying bank robbery. Four circuits have held that only a single offense exists. See United States v. Rossi, 552 F.2d 381 (1st Cir. 1977); Sullivan v. United States, 485 F.2d 1352 (5th Cir. 1973); United States v. Moore, 688 F.2d 433 (6th Cir. 1982); United States v. Pietras, 501 F.2d 182 (8th Cir.), cert. denied, 419 U.S. 1071 (1974). This approach does not permit separate penalties.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

For the proposition that a separate offense is committed, see Crawford v. United States, 519 F.2d 347 (4th Cir.), cert. denied, 423 U.S. 1057 (1976); United States v. Fleming, 594 F.2d 598 (7th Cir.), cert. denied, 442 U.S. 931 (1979). Gilmore v. United States, 124 F.2d 537 (10th Cir.), cert. denied, 316 U.S. 661 (1942).

It is suggested that separate counts be charged where separate offenses are recognized by circuit case law.

It should be noted that the offense of conspiracy to rob a bank (see 18 U.S.C. §371) and the offense of robbing the same bank are not merged into a single substantive crime. See United States v. Vasquez, 504 F.2d 555 (5th Cir. 1974). Therefore, a defendant may be separately charged, convicted, and sentenced for both conspiracy and the substantive offense.

Since passage of the Comprehensive Crime Control Act of 1984, a defendant charged with armed bank robbery, under 18 U.S.C. §2113(a) and (d), may also be charged and subjected to enhanced punishment under 18 U.S.C. §924(c), which prohibits using or carrying a firearm during and in relation to a federal crime of violence. Prior to the 1984 amendment of Section 924(c), a defendant convicted and sentenced for armed bank robbery could not receive an additional consecutive sentence under §924(c). See Simpson v. United States, 435 U.S. 6 (1977).

#### 9-61.652 Possession Offenses

18 U.S.C. §2113(c) prohibits receiving, possession, etc., of property or money taken from a federally insured bank, savings and loan association, or credit union in violation of 18 U.S.C. §2113(b) larceny. In view of the fact that larceny merges into 18 U.S.C. §2113(a) robbery and 18 U.S.C. §2113(d) robbery by assault or with jeopardy, 18 U.S.C. §2113(c) refers implicitly to 18 U.S.C. §2113(a) and (d) also.

The Comprehensive Crime Control Act of 1984 amended subsection (c) to reduce substantially the scienter requirement for conviction of receiving money or other property stolen from a bank. Under the former 18 U.S.C. §2113(c), the government had to prove that the accused received stolen bank property "knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section. . ." Under the revised subsection 2113(c), the government need only prove the accused knew the money was stolen. Thus, an accused cannot escape culpability for knowing possession of stolen property on the grounds that the evidence fails to show that he/she knew it was stolen from a federally insured financial institution.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In Heflin v. United States, 358 U.S. 415 (1959), the Supreme Court interpreted the legislative history of 18 U.S.C. §2113 as creating a separate offense "for those who receive the loot from the robber." Heflin, supra, at 419. Since the class of persons envisioned in the creation of 18 U.S.C. §2113(c) is different from those who participate in the robbery-related offenses, Congress was not authorizing the imposition of further punishment for the robbers. Thus, a defendant may be charged with, but not convicted of, both the robbery-related offense, 18 U.S.C. §2113(a), (b), or (d), and possession of the stolen money or property 18 U.S.C. §2113(c).

The Supreme Court, in United States v. Gaddis, 424 U.S. 544 (1976), reviewed a decision of the Fifth Circuit reversing a defendant's conviction for entering a federally insured bank with intent to rob (count One); robbing the bank by force and violence (count Two); possession of stolen bank funds (count Three); and armed bank robbery (counts Four-Eight); all in violation of 18 U.S.C. §2113(a)(c)(d).

The Supreme Court agreed with the appellate court that it was improper to convict the defendant of 18 U.S.C. §2113(c) in addition to 18 U.S.C. §2113(a), (b), (d), see United States v. Gaddis, supra, at 544, citing Heflin v. United States, 358 U.S. 415, 419. 18 U.S.C. §2113(c) did not merge with the latter offenses since it was not a lesser included offense thereof. However, the court of appeals was mistaken in ordering a new trial to correct the error, since there was no evidence adduced at trial that defendant possessed or received the funds aside from his/her participation in the robbery itself. Therefore, the trial judge's error in not dismissing sua sponte the possession count was remediable by simply vacating the conviction and sentence thereunder. Cf. Milanovich v. United States, 365 U.S. 551 (1961).

The Supreme Court also vacated the concurrent sentences imposed under counts one and two of the indictment, since entering with intent to rob a bank and robbery merged with armed robbery upon completion of the latter; Gaddis, supra; see Prince v. United States, 352 U.S. 322 (1957).

Finally, the Supreme Court recognized that both 18 U.S.C. §2113(c) and 18 U.S.C. §2113(a), (b), or (d) can be charged in an indictment and considered by a jury if sufficient evidence exists on both counts; Gaddis, supra. In such a case, however, conviction on both counts is not proper, and the jury must be instructed not to consider the possession (or receipt) count unless it finds insufficient the proof that defendant participated in the robbery.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.660 Imposition of Concurrent Sentences for Multiple Simultaneous Violations of Various Subsections of 18 U.S.C. §2113 Is Improper

The courts of appeals have vacated sentences under the Federal Bank Robbery Act where the trial court had imposed separate sentences on counts charging simultaneous violations of subsections (a), (b) and (d) of 18 U.S.C. §2113. These multiple sentences were vacated even though they were made to run concurrently with each other on the basis that a multiplicity of sentences may adversely affect a prisoner's opportunities for parole or pardon. See Bayless v. United States, 347 F.2d 354 (9th Cir. 1965); United States v. Machibroda, 338 F.2d 947 (6th Cir. 1964); Holland v. United States, 384 F.2d 370 (5th Cir. 1967); Cf. Benton v. Maryland, 395 U.S. 784, 790 (1969).

In United States v. White, 440 F.2d 978 (5th Cir.), cert. denied, 404 U.S. 839 (1971), the defendant was convicted on two counts of an indictment charging him/her with violations of 18 U.S.C. §2113(a) and (b) and he/she received concurrent sentences of ten years on each count. Although upholding this conviction, the Fifth Circuit Court of Appeals reemphasized the basic proposition established in Prince v. United States, 352 U.S. 322 (1956), that the subsections (a), (b) and (d) of 18 U.S.C. §2113 simply set forth various types of aggravated forms of a single offense. Accordingly, the Fifth Circuit held it was improper to impose separate sentences for violations of subsections (a) and (b) of 18 U.S.C. §2113 even though they were made to run concurrently with each other.

Other cases which have held similarly are: United States v. Spencer, 684 F.2d 220 (2d Cir. 1982); United States v. Foster, 440 F.2d 390 (7th Cir. 1971); Cruz v. United States, 439 F.2d 155 (9th Cir. 1971); United States v. Keel, 585 F.2d 110 (5th Cir. 1978).

In view of these holdings, care should be taken to make sure that district judges impose sentence on only one count where the defendant is found guilty of simultaneous violations of subsections (a), (b) and (d) of 18 U.S.C. §2113.

9-61.670 Lesser Included Offenses--Guilty Pleas

There is at least a question as to whether a defendant can enter a guilty plea to simple bank robbery (see 18 U.S.C. §2113(a) when charged in a one count indictment with armed bank robbery (see 18 U.S.C. §2113(d)). We are unable to find any case in the federal appellate courts raising this specific issue, however, it is our view that a defendant may enter a plea of guilty to the lesser included offense of simple bank robbery provided the court and the prosecutor agree to accept the plea. See Rule

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

11, Federal Rules of Criminal Procedure. It should be noted, however, that in United States v. Rocco, 397 F. Supp. 655 (D. Mass. 1975), the court indicated that if the government wanted to foreclose defendant's option to plead guilty to simple bank robbery, it could have done so by fashioning a single count indictment charging the aggravated offense.

Most appeals involving guilty pleas deal with failure of the court to allow a defendant to withdraw such a plea, or with failure of the court to comply with Rule 11, Federal Rules of Criminal Procedure. In one such case, McCarthy v. United States, 394 U.S. 459-469 (1969), involving Rule 11, Federal Rules of Criminal Procedure, the Supreme Court apparently recognizes that a defendant may wish to "...limit his guilty plea only to a lesser included offense . . ." Consequently, the best approach may be to file an information on the lesser included offense, have defendant plead guilty to it and then move to dismiss the indictment.

9-61.671 Rule 30, Federal Rules of Criminal Procedure--Instructions.  
Rule 31(c), Federal Rules of Criminal Procedure--Verdict,  
Conviction of Less Offense.

In affirming a bank robbery (18 U.S.C. §2113(d)) conviction, a panel of the Eighth Circuit stated that a lesser included offense instruction is mandated when requested, provided the lesser offense is necessarily included in the offense charged (see Rule 30, 31(c)), Federal Rules of Criminal Procedure, provided also that the proof of the element differentiating the two crimes is sufficiently in doubt so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense. The trial court had submitted the lesser offense of robbery (18 U.S.C. §2113(a)) but refused to give a lesser included offense instruction on the crime of bank larceny (18 U.S.C. §2113(b)). Defense did not object to the failure of the court to give the instruction. The court of appeals stated that absent an objection the defect is waived unless it may be found to be plain error under Rule 52(b), Federal Rules of Criminal Procedures, and held that upon the evidence adduced in this case it was not plain error to refuse to give a lesser included offense instruction on the crime of bank larceny. The conviction was affirmed; United States v. Cady, 495 F.2d 742 (8th Cir. 1974).

9-61.680 Problems with Robberies of

9-61.681 Bank Messengers Armored Truck Services

In addition to thefts and robberies committed on bank premises, the federal bank robbery statute also may encompass thefts and robberies of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

bank messengers and armored truck services. The key factor in determining whether a violation of 18 U.S.C. §2113 has occurred in such circumstances is whether or not the stolen money belonged to or was in the care, custody, control, management, or possession of a protected financial institution.

In United States v. Marzano, 537 F.2d 257 (7th Cir.), cert. denied, 429 U.S. 1037 (1976), defendants stole over three million dollars from the vaults of Purolator Security Inc., which was involved in the business of transporting money between banks and business establishments. Because the evidence established that the money in Purolator's custody actually belonged to various F.D.I.C. insured banks, defendants properly were convicted of six counts of bank larceny under 18 U.S.C. §2113(b). If, however, a theft from an armored truck service resulted in the taking of funds belonging to a business establishment other than a protected bank, there would be no violation of 18 U.S.C. §2113. See Lubin v. United States, 313 F.2d 419 (9th Cir. 1963).

U.S. Attorneys should request an immediate FBI investigation in cases of this nature in order to determine whether the funds or securities taken belonged to or were in the care, custody, control, management, or possession of a federally protected financial institution. Cases in this category also may involve violations of 18 U.S.C. §659 if the money or other property taken constituted an interstate or foreign shipment which had not reached its destination. Accordingly, the investigation should encompass not only the facts surrounding the robbery, but should ascertain the contractual relationship between the bank and the messenger service and the duties and functions of such service, particularly with reference to the money or other property taken.

9-61.682 Night Depositories

In United States v. Lankford, 573 F.2d 1051 (8th Cir. 1978), the defendants were convicted of attempting to enter a night depository located in a recessed entry way leading to the main entrance of the bank in violation of the second paragraph of 18 U.S.C. §2113(a). In affirming the convictions, the Eighth Circuit noted that the words of the statute "such bank, . . . or building, or part thereof, so used" reflect a Congressional intent to proscribe the entry of any part of a bank building with intent to steal. Here the depository chute was located inside the outer wall of the bank and the safe which receives the night deposits was located inside the inner wall of the bank. The court also rejected as immaterial an argument that title to the tendered deposits had not passed to the bank.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It should be noted that a completed theft from a night depository could, alternatively, be charged under 18 U.S.C. §2113(b).

9-61.683 Automated Teller Machines (Off Premises)

Because these machines usually are unattended, the first paragraph of 18 U.S.C. §2113(a) (robbery) would not apply. However, a break-in or attempted break-in of an automated teller machine would violate the second paragraph of 18 U.S.C. §2113(a) (burglary). Further, if money or other things of value are actually carried away, 18 U.S.C. §2113(b) (larceny) would be violated. See Pinckeney v. United States, 380 F.2d 882 (5th Cir. cert. denied, 390 U.S. 908 (1968)).

If money or other thing of value is obtained from an automatic teller machine the fraudulent use of a credit card, there would be a violation of 18 U.S.C. §2113(b) in view of the recent Supreme Court decision in Bell v. United States, \_\_\_ U.S. \_\_\_, 103 S.Ct. 2398 (1983). See USAM 9-61.640, supra.

9-61.690 Hobbs Act Problems

9-61.691 Extortion--Applicability of the Hobbs Act (18 U.S.C. §1951) to Extortionate Demands Made upon Banks and Airlines

Many extortion attempts directed at banking institutions are not prosecutable under federal extortion statutes, 18 U.S.C. §875 (interstate communications) and 18 U.S.C. §876 (mailing threatening communications). In addition, there is still a question as to whether the federal bank robbery statute, 18 U.S.C. §2113, adequately applies to all extortions and attempted extortions directed at banking institutions.

The typical bank extortion arises where, by telephone call or other means of communication, an extortionist conveys a threat to a bank official, and instructs the official to deliver bank funds to a specified "drop site," away from bank premises. Usually the extortion scheme contemplates that the extortionist will pick up the money after the bank official has departed from the "drop site" area. Thus, there usually is no contemplated face to face confrontation between the extortionist and the victim bank official.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The bank robbery statute, 18 U.S.C. §2113(a), requires a taking or attempted taking of bank property by force and violence or intimidation "from the person or presence of another." In the past, the Criminal Division took the position that many "drop site" extortion cases could not be prosecuted as bank robberies under 18 U.S.C. §2113(a) because, in the Criminal Division's view, the statute required a taking or attempted taking directly "from the person or presence of another," and did not apply to a situation in which the victim bank official might be miles away from the "drop site" when the actual taking occurred. Using this rationale, an extortionist who actually picked up bank funds at the "drop site" could still be prosecuted for the theft under 18 U.S.C. §2113(b), but the threats of violence would go unpunished. Moreover, an extortionist who did not pick up the bank funds at the "drop site" could not be charged with attempted theft under 18 U.S.C. §2113(b) because that subsection contains no attempt provision.

To remedy what was perceived to be a loophole in the coverage of the bank robbery statute, Criminal Division policy had been to utilize the Hobbs Act (18 U.S.C. §1951) in these "drop site" extortion cases. Thus, an extortionist who failed to pick up the money at the "drop site" would have been charged with attempted extortion under the Hobbs Act. If the extortionist succeeded in picking up the money, he/she would have been charged with one count of extortion under the Hobbs Act (18 U.S.C. §1951) and one count of bank theft (18 U.S.C. §2113(b)).

The Hobbs Act provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

Under the Hobbs Act, federal jurisdiction depends on whether the extortionist's threat might in any way obstruct, delay, or affect commerce, and it does not depend upon the use of any instrument of commerce to convey the threat. Even a minimal interference with commerce is prohibited under the Hobbs Act. See Stirone v. United States, 361 U.S. 212, 215 (1960), United States v. Culbert, 435 U.S. 371 (1978), United States v. Tropiano, 418 F.2d 1069, 1076 (2d Cir.), cert. denied, 397 U.S.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1021 (1970). Cf. United States v. Piranno, 385 F.2d 387 (7th Cir.), cert. denied, 390 U.S. 944 (1968). See USAM 9-131.000 et seq., for additional cases and information.

However, contrary to the Criminal Division's position, the Solicitor General's office has taken the view that the bank robbery statute, 18 U.S.C. §2113, fully applies to "drop site" extortion cases, even if there is no taking or attempted taking directly "from the person or presence of [the victim bank official]." It should be noted, however, that the Supreme Court expressed no view concerning the validity of the Criminal Division's interpretation of 18 U.S.C. §2113(a). See United States v. Culbert, 435 U.S. 371, n. 1 (1978). The Solicitor General's position and hence the Department's position now is that we should follow Brinkley v. United States, 560 F.2d 871 (8th Cir.), cert. denied, 434 U.S. 941 (1977).

In Brinkley, supra, a bank manager received a telephone call demanding \$75,000 or a bomb would go off in his/her home. Pursuant to the caller's instructions, the bank manager threw a sack of money over a viaduct. The extortionist, however, never picked up the money. These facts gave rise to Brinkley's conviction for aiding and abetting an attempted bank robbery, 18 U.S.C. §§2113(a) and 2. Brinkley argued that since no one confronted the bank manager, there was no taking or attempted taking "from the person or presence of another as required by 18 U.S.C. §2113(a). The Eighth Circuit, however, concluded that the telephone call to the bank manager was as much a personal confrontation as if Brinkley had entered the bank with a gun and demanded the manager hand over the money. The court further concluded that there was a taking from the person of the bank manager at the time he/she threw the money over the viaduct, and that the money was then in the constructive possession of the extortionist. Therefore, under Brinkley, supra, nearly all extortions and attempted extortions from federally protected banking institutions would come within the scope of 18 U.S.C. §2113. See also United States v. Hackett, 623 F.2d 343 (4th Cir.), cert. denied, 449 U.S. 902 (1980); United States v. Alessandrello, 637 F.2d 131 (3d Cir.), cert. denied, 451 U.S. 949 (1981); but see United States v. Wickham, 474 F. Supp. 113 (C.D. Cal. 1979).

Nevertheless, it continues to be our view that the Hobbs Act is fully applicable to robberies, extortions and attempts and conspiracies to rob and extort from federally protected banking institutions. United States v. Culbert, supra. The Sixth Circuit has held that the bank robbery statute is intended to be the exclusive remedy for conduct fully within its coverage. See United States v. Beck, 511 F.2d 997 (6th Cir.), cert. denied, 423 U.S. 836 (1975). However, the Ninth Circuit, which had held

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

that the Hobbs Act could not be applied to bank extortions (United States v. Small, 550 F.2d 518 (9th Cir. 1977)), has reversed its position in light of Culbert, supra. See United States v. LaBinia, 614 F.2d 1207 (9th Cir. 1980). The Ninth Circuit has rejected the Brinkley rationale and held that 18 U.S.C. §2113(a) is inapplicable where money is left at a drop site. See United States v. Toole, 610 F.2d 823 (9th Cir. 1979). We note that the Eighth Circuit has held that where the crime of bank robbery is committed by extortionate means it is appropriate to convict under both the bank robbery statute and the Hobbs Act, but that the Double Jeopardy clause precluded sentencing under both statutes. See United States v. Golay, 560 F.2d 866 (8th Cir. 1977).

9-61.692 Interstate Commerce

Whether the extortion constitutes "effect upon interstate commerce" is determined as follows. The trial court is the arbiter of what constitutes interstate commerce and what obstructs, delays, or affects it. See United States v. Hyde, 448 F.2d 815 (8th Cir. 1971). The standard by which such effects are judged is not very demanding, since the statute itself prohibits acts which "in any way or degree" affects commerce. See also Stirone v. United States, 361 U.S. 212, 215 (1960); United States v. Howe, 353 F. Supp. 419 (W.D. Mo. 1973); United States v. Mitchell, 463 F.2d 187 (8th Cir. 1972); United States v. DeMot, 486 F.2d 816 (7th Cir. 1973). Indeed, a potential effect on commerce delivered by means of a threat was held sufficient to constitute an effect prohibited. See United States v. Mitchell, supra; United States v. Howe, supra.

9-61.700 LIVESTOCK OFFENSES

9-61.701 Overview

Federal livestock crimes are defined and punished in three separate sections of Title 18, United States Code. 18 U.S.C. §667 deals with the theft and fraud in transactions involving the marketing of livestock in interstate commerce; 18 U.S.C. §2316 deals with the transportation of stolen livestock in interstate commerce and 18 U.S.C. §2317 deals with the sale and receipt of stolen livestock moving in interstate commerce. Federal jurisdiction should be exercised only in cases involving substantial violations of these sections. See S. Rep. No. 225, 98th Cong., 1st Sess. 385 (1983).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.702 Investigative Jurisdiction

The agency having investigatory responsibility for this statute is the Federal Bureau of Investigation.

9-61.703 Supervisory Jurisdiction

Supervisory jurisdiction is exercised by the General Litigation and Legal Advice Section, 724-6971.

9-61.710 Definitions

9-61.711 Livestock

The term "livestock," used in all three sections, although not defined in 18 U.S.C. §2311, carries its ordinary dictionary meaning of domestic animals raised for home use or profit. This includes but is not limited to such animals as cattle, horses, sheep, pigs and goats. See S. Rep. No. 225 on S. 1762, 98th Cong., 2d Sess. 384 (1983).

Originally, 18 U.S.C. §§2316 and 2317 were limited to cattle only. Cattle, as defined in 18 U.S.C. §2311, includes the carcasses of dead cows, bulls, etc. Inasmuch as Congress intended to expand the scope of 18 U.S.C. §§2316 and 2317 when it substituted "livestock" for "cattle," S. Rep. No. 225, at 384, it is the position of the Criminal Division that "livestock," for purposes of 18 U.S.C. §§2316 and 2317, at least, includes the carcasses of dead "livestock." The carcasses of cattle are clearly covered because cattle is certainly included within the term livestock. And since the Congress retained the definition for cattle in 18 U.S.C. §2311, it clearly indicates Congress' intent to continue coverage over the carcasses of cattle. It is also logical that Congress intended to include the carcasses of other "livestock." There is certainly no intent displayed by Congress to exclude them.

9-61.712 Stolen

The term "stolen" is to be construed broadly to cover all felonious takings regardless of whether they were in the nature of larceny, embezzlement, or false pretenses. See United States v. Turley, 352 U.S. 407 (1957); see also S. Rep. No. 225, at 384.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.713 Obtains or Uses

The term "obtains or uses" includes any type of theft, stealing, larceny, embezzlement, misapplication, fraud, deception or any other conduct similar in nature. S. Rep. No. 225, at 385.

9-61.714 With Intent to Deprive the Other of a Right to the Property

This term is not restricted to the common law concept of intent to cause a permanent deprivation. Instead, it includes an intent to cause any deprivation, even if only temporary. S. Rep. No. 225, at 385.

9-61.720 Jurisdiction

18 U.S.C. §667 is applicable only to crimes involving a value of at least \$10,000. This statutory requirement is intended to confine federal jurisdiction to substantial violations. While neither 18 U.S.C. §§2316 nor 2317 requires a minimum value for the livestock, minor violations should be left for state and local prosecution.

9-61.800 COUNTERFEITING AND FORGING OF STATE AND CORPORATE SECURITIES--  
18 U.S.C. §511

9-61.810 Investigative Jurisdiction

Violations of 18 U.S.C. §511 are within the investigative jurisdiction of the Federal Bureau of Investigation.

9-61.820 Supervising Section

General Litigation and Legal Advice Section.

9-61.830 Prosecutive Policy

Since 18 U.S.C. §511 expands considerably federal criminal jurisdiction over non-federal securities that are counterfeited and forged, its constitutional basis will doubtless be vigorously challenged. Accordingly, for constitutional and policy reasons, several factors should

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

be present before federal jurisdiction is exercised under this new provision.

First, the extent of the criminal activity should be sizeable and involve significant past or future interstate activity. The forging of an endorsement on one corporate check should normally not be sufficient in itself to warrant federal prosecution. Second, in regard to the counterfeiting of state securities, there should clearly be an interstate aspect. (E.g., counterfeiting of State of California checks in California should be handled by California authorities. However, the counterfeiting of California checks or motor vehicle titles in Nebraska, or the use of counterfeit California securities in another state, may warrant federal involvement.) Third, common sense must be used, not only to sustain the constitutionality of this important provision, but also to control the number of cases filed in federal courts. The general prosecution policies set forth in USAM 9-61.230, supra, relating to cases under the National Stolen Property Act should be applied to 18 U.S.C. §511 offenses. Finally, as to the "implement" provision in subsection 511(b), such implements should bear some connection to state or corporate securities.

In short, the major responsibility for dealing with counterfeit and forged state and corporate securities should lie with state and local governments. However, when because of its size and geographical scope a case warrants federal involvement, federal prosecutions should be undertaken. In utilizing 18 U.S.C. §511, the government will be in the best position to defend against constitutional challenges if the statute is applied only to fact patterns clearly showing large-scale organized interstate criminal activity. Because of the potential constitutional and policy issues, attorneys for the government may wish to consult with the Criminal Division (724-7526 or 724-6971) before seeking an indictment under 18 U.S.C. §511. In addition, each U.S. Attorney should develop prosecutive understandings concerning the counterfeiting and forgery of state and corporate securities with state and local authorities through the district's Law Enforcement Coordinating Committee.

9-61.840 Discussion of the Offense

9-61.841 General

18 U.S.C. §511 was created by Part D of Chapter XI of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, October 12, 1984. (It should be noted that the Motor Vehicle Theft Law Enforcement Act of 1984, Pub. L. No. 98-547, October 25, 1984, also created a section

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

511 in Title 18, United States Code, entitled "Altering or removing motor vehicle identification numbers." It is anticipated that the duplication of section numbers will be corrected by technical amendments to Title 18 early in the 99th Congress.)

18 U.S.C. §511 (Securities of the States and private entities) is an expansive new criminal provision intended by the Congress to help the federal government assist the states in fighting white collar crime relating to the counterfeiting and the forgery of securities issued by the states and by private organizations.

18 U.S.C. §511 covers the making, uttering, or possession of any such counterfeit or forged security. It covers not only marketable securities, such as stocks, bonds, and debentures, but also includes common securities, such as checks, money orders, and travelers' checks. In addition, it includes other commercial instruments. In enacting 18 U.S.C. §511 the Congress clearly intended to utilize the commerce power to nearly its outer limit. 18 U.S.C. §511 may prove effective in prosecuting those traffickers in counterfeit and forged securities who were previously difficult to reach under federal law because of some of the elements in the counterfeit and forgery provisions of 18 U.S.C. §2314 and §2315.

It is anticipated that the major challenge to the new statute will relate to the constitutional authority of Congress to extend federal jurisdiction to the degree reflected in 18 U.S.C. §511. The legal arguments in support of the statute's validity are that such counterfeit and forged securities plainly affect interstate and foreign commerce, and that fraudulent schemes using these securities commonly reach beyond state and even national boundaries. As a result, state law enforcement authorities frequently are unable to cope with them. Congress was aware that it was expanding federal jurisdiction, but found such expansion necessary and proper to protect this particularly important aspect of interstate and foreign commerce. See S. Rep. No. 225, 98th Cong., 2d Sess. 371; see also USAM 9-61.850, infra.

To understand the elements of 18 U.S.C. §511, it may be beneficial to consult the discussion of comparable provisions relating to the interstate transportation of counterfeit and forged securities under the National Stolen Property Act in USAM 9-61.200, supra. In particular, the following sections should be reviewed:

- USAM 9-61.230 - Policy Concerning Prosecution
- USAM 9-61.244 - Securities
- USAM 9-61.249 - Falsely Made, Forged, Altered, and Counterfeited
- USAM 9-61.250 - Forged Indorsements

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

USAM 9-61.263 - Third Paragraph of 18 U.S.C. §2314  
USAM 9-61.264 - Fourth Paragraph of 18 U.S.C. §2314  
USAM 9-61.265 - Fifth Paragraph of 18 U.S.C. §2314  
USAM 9-61.267 - Second Paragraph of 18 U.S.C. §2315  
USAM 9-61.268 - Third Paragraph of 18 U.S.C. §2315

It should be noted that 18 U.S.C. §511 does not require proof of certain elements required under 18 U.S.C. §2314 and §2315 (e.g., there is no need to prove actual interstate transportation of the security; forged indorsement of a state or corporate check is expressly covered.)

9-61.842 Offenses

Subsection (a) of 18 U.S.C. §511 makes it a federal crime to make, utter, or possess a counterfeit security of a state (or a political subdivision thereof) or an organization. It also makes it a crime to make, utter or possess such a forged security with intent to deceive another person, organization, or government. A forged security includes one which has a forged indorsement on it. The penalty is a fine of up to \$250,000 and imprisonment for up to ten years.

Subsection (b) makes it a federal crime for anyone to make, receive, possess, sell, or otherwise transfer an implement designed for, or particularly suited for, making a counterfeit or forged security, with the intent that it be so used. The penalty is a fine of up to \$250,000 and imprisonment for up to 10 years. In a prosecution under this subsection, it may be necessary to show that the implement is designed for, or particularly suited for, the making of a counterfeit or forged security of a state or corporation, although the express language of the subsection does not provide this limiting requirement, and the available legislative history throws no light on this point.

18 U.S.C. §511 does not cover personal checks or United States governmental securities. Nor does it cover securities issued by foreign governments. The counterfeiting and forgery of United States and foreign governmental securities is covered by offenses in chapter 25 of Title 18, United States Code (e.g., 18 U.S.C. §471, §472, §473, §478 and §479). Counterfeiting and forging of the securities of a foreign corporation including a foreign bank, are, however, covered by 18 U.S.C. §511. 18 U.S.C. §511 is not a predicate offense for a violation of the RICO statute, 18 U.S.C. §1961 et seq. (Violations of 18 U.S.C. §2314 and §2315 involving the interstate or foreign transportation of counterfeit securities are, however, predicate offenses for the RICO statute.)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.843 Definitions

The terms "counterfeited," "forged," "security," "organization," and "State" are defined in subsection 511(c). "Counterfeited" means a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety. "Forged" means a document that purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein.

"Utter," which is not expressly defined in 18 U.S.C. §511, has been previously defined to mean "to issue, authenticate, transfer, publish, sell, pledge, deliver, transmit, present, display, use, certify, or otherwise give currency to." (Proposed 18 U.S.C. §1747(h), S. 1630, 97th Congress, 1st Sess.). Further, the judicial construction given the word "utter" in the context of other federal statutes will likely be applied to this statute. See, e.g., 18 U.S.C. §§493, 494, and 495.

The terms "counterfeit" and "forged" refer to the making of the security. Did the person have the authority to issue or make the document or writing? If not, it is counterfeit or forged. 18 U.S.C. §511(a) does not encompass the genuine making of a security which contains false or misleading statements (e.g., true name check for which there is insufficient funds in the account to cover it). The purpose of this provision is the protection of the integrity of the security and not the punishment of fraudulent conduct in general.

The term "security" is defined broadly to encompass all the securities covered under the National Stolen Property Act (18 U.S.C. §§2311, 2314, and 2315) plus others. Besides stocks and bonds it covers common securities such as checks, money orders, and travelers' checks. It also covers letters of credit, warehouse receipts, and negotiable bills of lading. Because it encompasses "an instrument evidencing ownership of goods, wares, or merchandise," it covers motor vehicle titles issued by state departments of motor vehicles.

The term "security" also covers "debit instruments" as defined in section 916(c) of the Electronic Fund Transfer Act (15 U.S.C. §1693n(c)) (i.e., "any card, code, or other device other than a check, draft, or similar paper instrument, by the use of which a person may initiate an electronic fund transfer."). Accordingly, as to the counterfeiting and forging of debit instruments, new section 511 may overlap and expand upon some of the criminal activity prohibited by new 18 U.S.C. §1029 (Pub. L. No. 98-473, Title II, Chapter XVI--Credit Card Fund). It would appear

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

that possession of one counterfeit debit card is covered under 18 U.S.C. §511. 18 U.S.C. §1029(a)(3), on the other hand, requires possession of fifteen or more of such counterfeit devices.

The definition of security also includes the blank forms of any of the categories of securities covered by the statute.

The definition of "state" includes the 50 states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands and any other territory or possession of the United States. 18 U.S.C. §511 covers the securities of municipal and state agencies.

The term "organization" is defined to mean a legal entity, other than a government, established or organized for any purpose. This definition is broad enough to cover all organized business entities as well as any other association of persons which operates in, or the activities of which affect, interstate or foreign commerce.

9-61.850 Legislative History

It is anticipated that the major challenge to the new section will relate to the constitutional authority for Congress to extend federal jurisdiction to the degree reflected in 18 U.S.C. §511. 18 U.S.C. §511 is an outgrowth of Congress' attempt since the early 1970's to deal with the use by organized crime of stolen and counterfeit marketable securities (*i.e.*, equity and debt type securities such as stocks and bonds). See Organized Crime; Securities Thefts and Frauds, Hearings before the Permanent Subcommittee on Investigations of the Committee on Government Operations, United States Senate, 93rd Cong., 1st Sess., Part I, pp. 123-136. Separate bills were introduced in past Congresses to deal with the problem (S. 2221, 94th Cong., 1st Sess.; S. 2323, 95th Cong.; 1st Sess.; S. 1380, 96th Cong., 1st Sess.). The substance of these bills was incorporated into the Senate's effort to enact a new criminal code. (See S. 1630, 97th Cong., 1st Sess.; Criminal Code Reform Act of 1981, Report of the Committee on the Judiciary, United States Senate, Report No. 97-307, pp. 722-23, 780-781.) By 1981 the counterfeiting aspect relating to marketable securities was contained in proposed section 1741(c)(2)(E) of Title 18, U.S.C., in S. 1630, 97th Cong., 1st Sess. (*i.e.*, the counterfeiting of a security "that is a note, stock certificate, treasury stock certificate, bond, treasury bond, debenture, certificate of deposit, interest coupon, or any form of debt instrument bearing interest made or issued by an organization or by a state or local government").

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

However, when introduced as part of S. 1762, 98th Cong., 1st Sess. the State and organizational securities covered were broadened to include all types of securities, not just the equity and debt type covered by proposed section 1741(c)(2)(E) in S. 1630, 97th Cong. The legal arguments remain the same, however, namely that such counterfeit and forged securities affect interstate and foreign commerce and that fraudulent schemes using these securities frequently reach beyond state and even national boundaries, and thus state law enforcement authorities are generally unable to cope with them. The Congress was aware of its expansion of federal jurisdiction and deemed such expansion necessary and proper to adequately guard the stream of interstate and foreign commerce from the pollution of counterfeit and forged state and corporate securities.

9-61.900 MOTOR VEHICLE THEFT LAW ENFORCEMENT ACT OF 1984

9-61.901 Summary

Enactment of the Motor Vehicle Theft Law Enforcement Act, Pub. L. No. 98-547, 98 Stat. 2754 (1984), culminated a six-year effort by Congress to respond to the growing professionalization of motor vehicle theft during the past two decades. The Act's primary thrust is directed at professional "chop shops" which cause the theft of motor vehicles in order to obtain replacement parts for other vehicles damaged in accidents. As these "crash" parts (i.e., fenders, doors, hoods, etc.) do not bear identification numbers, they are nearly impossible to identify as stolen once separated from the stolen vehicle.

The Motor Vehicle Theft Law Enforcement Act of 1984 contains three titles. Title I, relating to identification of motor vehicle components, gives the Secretary of Transportation authority to require that manufacturers and importers of new passenger car models that are frequent theft targets ("high theft lines") mark the major components of such vehicles with an identification number in order to help prevent their theft for "chop shop" operations. The Secretary of Transportation is also authorized to issue a voluntary component identification standard for "low theft" passenger car lines and all other "road" motor vehicles (i.e., trucks, vans, motorcycles, etc.). The Secretary of Transportation is not given any authority over "off-highway" mobile equipment (i.e., bulldozers, farm tractors, etc.) by this Act.

Title II, which relates to the fencing of stolen motor vehicles and parts, amends Title 18, United States Code, to: (1) provide criminal

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

penalties for removing or falsifying road motor vehicle and road motor vehicle component identification numbers; (2) permit seizure and forfeiture of vehicles or components with falsified or removed identification numbers; (3) make it a federal crime to traffic in road motor vehicles or their components which have removed or falsified identification numbers; and (4) make violations of 18 U.S.C. §2312 and §2313 (as modified by the Act), and trafficking in certain motor vehicles or motor vehicle parts, predicate offenses under the RICO statute.

Title III, relating to importation and exportation measures, amends Title 18, United States Code, to create a new offense within the investigative authority of the United States Customs Service of importing or exporting any of a wide variety of motor vehicles, vessels, or aircraft that have been stolen or that have had their identification numbers falsified or removed. Title III also authorizes the Customs Service to establish a regulation requiring that the exporter of a used motor vehicle, or used off-highway mobile equipment, submit to the Customs Service before exportation a document evidencing his/her ownership and containing the identification number of the vehicle or equipment.

9-61.910 Investigative Jurisdiction

The National Highway Traffic Safety Administration (NHTSA) of the United States Department of Transportation (DOT) has investigative jurisdiction over the criminal and civil penalty provisions of Title I of the Act relating to the manufacturer's or importer's failure to comply with the Act's regulatory requirements. The Federal Bureau of Investigation has investigative jurisdiction over the criminal provisions contained in Title II of the Act. The United States Customs Service has jurisdiction over the criminal, civil, and regulatory provisions contained in Title III of the Act. The Customs Service also assists the NHTSA in the enforcement of the regulatory provisions applicable to importers of foreign manufactured vehicles.

9-61.920 Supervising Section

General Litigation and Legal Advice Section.

9-61.930 Title I--Improved Identification for Motor Vehicle Components

The Motor Vehicle Information and Cost Savings Act (15 U.S.C. §1901 et seq.) has been amended by the addition of a new Title VI concerning theft prevention.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.931 Mandatory Theft Prevention Standard

Under the new provisions, the Secretary of Transportation is required to promulgate a theft prevention standard for high theft passenger car lines. The standard will cover the major parts as well as replacement parts for the major parts. High theft passenger car lines are those found to be above the median theft rate in the two years immediately preceding the year in which the standard is promulgated.

For the first year, no more than 14 passenger car lines of any one manufacturer will be subject to the mandatory component identification standard. No manufacturer, except General Motors, has more than 14 high theft passenger car lines; based upon data for 1983, General Motors would have had 21 passenger car lines above the median theft rate. Also, no more than 14 parts for any one passenger car can be required to be numbered. The failure to include all high theft lines of a manufacturer (e.g., GM) may create enforcement difficulties relating to that manufacturer's vehicles.

9-61.932 Voluntary Theft Prevention Standard

Besides the mandatory component identification standard for high theft passenger car lines, the Secretary of Transportation is authorized to promulgate a voluntary component identification standard for the manufacturers and owners of all road motor vehicles not subject to the mandatory standard (e.g., vans, trucks, motorcycles, pick-ups, and low theft passenger car lines). Compliance with the voluntary standard affords the components coverage under the criminal provisions of Title II of the Act. It is the hope of the Criminal Division that the manufacturers will make judicious use of the voluntary standard in order to plug the various loopholes created by the legislative compromise that covers only high theft passenger car lines instead of all passenger car lines. The major law enforcement concern is the interchangeability of parts (i.e., some parts on a low theft line which do not have to be marked may be interchangeable with those on a high theft line). Once such a part is separated from its vehicle, it is extremely difficult to tell whether it came from the high theft or low theft line.

9-61.933 Required Records and Reports

The Secretary of Transportation may require manufacturers to maintain records to demonstrate compliance with the mandatory standard, and may

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

designate officers to inspect manufacturers' reports and facilities for compliance. The manufacturer must furnish a certification to the first purchaser stating that the vehicle conforms to the mandatory theft prevention standard.

9-61.934 Insurance Reports

Insurance companies are required to report to the Secretary of Transportation vehicle theft and recovery data, and rating data used to establish insurance premiums for motor vehicles.

9-61.935 Vehicle Theft Studies

The Secretary of Transportation is directed to submit to Congress three reports, prepared in consultation with the Attorney General, relating to the provisions of the Act. The first report, which is to be furnished by October 15, 1985, will deal with security devices and systems designed to deter individuals from entering and stealing a locked motor vehicle. The second report, due by October 25, 1987, will recommend whether the mandatory component identification standard should be expanded to cover other vehicles. The third report, due five years after the promulgation of the component identification standards, will provide information relating to: (1) the costs of complying with the standards; (2) the experience of law enforcement officials under the Act; (3) the effect of the standards on insurance premium rates; and (4) the effect an extension of the standards would have on thefts and recovery rates.

9-61.940 Title II--Anti-Fencing Measures

Title 18, United States Code, was amended by creating three new sections (§§511, 512, 2320) and by expanding the coverage of two others (§§2311 and 2313).

9-61.941 18 U.S.C. §511--Altering or Removing Motor Vehicles  
Identification Numbers

New 18 U.S.C. §511(a) makes it a felony knowingly to remove, obliterate, tamper with, or alter an identification number for a road motor vehicle or a road motor vehicle part. The maximum penalty is a fine

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of \$10,000 and imprisonment for five years. Under the provisions of the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (1984), however, a fine up to \$250,000 may be imposed for violations occurring on or after January 1, 1985. See new 18 U.S.C. §3623 (Alternative fines).

18 U.S.C. §511(b) creates exceptions for certain persons who engage in lawful conduct that may result in removal or alteration of an identification number. The legislative history is abundantly clear that subsection (b) is not intended to create a loophole for the operators of "chop shops." See H.R. Rep. No. 1087 on H.R. 6257, 98th Congress, 2d Sess. 23-25 (1984).

18 U.S.C. §511(c) contains the definitions for "identification number," "motor vehicle," "motor vehicle demolisher," and "motor vehicle scrap processor." The term "identification number" means a number or symbol that is inscribed or affixed for purposes of identification under either the National Traffic and Motor Vehicle Safety Act of 1966 (see Federal Motor Vehicle Safety Standard No. 115--Vehicle Identification Number, 49 C.F.R. §§571.115 and 565.1-561.5) or the Motor Vehicle Information and Cost Savings Act (15 U.S.C. §1901 et seq.), for which the mandatory and voluntary component identification standards have yet to be issued). The term "motor vehicle" covers any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads, and highways. See 15 U.S.C. §1901(15). It does not include self-propelled construction and farming equipment (i.e., bulldozers, farm tractors, etc.).

For a suggested form indictment for 18 U.S.C. §511 and a discussion of the indictment and the proof required therefor, consult USAM 9-61.991 and 9-61.992, infra.

It should be noted that there are now two sections 511 in Title 18. The first, created by Chapter XI of the Comprehensive Crime Control Act of 1984, deals with the counterfeiting and forging of securities of states and private organizations. The second, added by Pub. L. No. 98-547, 98 Stat. 2754 (1984), relates to altering or removing motor vehicle identification numbers. It is anticipated that the duplication of section numbers will be corrected by appropriate technical amendments to Title 18 early in the 99th Congress.

9-61.942 18 U.S.C. §512--Forfeiture of Certain Motor Vehicles and Motor Vehicle Parts

New 18 U.S.C. §512 provides that, with certain exceptions, a motor vehicle or motor vehicle part that has a falsified or removed

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

identification number is subject to seizure and forfeiture. The forfeiture provisions in the customs law (19 U.S.C. §1581 et seq.) are made applicable to seizures and forfeitures under 18 U.S.C. §512. For guidance on the statutory forfeiture provisions of 18 U.S.C. §512, contact the Asset Forfeiture Office (272-6423, 272-6424, or 272-6425).

9-61.943 18 U.S.C. §2320--Trafficking in Certain Motor Vehicles or Motor Vehicle Parts

New 18 U.S.C. §2320 makes it an offense to deal in motor vehicles or motor vehicle components knowing that the identification numbers have been falsified or removed. There is no need to prove that such vehicles or parts have been transported in interstate or foreign commerce. The maximum penalty specified in the section is a fine of \$20,000 and imprisonment for ten years. Under new 18 U.S.C. §3623 (Alternative fines) a fine up to \$250,000 is possible for offenses occurring on or after January 1, 1985. Neither 18 U.S.C. §2320 nor §511 cover the simple possession of a vehicle or component with a falsified or removed identification number. 18 U.S.C. §511 is limited to the person who removes or falsifies the identification number or who aids or abets such conduct. 18 U.S.C. §2320 covers the trafficker of such vehicles or components, not a mere possessor.

18 U.S.C. §2320 should be of immediate assistance in dealing with the various salvage switch schemes (sometimes referred to as "retagging" or "replating") where the VIN of a salvage motor vehicle and its "papers" (i.e., title) are transferred to a stolen motor vehicle of the same make and model. In executing this motor vehicle theft scheme, the defendant purchases or acquires a salvage vehicle at an insurance auction. He/she then steals or has stolen a vehicle of similar make and model year and then transfers the VIN of the salvage vehicle to the stolen vehicle. He/she then disposes of the stolen vehicle under its new identity. Since passenger cars of model years 1970 to date have been required to have a Department of Transportation (DOT) VIN, 18 U.S.C. §2320 is applicable to "salvage switches" involving passenger cars occurring after October 25, 1984. The VINs of most other road vehicles are covered from model years 1981 to date. See USAM 9-61.960 (Effective Dates), infra.

For a suggested form indictment for 18 U.S.C. §2320 and a discussion of the indictment and the proof required therefore, consult USAM 9-61.993 and 9-61.994, infra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It should be noted that Chapter XV of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2178 (1984), also created a section 2320 in Title 18, United States Code, entitled "Trafficking in counterfeit goods or services." It is anticipated that the duplication of section numbers will be corrected by technical amendments to Title 18 early in the 99th Congress.

9-61.944 18 U.S.C. §2311--Motor Vehicle Titles as "Securities"

The definition of the term "securities" in 18 U.S.C. §2311 has been broadened to specifically include a "valid or blank motor vehicle title." One consequence of this change is that a RICO prosecution under 18 U.S.C. §1961 et seq., can now be predicated on the interstate transportation of a blank counterfeited motor vehicle title as well as on the interstate transportation of a completed counterfeit motor vehicle title.

The precise meaning of "valid" is not clear. Earlier versions of the bill would have kept a motor vehicle title as a security until it was cancelled by the state of issuance. The earlier versions were intended to get around the problem created by United States v. Teresa, 420 F.2d 13 (4th Cir. 1969), where a cancelled security was held to no longer be a "security." However, the earlier bills' language was dropped in last minute floor action which was described as representing only technical amendments made by the House Judiciary Committee. See 130 Cong. Rec. H10470-10471 (daily ed. October 1, 1984). Regardless of the meaning of "valid," the change in the definition of security in 18 U.S.C. §2311, however, is rendered basically insignificant by the creation of the new 18 U.S.C. §511, recently added by Part D of Chapter XI of the Comprehensive Crime Control Act of 1984, which makes the counterfeiting or forging of state securities (including their blank forms) a federal crime. Since the definition of "security" in that section incorporates the definition of "securities" in former 18 U.S.C. §2311, it is now a federal offense to counterfeit or forge a motor vehicle title or a blank form thereof. No interstate transportation of the counterfeit or forged motor vehicle title is required. See USAM 9-61.800, supra, for the discussion of these new counterfeiting provisions. It should be noted, however, that 18 U.S.C. §511 is not a predicate offense for a RICO prosecution, while 18 U.S.C. §§2314 and 2315 are.

9-61.945 18 U.S.C. §2313--Sale or Receipt of Stolen Motor Vehicles

18 U.S.C. §2313 has been amended by adding the word "possesses" after the word "receives" and by striking out "moving as, or which is a part of,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

or which constitutes interstate or foreign commerce" and inserting instead "which has crossed a State or United States boundary after being stolen." The effect of these changes is to retain federal criminal jurisdiction over a stolen motor vehicle once it crosses a state line even after it ceases to be a part of interstate commerce. There is no longer a necessity to prove a continuing commerce nexus in regard to a stolen motor vehicle taken across a state line after October 25, 1984. For further discussion of new 18 U.S.C. §2313, and a form indictment therefor, see USAM 9-61.153, supra.

9-61.946 18 U.S.C §1961(1)--Racketeering Activity

The Racketeer Influenced and Corrupt Organizations statute (RICO) (18 U.S.C. §1961, et seq.) has been amended by adding to the definition of "racketeering activity" in 18 U.S.C. §1961(1) violations of 18 U.S.C. §§2312 and 2313 (relating to interstate transportation of stolen vehicles) and 18 U.S.C. §2320 (relating to trafficking in certain motor vehicles or motor vehicle parts). The use of the RICO provisions against professional theft rings utilizing legitimate businesses to engage in their illegal activities could have a major impact in reducing motor vehicle theft activity. For guidance on RICO prosecutions involving stolen motor vehicles and related offenses, contact the Organized Crime and Racketeering Section (633-3594).

9-61.950 Title III--Importation and Exportation Measures

New criminal and civil provisions have been added to Titles 18 and 19 of the United States Code to penalize the importation and exportation of stolen conveyances and related conduct.

9-61.951 18 U.S.C. §553--Importation or Exportation of Stolen Motor Vehicles, Off-Highway Mobile Equipment, Vessels, or Aircraft

18 U.S.C. §553(a) makes it a federal crime to knowingly import or export, or attempt to import or export: (1) any motor vehicle, off-highway mobile equipment, vessel, or aircraft, or a part thereof, knowing it to have been stolen; or (2) any motor vehicle or off-highway mobile equipment, or a part thereof, knowing that the identification number has been removed, obliterated, tampered with, or altered.

18 U.S.C. §553(b) provides that subsection (a)(2) does not apply if the vehicle identification number has been removed, obliterated, tampered

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

with, or altered by a collision or fire, or in a manner that does not violate new 18 U.S.C. §511.

18 U.S.C. §553(c) contains the definitions of "motor vehicle," "off-highway mobile equipment," "vessel," "aircraft," and "identification number." The term "motor vehicle" only covers those vehicles intended to be driven or pulled on the public roads. (See 18 U.S.C. §511(c)(2) and 15 U.S.C. §1901(15).) The term "off-highway mobile equipment" covers self-propelled construction and farming equipment.

The penalty for a violation of this section is a fine of \$15,000 and imprisonment for five years. Under new 18 U.S.C. §3623 (Alternative fines) a fine up to \$250,000 is possible for any offense occurring on or after January 1, 1985.

For suggested form indictments for 18 U.S.C. §553 and a discussion of such indictments and the proof required therefor, consult USAM 9-61.995, USAM 9-61.996, and USAM 9-61.997, infra.

9-61.952 19 U.S.C. §1627--Unlawful Importation or Exportation of Certain Vehicles and Equipment

Section 302 of the Motor Vehicle Theft Law Enforcement Assistance Act amended the Tariff Act of 1930 (19 U.S.C. §1581, et seq.) to create a new section 627 in the Tariff Act of 1930 (19 U.S.C. §1627) dealing with unlawful importation or exportation of certain vehicles and equipment. 19 U.S.C. §1627(a) creates a civil penalty of \$10,000 for the same conduct that has been made criminal under the new 18 U.S.C. §553.

19 U.S.C. §1627(b) gives the Secretary of the Treasury authority to prescribe a regulation requiring that any person, before exporting a used motor vehicle or used off-highway mobile equipment, present to the appropriate customs officer both the vehicle or equipment and a document describing such vehicle or equipment that includes the identification number. Failure to comply with this requirement carries a civil penalty of \$500 for each violation.

19 U.S.C. §1627(c) contains the definitions of "motor vehicle," "off-highway mobile equipment," "aircraft," "used," "ultimate purchaser," and "identification number." Once again, the term "motor vehicle" only covers road vehicles.

19 U.S.C. §1627(d) permits customs officers to exchange information concerning activities covered by 19 U.S.C. §1627 with other law

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

enforcement agencies and with organizations engaged in theft prevention activities (e.g., the National Automobile Theft Bureau) designated by the Secretary of the Treasury.

It should be noted that section 205 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984), also created another section 627 in the Tariff Act of 1930 (19 U.S.C. §1627). Section 205 of the Trade and Tariff Act of 1984 is actually an earlier legislative version of section 302 of the Motor Vehicle Theft Law Enforcement Act of 1984 as this provision was working its way through different congressional committees. In implementing its new authority, the United States Customs Service intends to use both new sections 1627 of Title 19, United States Code, unless there is an irreconcilable contradiction between the two, in which case under general maxims of legislative interpretation section 205 would control as it is the more recently enacted. While section 205 and section 302 are very similar there are a few differences:

A. Section 205 refers to "self-propelled vehicle" while section 302 divided such vehicles into "motor vehicles" and "off-highway mobile equipment." Because "motor vehicle" and "off-highway mobile equipment" were then also defined more specifically for section 302, section 205 may be minimally broader than section 302 in the types of vehicles it covers.

B. A significant difference between section 205 and section 302 is the meaning of "identification number." In section 205 "identification number" is not defined and hence it would mean the identification number placed upon the self-propelled vehicle or any of its parts by the manufacturer (see, e.g., 18 U.S.C. §553(b)(5)(B).) Under section 302 "identification number" had been defined differently for motor vehicles and for off-highway mobile equipment. As to off-highway mobile equipment, it would be the number assigned by the manufacturer (which is the same as section 205). But as to motor vehicles (i.e., road vehicles) the term refers to the number inscribed or affixed for purposes of identification under the National Traffic and Motor Vehicle Safety Act of 1966 or the Motor Vehicle Information and Cost Savings Act (in other words, the number required by the Department of Transportation (DOT)). (See 18 U.S.C. §511(c)(1).) The practical effect of this difference is that section 302 would not have covered the identification numbers on motor vehicle parts until the Secretary of Transportation issued his/her component identification standards. But, as section 205 is also applicable, identification numbers of motor vehicle parts (since they are parts of self-propelled vehicles) are covered under 19 U.S.C. §1627(a) as of October 30, 1984.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. Finally, section 302 specifically exempted from the concept of "removal" those accidental and legal removals that may occur (see, e.g., 18 U.S.C. §511(b) and §512(a)(3); see also 18 U.S.C. §553(b)). Section 205, on the other hand, does not expressly provide for these exceptions. In the Criminal Division's judgment, however, such exceptions should be implied as 19 U.S.C. §1627(a) is in no way intended to apply to the exportation or importation of a self-propelled vehicle by its lawful owner. See 125 Cong. Rec. 12245 (1979), where Senators Biden and Percy, who were two of the original sponsors of this legislation, stated, when referring to what became 19 U.S.C. §1627(a), "that this section would likewise not be applicable to the importation or exportation of the conveyance or part by the lawful owner or his agent."

9-61.960 Effective Dates

The Motor Vehicle Theft Law Enforcement Act of 1984 was signed by the President on October 25, 1984. All of its criminal provisions are effective as of that date.

It is anticipated that the Secretary of Transportation's mandatory and voluntary component identification standards will first become effective for 1987 model year vehicles. Before becoming effective they will have to pass through the necessary rule-making process. The Criminal Division intends to monitor the development of the standards in order to ensure final standards that are conducive to effective law enforcement.

While the component identification numbers will not be covered under the new criminal provisions (i.e., 18 U.S.C. §511, §512, §2320) for a few years, such is not the case with the actual vehicle identification number (VIN). While all "road" motor vehicles are now required by Federal Motor Vehicle Safety Standard 115 (49 C.F.R. 511.115 and 565.1-561.5) to have a VIN, this requirement was phased in over several years. Starting on January 1, 1969, all passenger cars manufactured in the United States or manufactured overseas on or after January 1, 1969, and subsequently imported into the United States were required to have a VIN. See 33 Fed. Reg. 10207, July 17, 1968. As a practical rule of thumb, this means that every passenger car from model year 1970 to date has been required by the Department of Transportation (DOT) to have a VIN. Until January 1, 1980, the VIN's characteristics (i.e., its length, the types and kinds of information encoded within particular positions or sections of the VIN, etc.) for passenger cars could be determined by each manufacturer.

Effective September 1, 1980, the VIN requirement was expanded to multipurpose passenger vehicles, trucks, buses, trailers, and motorcycles

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

manufactured in the United States on or after September 1, 1980, and such vehicles manufactured overseas after September 1, 1980, and subsequently imported into the United States. Hence, for non-passenger motor vehicles a VIN has been required for model years 1981 to date. See 43 Fed. Reg. 36448, August 17, 1978. The September 1, 1980, date was extended, however, to January 1, 1981, for two manufacturers (Fruehauf Corporation and Rolls-Royce Motors International) see 45 Fed. Reg. 12255, February 25, 1980. January 1, 1981, reflects the date used by those two manufacturers to start their 1981 model years. The September 1, 1980, date was the changeover date in the 1981 model year for most other manufacturers. VINs are also now required to follow a 17 character format. See 49 C.F.R. §§511.115 and 565.1-561.5. The 17 character VIN format was applicable to passenger cars as of January 1, 1980 and as to other vehicles as of September 1, 1980 (except for those vehicles manufactured by Fruehauf Corporation and Rolls-Royce Motors International in which case the effective date was January 1, 1981). See 43 Fed. Reg. 36448, August 17, 1978 and 45 F.R. 12255, February 25, 1980.

Accordingly, after October 25, 1984, the falsification or removal of any VIN required by the DOT on a motor vehicle is a federal crime under 18 U.S.C. §511. Motor vehicles which have had their DOT required VINs falsified or removed after October 24, 1984, are subject to seizure and forfeiture under 18 U.S.C. §512. Persons trafficking in motor vehicles with DOT required VINs that have been falsified or removed after October 24, 1984, are subject to prosecution under 18 U.S.C. §2320. See 130 Cong. Rec. S13584 (daily ed. October 4, 1984); see also H.R. Rep. No. 1456 on H.R. 4178, 96th Congress, 2d Sess. 25-26 (1980); and 125 Cong. Rec. 12244 (1979). In proving that the falsification or removal occurred after October 24, 1984, the fact that the theft date of the motor vehicle occurred after that date should be telling.

The RICO provisions are also now in force. All RICO prosecutions, however, must be submitted to the Organized Crime and Racketeering Section for review and authorization. See USAM 9-110.100 - 9-110.413.

#### 9-61.970 Policy Considerations

Violations of the new criminal provisions in Titles II and III of the Motor Vehicle Theft Law Enforcement Act of 1984 are to be governed by the Department's prosecutive policy under the Dyer Act (18 U.S.C. §§2311-2313). See USAM 9-61.130 - 9-61.134. Each U.S. Attorney should develop prosecutive understandings on these new criminal offenses with state and local authorities through the district's Law Enforcement Coordinating Committee.

9-61.980 Legislative History

The Motor Vehicle Theft Law Enforcement Assistance Act of 1984 culminated a legislative process that started in September 1978 when the Department of Justice submitted the original bill to the 95th Congress. The legislation was reintroduced in the 96th Congress. (See S. 1214, 125 Cong. Rec. 12242-12246 (1979), and again in the 97th and 98th Congresses.) During the long legislative process it underwent several modifications. The modifications were primarily in what ended up as Title I, the additional anti-theft authority for the Secretary of Transportation. The original proposal in 1978 tried to acquire for the Secretary of Transportation additional anti-theft authority to identify components of all road motor vehicles and to require better "locking" devices on all road motor vehicles. The proposed additional "locking" authority was dropped during the 96th Congress. In the 98th Congress a compromise was reached with the motor vehicle manufacturers to limit the mandatory "numbering" authority to high theft passenger car lines.

The criminal provisions of the bill underwent only minor changes during the six year process. The key legislative report is H.R. Rep. No. 1087 on H.R. 6257, 98th Cong., 2d Sess., (September 26, 1984). H.R. 6257, introduced on September 17, 1984, was the result of a compromise effort headed by Congressman Dingell, Chairman, Committee on Energy and Commerce, House of Representatives. H.R. 6257 passed the House on October 1, 1984, with some minor technical changes required by the House Judiciary Committee. See 130 Cong. Rec. H10462-10474 (daily ed. October 1, 1984). It passed the Senate without amendment on October 4, 1984. See 130 Cong. Rec. S13582-13586 (daily ed. October 4, 1984). It was signed by the President on October 25, 1984. During this six year effort the measure's chief sponsor in the Senate was then Senator Percy of Illinois, and in the House it was Representative William Green of New York.

A. During the legislative process, four relevant congressional reports were prepared. They were:

1. H.R. Rep. No. 1087 on H.R. 6257, 98th Congress 2d Sess. (September 26, 1984).
2. S. Rep. No. 478 on S. 1400, 98th Congress 2d Sess. (May 23, 1984).
3. H.R. Rep. No. 267 on H.R. 3398, 98th Congress, 1st Sess. (June 24, 1983). (This report relates primarily to tariff matters

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

but it does contain on pages 32-33 material on what has become Section 627 of the Tariff Act of 1930 (19 U.S.C. §1627).)

4. H.R. Rep. No. 1456 on H.R. 4178, 96th Congress, 2d Sess. (October 8, 1980).

B. Also, during this legislative process numerous congressional hearings were held concerning aspects of this legislation. Such hearings included:

1. Hearing on S. 1400 before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation, 98th Cong., 1st Sess. (July 19, 1983), Serial No. 98-32.

2. Hearings on Certain Tariff and Trade Bills, before the Subcommittee on Trade of the House Ways and Means Committee, 98th Cong., 1st Sess. (April 27 and May 5, 10, 1983) (see pages 542-569, 742-745), Serial No. 98-17.

3. Hearing on H.R. 4325 (Motor Vehicle Theft Law Enforcement Act) before the Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, 97th Cong., 2d Sess. (February 4, 1982), Serial No. 97-109.

4. Joint Hearings on H.R. 4178 (Motor Vehicle Theft Prevention Act) before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce and the Subcommittee on Inter-American Affairs of the House Committee on Foreign Affairs, 96th Cong., 2d Sess. (June 2, 10, and 12, 1980), Serial No. 96-179.

5. Hearing on S. 1214 (Automobile Theft Prevention Act of 1979) before the Subcommittee on Criminal Justice of the Senate Committee on the Judiciary, 96th Cong., 2d Sess. (April 14, 1980), Serial No. 96-76.

6. Hearings before the Senate Permanent Subcommittee on Investigations on Professional Motor Vehicle Theft and Chop Shops, 96th Cong., 1st Sess. (November 27, 28, 29, 30, and December 4, 1979).

9-61.990 Form Indictments for 18 U.S.C. §§511, 2320, and 553 and Discussions of Such Indictments

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-61.991 Form Indictment for 18 U.S.C. §511

On or about \_\_\_\_\_ (date) in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly and unlawfully tamper with and alter the vehicle identification number (VIN) for a motor vehicle, to wit, (describe the vehicle, e.g., a 1983 Cadillac Eldorado having altered its VIN to read as 1G6AL5782DE628027).

9-61.992 Discussion of an Indictment for 18 U.S.C. §511

It is not necessary to allege in the indictment the absence of the exceptions contained in subsection 18 U.S.C. §511(b). See USAM 9-12.325 (Negating Statutory Exceptions). The use of the term "unlawfully" excludes the coverage of the lawful removal or destruction of a number. A reason why you may wish to specifically describe the altered VIN is to establish with some specificity the actual motor vehicle which is the subject matter of the indictment.

To prove a violation of section 511, it must be established that:

- A. The defendant knowingly removed, obliterated, tampered with, or altered an identification number on a road motor vehicle (or component);
- B. The identification number was one required by the United States Department of Transportation (DOT); and
- C. Such conduct was not done lawfully (e.g., defendant knew the vehicle was stolen and was trying to conceal its identity).

The gist of the offense is to show a removal, obliteration, tampering with, or alteration by the defendant. Eye witness testimony is the best evidence to prove that defendant removed or falsified the number. Proof of a removal of a number should be easily accomplished by persons familiar with what numbers should be present on a motor vehicle or part.

Proof of the falsification of a VIN will require in most cases expert testimony. Law enforcement experts may be able to detect "concealed" numbers placed by the manufacturer on the motor vehicle. From such information, the original VIN can be reconstructed. If you know the make and model year of the motor vehicle in question, analysis of what the VIN

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

characters for such a vehicle should have been will help establish a falsification.

In regard to the present 17 character VINs, each character or group of characters has meaning. The falsification of a number can be established by experts from the law enforcement community, the National Automobile Theft Bureau (NATB), and the manufacturers. The meaning of the various characteristics of the VIN for a particular vehicle can be explained by these experts.

The manufacturer's production records will reflect whether a vehicle having a certain VIN was ever manufactured for that model year. If the criminal has duplicated an existing VIN from another vehicle, the manufacturer's records along with the VIN will reveal the particular characteristics of the vehicle having the original (i.e., authentic) VIN, thus permitting a comparison of the physical attributes of the two vehicles to determine to which vehicle the VIN was actually originally assigned by the manufacturer.

In most prosecutable cases, your expert witnesses will be able to establish the identity of the original VIN. However, if that is not possible, a successful prosecution should still be possible by showing that the vehicle was manufactured by a particular manufacturer, that such manufacturer always certified compliance with the DOT standard(s) (which compliance meant the vehicle had the required VIN (or component numbers)) and that the VIN (or component numbers) on the vehicle (or part) was not one the manufacturer assigned to any of its vehicles (or parts).

The evidence must establish an unlawful removal or falsification. The lawful removals can be found in 18 U.S.C. §511(b) and §512(a)(3). They include injury to a number caused by: (a) collision or fire (18 U.S.C. §512(a)(3)); (b) destruction of the number when the vehicle or part is crushed during the recycling process (18 U.S.C. §511(b)(2)(A)); (c) repair of a vehicle or part where the removal, obliteration, tampering, or alteration is reasonably necessary for the repair (18 U.S.C. §511(b)(2)(B)); and (d) restoration of a number when done in accordance with applicable state law (18 U.S.C. §511(b)(2)(C)). Under subsection 511(b), these lawful exceptions do not apply if the person knows that the motor vehicle or part is stolen. Except for the area of "repair," these exceptions should cause no significant enforcement problem. The relevant portion of H.R. Rep. No. 1089 on H.R. 6257, 98th Cong., 2d Sess. 23-25 (1984), makes clear that the "repair" exception is intended for the protection of the honest body shop operator who while fixing a part does some injury to its identification number. The exception "is not intended to apply to the operators of 'chop shops,' who remove such parts--not

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

repairing or recycling them for lawful purposes." Most of the states that are parties to the interstate compact which created the Vehicle Equipment Safety Commission (VESC) have established under their respective state laws procedures for the restoration and replacement of missing identification numbers. See Regulation VESC--18, Standardized Replacement Vehicle Identification Number System.

For a further discussion of 18 U.S.C. §511, consult USAM 9-61.941, supra.

9-61.993 Form Indictment for 18 U.S.C. §2320

On or about \_\_\_\_\_ (date) in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly buy, receive, possess, and obtain control of, with intent to sell and otherwise dispose of, a motor vehicle, to wit, (describe the vehicle adequately) knowing that the vehicle identification number (VIN) of said vehicle had been unlawfully removed, obliterated, tampered with, and altered.

9-61.994 Discussion of Indictment for 18 U.S.C. §2320

18 U.S.C. §2320 is a trafficking offense. The previous discussion relating to an indictment for 18 U.S.C. §511 should be consulted (see USAM 9-61.992, supra). In the indictment for 18 U.S.C. §2320 you may wish to use the false or altered VIN actually on the motor vehicle in order to help specify the motor vehicle which is the subject matter of the charge.

To establish a violation of 18 U.S.C. §2320 the government must establish:

A. The defendant acquired or possessed a road motor vehicle (or component), the vehicle identification number (VIN) (or component identification number after the component standard becomes effective) of which had been removed, obliterated, tampered with, or altered;

B. The identification number was one required by the United States Department of Transportation;

C. Such removal, obliteration, tampering with, or alteration was done unlawfully;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. That the defendant was aware of the unlawful removal, obliteration, tampering with, or alteration; and

E. That defendant had an intent to sell or otherwise dispose of the motor vehicle (or component part).

In most cases proof of the defendant's awareness of the stolen nature of the motor vehicle (or component) will satisfy the knowledge requirements. Also, the presence on the defendant's premises of several vehicles or numerous components lacking the proper numbers should help satisfy the knowledge and intent requirements.

For a further discussion of 18 U.S.C. §2320, consult USAM 9-61.943, supra.

9-61.995 Form Indictment for 18 U.S.C. §553(a)(1)

On or about \_\_\_\_\_ (date) \_\_\_\_\_ in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly and unlawfully export and attempt to export a motor vehicle, to wit, (describe the vehicle e.g., a 1983 Cadillac Eldorado having VIN 1G6AL5782DE628027), knowing the same to have been stolen.

9-61.996 Form Indictment for 18 U.S.C. §553(a)(2)

On or about \_\_\_\_\_ (date) \_\_\_\_\_ in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly and unlawfully import and attempt to import a motor vehicle, to wit, (describe the vehicle, e.g., a 1983 Mercedes Benz 380 SL having on it the altered vehicle identification number WDBBA45A9DB005423), knowing that the vehicle identification number of said vehicle had been tampered with and altered.

9-61.997 Discussion of an Indictment for 18 U.S.C. §553

The term "stolen" in 18 U.S.C. §553 is to be construed broadly to cover all felonious takings regardless of whether they were in the nature of larceny, embezzlement, or false pretenses. See United States v. Turley, 352 U.S. 407 (1957); see also USAM 9-61.142 and 9-61.248, supra. In regard to falsified or removed identification numbers, consult the previous discussions on the indictments for 18 U.S.C. §511 and §2320 in USAM 9-61.992 and USAM 9-61.994, respectively, supra.

For a general discussion of 18 U.S.C. §553, consult USAM 9-61.951, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 63

		<u>Page</u>
9-63.000	<u>PROTECTION OF PUBLIC ORDER, SAFETY, HEALTH, AND WELFARE</u>	1
9-63.100	AIRCRAFT PIRACY AND RELATED OFFENSES	1
9-63.101	General	1
9-63.102	Investigative Jurisdiction	1
9-63.103	Supervising Section	1
9-63.104	Summary of Changes Made to Aircraft Piracy and Related Offenses by the Aircraft Sabotage Act	2
9-63.110	<u>Special Aircraft Jurisdiction of the United States</u>	3
9-63.120	<u>Venue</u>	5
9-63.130	<u>Aircraft Piracy (49 U.S.C. App. §1472(1))</u>	5
9-63.131	Attempts	5
9-63.132	Indictment	6
9-63.133	Death Penalty	6
9-63.134	Negotiated Pleas	7
9-63.140	<u>Interference with Flight Crew Members or Flight Attendants (49 U.S.C. App. §1472(j))</u>	7
9-63.150	<u>Certain Crimes Aboard Aircraft in Flight (49 U.S.C. App. §1472(k))</u>	7
9-63.160	<u>Carrying Weapons or Explosives Aboard Aircraft (49 U.S.C. App. §1472(1))</u>	8
9-63.161	Attempts	9
9-63.162	Deadly or Dangerous	9
9-63.163	Specific Intent	9
9-63.164	Concealment	10
9-63.165	Prosecution Policy	10
9-63.170	<u>False Information and Threats (49 U.S.C. App. §1472(m))</u>	13
9-63.171	Discussion of Former False Information Offense	13

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-63.172	Discussion of New False Information Offense	14
9-63.173	Prosecution Policy	14
9-63.174	Discussion of New Threat Offense (49 U.S.C. App. §1472(m)(2))	15
9-63.180	<u>Aircraft Piracy Outside the Special Aircraft Jurisdiction of the United States (49 U.S.C. App. §1472(n))</u>	16
9-63.190	<u>Search and Seizure</u>	16
9-63.191	Metal Detectors--Consent	17
9-63.192	Search is Governmental	19
9-63.193	Frisking	19
9-63.194	Checked Baggage	19a
9-63.195	Protection of Confidentiality of Security Procedures	19a
9-63.200	DESTRUCTION OF AIRCRAFT AND MOTOR VEHICLES AND RELATED OFFENSES (18 U.S.C. §§31-35)	19b
9-63.210	<u>Investigative Jurisdiction</u>	19b
9-63.220	<u>Supervising Section</u>	19b
9-63.230	<u>General</u>	19b
9-63.231	Definitions	19b
9-63.232	Summary of Changes Made to 18 U.S.C. §32 by the Aircraft Sabotage Act	19c
9-63.233	Death Penalty	19d
9-63.240	<u>Destruction of Aircraft--18 U.S.C. §32(a)</u>	19d
9-63.250	<u>Extraterritorial Destruction of a Non-United States Civil Aircraft--18 U.S.C. §32(b)</u>	19f
9-63.251	Prosecutive Policy for 18 U.S.C. §32(b)	19g
9-63.260	<u>Threats to Destroy Aircraft--18 U.S.C. §32(c)</u>	19g
9-63.270	<u>Destruction of Motor Vehicles--18 U.S.C. §33</u>	19h
9-63.271	Prosecutive Policy for 18 U.S.C. §33	

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-63.280	<u>Imparting or Conveying False Information (Bomb Hoax--18 U.S.C. §35)</u>	19h
9-63.281	General	19h
9-63.282	Civil Provision (18 U.S.C. §35(a))	19i
9-63.283	Venue	19i
9-63.284	Subpoenas in Civil Cases	19i
9-63.285	Compromise of Civil Penalty	19k
9-63.286	Jury Trial in Civil Action	20
9-63.300	ANTI-RIOT ACT [RESERVED]	20
9-63.400	OBSCENE OR HARASSING TELEPHONE CALLS (47 U.S.C. §223)	20
9-63.410	<u>Description</u>	20
9-63.420	<u>Jurisdictional Requirement of the Statute</u>	21
9-63.430	<u>Investigative Jurisdiction</u>	21
9-63.440	<u>Supervisory Jurisdiction</u>	21
9-63.450	<u>Special Considerations</u>	21
9-63.460	<u>Obscene Communications for Commercial Purposes</u>	22
9-63.470	<u>Right to Jury Trial</u>	22a
9-63.480	<u>Threatening or Extortionate Telephone Calls</u>	22a
9-63.490	<u>Bomb Threats</u>	22a
9-63.500	FIREARMS CONTROL: THE 1968 ACTS (18 U.S.C. §§921-928; 18 U.S.C. App. §§1201-1203; 26 U.S.C. §§5801-5872)	22a
9-63.501	Introduction	22a
9-63.510	<u>Title I (18 U.S.C. §§921-928)</u>	22b
9-63.511	Exceptions	23
9-63.512	Sales to Certain Purchasers	24
9-63.513	Recordkeeping	24
9-63.514	Transportation of Firearms	25
9-63.515	Military Exemptions and Relief from Disabilities	27

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-63.516	Importation Provisions	27
9-63.517	Penalties	28
9-63.518	The Supreme Court's Analysis of the Enhanced Penalty Provision of Title I	29
9-63.519	The Supreme Court's Analysis of the Relationship Between the Sentencing Provision of Title I and the Sentencing Provision of Title VII	30
9-63.520	<u>Title II (26 U.S.C. §§5801-5872)</u>	30
9-63.521	Businesses Regulated	31
9-63.522	Importation and Transfer Restrictions	31
9-63.523	Manufacture	32
9-63.524	Registration	32
9-63.525	Penalties	33
9-63.530	<u>Title VII (18 U.S.C. App. §§1201-1203)</u>	34
9-63.531	Persons Covered	34
9-63.532	Offenses	35
9-63.533	Pen Guns	35
9-63.600	FIREARMS ISSUES	35
9-63.610	<u>Prosecutive Policy</u>	35
9-63.620	<u>Investigative Jurisdiction</u>	36
9-63.630	<u>Criminal Division Assistance</u>	36
9-63.640	<u>Proving the Minimal Nexus Requirement of Title VII</u>	36
9-63.641	A Felon May Not Possess a Firearm Even Though the Predicate Felony May Be Subject to Collateral Attack on Constitutional Grounds	37
9-63.642	Receipt of a Firearm by a Convicted Felon Must Be in the District of Prosecution for Proper Venue	38
9-63.643	Prosecutorial Policy Regarding Title VII	38
9-63.650	<u>Charging Possessory Offenses Under Title II</u>	38

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-63.660	<u>Dual Prosecution Policy</u>	39
9-63.670	<u>Affidavits for Search Warrants</u>	39
9-63.680	<u>Dickerson v. New Banner Institute, Inc., and State Expungement Statutes</u>	39
9-63.681	Effect of Pre-1968 Pardons on Convicted Felon Status	40
9-63.682	Effect of the Federal Youth Correc- tions Act on Convicted Felon Status	41
9-63.690	<u>Proof of Non-Registration of Firearms in Title II Prosecutions</u>	41
9-63.700	FIREARMS: INSPECTION OF LICENSEES' RECORDS, FIREARMS AND AMMUNITION	42
9-63.710	<u>Warrantless Inspections</u>	42
9-63.720	<u>Inspection Warrants</u>	43
9-63.730	<u>Prosecution of Licensed Dealers and Forfeiture of Firearms</u>	44
9-63.731	Forfeiture Policy	44
9-63.732	Revocation of License	45
9-63.800	FIREARMS: FORMS FOR INDICTMENT	46
9-63.801	Firearms Indictments; Deletion of the Term "Willfully"	46
9-63.900	THE FEDERAL EXPLOSIVES STATUTE (18 U.S.C. §§841 <u>et seq.</u> )	46
9-63.910	<u>Description</u>	46
9-63.920	<u>Investigative Guidelines</u>	47
9-63.930	<u>Special Considerations</u>	48
9-63.1000	DESTRUCTION OF ENERGY FACILITIES	49
9-63.1001	Overview	49
9-63.1002	Investigative Jurisdiction	49
9-63.1003	Supervisory Jurisdiction	49

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-63.1010	<u>Elements</u>	49
9-63.1011	Intent	49
9-63.1012	Act	50
9-63.1013	Jurisdiction	50
9-63.1100	TAMPERING WITH CONSUMER PRODUCTS--18 U.S.C. §1365	51
9-63.1110	<u>Investigative Jurisdiction</u>	51
9-63.1120	<u>Supervising Section</u>	51
9-63.1130	<u>Prosecutive Policy--18 U.S.C. §1365</u>	51
9-63.1140	<u>Discussion of the Offense</u>	52
9-63.1141	General	52
9-63.1142	Offenses	52
9-63.1143	Penalties	53
9-63.1144	Definitions	54
9-63.1150	<u>Legislative History</u>	54

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.000 PROTECTION OF PUBLIC ORDER, SAFETY, HEALTH AND WELFARE

9-63.100 AIRCRAFT PIRACY AND RELATED OFFENSES

9-63.101 General

49 U.S.C. App. §§1472(i) through (n) set forth the offenses of aircraft piracy and attempted piracy within or outside the special aircraft jurisdiction of the United States, interference with flight crew members or flight attendants, carrying weapons or explosives aboard an aircraft, conveyance of false information or threats regarding certain offenses prohibited by 49 U.S.C. App. §1472, and certain common law offenses. A brief discussion of each of the operative subsections is contained below.

Definitions of terms used in 49 U.S.C. App. §1472, such as "aircraft," "air commerce," "air transportation," "special aircraft jurisdiction," etc., are found in 49 U.S.C. App. §1301.

The destruction or damaging of aircraft or aircraft facilities is prohibited by 18 U.S.C. §32, and bomb hoaxes directed toward aircraft or aircraft facilities are prohibited by 18 U.S.C. §35. A discussion of these statutes may be found in USAM 9-63.200, infra.

9-63.102 Investigative Jurisdiction

Criminal violations of the aircraft piracy and related offense provisions are within the investigative jurisdiction of the Federal Bureau of Investigation. The Federal Aviation Administration (FAA) also has administrative responsibility to prevent and, where warranted, to punish such offenses by civil penalties.

9-63.103 Supervising Section

General Litigation and Legal Advice Section of the Criminal Division.

9-63.104 Summary of Changes Made to Aircraft Piracy and Related Offenses by the Aircraft Sabotage Act

Part B of chapter XX of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, October 12, 1984), contains the Aircraft Sabotage

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Act. The purpose of the Aircraft Sabotage Act was to implement fully the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (also known as the Montreal Convention). See Treaties and Other International Acts Series, No. 7570 (T.I.A.S. 7570); United States Treaties and Other International Agreements, Vol. 24, at 564 (24 U.S.T. 564). While the Aircraft Sabotage Act made several changes to 18 U.S.C. §32 (Destruction of aircraft and related facilities) (see USAM 9-63.232, infra), the Act also made several significant changes to various provisions of the Federal Aviation Act of 1958, as amended. These changes were effective on October 12, 1984 and consist of the following:

A. A new civil penalty of up to \$10,000 was created in 49 U.S.C. App. §1471(c) for conveying false information, knowing the information to be false and under circumstances in which such information may reasonably be believed, concerning a violation of subsections (i), (j), (k), or (l) of 49 U.S.C. App. §1472.

B. A new civil penalty of up to \$10,000 was created in 49 U.S.C. App. §1471(d) for persons who carry weapons or have weapons accessible to them on a flight or while boarding an aircraft.

C. The misdemeanor fine penalty for violating 49 U.S.C. App. §1472(1)(1) was increased to \$10,000. Also, the felony fine for violating 49 U.S.C. App. §1472(1)(2) was increased to \$25,000. These sections relate to carrying weapons or explosives aboard an aircraft. There are now felony, misdemeanor, and civil penalties for aircraft weapons offenses under 49 U.S.C. App. §1472(1)(2), §1472(1)(1), and §1471(c), respectively.

D. The misdemeanor false information provision in 49 U.S.C. App. §1472(m)(1) was repealed. The old felony provision in section 1472(m)(2) was renumbered as (m)(1), and the phrase "knowing the information to be false and under circumstances in which such information may reasonably be believed" was added to it.

E. A new threat offenses was created in 49 U.S.C. App. §1472(m)(2). It covers any threat to do an act which would be a felony under subsections (i), (j), (k), or (l) of section 1472. The new offense is punishable by a fine of \$25,000 and imprisonment for five years.

F. Finally, the definition of "special aircraft jurisdiction of the United States" (49 U.S.C. App. §1301 (38)) was amended to include any aircraft outside of the United States upon which an offense as defined in

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

paragraphs (1)(d) (destroying or damaging air navigation facilities or interfering with their operation, if such act is likely to endanger the safety of aircraft in flight) or (e) (knowingly communicating false information thereby endangering the safety of an aircraft in flight) of Article 1 of the Montreal Convention was committed and the aircraft lands in the United States with the alleged offender still on board.

It should be noted that for all felony offenses occurring on or after January 1, 1985, the maximum possible fine has been increased to at least \$250,000. The maximum possible fine for any misdemeanor offense not resulting in death and punishable by imprisonment for more than six months has also been increased to at least \$100,000. See new 18 U.S.C. §3623 (Alternative fines) created by the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596 (October 30, 1984).

The legislative history for the Aircraft Sabotage Act can be found at pages 13-18 of the Message from the President of the United States Transmitting Four Drafts of Proposed Legislation to Attack the Pressing and Urgent Problem of International Terrorism, H.R. Doc. No. 211, 98th Congress, 2d Sess.; in S. Rep. No. 619 on S. 2623, the Aircraft Sabotage Act, 98th Congress, 2d Sess.; and 130 Cong. Rec. E 4567-E 4568 (daily ed. November 14, 1984).

9-63.110 Special Aircraft Jurisdiction of the United States

In 1970 the President signed into law legislation (Pub. L. No. 449) which implemented the Convention on Offenses and Certain Acts Committed on Board Aircraft, the Tokyo Convention (20 U.S.T. 2941), thereby creating the special aircraft jurisdiction of the United States. The effect of the legislation was to give the state of registration of an aircraft jurisdiction over crimes committed aboard that aircraft while in flight anywhere in the world. The Antihijacking Act of 1974 (Pub. L. No. 366) fully implemented the Convention for the Suppression of the Unlawful Seizure of Aircraft, the Hague Convention (22 U.S.T. 1641), and redefined and expanded the special aircraft jurisdiction of the United States which is defined in 49 U.S.C. App. §1301(38). The Aircraft Sabotage Act (Part B of chapter XX of the Comprehensive Crime Control Act of 1984) (Pub. L. No. 473, October 12, 1984) further expanded the definition of special aircraft jurisdiction of the United States to include a foreign civil aircraft that lands in the United States having on board that aircraft an individual who has committed an offense as defined in paragraphs 1(d) or (e) of Article I of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (so called Montreal Convention). The special aircraft jurisdiction is a jurisdictional requirement for all

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

offenses proscribed by 49 U.S.C. App. §1472 except carrying weapons aboard an aircraft (49 U.S.C. App. §1472(1)), imparting false information (49 U.S.C. App. §1472(m)(1)) and conveying threats (49 U.S.C. App. §1472(m)(2)).

Included in the special aircraft jurisdiction of the United States is any civil aircraft of the United States; any aircraft of the United States defense forces; any aircraft within the United States; any foreign aircraft outside the United States which has its next scheduled destination or last point of departure in the United States if the foreign aircraft does, in fact, land in the United States; any foreign civil aircraft outside the United States which lands in the United States having on board that foreign aircraft an individual who has committed on that aircraft either an offense under 49 U.S.C. App. §1472 which is covered by the Hague Convention or an offense under 18 U.S.C. §32(a) which is covered by paragraphs 1(d) (destroying or damaging air navigational facilities or interfering with their operation, if such act is likely to endanger the safety of aircraft in flight) or (e) (knowingly communicating false information thereby endangering the safety of an aircraft in flight) of Article 1 of the Montreal Convention; and any aircraft leased without a crew to a lessee who has his/her principal place of business in the United States, or, if he/she has no such business, has his/her permanent residence in the United States. Such an aircraft is in the special aircraft jurisdiction of the United States only while the aircraft is in flight.

The 1974 Act also broadened the concept of "in flight" which is now defined as from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation, or in the case of a forced landing, until competent authorities take responsibility for the aircraft.

The "special aircraft jurisdiction" defined in 49 U.S.C. App. §1301(38) must be distinguished from the aircraft jurisdiction defined in subsection(5) of 18 U.S.C. §7 (special maritime and territorial jurisdiction). See USAM 9-20.130, supra.

9-63.120 Venue

Venue provisions for the criminal offenses enumerated in 49 U.S.C. App. §1472 are specified in 49 U.S.C. App. §1473(a) and embody substantially the same venue requirements applicable to violations of Title 18, United States Code, contained in 18 U.S.C. §§3237-3238 and Rule 18 of the Federal Rules of Criminal Procedure. It should be noted that

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

such non-continuing offenses as assault (49 U.S.C. App. §1472(k)), or a brief interference with a crew member (49 U.S.C. App. §1472(j)) must be tried in the district over which the aircraft was flying at the time the offense was committed. Consequently, it will be necessary to ascertain from the airline exactly where the offense occurred if venue is an issue in a case brought under 49 U.S.C. App. §§1472(j) and (k).

9-63.130 Aircraft Piracy (49 U.S.C. App. §1472(i))

As Congress intended, this offense is unique, and to be distinguished from 18 U.S.C. §1651 where the term "piracy" is defined by the law of nations. The elements of 49 U.S.C. App. §1472(i) are specifically stated in the statute. The "wrongful intent" element of the offense has been held to be not more than general criminal intent to seize or exercise control of an aircraft without any legal right to do so. See United States v. Basic, 592 F.2d 13, 21 (2d Cir. 1978); United States v. Bohle, 445 F.2d 54 (7th Cir. 1971).

9-63.131 Attempts

The Antihijacking Act of 1974 (Pub. L. No. 93-366) amended subsection (i) to specifically include a provision dealing with attempts to hijack aircraft not yet "in flight" in order to avoid the jurisdictional problem encountered in United States v. Pliskow, 480 F.2d 927 (6th Cir. 1973). Thus, an attempt to seize control of an aircraft is punishable whether the aircraft is actually in flight, is moving on the ground, or is parked so long as the aircraft would have been in the special aircraft jurisdiction of the United States if the air piracy had been completed.

9-63.132 Indictment

An air piracy indictment may be returned in the district where the hijacking offense was begun, continued or terminated (49 U.S.C. App. §1473(a)).

The courts have held in United States v. Basic, 592 F.2d 13 (2d Cir. 1978), United States v. Remling, 547 F.2d 1274 (6th Cir. 1977), and United States v. Ortiz, 480 F.2d 175 (9th Cir. 1973), that the twenty-year penalty for aircraft piracy where there is no loss of life is not a mandatory penalty and hence the perpetrator, in the discretion of the court, may be eligible for probation or parole. Accordingly, contrary to earlier Department policy, any indictment for air piracy may charge other

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

serious offenses, such as kidnapping and interference with a flight crew, arising out of the same transaction.

9-63.133 Death Penalty

A death which results from an aircraft piracy need not have occurred within the special area of federal jurisdiction encompassing the underlying offense. All that is required is that the death be proximately caused by the perpetrator's efforts to implement the hijacking. See United States v. Basic, 592 F.2d 13 (2d Cir. 1978).

As a result of the decision in Furman v. Georgia, 408 U.S. 238 (1972), and United States v. Bohie, 346 F. Supp. 577 (N.D.N.Y. 1972), striking down the death penalty provision of the air piracy statute, Congress enacted a mandatory death penalty for hijackers which the Department believes complies with the mandate of the Furman decision. Under the new law contained in 49 U.S.C. App. §1473(c), the convicted aircraft hijacker is to be given a sentencing hearing at which the judge or a jury must return a special verdict setting forth its findings as to the existence or nonexistence of certain aggravating and mitigating factors. A finding of one or more aggravating factors and no mitigating factors will result in a mandatory sentence of death. A finding of no aggravating factors or one or more mitigating factors precludes a sentence of death.

The death penalty shall not be recommended without the approval of the Attorney General. See USAM 9-2.151; USAM 9-10.020; and see generally USAM 9-10.000 (capital crimes).

9-63.134 Negotiated Pleas

The Department continues to advocate severe penalties for aircraft hijackers as a deterrent to future acts of piracy. Consequently, authorization from the Criminal Division must be obtained by the U.S. Attorney before he/she enters into any agreement to forego an air piracy prosecution under 49 U.S.C. App. §1472(i) in favor of a guilty plea to lesser offense, or decides otherwise not to prosecute fully an act of air piracy. The U.S. Attorney should obtain the views of the FAA on a proposed settlement that does not include a plea to a 49 U.S.C. App. §1472(i) violation. After obtaining the FAA's views, the U.S. Attorney should contact the General Litigation and Legal Advice Section for the necessary approval.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.140 Interference with Flight Crew Members or Flight Attendants (49 U.S.C. App. §1472(j))

One who assaults, threatens, or intimidates a flight crew member or attendant while aboard an aircraft in the special aircraft jurisdiction of the United States, and thereby interferes with the performance of that crew member's duties or lessens the ability of that crew member to perform his/her duties is punishable under this subsection. See United States v. Meeker, 527 F.2d 12 (9th Cir. 1975). Although an assault within the special aircraft jurisdiction is prohibited under 49 U.S.C. App. §1472(k)(1), Congress provided increased penalties in this subsection for assaults on flight crew members which actually interfere with the performance of the flight personnel. Still greater punishment may be imposed when the use of a deadly or dangerous weapon is used to effect such interference. What constitutes a "deadly or dangerous weapon" is discussed in USAM 9-63.162, infra.

9-63.150 Certain Crimes Aboard Aircraft in Flight (49 U.S.C. App. §1472(k))

Acts which would be punishable if they occurred in the special maritime and territorial jurisdiction of the United States, pursuant to 18 U.S.C. §7(5) are made criminal under 49 U.S.C. App. §1472(k)(1) if they occur within the special aircraft jurisdiction of the United States. The proscribed acts are assault (18 U.S.C. §113), maiming (18 U.S.C. §114), embezzlement and theft (18 U.S.C. §661), receiving stolen property (18 U.S.C. §62), murder (18 U.S.C. §1111), manslaughter (18 U.S.C. §1112), attempted murder or manslaughter (18 U.S.C. §1113), rape (18 U.S.C. §2031), carnal knowledge of a female under sixteen years of age (18 U.S.C. §2032), and robbery (18 U.S.C. §2111). The punishment for each offense is as stated in the operative section regardless of whether the jurisdictional basis is 18 U.S.C. §7(5) or 49 U.S.C. App. §1472(k)(1). It should be noted that the ten offenses set forth above are punishable regardless of any connection they may have with aircraft piracy or attempted piracy. See H.R. Rep. No. 958, 87th Congress, pp. 10-11 (Reprinted also at 1961 U.S. Code Cong. & Adm. News 2571).

Additionally, the commission within the special aircraft jurisdiction of the United States of an act which, if committed in the District of Columbia, would be a violation of Title 22, District of Columbia Code, section 1112 (indecent exposure), is made criminal by 49 U.S.C. App. §1472(k)(2). Only general criminal intent must be proven, and the indecent exposure need not be directed toward any particular person to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

constitute a violation of this provision. See Peyton v. District of Columbia, 100 A. 2d 36 (D.C. 1953). An indecent exposure committed only in the presence of the one person who had solicited the act was held not to be a violation of the statute. See Rittenour v. United States, 163 A. 2d 558 (1960).

9-63.160 Carrying Weapons or Explosives Aboard Aircraft (49 U.S.C. App. §1472(1))

In 1980 Congress modified 49 U.S.C. App. §1472(1) (Section 502, Pub. L. No. 96-193, Feb. 18, 1980, 94 Stat. 59). The revised subsection of 49 U.S.C. App. §1472(1) contains misdemeanor penalties for: (1) boarding, or attempting to board an aircraft in, or intended for operation in, air transportation or intrastate air transportation by a person possessing, on or about his/her person or property, a concealed deadly or dangerous weapon which is, or would be, accessible to him/her in flight and (2) placing or attempting to place aboard any such aircraft any bomb or similar explosive or incendiary device. Added to subsection (1)(1) of 49 U.S.C. App. §1472 was the placing or attempting to place aboard any such aircraft a loaded firearm in the baggage or other property not accessible to passengers in flight. 49 U.S.C. App. §1472(1)(2) makes it a felony for anyone who willfully and without regard for the safety of human life commits an act prohibited by 49 U.S.C. App. §1472 (1)(1). The 1980 amendment also modified 49 U.S.C. App. §1472(1)(3) so that 49 U.S.C. App. §1472(1) does not apply to any officer or employee of the federal government who is authorized or required in his/her official capacity to carry arms. Prior to 1980, the exemption was limited to federal law enforcement officers authorized to carry arms. However, an exempted person still must comply with FAA regulations concerning disclosure to the airline of the fact that he/she has a weapon upon his/her person. See 14 C.F.R. §108.11(a).

The Aircraft Sabotage Act increased the fine for a violation of 49 U.S.C. App. §1472(1)(1) to \$10,000 and for a violation of 49 U.S.C. App. §1742(1)(2) to \$25,000. For violations of such subsections occurring on or after January 1, 1985, the possible fines are at least \$100,000 and \$250,000, respectively. See new 18 U.S.C. 3623 (Alternative fines) (Criminal Fines Enforcement Act of 1984, Pub. L. No. 98-596 (October 30, 1984)).

9-63.161 Attempts

In order to prove an attempt to violate 49 U.S.C. App. §1472(1), the government must show that the defendant intended to board the aircraft.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Such intent has been demonstrated when an individual has surrendered his/her ticket to an airline employee and entered a departure area, United States v. Brown, 305 F. Supp. 415 (W.D. Tex. 1969), proceeded as a ticketed passenger into a sterile concourse, United States v. Flum, 518 F.2d 39 (8th Cir. 1975), or stood in a boarding line when the ticket was to be purchased aboard a shuttle flight, United States v. Edwards, 498 F.2d 496 (2d Cir. 1974).

9-63.162 Deadly or Dangerous

What constitutes a "deadly or dangerous weapon" is left to the general definition of that term as found in the law by the courts. See 107 Cong. Rec. 14366-67; H. Rep. No. 958, 87th Cong., 1st Sess. (1961), p.15. Courts have held that unloaded pistols, United States v. Cook, 446 F.2d 50 (9th Cir. 1971), a knife with a 3 1/4" blade, United States v. Margraf, 483 F.2d 708 (3d Cir. 1973), vacated and remanded on other grounds, 414 U.S. 1106 (1973), and a tear gas gun, United States v. Brown, 508 F.2d 427 (8th Cir. 1974), are "deadly and dangerous weapons" for purposes of this statute. Further, in consideration of the purposes of this statute, it should be noted that aircraft have been hijacked with the following devices: an unloaded air-operated BB gun, razors or razor blades, a tear gas pen, a broken bottle, a fire axe, and the threat of starting a fire with gasoline or a similar flammable liquid.

9-63.163 Specific Intent

With respect to the misdemeanor provision, it is not necessary that the defendant know that the weapon he/she is carrying is a "deadly or dangerous weapon," nor that he/she specifically intends to carry a weapon which is "deadly or dangerous." The language of the misdemeanor statute contains no knowledge or specific intent requirement, and courts have refused to read such a requirement into the statute. See United States v. Margraf, *supra*; United States v. Flum, 518 F.2d 39 (8th Cir. 1975); United States v. Dishman, 486 F.2d 727 (9th Cir. 1973).

9-63.164 Concealment

The government must prove that the defendant concealed the weapon, but need not prove that the defendant intended to conceal the weapon. If the weapon is hidden from view, it is concealed for purposes of this

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

statute. See United States v. Flum, supra, in which the Court of Appeals for the Eighth Circuit, sitting en banc, expressly overruled the decision of an Eighth Circuit panel in United States v. Brown, supra, which had held that a weapon carried in hand-held luggage which the defendant opened to airport security officials for inspection was not a concealed weapon.

9-63.165 Prosecution Policy

The Federal Aviation Administration (FAA) pre-board screening procedures have done much to curb aircraft hijacking incidents. These procedures have also resulted in the detection of relatively large numbers of passengers and other individuals who have attempted to board carrier aircraft with deadly or dangerous weapons concealed on the individual's person or contained in accessible property.

In the overwhelming number of cases involving this offense, the violators have an excellent prior record and the circumstances surrounding the offense are usually quite extenuating. Often, the concealed weapon is a knife, the possession of which does not constitute a violation of a federal or local statute, or the weapon may only marginally constitute a "deadly or dangerous weapon" for purposes of this statute. Also, individuals other than law enforcement officers have been issued permits by state or local governments to carry firearms because of the nature of their occupation, or for other good reason, but are not exempted from the enforcement of this statute. As a matter of policy, criminal prosecution of these types of offenders would be inappropriately severe, and an unproductive use of limited prosecutive resources.

Therefore, to achieve uniform application of 49 U.S.C. App. §1472(1) while continuing to have an effective deterrent to this type of offense, the following guidelines should be considered in determining how an offense will be investigated and prosecuted.

A. Aggravated cases should be vigorously investigated and criminally prosecuted under 49 U.S.C. App. §1472(1). Such aggravated cases include, but are not limited to, the following examples:

1. The individual has endeavored by obvious and deliberate measures to preclude detection of a concealed weapon on his/her person or in his/her carry-on baggage;
2. Evidence available indicates that the subject intended to use the weapon in the commission of an offense; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

3. The weapon is any type of explosive or incendiary device.

B. Federal criminal prosecution can be declined for those offenses involving the following mitigating factors:

1. Individuals who are not law enforcement officers, but who nevertheless possess valid permits to carry a weapon;

2. Individuals who have no serious criminal records, and the circumstances surrounding the offense are clearly extenuating in nature; and

3. Individuals who possess items which are normally and acceptably used for a noncriminal purpose and which are only marginally of a deadly or dangerous character.

All such unaggravated weapons violations will continue to be initially referred to state and local authorities for disposition. Where the state or local authorities are unwilling or unable to prosecute a weapon offense involving a firearm, a civil penalty for instances on or prior to October 12, 1984, will be sought pursuant to Section 901(a) of the Federal Aviation Act of 1958, as amended (49 U.S.C. App. §1471(a)) for the violations of Section 107.21 of the Federal Aviation Regulations (14 C.F.R. §107.21) which provides:

a. Except as provided in paragraph (b) of this section, no person may have a firearm, an explosive, or an incendiary device on or about the individual's person or accessible property:

(1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area; and

(2) When entering or in a sterile area.

b. The provisions of this section with respect to firearms do not apply to the following:

(1) Law enforcement officers required to carry a firearm by this part while on duty at the airport.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(2) Persons authorized to carry a firearm in accordance with §108.11 or §129.27.

(3) Persons authorized to carry a firearm in a sterile area under an approved security program or a security program used in accordance with §129.25.

For instances occurring after October 12, 1984, a civil penalty may also be sought pursuant to 49 U.S.C. App. §1471(c).

Explosive or incendiary devices, including containers of gasoline or similar flammable liquids, although subject to this regulation will in all cases be criminally prosecuted under 49 U.S.C. App. §1472(1). Additionally, those rare, unaggravated instances where an individual possesses a deadly or dangerous weapon while aboard an aircraft constitutes a violation of FAA regulation 14 C.F.R. §108.11(a). Any person violating either of these above mentioned regulations is subject to civil penalty not to exceed \$1,000 for such violation. However, for such incidents occurring after October 12, 1984, involving the possession of a deadly or dangerous weapon, civil penalty of up to \$10,000 is possible under 49 U.S.C. App. §1471(d).

A U.S. Attorney electing to seek such a civil penalty under FAA regulations should have the FBI (or other investigative agency detecting such a violation) refer the violation to the nearest FAA Civil Aviation Security Field Office (CASFO) for appropriate civil action. If a civil penalty is deemed appropriate by the FAA, the U.S. Attorney should provide whatever litigation assistance is necessary to enforce the civil penalty.

9-63.170 False Information and Threats (49 U.S.C. App. §1472(m))

9-63.171 Discussion of Former False Information Offense

The language of former 49 U.S.C. App. §1472(m) was substantially the same as that in 18 U.S.C. §35, the "bomb hoax" statute, except that it prohibited hoaxes concerning air piracy and related offenses. See the discussion of the "bomb hoax" statute in USAM 9-63.280, infra. The former misdemeanor provision, 49 U.S.C. App. §1472 (m)(1), prohibited the imparting of false information, knowing such information to be false, concerning an alleged violation of 49 U.S.C. App. §1472(i), (j), (k), or (l). The former felony provision, 49 U.S.C. App. §1472(m)(2), was identical to the misdemeanor provision except that the defendant must have

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

acted willfully and maliciously, or with reckless disregard for the safety of human life.

To constitute a violation under former 49 U.S.C. App. §1472(m), the false statement need not be a positive assertion and it need not be made to airport authorities. The provision covers pranksters as well as individuals acting out of malice. The false information, however, must pose a clear and present danger of interference with air commerce and safety. The provision is concerned not solely with preventing actual destruction or hijacking of the aircraft, but also with the disruption of air service and the jeopardy to the safety of aircraft passengers and personnel. See United States v. Irving, 509 F.2d 1325 (5th Cir. 1975). The question, "Is this the plane we are going to hijack?," made to third persons generally was prohibited by this section. See Taylor v. United States 358 F. Supp. 384 (S.D. Fla. 1973). It should also be noted that former 49 U.S.C. App. §1472(m) did not proscribe threats per se, although threats may constitute false information which would give rise to prosecution under this section. Nevertheless, extortion threats, whether or not they are within the proscriptions of former 49 U.S.C. App. §1472(m), may be violations of the Hobbs Act, 18 U.S.C. §1951, the Interstate Communications statute, 18 U.S.C. §875(b), (c), or (d), or the Mailing of Threatening Communications statute, 18 U.S.C. §§876-877.

9-63.172 Discussion of New False Information Offense

Effective October 12, 1984, the only false information offense in the Federal Aviation Act of 1958 is a felony (49 U.S.C. App. §1472(m)(1)). Subsection (m)(1) makes it a crime for anyone to:

[W]illfully and maliciously, or with reckless disregard for the safety of human life, imparts or conveys or cause to be imparted or conveyed false information, knowing the information to be false and under circumstances in which such information may reasonably be believed, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a felony prohibited by subsection (i), (j), (k), or (l) of this section....

While the language of new subsection 1472(m)(1) differs somewhat from that in former subsection 1472(m)(2), there is no material difference in their state of mind requirements. See 130 Cong. Rec. E 4568 (daily ed. Nov. 14, 1984).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.173 Prosecution Policy

As in violations of the weapons offense, 49 U.S.C. App. §1472(1), most violators of former 49 U.S.C. App. §1472(m)(1) had no prior criminal record and the circumstances surrounding the offense were often extenuating in nature. Violations usually occurred during the preboarding screening process by a passenger who had presented, or was about to present, his/her hand-carried luggage to the airline employee for inspection. The most frequent false statement was to the effect that there was a weapon in the bag to be inspected. Generally, the false statement was a poor attempt at humor, and was suspected to be such by the airline employee involved. Nevertheless, the individual making such a statement did not have a valid defense to a prosecution brought under the former section unless the statement was made under circumstances which rendered it inherently unbelievable to the recipient.

However, prosecutions under the former section could result in injustice to the defendants involved depending upon the circumstances of each case. Therefore, to achieve uniform application of former 49 U.S.C. App. §1472(m)(1), the following guidelines were to be considered in determining whether an offense was investigated and prosecuted:

A. Aggravated cases were to be fully investigated and prosecuted. Such aggravated cases include, but were not limited to, the following examples:

1. A hijacking hoax made by a person reporting the act attributable to another; and
2. False information not readily disclosed as such, resulting in delay of the flight or inconvenience to airport employees and passengers.

B. Offenses arising under former 49 U.S.C. App. §1472(m)(1) should not have been prosecuted in the following instances:

1. False statements made in the vicinity of the inspection point as a poor attempt at humor, and suspected to be such by the individual to whom the statement is directed;
2. Statements made by individuals who have good prior records under circumstances that are clearly extenuating in nature; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

3. Consistent with the considerations discussed above, cases in which the airlines do not deem the conduct of the individual to be of such seriousness as to warrant his/her removal from a flight or delay his/her travel schedule.

Effective October 12, 1984, there is no longer any misdemeanor offense for such incidents occurring on or after that date. In the absence of evidence warranting a felony prosecution for such incident, seeking an appropriate civil penalty should be considered.

9-63.174 Discussion of New Threat Offense (49 U.S.C. App. §1472(m)(2))

The Aircraft Sabotage Act created a new felony offense for anyone imparting or conveying or causing to be imparted or conveyed any threat to do an act which would be a felony prohibited by 49 U.S.C. App. §1472(i), (j), (k), or (l) with an apparent determination and will to carry the threat into execution. As with the new 18 U.S.C. §32(c) (see USAM 9-63.260, *infra*), the defendant must have exhibited an apparent determination and will to carry the threat into execution. New subsection (m)(2) does not specify the state of mind required for conviction of the offense. Since this offense is not merely regulatory, but rather *malum in se*, the generally applicable rule for criminal offenses, that a general *mens rea* is required, is applicable. See 130 Cong. Rec. E 4568 (daily ed. Nov. 14, 1984). See also H.R. Rep. No. 1396, accompanying H.R. 6915, the Criminal Code Revision Act of 1980, 96th Cong., 2d. Sess., at 31, 34-35 (1980).

New 49 U.S.C. App. §1472(m)(2) does not require any demand for a thing of value. If an extortive demand is made, there may be violations of the Hobbs Act, 18 U.S.C. §1951, the Interstate Communications statute, 18 U.S.C. §875(b), (c), or (d), or the Mailing of Threatening Communications statute, 18 U.S.C. §§876-877.

9-63.180 Aircraft Piracy Outside the Special Aircraft Jurisdiction of the United States (49 U.S.C. App. §1472(n))

The Antihijacking Act of 1974 (Pub. L. No. 93-366) in order to fully implement the Hague Convention, created a new provision (49 U.S.C. App. §1472(n)) whereby persons who commit acts of air piracy outside the special aircraft jurisdiction of the United States may be punished pursuant to 49 U.S.C. App. §1472(n) if they are subsequently found in the United States. The only limitation to this provision is that the place of take-off or actual landing of the aircraft on which the prohibited act was

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

committed must have been outside the territory of the state of registration of that aircraft. The effect of the limitation is to exclude prosecution in the United States of a hijacker who should more properly be prosecuted in the country of the aircraft's registration. Before indictments are returned alleging this offense, authorization shall be obtained from the Assistant Attorney General of the Criminal Division. Once an approved indictment is returned, any disposition thereof shall be governed by the same criteria as that for a 49 U.S.C. App. §1472(i) offense. See USAM 9-63.134, supra.

9-63.190 Search and Seizure

On January 5, 1973, the Federal Aviation Administrator ordered that inspections by metal detection devices or consent searches of all passengers, and searches of all carry-on baggage, be conducted as part of routine pre-boarding security measures at all airports. DOT Press Release No. 103-73, Dec. 5, 1972; FAA Telegram of Dec. 5, 1972. These inspections have been held proper under the Fourth Amendment by several United States Courts of Appeals.

This 100% passenger screening replaced an earlier system that used a profile to identify passengers for metal detector or consent frisk screening. Screening is done by airline employees or agents. The passenger is required to walk through a metal detector and his/her carry-on items are passed through an X-ray screening device. Law enforcement officers do not ordinarily participate until they are called upon to either provide expert assistance to the airline or, where a crime is suspected, to act in their official capacity. Under FAA approved procedures, when an airline is unable to identify the source of a metal detector alarm, the airline may choose to call upon the law enforcement officer to assist in searching a limited area of the passenger's person, identified by a hand-held metal detector, for the sole purpose of finding the source of the alarm. The airline may also choose to ask assistance in evaluating an unfamiliar object found during screening. In neither of these cases do the airline screening programs contemplate a full frisk by the law enforcement officer. He/she is not expected, however, to put aside his/her own professional judgment as to whether the total circumstances call for a lawful full frisk or a search incident to an arrest.

Whenever an airline agent or employee discovers a weapon, explosives, or incendiary device, the screening program requires that the airline notify the law enforcement officer on duty who is expected to take custody

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

of the item, and determine the proper law enforcement disposition of the matter.

Airline security programs also provide for implementation of extraordinary procedures when a heightened security threat is perceived. Such procedures were implemented in 1983 in certain high risk areas to combat the threat from nonmetallic weapons such as gasoline. They involve the identification of certain individuals by profile for a consent "pat down" of their person and a hand search of their carry-on items. This additional screening is done regardless of whether the metal detector is alarmed or a suspicious object is found on X-ray screening.

9-63.191 Metal Detectors--Consent

The Ninth Circuit in United States v. Davis, 482 F.2d 893 (9th Cir. 1973), held that searches by a metal detector alone of all passengers and carry-on baggage were a reasonable exception to the warrant requirements of the Fourth Amendment. In applying a series of Supreme Court cases relating to "administrative" searches, the court reasoned that such preboarding searches are part of a general regulatory scheme to deter aircraft hijacking, rather than as part of a criminal investigation to secure evidence of a crime, and that consent of the passenger to the search can be proved by the fact of clear warnings and announcements at airports that all passengers are subject to search prior to boarding the flight. To avoid the search, which must be not more intrusive than necessary to accomplish its goal, the passenger may elect simply not to board the airplane. Supporting the Davis case in dictum, United States v. Dalpiaz, 494 F.2d 374 (6th Cir. 1974), held that implied consent by passengers to boarding area searches is inferred from the wide-spread publicity of their existence and the passenger's right not to board an aircraft rather than submit to the inspection. Shortly after its decision in the Davis case, the Ninth Circuit decided that the presence of metal detectors at airports was sufficiently publicized through prominently posted signs or public announcements concerning the pre-flight screenings to support a finding of implied consent to the inspection by all passengers. See United States v. Doran, 482 F.2d 929 (9th Cir. 1973).

In United States v. Edwards, 498 F.2d 496 (2d Cir. 1974), the Second Circuit reached the same conclusion as to the constitutionality of the pre-boarding security search at airports as did the Davis and Doran decisions. However, the Edwards opinion held that the danger of possible hijackings alone made searches by metal detectors of passengers and carry-on baggage reasonable, provided that the inspection was made in good faith, was reasonable in scope, and the passenger was warned previously of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

his/her liability to search so that he/she could have avoided it by electing not to travel by air. The Edwards opinion noted that the prominently displayed sign reading "passengers and baggage subject to search" and loudspeaker warnings which announce the liability to search of passengers put the passenger on notice of the search.

While a number of court decisions do rely on a theory of consent or implied consent in upholding searches which have occurred in the screening process, at least one commentator argues that such an approach is basically unsound if established standards of voluntary consent are followed. See LaFave, W., Search and Seizure, a Treatise on the Fourth Amendment, (West Publishing Co., 1978), §10.6 Airport Searches. Without relying heavily on a consent theory, other cases have held that airport searches meet the test of reasonableness because of the great danger to human lives and property from hijacking, and the inherent exigent circumstances. See United States v. Moreno, 475 F.2d 44 (5th Cir. 1973).

David and later cases turned away from supporting airport screening searches with a stop-and-frisk analysis basis on Terry v. Ohio, 392 U.S. 1 (1968). Such an analysis was not pertinent to the 100% passenger screening which had replaced the previous system that used a hijacker profile to select passengers for further screening. However, a Terry analysis, such as that used in United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1071), may be useful again in view of a recent introduction of profile screening, in certain high risk areas, to combat the threat from nonmetallic weapons such as gasoline. A discussion of the Terry approach used in early cases may be found in LaFave, W., Search and Seizure, a Treatise on the Fourth Amendment (West Publishing Co., 1978), §10.6 Airport Searches.

9-63.192 Search is Governmental

Since a pre-boarding search of passengers and baggage is conducted pursuant to Federal Aviation Regulations, the search is governmental in nature under the Fourth Amendment, and it is irrelevant whether the search was performed by a private airline or airport authority or a public official. See United States v. Davis, *supra*, 482 F.2d at 904. Further, although the search must be limited in scope, the fact that an item is not metal does not mean that the item cannot be searched. See United States v. Edwards, *supra*, 498 F.2d at 501. (Sky marshal searched a box of tampons inside the beachbag of the accused to reveal heroin packets after metal detector alert was not satisfactorily explained by passenger.) See Accord, United States v. Albarado, 495 F.2d 799 (2d Cir. 1974).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.193 Frisking

The ability of a law enforcement officer to frisk suspicious persons even prior to the metal detector screening has been upheld as constitutional. See United States v. Moreno, 475 F.2d 44 (5th Cir. 1973). The scope and purpose of the police officer's frisk of the individual in these situations is to protect other passengers and flight crew by a deterrent measure designed to neutralize a threat before the suspicious person boards the airplane.

Since the advent of a 100% passenger screening in 1973, routine screening has been done by airline employees or agents, not by law enforcement officers. An airline employee may call upon the law enforcement officer to assist in identifying the source of a metal detector alarm by searching a limited area of the passenger's person or to evaluate an object found during screening. In such a case the officer is viewed as only giving expert advice; however, the officer may conduct a Terry frisk when "stop and frisk" criteria would make such a search appropriate. Whenever an airline agent or employee discovers a weapon, explosive, or incendiary device, he/she is required to notify the law enforcement officer on duty who will take custody of, and determine the proper law enforcement disposition of, the item. At this point circumstances may justify a Terry search or an appropriate search commensurate with an arrest.

9-63.194 Checked Baggage

Although the above cited cases avoid the issue of searches of checked baggage, an air carrier has the private right to control what it carries, and can randomly or systematically search checked baggage pursuant to the tariff agreement between the carrier and the person who ships the goods. See United States v. Issod, 508 F.2d 990 (9th Cir. 1974). Contraband or weapons so discovered by private searches are admissible in federal courts without regard to the Fourth Amendment where no "state action" initiated the search. See United States v. Ogden, 785 F.2d 536 (9th Cir. 1973). Thus, absent any federal regulation which requires the airline to search checked baggage, or any other search request by federal or state authorities which may constitute the air carrier an agent of the government, a weapon or other contraband discovered by private action is admissible notwithstanding Fourth Amendment requirements. See United States v. Ogden, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.195 Protection of Confidentiality of Security Procedures

It may be necessary for the Federal Aviation Administration to request a U.S. Attorney's office to intervene in a civil or criminal case on behalf of the FAA in order to obtain court protection of the confidentiality of the FAA's hijacker profile and certain aspects of airline security programs.

A civil or criminal suit in which discovery is sought of these aspects of the FAA's security program is a suit in which the United States has an interest under 28 U.S.C. §517. The purpose of intervention is to protect testimony and other material from unnecessary disclosure to the public. It has been the FAA's experience that cases involving the FAA program to combat air piracy attract more than the usual press coverage. Because the effectiveness of the hijacker profile and some aspects of airline security programs would be seriously compromised by publication, it is imperative that all documents and testimony containing information on FAA recommended or required security procedures, especially the elements of the hijacker profile, be kept under seal and not available for public viewing. It is also essential that all parties and their attorneys be ordered by the court not to reveal such information to any other person except the court in camera. The FAA is prepared to provide whatever testimony is necessary to establish the danger of disclosure of such information.

9-63.200 DESTRUCTION OF AIRCRAFT AND MOTOR VEHICLES AND RELATED OFFENSES  
(18 U.S.C. §§31-35)

9-63.210 Investigative Jurisdiction

The Federal Bureau of Investigation exercises investigative jurisdiction relative to incidents involving possible violations of Chapter 2 of Title 18, United States Code. Offenses included within this chapter are: (1) 18 U.S.C. §32 (Destruction of aircraft or aircraft facilities); (2) 18 U.S.C. §33 (Destruction of motor vehicles or motor vehicle facilities); and (3) 18 U.S.C. §35 (Imparting or conveying false information) (bomb hoax).

9-63.220 Supervising Section

General Litigation and Legal Advice Section.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.230 General

9-63.231 Definitions

The special definitions for Chapter 2 of Title 18, United States Code, are set forth in 18 U.S.C. §31. Section 31 incorporates by reference the definitions of "aircraft engine," "air navigation facility," "appliance," "civil aircraft," "foreign air commerce," "interstate air commerce," "landing area," "propeller," "special aircraft jurisdiction of the United States," and "spare part" as found in the Federal Aviation Act of 1958 (49 U.S.C. App. §1301). 18 U.S.C. §31 specifically defines "motor vehicle," "destructive substance," "used for commercial purposes," "in flight" and "in service." As amended by Part I of Chapter X of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473, October 12, 1984) the definition of "motor vehicle" has been expanded to include commercial trucks. "Motor vehicle" presently means "every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers and property, or property, or cargo."

9-63.232 Summary of Changes Made to 18 U.S.C. §32 by the Aircraft Sabotage Act

Part B of Chapter XX of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, October 12, 1984) contains the Aircraft Sabotage Act. The purpose of the Aircraft Sabotage Act was to implement fully the Convention for the Suppression of Unlawful Act Against the Safety of Civil Aviation (also known as the Montreal Convention). See Treaties and Other International Acts Series, No. 7570 (T.I.A.S. 7570); United States Treaties and Other International Agreements, Vol. 24, at 564 (24 U.S.T. 564). While the Aircraft Sabotage Act made several changes to provisions of the Federal Aviation Act of 1958 (see USAM 9-63.104, supra), the Act also made significant changes to 18 U.S.C. §32. These changes were effective on October 12, 1984, and consist of the following:

A. The first paragraph of 18 U.S.C. §32 was expanded to cover any aircraft in the special aircraft jurisdiction of the United States. The practical significance of this change is that the section (now designated as subsection (a)) now covers military and governmental aircraft. Formerly, it covered only "civil aircraft."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. The "with intent to damage" requirement of former paragraphs two and three of 18 U.S.C. §32 was changed to "likely to endanger the safety of any such aircraft."

C. The fifth paragraph of 18 U.S.C. §32 was expanded to cover an act of violence against any person on the aircraft if such act is likely to endanger the safety of such aircraft. The former paragraph covered only crew members.

D. Paragraph (6) of 18 U.S.C. §32(a) added a new offense of communicating false information which endangers the safety of an aircraft.

E. The maximum fine for any violation of subsection of 18 U.S.C. §32(a) was raised from \$10,000 to \$100,000. (The maximum term of imprisonment remains twenty years.)

F. New 18 U.S.C. §32(b) implemented the Convention obligation to prosecute an offender who destroys a foreign civil aircraft outside of the United States and who is subsequently found in the United States. (See paragraph 2, Article 5 of the Convention).

G. New subsection (c) made it an offense to threaten to commit a violation of subsections (a) or (b). The penalty is a fine up to \$25,000 and imprisonment for up to five years.

It should be noted that for all felony offenses occurring on or after January 1, 1985, the maximum possible fine has been increased to at least \$250,000. The maximum possible fine for any misdemeanor offense not resulting in death and punishable by imprisonment for more than six months has also been increased to at least \$100,000. See new 18 U.S.C. §3623 (Alternative fines) created by the Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, October 30, 1984.

The legislative history for the Aircraft Sabotage Act can be found at pages 13-18 of the Message from the President of the United States Transmitting Four Drafts of Proposed Legislation to Attack the Pressing and Urgent Problem of International Terrorism, H.R. Doc. No. 211, 98th Congress, 2d Sess.; in S. Rep. No. 619 on S. 2623, the Aircraft Sabotage Act, 98th Congress, 2d Sess.; and at 130 Cong. Rec. E 4567-E 4568 (daily ed. Nov. 14, 1984).

9-63.233 Death Penalty

In the judgment of the Criminal Division that portion of 18 U.S.C. §34 establishing a death penalty for a person convicted of a crime under

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Chapter 2 which resulted in the death of any person is inoperative as the provision does not contain sufficient procedures to pass constitutional requirements. (For a constitutional death penalty, see 49 U.S.C. App. §1473(c), USAM 9-63.133, supra.)

9-63.240 Destruction of Aircraft--18 U.S.C. §32(a)

Former section 32 of Title 18 of the United States Code made criminal certain acts of destruction of aircraft and aircraft facilities. The purpose of the new section 32(a) is the same. Those acts that cause destruction of aircraft and related facilities and parts, and thus endanger the safety of that aircraft, are made criminal.

New section 32(a) carries forward former law and, consistent with the requirements of the Montreal Convention, somewhat expands the kinds of acts it covers and the jurisdictional scope of former section 32. The state of mind necessary for conviction of an individual under section 32(a) remains the same. The defendant must perform the prohibited acts "willfully." The 1984 amendment made no change in the former law's interpretation of this term. "An act is done 'wilfully' if it is done voluntarily and intentionally...with the bad purpose to disobey or disregard the law." E. Devitt & C. Blackmar. Federal Jury Practice and Instructions §16.13 (2d ed. 1970). See generally An Analysis of the Term "Willful" in Federal Criminal Statutes, 51 Notre Dame Law. 786 (1976).

New subsection 32(a)(1) makes clear that jurisdiction over acts relating to the destruction of aircraft or aircraft facilities extends to "any aircraft in the special aircraft jurisdiction of the United States." The 1984 amendment expanded the reach of section 32 beyond the former law's jurisdictional base (i.e., "any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce"). "Special aircraft jurisdiction of the United States" is defined in section 101(38) of the Federal Aviation Act of 1958 (49 U.S.C. App. §1301(38)). The practical significance of this change is that subsection 32(a)(1) now covers military and governmental aircraft in flight. Formerly, it covered only "civil aircraft."

It is implicit in the kind of conduct prohibited by paragraph (1) of both former section 32 and new section 32(a)(1) that such acts are likely to endanger the safety of the aircraft. Thus, following the practice of the former law, new section 32(a)(1) does not state this requirement explicitly. However, the acts described in paragraph (1) can have no other result.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Because the acts prohibited by paragraphs (2) through (6), of new section 32(a) might have other results, the Congress believed it necessary to state explicitly that these paragraphs criminalize only that conduct that threatens the safety of the aircraft. Thus, paragraphs (2), (3), and (5) prohibit certain conduct that is "likely to endanger the safety of any such aircraft." Paragraph (4) requires that the defendant act "with the intent to damage, destroy, or disable" such aircraft. Paragraph (6), relating to the communication of false information, requires that the communication actually endanger the aircraft's safety.

The description of conduct proscribed by section 32 has, in some cases, been somewhat consolidated for the sake of clarity and brevity. But the kind of conduct covered--that which will threaten the safety of the aircraft--has not changed. For example, while the prohibition of any interference with the operation of an air navigation facility could be interpreted to prohibit work stoppages by unionized airline employees, new paragraph (3) covers only interference "by force or violence." The former type of conduct may not endanger the safety of the aircraft, while the latter would.

There are three other significant additions to the type of conduct prohibited by former section 32. First, paragraph (5) of former section 32 criminalized the willful incapacitation of any crew member of an aircraft. Paragraph (5) of new section 32(a) extends this coverage to acts of violence against or incapacitation of any individual on board the aircraft. Thus, both passengers and crew are protected.

Second, new section 32(a)(6) prohibits the communication of false information if the communication endangers the safety of the aircraft (e.g., forced to make an unscheduled landing). The defendant must know that the information is false. Consistent with current law, the communication must take place under circumstances which would lead a reasonable person to believe it. Cf. Watts v. United States, 394 U.S. 705, 707 (1969); United States v. Portillo, 431 F.2d 293 (4th Cir. 1970), aff'd en banc, 438 F.2d 13 (1971).

Third, new paragraph (7) of section 32(a) prohibits attempts to do any of the acts proscribed by paragraphs (1) through (6). Former law did not proscribe attempts. Of course, aiding or abetting any act proscribed by section 32(a) is prohibited by 18 U.S.C. §2. Solicitation to commit a violation of 18 U.S.C. §32(a) would be covered by new 18 U.S.C. §373, (Solicitation to commit a crime of violence).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Finally, it should be noted that the definition of "special aircraft jurisdiction of the United States" (49 U.S.C. App. §1301(38)) was amended to include any aircraft outside of the United States upon which an offense as defined in paragraphs (1)(d) (destroying or damaging air navigation facilities or interfering with their operation, if such act is likely to endanger the safety of aircraft in flight) or (e) (knowingly communicating false information thereby endangering the safety of an aircraft in flight) of Article 1 of the Montreal Convention was committed and the aircraft lands in the United States with the alleged offender still on board.

Consistent with the seriousness of the conduct prohibited by new section 2 (a), the penalty for a violation of that section is a \$100,000 fine, 20 years in prison, or both. Former section 32 authorized the imposition of the same term of imprisonment, but the authorized fine was only \$10,000. It should be noted that effective for offenses occurring on or after January 1, 1985, the maximum possible fine has been increased to at least \$250,000. See new 18 U.S.C. §3623 (Alternative fines).

9-63.250 Extraterritorial Destruction of a Non-United States Civil Aircraft--18 U.S.C. §32(b)

Subsection (b) of new section 32 implements paragraph 2 of Article 5 of the Montreal Convention which requires that each party establish jurisdiction over the offenses mentioned in Article 1, paragraphs (1)(a) (performing an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft), (b) (destroying an aircraft in service or causing damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight), or (c) (placing or causing to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight) in the case where the alleged offender is present in its territory and it does not extradite him/her. This extraterritorial jurisdiction of 18 U.S.C. §32(b) is comparable to that required by other recent international conventions (e.g., 49 U.S.C. App. §1472(n) (aircraft piracy outside special aircraft jurisdiction of the United States) and 18 U.S.C. §1116(c) (murder of internationally protected persons).

Ordinarily, the United States is reluctant to exercise its jurisdiction when all of the conduct comprising the offense was committed in another country, and the defendant entered the United States at a later point in time. In this case, however, the authorization of extraterritorial jurisdiction is appropriate because of the serious nature of the proscribed conduct and because the exercise of such jurisdiction is recognized under principles of international law and is required by the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Convention. The universality principle of international law permits the exercise of jurisdiction in this instance. Application of the universality principle depends on which nation has custody of the individual. The universality principle is generally accepted in the case of internationally recognized crimes. See Extraterritorial Jurisdiction--Criminal Law, 13 Harv. Int'l. L.J. 346-47, n.1 (1972). In this context, the Convention provides this international recognition.

As with subsection (a) of new section 32, the conduct proscribed by subsection (b) must be likely to endanger the aircraft's safety or to render it incapable of flight, and is punishable by a \$100,000 fine, 20 years in prison, or both. Beginning January 1, 1985, the maximum fine increased to at least \$250,000. See new 18 U.S.C. §3623 (Alternative fines).

9-63.251 Prosecutive Policy for 18 U.S.C. §32(b)

Before an indictment is returned alleging a violation of 18 U.S.C. §32(b), authorization shall be obtained from the Assistant Attorney General of the Criminal Division. This is consistent with the policy for 49 U.S.C. App. §1475(n). See USAM 9-63.190, *supra*.

9-63.260 Threats to Destroy Aircraft--18 U.S.C. §32(c)

Subsection (c) of new section 32 prohibits the willful imparting or conveying of threats to do any act which would violate paragraphs (1) through (5) of subsection (a) or paragraphs (1) through (3) of subsection (b). Consistent with current law, the threat must be issued "with an apparent determination and will to carry the threat into execution."

As with the offense of communicating false information, (see USAM 9-63.170, *supra*), if there is no reason to believe that the individual has the motivation or ability to carry out the threat, there is no reason to expend the resources of the federal government in criminally prosecuting such an individual. (See the discussion of new section 32(a)(6) in USAM 9-62.240, *supra*.) If, however, the threat is issued under circumstances where a reasonable person would believe that it would be carried out, the disruption of a flight or other action that would endanger the safety of the aircraft is likely. Such conduct should, therefore, be punished more severely. New subsection (c) thus authorizes the imposition of a \$25,000 fine, 5 years in prison or both. It should be noted that beginning January 1, 1985, the maximum fine increased to at least \$250,000. See new 18 U.S.C. §3623 (Alternative fines).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.270 Destruction of Motor Vehicles--18 U.S.C. §33

Section 33 makes it a federal crime willfully with intent to endanger the safety of any person on board or anyone he/she believes may be on board, to disable, destroy, tamper with, or place or cause to be placed any explosive or other destructive substance in, upon, or in proximity to any motor vehicle which is used, operated, or employed in interstate or foreign commerce, or its cargo or material used or intended to be used in connection with its operation. The motor vehicle must be one used for commercial purposes to transport persons and/or property on the highways. Prior to October 12, 1984, trucks carrying only cargo were not covered, but they now are. (See Part I of Chapter X of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, October 12, 1984.)

9-63.271 Prosecutive Policy for 18 U.S.C. §33

18 U.S.C. §33 is not intended to "federalize" every attack upon a commercial motor vehicle. Damaging a motor vehicle with the intent of injuring the driver or any passenger on board would violate a number of state laws. It is the intent of the Congress that state authorities continue to play the principal role in this area. See S. Rep. No. 225, at 324. Understandings should be reached with state and local authorities, through the Law Enforcement Coordinating Committees, reflecting the limited nature of the federal role. Questions concerning this statute should be directed to the General Litigation and Legal Advice Section (724-6971), except for questions concerning its application in labor-management disputes, which should be directed to the Labor-Management Unit of the Organized Crime and Racketeering Section (633-3666).

9-63.280 Imparting or Conveying False Information (Bomb Hoax)--18 U.S.C. §35

9-63.281 General

18 U.S.C. §35 provides civil and felony provisions for the conveyance of false information regarding attempts or alleged attempts to destroy, damage, or disable aircraft, aircraft related facilities, motor vehicles and their related facilities. The statute is frequently referred to as the "bomb hoax" statute. The statute contains a civil penalty provision, 18 U.S.C. §35(a), for nonmalicious false reports, and a felony provision, 18 U.S.C. §35(b), which prescribes maximum penalties of \$5,000 and five

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

years imprisonment for conveying or imparting of false information willfully and maliciously or with reckless disregard for the safety of human life. Statements which impart or convey false information regarding attempts to place or the placing of explosives aboard aircraft (but not in aircraft facilities such as airports) may also be punishable under 49 U.S.C. App. §1472(m)(1) which provides for a felony penalty and under 49 U.S.C. App. §1472(c) which provides for a civil penalty.

9-63.282 Civil Provision (18 U.S.C. §35(a))

The Department believes that civil penalties are an effective punishment for the disruption caused by pranksters and jesters who falsely report the presence of bombs or explosives aboard aircraft. Under 18 U.S.C. §35(a) willfulness need not be shown, and the penalty will be recoverable even if the false report was the result of a poor attempt at humor, irritation or fatigue. See United States v. Rutherford, 332 F.2d 444 (2d Cir. 1964), cert. denied, 377 U.S. 994 (1964); United States v. Sullivan, 329 F.2d 755 (2d Cir. 1964), cert. denied, 377 U.S. 1005 (1964).

The essence of the "impart or convey information" element will continue to be the impression created in the minds of those who hear the remark and observe the person making it. These impressions should be tested under the objective standard of what reasonable persons would conclude from the words actually spoken, and from the conduct and demeanor of the speaker. In general, the civil penalty should not be sought where the words amounted to an inquiry, conjecture or speculation, as distinguished from an affirmative imparting of information. Also, if an action is to be initiated, the statement should not be inherently unbelievable and the speaker's conduct and deportment should be consistent with his/her words. However, even if the speaker follows his/her false report with an immediate disclaimer of malevolent intent, he/she has aroused suspicion or doubt which, in the interest of the travelling public's safety, cannot be ignored. See H.R. Rep. No. 263, 89th Cong., 1 Sess., pp. 1-2 (1965). As a matter of practice the maximum penalty under the statute should be sought.

9-63.283 Venue

Under 28 U.S.C. §1355, the federal district courts have jurisdiction of actions for the recovery of any penalties incurred under acts of Congress, and a civil action for the recovery of a pecuniary penalty may, subject to the process provisions of Rule 4, Federal Rules of Civil Procedure, be brought either in the district in which it accrues or in the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

one in which the defendant is found. See 28 U.S.C. §1395(a). Since the Federal Rules of Civil Procedure govern actions brought pursuant to Pub. L. No. 89-64 (see Rules 1 and 81(a), Fed. R. Civ. P.; Rule 54(b)(5), Fed. R. Crim. P.; Reviser's Note, par. 4, under 28 U.S.C. §2462), U.S. Attorneys should insure that civil complaints and summonses instead of information and warrants of arrest are employed in these cases. See Rules 3 and 4, Fed. R. Civ. P.

28 U.S.C. §1395(a) provides that a civil action for the recovery of a pecuniary penalty may be brought either in the district in which it accrues or in the one in which the defendant is found. Despite the language of this provision, the cases indicate that the process limitations contained in Rule 4, Federal Rules of Civil Procedure, will govern the choice of forum in civil penalty "bomb hoax" cases just as in ordinary litigation. As the Supreme Court said in Georgia v. Pennsylvania R. Co., 324 U.S. 439, 467 (1944), "Apart from specific exceptions created by Congress the jurisdiction of the district courts is territorial." See Rule 4(f), Fed. R. Civ. P.; Ahrens v. Clark, 335 U.S. 188, 190 (1948); see also United States v. Congress Construction Co., 222 U.S. 199 (1911); Robertson v. Labor Board, 268 U.S. 619 (1924). Under rule 4(e), Federal Rules of Criminal Procedure, in certain instances state "long-arm" statutes might permit the commencement of a civil penalty suit in the district of the offense. However, since only a few states have enacted such statutes, the interest in uniformity requires that all civil penalty actions under 18 U.S.C. §35(a) be brought in the district in which the defendant resides. This policy comports with the general practice followed by other Divisions when enforcing civil sanctions.

9-63.284 Subpoenas in Civil Cases

Rule 45(e), Fed. R. Civ. P., provides in part:

At the request of any party subpoenas for attendance at a ... trial shall be issued by the clerk of the district court for the district in which the ... trial is held. A subpoena requiring the attendance of a witness at a ... trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the ... trial specified in the subpoena; and, when a statute of the United States provides therefor, the court, upon proper application and cause shown may authorize the service of a subpoena at any other place.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Inasmuch as no statute allows for special service of trial subpoenas in civil penalty "bomb hoax" cases, the takings and use of depositions will be necessary in many instances.

If the defendant shows an intention to contest the action, notices of deposition for witnesses residing beyond the limits of Rule 45(e)(1), Federal Rules of Criminal Procedure, should be mailed from the district where the action is filed. Reasonable notice in writing to every other party to the action should be given, see Rule (30a) Fed. R. Civ. P. When the defendant is apprised that he/she will at least have to employ counsel in one or more other districts in order to fully protect his/her interests, he/she may desire not to contest the action rather than assume the costs of a defense. While the taking of written interrogatories under Rule 31, Federal Rules of Criminal Procedure, might prove less expensive to the government, notifying the defendant of an intention to proceed by depositions will increase the likelihood that he/she will agree to a consent judgment.

If the defendant persists in his/her defense and one or more witnesses are reluctant to be deposed, their examination can be compelled in the following manner: The district court clerk in the district of the reluctant witness will issue a subpoena on the basis of proof that the witness has previously ignored the prior notice to take his/her deposition. The witness must allow his/her deposition to be taken in the county in which he/she resides, is employed or transacts business in person, or at another convenient place fixed by court order. A non-resident of the district must attend only in the county in which he/she is served with the subpoena, or within 40 miles from the place of service or at another convenient place fixed by court order. See Rule 45(d)(1)(2), Fed. R. Civ. P. The U.S. Attorney for the district in which the witness resides can be requested to apply for the issuance of a subpoena and to make arrangements for the taking of the deposition.

Under Rule 26(d)(3), Federal Rules of Civil Procedure, depositions may be introduced at civil penalty bomb hoax trials on a showing by the government that the deponent is more than 100 miles from the place of trial or out of the United States.

9-63.285 Compromise of Civil Penalty

Since there is doubt whether a civil penalty may be compromised in the absence of express statutory authority, and since no such authority exists with respect to the civil penalty prescribed by 18 U.S.C. §35(a),

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

consent judgments should be used for disposition of the case without trial.

9-63.286 Jury Trial in Civil Action

Defendants in civil actions under 18 U.S.C. §35(a) are entitled to trials by jury. See Hepner v. United States, 213 U.S. 103, 115 (1909) (dictum); Orenstein v. United States, 191 F.2d 184 (1st Cir. 1951). But where undisputed testimony in a civil penalty case shows the defendant committed the offense, the court may direct a verdict in the government's favor. See Hepner v. United States, *supra*, 213 U.S. at 105-15; *cf.* United States v. Grannis, 172 F.2d 507, 513 (4th Cir. 1949). The same rule will operate in behalf of the defendant where the testimony clearly absolves him/her of the charge. See Hepner v. United States, *supra*, at 112 (dictum). If the jury returns a verdict for the government, the judge will fix the amount of the penalty. See Missouri, K. & T. Ry. v. United States, 231 U.S. 112, 119-20 (1913) (penalty as "deterrent not compensation"). For a discussion of some constitutional considerations that may be involved in civil penalty cases, see Kennedy v. Mendoza-Martinez, 372 U.S. 144, 167-70 (1963).

9-63.300 ANTI-RIOT ACT [RESERVED]

9-63.400 OBSCENE OR HARASSING TELEPHONE CALLS (47 U.S.C. §223)

9-63.410 Description

47 U.S.C. §223 makes it a federal offense for any person, by means of telephone in the District of Columbia or in interstate or foreign communication, to:

- A. Make any obscene remark;
- B. Make an anonymous telephone call with intent to annoy, abuse, threaten, or harass;
- C. Make the telephone of another ring continuously or repeatedly, with intent to harass;
- D. Make repeated telephone calls, during which conversation ensues, with intent to harass; or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

E. Knowingly make any obscene or indecent communication for commercial purposes to any person under eighteen years of age or to any nonconsenting adult, regardless of whether the maker of such communication placed the call.

It is also a violation of 47 U.S.C. §223 for any person to knowingly permit his/her telephone to be used for any of these purposes.

9-63.420 Jurisdictional Requirement of the Statute

This section applies only to interstate or international telephone calls and to calls made within the District of Columbia. See United States v. Lampley, 573 F.2d 783 (3d Cir. 1978).

9-63.430 Investigative Jurisdiction

The FBI is the investigative agency with primary jurisdiction to investigate alleged violations of this statute.

9-63.440 Supervisory Jurisdiction

Supervisory jurisdiction for this statute is vested in the General Litigation and Legal Advice Section of the Criminal Division, FTS 724-6948.

9-63.450 Special Considerations

Past experience has indicated that approximately one-third of offending callers are mentally ill. U.S. Attorneys presented with cases involving such individuals should explore with defense counsel the possibility of voluntary submission to psychiatric treatment by the accused. If he/she does agree to undergo such treatment, a stern warning and declination of prosecution may be considered. Another third of all calls are juvenile pranksters. Cases involving juveniles may, in the discretion of U.S. Attorneys and in conformity with the Federal Juvenile Delinquency Act (see 18 U.S.C. §5031 et seq.), be appropriately handled under diversion programs. As a practical matter, almost all matters referred to the U.S. Attorneys involve repeated calls; therefore, it is recommended that when a violation of this statute is alleged, the defendant should be charged under 47 U.S.C. §223 1(d) rather than 47

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S.C. §223 1(a) (obscene phone calls), because of the substantial legal problems involved in obscenity prosecutions.

U.S. Attorneys can expect to receive occasional complaints from citizens who have received annoying and harassing telephone calls. If such a call is received it is suggested that:

A. The citizen be informed of the jurisdictional requirements of the statute;

B. The citizen be referred to the telephone company for possible verification of the calling number and notification of federal authorities by the telephone company if a violation of a federal law has occurred; and

C. The citizen be advised that the telephone company may protect him/her from receiving harassing calls either by changing the telephone number or by intercepting and identifying all persons attempting to call his/her present number.

9-63.460 Obscene Communications for Commercial Purposes

Paragraph (b) of 47 U.S.C. §223 makes it a crime to knowingly make by means of an interstate, international, or District of Columbia telephone call, any obscene or indecent communication to any person under eighteen years of age, or to any nonconsenting adult, regardless of who placed the call. This provision was added to 47 U.S.C. §223 by Pub. L. No. 92-214, which was enacted on December 8, 1983. 47 U.S.C. §223(b), which also creates civil and injunctive remedies that may be used against such communications, was intended to provide effective remedies against, inter alia, the "Dial-A-Porn" services, by which a person can make a telephone call and receive a recorded obscene message.

Subparagraph (2) of 47 U.S.C. §223(b) provides that it is a defense to prosecution that the defendant restricted access to the prohibited communications to persons eighteen years of age or older in accordance with procedures the Federal Communications Commission shall proscribe by regulation. The Department has concluded that 47 U.S.C. §223(b) cannot be enforced until such regulations are adopted by the Commission. See USAM 9-75.090--9-75.091, which require consultation with the General Litigation and Legal Advice Section prior to initiating action under 47 U.S.C. §223 for obscene telephone calls.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.470 Right to Jury Trial

The December 8, 1983, amendment to 47 U.S.C. §223 raised the maximum fine upon conviction from \$500 to \$50,000. As a result, the offense defined by 47 U.S.C. §223 is now a misdemeanor, whereas it was formerly a petty offense. See 18 U.S.C. §1. Consequently, a defendant charged with violating 47 U.S.C. §223, may be entitled to a jury trial unless it is stipulated that upon conviction the defendant's sentence will not exceed six months' imprisonment, or a fine of \$500, or both.

9-63.480 Threatening or Extortionate Telephone Calls

If an interstate telephone communication includes a demand for ransom for release of a kidnapped person, or a threat to kidnap any person or to injure any person, property, or the reputation of any person, the caller may be charged with a felony under 18 U.S.C. §875. See USAM 9-60.300.

9-63.490 Bomb Threats

If a telephone communication contains a threat or a malicious conveyance of false information concerning an alleged or actual attempt to injure any person or property by means of an explosive, the caller may be charged with a felony under 18 U.S.C. §844. See USAM 9-63.900, infra.

9-63.500 FIREARMS CONTROL: THE 1968 ACTS (18 U.S.C. §§921-928; 18 U.S.C. App. §§1201-1203; 26 U.S.C. §§5801-5872)

9-63.501 Introduction

In 1968 Congress enacted three separate and distinct firearms statutes. These three statutes govern the possession, transfer and manufacture of various types of firearms and destructive devices. The first firearms statute is Title I and is codified at 18 U.S.C. §§921-928. The second firearms statute is Title II and is codified at 26 U.S.C. §§5801-5872. The third firearms statute is Title VII of the Omnibus Crime Control and Safe Streets Act of 1968; Title VII is codified at 18 U.S.C. App. §§1201-1203.

Title I replaces part of the old Federal Firearms Act. Title I deals primarily with the transfer and transportation of virtually all firearms and destructive devices, and with the licensing of importers, manufacturers, dealers and collectors of firearms and destructive devices.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Title II completely revises part of the old Federal Firearms Act in accordance with the problems raised by the Supreme Courts' decision in Haynes v. United States, 390 U.S. 85 (1968). Title II creates a tax and registration scheme for so-called "gangster" type weapons and destructive devices. Unlike Title I, Title II does not include within its coverage most handguns, rifles and shotguns.

Title VII makes unlawful the receipt, possession or transportation, in commerce, of firearms and destructive devices by specific categories of persons. Congress has determined that the categories of persons specified in this statute should not be allowed to possess firearms because the possession of firearms by these persons constitutes a burden on interstate and foreign commerce impeding enforcement of federal law.

There is considerable overlap in the three firearms statutes. Given the complexity inherent in administering these overlapping statute, USAM 9-63.500 et seq., will succinctly describe the statutes, will indicate the recurring problems which arise in their enforcement, and will set forth the Criminal Division's policy regarding prosecutions under them.

9-63.510 Title I (18 U.S.C. §§921-928)

Title I revises and expands the licensing requirements for those engaged in the firearms business, requirements first established in the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

old Federal Firearms Act. 18 U.S.C. §923(a) requires all persons "engag[ing] in business as a firearms or ammunition importer, manufacturer or dealer" to secure a license from the Secretary of the Treasury. The Secretary of the Treasury has delegated to the Bureau of Alcohol, Tobacco and Firearms enforcement responsibility for Title I. The licensing requirements of Title I differ significantly from the licensing requirements of the old Federal Firearms Act, which only covered those businesses which shipped or received firearms in interstate or foreign commerce. In contradistinction, the scope of 18 U.S.C. §923(a) extends to all who "engage in business." The licensing provisions of 18 U.S.C. §923(a) apply with equal force to both interstate and intrastate businesses.

18 U.S.C. §923(b) creates a new license classification for collectors who acquire, hold or dispose of firearms or ammunition as curios or relics. This classification was created to clarify an ambiguity in the old Federal Firearms Act as to whether activities of this nature required hobbyists to become licensed dealers.

Except for certain limited exceptions (see USAM 9-63.511, *infra*), Title I prohibits all commercial transactions or shipments of firearms and ammunition in interstate or foreign commerce between persons who are not federal licensees. Title I forbids licensed dealers, manufacturers, importers or collectors to sell, deliver or transport firearms or ammunition to unlicensed persons residing in states other than those in which they conduct their businesses. See 18 U.S.C. §§922(a)(3) and (a)(5).

Title I also prohibits a federal licensee from shipping or transporting firearms or ammunition to anyone other than a fellow licensee. See 18 U.S.C. §922(a)(2). 18 U.S.C. §922(a)(2) prohibits the interstate mail order shipments of firearms or ammunition. Exceptions arise only when a licensee has repaired or replaced a damaged weapon, or where a weapon has been sent to an individual authorized to receive one through the mail pursuant to the "mailability" provisions of 18 U.S.C. §1715.

#### 9-63.511 Exceptions

The most significant exception to the prohibitions of Title I is the so-called "contiguous state" exception. This exception authorizes a licensee to sell a firearm to an unlicensed purchaser who is a resident of a state contiguous to the state in which the licensee's business is located. See 18 U.S.C. §922(b)(3)(A). It is important to note, however,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

that the exception is applicable only "if the purchaser's state of residence permits such sale or delivery by law." The Bureau of Alcohol, Tobacco and Firearms has interpreted this language to mean that the purchaser's state of residence must have enacted specific enabling legislation before such sales may be consummated legally. See 26 C.F.R. §198.96. Other exceptions are afforded to "out of state" transfers where the firearm is acquired through bequest or intestate succession (see 18 U.S.C. §922(a)(3)(A)); where the firearm is loaned or rented temporarily for sporting purposes (see §922(b)(3)(A)); or where a non-resident engaged in sport shooting purchases a firearm to replace a lost, stolen or inoperative weapon (see 18 U.S.C. §922(b)(3)(C)).

9-63.512 Sales to Certain Purchasers

Title I places a number of regulatory controls upon firearms transactions involving certain purchasers. A federal licensee is prohibited from selling or delivering weapons or ammunition to an individual who he/she knows or has reasonable cause to believe is less than eighteen years of age. See 18 U.S.C. §922(b)(1). In addition, no weapon other than a rifle or a shotgun may be sold to an individual under the age of twenty-one. See 18 U.S.C. §922(b)(1). Title I places an absolute prohibition upon the sale of firearms or ammunition by a licensee when the licensee knows, or has reasonable cause to believe that the purchaser is a convicted felon, is under indictment for a felony, is a fugitive from justice, is a narcotics addict or user, or is a person who has been adjudicated mentally defective or who has been committed to a mental institution. See 18 U.S.C. §922(d). Moreover, Title I prohibits a licensee from selling firearms or ammunition unless he/she has reason to believe that the purchase or possession of the articles sold is in conformity with state or local law at the place of sale or delivery. See 18 U.S.C. §922(b)(2).

9-63.513 Recordkeeping

Title I subjects licensees to rigorous recordkeeping requirements with respect to the importation, production, receipt or disposition of weapons or ammunition in a licensee's inventory. The Secretary of the Treasury has broad authority to enter a licensee's business premises during normal business hours in order to inspect or examine records or inventory. See 18 U.S.C. §923(g). Title I makes it a crime for a licensee "knowingly to make any false entry in, to fail to make appropriate entry in, or to fail to properly maintain any record which he/she is required to keep pursuant to [18 U.S.C. §923] or regulations

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

promulgated thereunder." See 18 U.S.C. §922(m). All information contained in a licensee's records concerning a purchaser's identity is available to local authorities on request to the Department of the Treasury. Since Title I does not place the purchaser under any compulsion to provide a licensee with such information, disclosure of the information does not give rise to a valid claim of privilege by the purchaser should such information be used against him/her in a subsequent criminal proceeding.

Title I places further restrictions on sales which are not consummated at the licensee's place of business. See 18 U.S.C. §922(c). 18 U.S.C. §922(c) is directed at intrastate mail order and freight sales--sales not covered by 18 U.S.C. §922(a)(1)--and at "contiguous state" transactions. See 18 U.S.C. §922(b)(3)(A). With respect to these transactions 18 U.S.C. §922(c) provides that a licensee may transfer weapons or ammunition only if the following conditions have been met: first, that the transferee has executed a sworn affidavit which states that he/she is not prohibited by federal or state law from receiving or possessing a weapon; second, that the transferor has given notice of the contemplated sale to the chief law enforcement officer of the transferee's place of residence; and third, that the transferor has delayed shipment or delivery for at least seven days following the law enforcement official's receipt of the required notice. 18 U.S.C. §922(c) also requires the licensee to retain copies of these documents as part of his/her permanent records.

9-63.514 Transportation of Firearms

Title I does more than simply regulate commercial transactions in firearms and ammunition; it also establishes restrictions and controls on the transportation of firearms or ammunition in interstate or foreign commerce. 18 U.S.C. §§922(g) and (h) make it unlawful for convicted felons, persons indicted on felony charges, fugitives from justice, drug addicts and users, and persons who have been adjudicated as mental defectives or who have been committed to a mental institution to ship, transport, or receive firearms or ammunition in interstate or foreign commerce. In Barrett v. United States, 423 U.S. 212 (1976), the Supreme Court held that 18 U.S.C. §922(h), which, inter alia, makes it unlawful for a convicted felon "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce", applied to a convicted felon's intrastate purchase of a firearm that previously, but independently of the convicted felon's receipt, had been transported in interstate commerce. In Barrett, the firearm had been shipped from the manufacturer to a distributor, who then shipped it to a licensee. Thus, Barrett stands for the proposition that the government is not required to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prove that the defendant participated in any interstate activity involving a firearm either before or after its purchase.

The only intent necessary for a violation of section 922 is the intent to accomplish the act of transportation across a state line while unlawfully in possession of a firearm, or the intent to unlawfully receive a firearm which has been transported across state lines. See, e.g., Lambert v. United States, 600 F.2d 476 (5th Cir. 1979); United States v. Haddad, 558 F.2d 968 (9th Cir. 1977); United States v. Butler, 541 F.2d 730 (8th Cir. 1976).

Subsection (i) of 18 U.S.C. §922 makes it unlawful for any person to transport or ship firearms or ammunition in interstate or foreign commerce, knowing or having reasonable cause to believe that the firearms or ammunition have been stolen. Subsection (j) of 18 U.S.C. §922 makes it unlawful for any person to receive or dispose of any stolen firearm or ammunition which is moving in or which is part of interstate or foreign commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen. Subsection (k) of 18 U.S.C. §922 makes it unlawful to transport, ship or receive a firearm which has had its serial number removed, obliterated or altered. It should be pointed out that 18 U.S.C. §923(i) requires all licensed importers and manufacturers to identify each weapon imported or manufactured by means of a serial number engraved or cast into the receiver or frame.

Title I restrictions on the transportation of firearms or ammunition also encompass such shipments in interstate or foreign commerce through a common or contract carrier. Subsection (e) of 18 U.S.C. §922 requires the person shipping firearms or ammunition in interstate or foreign commerce to serve written notice on the carrier. It should be noted that the Ninth Circuit in United States v. Flores, No. 82-1445, slip op. (9th Cir., May 3, 1983) (amended opinion filed by panel on October 24, 1983) reversed a conviction for violation of 18 U.S.C. §922(e) holding that compliance with 18 U.S.C. §922(e) violated the defendant's Fifth Amendment privilege against self-incrimination. A petition for rehearing en banc is pending. In United States v. Wilson, No. 83-5002, slip op. (4th Cir., Nov. 4, 1983) the Fourth Circuit affirmed the defendant's conviction, explicitly rejecting the Ninth Circuit's interpretation of 18 U.S.C. §922(e) in Flores. In Wilson the Fourth Circuit held that the notice provision of 18 U.S.C. §922(e) does not raise a specter of a substantial hazard of self-incrimination for two reasons: first, because the common carrier is the only party required to be given notice; and second, because the carrier may simply refuse to transport the firearms or ammunition brought to it for shipment. While subsection (f) of 18 U.S.C. §922 makes it unlawful for a carrier to transport or deliver firearms or ammunition with

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

knowledge or cause to believe that the shipment or receipt thereof violates Title I, 18 U.S.C. §922(f) does not place the carrier under any legal obligation to inform the government that a particular shipment violates Title I.

It should be noted that Title I imposes special restrictions upon the limited class of weapons, "gangster-type weapons", primarily regulated by Title II (26 U.S.C. §§5801-5872). See USAM 9-63.520-9-63.525, *infra*, which discusses Title II. All sales or deliveries of Title II weapons, including transfers to licensees, must be specifically authorized by the Secretary of the Treasury. See 18 U.S.C. §922(b)(4). Also authorization must be obtained before an unlicensed person may transport a Title II weapon in interstate or foreign commerce. See 18 U.S.C. §922(a)(4).

9-63.515 Military Exemptions and Relief from Disabilities

18 U.S.C. §925 affords limited exemptions from Title I for firearms or ammunition delivered to certain persons and groups pursuant to 10 U.S.C. §4308, and to firearms transactions by members of the armed forces outside the United States. See 18 U.S.C. §925(a). Also, upon application, the Secretary of the Treasury may relieve an individual from all disabilities imposed under the federal firearms statutes as a result of a conviction for a crime punishable by imprisonment for more than one year, unless the crime involved a violation of the federal firearms statute, where it is established that the applicant is unlikely to act in a manner dangerous to the public safety. See 18 U.S.C. §925(c).

9-63.516 Importation Provisions

Title I places comprehensive restrictions on the importation of firearms and ammunition. See 18 U.S.C. §925(d). The words "firearm" and "ammunition" are broadly defined. See 18 U.S.C. §§921(3) and (17). Title I imposes a complete embargo upon firearms or ammunition which do not fall within one of the four categories specified in 18 U.S.C. §925(d). This provision states that the Secretary of the Treasury may authorize importation if the person seeking permission to import establishes that the firearm or ammunition:

- (1) is being imported for scientific or research purposes, or is for use in connection with military competition, or training pursuant to chapter 401 of title 10;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- (2) is an unserviceable firearm other than a machine-gun as defined in [26 U.S.C. §5845(b)] (not readily restorable to firing condition) imported or brought in as a curio or museum piece;
- (3) is a type that does not fall within the definition of a firearm as defined in [26 U.S.C. §5845(a)] and is generally recognized as particularly suitable for, or readily adaptable to sporting purposes, excluding surplus military firearms; or
- (4) was previously taken out of the United States or a possession by the person who is bringing in the firearm or ammunition.

It should be noted that 18 U.S.C. §925(d) states that "[t]he Secretary may . . . permit the conditional importation or bringing in of a firearm or ammunition for examination and testing in connection with the making of a determination as to whether the importation or bringing in of such firearm or ammunition will be allowed under this subsection." It is important to note that 18 U.S.C. §925(d)(3) specifically prohibits the importation of all surplus military firearms.

Title I also makes it unlawful for any person knowingly to import or to bring into the United States any firearm or ammunition except as provided in 18 U.S.C. §925(d). See 18 U.S.C. §922(1). In addition, 18 U.S.C. §922(1) prohibits the knowing receipt of any firearm or ammunition which has been unlawfully imported. As to both these proscriptions, scienter is required.

#### 9-63.517 Penalties

18 U.S.C. §924(a) imposes a maximum penalty of five years imprisonment, or \$5,000 fine, or both, for violation of any provision of Title I, or for making a false statement or representation with respect to information required to be kept in the records of licensees, or in connection with an application for any license or exemption. See USAM 9-63.519, *infra*, which discusses United States v. Batchelder, 442 U.S. 114 (1979).

Title I creates new penalties where firearms are used in the commission of a crime. See 18 U.S.C. §§924(b) and (c). 18 U.S.C. §924(b) makes unlawful the shipment, transportation or receipt of firearms or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

ammunition in interstate or foreign commerce with the intent to use one or the other in the commission of a federal or state offense punishable by imprisonment for a term exceeding one year, or with knowledge or cause to believe that the firearms or ammunition will be used in an unlawful manner. Violation of 18 U.S.C. §924(b) subjects a person to a maximum penalty of ten years imprisonment, or \$10,000 fine, or both. 18 U.S.C. §924(c) makes unlawful the use of a firearm during the commission of a felony prosecutable in federal court, or the carrying of a firearm during the perpetration of such an offense. Violation of 18 U.S.C. §924(c) subjects a person to a sentence of from one to ten years imprisonment for the first offense, and to a sentence of from five to twenty-five years imprisonment for a subsequent offense. In the case of a subsequent conviction, the court is precluded from suspending sentence or giving a probationary sentence.

9-63.518 The Supreme Court's Analysis of the Enhanced Penalty Provision of Title I

In Simpson v. United States, 435 U.S. 6 (1978), the Supreme Court examined the relationship between the enhanced penalty provision of the federal bank robbery statute (18 U.S.C. §2113(d)), and the enhanced penalty provision of Title I (18 U.S.C. §924(c)). The Supreme Court held that when Congress enacted the enhanced penalty provision of Title I it did not intend to authorize the imposition of an additional penalty for the commission of a bank robbery with a firearm, since bank robbery with a firearm already is subject to enhanced punishment under the bank robbery statute.

In Busic v. United States, 446 U.S. 398 (1980), the Supreme Court considered the relationship between a statute prohibiting assaults on federal officers (18 U.S.C. §111) and the enhanced penalty provision of Title I (18 U.S.C. §922(c)). The Supreme Court held that Title I's enhanced penalty provision could not be applied to a defendant who used a firearm in the course of a felony proscribed by a statute which itself authorizes enhancement if a dangerous weapon is used. Because the statute prohibiting assaults on federal officers authorized enhancement, the defendant could only be sentenced pursuant to the enhanced penalty provision of the federal assault statute and not the enhanced penalty provision of Title I.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.519 The Supreme Court's Analysis of the Relationship Between the Sentencing Provision of Title I and the Sentencing Provision of Title VII

In United States v. Batchelder, 442 U.S. 114 (1979), the Supreme Court held that a defendant convicted of violating Title I is properly sentenced under Title I even though the defendant's conduct also violates Title VII (18 U.S.C. App. §§1201-1203). In Batchelder the defendant was convicted of violating 18 U.S.C. §922(h), which prohibits a previously convicted felon from receiving a firearm that has travelled in interstate commerce. Pursuant to 18 U.S.C. §922(a), Batchelder was sentenced to five years imprisonment. In the Supreme Court Batchelder contended that because the substantive elements of 18 U.S.C. §922(h) (Title I) and 18 U.S.C. App. §1202(a) (Title VII) were identical as applied to a convicted felon who unlawfully received a firearm, he/she could be sentenced to no more than the two year maximum sentence provided by 18 U.S.C. App. §1202(a) (Title VII). In rejecting Batchelder's contention the Supreme Court noted that Titles I and VII each had its own sentencing provision, each of which operated independently of the other. Each title, said the Court, unambiguously specified the penalties available to enforce its substantive proscriptions, and that Congress, in enacting Titles I and VII, enacted two independent firearms statutes, each fully enforceable on its own terms. That Title VII provided a different penalty than Title I for essentially the same conduct, said the Court, is no justification for taking liberties with unequivocal statutory language.

9-63.520 Title II (26 U.S.C. §§5801-5872)

Title II deals with a relatively limited class of weapons, often referred to as "gangster-type" weapons. Title II coverage extends to machine guns, sawed-off and short-barreled shotguns and rifles, mufflers, silencers, machine gun frames and receivers, combinations of machine gun parts, smooth-bore pistols and revolvers capable of firing shotgun shells, concealable weapons such as tear gas guns or "zip" guns designed to fire a projectile, and certain weapons with combination shotgun and rifle barrels. See 26 U.S.C. §§5845(a),(b),(c),(d), and (e). In addition, Title II includes within its coverage "destructive device[s]," which the title broadly defines as explosives, incendiary or poisonous gas bombs, grenades, rockets with a propellant charge of at least four ounces, missiles having an explosive or incendiary charge in excess of one quarter ounce, mines and similar devices--molotov cocktails and other "homemade" incendiary or explosive devices--weapons with a bore of at least one-half inch such as mortars, antitank guns and artillery pieces, and any combination of parts either designed or intended for use in converting a device into one of the foregoing weapons. See 26 U.S.C. §5845(f).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Title II exempts from coverage antique firearms and devices which are primarily collector's items and which are unlikely to be used as weapons. The statute also exempts devices which are neither designed nor redesigned for use as weapons, and any devices which the Secretary of the Treasury finds are not likely to be used as weapons, or are antiques or are rifles which the owners intend to use solely for sporting purposes. See 26 U.S.C. §§5845(a) and (f).

9-63.521 Businesses Regulated

Title II imposes a series of restrictions upon those businesses which deal in "gangster type" weapons, weapons listed in the previous section of this Manual. Title II imposes a special occupational tax on importers, manufacturers and dealers in firearms. See 26 U.S.C. §5801. Title II broadly defines "importers," "manufacturers" and "dealers." See 26 U.S.C. §§5845(k), (l) and (m). All businesses or enterprises dealing in "gangster-type" weapons must register in each internal revenue district in which they conduct business, and must obtain approval from the Secretary of the Treasury prior to commencing business operations at a new location or under a new trade name. See 26 U.S.C. §5861(a). This requirement is in addition to the licensing requirements contained in Title I.

Title II requires importers, manufacturers, and dealers to maintain careful business records concerning the manufacture, receipt and disposition of all firearms that come within their purview. See 26 U.S.C. §5843. Falsification of these business records, or any other documents required by Title II, is prohibited. See 26 U.S.C. §5861. Any falsification of records or documents should be prosecuted under this provision, rather than under 18 U.S.C. §1001 (false statements statute), given the stringent penalties provided by Title II. See USAM 9-63.525, infra.

9-63.522 Importation and Transfer Restrictions

Title II generally prohibits the importation of "gangster-type" weapons. See 26 U.S.C. §5844. These types of weapons may be brought into the United States only if one of the following conditions is met: that the weapons will be used by a federal or state agency, or that the weapons will be used for scientific or research purposes, or will be used for testing by a licensed manufacturer, or will be used as a sample by a registered importer or dealer. See 26 U.S.C. §5844. Title II makes it unlawful for any person to receive or possess a firearm which has been imported in violation of 26 U.S.C. §5844. See 26 U.S.C. §5861(k).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Title II imposes a tax on the transfer of a firearm. See 26 U.S.C. §5811(a). This levy is imposed upon transfers or dispositions of every nature, and is payable by the transferor. See 26 U.S.C. §5811(b). The term "transfer" is defined to include "selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of." See 26 U.S.C. §5845(j). Title II makes it incumbent upon the transferor to file an application, receive the Secretary of the Treasury's approval and pay the applicable tax prior to executing the transfer. See 26 U.S.C. §5812. An application will be denied if the transfer, receipt or possession of the firearm would constitute a violation of any law. See 26 U.S.C. §5812. 26 U.S.C. §§5861(b) and (e) makes it unlawful for any person to transfer a firearm in violation of Title II, or to receive or possess a firearm so transferred. It should be noted that Title I (18 U.S.C. §922) also is applicable to many transfers of Title II weapons.

9-63.523 Manufacture

Title II imposes a tax upon the "making" of a firearm, and requires the Secretary of the Treasury's ratification of an application and the payment of the tax as a condition precedent to the lawful production of a firearm. See 26 U.S.C. §§5821 and 5822. Persons "making" firearms for the use of the federal government, and manufacturers who have paid the special occupational tax are exempt from the payment of this tax. See 26 U.S.C. §5852(b). Production of a firearm in violation of the making provisions, or receipt or possession of an unlawfully made firearm is unlawful. See 26 U.S.C. §§5861(c) and (f). 26 U.S.C. §5861 requires that each firearm manufactured, made or imported be marked for identification in a manner prescribed by regulation; this section also proscribes the obliteration or alteration of the identification marking on a firearm, or the receipt or possession of a firearm which has been so altered or which has no serial number at all.

9-63.524 Registration

Title II establishes a central registry for "gangster-type" weapons. The title restructures the registration procedures in light of the Supreme Court's decision in Haynes v. United States, 390 U.S. 85 (1968), a decision striking down as violative of the Fifth Amendment's self-incrimination clause the registration procedure of Title II's predecessor. Cf. United States v. Freed, 401 U.S. 601 (1971) (registration procedures of Title II do not violate Fifth Amendment's self-incrimination clause). The registry is maintained by the Department of the Treasury and includes information about each registered firearm and the identity of its owner.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Title II imposes upon every manufacturer, importer or maker of firearms a legal obligation to register each and every weapon produced or imported. See 26 U.S.C. §5841. 26 U.S.C. §5841 also provides that each firearm transferred must be registered by the transferor, and each firearm transferred must be registered to the transferee by the transferor; in addition this section provides that when a manufacturer produces a firearm and notifies the Secretary of the Treasury of the firearm's production, such notice constitutes registration. Title II also makes it unlawful for any person to receive or possess a firearm which is not registered to him/her, or to transport, deliver or receive an unregistered firearm in commerce. See 26 U.S.C. §5861.

Unlike its predecessor, Title II mandates the registration of every weapon within its coverage, despite the owner's compliance with Title II's "making," transfer or importation provisions. Thus, Title II's registration requirements--unlike the registration requirements of its predecessor which were struck down in Haynes v. United States, supra--are not directed at persons inherently suspected of violating the statute. By specifically providing that registration information may not be directly or indirectly used against a registrant in a criminal proceeding for an offense occurring prior to, or concurrent with, his/her registration (see 26 U.S.C. §5848), Title II surmounts the constitutional disabilities of its predecessor. See United States v. Freed, supra. Because Title II was specifically drafted to protect a registrant from subjecting himself/herself to criminal prosecution by his/her act of registration, it follows that registration information cannot be used in a federal or state prosecution for illegal acquisition of a registered firearm, in a federal or state prosecution for a past crime involving the use of a registered firearm, or in a federal or state prosecution for previous, or concurrent, illegal possession of a registered firearm. See 26 U.S.C. §5848. It should be noted that 26 U.S.C. §5848 does not provide immunity from prosecution for Title II violations if independent evidence of the offense is discovered. Furthermore, this provision does not preclude the use of any such information or evidence in prosecution for furnishing false information.

9-63.525 Penalties

The maximum penalty for a violation of Title II is ten years imprisonment, a \$10,000 fine or both. See 26 U.S.C. §5871. In addition, 26 U.S.C. §5871 mandates the seizure and forfeiture of all firearms involved in violations of Title II. See USAM 9-63.731, infra, for a discussion of forfeiture policy.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.530 Title VII (18 U.S.C. App §§1201-1203)

Despite the fact that Title VII was a last minute amendment to the Omnibus Crime Control and Safe Streets Act of 1968, an amendment which was hastily passed with little discussion, no legislative hearings and no committee reports (see Bass v. United States, 404 U.S. 336 (1971)), the fact remains that its coverage is sweeping.

9-63.531 Persons Covered

Title VII (18 U.S.C. §1202(a)) makes it unlawful for any person in any of the following five categories to receive, possess or transport, in interstate or foreign commerce, any firearm or destructive device: first, persons who have been convicted of a felony in any federal court, or court of any state or political subdivision thereof; second, persons who have been discharged under dishonorable conditions, that is, pursuant to a general court martial; third, persons who have been adjudicated mentally incompetent by a federal court or court of any state or political subdivision thereof; fourth, persons who, having been citizens of the United States, have renounced that citizenship; and fifth, persons who, being aliens, are illegally in the United States.

Title VII exempts from its coverage two categories of persons: first, prisoners who, by reason of duties connected with law enforcement policy, have been expressly entrusted with a firearm by competent authority of the prison; second, persons who have been pardoned by the President of the United States, or by the chief executive of a state, and, who have been expressly authorized by either the President, or the chief executive officer, to receive, possess or transport a firearm in interstate or foreign commerce. See 18 U.S.C. §1203.

It should be noted that the definition of firearm in Title VII is essentially the same as the definition of firearm in Title I. The definition of firearm in Title VII is not limited to "gangster-type" weapons covered by Title II, for the definition includes handguns, shotguns and rifles.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.532 Offenses

A violation of Title VII occurs whenever a person belonging to one of the five proscribed categories knowingly receives or possesses a firearm, or knowingly transports a firearm in interstate or foreign commerce. No other intent is necessary. See United States v. Locke, 542 F.2d 800 (9th Cir. 1976); United States v. Goodie, 524 F.2d 515 (5th Cir. 1975), cert. denied, 425 U.S. 905 (1976); United States v. Powell, 513 F.2d 1249 (8th Cir.), cert. denied, 423 U.S. 853 (1975).

It should be noted that the transportation of a firearm in commerce by a person in one of the five proscribed categories not only constitutes a violation of Title VII but also of Title I. Cf. 18 U.S.C. §922(g). To the extent that both Title I and Title VII cover a given factual situation, it is the policy of the Criminal Division to proceed under Title I. See USAM 9-63.610, infra.

9-63.533 Pen Guns

Pen guns and similar small caliber weapons are firearms within the purview of Titles I, II and VII. As long as these small caliber weapons are readily convertible into weapons which expel projectiles by means of explosives they are within the coverage of the firearms statutes. See 18 U.S.C. §921(a)(3)(A); 26 U.S.C. §5845(e); 18 U.S.C. App. §1202(c)(3). When pen guns or similar weapons are transported by the United States Postal Service, consideration should be given to proceeding pursuant to 18 U.S.C. §1715 since such a weapon would constitute a nonmailable firearm.

9-63.600 FIREARMS ISSUES

9-63.610 Prosecutive Policy

The federal firearms statutes are not substitutes for state criminal statutes. In enacting Titles I, II and VII, Congress intended that they supplement state firearms statutes, not supplant them.

Title VII should not be utilized when Title I or Title II are also applicable. Title VII should not be utilized in this situation because of the significant amount of case law dealing with Titles I and II and their statutory predecessors, and because of the most stringent penalties imposed by Titles I and II.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.620 Investigative Jurisdiction

The Department of the Treasury's Bureau of Alcohol, Tobacco and Firearms has primary investigative jurisdiction over possible violations of the federal firearms statutes. The Federal Bureau of Investigation, United States Postal Service and the Immigration and Naturalization Service may exercise investigative jurisdiction over violations of the federal firearms statutes when such violations are ancillary to investigations within their primary jurisdiction.

9-63.630 Criminal Division Assistance

The General Litigation and Legal Advice Section is entrusted with supervision of the federal firearms statutes. Attorneys familiar with these statutes may be reached by calling FTS 724-6971 or 724-7526.

9-63.640 Proving the Minimal Nexus Requirement of Title VII

In Scarborough v. United States, 431 U.S. 563 (1977), the question before the Court was whether proof that a possessed firearm had previously travelled in interstate commerce was sufficient to satisfy the statutorily required nexus (see United States v. Bass, 404 U.S. 336 (1971)) between possession of a firearm by a convicted felon and interstate commerce. In answering this question in the affirmative the Supreme Court stated that there was no indication whatever that Congress intended to require any more than a minimal nexus between a person's possession of a firearm and the firearm's movement, at some time, in interstate commerce. The Court noted the lack of basis for contending that a weapon acquired after a conviction affected commerce differently than one acquired before conviction and then retained.

Proof that a firearm has moved in interstate commerce can be accomplished by a variety of means. One way to do this is through the use of a dealer's records and testimony. When direct testimony as to the firearm's interstate movement is not available, the easiest and most convenient mode of proof is the use of a dealer's records and testimony to show that the firearm in question was purchased by the dealer out-of-state. If the dealer did not purchase the firearm out-of-state, the investigative agency must trace the history of the firearm until its interstate movement can be established.

Another way of demonstrating the movement of a firearm in interstate commerce is through the manufacturer's records. Often the name of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

manufacturer, whose name is imprinted on the firearm, will be the only way to establish that the firearm, at some time, moved in interstate commerce. The manufacturer's records are admissible into evidence under the Federal Records Act (28 U.S.C. §1732). While the Federal Records Act obviates the hearsay problems of a business entry, it is still necessary to call as a witness an employee of the manufacturer to lay a foundation for the admission of the business record.

Yet another way of proving the movement of a firearm in interstate commerce is through the use of expert testimony in connection with the markings on the firearm. The federal firearms statutes require that a serial number, the name of the manufacturer or the manufacturer's symbol and the place of manufacture be placed on all firearms. Firearms experts from the regional offices of the Bureau of Alcohol, Tobacco and Firearms may be called upon to identify a particular firearm, to determine the place where the firearm was manufactured and to determine the authenticity of the manufacturer's markings. In those instances in which a firearm is devoid of markings, a firearms expert from the Bureau of Alcohol, Tobacco and Firearms may be able to identify the firearm by its characteristics and determine precisely its place of manufacture. The U.S. Attorney should consult with regional officials of the Bureau of Alcohol, Tobacco and Firearms to establish procedures as to the availability and use of expert witnesses.

Finally, it should be noted that if investigative reports clearly indicate that the movement of the firearm in interstate commerce can be proven by one of the means previously discussed, defense counsel may be willing to enter into a stipulation of expected testimony thus avoiding the necessity of calling out-of-state witnesses. This possibility should always be explored by government attorneys, especially where the calling of out-of-state manufacturers or dealers is contemplated.

9-63.641 A Felon May Not Possess a Firearm Even Though the Predicate Felony May Be Subject to Collateral Attack on Constitutional Grounds

In Lewis v. United States, 445 U.S. 55 (1980), the Supreme Court held that Title VII (18 U.S.C. §1202(a)(1)) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds. Examining the phraseology of 18 U.S.C. §1202(a)(1), the Court noted the provision's sweeping language and concluded that a felony conviction imposes a firearm disability until the conviction is vacated or the felon is relieved of his/her disability by some affirmative action provided for in the federal firearms statutes. Examining the legislative history of 18 U.S.C. §1202(a)(1), the Court

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

found nothing to suggest that Congress was willing to allow a defendant to question the validity of his/her prior conviction as a defense to a charge under 18 U.S.C. §1202(a)(1). Indeed, said the Court, what little relevant legislative history there is reflects an intent to impose a firearm disability on a felon based on nothing more than the simple fact of conviction. Finally, the Court noted that a convicted felon is not without relief (see 18 U.S.C. §1203(3)), and that such a remedy suggests that Congress intended that the felon clear his/her status before being able to obtain a firearm. Also, the Court noted that with regard to the issue before it, there is little difference between Title I and Title VII. Thus, the Lewis rationale is applicable not only to prosecutions under Title VII, but also to prosecutions under Title I.

9-63.642 Receipt of a Firearm by a Convicted Felon Must Be in the District of Prosecution for Proper Venue

Prosecution of a substantive firearm count must be in the district where the alleged receipt of the firearm took place. See Fed. R. Crim. P. 18; United States v. Black Cloud, 590 F.2d 270 (8th Cir. 1979) (Title I prosecution); United States v. Haley, 500 F.2d 302 (8th Cir. 1974) (Title VII prosecution).

9-63.643 Prosecutorial Policy Regarding Title VII

A Title VII prosecution should not be undertaken if a person's felony conviction occurred in the distant past and did not involve violence, or if the person's background contains no extensive course of criminal conduct. Most of these types of cases may be adequately handled by local prosecution or by administrative forfeiture of the firearm.

9-63.650 Charging Possessory Offenses Under Title II

As noted previously (see USAM 9-63.524, supra) the Supreme Court in United States v. Freed, 401 U.S. 601 (1971), held that Title II cured the constitutional defects of its predecessor as applied to possessors of unregistered "gangster-type" weapons. See 26 U.S.C. §5861(d). The rationale in Freed extends to Title II's transfer and making provisions. See 26 U.S.C. §§5861(e) and (f). Also, the Court in Freed noted that the government need only allege and prove that the possessor of the weapon was aware of its nature and knowingly possessed it, and that the government did not need to allege or prove that the possessor was aware of the registration requirement.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In light of the Freed decision it is recommended that Title II possessory offenses be charged under 26 U.S.C. §5861(d) rather than 26 U.S.C. §§5861(b) or (c), since 26 U.S.C. §5861(d) specifically makes it "unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Registration and Transfer Record." [emphasis added]. See Gott v. United States, 432 F.2d 45 (9th Cir. 1970) (conviction for possessing a firearm which had been unlawfully made reversed because government failed to prove that the firearm was made subsequent to the passage of Title II).

9-63.660 Dual Prosecution Policy

As noted elsewhere in this Manual (see USAM 9-2.142) the Department's dual prosecution policy precludes the initiation or continuation of a federal prosecution following a state prosecution based upon substantially the same act or acts unless there is a compelling federal interest supporting the dual prosecution. Because many acts that violate the federal firearms statutes also violate state firearms statutes, care should be taken that no federal firearms prosecution be undertaken subsequent to a state prosecution for the same act or acts without written authorization from the Assistant Attorney General of the Criminal Division. All requests for dual prosecution authorization for firearms offenses should be sent to the Criminal Division's General Litigation and Legal Advice Section.

9-63.670 Affidavits for Search Warrants

The Bureau of Alcohol, Tobacco and Firearms, in conjunction with the Criminal Division, has produced a suggested form for affidavits supporting applications for search warrants in firearms cases. These forms are available from the regional offices of the Bureau of Alcohol, Tobacco and Firearms.

9-63.680 Dickerson v. New Banner Institute, Inc., and State Expungement Statutes

In Dickerson v. New Banner Institute, Inc., \_\_\_ U.S. \_\_\_ (1983), the Supreme Court held that a corporate executive's plea of guilty to a state charge of carrying a concealed handgun was a conviction within the meaning of Title I (18 U.S.C. §§922 (g)(1) and (h)(1)), despite the state court's "deferred" entry of a formal judgment and its subsequent placement of the corporate executive on probation. More importantly, for purposes of this section of the Manual, was the Court's holding that the firearms disabilities imposed by 18 U.S.C. §§922(g)(1) and (h)(1) were applicable

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

to the corporate executive and were not removed by the expunction of the record of his/her guilty plea to the concealed weapon charge. So far as the language of Title I is concerned, said the Court, expunction under state law does not alter the historical fact of the conviction, for the expunction in no way signifies that the defendant was innocent of the crime to which he/she pleaded guilty. Examining the language of Titles I and VII the Court pointed out that various provisions in these titles supported its holding that expunction of a state conviction was not intended by Congress to automatically remove a federal firearms disability. Examining the legislative history of Titles I and VII the Court noted there was nothing in the legislative histories to suggest, even remotely, that a state expunction was intended to automatically remove a federal firearms disability. In concluding, the Court observed that a rule that would give effect to expunctions under varying state statutes would seriously hamper effective enforcement of the federal firearms statutes. Such a rule would hamper enforcement, said the Court, because state expunction statutes differ in almost every particular, and provide nothing less than a "national patchwork." To allow this "patchwork" to override the clear language of the federal firearms statutes would be intolerable. Thus, for a convicted felon to obtain relief from a federal firearms disability, the felon must rely on 18 U.S.C. §925(c) (Title I) or 18 U.S.C. §1203 (Title VII) where Congress has set forth specific procedures for obtaining relief.

9-63.681 Effect of Pre-1968 Pardons on Convicted Felon Status

In United States v. Matassini, 565 F.2d 1297 (5th Cir. 1978), the issue before the Court of Appeals was whether a person who had been convicted of a state felony in 1950, but who had been given a "full and complete pardon . . . restoring him to full and complete civil rights" by the governor in 1955, had to comply with the provisions in either 18 U.S.C. §925(c) (Title I) or 18 U.S.C. §1203 (Title VII), provisions dealing with the obtaining of relief from federal firearms disabilities. The Court of Appeals held that a pre-1968 "full pardon" exempted the pardonee from the firearms disabilities contained in Titles I and VII. See also, Decker v. Gibson Products Company of Albany, 679 F.2d 212 (11th Cir. 1982) (dictum asserting the continuing validity of the Matassini holding). It should be noted that the Matassini holding is contrary to the holdings in United States v. Sutton, 521 F.2d 1385 (7th Cir. 1975), and Thrall v. Wolfe, 503 F.2d 313 (7th Cir.), cert. denied, 420 U.S. 922 (1974).

U.S. Attorneys in all circuits, other than the Fifth and Eleventh, should follow the holdings in Sutton and Thrall. All U.S. Attorneys should be mindful that Matassini is applicable only to pre-1968 pardons, and has no applicability whatever to pardons received after 1968.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.682 Effect of the Federal Youth Corrections Act on Convicted Felon Status

The Federal Youth Corrections Act (see 18 U.S.C. §5021) provides that the conviction of a youth offender be automatically set aside when the Parole Commission unconditionally discharges the youth offender prior to the expiration of his/her maximum sentence. The Act also provides that the conviction of a youth offender be set aside when a court, which has placed a youth offender on probation, unconditionally discharges him/her from probation prior to the expiration of the period of probation. Offenders who have received the benefits of the Federal Youth Corrections Act should not be prosecuted under the federal firearms statutes on the basis of a felony conviction to which the Act is applicable.

9-63.690 Proof of Non-Registration of Firearms in Title II Prosecutions

Obviously, time and money are wasted if officials from the Bureau of Alcohol, Tobacco and Firearms are unnecessarily called to testify as to the unregistered status of a Title II firearm. The preferable practice in Title II cases is to introduce a certificate from the custodian of the National Firearms Registration and Transfer Record stating that he/she has made a diligent search of the records and has found no record of the firearm in question being registered to the defendant in question. See Fed. R. Crim. P. 27; Fed. R. Civ. P. 44; Robbins v. United States, 476 F.2d 26 (10th Cir. 1973). Non-registration certificates may be obtained from the regional offices of the Bureau of Alcohol, Tobacco and Firearms.

A certificate from the National Firearms and Transfer Record also can be used to establish that no approved application for transfer or making of the firearm is on file as required by Title II (26 U.S.C. §§5812(a)(6) and 5822(e)). However, it should be noted that only approved applications to make and transfer firearms are recorded in the National Firearms and Transfer Record. Thus, the custodian of the National Firearms and Transfer Record is incompetent to testify as to whether an application has been filed or a tax paid. A non-registration certificate from the National Firearms and Transfer Record is of no use whatever in determining whether an application has been filed or a tax paid. See United States v. Stout, 667 F.2d 1347 (11th Cir. 1982). While some National Firearms and Transfer Record non-registration certificates currently in use may contain representations that no record was found with respect to whether an application was filed or a tax paid, these certificates are not to be relied upon. Allegations that no application has been filed, or that no tax has been paid, should not be included in indictments unless other evidence is available to support them.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.700 FIREARMS: INSPECTION OF LICENSEES' RECORDS, FIREARMS AND  
AMMUNITION

9-63.710 Warrantless Inspections

In light of the Supreme Court's decision in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (federal liquor statutes do not authorize agents to forcibly enter occupational taxpayer's business premises without a warrant to conduct statutory inspection), the question arises as to the appropriate course of action to be taken by special investigators of the Bureau of Alcohol, Tobacco and Firearms when a licensee refuses to permit them to conduct a statutorily authorized inspection and examination of the licensee's records, firearms and ammunition. Also, the question arises as to the proper course of action where it is anticipated that the licensee will refuse such permission.

Title I (18 U.S.C. §923(g)) requires all licensees to maintain such records as prescribed by the Secretary of the Treasury in connection with their engaging in, manufacturing, importing or collecting firearms. 18 U.S.C. 923(g) also provides:

The Secretary may enter during business hours the premises (including places of storage) of any firearms or ammunition importer, manufacturer, dealer or collector for the purpose of inspecting or examining (1) any records or documents required to be kept by such importer, manufacturer, dealer or collector under the provisions of this chapter or regulations issued under this chapter, and (2) any firearms or ammunition kept or stored by such importer, manufacturer, dealer, or collector at such premises.

If a licensee refuses to permit agents from the Bureau of Alcohol, Tobacco and Firearms to inspect his/her records or to examine or to examine his/her stock of firearms and ammunition, there are two statutorily sanctioned courses of action. First, the licensee's license is subject to revocation pursuant to 18 U.S.C. §§923(e) and (f); second, the licensee is subject to prosecution pursuant to 18 U.S.C. §924(a) for violating §923(g).

In Colonnade Catering Corp. v. United States, *supra*, the Supreme Court dealt with a similar inspection scheme authorized by the federal liquor statutes. The issue before the Court was whether these statutes authorized federal agents to forcibly enter an occupational taxpayer's

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

business premises without a warrant to conduct a statutory inspection of the taxpayer's records and stock of liquor. Holding that the statutory provision did not authorize forcible entry the Court stated:

[T]his Nation's traditions are strongly opposed to using force without definite authority to break down doors . . . . Under the existing statutes, Congress selected a standard that does not include forcible entries without a warrant. It resolved the issue not by authorizing forcible, warrantless entries, but by making it an offense for a licensee to refuse admission to the inspector. Id. at 77.

Since the refusal of a licensee to comply with a request for an inspection pursuant to 18 U.S.C. §923(g) subjects the licensee to possible license revocation, criminal prosecution or both, the Court's rationale in Colonnade would seem to preclude forcible warrantless entries, pursuant to 18 U.S.C. §923(g), to inspect a licensee's records and stock of firearms.

However, the Court's rationale in Colonnade does not preclude all warrantless inspections of a licensee's records and stock of firearms. In United States v. Biswell, 406 U.S. 311 (1972), the Court upheld the warrantless search of a locked storeroom during business hours as part of an inspection procedure authorized by 18 U.S.C. §923(g). The Court did so first, because the federal agents used no unauthorized force, and second, because the agents merely asserted their statutory right, and the licensee, submitting to lawful authority, permitted the inspection rather than face criminal prosecution.

9-63.720 Inspection Warrants

In Camara v. Municipal Court, 387 U.S. 523 (1967), the Court recognized that a statute which creates inspection powers provides the probable cause for the issuance of an inspection warrant, so long as reasonable legislative and administrative standards for conducting such an inspection are satisfied. See Donovan, Secretary of Labor v. Dewey, 452 U.S. 594 (1981); See v. City of Seattle, 387 U.S. 541 (1967). It is the Department's position that 18 U.S.C. §923(g), and the regulations issued pursuant to it, provide the necessary legislative and administrative standards for conducting inspections and examinations, and thus, that 18 U.S.C. §923(g), and its accompanying regulations, establish the requisite probable cause for the issuance of an inspection and examination warrant under the Gun Control Act of 1968.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In the vast majority of instances, licensees will voluntarily comply with the inspection and examination requests of the Bureau of Alcohol, Tobacco and Firearms. In these instances of voluntary compliance no warrant is necessary. See United States v. Biswell, *supra*; United States v. Golden, 413 F.2d 1010 (4th Cir. 1969). In those situations in which a licensee refuses to comply with a statutable request, it generally will be preferable to institute administrative proceedings to revoke the licensee's license rather than to seek an inspection and examination warrant, or to institute criminal proceedings based on the licensee's refusal to permit inspection or examination.

In those situations in which it is desirable to conduct a statutable inspection and examination, and the investigators have reason to believe they will be refused permission to conduct the inspection and examination --even though the licensee has not actually refused permission investigators should contact the appropriate U.S. Attorney for assistance in obtaining an inspection and examination warrant. This approach also is applicable when the investigators are unexpectedly refused permission to conduct a statutable inspection and examination. Also, when it is anticipated that the impending inspection will reveal significant criminal violations by the licensee, consideration should be given to the prior obtaining of a warrant as a precaution against the possible refusal of the licensee to permit the inspection.

9-63.730 Prosecution of Licensed Dealers and Forfeiture of Firearms

Licensed firearms dealers are required by law to maintain a license for each place of business, and to keep and maintain records of importation, production, shipment, receipt, sale or other disposition of firearms and ammunition. Also, dealers are prohibited from knowingly selling firearms to convicted felons and other prohibited classes of persons, and to residents of other states with the exception of rifles and shotguns sold to persons residing in contiguous states and whose states have enacted appropriate legislation. A dealer who violates these prohibitions subjects himself/herself to criminal prosecution, license revocation and forfeiture of all firearms involved in any violation.

9-63.731 Forfeiture Policy

In matters referred to the U.S. Attorney by the Bureau of Alcohol, Tobacco and Firearms for forfeiture action, the U.S. Attorney should promptly move to forfeit any firearms involved in any violation. In cases involving serious violations the government, in effect, can shut down the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

violator's business by forfeiting all or most of the firearms in the dealer's stock. In those cases in which a dealer has made numerous false entries or omissions in his/her records, the government, with complete justification, can forfeit the entire stock pursuant to 18 U.S.C. §924(d). The Department of Justice has requested that all agents of the Bureau of Alcohol, Tobacco and Firearms consult with their regional offices and the appropriate U.S. Attorney before seizing the entire stock of a dealer. Where the dealer has made only a few false entries or omissions, only those firearms falsely recorded or not recorded should be seized.

9-63.732 Revocation of License

With respect to the revocation or non-renewal of dealers' licenses, authority is vested solely in the Secretary of the Treasury by 18 U.S.C. §§923(d) and (e). Coordination between the U.S. Attorney and the Bureau of Alcohol, Tobacco and Firearms in the early stages of the matter will be helpful in exploring the possibility of using administrative action as an alternative to criminal prosecution. The Bureau of Alcohol, Tobacco and Firearms is authorized to forfeit firearms and revoke licenses for violations of the statute and its attendant regulations, even though the violator is not criminally prosecuted. Dealers whose licenses have been revoked may apply for new ones. Pursuant to 18 U.S.C. §925(b) persons indicted for violations of the statute have a statutable right to continue in business until the conviction becomes final. When a conviction becomes final the Secretary of the Treasury is authorized to revoke the dealer's license, and to permanently bar the former licensee from engaging in the firearms business.

Cooperation between U.S. Attorneys and the Bureau of Alcohol, Tobacco and Firearms is essential. U.S. Attorneys should not enter into plea agreements with firearms dealers without first obtaining the concurrence of the Bureau of Alcohol, Tobacco and Firearms. It should not be forgotten that the sole authority to revoke licenses and to forfeit firearms in appropriate cases is with the Secretary of the Treasury and not with the Attorney General. The Bureau of Alcohol, Tobacco and Firearms should be consulted in those cases in which criminal prosecution is contemplated. Consultation is necessary in these circumstances to protect the dealer's statutable right to remain in business until his/her conviction becomes final. Without such consultation the dealer's right might be compromised by administrative action on the part of the Bureau of Alcohol, Tobacco and Firearms.

In summary, U.S. Attorneys should consult the Bureau of Alcohol, Tobacco and Firearms in all cases involving firearms dealers so that the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

criminal and administrative aspects of the case may be sorted out. Given the multi-agency interest in firearms violations, deferral of prosecutions of firearms dealers should not be agreed to without the concurrence of the Bureau of Alcohol, Tobacco and Firearms.

9-63.800 FIREARMS: FORMS FOR INDICTMENT

9-63.801 Firearms Indictments; Deletion of the Term "Willfully"

The offenses proscribed by the federal firearms statutes are regulatory offenses requiring proof of only general intent, that is, knowledge of the facts constituting the offense. See United States v. Freed, 401 U.S. 601 (1971). The model firearms indictments issued by the Criminal Division in 1969 charged firearms violations in terms of "willfully and knowingly." Because some district courts interpret the term "willfully" as requiring proof of specific intent, indictments for firearms violations should charge only that the defendant "knowingly" committed the alleged offense.

9-63.900 THE FEDERAL EXPLOSIVES STATUTE (18 U.S.C. §§841 et seq.)

9-63.910 Description

The federal explosives statute is both regulatory and criminal. The regulatory provisions establish federal controls over the interstate or foreign commerce in explosives. These provisions are designed to assist the states to more effectively regulate the manufacture, sale, transfer and storage of explosives within their borders. The statute establishes a system of federal licenses for importers, manufacturers and dealers in explosives, and a system of federal permits for users who wish to buy or transport explosives in interstate or foreign commerce. It prohibits the distribution of explosives by licensees to persons under twenty-one years of age, unlawful users of drugs, mental defectives, fugitives from justice, and persons who are under indictment or who have been convicted of felonies. The statute also requires the keeping of certain records in connection with transactions in explosives, and creates sanctions for false statements or the otherwise improper keeping of these records. Licensing authority is vested in the Secretary of the Treasury, and the responsibility for the enforcement of the regulatory provisions is in the Bureau of Alcohol, Tobacco and Firearms (BATF).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The federal explosives statute strengthened federal law with its prohibitions on the illegal use, transportation or possession of explosives. The statute's coverage includes malicious damage or destruction by explosives to federal premises or other federal property, as well as to the premises and property of institutions or organizations receiving federal financial assistance. The statute proscribes the malicious damage or destruction by explosives of real or personal property used in interstate or foreign commerce, or in any activity affecting such commerce. In addition, it proscribes the possession of explosives in a federally owned or occupied building, or the interstate transportation of stolen explosive materials. Finally, the statute proscribes the making of bomb threats and the malicious conveying of false information concerning an attempted or alleged attempted bombing.

The federal explosives statute was amended in October 1982. Subsections (e), (f), (h), (l) and (i) of 18 U.S.C. §844 were amended to cover crimes by means of "fire" as well as by means of an explosive. Primarily, the statute was amended to facilitate the continued use of 18 U.S.C. §844 in arson fires started by gasoline that result in the destruction of a building used in or affecting interstate commerce.

9-63.920 Investigative Guidelines

Three investigative agencies have potential primary jurisdiction to investigate violations under the federal explosives law: the Federal Bureau of Investigation; the Bureau of Alcohol, Tobacco and Firearms; and the Postal Inspection Service. The Postal Inspection Service has primary jurisdiction to investigate violations of 18 U.S.C. §844 which are directed at United States Postal Service property or functions. The Bureau of Alcohol, Tobacco and Firearms has primary jurisdiction to investigate regulatory violations of the explosives statute (18 U.S.C. §842); offenses against property used in commerce or affecting commerce (18 U.S.C. §844(i)); violations directed at Treasury buildings or functions (18 U.S.C. §844 generally); and, unless the explosives are mailed, interstate transportation of explosives with unlawful intent (18 U.S.C. §844(d)). The Federal Bureau of Investigation has primary jurisdiction to investigate all other violations of 18 U.S.C. §844, except those involving the use of explosives or the carrying of explosives in commission of a felony (18 U.S.C. §844(h)), which will be investigated by the agency having jurisdiction over the underlying felony. Unless otherwise directed by the Department of Justice, the Federal Bureau of Investigation is responsible for exercising primary jurisdiction over all 18 U.S.C. §844 violations perpetrated by terrorist or revolutionary groups

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

or individuals carrying out terrorist or revolutionary activities. In addition, the Federal Bureau of Investigation has primary jurisdiction over all 18 U.S.C. §844 violations affecting colleges and universities.

9-63.930 Special Considerations

The provisions of 18 U.S.C. §844(e) should not be used unless a substantial federal interest is involved. For example, 18 U.S.C. §844(e) should not be used in a situation involving a bomb threat by a student against the school he/she is attending, or by an employee of an organization other than the federal government. These types of cases should be deferred to state or local authorities whenever possible. The Federal Bureau of Investigation has been instructed to decline investigation of 18 U.S.C. §844(e) violations unless the identity of the offender is readily ascertainable or known, or a pattern or plan of these offenses appears to exist.

Note should be taken of 18 U.S.C. §848 which the Criminal Division views as expressing Congressional intent that the federal government, absent a specific federal interest, not become involved in bombing matters that can be adequately investigated and prosecuted by local authorities. During the Congressional hearings which led to passage of the federal explosives statute, Administration witnesses testified that federal jurisdiction would be exercised only upon a determination by the Attorney General or his/her designee that a federal prosecution is in the public interest. The members of the Congressional committees were explicitly assured that the Department of Justice would not displace the efforts of state and local officials in bombing matters.

No expansion of the efforts of the Bureau of Alcohol, Tobacco and Firearms to investigate arson fires is anticipated as a result of the October 1982 amendment to the federal firearms statute. State and local authorities still have primary responsibility for the investigation and prosecution of most arson fires.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-63.1000 DESTRUCTION OF ENERGY FACILITIES

9-63.1001 Overview

Section 1365 of Title 18, United States Code, defines and punishes intentionally damaging the property of a non-nuclear energy facility. The penalty established is commensurate with the amount of damage caused. For damage exceeding \$100,000 or which significantly interrupts or impairs the facility's functions, subsection (a) provides for a penalty of up to a \$50,000 fine and/or up to ten years imprisonment. For damage exceeding \$5,000, subsection (b) provides for a penalty of up to a \$25,000 fine and/or up to five years imprisonment.

Although damage to utility facilities has historically been a matter of state and local concern, recent acts of violence and sabotage have strained state and local law enforcement capabilities. The intent of Congress is to provide federal resources to assist in the investigation and prosecution of particularly serious crimes against energy facilities. See S. Rep. No. 98-225, 98th Cong., 1st Sess. 325(1983). Since federal action is intended, not as a substitute for state and local law enforcement, but rather as a supplement to state and local law efforts when those efforts are hampered due to the extent of the damage to the facility, federal involvement should be on a selective, case-by-case basis with federal jurisdiction being exercised sparingly.

9-63.1002 Investigative Jurisdiction

The agency having investigatory responsibility for this statute is the Federal Bureau of Investigation.

9-63.1003 Supervisory Jurisdiction

Supervisory jurisdiction is exercised by the General Litigation and Legal Advice Section, 724-6971.

9-63.1010 Elements

9-63.1011 Intent

Both subsection (a) and (b) require that the destructive act be "knowing" and "willful." It is the Department's view that the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

requirements of knowledge and willfulness apply only to the destructive act, and that the actor need not also know that the property being damaged belongs to an energy facility.

Although the words "knowingly and willfully" precede the entire phrase "damages the property of an energy facility in an amount...", the fact that the property belongs to an energy facility is simply the factor that confers federal jurisdiction. The destruction of any other property would not be a federal crime. It is the destruction of energy facility property that Congress intended to proscribe. See S. Rep. No. 98-225, at 325. Therefore, since "the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time he perpetrates the act made criminal by the federal statute," United States v. Feola, 420 U.S. 671, 67-77, n.9 (1975), the actor need not be aware that the property belongs to an energy facility in order to come within the statute.

9-63.1012 Act

To come within the statute, the actor must commit an act which causes damage.

9-63.1013 Jurisdiction

A. Property of an Energy Facility--The fact that the damaged property belongs to an energy facility confers federal jurisdiction. In subsection (c), the term "energy facility" is defined as a facility involved in the "production, storage, transmission or distribution of electricity, fuel, or another form or source of energy," as well as a research, development, or demonstration facility relating to fuel and energy. Plants not yet in operation are also covered. Facilities subject to the jurisdiction of the Nuclear Regulatory Commission have been excepted, however, since damaging such facilities is already proscribed by 42 U.S.C. §2284.

B. Amount--Subsection (a) requires that the damage be significant, either of a value exceeding \$100,000 or that "causes a significant interruption or impairment of a function of an energy facility." Subsection (b) requires that the damage be of a value exceeding \$5,000.

The \$5,000 amount is jurisdictional as is the alternative "significant interruption or impairment." Congress did not intend that federal authorities become involved in investigating or prosecuting cases

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

unless the amount of damage exceeds the \$5,000 base line amount, or causes a major disruption of service. See S. Rep. No. 98-225, at 326.

C. Significant Interruption or Impairment--No definition is provided, either in the statute or its legislative history, for the term "significant interruption or impairment of a function of an energy facility." Congress obviously intended, however, as evidenced by the severity of the penalty, that the term only include major disruptions of service to consumers in an extended area for several hours. S. Rep. No. 98-225, at 326.

9-63.1100 TAMPERING WITH CONSUMER PRODUCTS--18 U.S.C. §1365

9-63.1110 Investigative Jurisdiction

The Federal Bureau of Investigation has investigative responsibility for violations of 18 U.S.C. §1365. The Food and Drug Administration (FDA) and the Department of Agriculture also have investigative responsibilities for various aspects of this offense. The Department of Agriculture's responsibility is in the area of meat, poultry, and eggs. The FDA's responsibility covers other food items, drugs, devices, and cosmetics. Investigative understandings between the FBI, FDA, and Agriculture have been developed. The FBI's primary focus will be on those matters involving life endangering tamperings, threatened tamperings, tamperings accompanied by extortion demands, and paintings intended to cause, and false claims resulting in, serious injury to a product's reputation.

9-63.1120 Supervising Section

General Litigation and Legal Advice Section

9-63.1130 Prosecutive Policy--18 U.S.C. §1365

As in the past, state and local authorities will continue to play a large and significant role in the investigation and prosecution of alleged tampering. The Federal Anti-Tampering Act does not preempt prosecution by state and local authorities for conduct which would be in violation of 18 U.S.C. §1365. Hence, referral to such authorities is appropriate when no significant federal interest requires vindication (e.g., in an isolated instance, when there is no serious impact upon commerce, when the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

wrongdoer has been identified and state or local authorities are prepared to handle the case, etc.).

9-63.1140 Discussion of the Offense

9-63.1141 General

The Federal Anti-Tampering Act, Pub. L. No. 98-127, 97 Stat. 831, October 13, 1983, created a new section 1365 of Title 18, United States Code, which makes it an offense to tamper with consumer products or to engage in related conduct. It was enacted in response to the Tylenol poisoning deaths in the Chicago area in the fall of 1982. (It should be noted that part J of chapter X of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, October 12, 1984, also created a section 1365 in Title 18 entitled "Destruction of an energy facility." It is anticipated that the duplication of section numbers will be corrected by appropriate technical amendments to Title 18 which will be sought early in the 99th Congress.)

9-63.1142 Offenses

Subsection (a) of 18 U.S.C. §1365 prohibits tampering or attempted tampering with any consumer product that affects interstate or foreign commerce, or with the labeling of, or the container for, such a product. The tampering must be of such a nature that it creates a risk of death or bodily injury. Furthermore, the tampering must be done with reckless disregard for, and under circumstances manifesting extreme indifference to, such risk. The product "affects" interstate or foreign commerce while it is being manufactured, being distributed, being held for sale, or--if once removed from the retail process--being readied to be put back into the retail process. The statute is not intended to reach malicious tampering with a product once it has been purchased at retail and brought into the home for use. See S. Rep. No. 69 on S. 216, 98th Congress, 1st Sess., at 9, and H.R. Rep. No. 93 on H.R. 2174, 98th Congress, 1st Sess., at 4.

Subsection (b) of 18 U.S.C. §1365 makes it an offense to taint a consumer product which affects interstate or foreign commerce, or to render materially false or misleading the labeling of, or the container for, such a product, with intent to cause serious injury to the business of any person (i.e., cause commercial harm to a business). The term "taints" is not defined in the Act but is meant to be broader than

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

"tamperers." S. Rep. No. 69 defines "to taint" as meaning "to modify with a trace of something offensive or deleterious, or infect, contaminate, or corrupt. Such an 'offensive' or 'contaminating' result would be the addition of an unsightly or nauseating substance, as well as a dangerous substance."

Subsection (c) of 18 U.S.C. §1365 prohibits the knowing communication of false information that a consumer product has been tainted if the product or the results of the communication affect interstate or foreign commerce, and if the falsely alleged tainting, had it in fact occurred, would have created a risk of death or bodily injury to another person. The use of the phrase "results of such communication affect interstate or foreign commerce" is intended to assert federal jurisdiction in situations in which the product itself may no longer "affect" interstate or foreign commerce, but in which the false communication causes actions to be taken which affect interstate or foreign commerce (e.g., recall).

Subsection (d) of 18 U.S.C. §1365 prohibits credible threats to tamper. It does not require a demand for money or other consideration. If money is demanded, there may also be a violation of the Hobbs Act, 18 U.S.C. §1951, or the extortion statutes, 18 U.S.C. §§875-877.

Subsection (e) of 18 U.S.C. §1365 prohibits conspiracies to tamper with consumer products.

#### 9-63.1143 Penalties

Under 18 U.S.C. §1365(a), tampering with a consumer product that results in death is punishable by a fine of \$100,000 and imprisonment for any term of years or for life. If serious bodily injury results, the maximum penalties are a fine in the same amount and imprisonment for 20 years. Otherwise, tampering may be punished by a \$50,000 fine and a ten year prison term. The maximum penalty for attempted tampering is a \$25,000 fine and a ten year prison term.

Subsection (b) of 18 U.S.C. §1365 permits the imposition of a fine of \$10,000 and a prison term of three years on a person who taints a consumer product or falsifies the label or container thereof.

Subsections (c) and (d) of 18 U.S.C. §1365 provides \$25,000 fines and five year terms of imprisonment for communicating false information that a consumer product has been tainted, and for threatening to taint a consumer product, respectively.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Finally, under subsection (e) of 18 U.S.C. §1365, a conspiracy to commit an offense under subsection (a) is punishable by a fine of \$10,000 and imprisonment for ten years.

It should be noted that under the new 18 U.S.C. §3623 (Alternative fines) that a fine up to \$250,000 is possible for any federal felony committed on or after January 1, 1985. See Criminal Fine Enforcement Act of 1985, Pub. L. No. 98-596, October 30, 1984.

9-63.1144 Definitions

18 U.S.C. §1365(g) defines "consumer product," "labeling," "serious bodily injury," and "bodily injury." "Consumer product" is defined to include "food," "drug," "device," and "cosmetic" as such terms are respectively defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. §321). The term also includes any other "household product" that is consumed by individuals or used for purposes of personal care or in the performance of services rendered within the household, and that is designed to be consumed or expended in the course of such consumption or use. Thus, it covers such household products as waxes, detergents, air fresheners, toilet paper, etc., but it does not include durable products such as vacuum cleaners, brooms, brushes, or similar items since these products are not intended to be used up, though, of course, they do wear out.

The term "labeling" includes not only the label (see 21 U.S.C. §321(k)) on the immediate container of the product, but any other written material accompanying the product.

9-63.1150 Legislative History

Although 18 U.S.C. §1365 differs from either of the bills addressed by S. Rep. No. 69 on S. 216, 98th Congress, 1st Sess., or H.R. Rep. No. 93 on H.R. 2174, 98th Congress, 1st Sess., which bills were passed by the Senate and the House respectively, on May 9, 1983, the legislative history of these two bills is important to an understanding of the new statute. In addition, it may be helpful to consult the floor remarks concerning the two bills. See 129 Con. Rec. S 6311-S 6315, H 2703-H 2707, and H 2711 (May 9, 1983); H 7694-H 7698 (September 29, 1983); and §§13331-13334 (September 30, 1983).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 64

	<u>Page</u>	
9-64.000	<u>PROTECTION OF GOVERNMENT FUNCTIONS</u>	1
9-64.100	COUNTERFEITING	1
9-64.110	<u>Validity of Use of Penny Script (18 U.S.C. §336)</u>	1
9-64.120	<u>Coins and Currency in the Likeness or Similitude of Genuine Currency</u>	1
9-64.130	<u>Counterfeiting of Foreign Obligations or Securities (18 U.S.C. §478)</u>	2
9-64.140	<u>Forged Endorsements on Government Obligations and Securities are to be Charged Under 18 U.S.C. §495</u>	2
9-64.141	Prosecutive Policy on Forged Treasury Checks (18 U.S.C. §495)	2
9-64.142	Elements of the Offense of Forgery (18 U.S.C. §495)	3
9-64.143	Prosecutive Policy on Interspousal Forgery of Government Checks	3
9-64.150	<u>Postal Money Orders (18 U.S.C. §500)</u>	4
9-64.200	POSTAL VIOLATIONS	4
9-64.210	<u>Robbery or Theft of Mail, Money or Other Property of the United States (18 U.S.C. §2114)</u>	4
9-64.211	Supervising Section	4
9-64.212	Policy Governing Prosecution	4
9-64.220	<u>Use of U.S. Magistrate to Reduce Postal and Forgery Violation Caseload</u>	4a
9-64.221	Misdemeanor to be Considered	5
9-64.230	<u>Libelous Matter on Wrappers or Envelopes - 18 U.S.C. §1718</u>	5
9-64.231	Description	5

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-64.232	Investigative Jurisdiction	6
9-64.233	Special Considerations	6
9-64.240	<u>Forgeries</u>	6
9-64.250	<u>Addicts</u>	6
9-64.251	Admission of Guilt	7
9-64.300	FALSE PERSONATION	7
9-64.310	<u>Statute</u>	7
9-64.311	Legislative History	7
9-64.312	Purpose of Statute	9
9-64.320	<u>18 U.S.C. §912 Offenses Defined</u>	10
9-64.321	Elements of the Offenses	10
9-64.322	Falsely Defined	12
9-64.323	Intent to Defraud	12
9-64.324	Acts as Such	13
9-64.325	Demanding or Obtaining a Thing of Value	13
9-64.326	Acting Under the Authority of the United States	14
9-64.330	<u>Forms of Indictment</u>	14
9-64.331	Duplicity	17
9-64.340	<u>Prosecution of 18 U.S.C. §912 Violations - Criminal Division's Recommendation</u>	17
9-64.400	FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982	18
9-64.401	Overview	18
9-64.410	<u>18 U.S.C. §1028 - Fraud and Related Activity in Connection with Identi- fication Documents</u>	19
9-64.420	<u>Purpose</u>	20

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-64.430	<u>Terminology</u>	20
9-64.431	Covered Instruments	20
	A. Identification Document	20
	B. Document-Making Implement	21
9-64.432	Governmental Issuers	22
	A. United States Government	23
	B. Other Governments	23
	1. State	23
	2. Political Subdivision of a State	23
	3. Foreign Government	23
	4. Political Subdivision of a Foreign Government	24
	5. International Governmental or Quasi-Governmental Organization	24
9-64.433	Types of Identification Documents	24
	A. Genuine Documents	24
	B. False Documents	24
9-64.434	Specifically Mentioned Identifi- cation Documents	25
	A. Birth Certificate	25
	B. Driver's License	25
	C. Personal Identification Card	26
9-64.435	Operative Terms	26
	A. Produce	26
	B. Transfer	27
	C. Possess	27
	D. Use	27
	E. Defraud the United States	27
9-64.436	Culpable States of Mind	27
	A. Knowingly	28
	B. Knowing	28
	C. With the Intent	28
9-64.437	Relevant Circumstances	29
	A. False	29
	B. Stolen	29
	C. Lawful Authority	29
	D. Produced Without Lawful Authority	29
	E. Produced Without Authority	30
	F. Issued Lawfully for the Use of the Possessor	30
	G. Used in the Production	32
9-64.440	<u>Prohibited Acts</u>	32

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-64.450	<u>Federal Jurisdictional Circumstances</u>	33
9-64.451	United States Identification Document	33
9-64.452	United States Document-Making Implement	34
9-64.453	Possession With the Intent to Defraud the United States	34
9-64.454	Is in or Affects Interstate or Foreign Commerce	34
9-64.455	Transported in the Mail	35
9-64.460	<u>Penalties</u>	35
9-64.461	18 U.S.C. §1028(b)(1)	35
9-64.462	18 U.S.C. §1028(b)(2)	36
9-64.463	18 U.S.C. §1028(b)(3)	36
9-64.470	<u>Draft Indictments/Informations</u>	36
9-64.471	Production - 18 U.S.C. §1028(a)(1)	36
9-64.472	Form #1A - Production of a United States Government Identification Document	36
9-64.473	Form #1B - Production of a Birth Certificate, Driver's License or Personal Identification Card	38
9-64.474	Form #1C - Production of Five or More Non-Federal Identification Documents (Other than Birth Certificates, Driver's Licenses and Personal Identification Cards)	39
9-64.475	Form #1D - Production of Less than Five Non-Federal Identification Documents (Other than Birth Certificates, Driver's Licenses, and Personal Identification Cards)	40
9-64.480	<u>Draft Indictments/Informations</u> <u>(Cont'd)</u>	40
9-64.481	Transfer - 18 U.S.C. §1028(a)(2)	40
9-64.482	Form #2A - Transfer of a United States Government Identification Document	41
9-64.483	Form #2B - Transfer of a Birth Certificate, Driver's License or Personal Identification Card	42

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-64.484	Form #2C - Transfer of Five or More Non-Federal Identification Documents (Other Than Birth Certificates, Driver's Licenses and Personal Identification Cards)	43
9-64.485	Form #2D - Transfer of Less than Five Non-Federal Identification Documents (Other Than Birth Certificates, Driver's Licenses and Personal Identification Cards)	44
9-64.490	<u>Draft Indictments/Informations</u> (Cont'd)	45
9-64.491	"Possession" - 18 U.S.C. §§1028 (a)(3), (a)(4), and (a)(6)	45
9-64.492	Form #3A - Possession with Intent to Use or Transfer Unlawfully Five or More United States Government Identification Documents	45
9-64.493	Form #3B - Possession with Intent to Use or Transfer Unlawfully Five or More Non-Federal Identification Documents	47
9-64.494	Form #3C - Possession with Intent to Defraud the United States	48
9-64.495	Form #3D - Possession of a Stolen or Unauthorized Produced United States Government Identification Document	48
9-64.500	FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982 (CONT'D)	50
9-64.510	<u>Draft Indictments/Informations</u> (Cont'd)	50
9-64.511	Document-Making Implements- 18 U.S.C. §1028(a)(5)	50
9-64.512	Form #4A - Production, Transfer, or Possession of a United States Government Document-Making Implement	50
9-64.513	Form #4B - Production, Transfer, or Possession of a Non-Federal Document-Making Implement	51

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-64.520	<u>Venue</u>	52
9-64.530	<u>Selection of Counts</u>	52
9-64.540	<u>Other Federal Criminal Statutes</u>	52
9-64.550	<u>Investigative Responsibility</u>	53
9-64.560	<u>Exceptions for Law Enforcement Activities</u>	55
9-64.570	<u>Legislative History</u>	55
9-64.580	<u>Pleadings Bank</u>	57
9-64.590	<u>Supervisory Jurisdiction</u>	57
9-64.600	FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982 (CONT'D)	58
9-64.610	<u>18 U.S.C. §1738 - Mailing Private Identification Documents Without a Disclaimer</u>	58
9-64.620	<u>Purpose</u>	58
9-64.630	<u>Elements of the Offense</u>	58
9-64.640	<u>Penalty</u>	59
9-64.650	<u>Draft Indictment/Information for 18 U.S.C. §1738</u>	59
9-64.660	<u>Venue</u>	60
9-64.670	<u>Investigative Responsibility</u>	60
9-64.680	<u>Legislative History</u>	60
9-64.690	<u>Pleadings Bank</u>	60
9-65.700	FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982 (CONT'D)	61
9-64.710	<u>Supervisory Jurisdiction</u>	61

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.000 PROTECTION OF GOVERNMENT FUNCTIONS

9-64.100 COUNTERFEITING

9-64.110 Validity of Use of Penny Script (18 U.S.C. §336)

18 U.S.C. §336 does not prohibit the use of privately issued penny script redeemable only in merchandise and only at outlets of the issuing business. According to the Court in United States v. Van Auken, 96 U.S. 366 (1877), only the obligation for the payment of money fell within the predecessor of 18 U.S.C. §336, and the Revisers' Note (18 U.S.C. §336) indicates that Van Auken should control the interpretation of the current statute.

9-64.120 Coins and Currency in the Likeness or Similitude of Genuine Currency

18 U.S.C. §489 prohibits the making of any token, disc, or device in the likeness or similitude of coins of the United States, except under the authority of the Secretary of the Treasury. 18 U.S.C. §475 prohibits the making, distribution, or use of any business card, notice, placard, handbill, or advertisement in the likeness or similitude of an obligation or security of the United States. Neither statute should be confused with counterfeiting statutes. The counterfeiting of coins is proscribed by 18 U.S.C. §485 while the counterfeiting of currency is proscribed by 18 U.S.C. §471. Rather, 18 U.S.C. §489 and §475 relate to reproductions made in the general design of coins or currency but which vary sufficiently in detail that they have no serious potential for use in place of genuine money. Both statutes are misdemeanors punishable solely by fines, as contrasted with the two counterfeiting statutes, 18 U.S.C. §485 and §471, both of which are felonies punishable by imprisonment of up to 15 years.

18 U.S.C. §489 and §475 are, in essence, copyright statutes. However, in the past the Department has sought to limit their application so as to avoid a multitude of prosecutions for picayune violations. Prosecution under 18 U.S.C. §489 has been limited to those instances where the token or device in question has some potential for being mistaken for a genuine coin by the ignorant or unwary of society. In this regard, it has been agreed between the Department and Secret Service that no prosecution should be undertaken under 18 U.S.C. §489 for a token or device which is more than twice the size of a silver dollar or less than half the size of a dime. In gauging whether a token or device which is

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

more than half the size of a dime but less than twice the size of a silver dollar is appropriate for prosecution the additional factors of color and design should be closely scrutinized.

9-64.130 Counterfeiting of Foreign Obligations or Securities (18 U.S.C. §478)

18 U.S.C. §478 has been deemed applicable only to obligations of securities of currently existing governments. United States v. Gertz, 249 F.2d 622 (9th Cir. 1957). Further, the statute has only questionable application to demonetized obligations and securities of currently existing governments. Generally, when a demonetized obligation or security is counterfeited the purpose of such act is not to have the counterfeit item circulate as currency but rather to defraud philatelists or numismatists. Where the impact of the fraudulent item is solely on collectors, prosecution can generally be deferred in favor of civil action by defrauded collectors.

9-64.140 Forged Endorsements on Government Obligations and Securities are to be Charged Under 18 U.S.C. §495

18 U.S.C. §471 proscribes the counterfeiting or forgery of any obligation or security of the United States, while 18 U.S.C. §472 and §473 prohibit the uttering and dealing in such counterfeit or forged obligations or securities. Those statutes relate to the counterfeiting or forgery of the instrument itself. A forged endorsement on an otherwise valid government obligation does not render such obligation a forgery within the meaning of 18 U.S.C. §§471-473. United States v. Sebastian, 562 F.2d 211 (2d Cir. 1977); Roberts v. United States, 331 F.2d 502 (9th Cir. 1964). (For a discussion of the legislative history of the counterfeiting statutes, see Prussian v. United States, 282 U.S. 675 (1931)). Accordingly, forged endorsements on government obligations or securities must be charged under 18 U.S.C. §495.

9-64.141 Prosecutive Policy on Forged Treasury Checks (18 U.S.C. §495)

The primary thrust of the Department's enforcement program under 18 U.S.C. §495 is aimed at the organized rings of check forgers and at the professional forger who engages in multiple and repeated violations. Efforts should be made to obtain state or local prosecution of persons who engage in a relatively small number of forgeries and who have no prior history of this type of criminal conduct. To the extent that federal

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prosecution is pursued under 18 U.S.C. §495, consideration should be given to the use of pre-trial diversion for first offenders who meet the requirements of that program. (See USAM 1-12.000).

9-64.142 Elements of the Offense of Forgery (18 U.S.C. §495)

The first three paragraphs of 18 U.S.C. §495 set forth three separate offenses: forgery, uttering a forged instrument, and presentation of a false writing to an officer of the United States in support of a claim against the government. The second and third paragraphs specifically contain "intent to defraud the United States" as an element of those offenses. However, the forgery provision, 18 U.S.C. §495(1), makes no mention of "intent to defraud the United States." Nevertheless, the courts have interpreted the word "forgery" as used in the statute to embody the concept of forgery that existed at common law. See Gilbert v. United States, 370 U.S. 650 (1961); United States v. Hill, 579 F.2d 480 (8th Cir. 1978). Under common law forgery, it was incumbent on the prosecution to establish an intent to defraud. Accordingly, in prosecutions initiated under 18 U.S.C. §495, the government must prove that the defendant possessed the requisite intent to defraud the United States. See United States v. Jones, 648 F.2d 215 (5th Cir. 1981); United States v. Hester, 598 F.2d 247 (D.C. Cir. 1979).

9-64.143 Prosecutive Policy on Interspousal Forgery of Government Checks

It is the general policy of the Department not to prosecute for the interspousal forgery of government checks, for the reason that this type of forgery usually emanates from a domestic dispute and is better resolved through either state prosecution or civil litigation. In addition, in many of these cases the government cannot prove that the violating spouse possessed the requisite intent to defraud the United States, as such intent does not exist where the spouse who endorsed both names either had authority to endorse the other spouse's name or believed he or she had such authority. See USAM 9-64.142, supra.

An exception to the general rule against federal prosecution exists where there is independent evidence of intent to defraud, e.g., a court order prohibiting negotiation of a Treasury check, or where there are aggravating circumstances present.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.150 Postal Money Orders (18 U.S.C. §500)

The scope of 18 U.S.C. §500 includes the theft, embezzlement, or wrongful possession and use of blank postal money orders as well as those machines, tools or instruments used for filling in such money orders. As a corollary to the blank money order provisions, 18 U.S.C. §500 specifically covers those machines and other instruments essential to the thief if he/she is to complete the blank money orders for subsequent negotiation.

9-64.200 POSTAL VIOLATIONS

9-64.210 Robbery or Theft of Mail, Money or Other Property of the United States (18 U.S.C. §2114)

9-64.211 Supervising Section

General Litigation and Legal Advice Section.

9-64.212 Policy Governing Prosecution

18 U.S.C. §2114 prohibits assaulting with intent to rob "any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States . . ." and the robbing of such a person. In Hanahan v. United States, 414 U.S. 807 (1973), a case involving the robbery of an Internal Revenue Service officer, the Solicitor General confessed error, stating that the statute's legislative history "plainly shows that the statute was intended to apply only to postal crimes." Garcia v. United States, 53 U.S.L.W. 4016, 4021 (U.S. Dec. 10, 1984) (Stevens, J., dissenting).

On December 10, 1984, the Supreme Court, at the urging of the government, held that 18 U.S.C. §2114 "penalized assaults or robberies of anyone who is a custodian of 'any money or other property of the United States.'" Garcia v. United States, *supra*, 53 U.S.L.W. at 4018. In light of the holding in Garcia, U.S. Attorneys may now seek indictments of persons who rob United States officials although no Postal Service nexus exists.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.220 Use of U.S. Magistrate to Reduce Postal and Forgery Violation  
Caseload

Federal Magistrates provide an effective avenue for disposition of many postal violations at considerable savings in prosecutive and judicial resources. Since sentences for first offenders with little or no prior record and lack of extensive involvement in postal depredations generally fall within punishment which could be imposed by a Magistrate for a minor

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

offense, serious thought should be given in such cases to accepting pleas to misdemeanors before Magistrates instead of proceeding with the cases and felonies. More attorney, grand jury, and court time would then become available permitting more time to be allotted to major violators. Additionally, the immediacy of disposition made possible will, in the Department's view, enhance the prophylactic and deterrent effect of the law both specifically and generally.

No ironclad rules in this area are feasible. Generally, burglary of a post office (18 U.S.C. §2115) and robbery of the mails (18 U.S.C. §2114) are so grave as to require felony treatment. On the other hand, many thefts (18 U.S.C. §§1708, 1709) would not require such severe disposition. The vital consideration is the question of expected sentence rather than fixation of a particular label on the defendant's misconduct. Factors which would tend to indicate felony prosecution are the lengthy prior criminal record of a defendant (i.e. whether his/her depredations are extensive and involve a substantial amount of money or other property) and the degree to which his/her activities and that of others created a substantial interference with functioning of the postal system. Bearing especially on the latter consideration are existence and extent of any conspiracy and presence of collusion or internal corruption.

9-64.221 Misdemeanor to be Considered

Among the misdemeanor dispositions available are: 18 U.S.C. §1701 (obstruction of mails generally); 18 U.S.C. §1703(b) (opening, destroying, or detaining mail without authority; 18 U.S.C. §1707 (theft of property used by postal service); and 18 U.S.C. §1711 (misappropriation of postal funds). When the initial charge might best lie under 18 U.S.C. §1705 (destruction of letter boxes or mail) or 18 U.S.C. §1706 (injury to mail bags) and in other appropriate circumstances, an applicable misdemeanor may be found in 18 U.S.C. §641 (theft of government property, or 18 U.S.C. §1361 (destruction of government property).

9-64.230 Libelous Matter on Wrappers or Envelopes - 18 U.S.C. §1718

9-64.231 Description

This section prohibits the mailing of any postal cards, packages or envelopes which have any language of a libelous, scurrilous, defamatory or threatening character written upon them. The statute is of primary importance in the area of bill collection; its effect is prophylactic, to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prevent overly threatening dunning notices being sent on post cards. The statute provides for a fine of not more than \$1,000 or imprisonment of not more than one year or both for whoever knowingly takes the same from mails for the purpose of circulating or disposing of the nonmailable matter.

9-64.232 Investigative Jurisdiction

The Postal Inspection Service is the investigative agency with primary jurisdiction to investigate violations under 18 U.S.C. §1718.

9-64.233 Special Considerations

Two particular cases, Tollett v. United States, 485 F.2d 1087 (8th Cir. 1973), and United States v. Handler, 383 F. Supp. 1267 (D. Md. 1974), present obstacles to successful prosecution under 18 U.S.C. §1718 based upon first amendment grounds. Therefore, any future prosecutions under this section should only be attempted after a careful examination of the factual situation. For example, a "dunning notice" situation or similar harassing techniques should lay a basis for a factually sound prosecution. It is doubted that the courts would sanction such form or harassment-for-profit or, in any event, would be less likely to strike down the statute based upon constitutional infirmities.

9-64.240 Forgeries

Only rarely do forgeries of Treasury checks (18 U.S.C. §495) occur in the absence of a concomitant theft of mail or theft of the check from other United States custody. Often the record and conduct of the forger or passer will not merit more severe punishment than a Magistrate can assess. Usually, such a defendant will, in fact, have had the requisite knowledge of the character of the instrument as stolen from the mails or the United States, or other appropriate circumstances will exist, permitting misdemeanor disposition. U.S. Attorney programs established in accord with the policy expressed herein should include provision for such disposition of appropriate cases which may initially only present a forgery aspect.

9-64.250 Addicts

Not uncommonly, narcotics addiction lies at the root of a mail theft or forgery of a stolen check. In such instances, resort to Magistrate

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

disposition will not suffice unless accompanied by arrangements with a view to rehabilitation. When satisfactory solution of the narcotics aspect is not possible through resources available locally, U.S. Attorneys should still consider permitting misdemeanor disposition before a district court in conjunction with commitment under 18 U.S.C. §4253.

9-64.251 Admission of Guilt

Although the foregoing policies will normally find their greatest utility in the course of plea bargaining, and the willingness to admit guilt and accept punishment is a weighty factor in ascertaining the degree of punishment the interests of public justice require in any particular case, consent to trial by Magistrate, even on a plea of not guilty, offers considerable advantage to the United States. Accordingly, U.S. Attorneys should not foreclose resort to misdemeanor disposition solely because the defendant declines to plead guilty.

9-64.300 FALSE PERSONATION

9-64.310 Statute

18 U.S.C. §912 provides:

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than \$1,000 or imprisoned not more than three years, or both.

Act of June 25, 1948, Ch. 645, 62 Stat. 742."

9-64.311 Legislative History

In 1883, an appropriation bill for the fiscal year ending June 30, 1884, H.R. 7482, 47th Cong., 2d Sess. (1883), was being considered by the Senate. 14 Cong. Rec. 3214 (1883). An amendment to that bill was proposed which read as follows:

Any person who falsely represents himself to be an officer, agent, or employee of the Pension Bureau of the Interior Department, or in such assumed character

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

pretends or assumes to act and perform or does perform it such assumed character any duty or act belonging to such officer, agent, or employee so falsely personated, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding \$1,000, or be imprisoned for a period not more than two years, or both, in the discretion of the court.

14 Cong. Rec. 3238 (1883).

The amendment was stricken following an objection by Senator Edmunds that it was legislation on an appropriations bill. Senator Edmunds asserted that such a bill should be much broader in scope. Senator Edmunds said "[n]ow, there ought to be a law punishing every person who falsely personates any officer or employee of the United States for the purpose of committing any wrong or fraud upon anybody; that is plain enough." 14 Cong. Rec. 3238 (1883).

In apparent agreement with Senator Edmunds' opinion, Senator Blair of Vermont introduced a bill on February 24, 1883, to prohibit abuses under the pension law. The bill was referred to the Committee on Pensions. Subsequently, the Senate Committee on the Judiciary assumed jurisdiction of the subject in its wider sense and reported a bill which covered not only pension cases but all cases of like abuse. 14 Cong. Rec. 3263-4 (1883).

The bill, S. 2507, 47th Cong., 2d Sess. (1883), was reported by Senator Garland of Arkansas who, in explaining its purpose, said:

. . . Section 5435 of the Revised Statutes makes provision against persons falsely representing themselves to be entitled to certain annuities, dividends, pensions, prize-money, & c., from the Government, and Section 5448 makes provision for punishing persons who represent themselves as revenue officers. There the statutes stop. This bill provides for punishing persons who represent themselves as officials or employees or agents of the United States in any respect whatever.

14 Cong. Rec. 3263 (1883).

Although the bill passed the Senate, 14 Cong. Rec. 3264 (1883), it failed to become law in the 47th Congress. It was reported again in the next Congress by Senator Garland. 15 Cong. Rec. 1285-6 (1884). The Senate passed the bill without debate in its original form except that the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

words "or any officer" were inserted after "Department" in two places. 15 Cong. Rec. 1286 (1884).

In the House of Representatives, Mr. Browne of Indiana reported from the House Committee on the Judiciary a bill, H.R. 4993, 48th Cong., 1st Sess. (1884), which was identical to the original Senate bill.

The bill passed the House, 15 Cong. Rec. 2256 (1884), and was reported to the Senate where it was amended to conform to the second Senate bill and passed. 15 Cong. Rec. 2676 (1884).

As finally enacted the bill provided:

That every person who with intent to defraud either the United States or any person falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any Department or any office of the Government thereof, and who shall take upon himself to act as such, or who shall in such pretended character demand or obtain from any person or from the United States, or any Department or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be deemed guilty of a felony, and shall, on conviction thereof, be punished by a fine of not more than \$1,000 or imprisonment not longer than three years, or both said punishments, in the discretion of the court.

Act of Apr. 18, 1884, Ch. 26, 23 Stat. 11.

The statute was carried forward in the Criminal Code of 1909 without significant change. See S. Rep. No. 10, 60th Cong., 1st Sess. 14-15 (1908); Act of March 4, 1909, Ch. 321, §32, 35 Stat. 1095. By the Act of February 28, 1938, Ch. 37, 52 Stat. 83, the statute was amended to include pretending to be an officer or employee of "any corporation owned or controlled by the United States." In the 1948 revision of the code the reference to corporations was omitted and the word "agency" as defined in 18 U.S.C §6 was inserted. See Revisor's Note, 18 U.S.C. §912 (1948). Changes were also made in phraseology, *Ibid*; but the only substantial difference between the present statute and its predecessors is that the words "with intent to defraud the United States or any person" are omitted. The statute now appears as 18 U.S.C. §912.

#### 9-64.312 Purpose of the Statute

The legislative history indicates a Congressional intent to punish

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

persons who falsely represent themselves as officers or employees of the United States. From what was initially conceived in 1883 as a statute to prohibit abuses under the then existing pension law, a much broader, far more comprehensive false personation statute developed.

In construing 18 U.S.C. §912 and its predecessors, the courts generally have ascribed a twofold purpose to the statute: to protect innocent persons against fraud and to preserve the dignity and good repute of the federal service. See United States v. Lepowitch, 318 U.S. 702, 704 (1943); United States v. Barnow, 239 U.S. 74, 80 (1915). Honea v. United States, 344 F.2d 798, 803 (5th Cir. 1965). The gist of the offense, however, is the false personation of federal officers. See Lamar v. United States, 240 U.S. 60, 65 (1916); United States v. Barnow, 239 U.S. 74, 78 (1915); United States v. Robbins, 613 F.2d 688 (8th Cir. 1979). The statute is within the power of Congress to enact because a spirit of good will and respect for officers of the United States is necessary for the efficient operation of the government and would be impaired if unauthorized and unscrupulous persons were permitted to go about the country falsely assuming for fraudulent purposes to be entitled to the respect and credit due a federal officer. United States v. Barnow, *supra*.

9-64.320 18 U.S.C. §912 Offenses Defined

The statute defines two separate and distinct offenses. United States v. Lepowitch, 318 U.S. 702, 704-705 (1943); United States v. Rosser, 528 F.2d 652 (D.C. Cir. 1976); United States v. Mitman, 459 F.2d 451, 453 (9th Cir. 1972); United States v. Milton, 421 F.2d 586, 587 (10th Cir. 1970); United States v. Guthrie, 387 F.2d 569, 570 (4th Cir. 1967).

9-64.321 Elements of the Offenses

False personation of an officer or employee of the United States is an element of both offenses. See Lamar v. United States, 241 U.S. 103, 114-16 (1916); United States v. Barnow, 239 U.S. 74, 77 (1915); United States v. York, 202 F. Supp. 275, 276-77 (E.D. Va. 1962); Graham v. Squier, 53 F. Supp. 881, 882-83 (W.D. Wash.), *aff'd*, 145 F.2d 348 (9th Cir. 1944). The impersonation must be of a federal officer; see Massengale v. United States, 240 F.2d 781, 782 (6th Cir. 1957); Dickson v. United States, 182 F.2d 131, 132 (10th Cir. 1950); and may be effected by verbal declarations as well as by the exhibition of a counterfeited badge or a false certificate of authority. Pierce v. United States, 86 F.2d 949, 951 (6th Cir. 1936). Government officials are impersonated by any persons who assume to act in the pretended character; United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Lepowitch, supra, and thus action alone may amount to a false pretense of federal authority. See Heskett v. United States, 58 F.2d 897, 902 (9th Cir. 1932) (by inquiring about passports, defendants pretended to be federal immigration officers).

The most general allegations of impersonation of a government official sufficiently charges this element of the offense; United States v. Lepowitch, supra; and the omission of the word "falsely" is harmless error. Ferguson v. United States, 293 F. 361, 363 (8th Cir. 1923). Although an employee of one department of the government may be guilty of impersonating an officer of another department; Russell v. United States, 271 F. 684, 685 (9th Cir. 1921); one who in fact holds the office he/she claims cannot be convicted under the statute, except as an aider and abettor. Haggerty v. United States, 5 F.2d 224, 224-25 (7th Cir. 1925). Thus failure to prove that the representation of federal authority was false is reversible error. United States v. McNaugh, 42 F.2d 835, 836-37 (2d Cir. 1930). Proof of the falsity of the representation can be made under Fed. R. Crim. P. 27 and Fed. R. Civ. P. 44 by a properly authenticated affidavit of the person having custody of the personnel records of the office assumed reciting that a diligent search reveals no record of defendant's employment. T'Kach v. United States, 242 F.2d 937, 937-38 (5th Cir. 1957). The absence of any indicia of federal authority at the time of arrest four days after the offense and the failure of the defendant to produce any evidence of the defendant's authority at the trial have been held sufficient to prove lack of authority. Scala v. United States, 54 F.2d 608, 609-610 (7th Cir. 1931). If the government's case survives a motion for a judgment of acquittal and the defendant takes the stand and fails to testify to his/her authority; Haggerty v. United States, supra; or testifies that he/she has none; T'Kach v. United States, supra; his/her conviction will be sustained on appeal.

It has been held that evidence of reliance by the intended victim is admissible because reliance is an essential element of the offense. Haid v. United States, 157 F.2d 630, 632 (9th Cir. 1946). This conclusion seems to originate from a misinterpretation of United States v. Barnow, supra, in which the Supreme Court said: "It is the aim of the section not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself." Barnow, supra, at 80. Obviously, in cases under 18 U.S.C. §912(2) in which a thing of value has been obtained, reliance by the victim is almost always provable. It is the view of the Criminal Division, however, that there is no such reliance requirement inherent in the statute. See Levine v. United States, 261 F.2d 747, 751 (D.C. Dir. 1957).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.322 Falsely Defined

"Falsely" is sometimes used to imply scienter and the the word has been construed to mean something designedly untrue or deceitful, and as involving an intention to perpetrate some fraud; in a sense it means perfidiously or treacherously. 35 C.J.S. Falsely, 789, 790. "Falsely" is defined as "in a false manner, erroneously, not truly, peridiously or treacherously." Black's Law Dictionary 726 (Rev. 4th ed. 1968).

9-64.323 Intent to Defraud

Before the 1948 revision, the statute made an "intent to defraud" an essential element of both offenses. Honea v. United States, 344 F.2d 798, 803 (5th Cir. 1965); see United States v. Barnow, 239 U.S. 74, 75 (1915); Kane v. United States, 120 F.2d 990, 992 (8th Cir. 1941). The words are omitted from the present statute because it was thought the decision in United States v. Lepowitch, *supra*, rendered them "meaningless." Reviser's Note, 18 U.S.C. §912 (1948). Only the first offense was directly considered in Lepowitch, which held that "intent to defraud" did "not require more than the defendants have, by artifice and deceit, sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct." The court said of the second offense, however, that "more than a mere deceitful attempt to affect the course of action or another is required" because that clause of the statute "speaks of an intent to obtain a 'valuable thing'." One court of appeals now doubts that Lepowitch renders the requirement of fraudulent intent meaningless and holds that it continues to be an essential element of the second offense where it means "an intent to wrongfully deprive another of property." See Honea v. United States, *supra*, at 802-803.

Furthermore, United States v. Randolph, 460 F.2d 367, 370 (5th Cir. 1972), held that "intent to defraud" is an essential element of prosecution under Part I of 18 U.S.C. §912. Contrary views have been expressed in United States v. Cord, 654 F.2d 490 (7th Cir. 1981); United States v. Rosser, 528 F.2d 654 (D.C. Cir. 1976); United States v. Rose, 500 F.2d 12 (2d Cir. 1974), vacated on other grounds, 422 U.S. 1031 (1975); United States v. Mitman, 459 F.2d 451 (9th Cir. 1972); United States v. Guthrie, 387 F.2d 569 (4th Cir. 1967).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.324 Acts as Such

The distinguishing element of the first offense is acting as the officer impersonated. United States v. Lepowitch, supra; Lamar v. United States, 241 U.S. 103, 114 (1916); United States v. Barnow, supra. This element requires something more than a mere false pretense. The act that completes a violation of this section must be something more than merely an act in keeping with the falsely assumed character. United States v. Rosser, supra; United States v. Hamilton, 276 F.2d 96, 98 (7th Cir. 1960). For the indictment to be sufficient, the act charged must be something more than mere repetition of the pretense. See Ekberg v. United States, 167 F.2d 380 (1st Cir. 1948); Baas v. United States, 25 F.2d 294 (5th Cir. 1928); United States v. Larson, 125 F. Supp. 360 (D. Alaska 1954). Hence, an indictment alleging that a defendant as the officer impersonated by representing that he/she was an FBI agent engaged in the investigation of a criminal violation has been held to not state an offense in United States v. Larson, supra. But an allegation that a defendant acted as such by representing himself/herself to be an IRS agent engaged in locating the whereabouts of a named person who was a recent tenant of the person to whom the statement was addressed, has been held sufficient. United States v. Harth, 280 F. Supp. 425 (W.D. Okla. 1968). It is not necessary that the act be one which the pretended officer would have authority to perform if he/she were in fact the officer he/she represents himself/herself to be. Lamar v. United States, supra; United States v. Hamilton, supra. It is not necessary that there in fact be such an officer as the defendant pretends to be. United States v. Barnow, supra; Caruso v. United States, 414 F.2d 225, 227 (5th Cir. 1969).

Several acts which have been held to satisfy the "acting as the officer impersonated" requirement include attempting to elicit from another the whereabouts of a witness against the accused in a state proceeding, United States v. Sheker, 618 F.2d 607 (9th Cir. 1980); wearing firearms, United States v. Hamilton, supra; attempting to stay an execution, Thomas v. United States, 213 F.2d 30, 31 (9th Cir. 1954); and eliciting state secrets for information or for political advantage, United States v. Sheker, supra (dictum).

9-64.325 Demanding or Obtaining a Thing of Value

The distinguishing element of the second offense is demanding or obtaining a thing of value. Lamar v. United States, supra; Honea v. United States. This element is not limited in its application to things having commercial value. Even something as intangible as information has been held sufficient. United States v. Sheker, supra. Within the second

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

offense, some courts further distinguish two separate violations, demanding on the one hand and obtaining on the other. Ekberg v. United States, *supra*; see Elliott v. Hudspeth, 110 F.2d 389, 390 (10th Cir. 1940); United States v. York, 202 F. Supp. 275, 276, 277 (E.D. Va. 1962). One district court, however, has held that it is proper to allege demand and obtain conjunctively in a single count, and that proof of either will sustain the charge. United States v. Ballard, 118 F. 757, 759 (W.D. Mo. 1902). Form 9 of the Federal Rules of Criminal Procedure also approves conjoining the two allegations in the same count.

It has been held that demanding and obtaining are merely modes of committing the first offense and therefore are lesser offenses included in the more general offense of acting. Consequently, if the only act committed by the accused is the demanding or obtaining of a thing of value, he/she cannot be convicted both of acting as an officer of the United States and of demanding and/or obtaining a thing of value. See Ekberg v. United States, *supra*, at 384-87. The implication is that such facts would support a conviction under either the acting clause or the demanding and obtaining clause, but some courts hold that an allegation of demanding and obtaining appearing in the same count with an allegation of acting renders the count bad for duplicity. See United States v. Leggett, 312 F.2d 566, 568 (4th Cir. 1962).

9-64.326 Acting Under the Authority of the United States

Two district courts hold that, to be guilty of the second offense, the defendant must pretend not only that he is an employee of the United States, but also that the property is demanded or obtained under the authorization of the United States or for the United States. United States v. Grewe, 242 F. Supp. 826 (W.D. Mo. 1965) (cashing personal checks not an offense); United States v. York, *supra* (obtaining personal credit not an offense).

To save the phrase "acting under the authority of the United States" from being read out of the statute, the court in York finds it necessary to interpret it to mean acting "for the United States" or in a way "authorized by the United States."

9-64.330 Forms of Indictment

A recommended form for indictments which are drafted under 18 U.S.C. §912 (Part 1) is as follows:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, [defendant] did falsely pretend to be an officer and employee of the United States acting under the authority thereof, that is, an agent of the Federal Bureau of Investigation, and did falsely take upon himself/herself to act as such, in that he/she falsely stated to \_\_\_\_\_ that he/she was a special agent of the Federal Bureau of Investigation engaged in pursuit of a person charged with an offense against the United States, and interviewed \_\_\_\_\_.

The indictment must allege that the defendant acted as the officer impersonated; Baas v. United States, supra; United States v. Carr, 194 F. Supp. 144, 146 (W.D. Cal. 1961); but it is not essential that the particular act be described. See Ekberg v. United States, supra, at 387; United States v. Larson, supra. An allegation in the language of the statute is sufficient. See United States v. Cohen, 631 F.2d 1223 (5th Cir. 1980); United States v. Sheker, supra; United States v. Leggett, supra, at 569-70. If the statutory language alone is used, however, the defendant may be entitled to a bill of particulars as to the act. See Ekberg v. United States, supra. Any prejudice that may result from the denial of a bill of particulars is cured by the court's offer of a continuance at the close of the government's evidence. United States v. Hamilton, supra, at 99.

An intent to defraud was not alleged in the preceding form. Despite United States v. Randolph, supra, which held that failure to allege an intent to defraud in an indictment drawn under the first part of 18 U.S.C. §912 was reversible error, the Criminal Division subscribes to the views of the Second, Fourth, Seventh, Ninth and District of Columbia Circuits that the failure to allege intent to defraud is not fatal. United States v. Cord, supra; United States v. Rosser, supra; United States v. Rose, supra; United States v. Mitman, supra; United States v. Guthrie, supra. Thus, in districts outside of the Fifth Circuit we believe that it is unnecessary to allege an intent to defraud under the first part of 18 U.S. S. §912 and advise against it.

A recommended form for indictments which are drafted under 18 U.S.C. §912 (Part 2) is as follows:

B. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_ [defendant], with intent to defraud \_\_\_\_\_, did falsely assume and pretend to be an officer and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

employee of the United States acting under the authority thereof, in that he/she falsely stated to \_\_\_\_\_ that he/she was a special agent of the Federal Bureau of Investigation, and is such assumed and pretended character [defendant] did gain entrance to \_\_\_\_\_ Street, \_\_\_\_\_, without paying the admission charge.

The recommended form includes an allegation of "intent to defraud." The language of the statute contains no such element. But see, Honea v. United States, supra. In Honea, the defendant was convicted for impersonation of a federal employee and obtaining property. In setting aside Honea's conviction, the Fifth Circuit decided that an intent to defraud or an intent to wrongfully deprive another of property is an essential element of the offense and that the indictment was fatally defective for failure to include such an allegation. Id., at 801-803.

In Honea, the defendant by a timely pretrial motion to dismiss, Fed. R. Crim. P. 12(b) (2), urged that the indictment was "fatally defective" because it failed "to allege that the defendant did the acts with intent to defraud either the United States or any person." The motion was denied at trial. The Fifth Circuit held this to be error, saying "[i]t is often said that an indictment must (a) apprise the defendant of what he will have to meet and (b) protect him from double jeopardy. This indictment is sufficient as to (b), but . . . insufficient as to (a)." Id., at 804. The Honea court concluded that the indictment was sufficient to protect the defendant from double jeopardy but insufficient to enable the defendant to prepare an adequate defense.

Had the defendant in Honea chosen not to object at trial to the failure of the indictment to allege intent to defraud, the indictment's sufficiency as a basis for enabling the defendant to prepare his defense would no longer have been a dominant consideration. See Kane v. United States, 120 F.2d 990, 992 (8th Cir. 1941). Under such circumstances, the indictment should be examined on appeal to determine whether it constituted a sufficient foundation for a judgment and whether it protected the defendant against another prosecution for the same offense. "In testing the sufficiency of the indictment for these purposes, there is no sound reason why all the facts and elements of the crime should be required to be stated directly. When this stage of the inquiry is reached, reasonable inferences and clear implications from the allegations made are a legitimate aid to the indictment." Id., at 992, citing, Wishart v. United States, 29 F.2d 103 (8th Cir. 1928).

In view of Honea, care should be taken to allege intent to defraud in indictments for the second offense under 18 U.S.C. §912. In a given case,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

if such an allegation is not made and the defendant fails to raise the issue at trial but subsequently raises it on appeal, then it can be argued for the government that reasonable inferences and clear implications from the language of the indictment were sufficient to enable the defendant to prepare his/her defense as evidenced by his/her failure to object at trial.

9-64.331 Duplicity

As was previously discussed under USAM 9-64.325, supra, (Demanding or Obtaining a Thing of Value), some courts have held that an allegation of acts as such appearing in the same count with an allegation of demanding and obtaining renders the count bad for duplicity. See United States v. Leggett, supra; Shepherd v. United States, 191 F.2d 682 (10th Cir. 1951). Thus, in drafting indictments, care should be exercised to avoid joining "acts as such" with "demanding and obtaining."

9-64.340 Prosecution of 18 U.S.C. §912 Violations - Criminal Division's Recommendation

The Division's recommendation is that generally in situations which involve the impersonation of a federal officer or employee, coupled with an application for credit, registration for lodging, cashing of a personal check or some other similar act, prosecution should not be initiated under the second part of 18 U.S.C. §912 unless the subject has also pretended to under color of federal authority or expressly or implicitly suggested that the valuable thing demanded or obtained was necessary for the performance of his official duty. The basic procedure to follow when deciding whether to prosecute such cases under the second part of 18 U.S.C. §912 is to determine whether the benefit is purported to run to the federal government or to the federal employee in his/her capacity as a private citizen. If the latter, when there should be no prosecution under the second part of 18 U.S.C. §912. See United States v. Grewe, supra; United States v. York, supra. his/her

The foregoing obviously does not foreclose all possibility of prosecution of such cases. The alternatives of prosecution under the first part of 18 U.S.C. §912, prosecution under 18 U.S.C. §§701, 702, and action by state and local authorities, remain to be considered. Where these alternatives are appropriate they should be utilized.

In deciding whether a false personation case warrants prosecution under the first part of 18 U.S.C. §912, it should be noted that the distinctive element of the offense under the first part of 18 U.S.C. §912 is acting as

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the officer impersonated. This element requires something more than a mere false pretense; there must be some additional overt act in keeping with the pretense. For an example of what acts have been held to satisfy this requirement, see USAM 9-64.324, *supra*.

Absent an overt act which is distinguishable from the pretense, prosecution under the first part of 18 U.S.C. §912 should not be undertaken.

Therefore, when presented with a situation in which a subject has pretended to be a federal officer or employee but has not performed an overt act which is distinguishable from the pretense itself, or has demanded or obtained credit, lodging or some similar benefit but has not pretended to be acting under color of federal authority and has not expressly or implicitly suggested that the valuable thing demanded or obtained was necessary for the performance of his/her official duty, consideration should be given to referring the matter to state and local authorities for their action, rather than initiating a 18 U.S.C. §912 prosecution.

9-64.400 FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982

9-64.401 Overview

The False Identification Crime Control Act of 1982 (FICCA), Public Law 97-398, 96 Stat. 2009 (approved December 31, 1982) was the culmination of a ten-year legislative process to improve federal criminal statutes relating to the false identification problem. It is an outgrowth of a comprehensive study on the criminal use of false identification made by the Justice Department sponsored Federal Advisory Committee on False Identification (FACFI) in the mid-1970's. The Act implements one of the Committee's major recommendations. The Department of Justice strongly supported the legislative effort and believes this Act will have a significant impact upon all aspects of the complex false identification problem.

FICCA is the combination and reworking of four bills introduced in the 97th Congress (H.R. 352, H.R. 6105, S. 1924, and S. 2043). H.R. 352 and S. 1924 were basically identical and were the predecessors of the newly created 18 U.S.C. §1028, entitled "Fraud and related activity in connection with identification documents." This section defines offenses involving the counterfeiting of identification documents issued by the United States and other governmental entities, both foreign and domestic,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

and the trafficking in and the illegal use of counterfeit or stolen governmental identification documents. H.R. 6105 and S. 2043, which were intended to help fight the youthful driver aspect of the drunk-driving problem, were the predecessors of the newly created 18 U.S.C. §1738, entitled "Mailing private identification documents without a disclaimer."

After H.R. 6946 was introduced as a substitute for H.R. 352 by the Chairperson of the Subcommittee on Crime of the House Committee on the Judiciary, 18 U.S.C. §1028 was expanded by the full House Judiciary Committee. The Senate further expanded and clarified certain aspects of 18 U.S.C. §1028. (Most of the expansion of the section was in the area of the possession offenses.) As a result of the Conference between the House and Senate, 18 U.S.C. §1028 retained most of the Senate amendments.

The House Judiciary Subcommittee on Crime originally rejected H.R. 6105 (a bill "attacking the youthful driver aspect of the drunk-driving problem") since it felt that most of its proposed coverage was incorporated within new 18 U.S.C. §1028 insofar as the identification documents were, or appeared to be, issued by a governmental agency. The Senate, however, included a modified version of S. 2043 when it passed H.R. 6946. In Conference, an agreement was reached to narrow the new 18 U.S.C. §1738 to private identification documents which bore a birth date or indicated the age of a person and which were manufactured by an entity in the business of selling identification documents through the mails or in interstate or foreign commerce. If the document contained such information, the document had to carry the disclaimer clause "NOT A GOVERNMENT DOCUMENT" on its front and back in a specified type size. As so modified, the Congress passed H.R. 6946 and the President signed it into law on December 31, 1982. Hence, as a practical matter, FICCA was fully effective as of the beginning of 1983. 18 U.S.C. §§1028 and 1738 will be discussed separately at USAM 9-64.610-64.790 and 9-64.810-64.910, infra, respectively.

The FICCA does not supplant or replace any existing criminal provision which may be applicable to a particular identification document. However, because of FICCA's broad coverage and realistic penalties, it will normally be the vehicle by which most false identification violations are pursued in the future. Of course, depending upon the particular and unique circumstances of an individual situation, other provisions of applicable federal statutes may be utilized where the prosecutor believes that to be warranted.

9-64.410 18 U.S.C. §1028 - Fraud and Related Activity in Connection with Identification Documents

9-64.420 Purpose

18 U.S.C. §1028 is intended to give the federal prosecutor an effective tool with reasonable penalties to deal with the federal aspects of the false identification problem involving governmental identification documents and certain implements used in manufacturing those documents. Different provisions of the section may be applicable to crimes involving terrorism, illegal immigration, organized crime, narcotic trafficking, welfare fraud, white collar crime, smuggling, firearms violations, and fugitives from justice, to name a few. 18 U.S.C. §1028 is limited to governmental identification documents, but it is very broad because it covers all those issued by federal, state, local, foreign, international and quasi-international governmental entities.

Of extreme importance is the fact that 18 U.S.C. §1028 is written in the statutory format of the proposed revision to the federal Criminal Code which has been developing during the past decade. As such, this requires that an indictment be drafted to describe properly (1) the prohibited act, (2) the federal jurisdictional circumstances, and (3) the facts necessary for a determination of the appropriate penalty. Copies of draft indictments/informations for the basic fourteen types of different factual situations which may arise under 18 U.S.C. §1028(a) are provided at USAM 9-64.670 - 9-64.713, infra.

9-64.430 Terminology

It is essential to understand certain terminology used in 18 U.S.C. §1028. The terms have been divided into eight separate groupings to facilitate discussion. (All references to the House Judiciary Committee Report, House Report No. 97-802, 97th Congress, 2d Sess., are indicated as "H. Rep." This report is reprinted in the 1982 U.S. Code Cong. & Ad. News, at p. 3519.)

9-64.431 Covered Instruments

A. Identification Document This term is defined in 18 U.S.C. §1028(d)(1) to mean:

[A] document made or issued by or under the authority of . . . [a governmental entity] which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The document must be issued by a government agency. It must identify a particular person. (Hence, the term does not cover certificates of title or registration for motor vehicles since such documents identify vehicles, not persons.) The term includes blank documents. That is the intention of the phrase "which, when completed with information." H. Rep., p. 9. The description of an identification document will normally include such identifying elements as an individual's name, address, date or place of birth, physical description, photograph, fingerprints, employer, profession, occupation, or any unique number assigned to an individual by a governmental entity. H. Rep., p. 9. Whether a document is "intended" to identify an individual is determinable by looking at the purpose for which the governmental agency issued it. Examples of such would be passports, alien registration cards, Justice Department credentials, etc. The term "commonly accepted" is intended to cover identification documents which may not have been intended to serve as an identification document in common usage. Examples would be birth certificates, driver's licenses, social security cards, etc. However, "commonly accepted" does not require that the document be accepted for identification purposes under any and it is accepted in situations where a document of that nature would reasonably be accepted for identification purposes. H. Rep., p. 9. Of course, an identification document can be both "intended" and "commonly accepted."

While an identification document is usually made of paper or plastic, the term may also include badges for law enforcement officers if such a badge has a unique number on it which is assigned to a particular officer for the purpose of identifying such officer. The term refers to a tangible document and not merely the information contained on such a document (e.g., a Social Security number by itself is not an identification document under 18 U.S.C. §1028. However, the use of someone else's Social Security number, or a false one, with intent to deceive any person for the purpose of obtaining anything of value from such person may be in violation of 42 U.S.C. §408(g)(2).)

B. Document-Making Implement This term is defined in 18 U.S.C. §1028(d)(3) to mean:

. . . any implement or impression specially designed or primarily used for making an identification document, a false identification document, or another document-making implement.

It obviously includes plates, dyes, stamps, and molds and other "tools" used to make identification documents. Another example of a document-making implement could be a device specially designed or primarily used to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

produce a small photograph and assemble laminated identification cards. The term may also include any official seal or signature, or text in a distinctive typeface and layout that when reproduced are part of an identification document. In cases in which specialized paper or ink or other materials are used in the production of an identification document, those items would be document-making implements. The term does not, however, include office photocopying machines because such machines are designed for more general purposes (i.e., not "specially designed or primarily used for" making identification and false identification documents). H. Rep., p. 11. However, persons who use such machines to manufacture false identification documents or who provide them to another for the same purpose could be guilty of other offenses under 18 U.S.C. §1028.

9-64.432 Governmental Issuers

While 18 U.S.C. §1028 does not use the term "governmental entity," this term is an aid to understanding the scope of 18 U.S.C. §1028. It is clear that the Congressional intent was to cover all governmental identification documents regardless of which governmental body in the world issued them. And it is clear that 18 U.S.C. §1028 does not cover identification documents issued by private parties such as private and parochial schools, non-governmental employers, etc. Thus, it does not cover credit cards, bank cards, insurance coverage cards issued by a private insurer, membership cards of private associations, private clubs, or private citizen's groups, personal name cards, retail business check cashing cards, etc. It would, however, cover the identification documents of the employees of government contractors if such documents were issued by or under the authority of a government agency.

The concept of "governmental entity" is set forth in the definition of "identification document" in 18 U.S.C. §1028(d)(1) and includes:

. . . the United States Government, a State, political subdivision of a State, a foreign government, political subdivision of a foreign government, an international governmental or an international quasi-governmental organization . . . .

This expansive definition should be read to include multi-state governmental bodies established pursuant to interstate compacts. While these entities are not explicitly mentioned, they are certainly intended to be covered and are implicitly incorporated within the concepts of "State" or "political subdivision of a State." H. Rep., pp. 5,8. ("The

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Committee desired to protect all government issued documents directly" (emphasis supplied.) Interstate compact entities often operate certain facilities, such as those for water storage or public transportation, which may be prime targets of terrorist endeavors.

There follows a description of the specified governmental entities. Because of the jurisdictional circumstance requirement, it is convenient to divide the issuers into two groups: (A) United States Government and (B) Other governments.

A. United States Government - This term is not defined in 18 U.S.C. §1028 and, hence, it should be construed as broadly as is possible under title 18. It includes all three branches of the federal government (executive, judicial, and legislative). It covers all federal departments, agencies, offices, commissions, administrations, institutions, corporations, services, boards, etc., and any component thereof. See 18 U.S.C. §6; United States v. Bramblett, 348 U.S. 503 (1955). It does not, however, include the governments of the District of Columbia, Puerto Rico, or other territories or possessions of the United States as these entities are to be considered as "States."

B. Other Governments - For the sake of convenience, the expression "non-federal" will often be used to refer to governments other than the United States Government.

1. State - This term is defined in 18 U.S.C. §1028(d)(5) to include:

. . . any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any other possession or territory of the United States.

As noted above, multi-state governmental bodies are covered.

2. Political Subdivision of a State - This term is not specifically defined. It is intended to cover all cities, towns, counties, water districts, school districts, etc. It covers all agencies and departments of such governmental bodies, including public schools, public universities, public libraries, public museums (i.e., owned by a government agency), voting districts, etc.

3. Foreign Government - This term is not defined in 18 U.S.C. §1028 and, hence, its definition is that found in 18 U.S.C. §11:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The term "foreign government", as used in this title except in sections 112, 878, 970, 1116, and 1201, includes any government, faction, or body or insurgents within a country with; which the United States is at peace, irrespective of recognition by the United States.

4. Political Subdivision of a Foreign Government - This term is not defined in 18 U.S.C. §1028 but is clearly intended to cover all the subordinate governmental bodies in foreign countries regardless of nomenclature. It therefore covers provinces, cities, districts, states, towns, villages, counties, departments, or whatever structure is used in the foreign country to divide governmental responsibility, however labelled. It also covers the agencies and departments of such governmental bodies.

5. International Governmental or Quasi-Governmental Organization This term is not defined in 18 U.S.C. §1028 but includes such bodies as the United Nations (UN), North Atlantic Treaty Organization (NATO), European Economic Community (EEC), Organization of American States (OAS), the World Bank, the Inter-American Development Bank, etc., and other public international organizations designated as such pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. §288), (See, generally, chapter 7 of title 22, United States Code, H. Rep., p. 8).

9-64.433 Types of Identification Documents

Identification documents will fall into two categories: (A) "genuine" or (B) "false." Neither type is defined in 18 U.S.C. §1028. The types may even overlap at times.

A. Genuine Documents - The term "genuine" is not used in 18 U.S.C. §1028 but is used here to refer to those authentic identification documents actually made or issued under the authority of a governmental entity. It includes genuine blank documents (i.e., blank forms not yet filled in). H. Rep., p.9.

B. False Documents - The term "false identification document" is used throughout 18 U.S.C. §1028. It is not, however, defined in the section., The term is intended to include counterfeit, forged, or altered identification documents as well as apparent identification documents which seem to have been issued by a government authority, even though that authority may not issue an identification document of that particular

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

type. (See H. Rep., p. 9 - "Such document could be found to be a 'false identification document' for purposes of the Act because it appears to be a government-issued document, even though it may not be a counterfeit of a document actually issued by that state.") This concept would also apply when all identification document purports to be issued by a governmental entity, which in fact does not actually exist. See Pines v. United States, 123 F.2d 825 (8th Cir. 1941). Documents purportedly issued by non-existing governmental entities might be called "spurious" for the want of a better term. "Counterfeit" implies an unauthorized reproduction of an original document, which would include a bank. "Altered" would be the unauthorized changing of a material fact contained in the document. "Forged" would relate to the unauthorized execution of the document (e.g., filling in a genuine blank identification document without authority). "Spurious" could be the creation of a completely fictitious government entity. It is possible for a document to be "genuine" and "false" at the same time (e.g., a genuine driver's license is stolen and the driver's name is altered; a genuine birth certificate blank form is stolen and is filled in without authorization).

9-64.434 Specifically Mentioned Identification Documents

18 U.S.C. §1028 singles out three special non-federal identification documents and gives them preferred treatment. This is so because these three documents, in the absence of a national identity card, are the prime means by which an individual establishes his/her identity in the United States. The three documents are: (A) birth certificate; (B) driver's license; and (C) personal identification card.

A. Birth Certificate - This term is not defined in 18 U.S.C. §1028 as is is self-explanatory. This document is issued by different agencies in different states and foreign countries. Nevertheless, it represents the official governmental statement by the proper government agency that a person having such a name was born on a particular date in a particular place of specific parentage. Obviously, a birth certificate is not intended to actually identify the person who claims such a document pertains to him/her. There are few physical characteristics that remain the same as those at the time of birth. Nevertheless, the birth certificate has become "commonly accepted" as an identification document in this country.

B. Driver's License - This term is not defined in 18 U.S.C. §1028. This governmentally issued document's original purpose was to state that a particular person was authorized to operate a vehicle upon the public roadways. It was not intended to establish one's identity. Because of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the absence of a better document, however, the driver's license eventually has become "commonly accepted" as the "national identity card." 18 U.S.C. §1028 covers both domestic as well as foreign governmentally issued driver's licenses.

C. Personal Identification Card - This term is defined in 18 U.S.C. §1028(d)(4) to mean -

. . . an identification document issued by a State or local government solely for the purpose of identification . . .

This definition would appear to limit such documents to those issued by domestic (i.e., within the United States) governmental entities in contrast to the first two (birth certificates and driver's licenses). This document is normally issued by state departments of motor vehicles to provide an identification document for those persons who do not for some reason obtain a driver's license. In 1979, the National Committee on Uniform Traffic Laws and Ordinances, authors of the Uniform Vehicle Code (UVC), provided for the issuance of identification cards for non-drivers and restrictions on the unlawful use of such cards. The UVC, which serves as the model state code for vehicular matters, defines a "personal identification card" as "a document issued by the department [of motor vehicles] for the sole purpose of identifying the bearer and not authorized for use as driver's license." (UVC §1-144.1) As of 1978, approximately 35 state jurisdictions issued such cards. In 32 of these states, they were issued by the motor vehicle department. H. Rep., p.12,

9-64.435 Operative Terms

18 U.S.C. §1028 has three basic operative offenses. They are to "produce," "transfer," or "possess." With the exception of simple possession of a United States identification document which was stolen or produced without lawful authority which is prohibited by 18 U.S.C. §1028(a)(6), possession is always coupled with the purpose to "use unlawfully," "transfer unlawfully" or "use to defraud the United States." Hence, it is necessary to understand the scope of the words "produce," "transfer," "possess," "use," and "defraud the United States."

A. Produce - This term is defined in 18 U.S.C. §1028(d)(2) to include "alter, authenticate, or assemble." Obviously, since the word "include" is used in the definition, the term is not limited to these three concepts but also encompasses all forms of counterfeiting, forging,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

making, manufacturing, issuing, and publishing. A government employee whose duty is to simply issue identification documents (i.e., he/she does not manufacture or assemble the documents) is, by issuing the document, authenticating it. If such an employee were to authenticate such documents without lawful authority, it would constitute an offense under 18 U.S.C. §1028(a)(1). H. Rep., p. 9.

B. Transfer - This term is not defined in 18 U.S.C. §1028 but is intended to reach those persons who "traffic" in stolen and false identification. It includes the acts of selling, pledging, distributing, giving, loaning or otherwise transferring. It does not require any exchange of "consideration" (i.e., thing of value) for the transfer. To transfer "unlawfully" means the transfer of an identification document in a manner forbidden by federal, state, or local law. H. Rep., pp. 10, 11.

C. Possess - This term is not defined in 18 U.S.C. §1028 but is to be construed broadly. It includes the concept of "receipt" but is not limited thereto. H. Rep., p. 10. Constructive possession would also be included.

D. Use - This term is not defined in 18 U.S.C. §1028 but is to be broadly construed and includes presenting, displaying, certifying, or otherwise giving currency to an identification document so that it would be accepted as an identification document in any manner. To use "unlawfully" means that the document was used in a manner that violates a federal, state or local law, or is part of a misrepresentation that violates a law. For example, 18 U.S.C. §1028(a)(3) would be violated if the possessor intended to use the five or more documents to make representations in any matter within the jurisdiction of any department or agency of the United States in violation of 18 U.S.C. §1001. H. Rep., p. 10.

E. Defraud the United States - This term is not defined in 18 U.S.C. §1028 but it is not intended to be limited to misrepresentations related to financial fraud but would also include the misrepresentative use of false identification to obstruct functions of the government (e.g., display to government investigator a false pilot's license or someone else's driver's license for the purpose of trying to deceive or mislead such investigator). H. Rep., p.11.

9-64.436 Culpable States of Mind

There are three different terms used in 18 U.S.C. §1028 to connote the culpable state of mind requirement for an offense. They are: (A)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

"knowingly"; (B) "knowing"; and (C) "with the intent." The first two are, for all practicable purposes, the same.

A. Knowingly - The first five subsections of 18 U.S.C. §1028(a) all start with this term. (Its absence from subsection 18 U.S.C. §1028 (a)(6) may be explainable on grounds of redundancy.) A knowing state of mind with respect to an element of the offense is (1) an awareness of the nature of one's conduct, and (2) an awareness of or a firm belief in the existence of a relevant circumstance, such as the "stolen," the "produced without lawful authority," or "false" nature of the identification document. The knowing state of mind requirement may be satisfied by proof that the actor was aware of a high probability of the existence of the circumstance (e.g., stolen or false nature of the document), although a defense should succeed if it is proven that the actor actually believed that the circumstance did not exist after taking reasonable steps to ensure that such belief was warranted. 18 U.S.C. §1028 follows the approach of the Model Penal Code (§2.02(7)) in dealing with what has been called "willful blindness," the situation where the actor, aware of the probable existence of a material fact, does not take steps to ascertain that it does not exist. Willful blindness would require an awareness of a high probability of the existence of the circumstance. United States v. Jewell. 532 F.2d 697, 700 n.7 (9th Cir.), cert. denied, 426 U.S. 951 (1976)(H. Rep., pp. 9-10).

B. Knowing - This term appears in 18 U.S.C. §1028 U.S.C. §1028(a)(2) and (a)(6). As such, it applies to a knowledge of a relevant circumstance (e.g., the character of the document as "stolen" or "produced without lawful authority"). The above discussion of "knowingly" is equally applicable to "knowing". H. Rep., pp 9-10.

C. With the Intent - This term which appears in 18 U.S.C. §§1028(a)(3), (a)(4), and (a)(5), is intended to mean the same culpable state of mind as that described by the term "purpose" in the Model Penal Code (§2.02). The distinction between "with the intent" (i.e., "purpose") and a "knowing state of mind" was recently restated by Justice Rehnquist:

As we pointed out in United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978), a person who causes a particular result is said to act purposefully if 'he consciously desires that result, whatever the likelihood of that result happening from his conduct,' while he is said to act knowingly if he is aware 'that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.'

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. Bailey, 444 U.S. 394, 404 (1980), quoted in, H. Rep., p. 10.

9-64.437 Relevant Circumstances

There are seven non-jurisdictional circumstances in 18 U.S.C. §1028(a). They are (A) "false"; (B) "stolen"; (C) "lawful authority"; (D) "produced without lawful authority"; (E) "produced without authority"; (F) "issued lawfully for the use of the possessor"; and (G) "used in the production."

A. False - The concept of a false identification document has been fully discussed at USAM 9-64.633, supra.

B. Stolen - This term is not defined in 18 U.S.C. §1028 but it is intended to cover identification documents "obtained by fraudulent means, as well as theft." H. Rep., p. 10. Hence, it covers all forms of unlawful takings and is not limited to common law larceny. See generally Bell v. United States, 103 S. Ct. 2398 (1983); United States v. Turley, 352 U.S. 407 (1957). It would appear that a genuine identification document obtained by fraud from a government agency could be considered as "stolen" under two subsections of 18 U.S.C. §1028(a)(2) and (a)(6). Of course, under 18 U.S.C. §1028(a)(2) the gist of the offense is not the acquisition of an identification document by false information, but rather the transfer of such a "stolen" identification document, while under 18 U.S.C. §1028(a)(6) the gist of the offense is the possession of such a "stolen" (i.e., falsely acquired) identification document of the United States.

C. Lawful Authority - This term is not defined in 18 U.S.C. §1028. It refers to the authority to manufacture, prepare or issue identification documents by statute or regulation, or by contract pursuant to such authority. A person, such as clerk, who is authorized to issue identification documents upon the satisfaction of certain requirements, could be acting without lawful authority if he/she issued an identification document knowing that the requirements had not been fulfilled. Similarly, a party printing identification documents under an authorized contract could be producing without lawful authority if he/she intended to deliver an identification document to any party other than an authorized recipient. H. Rep., p. 10.

D. Produced Without Lawful Authority - This term, which is not defined in 18 U.S.C. §1028, appears in 18 U.S.C. §1028(a)(2). That

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

subsection precludes the transfer of such a document. Producing without lawful authority goes to the legality of the execution of the document. If the issuer had the lawful authority to issue the document, it was produced with lawful authority even if the recipient was not entitled to it, provided the issuer did not know that the recipient was not entitled to it.

1. Example:

A state hunting license requires that the applicant be a resident of the state and be 18 years of age. An applicant, who is a resident of the state, claims he/she is 18 years of age but in reality is only 16 years of age. The government clerk believes him/her and issues him/her a hunting license. (Note. This document, however, while genuine, was not "issued lawfully" under 18 U.S.C. §1028(a)(3) and (a)(4) because the conditions for lawful issuance were not present (i.e., person was not 18 years of age).)

E. Produced Without Authority - This term, which is not defined in 18 U.S.C. §1028, appears in 18 U.S.C. §1028(a)(6). There is no easily discernible reason why the term "lawful" was omitted except to note that 18 U.S.C. §1028(a)(6) was added as a result of a Senate amendment which did not necessarily follow the drafting terminology of the preceding five subsections which were authored by the House. Since the absence of "lawful" may cause some defendants to claim that the documents were produced by some authority, albeit illegal (i.e., the owner of the counterfeit print shop instructed them to produce the documents) it is probably best to treat the word "lawful" as being understood. This can be justified because 18 U.S.C. §1028(a)(6)'s antecedent is obviously 18 U.S.C. §1028(a)(1) and there is no indication that Congress intended these two terms to have any difference in meaning in these two subsections.

F. Issued Lawfully for the Use of the Possessor - This term is not defined in 18 U.S.C. §1028 nor is it discussed in the House Judiciary Committee Report. It excludes genuine documents issued lawfully by a government agency to the possessor. It does not exempt such a document if it is turned over to another person for his/her use (e.g., impersonation of the original recipient). The phrase "issued lawfully" is ambiguous. Is a genuine document issued by clerical mistake issued lawfully? Is a genuine document issued as a result of a submission of false information to the government agency issued lawfully? This is unclear and probably may only be resolved through litigation. Obviously, there is no problem when the identification document is truly "false" as this phrase only applies to "genuine" identification documents. However, when it is

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

genuine (i.e., actually issued by a government agency) the meaning of the phrase is uncertain and legislative history is not helpful. Nevertheless, we believe that a strong argument can be made that the term means "issued in accordance with all legal requirements," so that if the recipient was not legally entitled to it, it was not issued lawfully (although it was produced with lawful authority).

Accordingly, in the Criminal Division's judgment, the phrase "issued lawfully for the use of the possessor" refers to those genuine documents issued by the proper governmental authorities to which the applicant is legally entitled, i.e., the applicant met all the material criteria for obtaining the identification document. Hence, an individual who applies for a hunting license which requires a minimum age of 18 and who is actually only 16 and who misrepresents his/her age, has not received an identification document "issued lawfully for the use of the possessor" even though the document is genuine and is in his/her true name. Likewise, a document applied for in a fictitious name would not be considered as "issued lawfully" if the true name of the individual was a material aspect of the issuance of the document by the government agency. Furthermore, an identification document that was lost by the original recipient, stolen from the original recipient or turned over by the original recipient to another person who now happens to be in possession of the document was not issued lawfully for the use of the current possessor.

The term "other than issued lawfully for the use of the possessor" comes into play only under 18 U.S.C. §1028(a)(3) and (a)(4). Under 18 U.S.C. §1028(a)(3), the relevant prohibited conduct involving this term would be the possession with the purpose of using or transferring unlawfully five or more genuine identification documents to which the possessor was not entitled. Hence, if a subject has five or more such genuine documents and there is evidence to show a purpose to use or transfer unlawfully these genuine documents, such conduct can be reached under 18 U.S.C. §1028(a)(3). Under this subsection, most violations involving this term will be limited to situations involving perpetrators who have purposely created multiple identities for themselves.

18 U.S.C. §1028(a)(4), on the other hand, can involve a greater number of potential violators because under this subsection only one document is necessary for a violation. 18 U.S.C. §1028(a)(4) prohibits the knowing possession of a genuine identification document (other than one issued lawfully for the use of the possessor) with the purpose of such document being used to defraud the United States. Consequently, this subsection could involve genuine documents which were not actually issued to the possessor (e.g., stolen from person or lost by the person to whom

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

originally issued or "turned-over" by original recipient to some "friend" and genuine documents still in the possession of the original recipient which he/she was not legally entitled to receive in the first place.)

G. Used in the Production - This term is utilized in 18 U.S.C. §1028(a)(5) and relates to the improper purpose for which a document-making implement is intended to be used. It appears to be self-evident. It implicitly recognizes that document-making implements also serve a lawful purpose and may be legally possessed or transferred.

9-64.440 Prohibited Acts

While there are six subsections to 18 U.S.C. §1028(a), they can be viewed as chiefly covering these ten different prohibited acts:

A. Producing without lawful authority an identification document or a false identification document (18 U.S.C. §1028(a)(1));

B. Transferring an identification document or a false identification document knowing that such document was stolen or produced without lawful authority (18 U.S.C. §1028(a)(2));

C. Possessing with intent to use unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor) or false identification documents (18 U.S.C. §1028(a)(3));

D. Possessing with intent to transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor) or false identification documents (18 U.S.C. §1028(a)(3));

E. Possessing an identification document (other than one issued lawfully for the use of the possessor) or a false identification document with the intent such document be used to defraud the United States (18 U.S.C. §1028(a)(4));

F. Possessing an identification document that is an identification document of the United States which is stolen knowing that such document was stolen (18 U.S.C. §1028(a)(6));

G. Possessing an identification document that appears to be an identification document of the United States which was produced without authority knowing that such document was produced without authority (18 U.S.C. §1028(a)(6));

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

H. Producing, transferring, or possessing a document-making implement with the intent that such document-making implement will be used in the production of a false identification document (18 U.S.C. §1028(a)(5));

I. Producing, transferring, or possessing a document-making implement with the intent that such document-making implement will be used in the production of another document-making implement which will be used in the production of a false identification document (18 U.S.C. §1028(a)(5)); and

J. Attempting to do any of the above (18 U.S.C. §1028(a)).

9-64.450 Federal Jurisdictional Circumstances

There are five different bases for federal jurisdiction over the offense under 18 U.S.C. §1028(c). They are: (1) the presence of a United States identification document; (2) the presence of a United States document-making implement; (3) the possession of the identification document is with the intent to defraud the United States; (4) the prohibited production, transfer, or possession of the identification document or document-making implement "is in or affects interstate or foreign commerce"; and (5) the identification document or document-making implement is "transported in the mail in the course of the production, transfer, or possession." The presence of any one circumstance grants federal jurisdiction. There is no need for the prosecution to prove the defendant's state of mind with respect to the jurisdictional circumstance. H. Rep., p. 13. See generally United States v. Feola, 420 U.S. 671 (1975). However, it should be noted that the same circumstance which provides federal jurisdiction may also be a circumstance of the offense itself, e.g., "intent to defraud the United States" under 18 U.S.C. §1038 (a)(4). As a practical matter, therefore, it may be only the "commerce" and "mail" jurisdictional bases for which no proof of the state of mind of the defendant will be required.

9-64.451 United States Identification Document

This concept is self-explanatory. As stated in 18 U.S.C. §1028(c)(1), it covers both genuine and false identification documents which are issued or appear to be issued under the authority of the United States. There is extraterritorial jurisdiction over offenses involving United States identification documents under the generally recognized "protective principle" of international law. H. Rep., p. 14.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.452 United States Document-Making Implement

This concept is described in 18 U.S.C. §1028(c)(1) and covers a document-making implement, as defined in 18 U.S.C. §1028(d)(3), which is designed or suited for making a United States identification document or a false United States identification document. (This would cover the photograph/lamination machine, even though it is also suited for producing non-federal identification documents.)

9-64.453 Possession With the Intent to Defraud the United States

This concept applies to any identification document possessed for such purpose unless the document was issued lawfully for the use of the possessor. It is found in 18 U.S.C. §1028(c)(2).

9-64.454 Is in or Affects Interstate or Foreign Commerce

This term, found in 18 U.S.C. §1028(c)(3), requires that the prohibited production, transfer, or possession have no more than a minimal nexus with interstate or foreign commerce. Scarborough v. United States, 431 U.S. 563, 575 (1977). The prohibited act need not be contemporaneous with the movement in or the effect upon interstate or foreign commerce. Nor is it necessary that the purpose of the prohibited act be to use or affect interstate or foreign commerce. United States v. Daley, 564 F.2d 645, 649 (2d Cir. 1977). For instance, a showing that a false identification document in the possession of the defendant traveled at some time in interstate or foreign commerce would be sufficient. H. Rep., p. 14. Moreover, a production or transfer of identification documents which are intended to be distributed in interstate or foreign commerce would be covered. This is so because under 1 U.S.C. §1 "words used in the present tense include the future as well as the present". Hence, the term "affects" includes "will affect." Furthermore, since 18 U.S.C. §1028 has an attempt provision, the commerce aspect need not be completed in order to vest federal jurisdiction. However, in the absence of evidence showing that interstate or foreign commerce was affected the prosecutor will have to prove there was an intent to do acts which, if completed, would have affected interstate or foreign commerce. Because this is a jurisdictional circumstance, there will not have to be proof that each participant in the scheme was aware of the future effect upon commerce but only that the full extent of the scheme, if successful, would have had such results. See also McElroy v. United States, 455 U.S. 642 (1982), as to when interstate commerce begins.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.455 Transported in the Mail

The concept, which is found in 18 U.S.C. §1028(c)(3), provides there is federal jurisdiction if, in the course of the prohibited production, transfer, or possession, the identification document, false identification document, or document-making implement is transported in the United States mail. As a practical matter, this concept expands coverage to include intrastate mailings since interstate mailings are also covered by the "commerce" basis.

9-64.460 Penalties

In addition to prescribing the elements of the prohibited acts and federal jurisdictional circumstances, 18 U.S.C. §1028 provides a three-tier level of penalties depending upon the nature of the prohibited act and the type of document involved.

9-64.461 18 U.S.C. §1028(b)(1)

This subsection contains the most serious penalty provision and is aimed at the most dangerous producers of and traffickers in false identification. It establishes a fine of not more than \$25,000 and/or imprisonment for not more than five years if the offense involves:

A. The production or transfer of an identification document or false identification document that is or appears to be

1. A United States identification document; or
2. A birth certificate, driver's license, or personal identification card;

B. The production or transfer of more than five identification documents or false identification documents; or

C. The production, transferring or possession of a document-making implement under 18 U.S.C. §1028(a)(5).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.462 18 U.S.C. §1028(b)(2)

This subsection creates an intermediate penalty for the other producers and traffickers consisting of a fine of not more than \$15,000 and/ or imprisonment for not more than three years if the offense involves:

A. Any production or transfer of an identification document or false identification document other than that penalized by 18 U.S.C. §1028(b)(1); or

B. The possession with the intent to use unlawfully or transfer unlawfully five or more identification documents (other than those issued lawfully for the use of the possessor) or false identification documents under 18 U.S.C. §1028(a)(3).

9-64.463 18 U.S.C. §1028(b)(3)

This subsection provides that for any offense not covered by 18 U.S.C. §1028(b)(1) or (b)(2), there is a fine of not more than \$5,000 and/or imprisonment for not more than one year. This covers offenses under 18 U.S.C. §1028(a)(4) and (a)(6).

While it may be argued that the penalty provision for an attempt is unclear under 18 U.S.C. §1028 (e.g., does the word "production" encompass also an attempt to produce or is an attempt to be treated as "any other case" under 18 U.S.C. §1028(b)(3)?), the legislative history conclusively indicates that the Congress intended attempts to be punished at the same level as the completed offense. See H. Rep., pp. 12-13. Federal prosecutors should therefore urge the higher penalty for attempt. Of course, attempts to violate 18 U.S.C. §1028(a)(4) and (a)(6) would be misdemeanors because such offenses are themselves misdemeanors.

9-64.470 Draft Indictments/Informations

9-64.471 Production - 18 U.S.C. §1028(a)(1)

9-64.472 Form #1A - Production of a United States Government Identification Document

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_, in the \_\_\_\_\_  
District of \_\_\_\_\_, the defendant, \_\_\_\_\_,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

knowingly and with lawful authority, did [attempt to] (1) produce [(a) United States identification document(s)], (2) [(a) false United States identification document(s)], (3) to wit [describe the identification document(s)]. (4)(5)(6)

Notes to Form #1A:

- (1) The attempt provision is to be punished at the same level as the actual offense. See House Report No. 97-802, 97th Congress, 2d Sess., pp. 12-13.
- (2) You should use the term "United States identification document" in the rare situation where the production was done within the government itself but was not authorized, e.g., government clerk supplies false information to the issuing department causing a genuine document to be issued by a federal agency to a person not entitled to it.
- (3) The term "false United States identification document" is used when the document produced is not genuine but is counterfeit, altered, or spurious. This will be in the majority of cases. See House Report No. 97-802, 97th Congress, 2d Sess., p. 9.
- (4) The description of the United States identification document will clearly establish the necessary federal jurisdiction under 18 U.S.C. §1028(c)(1).
- (5) The production of a United States identification document is punishable by imprisonment of not more than five years and/or a fine of not more than \$25,000 pursuant to 18 U.S.C. §1028(b)(1)(A)(i).
- (6) In selecting the number of counts for such production, common sense should be used. If the defendant produced 50 identification documents at the same time, it should be alleged as one count for the entire "run" of 50. However, if he/she produced 25 on Monday, 30 on Thursday, and one more on Saturday, you could allege three separate counts. Also, since the production of different kinds of identification documents requires a change in the manufacturing process, the production of different types of identification documents may be charged as separate counts. For example, if he/she produced on the same day a social security card, an alien registration card, and a United States passport, these acts should be charged as three separate offenses. Of course, multiple "runs" of the same document at the same time should be treated as one "production" for the same type document.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.473 Form #1B - Production of a Birth Certificate, Driver's License  
or Personal Identification Card

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_, in the \_\_\_\_\_  
District of \_\_\_\_\_, the defendant, \_\_\_\_\_,  
knowingly and without lawful authority did [attempt to] (1) produce [, in  
and affecting interstate (and foreign) commerce,] (2) [and transported in  
the mail] (3) [a] [birth certificate(s)] [driver's license(s)] [personal  
identification card(s)] (4)(5) [false birth certificate(s)] [false  
driver's license(s)] [false personal identification card(s)] (6) to wit  
[describe the identification document(s)]. (7)

Notes to Form #1B:

- (1) See note (1) to Form #1A on p. 37.
- (2) For non-federal government identification documents, you must allege a separate federal jurisdictional basis. If the mails were not used in the production, transfer, or possession, then the production, transfer, or possession must be "in or affecting interstate or foreign commerce" for there to be federal jurisdiction. This requires only a minimal commerce nexus, meaning that the document's production, transfer, or possession has had to have some effect upon interstate or foreign commerce. See generally Scarborough v. United States, 431 U.S. 563, 575 (1977), and United States v. Daley, 564 F.2d 645, 649 (2d Cir. 1977). If foreign commerce is not involved, you should not allege it in the indictment.
- (3) The use of mails during the production may give rise to federal jurisdiction authority.
- (4) The production of one birth certificate, driver's license, or personal identification card is punishable by imprisonment of not more than five years and/or a fine of not more than \$25,000 pursuant to 18 U.S.C. §1028(b)(1)(A)(ii).
- (5) You should use the term "birth certificate," "driver's license," or "personal identifications card" in the rare situation where the production of such document was done within the government itself but was not authorized, e.g., the government clerk knows that the person is not lawfully entitled to the document but issues it anyway.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(6) You should use the term "false birth certificate," "false driver's license," or "false personal identification card" when the document produced is not genuine but is counterfeit, altered, or spurious. This will be in the majority of cases. See House Report No. 97-802, 97th Congress, 2d Session, p. 9.

(7) See note (6) to Form #1A on p. 37.

9-64.474 Form #1C - Production of Five or More Non-Federal Identification Documents (Other than Birth Certificates, Driver's Licenses and Personal Identification Cards)

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, knowingly and without lawful authority did [attempt to] (1) produce [, in and affecting interstate (and foreign) commerce,] (2) [and transported in the mail] (3) five [or more] (4) [identification documents] (5) [false identification documents] (6) to wit [describe the documents]. (7)

Notes to Form #1C:

(1) See note #1 to Form #1A on p. 37.

(2) See note #2 to Form #1B on p. 38.

(3) See note #3 to Form #1B on p. 38.

(4) The production of five or more of the involved documents under this count is punishable by imprisonment of not more than five years and/or a fine of not more than \$25,000 pursuant to 18 U.S.C. §1028(b)(1)(B).

(5) See note #5 to Form #1B on p. 38.

(6) See note #6 to Form #1B on above.

(7) See note #6 to Form #1A on above.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.475 Form #1D - Production of Less than Five Non-Federal Identification Documents (Other Than Birth Certificates, Driver's Licenses and Personal Identification Cards)

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, knowingly and without lawful authority did [attempt to] (1) produce [, in and affecting interstate (and foreign) commerce,] (2) [and transport in the mail] (3) [(an) identification document(s)] (4)(5) [(a) false identification document(s)], (6) to wit [describe the document(s)]. (7)

Notes to Form #1D:

- (1) See note #1 to Form #1A on p. 37.
- (2) See note #2 to Form #1B on p. 38.
- (3) See note #3 to Form #1B on p. 38.
- (4) The production of less than five of the involved documents under this count is punishable by imprisonment of not more than three years and/or a fine of not more than \$15,000 pursuant to 18 U.S.C. §1028(b)(2)(A).
- (5) See note #5 to Form #1B on p. 38.
- (6) See note #6 to Form #1B on p. 39.
- (7) See note #6 to Form #1A on p. 39.

9-64.480 Draft Indictments/Informations (Cont'd)

9-64.481 Transfer - 18 U.S.C. §1028(a)(2)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.482 Form #2A - Transfer of a United States Government Identification Document

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly [attempt to] (1) transfer [(a) United States identification document(s)] (2) [(a) false United States identification document(s)], (3) to wit [describe the document(s)], (4) knowing that such document(s) [(was) (were)] [stolen] (5) [and] (6) [produced without lawful authority]. (7)(8)(9)

Notes to Form #2A:

- (1) See note #1 to Form #1A on p. 37.
- (2) You should use the term "United States identification document" when the transfer involves a genuine document, which was actually issued by the government agency. It would also include a genuine document which is still blank (not filled in as yet). See also note #2 to Form #1A on p. 37.
- (3) The term "false United States identification document" is used when the document being transferred is not genuine and was not actually issued by a government agency, or if issued it has been altered. Hence, the document is counterfeit, altered, or spurious. A stolen blank document which has not yet been filled out should be treated as genuine. A document stolen in blank which has been filled in, can also be treated as "false."
- (4) See note #4 to Form #1A on p. 37.
- (5) The term "stolen" is to be construed to include all forms of unlawful takings including those by means of false pretenses. It thus includes all forms of theft and is not limited to larceny as defined by common law. See House Report No. 97-802, 97th Congress, 2d Sess., p. 10. See generally Bell v. United States, 103 S. Ct. 2398 (1983); United States v. Turley, 352 U.S. 407 (1957). The unlawful taking would normally be from the person to whom the document was issued by the government agency. However, there is the intriguing possibility that where the document is genuine but was obtained by fraud from the government agency, it can be considered as "stolen" from the agency.
- (6) The term "and" will normally not be necessary as the prosecutor will normally know whether the document is genuine or false. If genuine, it will normally be treated as "stolen." If false, it will be treated as

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

"produced without lawful authority." However, at times the prosecutor may not have evidence to select which knowledge the defendant had and may be able to prove only that the defendant knew the document was "phony." In these rare situations the use of "and" may be appropriate. Moreover, since a genuine document or blank document can be stolen and subsequently altered or forged, the use of "and" may be warranted at times.

(7) The term "produced without lawful authority" obviously covers identification documents which are false (i.e., counterfeit, altered, and spurious). See also notes #2 and #3 to Form #1A on p. 37.

(8) The transfer of a United States government identification document is punishable by imprisonment of not more than five years and/or a fine of not more than \$25,000 pursuant to 18 U.S.C. §1028(b)(1)(A)(i).

(9) In selecting the number of counts for such transfers, common sense should be used. If the defendant transfers five United States government identification documents at the same time, it is one count since the gist of the offense is the "transfer." If he/she transfers at the same time non-federal identification documents, such activities may be charged as separate counts for pleading purposes, but they will undoubtedly merge at the time of sentencing since the act of transferring covered both types of documents. The defendant should be charged in separate counts to ensure that upon conviction, he/she can be sentenced to the highest penalty allowed by 18 U.S.C. §1028(b). At times, you may have combined into one count the United States government identification documents and the non-federal identification documents in order to reach the required number of documents. If such was done, you must also allege the proper jurisdictional circumstance for the non-federal identification documents.

9-64.483 Form #2B - Transfer of a Birth Certificate, Driver's License or Personal Identification Card

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly [attempt to] (1) transfer [, in and affecting interstate (and foreign) commerce,] (2) [and transported in the mail] (3) [a] [birth certificate(s)] [driver's license(s)] [personal identification card(s)] (4)(5) [false birth certificate(s)] [false driver's license(s)] [false personal identification card(s)], (6) to wit [describe the identification document(s)], knowing that such [birth certificate(s)] [driver's license(s)] [personal identification card(s)] [(was) (were) [stolen] (7) [and] (8) [produced without lawful authority]. (9)(10)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Notes to Form #2B:

- (1) See note #1 to Form #1A on p. 37.
- (2) See note #2 to Form #1B on p. 38.
- (3) See note #3 to Form #1B on p. 38.
- (4) The transfer of one birth certificate, driver's license, or personal identification card is punishable by imprisonment of not more than five years and/or a fine of not more than \$25,000 pursuant to 18 U.S.C. §1028(b)(1)(A)(ii).
- (5) See note #2 to Form #2A on p. 41.
- (6) See generally note #3 to Form #2A. on p. 41.
- (7) See note #5 to Form #2A on p. 41.
- (8) See note #6 to Form #2A on p. 41.
- (9) See note #7 to Form #2A on p. 42.
- (10) See note #9 to Form #2A on p. 42.

9-64.484 Form #2C - Transfer of Five or More Non-Federal Identification Documents (Other Than Birth Certificates, Driver's Licenses and Personal Identification Cards)

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198 \_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly [attempt to] (1) transfer [, in or affecting interstate (and foreign) commerce,] (2) [and transported in the mail] (3) five [or more] (4) [identification documents] (5) [false identification documents], (6) to wit [describe the identification documents], knowing that such documents were [stolen] (7) [and] (8) [produced without lawful authority]. (9)(10)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Notes to Form #2C:

- (1) See note #1 to Form #1A on p. 37.
- (2) See note #2 to Form #1B on p. 38.
- (3) See note #3 to Form #1B on p. 38.
- (4) The transfer of five or more of the involved documents under this count is punishable by imprisonment of not more than five years and/or a fine of not more than \$25,000 under 18 U.S.C. §1028(b)(1)(B). The documents need not be of the same type.
- (5) See note #2 to Form #2A on p. 41.
- (6) See note #3 to Form #2A on p. 41.
- (7) See note #5 to Form #2A on p. 41.
- (8) See note #6 to Form #2A on p. 41.
- (9) See note #7 to Form #2A on p. 42.
- (10) See note #9 to Form #2A on p. 42.

9-64.485 Form #2D - Transfer of Less than Five Non-Federal Identification Documents (Other Than Birth Certificates, Driver's Licenses and Personal Identification Cards)

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly [attempt to] (1) transfer [, in or affecting interstate (and foreign) commerce,] (2) [and] transported in the mail] (3) [(an) identification document(s)] (4)(5) [(a) false identification document(s)], (6) to wit [describe the identification document(s)], knowing that such document(s) [(was) (were)] [stolen] (7) [and] (8) [produced without lawful authority]. (9)(10)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Notes to Form #2D:

- (1) See note #1 to Form #1A on p. 37.
- (2) See note #2 to Form #1B on p. 38.
- (3) See note #3 to Form #1B on p. 38.
- (4) The transfer of less than five of the involved documents under this count is punishable by imprisonment of not more than three years and/or a fine of not more than \$15,000 pursuant to 18 U.S.C. §1028(b)(2)(A).
- (5) See note #2 to Form #2A on p. 41.
- (6) See note #3 to Form #2A on p. 41.
- (7) See note #5 to Form #2A on p. 41.
- (8) See note #6 to Form #2A on p. 41.
- (9) See note #7 to Form #2A on p. 42.
- (10) See note #9 to Form #2A on p. 42.

9-64.490 Draft Indictments/Informations (Cont'd)

9-64.491 "Possession" - 18 U.S.C. §§1028(a)(3), (a)(4), and (a)(6)

9-64.492 Form #3A - Possession with Intent to Use or Transfer Unlawfully  
Five or More United States Government Identification Documents

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_\_\_, in the \_\_\_\_\_  
District of \_\_\_\_\_, the defendant, \_\_\_\_\_,  
did knowingly [attempt to] (1) possess with intent to [use] (2) [transfer]  
(3)/ unlawfully five [or more] (4) [United States identification documents  
(other than those issued lawfully for the use of the (defendant))] (5)  
[false United States identification documents], (6) to wit [describe the  
identification documents]. (7)(8)(9)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Notes to Form #3A:

- (1) See note #1 to Form #1A on p. 37.
- (2) The term "with intent to use unlawfully" means the intent to use (i.e., present, display, certify, or otherwise give currency to) the identification document in any manner so that it would be accepted as identification in a manner that violates a federal, state, or local law, or is part of the making of a misrepresentation that violates a law. See House Report No. 97-802, 97th Congress, 2d Sess., pp. 10-11.
- (3) The term "with intent to transfer unlawfully" means the intent to sell, pledge, distribute, give, loan, or otherwise transfer an identification document in a manner forbidden by federal, state, or local law. See House Report No. 97-802, 97th Congress, 2d Sess., p. 11.
- (4) The possession of five identification documents with the intent to unlawfully use or transfer is punishable by imprisonment of not more than three years and/or a fine of not more than \$15,000 under 18 U.S.C. §1028(b)(2)(B).
- (5) See notes #2 to Form #1A on p. 37, and #2 to Form #2A on p. 41. When genuine identification documents are involved, you will have to allege and prove that such documents were not issued lawfully for the use of the defendant.
- (6) See notes #3 to Form #1A on p. 37, and #3 to Form #2A on p. 41.
- (7) See note #4 to Form #1A on p. 37.
- (8) Since possession is a continuing offense, there should usually be only one count in an indictment for any violation of 18 U.S.C. §1028(a)(3). See also the discussion in note #9 to Form #2A on p. 42, when some other identification documents in addition to United States identification documents are being possessed.
- (9) It is possible to meet the five documents minimum by proving the possession of false identifications and genuine identification documents which the defendant was not lawfully entitled to possess so long as there are at least five documents. See also the discussion in note #9 to Form #2A on p. 42, when some other governmental identification documents in addition to United States identification documents are being possessed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.493 Form #3B - Possession with Intent to Use or Transfer Unlawfully  
Five or More Non-Federal Identification Documents

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_, in the \_\_\_\_\_  
District of \_\_\_\_\_, the defendant, \_\_\_\_\_,  
did knowingly [attempt to] (1) possess [, in and affecting interstate (and  
foreign) commerce,] (2) [and transported in the mail] (3) with intent to  
[use] (4) [transfer] (5) unlawfully five [or more] (6) [identification  
documents (other than those issued lawfully for the use of the (defen-  
dant))] (7) [false identification documents], (8) to wit [describe the  
identification documents]. (9)

Notes to Form #3B:

- (1) See note #1 to Form #1A on p. 37.
- (2) See note #2 to Form #1B on p. 38.
- (3) See note #3 to Form #1B on p. 38.
- (4) See note #2 to Form #3A on p. 46.
- (5) See note #3 to Form #3A on p. 46.
- (6) See note #4 to Form #3A on p. 46.
- (7) See note #5 to Form #3A on p. 46.
- (8) See notes #3 to Form #1A on p. 37, and #3 to Form #2A on p. 41.
- (9) See note #8 to Form #3A on p. 46.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.494 Form #3C - Possession with Intent to Defraud the United States

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_, in the District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly [attempt to] (1) possess [(an) identification document(s) (other than one(s) issued lawfully for the use of the (defendant))] (2)(3) [(a) false identification document(s)], (4) to wit [describe the identification document(s)], with the intent that such document(s) be used to defraud the United States. (5)(6)(7)

Notes to Form #3C:

- (1) See note #1 to Form #1A on p. 37.
- (2) This provision applies to any type of identification document regardless of which government issued it.
- (3) See note #5 to Form #3A on p. 46.
- (4) See notes #3 to Form #1A on p. 37, and #3 to Form #2A on p. 37.
- (5) The term "defraud" is to be construed broadly to cover not only "misrepresentations" but also to include the use of false identification to obstruct functions of the government. See House Report No. 97-802, 97th Congress, 2d Sess., p. 11.
- (6) The possession of an identification document with the intent to defraud the United States is a misdemeanor and is punishable by imprisonment of not more than one year and/or a fine of not more than \$5,000 pursuant to 18 U.S.C. §1028(b)(3).
- 7/ See note #8 to Form #3A on p. 46.

9-64.495 Form #3D - Possession of a Stolen or Unauthorized Produced United States Government Identification Document

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly [attempt to] (1) possess [(an) identification document(s)] that [(was) (were)] (2) [appeared to be] (3) [(an) identification document(s) of the United States], to wit [describe the document(s)], (4)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

which document(s) [(was) (were)] [stolen] (5) [and] (6) [produced without authority], (7) knowing that such document(s) [(was) (were)] [stolen] (8) [and] (9) [produced without authority]. (10)(11)(12)

Notes to Form #3D:

(1) See note #1 to Form #1A.

(2) The term "was" or "were" should be used when the documents are "genuine," i.e., actually issued by a federal agency or would be in the case of a genuine blank document. Hence, in most cases, it will be used with "stolen" identification documents. It should be remembered that "stolen" covers documents acquired by fraud. Hence, this offense also applies to the possession of a genuine United States identification document which was acquired by fraud.

(3) The term "appeared to be" should be used where it is a "false" identification document. Genuine identification documents which have been altered should be considered as "false." See also notes #3 in Form #1A on p. 37 and #3 in Form #2A on p. 41.

(4) See note #4 in Form #1A on p. 37.

(5) See note #5 in Form #2A on p. 41.

(6) See note #6 in Form #2A on p. 41.

(7) See note #7 in Form #2A on p. 42. (Note: the absence of the word "lawful" appears to have no readily legislatively specified purpose.)

(8) Same as note #5 in Form #3C on p. 48.

(9) Same as note #6 in Form #3C on p. 48.

(10) Same as note #7 in Form #3C on p. 48.

(11) The possession of a stolen or unauthorizedly produced United States identification document is a misdemeanor and is punishable by imprisonment of not more than one year and/or a fine of not more than \$5,000 pursuant to 18 U.S.C. §1028(b)(3).

(12) See footnote #8 to Form #3A on p. 42.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.500 FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982 (CONT'D)

9-64.510 Draft Indictments/Informations (Cont'd)

9-64.511 Document-Making Implements - 18 U.S.C. §1028(a)(5)

9-64.512 Form #4A - Production, Transfer, or Possession of a United States Government Document-Making Implement

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly [attempt to] (1) [produce] [transfer] [possess] a United States document-making implement, (2) to wit [describe the implement], (3) with the intent that such document-making implement be used in the production of [a false United States identification document] (4) [another document-making implement which would be used in the production of a false United States identification document]. (5)(6)(7)

Notes to Form #4A:

(1) See note #1 to Form #1A on p. 37.

(2) The term "document-making implement" is defined in 18 U.S.C. §1028(d)(3). See also House Report No. 97-802, 97th Congress, 2d Sess., pp. 11-12.

(3) The description of the United States document-making implement will clearly establish the necessary federal jurisdiction under 18 U.S.C. §1028(c)(1).

(4) See notes #3 to Form #1A on p. 37, and #3 to Form #2A on p. 41. You should describe the false United States identification document which was to be produced.

(5) This provision is included to cover the situation where the document-making implement can be used to generate another such implement.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(6) You should describe the false United States identification document which was to be produced.

(7) The production, transferring, or possession of a document-making implement is punishable by imprisonment of not more than five years and/or a fine of not more than \$25,000 pursuant to 18 U.S.C. §1028(b)(1)(C).

9-64.513 Form #4B - Production, Transfer or Possession of a Non-Federal Document-Making Implement

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 198\_\_\_\_, in the \_\_\_\_\_ district of \_\_\_\_\_, the defendant, \_\_\_\_\_, did knowingly [attempt to] (1) [produce] [transfer] [possess] [, in and affecting interstate (and foreign) commerce,] (2) [and transported in the mail] (3) a document-making implement, (4) to wit [describe the implement], with the intent that such document-making implement be used in the production of [a false identification document] (5) [another document-making implement which would be used in the production of a false identification document]. (6)(7)

Notes to Form #4B:

(1) See note #1 to Form #1A on p. 37.

(2) See note #2 to Form #1B on p. 38.

(3) See note #3 to Form #1B on p. 38.

(4) See note #2 to Form #4A on p. 50.

(5) See generally notes #6 to Form #1B on p. 39, and #3 to Form #2A on p. 41. You should describe the false identification document which was to be produced.

(6) See note #5 to Form #4A on p. 50. You should describe the false identification document which was to be produced.

(7) See note #7 to Form #4A above.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.520 Venue

Generally, venue is appropriate in whatever district the prohibited act of production, transfer, or possession was performed. Offenses begun in one district and continued or completed in another district may be prosecuted in any district (18 U.S.C. §3237). Likewise, any offense involving the transportation in the mail or in interstate commerce can be prosecuted in any district from, through or into which the commerce or the mail moved (18 U.S.C. §3237). The venue for extraterritorial offenses involving the counterfeiting of United States identification documents outside of the United States is governed by 18 U.S.C. §3238.

9-64.530 Selection of Counts

Since the gist of the offense is either the production, transfer, or possession, it will often be necessary to combine numerous documents into a single count. Common sense should be used. Prohibited acts of production and transfer done at separate times and/or places can be treated as separate offenses. Since possession is generally a continuing offense, however, the proper number of counts for the entire duration of such possession under any one provision of 18 U.S.C. §1028(a) should normally be one. Production of different types of identification documents should be treated as separate counts since different tools were necessary to produce the documents. In regard to transfer and possession offenses, such activity may often involve both United States government identification documents and non-federal identification documents. To the extent that separate counts are factually provable, charge these offenses in separate counts. However, since the gist of the offense is the transfer or possession, the separate counts will probably be held to merge into the offense carrying the highest penalty permitted under 18 U.S.C. §1028(b). At times it may be necessary to combine United States government identification documents and non-federal identification documents in the same count to reach the required number of documents (e.g., a violation of 18 U.S.C. §1028(a)(3)). If such is necessary, you must allege the proper jurisdictional circumstance for the non-federal identification documents.

9-64.540 Other Federal Criminal Statutes

18 U.S.C. §1028 neither replaces nor supplants any existing federal statute relating to false identification crimes. For a listing of some such offenses, see House Judiciary Committee Report, H. Rep., pp. 3-4, n.l.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

See also Appendix E3 entitled "Federal Statutes Relating to the Use of False Identification" to "The Report of the Federal Advisory Committee on False Identification" (FACFI), "The Criminal Use of False Identification," United States Department of Justice, November 1976. The use of prior statutes may be warranted in certain situations, such as in plea bargaining or in the case where felony treatment is desired for fraudulently acquiring a United States identification document (see, e.g., 18 U.S.C. §1542 (false statement in application and use of passport)).

9-64.550 Investigative Responsibility

18 U.S.C. §1028 does not specifically assign investigative jurisdiction. The Department has developed investigative responsibility guidelines for the federal investigative agencies. Because of the extreme breadth of 18 U.S.C. §1028, both with respect to the types of documents and types of criminal activity in which such documents can be utilized, the drawing of crystal clear lines of responsibility was impossible. However, an effort has been made to ensure that agencies with current authority over false identification violations (i.e., as issuer of the identification document or the victim of its misuse) obtain the same jurisdiction under 18 U.S.C. §1028. Also, where the false identification is used in the commission of crime over which an agency has investigative responsibility, it is given ancillary jurisdiction under 18 U.S.C. §1028 over the use of the false identification in the commission of such offense. (Of course, any federal agency whose documents were used should be notified.) 18 U.S.C. §1028 will provide an excellent opportunity for cooperative investigative activity by federal agencies which are already, in most cases, being overtaxed. The major new area of federal crime under 18 U.S.C. §1028 relates to state and foreign government identification documents. Primary investigative authority for such state and foreign government identification documents is assigned to the Secret Service. The next page shows a chart reflecting investigative responsibility.

CHART OF INVESTIGATIVE JURISDICTION FOR 18 U.S.C. §1028

MAY 11, 1984  
Ch. 64, p. 54

Federal Government ID

Non-Federal Government ID

		Issued by Agency with CAAA	Issued by Agency without CAAA	Issued by a Government other than that of the United States
Production	Terrorism Activity	FBI	FBI	FBI
		Issuing Agency (with ancillary in SS except for employee IDs)	SS	SS
	Transfer	Issuing Agency (with ancillary in SS except for employee's IDs)	SS	SS
Possession	Defrauding agency with CAAA or IG	Defrauded agency	Defrauded agency	Defrauded agency
	Defrauding agency without CAAA or IG	FBI	FBI	FBI
	Ancillary to another investigation	Investigating agency with CAAA or IG	Investigating agency with CAAA or IG	Investigating agency with CAAA or IG
	Other	Issuing Agency	SS	SS

Abbreviations:

- ID - Identification Document
- CAAA - Civilian Agency with Arrest Authority
- FBI - Federal Bureau of Investigation
- SS - Secret Service
- IG - Inspector General

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.560 Exceptions for Law Enforcement Activities

18 U.S.C. §1028(e) provides that 18 U.S.C. §1028:

. . . does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481).

Title V is the basis of the Federal Witness Security Program administered by the U.S. Marshals Service in which persons who have cooperated with federal prosecutors and investigators, and who may be the subject of retaliation by the defendant or his/her confederates, are enabled to relocate and establish new identities for themselves and their families. The authorized production and transfer of identification documents by United States employees to protected persons and undercover personnel would be excluded from 18 U.S.C. §1028 as would the lawful use of these documents by the protected person, his/her family, and the undercover personnel. This subsection is intended to provide immunity analogous to that afforded in 21 U.S.C. §885(d), H. Rep., pp. 14-15. The term "lawfully authorized" describes functions approved in accordance with an agency's rules and practices. It does not excuse conduct by a law enforcement officer who has gone on a lark of his/her own.

9-64.570 Legislative History

There follows a chronology of legislative events which occurred in the 97th Congress which resulted in the enactment of 18 U.S.C. §1028:

A. January 5, 1981 - Congressman Hyde introduced H.R. 352 which was the descendant of the false identification bill recommended in the Federal Advisory Committee on False Identification report in 1976;

B. December 9, 1981 - Senator DeConcini introduced S. 1924 which for all practical purposes was identical to H.R. 352;

C. February 2, 1982 - Senator Humphrey introduced S. 2043 which was aimed at the youthful driver aspect of the drunk-driving problem. S. 2043 ultimately evolved into new 18 U.S.C. §1738.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. April 6, 1982 - Congressman Sawyer introduced H.R. 6105 which was a slightly modified version of S. 2043;

E. May 5, 1982 - The Subcommittee on Crime of the Committee on the Judiciary of the House of Representatives held a hearing on H.R. 352 and H.R. 6105. Deputy Assistant Attorney General John C. Keeney of the Criminal Division testified on behalf of the Department in support, with some modifications, of these bills;

F. June 16, 1982 - The Subcommittee on Criminal Law of the Committee on the Judiciary of the United States Senate held a hearing on S. 1924 and S. 2043. Deputy Assistant Attorney General Mark Richard of the Criminal Division testified on behalf of the Department in support, with some modifications, of these bills;

G. August 5, 1982 - The House Subcommittee on Crime introduces H.R. 6946 as a clean bill as a result of its mark-up of H.R. 352 and H.R. 6105;

H. September 10, 1982 - The full House Judiciary Committee passed H.R. 6946, expanded it to include present 18 U.S.C. §1028(a)(3) and (a)(4) and ordered House Report No. 97-802, 97th Congress, 2d Sess., to be printed. (This report is reprinted in the 1982 U.S. Code Cong. & Ad. News, starting at p. 3519);

I. September 14, 1982 - The full House passed H.R. 6946 as modified by the full Judiciary Committee and sent it to the Senate. See Cong. Rec., H 6940 - H 6943, (September 14, 1982);

J. October 1, 1982 - The full Senate added several provisions by floor amendments to 18 U.S.C. §1028 and included a modified version of S. 2043 in the version it passed of H.R. 6946. The House objected to H.R. 6946 as passed by the Senate and a Conference Committee was established. See Cong. Rec., S 13018, S 13019, H 8459, (October 1, 1982);

K. December 17, 1982 - The House agreed to the Conference Report on H.R. 6946. (H. Rep. No. 97-975, 97th Congress, 2d Sess.) (See Cong. Rec., H 10168, H 10169, (December 17, 1982.)) The Conference Report contains the new 18 U.S.C. §1738;

L. December 19, 1982 - The Senate agreed to the Conference Report and H.R. 6946 was sent to the President;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

M. December 31, 1982 - The President signed H.R. 6946 and it became Pub. Law 97-398, 96 Stat. 2009 (December 31, 1982). It was effective at the time of signing.

The following changes were made to the original house version of 18 U.S.C. §1028 by agreement to the Conference Report:

1. 18 U.S.C. §1028(a)(6) was added;
2. In the definition of "identification document" in 18 U.S.C. §1028(d)(1), the concept of local government was relabeled as "political subdivision of a State," the term "political subdivision of a foreign government" was included, and the words "intended or" were inserted after "type";
3. In the definition of "State" in 18 U.S.C. §1028(d)(5), the phrase "any State of the United States" was added;
4. In 18 U.S.C. §1028(e), the word "political" was inserted before the word "subdivision."

9-64.580 Pleadings Bank

A central bank of pleadings filed under 18 U.S.C. §1028 is being established in the Office of Enforcement Operations, telephone number FTS 724-7184. Please send a copy of any significant pleadings involving this section to:

Office of Enforcement Operations  
Criminal Division  
Room 303, Federal Triangle Building  
315 9th Street, N.W.  
Washington, D.C. 20530

9-64.590 Supervisory Jurisdiction

Supervisory jurisdiction over 18 U.S.C. §1028 is with the General litigation and Legal Advice Section of the Criminal Division. Questions about this offense may be directed to attorneys at FTS 724-7526 or 724-6971.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-64.600 FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982 (CONT'D)

9-64.610 18 U.S.C. §1738 - Mailing Private Identification Documents  
Without a Disclaimer

9-64.620 Purpose

18 U.S.C. §1738 is intended to allow the federal government to assist state and local authorities in dealing with the youthful driver aspect of the drunk-driving problem. It is aimed only at private identification documents, that is, those identification documents not issued by a government agency. To the extent, however, that a private entity issues identification documents which appear to be "governmental," the applicability of 18 U.S.C. §1028 should be considered, as Congress clearly intended to reach apparent governmental identification documents under 18 U.S.C. §1028. See H. Rep., pp. 6-7. 18 U.S.C. §1738 is a compromise reached in Conference between the Senate and the House on how far the federal government should regulate the issuance of private identification documents. 18 U.S.C. §1738 should be viewed primarily as a prophylactic statute. To the extent, however, that a violator has habitually violated or continues to violate this section, vigorous prosecution should be pursued.

9-64.630 Elements of the Offense

18 U.S.C. §1738 has these elements:

A. It applies only to those entities which are in the business of furnishing identification documents for valuable consideration. Hence, the entity must either sell or exchange the private identification document for money or other valuable consideration.

B. The identification document must be of the type that bears a birth date or age purported to be that of the person named in the identification document.

C. If the identification document bears a birth date or age purported to be that of the person named therein, it must fail to carry the disclaimer "NOT A GOVERNMENT DOCUMENT" printed clearly and indelibly on both the front and back of the document in not less than twelve point type (i.e., pica-approximately 1/6 inch-type); and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. Such a document must, in the furtherance of such business activity, be transported or deposited into the mails or be caused to be transported in interstate or foreign commerce.

Hence, 18 U.S.C. §1738 would not apply to identification documents issued at walk-in photographic studios so long as they are picked up at such site or within the same state, provided, of course, that at no time are they sent in the mail. Nor would it apply to any identification document lacking the age or date of birth of the recipient.

9-64.640 Penalty

18 U.S.C. §1738 is a misdemeanor and carries a fine of not more than \$1,000 and/or imprisonment not more than one year for each offense. The gist of the offense is that mailing or causing the transportation in interstate or foreign commerce of such an identification document without the proper disclaimer. Hence, if the printer sends two such documents in the same mailing, it is one offense. Separate mailings to different individuals, however, result in separate offenses, thereby permitting the charging of several counts and multiple penalties.

9-64.650 Draft Indictment/Information for 18 U.S.C. §1738

On or about \_\_\_\_\_ (date) in the \_\_\_\_\_ District of \_\_\_\_\_, (the defendant), being in the business of furnishing identification documents for valuable consideration and in the furtherance of that business, knowingly [used the mail for the mailing, carriage in the mails, and delivery of] (1) [caused to be transported in interstate (and foreign) commerce from \_\_\_\_\_ to \_\_\_\_\_] (2) an identification document which bore the [birth date] [age] (3) purported to be that of [name of person identified in the document], the person named in such identification document, knowing that such document failed to carry diagonally printed clearly and indelibly on both the front and back the words "NOT A GOVERNMENT DOCUMENT" in capital letters in not less than twelve point type.

Notes to Draft Indictments/Information for 18 U.S.C. §1738:

(1) To be used if transported by use of the U.S. mails (Note: there does not have to be any interstate transportation; intrastate transportation is covered if the mails are used).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(2) To be used when the U.S. mails were not utilized. there must be an interstate or foreign transportation. This would cover the situation where some entity such as "Federal Express," "United Parcel Service," etc. was actually used to deliver the identification document. You should only allege "foreign" if such commerce was involved.

(3) Normally, the document will only specify a date of birth or an age. Most of the time it will be the date of birth, since a person's age continues to increase after the day of the issuance of the particular identification document and the document thereby loses its precision.

9-64.660 Venue

Venue is governed by the provisions of 18 U.S.C. §3237. Hence, violations may be prosecuted in any district where the mailing or transportation was initiated, continued, or concluded.

9-64.670 Investigative Responsibility

The U.S. Postal Inspection Service has investigative jurisdiction for an offense under 18 U.S.C. §1738 when the private identification document was transported through the United States mails. If some entity other than the United States mails (e.g., Federal Express, United Parcel Service, etc.) is used to transport the document in interstate or foreign commerce, investigative jurisdiction is with the Federal Bureau of Investigation (FBI).

9-64.680 Legislative History

See generally USAM 9-64.770, supra, for 18 U.S.C. §1028. 18 U.S.C. §1738 is a compromise reached at Conference between the Senate and the House. See Conference Report, pp. 3-4.

9-64-690 Pleading Bank

A central bank of pleadings filed under 18 U.S.C. §1738 is being established in the office of Enforcement Operations, whose telephone number is FTS 724-7184. Please send a copy of any significant pleading involving 18 U.S.C. §1738 to:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Office of Enforcement Operations  
Criminal Division  
Room 303, Federal Triangle Building  
315 9th Street, N.W.  
Washington, D.C. 20530

9-64.700 FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982 (CONT'D)

9-64.710 Supervisory Jurisdiction

Supervisory jurisdiction over 18 U.S.C. §1738 is with the General Litigation and Legal Advice Section of the Criminal Division. Questions about this offense may be directed to attorneys at FTS 724-7526 or 724-7144.

7-84 USAM (superseded)

CLII DETAILED  
 TABLE OF CONTENTS  
 FOR CHAPTER 65

	<u>Page</u>
9-65.000 <u>PROTECTION OF GOVERNMENT OFFICIALS</u>	1
9-65.100 PROTECTION OF THE PRESIDENT, PRESIDENTIAL STAFF AND CERTAIN SECRET SERVICE PROTECTEES	1
9-65.110 <u>Relevant Statutes</u>	1
9-65.120 <u>Supervising Section</u>	1
9-65.130 <u>Investigative Jurisdiction</u>	1
9-65.140 <u>Publicity: The "Contagion Hypothesis"</u>	1
9-65.200 THREATS AGAINST THE PRESIDENT AND SUCCESSORS TO THE PRESIDENCY: 18 U.S.C. §871	2
9-65.210 <u>True Threats</u>	2
9-65.220 <u>Intent to Carry Out Threats</u>	2
9-65.230 <u>Conditional Threat</u>	3
9-65.240 <u>Competency Determination - Federal Facility</u>	4
9-65.250 <u>Jury Instructions</u>	4
9-65.260 <u>Threats Against Former Presidents, and Certain Other Secret Service Protectees</u>	4
9-65.300 PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATE STATUTE - 18 U.S.C. §1751(i)	6
9-65.301 Constitutionality	6
9-65.302 Investigation; 18 U.S.C. §1751(i)	6
9-65.310 <u>Killing The President; President Elect Vice President, Members of Presidential Staff - 18 U.S.C. §1751(a)</u>	6
9-65.311 <u>Murder - Definition and Degrees</u>	7
9-65.312 <u>Manslaughter Defined</u>	7
9-65.320 <u>Kidnapping the President; 18 U.S.C §1751(b)</u>	8
9-65.321 <u>Elements</u>	8

JAMAICA UNITED STATES ATTORNEYS' MANUAL  
 TITLE 9—CRIMINAL DIVISION

DETAILED  
 TABLE OF CONTENTS  
 FOR CHAPTER 65

<u>Page</u>		<u>Page</u>
9-65.330	<u>Attempting to Kill or Kidnap the President;</u> <u>18 U.S.C. §1751(c)</u>	9
9-65.340	<u>Conspiring to Kill or Kidnap the President;</u> <u>18 U.S.C. §1751(d)</u>	11
9-65.350	<u>Assault; 18 U.S.C. §1751(e)</u>	11
9-65.360	<u>Definitions; 18 U.S.C. §1751(f)</u>	12
9-65.370	<u>Rewards; 18 U.S.C. §1751(g)</u>	12
9-65.380	<u>Suspension of State and Local Jurisdiction;</u> <u>18 U.S.C. §1751(h)</u>	13
9-65.400	PROTECTION OF TEMPORARY RESIDENCES AND OFFICES OF THE PRESIDENT AND OTHER SECRET SERVICE PROTECTEES 18 U.S.C §1752	14
9-65.401	Constitutionality	14
9-65.402	Investigative Responsibility	17
9-65.410	<u>Protected Premises</u>	17
9-65.411	Designation of Protected Premises	17
9-65.412	Prohibited Acts - Designated Premises	17
9-65.413	Prohibited Acts - Other Premises	18
9-65.420	<u>Penalties, Venue, Effect on Other Laws</u>	18
9-65.430	<u>Local Law Enforcement</u>	18
9-65.440	<u>Sectional Analysis</u>	19
9-65.441	Willfully and Knowingly	19
9-65.442	Other Elements	20
9-65.443	Designated Temporary Residences or Offices	20
9-65.444	Posted, Cordoned Off or Restricted Area- Presidential Visit	20
9-65.445	Disruption of Government Business	21
9-65.446	Interference with Ingress and Egress	21
9-65.447	Violence Within Premises	21
9-65.448	Penalty and Venue	22
9-65.449	Authority to Designate	22

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 65

	<u>Page</u>
9-65.450	<u>Sectional Analysis (cont'd)</u> 22
9-65.451	Effect On Other Laws 22
9-65.460	<u>Other Considerations</u> 22
9-65.461	General Services Administration 22
9-65.462	Executive Protection Service 23
9-65.463	Competency - Utilization of Federal Facility 23
9-65.464	Presidential Visit - U.S. Attorneys Responsibility 23
9-65.500	<u>INTERFERENCE OR OBSTRUCTION OF SECRET SERVICE- 18 U.S.C. §3056(d)</u> 24
9-65.501	Investigative Responsibility 24
9-65.502	Supervising Section 24
9-65.600	<u>ASSAULTS ON AND KIDNAPING OF FEDERAL OFFICERS</u> 25
9-65.601	Supervisory Jurisdiction 25
9-65.602	Investigative Jurisdiction 25
9-65.610	<u>Assaults in General</u> 26
9-65.611	Requirement Under 18 U.S.C. §111 That the Act in Opposition of the Federal Officer be Forcible: Application of Statute to Threats 26
9-65.612	Knowledge of Victim's Status as a Federal Officer in Prosecution Under 18 U.S.C. §111 and §1114 27
9-65.613	Applicability of 18 U.S.C. §111 and §1114 to Assault Upon and Killing of Informants 27
9-65.614	General Prosecutive Policy under 18 U.S.C. §111 27
9-65.620	<u>Assaults On Specific Officials</u> 28
9-65.621	Assaults on Staff Members of Federal Penal and Correctional Institutions 28
9-65.622	Assaults on Postal Employees 28
9-65.623	Assaults Between Postal Employees 29a
9-65.624	Assaults Upon Internal Revenue Service Personnel 29a
9-65.630	<u>Kidnaping of Federal Officers</u> 29b
9-65.631	Kidnaping in General 29b
9-65.632	Offense 29b

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

	<u>Page</u>	
9-65.633	Applicability of Case Law Under 18 U.S.C. §111 and §1114	29c
9-65.634	Penalty	29c
9-65.700	CONGRESSIONAL ASSAULT STATUTE (18 U.S.C. §351)	29c
9-65.701	Supervisory Jurisdiction	29c
9-65.702	Investigative Responsibility; 18 U.S.C. §351(g)	30
9-65.703	Background	30
9-65.710	<u>Killing Individuals Designated in; 18 U.S.C. §351(a)</u>	31
9-65.711	Member of Congress - Defined	31
9-65.712	Member of Congress-Elect - Defined	31
9-65.713	Executive Branch Members	32
9-65.714	Justices of the United States	32
9-65.720	<u>Kidnaping; 18 U.S.C. §351(b)</u>	32
9-65.730	<u>Attempts to Kill or Kidnap; 18 U.S.C. §351(c)</u>	33
9-65.731	Dangerous Proximity Test	33
9-65.732	Any Act or Endeavor Test	34
9-65.740	<u>Conspiracy to Kill or Kidnap 18 U.S.C. §351(d)</u>	34
9-65.750	<u>Assault; 18 U.S.C. §351(e)</u>	35
9-65.760	<u>Federal Investigative and Prosecutive Jurisdiction; 18 U.S.C. §351(f) - Effect on State and Local Authority</u>	36
9-65.770	<u>Authorization for Interception of Wire or Oral Communications; 18 U.S.C. §2516(1)(c)</u>	37
9-65.780	<u>Venue</u>	37
9-65.800	PROTECTION OF FOREIGN OFFICIALS (18 U.S.C. §§112, 878, 970, 1116, 1117, and 1201)	37
9-65.801	Investigative Jurisdiction	38
9-65.802	Responsibilities of Treasury	38
9-65.803	Authority to Initiate Prosecution	39
9-65.804	Preference for Local Disposition	39
9-65.805	Supervisory Jurisdiction	39
9-65.806	Offenses Against Officials of the Coordination Council for North American Affairs (Taiwan)	40

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-65.810	<u>Murder (18 U.S.C. §1116)</u>	42
9-65.811	Foreign Official	42
9-65.812	Foreign Government	43
9-65.813	International Organization	43
9-65.814	Family	43
9-65.815	Official Guest	44
9-65.816	Internationally Protected Person	44
9-65.820	<u>Conspiracy to Murder (18 U.S.C. §1117)</u>	45
9-65.830	<u>Kidnaping (18 U.S.C. §1201)</u>	45
9-65.840	<u>Assault (18 U.S.C. §112)</u>	46
9-65.841	Legislative History	46
9-65.842	First Amendment	47
9-65.850	<u>Threats and Extortion (18 U.S.C. §878)</u>	48
9-65.860	<u>Protection of Temporary Residences and Offices - 18 U.S.C. §1752</u>	48
9-65.870	<u>Destruction of Property (18 U.S.C. §970)</u>	48
9-65.880	<u>Demonstrations</u>	49
9-65.881	Procedures	50
9-65.882	Opinions by U.S. Attorneys	51
9-65.900	PROTECTION OF A MEMBER OF FEDERAL OFFICIAL'S FAMILY	51
9-65.901	General	51
9-65.902	Family Members Protected	52
9-65.903	Investigative Jurisdiction	52
9-65.904	Policy Consideration	52
9-65.905	Supervising Section	52

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-65.000 PROTECTION OF GOVERNMENT OFFICIALS

9-65.100 PROTECTION OF THE PRESIDENT, PRESIDENTIAL STAFF, AND CERTAIN  
SECRET SERVICE PROTECTEES

9-65.110 Relevant Statutes

The primary statutes relevant to protection of the President and other Secret Service protectees are as follows: 18 U.S.C. §871 - Threats Against the President; 18 U.S.C. §879 - Threats Against Former Presidents and Certain Other Persons Protected by the Secret Service; 18 U.S.C. §1751 - Presidential and Presidential Staff Assassination, Kidnapping, and Assault; 18 U.S.C. §1752 - Protection of Temporary Residences and Offices of the President and Others; 18 U.S.C. §3056(b) - Interference with Secret Service Agents.

9-65.120 Supervising Section

Supervisory authority over the above statutes rests with the General Litigation and Legal Advice Section of the Criminal Division. Attorneys responsible for the enforcement of these statutes can be reached at FTS 724-7144. Such attorneys should be telephonically notified immediately upon the initiation of any investigation under 18 U.S.C. §1751.

9-65.130 Investigative Jurisdiction

Investigative jurisdiction for violations of 18 U.S.C. §§871, 879, and 1752 rests with Secret Service while the FBI has jurisdiction over 18 U.S.C. §1751. Steps should be taken to insure that the FBI maintains close liaison with Secret Service throughout the conduct of investigations under 18 U.S.C. §1751.

9-65.140 Publicity: The "Contagion Hypothesis"

The "contagion hypothesis" is the theory that media attention given to certain kinds of criminal activity spawns further criminal activity. This theory appears to be substantiated where threats against the President are concerned. The U.S. Secret Service reported significant increases in the number of threats investigated following the attacks on President Ford by Lynette Fromme and Sara Jane Moore and the March 30, 1981, attack on President Reagan.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

To avoid possible adverse effects caused by the publicity concerning threats against the President, attorneys should be sensitive to this problem and exercise caution when considering the release of information concerning such threats. This exercise of caution should extend to secondary sources of press information as well (search warrants, affidavits, etc.), and the use of tools such as sealed affidavits should be considered.

(See also: USAM 1-5.545 Publicity Concerning Threats Against Government Officials.)

9-65.200 THREATS AGAINST THE PRESIDENT AND SUCCESSORS TO THE PRESIDENCY:  
18 U.S.C. §871

Several decisions have cast new light on the scope of 18 U.S.C. §871 and the requisite intent which must be proved in prosecutions thereunder. Proof that threatening words were uttered in a context such that a reasonable person would interpret them as mere political hyperbole, idle talk, or jest indicates that the words do not constitute a threat within the scope of the statute. However, it is the view of the Department that an actual intent to carry out a threat is not a requisite to violation of the statute.

9-65.210 True Threats

In Watts v. United States, 394 U.S. 705 (1969), the Supreme Court limited the applicability of 18 U.S.C. §871 to situations involving the communication of a "true threat." At a political rally Watts had said, "If they ever make me carry a rifle the first man I want to get in my sight is L.B.J." This, the court held, taken in context amounted to mere indulgence in political hyperbole, and such speech is within the protection of the First Amendment.

Following the principle announced in Watts, the Court of Appeals for the District of Columbia, in Alexander v. United States, 418 F.2d 1203 (D.C. Cir. 1969), reversed a conviction under 18 U.S.C. §871 on the ground of instructional error, holding that neither idle talk nor mere jest qualify as a true threat. The court did not, however, criticize that portion of the instructions which indicated that the government need not prove that the defendant actually intended to carry out the alleged threat, an apparent determination to do so being sufficient. The Supreme Court in Watts had expressed grave doubt on the correctness of such instructions.

9-65.220 Intent To Carry Out Threat

In Roy v. United States, 416 F.2d 874 (9th Cir. 1969), the court dealt

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

expressly with the issue of intent and held "...the statute to require only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of the President, and that the statement not be the result of mistake, duress, or coercion." The court noted the doubt expressed in Watts on this issue, but concluded that one purpose of the statute was to prevent hindrance of the President's movements, necessitated by the receipt of apparently serious threats against the President. This harmful interference is bound to ensue when the objective circumstances indicate need to take action for the protection of the President, regardless of the defendant's subjective intention. Thus the defendants claim in Roy that, on the eve of a Presidential visit, he called in a threat to a local telephone operator only as a joke and later so informed the operator, did not establish a defense. The operator had every reason to take the initial call seriously and the later explanation of the matter as a joke did not necessarily eliminate the mischief created. See also, United States v. Vincent, 681 F.2d 462 (6th Cir. 1982); USAM 9-65.260 (Threats Against Former Presidents and Certain Other Secret Service Protectees) infra.

9-65.230 Conditional Threat

That an alleged threat was conditional does not ipso facto remove it from the purview of 18 U.S.C. §871. So much of the discussion of this question as appears in the lower court's opinion in Watts v. United States, supra, still appears sound. However, the use of conditional language is pertinent in evaluating the "threat" content of a statement. Such evaluation must take the full context of an alleged threat into consideration. Alexander v. United States, supra. Motive of the defendant may well be germane to the inquiry if communicated so as to become a part of the context. In a recent incident a state prisoner dispatched a threat letter with the motive of triggering his transfer to federal custody for violation of 18 U.S.C. §871. The prisoner's intent was to violate the statute and he succeeded though he will not obtain transfer. Had the prisoner made his motive known in advance to the persons from whom the prisoner expected responsive action, such knowledge could well, though not necessarily, negate interpretation of the statement as a serious expression of an intent to inflict harm. Other factors for consideration would include such matters as a audience reaction, intoxication, a history of mental illness unaccompanied by dangerous propensities, and capability of or preparations by the defendant to act upon his/her words.

To summarize, Watts, supra does somewhat narrow the application of 18 U.S.C. §871, but U.S. Attorneys should not decline prosecution on the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

ground of a lack of a defendant's subjective intent to carry out a threat. If a prospective defendant's conduct reasonably appears to amount to a serious expression of intent to inflict harm, action to prosecute should follow immediately. The need for prompt action in this type of case indicates use of complaint procedure unless some special circumstances requires direct resort to the grand jury.

9-65.240 Competency Determination - Federal Facility

See USAM 9-65.463, infra.

9-65.250 Jury Instructions

Future jury instructions in trial of a violation of 18 U.S.C. §871 should include the substance of the quoted paragraph from Roy, supra. This same standard and the teaching of Watts, supra, should govern prosecutive determinations under the statute. As great caution must be taken in matters relating to the security of the persons protected by 18 U.S.C. §871, U.S. Attorneys are encouraged to consult with the Department when they have doubts on the prosecutive merit of a case. For the same reason, dismissal of complaints under 18 U.S.C. §871, when the defendant is in custody under the Mental Incompetency Statutes (18 U.S.C. §§4244, 4246), requires approval from the General Litigation and Legal Advice Section of the Criminal Division.

9-65.260 Threats Against Former Presidents, and Certain Other Secret Service Protectees

Public Law 97-297 (October 12, 1982) added a new section 879 to Title 18 U.S.C., which prohibits knowing and willful threats to kill, kidnap, or inflict bodily harm against the following categories of persons, all of whom are authorized to be protected by the United States Secret Service:

- A. Members of the immediate family of the President
- B. Members of the immediate family of the Vice President
- C. Former Presidents
- D. Wives, widows, and minor children of former Presidents
- E. Major candidates for the Office of President and Vice President

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

- F. Spouses of major candidates for the Office of President and Vice President
- G. Immediate families of the President-elect and Vice President-elect

The purpose of this statute is to prohibit threats against former Presidents and other Secret Service protectees not covered by the Presidential threat statute, 18 U.S.C. §871, or the protection of foreign officials statute, 18 U.S.C. §112. The U.S. Secret Service now has a legal basis for investigating and prosecuting threats against all categories of persons authorized to be protected under 18 U.S.C. §3056 and Public Law 90-331, 82 Stat. 170, as amended.

The legislative history notes that the term "knowingly and willfully," as used in 18 U.S.C. §871, has not been uniformly construed by the courts. Accordingly, an effort was made to clarify the term.

With regard to section 879, the Committee recognizes the need to protect the safety of protectees of the Secret Service and their ability to function free of fear. Moreover, the Committee recognizes the fundamental interests shared by all Americans in free and uninhibited speech, especially where public figures are concerned. Therefore, the Committee construes a threat that is "knowingly and willfully" made as one which the maker intends to be perceived as a threat regardless of whether he or she intends to carry it out. A prosecution under this section would not only require proof that the statement could reasonably be perceived as a threat but would also require some evidence that the maker intended the statement to be a threat.

Objective circumstances would bear upon the proof of both subjective intent and objective perceptions. For example, if a person were serving a term of life imprisonment without the possibility of parole and therefore objectively could not be perceived as presently able to effect a threat to kill a protectee next week, this circumstance should bear upon whether a communication by the person would be considered as "knowingly and willfully" made. In other words, objective circumstances can bear upon the question of subjective intent, as in a situation where a threatened act would be patently infeasible.

H. Rep. No. 725, 97th Cong., 2d Sess. 4 (1982) (footnotes omitted).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.300 PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATION  
STATUTE - 18 U.S.C. §1751

9-65.301 Constitutionality

The constitutionality of 18 U.S.C. §1751 rests on the power of Congress to suspend the enforcement of state laws which interfere with the protection of a dominant federal interest in the same subject. Cf. Pennsylvania v. Nelson, 350 U.S. 497, 504-505 (1956). Conflicts of jurisdiction resulting from the commission of an independent state offense such as the wounding of the Governor, incidental to an offense against the President, are to be resolved on a case-by-case basis.

The provision does not diminish the existing authority and responsibility of the Secret Service for the protection of the President or for making arrests for violations of the act. 111 Cong. Rec. (1965). Thus, the Secret Service will continue to investigate all threats against the President (18 U.S.C. §871), but the Bureau will investigate all types of assaults and all actual kidnappings and killings. In addition, the Bureau will investigate conspiracies and attempts to kill or kidnap the President. Threats against the President involving two or more persons by a single individual will be investigated by the Bureau as conspiracies or attempts, respectively, if accompanied by any overt act, such as obtaining the instruments or means, to accomplish the threat.

9-65.302 Investigation; 18 U.S.C. §1751(i)

This section provides that:

Violations of this section shall be investigated by the Federal Bureau of Investigation. Assistance may be requested from any federal, state, or local agency, including the Army, Navy, Air Force any statute, rule, or regulation to the contrary notwithstanding.

9-65.310 Killing the President; President Elect, Vice President, Members of Presidential Staff - 18 U.S.C. §1751(a)

This section provides:

(a) Whoever kills (1) any individual who is the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

President of the United States, the President-elect, the Vice President, or, if there is no Vice President, the next in the order of succession to the Office of the President of the United States, the Vice President-elect or any person who is acting as President under the Constitution and laws of the United States, or (2) any person appointed under section 105(a)(2)(A) of Title 3 employed in the Executive Office of the President or appointed under section 106(a)(1)(A) of Title 3 employed in the Office of the Vice President, shall be punished as provided by sections 1111 and 1112 of this title.

Public Law 97-285 (October 6, 1982) expanded the coverage of 18 U.S.C. §1751 to include senior members of the Presidential and Vice Presidential staffs, defined to include persons appointed under 3 U.S.C. §105 (a)(2)(A) and 3 U.S.C. §106 (a)(1)(A). The number of appointees in these positions is limited to a total of 30 persons. See H.R. Rep. 97-803, 97th Cong., 2d Sess. 4 (1982). In addition, the 1982 amendment provided that in a prosecution under this section, the government need not prove that the defendant knew the victim of the offense was an official protected by this section. Further, the amendment specifically provided for extraterritorial jurisdiction.

9-65.311 Murder - Definition And Degrees

18 U.S.C. §1751(a) incorporates by reference 18 U.S.C. §§1111 and 1112. 18 U.S.C. §1111 defines murder as the unlawful killing of a human being with malice aforethought, and divides it into two degrees. Murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate any arson, rape, burglary, or robbery, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him/her who is killed, is murder in the first degree, and is punishable by death unless the jury qualifies its verdict, in which event the punishment is life imprisonment. But see, Furman v. United States, 408 U.S. 238 (1972). Any other kind of murder is murder in the second degree and is punishable by any term of imprisonment including life.

9-65.312 Manslaughter Defined

18 U.S.C. §1112 defines manslaughter as the unlawful killing of a human being without malice. Manslaughter is of two kinds: voluntary, upon a sudden quarrel or heat of passion, and involuntary, in the commission of an

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death. Voluntary manslaughter is punishable by imprisonment for not more than ten years, and involuntary manslaughter is punishable by a fine of not more than \$1,000 or imprisonment for not more than three years or both.

9-65.320 Kidnapping The President; 18 U.S.C. §1751(b)

This section provides that:

Whoever kidnaps any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.

There has never been an attempt to kidnap a President, but it was felt that the full range of offenses against the President should be directly covered by federal statute.

9-65.321 Elements

18 U.S.C. §1751(b) does not define kidnapping nor does the Federal Kidnapping Act (18 U.S.C. §1201). However, it appears that the essential elements of the offense are the involuntary nature of the seizure and detention; *Chatwin v. United States*, 326 U.S. 455, 464 (1964). 18 U.S.C. §1751(b), like 18 U.S.C. §1201(a)(4) (kidnapping of protected foreign officials), does not incorporate transportation across a state line as an element of the offense. Rather, the jurisdictional basis for this statute is founded in the substantial relation which exists between the denounced acts and the execution of the powers of the executive branch of the United States government. Under the Incidental Powers granted to Congress by the "necessary and proper" clause, Art. I, Sec. 8, cl. 18, of the Constitution, it is universally conceded that Congress has the power to create, define, and punish crimes whenever necessary to effectuate the objects of the federal government.

The penalty for kidnapping the President is imprisonment for any term of years or for life. Without the kidnapping provision, federal prosecutive jurisdiction over the kidnapping of the President would be limited to the assault necessarily committed in seizing him/her. The maximum penalty for assaulting the President is imprisonment for ten years and a fine of \$10,000. 18 U.S.C. §1751(e).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.330 Attempting to Kill Or Kidnap The President; 18 U.S.C §1751(c)

18 U.S.C. §1751(c) provides that:

Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished by imprisonment for any term of years or for life.

The proposed bill sought to punish "endeavors or attempts." The two terms were distinguished from each other: "[W]hile successful prosecution for an attempted killing would require proof of a preparation which came so reasonable close to consummation of the crime that it would have been executed had nothing interfered to prevent the further continuation of the activity, an endeavor is prosecutable as soon as an essay or effort has been expended to accomplish the killing." (Emphasis supplied.) The term "endeavor" was considered as meaning "to exert physical and intellectual strength towards the attainment of an object . . ." (emphasis supplied.) This definition was evaluated with a proposed penalty of up to fifteen years imprisonment as contrasted to a proposed penalty of ten years imprisonment for manslaughter. On the other hand, the term "attempt" was thought to have been so defined at common law as to have an acceptable definition. The term "endeavors" was deleted and this section of the legislation restricted to criminal attempts H. Rep P. No. 488, 89th Cong., 1st Sess. 1-2, 4 (1965).

Two concepts of criminal attempts have emanated from the Supreme Court:

To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress toward it; any effort or endeavor to effect it will satisfy the terms of the law.

United States v. Quincy, 31 U.S. 445, 464 (1832) (dictum); cf. Giles v. United States, 157 F.2d 588, 590 (9th Cir. 1946); United States v. Ford, 34 Fed. 26, 27 (W.D. N.C. 1888).

(C)ombination, intention and overt act may all be present without amounting to a criminal attempt--as if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offensep Hyde v. United States, 225

Hyde v. United States, 225 U.S. 347, 384, 387-88 (1912) (dissenting opinion); cf. Swift & Co. v. United States, 196 U.S. 375, 402 (1905).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Under the first formulation, soliciting another to sabotage machinery was held to be an attempt to cause sabotage, United States v. DeBolt, 253 F. 78 (S.D. Ohio 1918), and sending a letter to a contact in a foreign country inquiring whether the contact had any narcotics was held to be an attempt to import narcotics into the United States; United States v. Rebles, 185 F. Supp. 82, 85 (N.D. Cal. 1960). An evolution in the doctrine of attempt is suggested by comparing Robles, supra, with United States v. Stephens, 12 Fed. 52 (C.C. D. Ore. 1882), holding that sending a letter to a liquor dealer ordering 100 gallons of liquor was not attempt to introduce liquor into Alaska.

In cases applying the dangerous proximity doctrine, meeting a foreign agent with classified documents was held to be an attempt to deliver defense information; United States v. Coplon, 185 F.2d 629, 633 (2d Cir. 1950), and beginning a journey with a cargo of liquor was held to be an attempt to transport liquor into a dry state a hundred and fifty miles away, Gregg v. United States, 113 F.2d 687 (8th Cir. 1940); accord, Daniel v. United States; United States v. Duane, 66 F. Supp. 459 (D. Neb. 1946).

Without reference to either test, telling a bank clerk to hand over the money and there will not be any trouble, was held to be an attempt to take money by intimidation, United States v. Baker, 129 F. Supp. 684 (S.D. Cal. 1955). Also, arranging to purchase narcotics and going to the delivery point was said to be an attempt to purchase narcotics, United States v. Butler, 204 F. Supp. 339, 344 (S.D. N.Y. 1962)(dictum).

Under the Alaska attempt statute, which punishes any person who "attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof," signing fraudulent vouchers and giving them to a confederate to present for payment was held to be an attempt to obtain money by false pretense. Lemke v. United States, 211 F.2d 53 (9th Cir. 1954), and sending another to collect a shipment of narcotics was held to be an attempt to possess narcotics, Simpson v. United States, 195 F.2d 721 (9th Cir. 1952).

The holdings, if not always the reasoning, of the more recent federal decisions, reflect the modern tendency to analyze attempts in terms of what has already been done rather than what remains to be done, in order to minimize the risk of substantive harm. See generally Model Penal Code, Art. 5 comment (Tent. Draft No. 10, 1960).

The American Law Institute, in drafting the Model Penal Code, rejected as too restrictive, the dangerous proximity doctrine, the physical proximity doctrine, the indispensable element test, the probable desistence test, the abnormal step test, and the res ipso loquitur test, and has proposed instead that:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A person is guilty of an attempt to commit a crime, if acting with the kind of culpability otherwise required for commission of the crime, he:

purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Model Penal Code, Art. 5, §5.01 (Proposed Official Draft 1962)

The direction of the development of statutory, if not case law also, is indicated by the discussion in S. Rep. No. 94-00, 94th Cong., 1st Sess (1975) (Committee on the Judiciary), of proposed section 1001 of the Criminal Justice Reform Act of 1975 (S.1) at pp. 171-172. The requirement would be proof of ". . . conduct that, in fact, amounts to more than mere preparation for, and indicates . . . intent to complete, the commission of the crime." Id. 171.

9-65.340 Conspiring To Kill Or Kidnap The President; 18 U.S.C. §1751(d)

This section provides that:

If two or more persons conspire to kill or kidnap any individual designated in subsection (a) of this section and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.

The conspiracy section is identical to the general conspiracy statute (18 U.S.C. §371) except that it is limited to the two objects of killing or kidnapping the President. This section does not preclude prosecution under the general conspiracy statute, but merely provides an increased penalty where the object of the conspiracy is to kill or kidnap the President. Cf. United States v. Bazzell, 187 F.2d 878, 885 (7th Cir.), cert. denied, 342 U.S. 849 (1951). Conspiracy to kill or kidnap the President is punishable by imprisonment for any term of years or life, or by death if death results to the victim. The maximum penalty under the general conspiracy statute is imprisonment for five years and a fine of \$10,000.

9-65.350 Assault; 18 U.S.C. §1751(e)

This section provides:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(e) Whoever assaults any person designated in subsection (a) (1) shall be fined not more than \$10,000, or imprisoned not more than ten years, or both. Whoever assaults any person designated in subsection (a) (2) shall be fined not more than \$5,000, or imprisoned not more than one year, or both; and if personal injury results, shall be fined not more than \$10,000, or imprisoned not more than ten years, or both.

There are several federal assault statutes (e.g., 7 U.S.C. §§60, 86; 18 U.S.C. §§111, 112, 113, 1153, 1501, 2113, 3242; 46 U.S.C. §§324, 701), but only in the Uniform Code of Military Justice has Congress undertaken to define the offense. Article 128 of the Uniform Code of Military Justice (10 U.S.C. §928) provides that any person who "attempts or offers with unlawful force or violence to do bodily harm to another person, whether or not the attempt or offer is consummated, is guilty of assault." The Committee which considered the present act contemplated that the term "assault" would be understood according to its established meaning in the criminal law. Hearings, supra, at. 35. The Supreme Court has said, in construing a criminal assault statute, that "an assault is ordinarily held to be committed merely by putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm." Ladner v. United States, 358 U.S. 169, 177 (1958).

9-65.360 Definitions; 18 U.S.C. §1751(f)

This section provides that:

The terms "President-elect" and "Vice President-elect" as used in this section shall mean such persons as are the apparent successful candidates for the offices of President and Vice President, respectively, as ascertained from the results of the general elections held to determine the electors of President and Vice President in accordance with Title 3, United States Code, sections 1 and 2.

9-65.370 Rewards; 18 U.S.C. §1751(g)

This section provides:

The Attorney General of the United States, in his discretion, is authorized to pay an amount not to exceed \$100,000 for information and services concerning a violation of subsection (a)(1). Any officer or employee of the United States or of any State or local government

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

who furnishes information or renders service in the performance of his official duties shall not be eligible for payment under this subsection.

One purpose of the rewards provision was to increase the amount payable for assistance in investigating offenses against the President. The general rewards statute (18 U.S.C. §3059) limits the amount payable for any violation to \$25,000, whereas the Attorney General may pay up to \$100,000 in rewards under the present statute.

The other object of the section was to make rewards immediately payable during the investigative stage of the case without waiting until arrest and conviction. As introduced, the bill authorized rewards "for information leading to the detection of any person for a violation of this section." As passed, the act authorizes rewards "for information and services concerning a violation of this section." The amendment was intended to make the reward authorization consonant with other statutory reward authority. H. Rep. No. 488, 89th Cong., 1st Sess. 5 (1965). The present statute actually conforms only to 39 U.S.C. §509, which authorizes "rewards for information and services in connection with violations of the postal laws" and is cast in broader terms than similar provisions. Compare 18 U.S.C. §3056 (services or information looking toward the apprehension of criminals); 18 U.S.C. §3056 (capture or information leading to arrest); 26 U.S.C. §7623 (detecting and bringing to trial and punishment).

Unlike other reward statutes, the present statute prohibits the payment of rewards to "[a]ny officer or employee of the United States or of any state or local government who furnishes information or renders service in the performance of his official duties."

9-65.380 Suspension Of State And Local Jurisdiction; 18 U.S.C. §1751(h)

This section provides that:

If federal investigation or prosecutive jurisdiction is asserted shall suspend the exercise of jurisdiction by a state or local law, until federal action is terminated.

The original bill provided that the assertion of federal jurisdiction "shall preclude the exercise of jurisdiction by a state or local authority . . . to such extent as the Attorney General of the United States shall direct." The purpose of this language was to invest the Attorney General with authority to preempt jurisdiction of offenses against the President when, and insofar as, he/she deemed it necessary to facilitate federal investigation and prosecution.

Before passage, the bill was amended to provide that the assertion of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

federal jurisdiction "shall suspend the exercise of jurisdiction by a state or local authority . . . until Federal action is terminated." The purpose of the amendment was to make it clear that there is no final preclusion of state jurisdiction but only a suspension which will terminate when federal investigative or prosecutive jurisdiction is terminated. 111 Cong. Rec. 18035 (1965). The suspension of jurisdiction does not prevent the states from cooperating with federal authorities in an investigation of violations of the act. S. Rep. No. 498, 89th Cong., 1st Sess. 2 (1965).

The original bill contemplated that federal jurisdiction would be asserted through a conscious and deliberate decision by the Attorney General expressly dealing with the matter. See Hearings, supra, at 74. The present act specifies state jurisdiction is suspended by the assertion of either investigative or prosecutive jurisdiction.

9-65.400 PROTECTION OF TEMPORARY RESIDENCES AND OFFICES OF THE PRESIDENT  
AND OTHER SECRET SERVICE PROTECTEES - 18 U.S.C. §1752

18 U.S.C §1752 provides for the exercise of federal jurisdiction over disorders and misconduct in relation to Presidential residences, offices, and areas which are designated by the Secretary of the Treasury and restricted by regulations because the President may be or is located there for some period of time, however brief in duration, or in the absence of such a designation, notice is given by posting of signs or cordoning of the area.

Public Law 97-308 (October 14, 1982) expanded the scope of 18 U.S.C §1752 by extending criminal sanctions to violations of similar zones of protection established for the protection of other persons protected by the U.S. Secret Service. Those other persons are defined in 18 U.S.C. §3056 and Public Law 90-331, 82 Stat. 170 as amended (Major Presidential and Vice Presidential candidates and spouses). Violations of 18 U.S.C. §1752 and attempts and conspiracies to violate the section are punishable by a fine not to exceed \$500 or imprisonment not exceeding six months or both. In addition, a knowing and willful interference with a Secret Service agent (without the element of force required by 18 U.S.C. §111) engaged in protective duties authorized by 18 U.S.C. §1752, may be prosecuted under 18 U.S.C. §3056, which now provides for a fine of \$500 or imprisonment for not more than a year or both.

9-65.401 Constitutionality

Constitutional attacks on 18 U.S.C. §1752 would most likely fall in two categories that it is overbroad or vague or that it is in violation of the First Amendment.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A defendant might try to argue that the section has a "chilling effect" on an individual seeking to demonstrate thereby impinging upon the free exercise of First Amendment rights, because there would be no way of predicting whether one's activities were actually violating the law or not. It is believed that the question of vagueness is overcome by the formal designation of the buildings and grounds that are subject of the regulations published in the Federal Register.

In addition to appropriate signs, giving notice of a temporary residence or of a restricted area, we understand that to meet the special problems of notice in merely restricted areas, the Secret Service will endeavor to post personnel in appropriate locations to give verbal notification to persons seeking to enter without authority or otherwise act in violation of the statute. It will still be possible to assemble peacefully wherever the President or the President's office is located. No longer, however, will Presidential security depend upon differing local ordinances.

The basic legal theory underlying the provisions of this statute is that of trespass. 18 U.S.C. §1752(a)(1), concerned with the right to enter and remain in certain areas, might be attacked by defendants contending that a conviction under this subsection would deprive them of their rights of free speech, assembly, petition, and due process of law and equal protection of the law. The government has the right to control presence on government property, and physical presence on the designated grounds is clearly covered by regulations. See Adderley v. Florida, 385 U.S. 39 (1966), which upheld the validity of the Florida trespass statute as it was applied to a demonstration on a non-public jail driveway and adjacent county jail premises. It is well established that because demonstrations involve conduct, they are subject to reasonable regulations when necessary to protect other legitimate government interests. See Cox v. Louisiana, 379 U.S. 559 (1965). In Edwards v. South Carolina, 372 U.S. 229 (1963), the Supreme Court held invalid a conviction of demonstrators under a breach of the peace statute because of the indefinite, loose, and broad nature of the statute. The Court pointed out, however:

We do not review in this case criminal convictions resulting from even handed application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed.

Edwards, supra, at 236.

18 U.S.C. §1752 is aimed at specific categories of conduct denounced in terms of reasonable specificity, that is knowingly and willfully. Indeed,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

18 U.S.C. §1752(a)(1) is far more circumscribed than the general trespass statute upheld in Adderly, supra. The language of the Court in Adderly, supra, is applicable here:

The Florida trespass statute under which these petitioners were charged cannot be challenged on [vagueness grounds]. It is aimed at conduct of one limited kind, that is, for one person to trespass upon the property of another with a malicious and mischievous intent. There is no lack of notice in this law, nothing to entrap or fool the unwary.

Adderley, supra, at 42.

It is anticipated that First Amendment objections may well be raised as to the validity of 18 U.S.C. §1752(a)(2) which outlaws the intentional disruption of government business at designated residences and offices. It should be emphasized again that 18 U.S.C. §1752(a)(2) is not aimed at suppression of peaceful and orderly protests and does not apply where there is no disturbance of others and no disruption of government activities. See, United States v. O'Brien, 391 U.S. 367, 376 (1968), the dissent of Justice Douglas in Adderley, supra, and the opinion of the Court in Cox v. Louisiana, supra, discussing a Louisiana statute prohibiting picketing near a courthouse with the intent to obstruct justice. The Court stated:

We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection.

Cox, supra, at 564.

18 U.S.C. §1752(a)(2) might also be attacked with the argument that the phrase "within such proximity to" makes the statute unconstitutionally vague. However, the Court in Cox v. Louisiana, supra, upheld the language "near," in a statute prohibiting picketing "near" a courthouse, and stated that although it was clear there was some lack of specificity, the statute gave administrators a narrow discretion to construe the term and that demonstrators would rely on the administrative interpretation. The court stated it has recognized this type of narrow discretion as the proper role of responsible officials in making determinations concerning the time, place, duration, and manner of demonstrations.

18 U.S.C. §1752(a)(3) outlaws any intentional interference with ingress or egress to or from any of the buildings, grounds or areas specified in 18 U.S.C. §1752(a)(1). The Supreme Court upheld the Mississippi Anti-Picketing law which prohibits "picketing . . . in such a manner as to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

obstruct or unreasonably interfere with free ingress or egress to and from any country . . . courthouses . . .," in Cameron v. Johnson, 390 U.S. 611 (1968). Similarly, the Court held, in Schneider v. State, 308 U.S. 147, 161 (1939), that prohibition of conduct which has the effect of interfering with ingress or egress does not abridge constitutional liberty "since such activity bears no necessary relationship on the freedom to . . . distribute information or opinion."

9-65.402 Investigative Responsibility

The Secret Service will conduct investigations of alleged violations of 18 U.S.C. §1752 and forward copies of all investigative reports to the U.S. Attorney and to the Criminal Division.

9-65.410 Protected Premises

9-65.411 Designation of Protected Premises

The statute authorizes the Secretary of the Treasury to designate, by notice-type publication, buildings and grounds which constitute the temporary residences of the President and other Secret Service protectees, and the temporary offices of the President, his/her staff, and other Secret Service protectees, and to prescribe regulations governing ingress or egress to such buildings and grounds and to posted, cordoned off, or otherwise restricted areas where the President is or will be temporarily visiting. These designations and regulations are published in the Federal Register. Cf. 31 C.F.R. §§408.1 to 408.3. Information on the latest updating of the temporary residence regulations can be obtained from the Secret Service General's office (202-634-5771).

The statute makes it a misdemeanor for a person or group of persons to willfully and knowingly engage in certain conduct in violation of the statute or regulations issued thereunder.

9-65.412 Prohibited Acts - Designated Premises

18 U.S.C. §1752 prohibits the following acts:

With respect to buildings or grounds designated by the Secretary (31 C.F.R. §408.2) as a temporary Presidential residence or as a temporary office of the President and his staff-

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- (1) willfully and knowingly entering or remaining therein violation of the Secretary's regulations;
- (2) willfully and knowingly obstructing or impeding ingress to or from the premises;
- (3) willfully and knowingly engaging in any act of physical violence against any person or property;
- (4) engaging in disorderly or disruptive conduct with the intent to disrupt or impede the orderly conduct of government business or official functions if such interference, in fact, occurs (proximity to, as distinguished from presence in, the designated premises is sufficient if each of the other elements is present).

9-65.413 Prohibited Acts - Other Premises

With respect to posted, cordoned off or otherwise restricted areas where the President is or will be temporarily visiting, in the absence of a notice-type publication, such posting, etc. must take place a substantial time in advance of the temporary visit, (see USAM 9-65.412(1), (2) and (3) supra).

9-65.420 Penalties, Venue, Effect On Other Laws

18 U.S.C. §1752 further provides: (1) maximum punishment of \$500 or six months imprisonment, or both, for violation and attempt or conspiracy to violate the section; (2) for venue in the federal district court having jurisdiction of the place where the offense occurred; and (3) that none of the existing federal or local laws are superseded by the Act.

9-65.430 Local Law Enforcement

18 U.S.C. §1752 does not supersede any existing state (or federal) laws regarding the maintenance of order and the protection of persons and property in any jurisdiction. Local law enforcement agencies continue to have the responsibility to assist in providing protection to the President while the President is visiting their localities, to conduct criminal investigations involving violations of state and local statutes which result from a Presidential visit, and to furnish police officers in adequate numbers to control demonstrations and other disturbances occurring in close proximity to places where the President is visiting. S. Rep. No. 91-1252, 91st Cong., 2d Sess. 10-11 (1976).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Difficulties in proof of the elements of guilty knowledge or scienter required for violation of the statute may well leave local action as the only effective recourse in many instances, unless a previous ejection, other encounter, or special circumstances are present and will serve to prove the defendant acted willfully and with knowledge.

9-65.440 Sectional Analysis

9-65.441 Willfully and Knowingly

In 18 U.S.C. §1752(a)(1), (3) and (4) the phrase "willfully" and "knowingly" precedes description of activities prohibited thereunder. This clearly limits the reach of those provisions to acts of entering, remaining (18 U.S.C. §1752(a)(1)), obstructing, impeding (18 U.S.C. §1752(a)(3)), or engaging in physical violence (18 U.S.C. §1752(a)(4)), resulting from deliberate informed decision of the defendant to enter, etc. Accordingly, we find it difficult to conclude that proof of less than notice in fact of the designation or restriction of a place will suffice to establish a violation of these three subsections. Given an entry under sufficiently aggravated conditions, we might well test these issues by concurring in prosecution, despite inability to prove actual notice. However, as a practical matter, we suggest that U.S. Attorneys decline prosecution when the circumstances indicate the subject's honest ignorance of the fact of designation or restriction. Regulations designating places of temporary residence and governing ingress and egress thereto and to restricted areas have been published in the Federal Register as aforementioned. By obtaining judicial notice of such publication the benefit of certain presumptions follows, and publication is a fact tending to prove scienter but is probably not conclusive on the issue. See 44 U.S.C. §1507. References in the legislative history to such publication appear to address themselves more to the utility of publication in avoidance of a chilling effect on free speech and possible problems of vagueness than to provision of some form of constructive notice of knowledge. Publication enables those who would address the President by way of a demonstration to inform themselves in advance of applicable regulations and of places where demonstrating may involve risk of violating 18 U.S.C. §1752.

The decision of the Supreme Court in the case of United States v. International Minerals and Chemical Corporation, 402 U.S. 558, affords some guidance on the scienter issues discussed above. In that case the Department took the position that proof that one has knowingly violated regulations in the transportation of hazardous and dangerous materials did not require proof of actual knowledge of the regulations and specific intent to violate them. The court held that the word "knowingly" in the statute pertains to knowledge of facts and, where dangerous products are involved, the

probability of regulation is so great that anyone who is aware that he/she is in possession of or dealing with them must be presumed to be aware of the regulation.

#### 9-65.442 Other Elements

Aside from questions as to scienter, 18 U.S.C. §1752(a)(1) is essentially a "no trespassing" or "unlawful entry" provision, concerned with the right to enter and remain in certain areas. It reaches one who, in violation of regulations governing ingress or egress to places designated or enumerated in 18 U.S.C. §1752(a)(1)(i) and (ii), willfully and knowingly enters or remains in such a place. It is similar to a District of Columbia Code, Section 22-3102, which 40 U.S.C. §101 makes applicable to all public buildings and grounds belonging to the United States within the District of Columbia. It is also similar to 40 U.S.C. §193(f)(b)(1-3) dealing with unlawful entry on the United States Capitol grounds or in its buildings. There is no question as to the government's right to control such presence. Addeley v. Florida, supra.

#### 9-65.443 Designated Temporary Residences Or Offices

The first places to which 18 U.S.C. §1752(a) applies is the buildings or grounds designated by the Secretary of the Treasury as temporary residences of the President or temporary offices of the President or (his) staff (31 C.F.R. §408.2). The places so designated are places utilized by the President with some repetition or for substantial or indefinite periods of time, thus making feasible an advance, formal notice-type publication of the fact of designation. Cross references in 18 U.S.C. §1752(a)(2) (disruptive conduct), 18 U.S.C. §1752(a)(3) (impending ingress and egress), and 18 U.S.C. §1752(a)(4) (physical violence) makes those subsections also applicable to such designated places.

#### 9-65.444 Posted, Cordoned Off Or Restricted Area - Presidential Visit

In the second category of places is any posted, cordoned off, or otherwise restricted area where the President is or will be temporary visiting. This makes provision for protection of the President during his/her travels without requirement for advance formal designation. Again, cross reference in 18 U.S.C. §1752(a)(3) (impending ingress and egress) and 18 U.S.C. §1752(a)(4) (physical violence) makes those subsections applicable to restricted areas. However, 18 U.S.C. §1752(a)(2), (disruptive conduct) does not apply to temporary visit areas. See S. Rep. No. 91-1252, 91st Cong., 2d Sess. 2,9,11 (1976). The reason for exempting 18 U.S.C. §1752(a)(2) is not apparent from the legislative history. It appears to reflect at an accommodation to First Amendment considerations. Need for protection of a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

place of temporary visit from a disruptive demonstration is not so great as in the case of temporary residence or office and protection of the latter places imposes restriction on only a few places as opposed to the many places involved, albeit relatively fleetingly, in temporary visits.

9-65.445 Disruption Of Government Business

18 U.S.C. §1752(a)(2) outlaws the intentional disruption of government business at designated residences or offices. This subsection is designed to require both an intent to impede or disrupt as well as an actual impedance or disruption. The intent requirement is not necessarily specific intent; a showing of reckless disregard of consequences would suffice. S. Rep. No. 91-1252, supra, at 11. Also, intent to disrupt one government function which in fact disrupts other government business would fall within the area proscribed by this subsection. The proscribed actions are, however, limited to disruptive or disorderly conduct. "Government business or official functions" does not include purely "political party" type business or functions. Of course, demonstrations at any temporary office of the President remain subject to state and local nuisance, unlawful entry and trespass laws. A count under this subsection requires allegation and proof of the fact of designation, but we see no basis for a requirement of proof of knowledge with respect thereto under this subsection.

9-65.446 Interference With Ingress And Egress

18 U.S.C. §1752(a)(3) outlaws any intentional interference with ingress or egress to or from any of the buildings, grounds or areas referred to in 18 U.S.C. §1752(a). 18 U.S.C. §1752(a)(3) is designed to assure the orderly flow of personnel and material. This provision is similar to 40 U.S.C. §193f (5)(6) dealing with the United States Capitol and buildings and grounds. There is no question as to the government's right to regulate crowds to preserve free ingress and egress to buildings. Similar "obstruction" statutes have been upheld by the Supreme Court. See, Cameron v. Johnson, 390 U.S. 611 (1968) and Cox v. Louisiana, 379 U.S. 536 (1965) and cases cited therein.

9-65.447 Violence Within Premises

18 U.S.C. §1752(a)(4) outlaws any intentional act of physical violence against any person or property within the buildings, grounds, or areas specified in 18 U.S.C. §1752(a)(1). The underlying concept of "violence" is force, and the word is frequently defined as meaning force, an abuse of force, physical force, force unlawfully exercised. It implies external physical contact. The statutory term "physical violence" therefore encompasses physical assaults on the person of another but not circumstances

denoting only an intention of using force against a person.

9-65.448 Penalty And Venue

18 U.S.C. §1752(b) sets forth the penalty for a violation, and attempts or conspiracies to commit such violations.

18 U.S.C §1752(C) provides that violations will be prosecuted by the U.S. Attorney in the federal district court where the offense occurs.

9-65.449 Authority To Designate

18 U.S.C. §1752(d) authorizes the Secretary of the Treasury to prescribe regulations designating buildings and grounds constituting temporary Presidential residences and regulations governing ingress or egress to such buildings or grounds or to areas where the President or certain other Secret Service protectees will be temporarily visiting.

9-65.450 Sectional Analysis (cont'd.)

9-65.451 Effect on Other Laws

18 U.S.C. §1752(e) specifically provides that the section does not supersede any of the laws of the United States or the District of Columbia. This is in accord with the intent of this section to provide a uniform minimum of Presidential protection in certain specified situations, and still rely upon other federal, state and local laws and ordinances for other forms of Presidential security. S. Rep. No. 91-1252, supra, at 14.

9-65.460 Other Considerations

9-65.461 General Services Administration

If the buildings constituting temporary offices of the President or the President's staff, or if a building the President is temporarily visiting is federal property under the charge and control of the General Services Administration, and disruptive conduct occurs on such property, violators may also be prosecuted for violation of General Services Regulations promulgated pursuant to 40 U.S.C. §318, found in Section 101-19.3 of Title 41, Code of Federal Regulations. These regulations have been held constitutional against attacks that they violate the First Amendment and are vague and overbroad in United States v. Akeson, 290 F. Supp. 212 (D. Colo,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

1968); United States v. Sroka, 307 F. Supp. 400 (E.D. Wis. 1969); United States v. Cassiagnol, 420 F.2d 868 (4th Cir.), cert. denied, 397 U.S. 1044 (1970).

9-65.462 Executive Protective Service

Department Attorneys should also be aware of 3 U.S.C. Chap. 3 relating to the Executive Protective Service. The direction of the Executive Protection Service is a responsibility of the Director of the Secret Service and it performs such duties as the Director of the Secret Service may prescribe, including protection of any building in which Presidential offices are located. While the Executive Protection Service could therefore be utilized anywhere Presidential offices are situated, the Secret Service has indicated its primary responsibility will be to insure adequate protection from demonstrations and other large disturbances occurring in the Washington, D.C. area, particularly near foreign diplomatic missions.

9-65.463 Competency - Utilization Of Federal Facility

Because it is of the utmost importance that the President be fully protected at all times against the isolated deranged individual, if the mental competency of a violator of this section is in question, commitment to the Federal Medical Center, Springfield, Missouri, is recommended as an exception to the policy favoring utilization of the services of the local or nearest available psychiatrist or hospital.

9-65.464 Presidential Visit - U.S. Attorney's Responsibility

When a Presidential visit or sojourn is scheduled, the U.S. Attorney should be alert to indications of plans by individuals or groups which may result in activity in violation of 18 U.S.C. §1752. If such activity is anticipated, the U.S. Attorney should, after consultation with the appropriate office of the Secret Service, consider whether preventive measures such as a temporary restraining order would be useful and whether the U.S. Attorney should be present at the scene. The U.S. Attorney should also advise the Department of Justice in Washington, D.C., as early as practicable of the anticipated activity so that background information on the individuals or groups concerned which is available to the Department, may be furnished to the appropriate offices and agencies.

Although state and local ordinances differ as to the exact extent of their coverage, almost everything proscribed in 18 U.S.C. §1752 is presently outlawed in some form or other at the state or local level. 18 U.S.C. §1752 makes these activities a federal offense so that the Secret Service also has the authority to prevent such activities.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.500 INTERFERENCE OR OBSTRUCTION OF SECRET SERVICE - 18 U.S.C.  
§3056(d)

18 U.S.C. §3056(d) (formerly 18 U.S.C. §3056(b), see Pub. L. No. 98-587, 98 Stat. 3110 (1984)), prohibits knowingly and willfully obstructing, resisting, or interfering with a Secret Service agent who is engaged in protective functions. This provision does not apply to interference with other federal officials, such as members of the Executive Protective Service, who might also be engaged in protective functions at Presidential offices or residences. It is presently a felony under 18 U.S.C. §111 forcibly to assault, resist, oppose, impede, intimidate, or interfere with federal law enforcement officers, including Secret Service agents, in the performance of their duties. Unlike 18 U.S.C. §111, 18 U.S.C. §3056(d) appears to require proof of knowledge of the victim's official status. Compare the similar distinction drawn between 18 U.S.C. §111 and 26 U.S.C. §7212 in United States v. Rybicki, 403 F.2d 599 (6th Cir. 1968). In prosecutions under 18 U.S.C. §3056, a showing of utilization of force by the defendant would not be necessary. It would suffice to show that the defendant's willful action constituted an obstruction or resistance to, or interference with, the performance of the protective duties of a Secret Service agent. See S. Rep. No. 1252, 91st Cong. 2d Sess. 14 (1970). This offense provides the authority for Secret Service agents to arrest persons who engage in activities which could nullify or reduce the effectiveness of security precautions taken by the Secret Service, without the necessity of establishing that such interference was forcible or aggressive in character.

18 U.S.C. §3056(d) applies only to those protective functions enumerated therein.

9-65.501 Investigative Responsibility

The Secret Service will conduct investigations of alleged violations of 18 U.S.C. §3056(d) and forward copies of all investigative reports to the U.S. Attorney and to the Criminal Division.

9-65.502 Supervising Section

The General Litigation and Legal Advice Section has supervisory responsibility over 18 U.S.C. §3056(d).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.600 ASSAULTS ON AND KIDNAPING OF FEDERAL OFFICERS

9-65.601 Supervisory Jurisdiction

Supervisory jurisdiction over the statutes relating to assaults on, kidnaping of, and murder of federal officers rests with the General Litigation and Legal Advice Section of the Criminal Division. Attorneys responsible for these statutes can be reached at FTS 724-7144.

9-65.602 Investigative Jurisdiction

All assaults on, kidnapings of, and murders of federal officers will be investigated exclusively by the FBI except:

A. The FBI does not, at the request of the Treasury Department, investigate assaults on, kidnapings of, or murders of any Treasury Department personnel. This includes Secret Service, ATF, IRS, and Customs. However, if the Bureau believes that its absence from a case is materially affecting the interests of justice, it is to call this to the attention of the Attorney General.

B. In accordance with the April 20, 1968, agreement between the Postal Service and Justice Department, investigative jurisdiction of offenses in Postal Service buildings against postal laws, or involving, among other things, offenses committed by postal employees, is with the Postal Service inspectors. In addition, inspectors also have investigative jurisdiction with respect to offenses involving the custody of the mails and personal property of postal employees. Thus, the responsibility for investigating the large majority of cases involving postal employees that can be expected to arise under 18 U.S.C. §111 will be with the postal inspectors. FBI investigation of assaults on, kidnapings of, and murders of Postal Service employees is limited to the following three situations: (1) assaults, kidnapings, or homicides of postal employees which are incidental to some other crime which is within the investigative jurisdiction of the FBI; (2) assaults, kidnapings, or homicides of Postal Inspectors believed to have been committed by persons who are not employees of the Postal Service; (3) in any other situation where the FBI is directed by the Department of Justice to investigate. All other assaults on, kidnapings of, or murders of postal employees are investigated by the Postal Service.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.610 Assaults In General

The primary statutes governing assaults and murder of federal officers are 18 U.S.C. §111 and §1114. However, the following additional statutes are applicable to specific categories of interference with or assaults on federal officers: 18 U.S.C. §245(b)(1)(C) (Forcible interference against a federal officer because of his/her official duties); 18 U.S.C. §372 (Conspiracy to Impede or Injure a Federal Officer); 18 U.S.C. §1859 (Criminal Interference with Surveyors of Public Land); 18 U.S.C. §3056 (Interference with a Secret Service Agent); 19 U.S.C. §70 (Obstruction of Revenue Officers by Masters of Ships); 21 U.S.C. §461(c) (Assaults on Poultry Inspectors); 26 U.S.C. §7212(a) (Assaults on IRS Agents); and 29 U.S.C. §629 (Interference with Department of Labor Compliance Personnel). The kidnaping of a federal officer named in 18 U.S.C. §1114 or designated by regulations issued by the Attorney General for coverage under 18 U.S.C. §1114 is a violation of 18 U.S.C. §1201(a)(5). (See USAM 9-65.630, infra.) The assaulting, kidnaping, or murder of a family member of certain federal officials is covered by 18 U.S.C. §115. (See USAM 9-65.900, infra.)

9-65.611 Requirement Under 18 U.S.C. §111 That the Act in Opposition of the Federal Officer be Forcible: Application of Statute to Threats

Section 111, Title 18 of the United States Code, punishes anyone who "forcibly assaults, resists, opposes, impedes, intimidates or interferes with any person designated in Section 1114 of Title 18 while engaged in or on account of the performance of his/her official duties." Judge Parker in Long v. United States, 199 F.2d 717 (4th Cir. 1952) said, "Congress has not left the matter in doubt but has specifically prescribed the use of force as an essential element of the crime."

Whether the element of force, as required by the statutes, is present in a particular case is a question of fact to be determined from all of the circumstances. The Long case indicates that a threat of force will satisfy the statute. Such a threat which reasonably causes a federal officer to anticipate bodily harm while in the performance of his/her duties constitutes a "forcible assault" within the meaning of 18 U.S.C. §111. See also Gornick v. United States, 320 F.2d 325 (10th Cir. 1963). Thus, a threat uttered with the apparent present ability to execute it, or with menacing gestures, or in hostile company or threatening surroundings, may, in the proper case, be considered sufficient force for a violation of 18 U.S.C. §111. These judicial decisions suggest a similar construction of the statutory words "resists, opposes, impedes, intimidates or interferes with."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.612 Knowledge of Victim's Status as a Federal Officer in Prosecution Under 18 U.S.C. §111 and §1114

Under 18 U.S.C. §111 and §1114, knowledge by the accused of the official capacity of the victim is not an element of either offense. Of course, the government must prove the official capacity of the victim as a jurisdictional element, but is not necessary to prove that the accused had knowledge of such capacity. The necessity of proving the official capacity of the victim was not eliminated by the deletion through part K of chapter X of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2142 (1984), of the phrase "while engaged in the performance of his official duties," which had appeared three quarters of the way down section 1114's list of protected persons. This was only a technical correction since the phrase appears at the end of section 1114 and applies to all the listed persons. See S. Rep. No. 225, 98th Cong., 1st Sess. 328-29 (1983). Similarly, in prosecutions brought under 18 U.S.C. §371 for conspiracy to assault a federal officer, there is no requirement that the government establish knowledge by the defendant of the potential victim's official capacity. See United States v. Feola, 420 U.S. 671 (1975).

9-65.613 Applicability of 18 U.S.C. §111 and §1114 to Assault Upon and Killing of Informants

A typical informant, including a so-called "special employee," is not covered by 18 U.S.C. §§111 and 1114. 18 U.S.C. §§1512 and 1513 may be utilized for investigating and punishing most attacks on informants.

9-65.614 General Prosecutive Policy Under 18 U.S.C. §111

Through 18 U.S.C. §1114, the protection of 18 U.S.C. §111 is afforded to a diverse collection of federal government personnel. The primary focus of the department's enforcement program is on those employees who have law enforcement duties which regularly expose them to the public (e.g., agents of the FBI, DEA, ATF, Secret Service, IRS, Customs, Postal Inspectors, etc.) and on staff members of federal correctional institutions (see USAM 9-64.121). Without protection from assaults and other forms of forcible resistance, such persons can hardly be expected to perform their required functions effectively. Accordingly, forcible acts against this type of federal employee should be prosecuted vigorously. By contrast, offenses against other types of federal employees should be referred to the local prosecutor unless the offense is particularly aggravated or there are other unusual factors present justifying federal action.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.620 Assaults On Specific Officials

The federal officials protected from assault and murder include not only those enumerated in 18 U.S.C. §1114, but also any additional officials designated for coverage under 18 U.S.C. §1114 by regulations issued pursuant to the authority granted to the Attorney General by part K of chapter X of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2142 (1984). Such a regulation is to be included in Title 28 of the Code of Federal Regulations.

9-65.621 Assaults on Staff Members of Federal Penal and Correctional Institutions

U.S. Attorneys in those districts where federal penal and correctional institutions are located should give special prosecutive attention to cases involving assaults on staff members. Assaults by inmates upon federal officers are considered most serious offenses. In order to deter such acts, to show support for the federal employees working in these hazardous assignments, and thereby to strengthen the operation of the correctional segment of the department's criminal justice program, prompt and vigorous prosecution of cases involving inmate assaults upon employees should be pursued.

The foregoing policy does not eliminate the necessity of reviewing a prospective defendant's file and consulting with institution authorities to rule out the existence of factors which would tend to favor declination of prosecution under 18 U.S.C. §111 for such an incident. Such factors would include; amount of good time subject to forfeiture, possible vacation of any suspension of sentence, effort of the incident on parole eligibility, and local conditions tending to mitigate or extenuate culpability. In some cases prosecution under 18 U.S.C. §751 and §1791 may prove a useful adjunct or alternative to prosecution under 18 U.S.C. §111

9-65.622 Assaults on Postal Employees

The Department of Justice did not support the amendment of 18 U.S.C. §1114, which brought all Postal Service employees within the protection afforded in 18 U.S.C. §111. The amendment creates federal jurisdiction over a substantial number of offenses which do not normally call for federal

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prosecution under the general guidelines discussed above. Accordingly, some special attention needs to be given to the processing of offenses in this area.

Consideration must be given to the selection of those investigations which will be presented to the U.S. Attorneys for their prosecutive determination. The Post Office inspectors will benefit from some guidance in this regard, for their reports are prepared differently depending upon whether presentation will be made to a U.S. Attorney or, as an alternative, to a local prosecutor. In addition, the presentment to and declination by a U.S. Attorney of prosecution in an investigation tends to lessen the ardor of a local prosecutor who is subsequently presented with the same investigation.

Care must be taken to distinguish the three different types of violations of 18 U.S.C. §111 relating to postal employees. These types are: (1) those assaults involving postal inspectors; (2) those involving assaults on non-inspector postal employees by members of the public; and (3) those involving an assault by one postal employee upon another postal employee.

Postal inspectors are engaged in the investigation of cases and because of the importance of their investigative role all potential violations of 18 U.S.C. §111 involving postal inspectors should be presented to the U.S. Attorney's office rather than to a local prosecutor. The efficient operations of postal inspectors can be significantly impaired by forcible assaults or obstructions. Consequently, such instances should be considered high priority cases for prosecution.

With regard to the other two classes of assaults involving postal employees, it does not appear necessary that all of these possible cases be presented to a U.S. Attorney for evaluation. Well under half of the total incidents occurring in these classes involve physical abuse. It should be noted from the legislative history of the statute that the sponsor of the original legislation stated that the "chief thrust" of the legislation "is to give protection against forcible assault." It would appear that incidents which do not involve physical abuse could best be handled by local courts as either civil or criminal proceedings or by the administrative remedies of the Post Office Department. Accordingly, we have asked the Chief Postal Inspector's office not to present to the U.S. Attorney's office for evaluation those matters which do not involve a physical injury which is of such substantial character that the extent of the injury can be demonstrated and conveyed to a jury in a trial in the event that such case is accepted for prosecution.

Even as to demonstrable physical assaults by members of the public on postal employees, the local courts may well afford a sufficient remedy. It is requested that the U.S. Attorney's office evaluate and compare the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

capability of both the local and federal courts to render an appropriate and expeditious remedy and such cases be accepted or declined for federal prosecution according to that evaluation. It is not intended that the U.S. Attorney's office accept for prosecution such physical abuse cases unless some significant deficiency in the local court remedy is apparent.

9-65.623 Assaults Between Postal Employees

Turning to those physical assaults between postal employees, it is requested that prosecutive consideration be given only to those incidents which originate from and continue in such a manner as to involve job-related disputes without significant fault of the victim. Those physical assaults originating from or substantially involving personal matters not related to their employment or which involved significant fault on the part of the victim should be referred to the local prosecutor or handled administratively by the Post Office Department.

9-65.624 Assaults Upon Internal Revenue Service Personnel

Prosecutions of assaults upon Internal Revenue Service personnel can be instituted under either 18 U.S.C. §111 or 26 U.S.C. §7212(a). The latter statute provides a particularly helpful alternative in cases where there is simply an offer of violence unaccompanied by the potential for imminent use of physical force. In contrast to 18 U.S.C. §111 where it is necessary to establish that the defendant forcibly assaulted, resisted, opposed, impeded, intimidated, or interfered with the federal officer under 26 U.S.C. §7212(a) a mere threat of force, including a threat conveyed by letter, is sufficient to constitute an offense. However, to constitute a violation of this statute, the statement must be a true threat as opposed to simply a coarse statement of opposition to the practices of the IRS and its agents. See Watts v. United States, 394 U.S. 705, 708 (1969). Further, unlike 18 U.S.C. §111, 26 U.S.C. §7212(a) requires that the government establish knowledge by the defendant of the IRS agent's official capacity. United States v. Johnson, 462 F.2d 423 (3d Cir. 1972), cert. denied, 410 U.S. 937; United States v. Rybicki, 403 F.2d 599 (6th Cir. 1968). Normally, prosecutions should be instituted under this statute only when the nature and gravity of the threat is sufficient to impede operations of the IRS. Prosecutions should generally not be undertaken in instances of picayune threats in which the only purpose to be served is to shield IRS agents with a special inviolability not accorded other federal investigative agents.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.630 Kidnaping of Federal Officers

9-65.631 Kidnaping In General

Kidnaping of federal officers was added to 18 U.S.C. §1201(a)(5) by part F of chapter X of the Comprehensive Crime Control Act of 1984 (Pub. L. No. 98-473 98 Stat. 2139 (1984)). The Congress determined that the kidnaping of any of the federal officers and employees listed in or designated under 18 U.S.C. §1114 should be a federal crime. Such persons are generally engaged in law enforcement or similar work which can bring them into hostile encounters with the public solely because of their work as federal employees. Moreover, their status could make them targets for a hostage taking by a terrorist or subversive group. See S. Rep. No. 225, 98th Cong., 1st Sess. 318 (1983). (For discussions on kidnaping in general and the crime of hostage taking in particular, see USAM 9-60.100 and 9-60.700, respectively.)

9-65.632 Offense

Section 18 U.S.C. §1201(a)(5) provides:

Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when . . . (5) the person is among those officers and employees designated in section 1114 of this title and any such act against the person is done while the person is engaged in, or on account of, the performance of his official duties. . . .

The gist of the offense is the kidnaping of a designated federal official which is done while the federal officer is engaged in, or on account of, the performance of his/her official duties. Unlike 18 U.S.C. §1201(a)(4) relating to the kidnaping of internationally protected persons (see USAM 9-65.830, infra), there is no attempt provision for 18 U.S.C. §1201(a)(5).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.633 Applicability of Case Law Under 18 U.S.C. §1111 and §1114

The term "engaged in or on account of the performance of official duties" is a limitation which is identical to that contained in 18 U.S.C. §1111 and 18 U.S.C. §1114, which proscribe assaults on federal officers and murder of federal officers, respectively. The Congress expressly intends that the body of law that has developed concerning the meaning of that term in reference to these two statutes apply here. See S. Rep. No. 225, 98th Cong., 1st Sess. 318 (1983).

9-65.634 Penalty

The penalty for a violation of 18 U.S.C. §1201(a)(5) is imprisonment for any term of years or life. For any offense committed after December 31, 1984, a fine up to \$250,000 is also possible. (See 18 U.S.C. §3623 (Alternative fines) (Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (1984)).

9-65.700 CONGRESSIONAL, CABINET, AND SUPREME COURT ASSASSINATION, KIDNAPING, AND ASSAULT (18 U.S.C. §351)

9-65.701 Supervisory Jurisdiction

Supervisory jurisdiction for this statute rests with the General Litigation and Legal Advice Section of the Criminal Division. Attorneys responsible for the enforcement of the statute can be reached at FTS 724-7144. Such attorneys should be notified telephonically immediately upon the initiation of an investigation under this statute.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.702 Investigative Responsibility; 18 U.S.C. §351(g)

18 U.S.C. §351(g) assigns investigative jurisdiction to the FBI and further provides that the FBI may request investigative assistance from any federal, state, or local agency including the Army, Navy, and Air Force. This latter provision overcomes the effect of 18 U.S.C. §1385, which generally prohibits use of any part of the Army or Air Force as a *pos commitatus* or otherwise to execute the law.

9-65.703 Background

The Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1891 (1971), established a new section §351 of Title 18 U.S.C. which prohibited killings, kidnappings, and assaults of Members of Congress or Members of Congress-elect. The scope of the statute was expanded by Pub. L. No. 97-285, 96 Stat. 1219 (1982), to include the following categories:

A. Cabinet officer defined as a member of the executive branch of government who is the head of a department listed in 5 U.S.C. §101, nominees to such positions, and the second ranking official in such departments.

B. Director of Central Intelligence or nominee to be Director of Central Intelligence, and the Deputy Director of Central Intelligence.

C. Justices of the United Supreme Court and persons formally nominated to fill a vacancy on the Court.

18 U.S.C. §351 makes it a federal offense to kill or kidnap any individual within the above listed categories, to attempt or conspire to commit such offenses, or to assault any such individual.

In enacting this legislation, the Congress acted well within its constitutional powers. There is a strong federal interest in vindicating crimes of violence directed at members of Congress, Cabinet members and Justices of the Supreme Court. Under the incidental powers granted to Congress by the "necessary and proper" clause, Art. I, Sec. 8, cl. 18 of the Constitution, it is clear that Congress has the power to create, define and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

punish crimes and offenses whenever necessary to effectuate the objects of the federal government. See, United States v. Calderon, 655 F.2d 1037 (10th Cir. 1981).

The 1982 amendment to 18 U.S.C. §351 added a new subsection (h) which provides that in a prosecution under this section, the government need not prove that the defendant knew the victim was an official protected by this section. In addition, a new subsection (i) of 18 U.S.C. §351 specifically provides for extraterritorial jurisdiction over the conduct prohibited by this section. Prior to this amendment, extraterritorial jurisdiction was assumed. United States v. Layton, 509 F. Supp 212 (N.D. Cal.), appeal dismissed, 645 F.2d 681, cert. denied, 452 U.S. 972 (1981).

9-65.710 Killing Individuals Designated in 18 U.S.C. §351(a)

The killing of an individual designated by 18 U.S.C. §351(a) is punishable as provided in 18 U.S.C. §1111 and §1112. These sections must be consulted for definitions of the substantive homicide offenses and the applicable penalties.

9-65.711 Member Of Congress - Defined

A Member of Congress has been defined as "one who is a component part of the Senate or House of Representatives . . . one who is sharing the responsibilities and privileges of membership." United States v. Dietrich, 126 F. 676, 681 (8th Cir. 1904). It is Criminal Division's view that the membership of Congress includes not only the presently constituted membership of one hundred Senators and four hundred thirty-five Representatives, but also those representatives or delegates for special geographical divisions who are extended the privileges of membership, such as the Resident Commissioner from Puerto Rico and the Non-Voting Delegate from the District of Columbia. See, Act of September 1970, Public Law 91-405, Title II, section 202(a), 84 Stat. 845 (Non-Voting Delegate from the District of Columbia to have privileges granted to Representative).

Note: Also, in Criminal Division's view the Vice President would be classed as a Member of Congress. However, any prosecutions for incidents involving this official should be pursued under 18 U.S.C. §1751, the Presidential assassination statute, so as to allow use of the more liberal assault provisions and reward provision contained in the statute.

9-65.712 Member Of Congress-Elect - Defined

A Member of Congress-Elect is one who has been certified by the usual

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

state, or local, certifying official, as having been elected to one of the offices discussed above. This term does not encompass a Senator appointed under the 17th Amendment, pending his/her entry upon the office, though, of course, thereafter he/she is a member.

Unlike 18 U.S.C. §1114 (protection of officers and employees of the United States) these provisions do not require that the attack occur while the victim is engaged in, or be on account of the performance of his/her official duties. Therefore, any incident involving a Member of Congress or Member of Congress-Elect, would be within these provisions regardless of the timing or motive of the attack in question.

As with 18 U.S.C. §1114 and §1751, the official status of the victim is merely the basis upon which federal jurisdiction is asserted. Knowledge of the official status of the victim is not an element of the offense itself. See, United States v. Feola, 420 U.S. 671 (1975); Hearings on H.R. 6097 Before a Subcomm. of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 33 (1965).

9-65.713 Executive Branch Members

By its terms, the statute applies to "a member of the executive branch of the government who is the head, or a person nominated to be head during the pendency of such nomination, of a department listed in section 101 of Title 5, or the second ranking official in such department."

In addition, the statute applies to the Director of Central Intelligence, a person nominated to be Director during pendency of such nomination, or the Deputy Director of Central Intelligence.

9-65.714 Justices of the United States

The 1982 amendment expressly includes Supreme Court Justices and nominees to the Court within the coverage of 18 U.S.C. §351. This provision was deemed necessary because of the uncertainty as to whether a Supreme Court Justice is considered a "judge of the United States" within the meaning of 18 U.S.C. §114. See 28 U.S.C. §451.

9-65.720 Kidnapping: 18 U.S.C. §351(b)

Whoever kidnaps any individual designated in subsection (a) of this section shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

As with the Federal Kidnapping Act (18 U.S.C. §1201) this statute does not attempt to define the term "kidnap." However, it appears that the essential elements of the offense are the involuntary nature of the seizure and detention. Chatwin v. United States, 326 U.S. 455, 464 (1964). To the extent that transportation is deemed to be an element of kidnapping under this statute, any significant transportation should suffice, Cf. 2 Bish. Criminal Law, section 750 (9th Ed.). Analogizing this statute to 18 U.S.C. §1201(a)(4) (kidnapping of protected foreign officials), it does not appear that transportation across a state line is an element of the offense. Rather, the jurisdictional basis for this statute is founded in the substantial relation which exists between the denounced acts and the execution of the powers of Congress. In any event, the term is used in its generic sense in this statute and to fulfill the purpose intended by Congress, protection of its members, it should be given a broad scope and should not be limited by geographical considerations beyond the possible element of "carry away" the victim.

Although 18 U.S.C. §351(b) provides that the death penalty may be imposed if death results to the victim, it is the Department's position that the death penalty cannot be legally obtained in light of Furman v. Georgia, 408 U.S. 238 (1973).

9-65.730 Attempts to Kill or Kidnap: 18 U.S.C. §351(c)

Whoever attempts to kill or kidnap any individual designated in subsection (a) of this section shall be punished by imprisonment for any term of years or for life.

Refer to USAM 9-65.330 supra, for a discussion of the term "attempt".

9-65.731 Dangerous Proximity Test

The dangerous proximity test adopted by Judge Learned Hand in a case in which the defendant was arrested before passing classified government documents, which were in the defendant's purse, to her paramour.

[P]reparation is not attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exertion of the will to complete the crime.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States v. Coplon, 185 G.2d 629, 633 (2d Cir. 1950), (quoting Holmes, J., in Commonwealth v. Peaslee, 177 Mass. 267, 272 (1901)), cert. denied., 342 U.S. 920 (1952)).

9-65.732 Any Act Or Endeavor Test

This test, a more recent development, can be found in a case in which a defendant was charged with using communication facilities in attempting to commit the crime of illegally importing narcotic drugs, having mailed a letter to a Mexican manufacturer of heroin in which the defendant asked to purchase some. The court said:

To attempt to do an act does not imply a completion of the act, or in fact any definite progress toward it. Any effort or endeavor to effect the act will satisfy the terms of the law. United States v. Robles, 185 F. Supp. 82, 85 (N.D. Cal., 1960).

This position must be examined with an eye to those cases which have striven to distinguish the terms "attempt" and "endeavor", thereby forcing a definition of the former term in much the same terms as under the dangerous proximity test. See, Osborn v. United States, 385 U.S. 322, 333, reh'g denied, 386 U.S. 938 (1966). The gravity of the violations encompassed by the statute would indicate the propriety of prosecution as an attempt for conduct which might as to other violations be considered mere preparation or endeavor.

Inasmuch as the assault provision of this statute, 18 U.S.C. §351(e), makes no provision for aggravated assaults (i.e., assault by use of a deadly or dangerous weapon) and since the penalty for assaults not resulting in personal injury is so light, consideration should be given to prosecuting as an attempted killing, when a deadly or dangerous weapon is involved in an incident where no injury results.

9-65.740 Conspiracy To Kill Or Kidnap - 18 U.S.C. §351(d)

If two or more persons conspire to kill or kidnap any individual designated in subsection (a) of this section and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished (1) by imprisonment for any term of years or for life, or (2) by death or imprisonment for any term of years or for life, if death results to such individual.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

This provision tracks the general conspiracy statute (18 U.S.C. §371) except that it is limited to the two objects of killing or kidnapping a Member of Congress. 18 U.S.C. §351(d) does not preclude prosecution under the general conspiracy statute, but merely provides an increased penalty where the object of the conspiracy is to kill or kidnap a Member of Congress. See, United States v. Bazzell, 187 F.2d 878, 885 (7th Cir.), cert. denied., 342 U.S. 849 (1951). Conspiracy to kill or kidnap a Member of Congress is punishable by imprisonment for any term of years or life, or by death if death results to the victim, while the maximum penalty under 18 U.S.C. §371 would be a \$10,000 fine and five years imprisonment. But see, Furman v. Georgia, 408 U.S. 238 (1972).

9-65.750 Assault: 18 U.S.C. §351(e)

Whoever assaults any person designated in subsection (a) of this section shall be fined not more than \$5,000, or imprisoned not more than one year, or both; and if personal injury results, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

Absent a statutory definition of assault, the courts have looked to the common law and have concluded that an "assault" is:

An attempt with force or violence to do a corporal injury to another; may consist of any act tending to such corporal injury, accompanied with such circumstances as denotes at the time an intention, coupled with present ability, of using actual violence against the person.

Guarro v. United States, 237 F.2D 578, 580 (D.C. Cir. 1956).

But, of course, an assault can also be committed "merely by putting another in apprehension of harm whether or not the actor actually intends to inflict, or is capable of inflicting that harm." Ladner v. United States, 358 U.S. 169, 177 (1958). Proof of this form of assault requires establishment of a reasonable apprehension of the immediate application of force to the victim. In a recent case brought under 18 U.S.C. §111, the court properly granted a judgment of acquittal where the evidence showed only a confrontation between the victim and defendant which was ended by the defendant's saying in effect "you've had your warning, we'll get you." While there was a background of previous violence in the case from which an implication of force could be found, absent some additional circumstance the words alone carry insufficient connotation of force. In addition the force, if any, was for application in the future, not immediately. Accordingly, at best the defendant's acts were a mere threat, conduct not generally covered by federal law (but see, e.g., 18 U.S.C §§372, 876). Note also that a condition in an offer of violence may negate the element of apprehension.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

For an excellent discussion of this concept see Watts v. United States, 402 F.2d 878 (D.C. Cir. 1968), reversed on other grounds, 194 U.S. 705 (1969).

Unlike 18 U.S.C. §1751, the assault provision of 18 U.S.C. §351(e) divides assaults into two categories, those that result in personal injury, and all others. If personal injury occurs, then the penalty is a maximum of ten years imprisonment and a fine of \$10,000. In all other cases the maximum penalty is one year imprisonment and a fine of \$5,000. Undoubtedly, the injury cited would have to be to the Member of Congress and not to a third party who may be the unfortunate recipient of a blow aimed at a Member of Congress.

From the debate on the Senate floor, it is apparent that Senator's Ervin's motion to amend this section in this matter was prompted by his desire to exclude simple assaults from the higher penalty provision. 116 Cong. Rec., 35655 (1970). Senator Ervin suggested that if a person strikes at a Member of Congress with his/her fist without landing the blow, or does strike the Member of Congress with his/her open hand then he/she should be guilty of the lesser offense. 116 Cong. Rec., supra. Of course, if a Member of Congress is injured by the open hand, more than just momentary pain, then the high penalty could be sought in that case.

As the statute does not provide for aggravated assaults, involving use of deadly or dangerous weapons without inflicting personal injury, applicability or the attempted homicide provision should be considered in those cases wherein the penalty for simple assault appears unsuitable.

9-65.760 Federal Investigative And Prosecutive Jurisdiction; 18 U.S.C. §351(f) - Effect On State And Local Authority

If federal investigative or prosecutive jurisdiction is asserted for a violation of this section, such assertion shall suspend the exercise of jurisdiction by a State or local authority, under any applicable State or local law, until Federal action is terminated.

When and if federal investigative or prosecutive jurisdiction is asserted, this provision suspends state or local jurisdiction in cases of possible violation of 18 U.S.C. §351, until all federal action is terminated. This is within the powers delegated to Congress under the Constitution, as it has long been established that the enforcement of state laws which interfere with the protection of a dominant federal interest in the same subject, as we have here, can be suspended by federal law. See, Pennsylvania v. Nelson, 350 U.S. 497, 504-505 (1956).

Although this section suspends state action, it does not prevent the states from cooperating with federal authorities in an investigation of violations of the act. See 18 U.S.C. §351(g). In addition, state action is

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

only suspended until the federal action is terminated.

Conflicts of jurisdiction resulting from the commission of an independent state offense, such as the wounding of a state official, incidental to an offense against a Member of Congress, are to be resolved on a case-by-case basis.

9-65.770 Authorization For Interception Of Wire Or Oral Communications; —  
18 U.S.C. §2516(1)(c)

Section 16 of the Act adds 18 U.S.C. §351 as one of the statutory offenses under 18 U.S.C. §2516(1)(c) which can be investigated by use of properly authorized interception of wire or oral communications, when such interception may provide evidence of such a violation. Of course, the FBI, the agency charged with investigative responsibility, will be the agency making use of this provision.

9-65.780 Venue

As this statute contains no special venue requirements, normally venue will lie in that district wherein the violation occurred. However, Chapter 211, Title 18, United States Code, should be consulted to answer such questions as may arise in cases involving: offenses begun in one district and completed another (18 U.S.C. §3237); offenses not committed in any district (18 U.S.C. §3238); murder or manslaughter (18 U.S.C. §3236); or capital cases in general (18 U.S.C. §3235).

9-65.800 PROTECTION OF FOREIGN OFFICIALS (18 U.S.C. §§112, 878, 970  
1116, 1117 and 1201)

On October 8, 1976, the President approved Public Law No. 94-467, an act for protection of Internationally Protected Persons. The primary purpose of the bill was to implement the United Nations (UN) "Convention on the Prevention and Punishment of Crimes Against Internationally Protect Persons, Including Diplomatic Agents," and the Organization of American States (OAS) "Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that Are of International Significance," In line with the 1972 Act for protecting foreign officials and official guests, P.L. 94-467 expressly recognizes and preserves existing local jurisdiction to punish criminal conduct directed against foreign officials, official guests, and internationally protected persons.

The Act gives courts of the United States jurisdiction over offenders who have committed crimes against internationally protected persons whether or not the offense occurred within the United States, when the offenders are

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

found within the jurisdiction of the United States. Crimes for which there is extraterritorial jurisdiction are murder (18 U.S.C. §1116(c)), kidnapping (18 U.S.C. §1201(e)), assault (18 U.S.C. §112(e)), and threats (18 U.S.C. §878(d)).

President Ford identified the evil to be remedied by the conventions and the legislation when he transmitted a copy of the United Nations Convention to the Senate:

The effective conduct of international relations depends in large part on the ability of diplomatic agents to travel and live freely and securely while representing the interests of their respective countries. We have witnessed in recent years an unprecedented increase in acts of violence directed against diplomatic agents and other internationally protected persons.

Because the conventions were designed to protect the "effective conduct of international relations," they are surely "subjects that properly pertain to our foreign relations . . ." Santovincenzo v. Egan, 284 U.S. 30, 40 (1931); see Asakura v. Seattle, 265 U.S. 332, 341 (1924); and are properly within the treaty-making power found in Art. 2, §2 of the constitution. Since the conventions were a proper exercise of the treaty power, the authority to effect the agreements is conclusively determined by Missouri v. Holland, 252 U.S. 416 (1920).

An alternate constitutional underpinning is the power to "define and punish...offenses against the law of nations." Art. I, §8, cl. 10. The OAS and UN Conventions evidence international law. Cf. The Paquete Habana, 175 U.S. 677, 700 (1900); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 860 (2d Cir. 1962), rev'd on other grounds, 376 U.S. 398 (1964). Consequently, Congress can legislate to effect that law. Cf. In Re Yamashita, 327 U.S. 1, 7 (1946). In addition to the conventions, the assertion of jurisdiction based upon the nationality or national character of the victim (passive personality principle) or injury to the national interest (protective principle) is recognized in international law. See e.g., Working Papers of the National Commission on Reform of Federal Criminal Laws 72-73 (1970); Rivard v. United States, 375 F.2d 882, 885 (5th Cir.), cert. denied, 389 U.S. 884 (1967).

#### 9-65.801 Investigative Jurisdiction

Responsibility for the federal investigation of all violations of the act has been assigned to the FBI.

#### 9-65.802 Responsibilities of Treasury

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The assignment of sole federal jurisdiction to the FBI to investigate violations of the protection of foreign officials provisions takes cognizance of the protective responsibilities of the Department of Treasury under 3 U.S.C. §202 and 18 U.S.C. §3056 and, thus, does not limit or interfere with the power of the Secretary of the Treasury in the discharge of his/her statutory protective responsibilities. Only a few foreign officials within the United States will at any one time be exposed to sufficient hazard or planned, deliberate attack or conspiracy (18 U.S.C. §371) to warrant provision of protective services, but U.S. Attorneys should immediately furnish information indicating the existence of such a hazard to the FBI field office for FBI dissemination to the U.S. Secret Service, Department of State, and other interested persons and agencies. Likewise, U.S. Attorneys should continue to assist the U.S. Secret Service in coordinating and obtaining the support of local agencies in the provision of protective services.

It should be noted that Public Law 97-308 (October 14, 1982) amended 18 U.S.C. §1752 by providing criminal sanctions for violations of zones of protection established for the protection of persons being protected by the U.S. Secret Service. (See USAM 9-65.400, 9-65.400, supra).

9-65.803 Authority To Initiate Prosecution

U.S. Attorneys may initiate prosecution without consultation with the Criminal Division.

9-65.804 Preference For Local Disposition

Both the 1976 Act and its predecessor include specific provisions precluding the preemption of local law. This reflects the statutory recognition of the traditional primary responsibility of local law enforcement agencies for handling common crimes. As noted in the prior Act in 1972, the purpose of the Act was to create in the "... United States jurisdiction, concurrent with that of the States, to proceed against only those acts committed against foreign officials which interfere with its conduct of foreign affairs." H.R. Rep. No. 1268, 92d Cong., 2d Sess. 13 (1972).

9-65.805 Supervisory Jurisdiction

Supervisory jurisdiction over the protection of foreign officials statutes rests with the General Litigation and Legal Advice Section of the Criminal Division. Attorneys responsible for these statutes can be reached at FTS 724-7144.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

9-65.806 Offenses Against Officials of the Coordination Council for  
North American Affairs (Taiwan)

In the opinion of the Criminal Division, appropriate officials of Taiwan's Coordination Council for North American Affairs (CCNAA) come within the definition of the term "foreign official" as used in 18 U.S.C. §1116(b)(3)(B), by virtue of the Taiwan Relations Act, 22 U.S.C. §3301 et seq., and Executive Order 12143 at Section 1-204, 44 Fed. Reg. 37191. Thus the following sections of Title 18 prohibit offenses against CCNAA officials: 18 U.S.C. §112 (assault), 18 U.S.C. §878 (threat), 18 U.S.C. §970 (destruction of property), 18 U.S.C. §1201 (kidnapping), 18 U.S.C. §1116 (murder), and 18 U.S.C. §1117 (conspiracy to murder).

A. Elements for "Foreign Official" Status

Under 18 U.S.C. §1116(b)(3)(B), a person is a "foreign official" if he/she (1) is "of foreign nationality," (2) is "duly notified to the United States as an officer or employee of a foreign government" and (3) is in the United States on official business.

For the purposes of 18 U.S.C. §1116, it should not be difficult to prove that a CCNAA victim, who is not a United States national employed by the CCNAA, is treated as a foreign national in the United States on official business. Although the CCNAA is an unofficial instrumentality established by Taiwan and not a governmental entity, its employees sent from Taiwan are on official business of the CCNAA, which is the instrumentality provided for in sections 10(a) and 10(c) of the Taiwan Relations Act (22 U.S.C. §3309(a) and §3309(c)) and section 1-204 of Executive Order 12143.

Proving that the CCNAA is "duly notified . . . as officer or employee of a foreign government" requires resort to the Taiwan Relations Act.

B. "Officer or Employee of a Foreign Government"

After the President terminated governmental relations with the Republic of China, Congress passed the Taiwan Relations Act, 22 U.S.C. §3301 et. seq. The Act provides that "the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied to Taiwan" prior to the termination of relations. 22 U.S.C. §3303(a). Specifically, 22 U.S.C. §3303(b)(1) provides that "[w]henver the laws of the United States refer to foreign countries, nations, states, governments, or similar entities, such terms shall apply with respect to Taiwan." Thus, for the purposes of 18 U.S.C. §1116(b)(3)(B), Taiwan may be considered a "foreign government."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Under 22 U.S.C. §3309(a), whenever the President and agencies of the United States government are authorized or required by United States law to engage in activities with respect to Taiwan, these activities shall be conducted, in the manner and to the extent directed by the President, through an "instrumentality established by Taiwan which [has the authority] . . . to provide assurances and take other actions on behalf of Taiwan . . . ." The President designated the Coordination Council for North American Affairs as such "instrumentality." Executive Order No. 12143 at section 1-204, 44 Fed. Reg. 37191.

Thus officers and employees of the CCNAA should be treated as officers and employees of a "foreign government" for the purposes of 18 U.S.C. §1116(b)(3)(B). Cf., United States v. Irick, 497 F.2d 1369 (5th Cir. 1974), cert. denied, 420 U.S. 945 (1975); United States v. Lopez, 586 F.2d 978 (2d Cir. 1978), cert. denied, 440 U.S. 923 (1979).

C. "Duly Notified"

The notification procedure for CCNAA officials is not the same as the procedure for accreditation. Cf., United States v. Dizdar, 581 F.2d 1031, 1033-34 (2d Cir. 1978). Thus, whether CCNAA officials are "duly notified" calls for the judgment of the Chief of Protocol in the Department of State. 22 C.F.R. §2.3(b). Although such officials are not diplomatic or consular agents accredited to the United States government, the Chief of Protocol has received a roster of CCNAA officials and is prepared to certify that such persons are "duly notified" within the meaning of 18 U.S.C. §1116(b)(3)(B) (i.e. that they are notified to the American Institute in Taiwan to receive, in part, the functional privileges and immunities authorized by section 10(c) of the Taiwan Relations Act (22 U.S.C. §3309(c) and that a copy of a list of appropriate CCNAA officials and employees is sent to the Office of Protocol which confirms such listing for law enforcement or other appropriate purposes if called upon to do so).

D. Indictments and Pleadings

The Department of State believes that indictments and pleadings which are not precisely drawn to reflect the unofficial nature or relations with Taiwan may have an adverse impact on foreign affairs. The Department of Justice is prepared to accommodate the concerns of the Department of State unless a prosecution would be jeopardized. Consequently, all matters involving offenses against CCNAA officials should, absent emergency circumstances, be brought to the attention of the Criminal Division prior to federal arrest and should in all cases be brought to the attention of the Criminal Division prior to indictment.

The Criminal Division recommends that indictments describe, in part,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the offense in the following manner: "X did willfully and unlawfully [assault, threaten, etc.] Y, who is a 'foreign official' within the meaning of section 1116 of title 18, United States Code, by operation of the Taiwan Relations Act." Any difficulties which are anticipated as a result of this language must be brought to the attention of the Criminal Division prior to indictment.

9-65.810 Murder (18 U.S.C. §1116)

18 U.S.C. §1116 prohibits the killing or attempted killing of foreign officials, official guests, or internationally protected persons. The penalty provisions of 18 U.S.C. §§1111, 1112, and 1113 are made applicable except that the penalty for first degree murder is imprisonment for life. The penalty for attempted murder, not more than twenty years, parallels that for assault with intent to commit murder (18 U.S.C. §113) because it is more appropriate than the three year penalty otherwise applicable under 18 U.S.C. §1113. 18 U.S.C. §1116(b) contains the definition of key terms used in 18 U.S.C. §1116 and in the sections on kidnapping, threats, assault, and protection of property.

9-65.811 Foreign Official

"Foreign official" (18 U.S.C. §1116(b)(3)) includes two distinct categories. In the first group are heads of state (Chief of State or political equivalent, President, Vice President, Prime Minister), foreign ministers, ambassadors, and other officers of cabinet rank or above of a foreign government, chief executive officers of international organizations, persons who have formerly served in such capacities, and members of their families. "Political equivalent" refers to the top official of a country, who in some instances may not be a country's formally designated "Chief of State." H. R. Rep. No. 1268, 92d Cong. 2d Sess. 8 (1972). The added clause "while in the United States" serves as a territorial limitation (see 18 U.S.C. §5) as to all of the violations directed against this category of persons, but the purpose of the victim's presence is immaterial. As indicated in H. R. Rep. No. 1268, *supra*, at 2: ". . . the term 'officer of cabinet rank or above' is intended to include, without being limited to, a member of the government of any nation who is the head of an executive department, the presiding officer of a nation legislative body, or member of a nation's highest judicial tribunal."

In the second category (18 U.S.C. §1116(b)(3)(B)) are persons of foreign nationality who are duly notified to the United States as officers or employees of a foreign government or international organization but only if the person's presence in the United States is attributable to official business. Procedures for foreign governments to make "notification" to the United States (as well as for "designation" as an official guest) have been published as an amendment to 22 C.F.R. §2.3. To obtain information whether

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

a person has been "duly notified" or received "designation", contact the Office of the Chief of Protocol, Department of State, Washington, D.C. 20520. As proof of status that office will furnish on request a certificate in proper form admissible in evidence under Fed. R. Evid. 902(1). "The category of officers and employees of foreign governments includes those at embassies and consulates, those at missions of their governments to international organizations, and those at trade or commercial offices of foreign government." H. Rep. No. 1268, *supra*, at 2, 8, 11. The definition also includes any member of the family of a foreign official in this second category, but unlike the first category, a family member's presence in the United States must be in connection with the presence in the United States of the related foreign official.

9-65.812 Foreign Government

"Foreign government" means the government of a foreign country, irrespective of recognition by the United States.

Unlike 18 U.S.C. §11, 18 U.S.C. §1116(b)(2) defines the term "foreign government" without a limitation to countries "with which the United States is at peace" and excludes from that term "a faction or body of insurgents within a country." As in 18 U.S.C. §11, recognition by the United States is not a factor.

9-65.813 International Organization

"International organization" means a public international organization designed as such pursuant to section 1 of the International Organization Immunity Act (22 U.S.C. §288).

Reference in 18 U.S.C. §1116(b)(5) to section 1 of the International Organization Immunities Act (22 U.S.C. §288) serves in the definition of "international organizations" to provide in effect a specific list of such organizations. The list appears in the note following 22 U.S.C. §288. It currently includes organizations whose activities are well known, e.g., the United Nations, as well as a number of relatively obscure organizations involved in rather esoteric activity such as the Coffee Study Group. U.S. Attorneys may check for last minute changes and obtain the Federal Register citation to any new Executive orders by inquiry of the Bureau of International Organization Affairs, Department of State.

9-54.814 Family

"Family" is defined in 18 U.S.C. §1116(b)(1) to include spouse, parent, brother or sister, child or person to whom a "foreign official" or "internationally protected person" stands in loco parentis and any other person living in his/her household and related to him/her by blood or marriage. The terms "foreign official" and "internationally protected persons" are underlined to emphasize that the protection of these statutory provisions does not extend to the families of "official guests." However, when appropriate, family members may be designated "official guests" in their own right.

9-65.815 Official Guest

"Official guest" means a citizen or national of a foreign country present in the United States as an official guest of the government of the United States pursuant to designation as such by the Secretary of State.

This category ("official guests") was added in the course of Senate action in response to the monstrous attack on the Israeli Olympic Team in Munich, Germany. See S. Rep. 93-1105, 92d Cong., 2d Sess. 9 (1972). 18 U.S.C. §1116(b)(6) defines "official guest" as a citizen or national of a foreign country present in the United States as an official guest of the government of the United States pursuant to designation as such by the Secretary of State. As with notification, the Chief of Protocol of the Department of State will be the source of certificates of designation.

9-65.816 Internationally Protected Person

18 U.S.C. §1116(b)(4) defines "internationally protected person" as a Chief of State or the political equivalent, a Head of Government, or a Foreign minister outside his/her own country, as well as any member of his/her family accompanying him/her. The definition also encompasses any other representative, officer, employee, or agent of the United States government, a foreign government, or international organization who is entitled pursuant to international law to special protection as well as members of his/her family, then forming part of his/her household. The definition is meant to parallel that found in the United Nations Convention definition of "internationally protected person":

(a) a Head of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the state concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign state, as well as

members of his family who accompany him;

(b) any representative or official of a state or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from attack on his person, freedom, or dignity, as well as members of his family forming part of his household . . . .

The term "internationally protected person" overlaps significantly with the term "foreign official." The former term is needed, however, to define precisely those persons in whose favor operate the extraterritorial jurisdiction provisions of the statute.

9-65.820 Conspiracy To Murder (18 U.S.C. §1117)

18 U.S.C. §1117. (Conspiracy to Murder) provides:

If two or more persons conspire to violate section 1111, 1114, or 1116 of this title, and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.

In 18 U.S.C §1117 conspiracy to murder is specially denounced. Conspiracy to violate existing 18 U.S.C. §1111 (Murder within the special and maritime jurisdiction of the United States), 18 U.S.C §1114 (Protection of officers and employees of the United States), and 18 U.S.C. §1116 is made punishable by imprisonment for any term of years or for life. This parallels the existing special conspiracy provision for kidnapping. See 18 U.S.C. §1201(c).

Because of the extraterritorial provision in 18 U.S.C §1116(c), a conspiracy within the United States to murder an internationally protected person outside the jurisdiction of the United States is prohibited.

9-65.830 Kidnapping (18 U.S.C. §1201)

The act of kidnapping a "foreign official", "internationally protected person", or "official guest" is punishable without regard to interstate transportation of the victim. The permissible punishment is imprisonment for any term of years or for life, but no statutory proof of harm to the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

victim is required to support any sentence which may be adjudged. Any harm to the victim of course remains fair matter for consideration by the court in imposing a sentence.

Because of the extraterritorial reach of 18 U.S.C. §1201(e), a conspiracy within the United States to kidnap an internationally protected person outside the jurisdiction of the United States is prohibited.

9-65.840 Assault (18 U.S.C. §112)

18 U.S.C. §112(a) covers one who assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or who makes a violent attack upon the official premises, private accommodation, or means of transport of such person. The provision also covers attempts. 18 U.S.C. §112(b) makes it a misdemeanor to willfully intimidate, coerce, threaten, or harass a foreign official or an official guest or willfully obstruct a foreign official in the performance of his/her duties. This subsection against obstruction extends only to a foreign official who must be engaged in the performance of his/her duties as a foreign official at the time of the violation.

Because of the extraterritorial reach of 18 U.S.C. §112(e), a conspiracy (18 U.S.C. §371) to commit a violent act against an internationally protected person outside the jurisdiction of the United States is prohibited.

9-65.841 Legislative History

In Senate Report No. 93-1105, *supra*, at 18, the following acts are listed as illustrative of the misconduct intended to be covered in 18 U.S.C. §112(b) if done "with intent to intimidate, alarm, or persecute a foreign official or an official guest."

(1) Following him [foreign official or official guest] about in public place or places after being request not to do so.

(2) Engaging in a course of conduct, including the use of abusive language, or repeatedly committing acts which alarm, intimidate or persecute him which serve no legitimate purpose; or

(3) Communicating with him anonymously by telephone, telegraph, or otherwise in a manner likely to cause annoyance or alarm, or making repeated telephone calls

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

to him whether or not conversation ensues, with no purpose of legitimate communication.

The list is not all-inclusive (*ibid.*, p. 19) and other ways of violation, either more sophisticated or crude, will no doubt occur to one bent on harassment, etc. The Senate Report, *supra*, at 19, cites the comparable provisions in New York Penal Code, section 240.25, 240.30. Other state and federal law of more general applicability will also reach most, if not all of such activity. Note particularly in federal law: 18 U.S.C. §875, 876, concerning threatening communications and 47 U.S.C. §223, concerning harassing telephone calls.

Unlike 18 U.S.C. §111, the word "forcibly" does not appear in relation to "obstructs" in 18 U.S.C. §112(b). See *Lonzo v. United States*, 119 F.2d 717 (4th Cir. 1952), but compare *District of Columbia v. Little*, 339 U.S. 1 (1950), (reading an element of force into a similar provision to avoid conflict with a constitutional right of a person). Whether a completely passive refusal to act will constitute an obstruction, e.g., refusing to unlock a door, is a subject to question, and the decision could well turn on the existence of a legal duty to perform the act or general privilege to so refuse. See in this connection the discussion and cases cited on resistance or interference with an officer in 48 A.L.R. 746 *et seq.*

9-65.842 First Amendment

18 U.S.C. §112(d) provides against any construction or application of 18 U.S.C. §112 " . . . so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States." In large part the comparative specificity of the section and limited radius of application go far to avoid any such abridgement. H.R. Rep. No. 1268, *supra*, at 9, and 8. The constitutionality of the comparable D.C. Code provision was upheld against a defense predicated on the first amendment in *Frend v. United States*, 100 F.2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640, and the validity of *Frend*, *supra*, was reaffirmed in *Zaimi v. United States*, 261 F.2d 233 (D.C. Ct. App. 1970) *rev'd on construction issue*, 476 F.2d 511 (D.C. Cir. 1973), *Jews for Urban Justice v. Wilson*, 311 F. Supp. 1158 (D.D.C. 1970), and *United States v. Travers*, Crim. No. U.S. 42935-69 (D.C. Ct. Gen. Sess. 1970) (unreported opinion). The opinion in *Frend*, *supra*, contained the following comment:

As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers, and consuls charged with friendly national intercourse, are objects of special respect and protection, each according to the rights belonging to his rank and station. The law of nations, therefore, requires every government to take all

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

reasonable precautions to prevent the doing of the things which the [D.C. statute protecting embassies] makes unlawful. The rule arises out of the necessity of the protection of nations in their intercourse with each other, and imposes on the Government of the United States responsibility to foreign nations for all violations by the United States of their international obligations. United States v. Arjona, 120 U.S. 479, 483-485 . . . . This responsibility includes the duty of protecting the residence of an ambassador or minister against invasion as well as against any other act tending to disturb the peace or dignity of the mission or of the member of the mission (Footnotes omitted).

Frend, supra, at 693.

Thus, the general power of the United States to protect its foreign relations includes the specific power to limit demonstrations by enactment of 18 U.S.C. §112(c).

9-65.850 Threats and Extortion (18 U.S.C §878)

18 U.S.C. §878 prohibits threats and extortion directed against foreign officials, official guests, or internationally protected persons.

9-65.860 Protection of Temporary Residences and Offices - 18 U.S.C. §1752

See discussion at USAM 9-65.400, supra.

9-65.870 Destruction Of Property (18 U.S.C. §1970)

Rounding out the protection afforded activities of foreign officials and official guest, 18 U.S.C. §970 provides for a fine of up to \$10,000 and imprisonment for up to five years for one who ". . . willfully injures, damages, or destroys . . . any property, real or personal, located within the United States and belonging to or utilized or occupied by any foreign government or international organization, by a foreign official or official guest . . . ." Attempts are also covered. Except for the use of foreign entities as a jurisdictional base, this section is little different in nature and scope from the various provisions against malicious mischief in 18 U.S.C. Chap. 65. Bombing attacks not clearly covered in 18 U.S.C. §844(i) would clearly fall within the provisions of this section. In addition to covering embassies, consulates, missions to international organizations, the places of residence of foreign officials and official guests, trade or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

commercial offices of foreign governments and premises and property of international organizations, this section also covers automobiles and other vehicles and personal property, under the requisite ownership, use or possession, whether the property is used for official or unofficial purposes. S. Rep. No. 93-1105, supra, at 19. Note that only property within the United States is covered but 18 U.S.C. §956 covers conspiracy in the United States to injure properties of foreign governments abroad.

18 U.S.C. §970(b) prohibits the forcible thrusting of a person or object within a premises occupied by foreign governments and prohibits remaining in foreign premises after receiving a proper request to depart.

9-65.880 Demonstrations

Normally the violations under consideration occur in the course of demonstrations involving a sizable number of persons. When this is so, U.S. Attorneys should look to the local police to maintain order and to make any necessary arrests. However that alone does not relieve federal officials of responsibilities in the matter. Those responsibilities commence with participation in and coordination of appropriate exchange of intelligence information on potential disturbances likely to affect a foreign facility and arrangements for needed law enforcement response.

As pre-planned or immediately upon notification of a demonstration likely to result in a disturbance, an Assistant U.S. Attorney should be assigned to monitor the activity on the basis of spot reports from FBI observers at the scene. Presumably the local police will make arrests as the occasion and their judgment dictate. Generally conduct in violation of the Act will also violate local law, but if only a federal violation appears and arrest is indicated then that is what should occur without the need for any request or prior authorization from the Criminal Division. Of course, local police should immediately notify the U.S. Attorney's office of any such arrest so that appropriate assistance can be provided in the initial appearance and complaint procedure.

Some suggestion has been made that the FBI observers should make such arrests, but this would not only defeat their purpose as observers but also, because they do not operate in uniform, would be a most ill-advised enforcement effort, inviting the very resistance a uniform is designed to aid in dispelling. This does not mean that an agent on the scene would stand idly by while a mission member entering or leaving the premises was attacked in his/her immediate vicinity. But absent some such exceptional circumstances, any necessary protective measures for protected foreign officials, including arrests for attacks made on their persons should be taken by uniformed officers.

The General Litigation and Legal Advice Section of the Criminal

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9—CRIMINAL DIVISION

Division has general responsibility for those matters which are of federal interest. U.S. Attorneys should be alert for indications of militant political motivation, international in scope with subversive overtones, in reported violations and insure that the presence of any such features or other factors, which may highlight the federal interest as well as affect the prosecutive merit of a possible violation, are reflected in the FBI's report.

9-65.881 Procedures

Upon receipt of information indicating a violation or potential violation of the Act, the FBI, after notifying the Department of State and consulting with the appropriate U.S. Attorney, will initiate such investigation as is deemed necessary if it is determined that federal presence is warranted. The State Department Operations Center (FIS 203-633-1512) can quickly locate and have the appropriate State Department officials contact the U.S. Attorney in cases wherein the U.S. Attorney is uncertain as to whether the incident will adversely affect the foreign relations of the United States.

The determination made and action initiated, if any, will be reported by the FBI to the Criminal Division, U.S. Attorney concerned, U.S. Secret Service, and Department of State without delay. The Bureau will bring to the attention of the Criminal Division for conclusion any unresolved difference of opinion among the Bureau, Secret Service, Department of State, and U.S. Attorney concerning action or lack thereof by any of them. If a U.S. Attorney's office receives a complaint of violation of the Act, the complainant should be referred to the FBI field office concerned, with advice that, as indicated in the Department of State communication, most conduct in possible violation of the Act is more appropriate for disposition under local law, but the FBI will report the complaint to the appropriate United States authorities for consideration of possible federal disposition.

Where the offense is of a nature that merits federal prosecution, an investigation should be pursued without regard for whether the pertinent foreign officials will agree to appear as witnesses at an ensuing trial. Once a subject has been identified and sufficient evidence has been developed to form the basis for federal charges, a determination should be sought as to whether the relevant foreign officials will agree to testify.

In instances where there is a federal interest sufficient to proceed under one of the protection of foreign officials statutes, it may still be advantageous to defer to a local prosecution. This is particularly true where there is a local statute which better fits the crime than does the federal statute. However, in such cases, the U.S. Attorney's office should insure that the FBI monitors the progress of the local prosecution. Should local efforts be dropped prior to a trial, the matter should be reevaluated

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

by the U.S. Attorneys office and a new prosecutive determination should be rendered.

9-65.882 Opinions by U.S. Attorneys

Our experience indicates that most demonstrating groups are careful to follow the requirements and instructions of the local police officers and that, when FBI agents have explained the federal statutes to them, the demonstrators have attempted to comply with its provisions. If the activity is clearly objectionable (obstructing the entranceway to the building using public address systems), the U.S. Attorney may wish to ask the FBI to conduct an investigation in addition to the normal procedure of maintaining contact with local officials and keeping informed. The availability and willingness to act of local law enforcement officials, who have the resources and the traditional responsibility to protect people and property, are prime factors to weigh when considering federal involvement. Another factor to consider is the potential adverse effect upon the conduct of our foreign relations which the activity might have. In making this determination, U.S. Attorneys may wish to contact the U.S. Department of State to discuss the potential impact upon United State's foreign relations. The State Department Operations Center (FTS 633-1521) can speedily locate the proper officials in the State Department who can give such advice. The obstruction of ingress and egress to and from public buildings and/or the use of public address systems or other sound amplification systems usually violates one or more local law statutes or ordinances. Normally, we would expect state and local law enforcement officials to enforce such local laws and that federal officers will act after the activity has terminated or in those isolated instances wherein local officials fail to carry out their responsibilities or cannot because of limited statutory authority, or wherein federal action is deemed necessary.

9-65.900 PROTECTION OF A MEMBER OF FEDERAL OFFICIAL'S FAMILY

9-65.901 General

Part G of chapter X of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2140 (1984), included a new criminal code enactment, appearing at 18 U.S.C. §115, which makes it a federal crime to assault, kidnap, or murder a family member of certain federal officials. It also covers attempts and threats to assault, kidnap, or murder such family members. The purpose of this provision is to provide comprehensive protection against attempts to impede, intimidate, or interfere with certain federal officials' performance of their duties by the commission of crimes against members of the officials' immediate families.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-65.902 Family Members Protected

18 U.S.C. §115 protects immediate family members of the President, Vice President, members of Congress, cabinet officers, federal judges, officials listed or designated under 18 U.S.C. §1114, and "federal law enforcement officers" defined in subsection 115(c) to include any officer, agent or employee of the United States authorized by law or by a government agency to engage in or supervise the prevention, detection, investigation or prosecution of any federal criminal law.

"Immediate family member" is defined in subsection 115(c) to include the official's spouse, parent, brother, sister, child, or person to whom he/she stands in loco parentis, or any other person living in his/her household and related to him/her by blood or marriage.

9-65.903 Investigative Jurisdiction

The agency which would have investigative jurisdiction over an assault or murder of a particular federal official will have corresponding investigative jurisdiction over an assault or murder of a member of that federal official's family. See USAM 9-65.602, supra.

9-65.904 Policy Considerations

The Senate Judiciary Committee Report regarding 18 U.S.C. §115 stated that it was not the intent of this provision to make federal jurisdiction over the enumerated crimes exclusive, but to reflect the federal interest in responding to terrorists and other criminals who would seek to influence the making of federal policies and interfere with the administration of justice by attacking close relatives of those entrusted with those tasks, S. Rep. No. 225, 98th Cong., 1st Sess. 320 (1983). In many instances, a crime against a family member of a federal official, even if prompted by a defendant's opposition to policies implemented by the official can be adequately handled by state and local authorities without federal involvement.

9-65.905 Supervising Section

The General Litigation and Legal Advice Section has supervisory responsibility over 18 U.S.C. §115(d).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 66

Page

9-66.000	<u>PROTECTION OF GOVERNMENT PROPERTY</u>	1
9-66.010	<u>Investigative Jurisdiction</u>	1
9-66.020	<u>Supervisory Responsibility</u>	2
9-66.100	PROTECTION OF GOVERNMENT PROPERTY--REAL PROPERTY	2
9-66.110	<u>Jurisdiction Over Federal Land and The Federal Enclave Statute, 18 U.S.C. §7</u>	3
9-66.120	<u>Protection of Federal Real Property--Other Laws</u>	4
9-66.121	National Parks and Forest	4
9-66.122	Natural Resources	6
9-66.123	Military Bases	8
9-66.124	Other Federal Buildings and Offices	8
9-66.200	PROTECTION OF GOVERNMENT PROPERTY--PERSONALTY	9
9-66.210	<u>Acts Prohibited by 18 U.S.C. §641</u>	10
9-66.211	Embezzlement	10
9-66.212	To Steal or Purloin	11
9-66.213	Knowing Conversion	12
9-66.214	Sell, Convey or Dispose of Government Property Without Authority	13
9-66.215	Receiving, Concealing or Retaining Stolen Property	13
9-66.220	<u>Property Protected by 18 U.S.C. §641</u>	14
9-66.221	Title in the United States	15
9-66.222	State and Local Programs Financed by the Federal Government	15
9-66.223	Nonappropriated Funds	16
9-66.224	National Guard Property	16
9-66.225	Civil Air Patrol Property	17
9-66.226	Goods in Transit	17
9-66.227	United States Government Checks	17
9-66.228	Seized Property	18
9-66.229	Intangible Property Interests	18

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-66.230	<u>Custody in the United States</u>	19
9-66.231	"Or Any Property Made or Being Made Under Contract for the United States or Any Department or Agency Thereof"	19
9-66.240	<u>Intent</u>	20
9-66.250	<u>Value</u>	21
9-66.260	<u>Problems of Proof in Section 641 Prosecutions</u>	23
9-66.270	<u>Jurisdiction and Venue</u>	25
9-66.300	OTHER EMBEZZLEMENT PROVISIONS	25
9-66.310	<u>Embezzlement by Court Officers</u>	25
9-66.320	<u>Embezzlement of Public Funds</u>	26
9-66.330	<u>Miscellaneous Theft of Government Property Statutes</u>	28
9-66.400	PROTECTION OF PUBLIC RECORDS AND DOCUMENTS	31
9-66.500	DESTRUCTION OF GOVERNMENT PROPERTY; 18 U.S.C. §1361	33
9-66.510	<u>Malicious Mischief; Communication Lines, Stations or Systems, 18 U.S.C. §1362</u>	34
9-66.511	Application of 18 U.S.C. §1362 to Commercial Radio Stations	35

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-66.000 PROTECTION OF GOVERNMENT PROPERTY

One of the principle responsibilities of the federal criminal law is the protection of government property. The property holdings of the United States, its departments and agencies are extensive and include both real and personal property in this country and abroad. In order for the federal government to perform the wide range of duties assigned to it by law, it must have ready access to these properties and resources. Therefore it is very important that these properties be protected from any theft, misuse or misappropriation.

The criminal law serves an important function as the vehicle for protection of federal property. Congress has enacted a series of laws which prohibit the wrongful taking or misuse of land, personal property and other resources belonging to the United States. The purpose of the following sections is to outline these laws and describe their scope as an aid to their vigorous enforcement.

9-66.010 Investigative Jurisdiction

It can be fairly stated that the scope of the federal government's property holdings is rivaled only by the number of agencies with investigative jurisdiction over crimes involving that property. Because a number of distinct agencies possess jurisdiction to investigate crimes against government property it is impossible to provide any simple rules which in all cases define investigative responsibility. In some cases the jurisdiction of these competing agencies is set by statute. In other instances investigative authority is defined by memorandum of understanding between the affected agencies.

Of course, the principle law enforcement agency in this area is the Federal Bureau of Investigation. By statute and by regulation the FBI has broad jurisdiction over offenses involving government property. See 28 U.S.C. §533; 28 C.F.R. §0.85. A number of other agencies, however, possess investigative jurisdiction over crimes involving specific federal properties. Some of the most significant of these agencies are described below:

A. The Department of the Interior is authorized by 16 U.S.C. §1a-6 to designate certain officers "who shall maintain law and order and protect persons and property within the areas of the National Park System." These officers may make arrests, with and without warrants, conduct investigations and carry firearms. See 16 U.S.C. §1a-6(1)-(3).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. The General Services Administration, as part of its statutory mandate to administer government properties, is authorized to appoint uniformed guards as "special policemen." See 40 U.S.C. §318. These special policemen are empowered "to enforce the laws enacted for the protection of persons and property, . . . to prevent breaches of the peace, to suppress affrays or unlawful assemblies, and to enforce any rules and regulations made and promulgated by the Administrator [of General Services] . . . ." See 40 U.S.C. §318.

C. The Inspector General Act of 1978, 5 U.S.C. App. §1 et seq., creates within several government agencies independent Offices of Inspector General. See 5 U.S.C. App. §2(1). The duties of these Inspectors General include the detection of fraud and abuse in government programs. See 5 U.S.C. App. §2(2). Thus, the Act gives these Inspectors General investigative jurisdiction over some crimes involving government property. Under the Act, Inspectors General are required to report to the Attorney General any information which provides them with "reasonable grounds to believe that there has been a violation of federal criminal law." See 5 U.S.C. App. §4(d).

D. The United States Postal Service has jurisdiction to investigate postal offenses. See 39 U.S.C. §404(a)(7). In practice, many crimes involving postal service property and personnel are investigated by law enforcement officers from the Postal Service.

E. Finally, many crimes involving the theft or misuse of property belonging to the armed services will be investigated at the outset by military police. This is particularly true of offenses committed by military personnel.

9-66.020 Supervisory Responsibility

Supervisory responsibility for prosecutions involving crimes against government property rests with the General Litigation and Legal Advice Section of the Criminal Division. Prior authorization of the Criminal Division is not required for instituting these prosecutions. U.S. Attorneys with questions regarding the application of these laws are encouraged, however, to contact the General Litigation and Legal Advice Section for assistance.

9-66.100 PROTECTION OF GOVERNMENT PROPERTY--REAL PROPERTY

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-66.110 Jurisdiction over Federal Land and the Federal Enclave Statute, 18 U.S.C. §7

The federal government is the single largest holder of real estate in the United States. Federal custody and control over this property brings with it a host of responsibilities, including in some cases federal criminal jurisdiction.

Yet it is clear that federal criminal jurisdiction does not exist over real property simply because the United States owns it. See Adams v. United States, 319 U.S. 312 (1943). For purposes of federal criminal jurisdiction, government property can be categorized in three ways. First, certain lands fall within the exclusive jurisdiction of the United States. As this term implies, on these lands federal criminal law applies to the exclusion of state law. Other properties acquired by the United States fall within the concurrent criminal jurisdiction of the state and federal governments. Finally, the United States may acquire property without accepting any special criminal jurisdiction over it. In this situation the United States simply retains proprietary jurisdiction over the property.

The jurisdictional status of property acquired by the United States is important because it triggers the application of a series of federal laws, known as federal enclave statutes. These statutes apply to lands within the "special maritime and territorial jurisdiction of the United States," a term which includes "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . ." See 18 U.S.C. §7(3). Therefore any property under the exclusive or concurrent jurisdiction of the United States is subject to these federal enclave laws.

The federal enclave laws provide two forms of protection to property found on federal land. At the outset these laws specifically forbid certain property crimes. For example, arson, theft, receiving stolen goods, destruction of property and robbery are all prohibited within the special maritime and territorial jurisdiction of the United States. See 18 U.S.C. §§81 (arson), 661 (theft), 662 (receiving stolen goods), 1363 (destruction of property), 2111 (robbery). In addition, 18 U.S.C. §13 incorporates state law into the law of the federal enclave. Thus, property offenses which violate state law but are not otherwise punishable under federal law become federal crimes when committed on a federal enclave within the state.

Through these two means the federal enclave statutes add significantly to the body of law protecting government property. While these laws are not expressly limited to crimes involving government

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

property, much of the property crime occurring in a federal enclave will involve property belonging to the United States. Therefore, U.S. Attorneys should be aware of the jurisdictional status of all federal property within their respective districts.

There are three methods by which the United States obtains exclusive or concurrent jurisdiction over federal lands in a state: (1) a statute consenting to the purchase of land by the United States for the purposes enumerated in Article I, Section 8, Clause 17, of the Constitution of the United States; (2) a state cession statute; and (3) a reservation of federal jurisdiction upon the admission of a state into the Union. See Collins v. Yosemite Park Co., 304 U.S. 518 (1938). Since February 1, 1940, the United States acquires no jurisdiction over federal lands in a state until the head or other authorized officer of the department or agency which has custody of the lands formally accepts the jurisdiction offered by state law. See 40 U.S.C. §255; Adams v. United States, 319 U.S. 312 (1943). Prior to February 1, 1940, acceptance of jurisdiction had been presumed in the absence of evidence of a contrary intent on the part of the acquiring agency or Congress. See Mason Co. v. Tax Commission, 302 U.S. 186 (1937). See also USAM. §9-20.000 et seq., for a discussion of federal enclave jurisdiction.

9-66.120 Protection of Federal Real Property - Other Laws

The assumption of concurrent or exclusive federal criminal jurisdiction is not the only means by which the United States protects real property under its charge or control. Congress has enacted a series of laws aimed at protecting various federal properties without regard for their jurisdictional status. Moreover, the departments and agencies which administer federal properties are empowered to regulate conduct on these lands. The regulations established by these departments are enforced through criminal penalties. Enforcement of these regulatory offenses does not rest on exclusive or concurrent federal criminal jurisdiction.

These statutes and regulations have been developed to protect several broad classes of federal property. The types of property protected and the scope of that protection are set forth below.

9-66.121 National Parks and Forests

Much of the property held by the United States is made available for the use and enjoyment of the public as part of our national park system. This system consists of hundreds of parks, forests, recreation areas, game preserves and historic sites located throughout the United States.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The national park system is jointly administered by the Department of Interior, the Department of Agriculture and the Department of the Army. By law, the secretaries of these three departments are empowered to make regulations governing the use and maintenance of park lands under their charge. See 16 U.S.C. §3 (Interior); 16 U.S.C. §9a (Army); 16 U.S.C. §551 (Agriculture). Violations of these regulations may subject individuals to penalties ranging from three months imprisonment, a \$100 fine, or both, see 16 U.S.C. §9a; to 6 months imprisonment, a \$500 fine, or both, see 16 U.S.C. §§3 and 551. The regulations prescribed pursuant to these statutes may be found in Title 36 of the Code of Federal Regulations.

Conduct in national parks is not controlled exclusively by regulation. Congress has also enacted a series of statutes which proscribe certain activities in such parks. For example, 16 U.S.C. §26 prohibits unauthorized hunting and fishing on park lands. Similarly, 16 U.S.C. §§413 and 414 proscribe willful destruction of property or trespassing on military parks. In addition 16 U.S.C. §433 forbids the destruction of any historic or prehistoric ruins or any other article of antiquity found in a national park.

Finally there are a large number of statutes which apply to specific national parks and prohibit certain activities within those parks. These statutes are set out, in summary fashion below:

16 U.S.C. §§45e, 60 and 63	Sequoia and Yosemite National Parks
16 U.S.C. §§92 and 98	Mount Ranier National Park
16 U.S.C. §§114 and 117e-d	Mesa Verde National Park
16 U.S.C. §§123 and 127	Crater Lake National Park
16 U.S.C. §146	Wind Cave National Park
16 U.S.C. §152	Platt National Park
16 U.S.C. §§170-171	Glacier National Park
16 U.S.C. §§198c-d	Rocky Mountain Park
16 U.S.C. §204c-d	Lassen Volcanic National Park

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

16 U.S.C. §§256b-c	Olympic National Park
16 U.S.C. §354	Mount McKinley National Park
16 U.S.C. §§371, 373 and 374	Hot Springs National Park
16 U.S.C. §§395c-d	Hawaii National Park
16 U.S.C. §§403c-3 and 403h-3	Shenandoah and Great Smokey National Parks
16 U.S.C. §404c-3	Mammoth Cave
16 U.S.C. §408k	Isle Royal National Park
16 U.S.C. §422d	Moore's Creek National Battlefield
16 U.S.C. §423f	Petersburg National Battlefield
16 U.S.C. §425g	Fredericksburg National Battlefield
16 U.S.C. §426i	Stones River National Battlefield
16 U.S.C. §428i	Fort Donelson National Battlefield
16 U.S.C. §430g	Monocacy National Battlefield
16 U.S.C. §430v	Kennesaw Mountain National Battlefield

All U.S. Attorneys should be familiar with the rules and regulations applicable to park lands in their districts.

9-66.122 National Resources

Federally-owned property provides the public with a host of natural resources, including timber, minerals, grazing lands and, in arid parts of this country, potable water. The wise management of these resources requires that the federal government carefully regulate the extent of their use. One form of this regulation consists of criminal penalties for the exploitation or misuse of these resources.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Currently there are several statutes which protect the natural resources found on federal land. For example, 18 U.S.C. §1852 prohibits the unauthorized mining or removal of coal from lands owned by or reserved for the United States. Timber found on federal land, in turn, is protected by 18 U.S.C. §§1851-56. These sections prohibit the unlawful cutting, injuring, removing or transporting of timber found on public lands. See 18 U.S.C. §§1852 (removing or transporting); 1853 (cutting or injuring). Also prohibited is the processing of timber belonging to the United States for the purpose of making pitch or turpentine. See 18 U.S.C. §1854. These sections further protect federal woodlands by prohibiting the willful starting of unauthorized fires, 18 U.S.C. §1855, and by penalizing those who leave fires unattended or unextinguished, see 18 U.S.C. §1856. It should be noted that section 1856, which deals with unattended fires, applies not only to fires on public lands but also to fires dangerously near public lands. See United States v. Alford, 224 U.S. 264 (1927). Finally 16 U.S.C. §§604 and 605 authorize the Secretary of the Interior to regulate the cutting of timber on public land. Violation of these regulations is a criminal offense, punishable by 6 months imprisonment and a \$500 fine. See 16 U.S.C. §606.

Federally-owned livestock grazing lands are another natural resource which is protected both by regulation and by statute. Under 43 U.S.C. §315a the Secretary of the Interior is authorized to "make provision for the protection, administration, regulation and improvement" of livestock grazing areas. Violations of these regulations are punishable by a \$500 fine. In addition, 43 U.S.C. §1061 prohibits unauthorized inclosure or occupancy of these public lands. See 43 U.S.C. §1061. This provision is complemented by 43 U.S.C. §1063, which forbids obstruction of lawful settlement or free transit through these lands. Violations of these sections are punishable by one (1) year imprisonment, a \$1,000 fine, or both. See 43 U.S.C. §1064. Finally, 18 U.S.C. §1857 proscribes the destruction of fences erected by the United States on grazing lands or the unauthorized entry of livestock onto these lands. Individuals who violate this section are subject to one (1) year imprisonment, a \$500 fine, or both.

In arid lands, the Secretary of the Interior is empowered to develop on federal property springs, streams and water holes. In order to make these water holes accessible to the public, the Secretary is also authorized to erect signs and monuments designating their locations, see 43 U.S.C. §361. Willful or malicious injury to these signs or monuments and the willful or malicious fouling of water holes violate 43 U.S.C. §362 and are punishable by one (1) year imprisonment, a \$1,000 fine, or both.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-66.123 Military Bases

18 U.S.C. §1382 forbids trespassing on military bases. Two distinct offenses are embraced by this section. First, 18 U.S.C. §1382 prohibits any person from entering any military installation for any purpose prohibited by law. In addition this section precludes individuals who have been removed from bases and instructed not to reenter from reentering without permission.

The intent required for these two offenses differs. In order to violate the first paragraph of 18 U.S.C. §1382 an individual must enter for some "purpose prohibited by law or lawful regulation." Thus, this offense is a specific intent crime. Note, however, that in military installations where the public is forbidden entry by law or regulations, the simple intent to enter will be sufficient to trigger this section.

The second paragraph of this section forbids reentry onto a military base after one has been removed from that base and told not to return. Given the nature of this offense it has been suggested that a distinct criminal intent need not be shown. See Holdridge v. United States, 282 F.2d 302, 309 (8th Cir. 1960). The mere presence of the individual on the base after his/her exclusion is sufficient to violate the law.

This section applies to any military, naval, or coast guard reservation, post, fort, arsenal, yard, station or installation over which the United States has exclusive possession. See Holdridge v. United States, *supra*. Persons violating this section are subject to 6 months imprisonment, a \$500 fine, or both.

Of course, property offenses occurring on military bases may also violate 18 U.S.C. §1361 or, where federal jurisdiction exists, the applicable federal enclave statutes.

9-66.124 Other Federal Buildings and Offices

The Administrator of the General Services Administration is responsible for the maintenance and operation of federal offices and buildings throughout the United States. See 40 U.S.C. §301 *et seq.* One of the duties of the administrator is to protect all of the property under his/her control. In order to fulfill this responsibility the administrator is authorized to make rules and regulations for this

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

property. See 40 U.S.C. §318a. Violations of these regulations are criminal offenses, punishable by thirty (30) days imprisonment, a \$50 fine, or both. See 40 U.S.C. §318c. The GSA regulations promulgated pursuant to 40 U.S.C. §318a can be found in Title 41 of the Code of Federal Regulations.

In addition there are several statutes which apply to specific federal office buildings. For example, 2 U.S.C. §§167a-g prohibits soliciting, malicious property damage, possession of firearms and fireworks, speeches or parades in the Library of Congress. A similar set of prohibitions, applicable to the Capital Building and grounds, can be found at 40 U.S.C. §1936 et seq.

Finally, statutes of general application, such as 18 U.S.C. §1361, would also extend to federal office buildings. Moreover, where the jurisdictional prerequisites had been met, offenses committed within these buildings may also violate the federal enclave laws. See USAM 9-66.110, supra.

9-66.200 PROTECTION OF GOVERNMENT PROPERTY--PERSONALTY

18 U.S.C. §641 can be seen as an attempt to rationalize the then existing common law of property crime. At common law, offenses involving the loss of property were categorized on the basis of the nature of the taking; the relationship between the defendant and the property owner at the time of the taking. This method of defining property crime inevitably led to many fine distinctions in the law. The subtle distinctions developed in the common law in turn created significant enforcement problems. These distinctions demanded extreme care in the drafting of indictments, were difficult to prove at trial and placed unreasonable burdens on the prosecution.

18 U.S.C. §641 eliminated many of these problems by defining the crime of taking government property in the broadest terms. Thus 18 U.S.C. §641 attempts to reach all possible offenses involving the loss or misuse of government property. As the Supreme Court noted in Morrisette v. United States, 342 U.S. 246, 271 (1952):

What has concerned codifiers of [18 U.S.C. §641] is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

wrongful advantages from another's property. The codifiers wanted to reach all such instances.

18 U.S.C. §641 is the principal statutory weapon aimed at the protection of government property. The following sections outline the offenses encompassed by 18 U.S.C. §641, their elements and their proof.

9-66.210 Acts Prohibited by 18 U.S.C. §641

As noted above, 18 U.S.C. §641 was drafted broadly to encompass a full range of offenses relating to government property. This section now provides that, "[w]hoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of [government property]; or . . . receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted," commits a federal offense. This language incorporates several distinct common law property offenses along with other property offenses not known in the common law. These separate offenses, and their elements, are discussed below.

9-66.211 Embezzlement

In Moore v. United States, 160 U.S. 268, 269 (1895), the Supreme Court defined embezzlement in the following terms:

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

There are six elements to the crime of embezzlement, as defined in 18 U.S.C. §641. These are:

A. A trust or fiduciary relationship between the defendant and the property owner;

B. The property taken falls within the statute; *i.e.*, it must be government property. See USAM 9-66.220, *infra*, for a discussion of the types of property which fall within this section;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. The property came into the possession or care of the defendant by virtue of his/her employment;

D. The property belonged to another, in this case the United States;

E. The defendant's dealings with the property constituted a fraudulent conversion or appropriation of it to his/her own use; and

F. The defendant acted with the intent to deprive the owner of the use of this property.

See United States v. Powell, 294 F. Supp. 1353, 1355 (E.D. Va.), *aff'd*, 413 F.2d 1037 (4th Cir. 1968); United States v. Dupee, 569 F. 2d 1061 (9th Cir. 1978).

The requirement that the defendant act with the intent to deprive the owner of his/her property makes embezzlement a specific intent crime. See United States v. May, 625 F.2d 186, 189-90 (8th Cir. 1980). It should be noted, however, that the intent required to violate the law is not an intent to deprive another of his/her property permanently. Therefore even if an individual intends to return the property his/her actions are still criminal. In short, restitution is no defense to embezzlement. See United States v. Powell, *supra* at 1355.

9-66.212 To Steal or Purloin

The terms to steal or to purloin have no established meaning in the common law. See United States v. Maloney, 607 F.2d 222, 229 (9th Cir. 1979), *cert. denied*, 445 U.S. 918 (1980) (purloin); Crabb v. Zerbst, 99 F.2d 562, 565 (5th Cir. 1938) (steal). Instead, these terms refer generally to the crime of larceny and were developed in modern pleading to broaden larceny beyond its strict common law definition. See United States v. Maloney, *supra*; United States v. Archambault, 441 F.2d 281, 282-83 (10th Cir.), *cert. denied*, 404 U.S. 843 (1971).

Larceny, under 18 U.S.C. §641, requires proof of the following four elements:

A. The wrongful taking and carrying away (asportation);

B. Of personal property belonging to another, in this case property of the United States;

C. Without the consent of the owner; and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. With the intent to deprive the owner of his/her property.

See United States v. Barlow, 480 F.2d 1245, 1251 (D.C. Cir. 1972). Larceny, like embezzlement, is a specific intent crime. However, in contrast to embezzlement, larceny requires an intent to permanently deprive another of his/her property. See Ailsworth v. United States, 448 F.2d 439, 442 (9th Cir. 1971).

This language in 18 U.S.C. §641 encompasses all forms of larceny, including larceny by trick. See United States v. Crutchley, 502 F.2d 1195 (3d Cir. 1975). It also includes closely related property offenses, such as theft by false pretenses. See Morgan v. United States, 380 F.2d 686 (9th Cir. 1967).

9-66.213 Knowing Conversion

Knowing conversion completes the picture of 18 U.S.C. §641 by prohibiting all other deliberate wrongful uses of government property. In Morissette v. United States, 342 U.S. at 271-72, the Supreme Court aptly described the breadth of this provision:

Probably every stealing is a conversion, but certainly not every knowing conversion is a stealing. To steal means to take away from one in lawful possession without right with the intention to keep wrongfully . . . Conversion, however, may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner as to an unauthorized extent of property placed in one's custody for limited use. Money rightfully taken into one's custody may be converted without any intent to keep or embezzle it merely by commingling it with the custodian's own, if he was under a duty to keep it separate and intact. It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing or purloining. Knowing conversion adds significantly to the range of protection of government property without interpreting it to punish unwitting conversions.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Thus, where the misuse of government property does not fall within any of the existing classes of common law crime, it may still be reached by 18 U.S.C. §641 under the theory that the defendant's actions constituted a knowing conversion.

9-66.214 Sell, Convey or Dispose of Government Property Without Authority

The offense of selling, conveying or disposing of government property without authority can be seen simply as one form of knowing conversion. 18 U.S.C. §641, however, contains a separate prohibition against this conduct. To prove a violation of this prohibition the United States must show:

- A. That the defendant sold, conveyed or disposed of;
- B. Property belonging to the United States;
- C. Without authority to do so; and
- D. With knowledge that he/she did not have authority to do do.

See, e.g., United States v. Denmon, 483 F.2d 1093 (8th Cir. 1973); United States v. Sher, 418 F.2d 914 (9th Cir. 1969); United States v. Souza, 304 F.2d 274 (9th Cir. 1962).

It is not necessary, however, for the government to prove that the defendant knew the property belonged to the United States as part of the prosecution under this section. See United States v. Denmon, *supra* at 1095. Nor must the government show that the property was stolen from the United States. The government is not required to show how a defendant obtained possession of this property in a prosecution for sale of government property. See United States v. Sher, *supra* at 915.

9-66.215 Receiving, Concealing or Retaining Stolen Property

18 U.S.C. §641 also prohibits receipt of stolen government property. There are five elements to the offense described by this language. They are:

- A. The defendant must receive, conceal or retain;
- B. Stolen property;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

C. Belonging to the United States;

D. Knowing that property to have been embezzled, stolen, purloined or converted; and

E. With the intent to convert that property to his/her own use or gain.

See United States v. Fench, 470 F.2d 1234 (D.C. Cir.), cert. denied, 410 U.S. 909 (1972); Teel v. United States, 407 F.2d 604 (8th Cir. 1969).

At the outset, it should be noted that the conduct proscribed by this section is set forth in the disjunctive. Thus, a defendant violates the law when he/she either "receives," "conceals" or "retains" stolen property. None of these words are terms of art and they should be given their normal construction.

The intent requirement of this section presents more serious problems. Prosecutions for receiving stolen property require proof of a compound state of mind. At the outset, the defendant must know that the property he/she has received, concealed or retained is stolen. Note, however, that the defendant need not know that the property was stolen from the United States. See Baker v. United States, 429 F.2d 1278 (9th Cir.), cert. denied, 400 U.S. 957 (1970). Ownership of the property by the United States is simply a jurisdictional requirement. It is not relevant to the criminal intent needed to violate the law.

Moreover, the defendant must act with the intent to convert the property to his/her own use. Thus, this offense is a specific intent crime. Proof of this intent, however, does not require evidence showing that the defendant actually derived some benefit from the property. This element is satisfied merely by showing that the defendant intended to convert some property to his/her personal gain. See United States v. Hinds, 662 F.2d 362, 369 n.15 (5th Cir. 1981), cert. denied, 455 U.S. 1022 (1982).

9-66.220 Property Protected by 18 U.S.C. §641

The property encompassed by 18 U.S.C. §641 is also defined in broad terms. This section protects "any record, voucher, money, or thing of value of the United States or any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Generally, jurisdiction under 18 U.S.C. §641 turns on the nature of the government's interest in the property which has been stolen. If that interest is sufficient, federal jurisdiction attaches; if it is not sufficient, the prosecution must be deferred to the state or local authorities. The question of whether the United States has sufficient interest in some property to trigger jurisdiction under 18 U.S.C. §641 arises in a wide variety of factual contexts. Some of the most common situations involving this issue are described below.

9-66.221 Title in the United States

Actual title in the United States is sufficient to confer jurisdiction, regardless of whether title coincides with physical possession. Determining when the United States holds title to some property in the possession of a third party frequently turns on the facts of the individual case. The following situations have presented the most difficulty in the past.

9-66.222 State and Local Programs Financed by the Federal Government

The federal government disburses funds to state and local organizations in a variety of ways. In some cases federal funding takes the form of an unconditional grant of aid. In other cases funding is received through grants conditioned on compliance with certain federal regulations. In still other instances federal assistance is provided through cost reimbursement contracts. These variations can create problems for the prosecutor in determining when funds lose their "federal character."

In some instances the funding program itself defines when title to the funds passes from federal to local authorities. For example, in many unconditional grants, a letter of credit upon which the program may draw is issued to a bank. When the letter of credit is issued, title to the funds passes to the program, Kings County v. Seattle School District, 263 U.S. 361 (1923), and 18 U.S.C. §641 would not be applicable. In some cost reimbursement contracts the agreement itself will specifically provide for the passing of title. See United States v. Echevaria, 262 F. Supp. 373 (D. P.R. 1967).

In other cases the point at which title passes will not be as clear. In these instances the courts have looked to the degree of control which the federal government retains over the funds to determine whether jurisdiction exists under 18 U.S.C. §641. See United States v. Smith, 596

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

F.2d 662 (5th Cir. 1979) (federally funded student loan money, held property of the United States); United States v. Johnson, 596 F.2d 842 (9th Cir. 1979) (money provided by federal government to local redevelopment authority was property of the United States). In any event once these funds are spent by the local authority they lose their "federal character," see generally United States v. Owen, 536 F.2d 340 (10th Cir. 1976), and jurisdiction no longer exists under 18 U.S.C. §641.

Finally, it must be remembered that many federal programs have specific statutory provisions relating to theft or embezzlement of funds or property. A listing of these more specific statutes can be found at USAM 9-66-330, infra.

9-66.223 Nonappropriated Funds

The Department has in the past successfully maintained the position that money and property of nonappropriated fund activities such as armed services post exchanges are within the scope of 18 U.S.C. §641. See United States v. Cotten, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973). This position rests on the fact that employees of these activities are employees of the United States under 5 U.S.C. §2105(c) and on the fact that these entities have been considered federal agencies for a number of purposes. See, e.g., Jaeger v. United States, 394 F.2d 944 (D.C. Cir. 1968); Brethauer v. United States, 333 F.2d 307 (8th Cir. 1964); United States v. Holcomb, 277 F.2d 143 (4th Cir. 1960).

9-66.224 National Guard Property

Under 32 U.S.C. §710(a), "all military property issued by the United States to the National Guard remains the property of the United States." The term "military property" should be broadly construed to include all manner of property used or consumed by the military and not simply "military-type" items. See 32 U.S.C. §105. See also 32 U.S.C. 101(13); Northern Pacific Railway Company v. United States, 330 U.S. 248, 254 (1947). In cases involving property in the possession of the National Guard under 32 U.S.C. §702 or a similar provision, in which case it would come under 18 U.S.C. §641, or whether it was purchased by the National Guard with its own funds, in which case it would be the property of the state.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-66.225 Civil Air Patrol Property

The Civil Air Patrol is officially an auxiliary of the United States Air Force, but is actually no more than a private corporation chartered by act of Congress and operating without any federal funds. Senate Permanent Subcommittee on Investigations, S. Rep. No. 40, 86th Cong., 1st Sess., 11-12 (1959). See also Pearl v. United States, 230 F.2d 243, 245 (10th Cir. 1956). Therefore as a general rule a theft of C.A.P. property could not be covered by 18 U.S.C. §641. However, close attention must be directed to the manner in which local C.A.P. auxiliaries acquire surplus government property to determine whether specific goods constitute property of the United States.

9-66.226 Goods in Transit

When the United States as the seller is shipping property to a buyer or when the United States has property shipped to it for purchase, the status of the property in transit is determined by the contract and the application of the Uniform Commercial Code. Cf. Heath v. United States, 209 F.2d 318 (9th Cir. 1954); Clark v. United States, 258 F. 437 (3d Cir. 1919). It should be noted, however, that section 641 also protects property "made or being made under contract for the United States." See USAM 9-66.330, *infra*. Therefore, theft of property made under contract for the United States is punishable under this section without regard for title or custody.

9-66.227 United States Government Checks

A government check remains government property as long as the paying officer has the power to recall it. See England v. United States, 174 F.2d 466 (5th Cir. 1949); Clark v. United States, 268 F. 329, 333 (6th Cir. 1920). Therefore, 18 U.S.C. §641 applies to the theft of a government check until that check is delivered to the payee. See United States v. Forcellati, 610 F.2d 25 (1st Cir. 1978), cert. denied, 445 U.S. 944 (1980); United States v. Edwards, 473 F. Supp. 81 (D. Mass. 1979); see United States v. Lee, 454 F.2d 190 (9th Cir. 1972). Theft of a check from the mail or from a mailbox may also violate 18 U.S.C. §§1702 and 1708. See Whiteside v. United States, 346 F.2d 500 (8th Cir.), cert. denied, 389 U.S. 1023 (1965). Once a check is delivered to its payee 18 U.S.C. §641 no longer applies. A theft of the check in any subsequent mailings would be covered only by 18 U.S.C. §§1702 and 1708. See 31 U.S.C. §528(b)(1). Of course, false endorsement of a government check or the possession of a government check bearing a false endorsement may also violate 18 U.S.C. §§495 and 510.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-66.228 Seized Property

Property seized by the United States is protected by 18 U.S.C. §641. See United States v. Gordon, 638 F.2d 886 (5th Cir.), cert. denied, 452 U.S. 909 (1981). If the property has been seized but not removed, 18 U.S.C. §641 still applies under the theory that forfeiture actually occurred at the time the criminal act was committed. See Roma v. United States, 53 F.2d 1007 (7th Cir. 1931). Contra, Patmore v. United States, 1 F.2d 8 (6th Cir. 1924). Once the property has been taken into the custody of the United States "possession is sufficient evidence of title." See United States v. Gardner, 42 F. 829, 832 (N.D.N.Y. 1890). In the case of property seized under a revenue law, "a forcible retaking of property out of the hands of officers of the law who have it in legal custody" would also be a violation of 18 U.S.C. §2233. See also United States v. Ford, 33 F. 861, 863 (W.D.N.C. 1887). See also 26 U.S.C. §7212(a) and (b). Causing injury to or removing property in order to prevent seizure under a revenue law would be a violation of 18 U.S.C. §2232. See also 10 U.S.C. §7678.

9-66.229 Intangible Property Interests

The inclusion of the phrase "thing of value" in 18 U.S.C. §641 creates a problem regarding whether the theft of intangible property is covered by this section. At least one case has adopted the view that 18 U.S.C. §641 applied only to "corporeal or tangible property" and refused to extend that section to the theft of services. See Chappel v. United States, 270 F.2d 274, 277 (9th Cir. 1959); but see Burnett v. United States, 222 F.2d 426 (6th Cir. 1955) (affirming a 18 U.S.C. §641 conviction involving the theft of services).

A number of recent decisions, however, have suggested that this section includes intangible, as well as tangible losses. See United States v. Girard, 601 F.2d 69, 71 (2d Cir.), cert. denied, 444 U.S. 871 (1979) (theft of information stored in government computer); United States v. DiGilio, 538 F.2d 972 (3d Cir.), cert. denied, 429 U.S. 1038 (1976) (theft by photocopying government records).

These later decisions appear to express the better view on this issue. The extension of 18 U.S.C. §641 to intangible property interests is consistent with both the plain language of the statute and the judicial construction of that language. The term "thing of value" is certainly broad enough to encompass both tangible and intangible properties and, in fact, has been construed to cover intangibles. See United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Girard, supra at 71 (collecting cases). Moreover, such a construction is in accord with the interpretation given 18 U.S.C. §641 by the Supreme Court in Morissette v. United States, 342 U.S. 246 (1952). In Morissette, the Court indicated that 18 U.S.C. §641 was drafted broadly to reach all misuse of government property. Id. at 271. A construction of this section which extends it to tangible and intangible government property is consistent with this objective.

9-66.230 Custody in the United States

The ownership interest necessary to trigger jurisdiction under 18 U.S.C. §641 is not confined to exclusively legal title. Custodial interests which fall short of actual title may also provide a basis for the assertion of federal jurisdiction. See Fowler v. United States, 273 F. 15, 17 (9th Cir. 1921). This custodial interest may take the form of a bailment, Fowler v. United States, supra; a fiduciary relationship, Loewe v. United States, 135 F.2d 622 (9th Cir. 1943); a leasehold interest, United States v. Bridle, 443 F. 2d 443 (8th Cir. 1971), or simply the quantity of control the United States exercises over the property or funds, Arbuckle v. United States, 146 F.2d 657, 659 (D.C. Cir. 1944).

9-66.231 "Or Any Property Made or Being Made Under Contract  
for the United States or Any Department of Agency  
Thereof"

This phrase results in a significant extension of the scope of 18 U.S.C. §641 in that it applies to property in which the United States holds neither title nor a custodial interest. The scope of this section is illustrated by United States v. Anderson, 45 F. Supp. 943 (S.D. Cal. 1942). In Anderson the defendants were convicted of stealing aluminum used in the manufacture of aircraft for the War Department. In sustaining these convictions the court noted that:

What the Congress sought, by the section (a predecessor to section 641), was to protect the rights of the Government in property which had either been completed or was being held for delivery for the United States, or property as well as materials which were in the process of being made, manufactured or constructed into parts for completed objects under contract with the Navy or War Departments of the United States . . . not only the finished object, but also the raw material which is held available for its

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

construction, is within the designation of "property."

See United States v. Anderson, supra at 949. This extension of jurisdiction is rarely used because in most cases a theft from a government contractor will be a matter of concern primarily to local law enforcement officials. However, situations arise in which the federal interest will predominate and for which prosecution under 18 U.S.C. §641 should be considered; for example, the theft of property being used in a high priority federal program, the theft of property from an ordinary contractor but on such a large scale that completion of the contract is impaired, or the theft of military weapons, explosives or ammunition.

9-66.240 Intent

Proof of criminal intent is part of every prosecution under 18 U.S.C. §641. See Morissette v. United States, 342 U.S. at 273. However, there is no single intent requirement for the offenses included under 18 U.S.C. §641. As we have noted, this section incorporated several distinct property crimes into one statute. These distinct offenses, many of which were originally developed at common law, each required proof of a different mental state. In fact several of these offenses, such as receipt of stolen property, call for proof of a compound state of mind. These offenses, and their elements, are described at USAM 9-66.210, supra. Prosecutors with questions regarding the state of mind which must be proven as part of a prosecution under 18 U.S.C. §641 should refer to the appropriate section of the Manual for advice.

There are several recurring common questions of intent which arise in 18 U.S.C. §641 prosecutions. The first question involves whether temporary misappropriation of government property falls within the sanctions of this section. The answer to this question turns on the nature of the offense charged. 18 U.S.C. §641 incorporates several distinct offenses. One of these offenses, larceny, requires an intent to permanently deprive another of his/her property. See Ailsworth v. United States, 448 F.2d 439, 442 (9th Cir. 1971). In contrast several other offenses encompassed by this section, such as embezzlement and knowing conversion of property, simply require temporary misappropriation of property. See Morissette v. United States, supra at 246 (knowing conversion); United States v. Powell, 294 F. Supp. 1353 (E.D. Va.), aff'd, 413 F.2d 1037 (4th Cir. 1968) (embezzlement). Therefore, 18 U.S.C. §641 can reach temporary misappropriation of government property under either an embezzlement or knowing conversion theory of prosecution.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A second recurring question involves whether the intent requirement of 18 U.S.C. §641 demands that a defendant know that the property belongs to the United States. While the United States Court of Appeals for the Tenth Circuit at one time held that knowledge of government ownership was an element of this offense; see Findley v. United States, 362 F.2d 921 (10th Cir. 1966), it has since abandoned this position. See United States v. Speir, 564 F.2d 934, 938 (10th Cir. 1977) (en banc). Other circuits have adopted this view and held that a defendant need not know that it is government property which he/she is taking. See, e.g., United States v. Crutchley, 502 F.2d 1195 (3d Cir. 1974); United States v. Boyd, 446 F.2d 1267 (5th Cir. 1971); Baker v. United States, 429 F.2d 1278 (9th Cir.), cert. denied, 400 U.S. 957 (1970); United States v. Howey, 427 F.2d 1017 (9th Cir. 1970).

9-66.250 Value

The value of the stolen property is an element of the offense and proof of value must be introduced at trial. See United States v. Wislon, 284 F.2d 407, 408 (4th Cir. 1960); Cartwright v. United States, 146 F.2d 133, 135 (5th Cir. 1944). 18 U.S.C. §641 defines value as "face, par, or market value, or cost price, either wholesale or retail, whichever is greater." The face value can be virtually nothing, as in Keller v. United States, 168 F. 697 (7th Cir. 1909), where the stolen property consisted of six blank checks worth one cent each. The market value is not limited to the legitimate resale price of the property but may also be the price fences might pay on the "thieves' market." See Churder v. United States, 387 F.2d 825 (8th Cir. 1968); Jalbert v. United States, 375 F.2d 125 (5th Cir. 1967); United States v. Ciongoli, 358 F.2d 439 (3d Cir. 1966). Unless the thefts were part of a common scheme or plan the value of property taken in separate larcenies cannot be aggregated to reach the \$100 felony minimum, See United States v. DiGilio, *supra*; Cartwright, *supra*, at 135, but it may be shown that the aggregate value of property taken in a single offense exceeds \$100. See Jalbert, *supra*, at 116. The "whichever is greater" rule is applicable regardless of the disparity between the retail cost price and the market value. See O'Malley v. United States, 227 F.2d 332, 336 (1st Cir. 1955), cert. denied, 350 U.S. 966 (1956). In Fulks v. United States, 283 F.2d 259 (9th Cir. 1960), cert. denied, 365 U.S. 812 (1961), the court upheld a felony conviction based on the theft of eight gyro horizon indicators with a cost price of \$205 each but a scrap value of only \$.76 each. Finally, the prosecution does not have to prove the exact or approximate value of the stolen property but merely has to show that it is in excess of \$100. See Jalbert, *supra*, at 126.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In some situations where valuation problems exist or where realty is involved, consideration should be given to instituting a prosecution under 18 U.S.C. §1361 in place of or in addition to a prosecution under 18 U.S.C. §641. In cases involving fixtures or other attached property, the removal of which necessitates some injury, it is possible to institute a prosecution under 18 U.S.C. §1361. This is useful because a felony conviction can be sustained if "damage" which can be measured by the cost of repair, see Brunette v. United States, 378 F.2d 18 (9th Cir.), cert. denied, 389 U.S. 961 (1967), to such property exceeds \$100. Occasionally, the value of items removed might not exceed \$100, but the cost of repair would. See Edwards v. United States, 361 F.2d 732 (8th Cir. 1966).

One additional question involving value concerns the meaning and application of the term "cost price." In most cases this poses no problem since "cost price" to the government is established by reference to catalogues or other records, kept in the regular course of business by the government, which reflect the price paid by the government for the item. These records, after proper identification and authentication, can be introduced to establish the "cost price."

However, what measure of value can be used when the government makes the items itself? Frequently, items made by government employees are of special nature for which there is no readily ascertainable market value, and even when a market value can be approximated, it may not adequately reflect the value of the item. Thus, the issue arises whether "cost price" can be construed as "cost to the government" in those situations where the government has produced the item itself. As yet, there are no reported decisions on this point.

In general usage "cost price" to the government would mean the price paid by the government in purchasing an item. However, in this unusual situation involving the "internal purchase" of products, the Department feels it would not be unreasonable to argue that "cost price" means cost to the government. Thus it should be possible to introduce evidence as to the costs incurred in making an item.

The question of value relates only to punishment and not to guilt. If a properly instructed jury finds that a defendant is guilty but that the property has a value of \$100 or less, it may convict him/her for a misdemeanor despite the fact that he/she was indicted for a felony. See Giorgoli, supra; Robinson v. United States, 333 F.2d 323 (8th Cir. 1964); Larson v. United States, 296 F.2d 80 (10th Cir. 1961); United States v. Marpes, 198 F.2d 186 (3d Cir. 1952).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

When the case involves the embezzlement of funds over a period of time, it is possible to allege the loss of a single sum of money even though the embezzlement may have consisted of a series of conversions occurring at different times. See O'Malley v. United States, 378 F.2d 401 (1st Cir.), cert. denied, 389 U.S. 1008 (1967); Hansberry v. United States, 295 F.2d 800 (9th Cir. 1961). Thus, when small sums of money (less than \$100) are embezzled over a period of time, it should be possible to aggregate these amounts (when these embezzlements follow a pattern or reveal a single sustained criminal intent), and allege the loss of a single sum thereby sustaining a felony conviction.

9-66.260 Problems of Proof in Section 641 Prosecutions

Prosecutions under 18 U.S.C. §641 encounter several recurring problems of proof. For example, in some cases the property which is alleged to have been taken either no longer exists or cannot be found. In these instances, proving government ownership of the property can present significant difficulties.

At the outset, it is clear that "[t]o prove the corpus delicti it is not required to identify the recovered property as stolen or even to recover the stolen property." See Mora v. United States, 190 F.2d 749, 750 (5th Cir. 1951). Thus, proof of government ownership of stolen property can rest entirely on circumstantial evidence as in United States v. Donato, 269 F. Supp. 921 (E.D. Pa.), aff'd, 379 F.2d 288 (3d Cir. 1967). See Teel v. United States, 407 F.2d 604 (8th Cir. 1969). The situation where the corpus delicti must be proved by circumstantial evidence is rare and presents far greater problems than the situation where the only issue is the defendant's participation in the offense. The latter situation is typical of theft of government property cases and the courts of appeals have generally upheld convictions based only on circumstantial evidence. See O'Malley v. United States, supra; United States v. Parks, 384 F.2d 714 (4th Cir. 1967).

Receiving stolen property cases also frequently share a common problem of proof. In many instances, the government's proof consists largely of evidence showing that the defendant had in his possession goods which were recently stolen.

The evidentiary impact of possession of recently stolen property, as a practical matter, is obvious, but the technical label for this impact has been stated in various ways. A good statement of the current status of the "rule" is as follows:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

According to the more recent decisions, the possession of recently stolen property does not give rise to a presumption that the possessor knew the property was stolen but only gives rise to a permissive inference from which the jury may infer under all of the facts and circumstances in evidence that the possessor had guilty knowledge of the stolen characteristics of the property unless the possessor comes up with a reasonable and believable explanation of his possession.

In applying the rule respecting possession of recently stolen property the length or possession along with all the other facts and circumstances must be considered, as the type and kind of property, the amount or volume thereof, the ease or difficulty with which it may be assimilated into legitimate trade channels, including the circumstances under which the property is alleged to have been acquired.

See Aaron v. United States, 382 F.2d 965, 971 (9th Cir. 1967). See United States v. Fench, 470 F.2d 1234 (D.C. Cir.), cert. denied, 410 U.S. 909 (1972). Thus, possession of recently stolen goods is a factor from which a jury may infer that the defendant has knowingly received stolen property.

In embezzlement cases certain types of circumstantial proof are admissible to establish a wrongful taking of property entrusted to the defendant. In fact, Congress has, by statute, prescribed some forms of circumstantial proof in these cases.

Under 18 U.S.C. §3487, a refusal to pay the General Accounting Office by a person charged with the safe-keeping of public money is prima facie evidence of embezzlement. The effect of this statute is merely to restate the principle that the corpus delicti may be proved by circumstantial evidence, and it does not relieve the prosecution of the burden of proving criminal intent. See Shaw v. United States, 357 F.2d 949, 958 (Ct. Cl. 1966). The necessity of proving a formal demand for an accounting and a refusal to account is eliminated when the time for payment of the money was fixed and the payment was not made within that time. See Taylor v. United States, 320 F.2d 843, 850 (9th Cir. 1963), cert. denied, 376 U.S. 916 (1964). A transcript from the books and proceedings of the General Accounting Office is prima facie evidence of a balance against a person charged with embezzling public funds. See 18 U.S.C. §3497.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Another common method of proof in embezzlement cases is the net worth or cost of living technique in which the defendant's admitted income is compared with his assets and expenditures: "clearly, evidence of large expenditures or the acquisition of large unexplained sums of money, during the time charged as that which the embezzlement took place, is some evidence of such embezzlement." See Hansberry v. United States, 295 F.2d 800, 807 (9th Cir. 1961).

9-66.270 Jurisdiction and Venue

Much of the property owned by the United States is located outside the territorial limits of this country. The presence of American military and diplomatic personnel overseas necessarily requires the presence of government property abroad as well. In order to protect this property, section 641 has been construed to have extraterritorial effect. See United States v. Cotten, 471 F.2d 744, 749-50 (9th Cir.), cert. denied, 411 U.S. 936 (1973). Therefore, the theft of United States government property in foreign countries violates 18 U.S.C. §641.

Venue for violations of 18 U.S.C. §641 committed abroad is defined by 18 U.S.C. §3238, which provides that the trial of such offenses shall be brought in the district "in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia." See 18 U.S.C. §3238. See United States v. Cotten, supra.

9-66.300 OTHER EMBEZZLEMENT PROVISIONS

Title 18, United States Code, Chapter 31, contains several rarely used theft of government property statutes. See 18 U.S.C. §§643-654. These sections are somewhat narrower in their application than 18 U.S.C. §641 and cover two specific situations.

9-66.310 Embezzlement by Court Officers

First, three of these sections apply to misuse of funds by court officers. See 18 U.S.C. §§645, 646, 647. At the outset 18 U.S.C. §645 provides that:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- A. Any United States Marshal, clerk, receiver, referee, trustee or other officer or employee of a United States court who;
- B. Retains or converts to his/her use or the use of another;
- C. Any money coming into his/her hands by virtue of his/her official duties; or
- D. Refuses to return such money after a demand by the party entitled to it, violates the law.

18 U.S.C. §646, in turn, forbids court officers from failing to promptly deposit, or from retaining or converting moneys belonging to the registry of the court. 18 U.S.C. §646 is complemented by 18 U.S.C. §647 which prohibits knowing receipt from a court officer of moneys belonging to the registry of the court.

The penalties for violations of these three sections are tied to the amount of the funds taken. If that amount is \$100 or less, the defendant is subject to one year imprisonment, a \$1,000 fine, or both. If that amount exceeds \$100, the defendant may be sentenced to ten years imprisonment, a fine equal to the amount embezzled, or both.

9-66.320 Embezzlement of Public Funds

In addition, there are a series of sections prohibiting misuse or theft of public funds. See 18 U.S.C. §§643, 644, 648, 649, 650, 651, 652, and 653. These sections are described, in summary fashion, below:

A. 18 U.S.C. §643 provides that any officer, employee or agent of the United States who receives money which he/she is not authorized to retain as salary and fails to account for it as provided by law is guilty of embezzlement.

B. 18 U.S.C. §644 prohibits persons who are not authorized depositaries of public money from knowingly receiving any such money or using, transferring, converting, appropriating or applying such money for any purpose not prescribed by law.

C. 18 U.S.C. §648 forbids custodians of public funds from loaning, using, or converting those funds, or depositing or exchanging them, except as authorized by law.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

D. 18 U.S.C. §649 provides that any person who possesses or controls money belonging to the United States and fails to deposit it when required to do so is guilty of embezzlement.

E. 18 U.S.C. §650 applies to the Treasurer of the United States or any public depository and provides that if these officials fail to keep safely all money deposited with them, they violate the law. One case has suggested that this section is violated when a depository of government money negligently loses these funds. See Shaw v. United States, 357 F.2d 949, 957-58 (Ct. Cl. 1966). The better view on this question, however, seems to be that some criminal intent must be proven as part of a prosecution under this section. See Morrisette v. United States, supra, at 266-67 (1922).

F. 18 U.S.C. §651 relates to the disbursement of public funds and prohibits disbursing officers from falsely certifying full payment of government obligations.

G. 18 U.S.C. §652 also relates to the disbursement of government funds. This section prohibits disbursing officers from disbursing a sum less than that required by law.

H. 18 U.S.C. §653 prohibits any other misuse of government funds by disbursing officers including: (1) converting, loaning or depositing these moneys except as authorized by law; and (2) withdrawing, transferring or applying these funds without authority.

I. Finally, 18 U.S.C. §654 forbids government employees from wrongfully converting the property of others which they receive in the course of their employment.

Penalties for violations of these sections are similar to the penalties prescribed under 18 U.S.C. §§654-47. If the value of the property is \$100 or less, a defendant is subject to one year imprisonment, a \$1,000 fine, or both. When the value of the property exceeds \$100, the defendant may be sentenced to ten (10) years imprisonment, a fine equal to the amount of the property taken, or both. In the case of a violation of 18 U.S.C. §§651 or 652, the maximum fine may equal twice the value of the property taken.

Most of these sections involve situations in which 18 U.S.C. §641 would be equally applicable. Note, however, that the penalties provided by 18 U.S.C. §641 differ from the penalties provided for in 18 U.S.C. §§643 through 654. Violations of 18 U.S.C. §641 are punishable by ten years imprisonment and/or a \$10,000 fine. In contrast, 18 U.S.C. §§643 through 654 provide for a maximum penalty of ten years imprisonment and/or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

a fine equal to the amount taken, or double that amount. Thus, in a given case, the defendant could be subject to a greater or lesser fine, depending upon the statute used. Because of this difference in the penalties provided by these statutes, defendants who fall within these specific sections generally should be prosecuted under the specific statute rather than 18 U.S.C. §641.

9-66.330 Miscellaneous Theft of Government Property Statutes

The following chart lists the statutory provision applicable to the property and funds of specific departments and agencies.

<u>Agency or Program</u>	<u>Statute</u>	<u>Offense</u>
Bankruptcy Act (Title 11, U.S.C.)	18 U.S.C. §153	Embezzlement by a trustee, receiver, custodian, United States Marshal, or other officer of the court of any property in his/her charge belonging to the estate of a bankrupt.
Commodity Credit Corporation	18 U.S.C. §714 m(b)-(d)	Whoever shall willfully steal, conceal, remove, dispose of, or convert to his/her own use or to that of another any property owned or held by, mortgaged or pledged to, the corporation, or any property mortgaged or pledged as security for any promissory note, or other evidence of indebtedness, which the corporation has guaranteed.
Farm Credit Administration	18 U.S.C. §657	Whoever, being an officer, agent or employee of or connected in any capacity with the agency, embezzles, abstracts,

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to the agency, or pledged or otherwise entrusted to its care.
Farm Credit Administration	18 U.S.C. §658	Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his/her own use or to that of another, any property mortgaged or pledged to, or held by, the Administration.
Federal Crop Insurance	18 U.S.C. §§657, 658	<u>See</u> F.C.A. above.
Federal Deposit Insurance Corporation	18 U.S.C. §§657, 658	<u>See</u> F.C.A. above.
Farmers' Home Administration; Farmers' Home Corporation	18 U.S.C. §§657, 658	<u>See</u> F.C.A. above.
Home Owners' Corporation	18 U.S.C. §657	<u>See</u> F.C.A. above.
Housing and Urban Development	18 U.S.C. §657	<u>See</u> F.C.A. above
Indian Tribal Organizations	18 U.S.C. §1163	Embezzlement and theft from tribal organizations.
	18 U.S.C. §1164	Destruction of boundaries or signs designating reservation lands.
United States Postal Service	18 U.S.C. §§691 through 1713	Theft, embezzlement, misappropriation and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Public Works and Economic Development Act of 1965 (42 U.S.C. 3121 <u>et seq.</u> )	42 U.S.C. §3220(b)(1)	destruction of mails and postal property.  Whoever connected in any capacity with the Secretary of Commerce, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, securities or other things of value entrusted to him/her under the Act.
Reconstruction Finance Corporation	18 U.S.C. §657	<u>See</u> F.C.A. above.
Saint Lawrence Seaway Development Corporation	33 U.S.C. §990	All general penal statutes relating to the larceny, embezzlement or conversion of public moneys or property of the United States shall apply to the money and property of the Corporation.
Small Business Administration	15 U.S.C. §645 (b)(1)	Whoever connected in any capacity with the Administration embezzles, abstracts, purloins, or willfully misapplies any moneys, funds, securities or other things of value belonging to or otherwise entrusted to the Administration.
State, Department of	22 U.S.C. §4199	Embezzlement of moneys or property entrusted to consular officers as administrators or guardians.
	22 U.S.C. §4317	Embezzlement by a consular officer of moneys or property received by

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

him/her for use of the United States or of the money, property, or effects of an American citizen received by him/her.

Tennessee Valley  
Authority

16 U.S.C. §831  
t(a)

All general penal statutes relating to the larceny, embezzlement, conversion, or to the improper handling, retention, use or disposal of public moneys or property of the United States, apply to the moneys and property of or entrusted to the Corporation.

Veterans  
Administration

38 U.S.C.  
§3501(a)

Misappropriation by a fiduciary of money paid under any of the laws of the Veterans Administration for the benefit of any minor, incompetent, or other beneficiary. See United States v. Hall, 98 U.S. 343 (1878); United States v. Summers, 19 F.2d 627 (D.D. Va. 1927).

9-66.400 PROTECTION OF PUBLIC RECORDS AND DOCUMENTS

The taking of a public record or document is prohibited by 18 U.S.C. §641. The destruction of such records may be reached under 18 U.S.C. §1361. In both instances, however, proving a \$100 loss, the prerequisite to a felony conviction, may be difficult. Thus neither of these statutes adequately protects government records.

That necessary measure of protection for government documents and records is provided by 18 U.S.C. §2971. 18 U.S.C. §2071(a) contains a broad prohibition against destruction of government records or attempts to destroy such records. This section provides that whoever:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- A. Willfully and unlawfully;
- B. Conceals, removes, mutilates, obliterates or destroys;
- C. Or attempts to conceal, remove, mutilate, obliterate or destroy;  
or
- D. Carries away with intent to conceal, remove, mutilate, obliterate or destroy; and
- E. Any record, proceeding, map, book, paper, document or other thing deposited in any public office may be punished by imprisonment for three years, a \$2,000 fine, or both.

There are several important aspects to this offense. First, it is a specific intent crime. This means that the defendant must act intentionally with knowledge that he/she is violating the law. See United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972). Moreover, one case has suggested that this specific intent requires that the defendant know that the documents involved are public records. See United States v. DeGrout, 30 F. 764, 765 (E.D. Mich. 1887).

The acts proscribed by this section are defined broadly. Essentially three types of conduct are prohibited by 18 U.S.C. §2071(a). These are: (1) concealment, removal, mutilation, obliteration or destruction of records; (2) any attempt to commit these proscribed acts; and (3) carrying away any record with the intent to conceal, remove, mutilate or destroy it. It should be noted that all of these acts involve either misappropriation of or damage to public records. This has led one court to conclude that the mere photocopying of these records does not violate 18 U.S.C. §2071. See United States v. Rosner, 352 F. Supp. 915, 919-922 (S.D. N.Y. 1972), petition denied, 497 F.2d 919 (2d Cir. 1974).

Subsection (b) of 18 U.S.C. §2071 contains a similar prohibition specifically directed at custodians of public records. Any custodian of a public record who "willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys [any record] shall be fined not more than \$2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States." While the range of acts proscribed by this subsection is somewhat narrower than subsection (a), it does provide the additional penalty of forfeiture of position with the United States.

Title 18 contains two other provisions, of somewhat narrower application, which relate to public records. 18 U.S.C. §285 prohibits the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

unauthorized taking, use and attempted use of any document, record or file relating to a claim against the United States for purposes of procuring payment of that claim. 18 U.S.C. §1506 prohibits the theft, alteration or falsification of any record or process in any court of the United States. Both of these sections are punishable by a \$5,000 fine or imprisonment for five years.

9-66.500 DESTRUCTION OF GOVERNMENT PROPERTY; 18 U.S.C. §1361

18 U.S.C. §1361 is perhaps the broadest of the federal laws protecting government property. It encompasses both real and personal property and prohibits any damage or destruction of that property. 18 U.S.C. §1361 provides as follows:

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof [commits a federal offense].

At the outset it should be noted that this section simply forbids injury or depredation of government property. "Depredation" has been characterized as the act of plundering, robbing, pillaging or laying waste. Thus, it is clear that this section requires actual damage to government property. Mere adverse possession of that property without physical harm is insufficient to violate the law. See United States v. Jenkins, 554 F.2d 783 (1977).

Moreover this injury or depredation must be willfully inflicted. Accordingly section 1361 is a specific intent crime. See United States v. Jones, 607 F.2d 269, 273-74 (9th Cir. 1979), cert. denied, 444 U.S. 1085 (1980). Under 18 U.S.C. §1361 the statutory requirement of willfulness is satisfied when the defendant acts intentionally, with knowledge that he is violating the law. See United States v. Simpson, 460 F.2d 515, 518 (9th Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1004 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970).

Finally, this section applies to willful damage committed against any property of the United States or its agencies, or any property being manufactured for the United States or its agencies. By its use of the term "any property" this section extends both to realty and personalty. Moreover, 18 U.S.C. §1361 protects not only government-owned property but also private property which is being manufactured or constructed for the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

United States. Thus, title or possession by the United States is not a necessary element of this offense, if the property in question was being made for the United States.

The penalties for violations of this section are tied to the extent of the property damage. If the damage exceeds \$100, then a defendant is subject to a \$10,000 fine, ten (10) years imprisonment, or both. Property damage which does not exceed \$100 is punishable by a \$1,000 fine, one (1) year imprisonment, or both.

9-66.510 Malicious Mischief: Communication Lines, Stations or Systems,  
18 U.S.C. §1362

Another destruction of property provision, albeit of narrower scope, is 18 U.S.C. §1362. This section forbids three distinct acts. These are: (1) willfully or maliciously destroying any works, property or material of certain radio, telephone telegraph or communications systems; (2) willfully or maliciously interfering with the workings or use of such systems; or (3) willfully or maliciously obstructing, hindering or delaying communications through these systems.

A. Two types of communication facilities are protected by this section. First, 18 U.S.C. §1362 extends to communication facilities operated or controlled by the United States. This includes all government owned facilities plus the following leased facilities:

1. Private line networks. These are lines on full-time lease to the United States. They generally have terminals at government facilities, are used for government business, and may not be repaired without government permission. See Abbate v. United States, 247 F.2d 410, 413-14 (5th Cir. 1957), aff'd, 359 U.S. 187 (1959).

2. Engineered military circuits. The government pays rental for the terminating equipment and the lines to the central office of the carrier. Rental is not paid for the lines between carriers' offices until those lines are needed. The lines from the carrier to the terminating equipment would be covered by this clause; the lines between the carriers would be covered by the second clause of 18 U.S.C. §1362.

B. In addition, 18 U.S.C. §1362 protects facilities "used or intended to be used for military or civil defense functions of the United States." This clause was added in 1961 to cover those military and civil defense communications networks that were not owned by the United States or under

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the equivalent of a full-time lease. It includes, but is not limited to, the following systems:

1. Engineered military circuits not covered by the first clause;
2. The Federal Civil Agencies Communications Systems;
3. The office of Civil Defense Mobilization national warning system; and
4. "[T]he aircraft control and warning network . . . Strategic Air Command communications network, and other systems and networks necessary for weather reporting, command and logistical support . . ." See S. Rep. No. 458, 87th Cong., 1st Sess., 3 (1961).

In determining the applicability of this clause to a particular situation, the following expression of legislative intent should be noted:

This is not a problem of protecting the whole of commercial communications companies. Nor is it a question of protecting all facilities used by all agencies of the Federal Government. Rather, the amendment . . . would protect only that portion of the facilities of commercial carriers which are vital and necessary for military and civil defense functions, [emphasis added] regardless of whether the function is performed by an agency which is part of the Department of Defense or the Office of Civil Defense Mobilization. See S. Rep. No. 485, supra, at 6.

Although the coverage of the statute is broad, it does not extend to nonmilitary or noncivil defense facilities not "operated or controlled" by the United States.

9-66.511 Application of 18 U.S.C. §1362 to Commercial Radio Stations

As noted above, not all civil communications facilities are entitled to 18 U.S.C. §1362's protection. Only those facilities which are "used or intended to be used for military or civil defense functions . . ." fall within this section.

As indicated above, the Congressional intent behind the 1961 amendment to 18 U.S.C. §1362 was that the new protection it afforded for

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

commercial communications companies would be extended only to that portion of the facilities of those companies which are vital and necessary for the military and civil defense functions of the United States. In effectuating that intent, the Department promulgated a policy which limited the circumstances under which federal jurisdiction was to be asserted to those acts perpetrated against member stations of the Emergency Broadcast System (EBS) within the Emergency Action Notification System (EANS). Protection was afforded to these stations inasmuch as they provided the President and the federal government, as well as state and local governments, with an expeditious means of communicating with the general public during an emergency action condition. The EBS, therefore, functioned in a way similar to its predecessor, the CONELRAD System, which was in existence at the time of the 1961 amendment.

In early 1972, the Federal Communications Commission reorganized and significantly expanded the EBS by issuing EBS authorizations to nearly all existing broadcast stations. This resulted in an increase in active station participation in the EBS from 40% to over 95% of the total broadcast stations in the United States. In so reorganizing the EBS, little if any resemblance remains to the previous CONELRAD or EBS programs and, under former Departmental investigative and prosecutive guidelines, more than 8,000 stations would now be afforded the protection of section 1362 by virtue of their EBS designations.

In point of fact, however, the vast majority of these stations serve no vital or necessary military or civil defense function.

Further study of the new EBS program disclosed that, within that system there are 490 operational areas. Within each operational area, there is a key station known as a number 1 Common Program Control Station (CPCS-1). The function of CPCS-1 stations parallels that of those stations operating within the earlier EBS. There are also some 600 broadcast stations which participate in the EBS Protected Station Program, 400 of which are also CPCS-1 stations. Such protected stations are considered vital to EBS inasmuch as they maintain government owned emergency equipment in a fallout protected environment. Within the reorganized EBS, there are approximately 690 broadcast stations which, either by virtue of their CPCS-1 designation or participation in the EBS Protected Station Program, serve a function which can be described as vital and necessary to the military or civil defense functions of the United States. Therefore, in order to continue to effectuate Congressionally enacted policy and to achieve uniform application of this statute in all judicial districts, only these broadcast facilities shall now be afforded protection under 18 U.S.C. §1362.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Upon receipt of information that a broadcast facility has been the victim of willful or malicious destruction of its property, initial inquiries should be directed toward ascertaining whether the facility falls within the scope of 18 U.S.C. §1362. In many cases, the victim facility may be in a position to provide initial information on this question. Such information, however, should not be relied upon in making a determination as to whether federal jurisdiction will be asserted. Such a determination should be made only after ascertaining from the regional office of the F.C.C. whether the facility's connection to civil defense is sufficient to confer federal criminal jurisdiction.

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 69

		<u>Page</u>
9-69.000	<u>PROTECTION GOVERNMENT PROCESSES</u>	
9-69.100	OBSTRUCTION OF JUSTICE	1
9-69.101	Overview	2
9-69.102	Legislative History	3
9-69.103	Effective Date of the Victim and Witness Protection Act of 1982	5
9-69.110	<u>18 U.S.C. §1512--Generally</u>	5
9-69.111	Scope of 18 U.S.C. §1512	6
9-69.112	"Official Proceeding" Requirement (18 U.S.C. §1512)	7
9-69.113	State of Mind (18 U.S.C. §1512)	8
9-69.114	Constitutionality of 18 U.S.C. §1512(c)	9
9-69.120	<u>18 U.S.C. §1513</u>	12
9-69.121	Scope of 18 U.S.C. §1513	12
9-69.122	State of Mind (18 U.S.C. §1513)	12
9-69.130	<u>18 U.S.C. §1503</u>	13
9-69.131	Scope of 18 U.S.C. §1503	13
9-69.132	Pending-Proceeding Requirement (18 U.S.C. §1503)	14
9-69.133	State of Mind (18 U.S.C. §1503)	15
9-69.134	Omnibus Clause (18 U.S.C. §1503)	17
9-69.140	<u>18 U.S.C. §1505</u>	24
9-69.141	Scope of 18 U.S.C. §1505	24
9-69.142	Omnibus Clause (18 U.S.C. §1505)	24
9-69.150	<u>18 U.S.C. §1510</u>	27
9-69.160	<u>Inchoate Obstruction of Justice Offenses</u>	29
9-69.170	<u>Civil Action to Enjoin the Obstruction of Justice</u>	31
9-69.175	Offenses Related to Obstruction-of- Justice Offenses	32

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-69.180	<u>Venue</u>	35
9-69.181	Extraterritorial Federal Jurisdiction	36
9-69.190	<u>Penalties</u>	36
9-69.195	Research Sources	36
9-69.196	Pleadings Bank	36
9-69.197	Other Research Aids	37
9-69.200	PERJURY AND FALSE DECLARATIONS BEFORE GRAND JURY OR COURT	37
9-69.201	Perjury - 18 U.S.C. §1621	38
9-69.202	False Declarations Before Grand Jury or Court - 18 U.S.C. §1623	38
9-69.210	<u>Elements of Perjury</u>	40
9-69.220	<u>Subornation of Perjury - 18 U.S.C. §1622</u>	43
9-69.221	Elements	44
9-69.230	<u>Investigative Responsibility</u>	44
9-69.240	<u>Supervisory Jurisdiction</u>	45
9-69.250	<u>No Prior Authorization Required</u>	45
9-69.260	<u>Special Problems</u>	45
9-69.261	Prosecutorial Discretion to Indict Under 18 U.S.C. §1621 or §1623	45
9-69.262	Venue	47
9-69.263	Unresponsive Answers: The Case Against Samuel Bronston	47
9-69.264	The "I Don't Remember" Syndrome	48
9-69.265	"Two-Witness Rule"	49
9-69.266	The "Use" of Material Containing False Statements	50
9-69.267	False Affidavits Submitted in Federal Court Proceedings do not Constitute Perjury Under 18 U.S.C. §1623	50
9-69.268	Indictments	53
9-69.270	<u>Defenses and Bars to Prosecution</u>	54
9-69.271	In General	54

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-69.272	Collateral Estoppel	54
9-69.273	Lack of <u>Miranda</u> Warning	58
9-69.274	Recantation	
	In General	
	Necessity of Advising a Witness of Recantation of Provision of 18 U.S.C. §1623(d)	
	Witness' Right to Recant	60
9-69.280	<u>Suggested Forms of Indictments</u>	64
9-69.281	Indictment (18 U.S.C. §1621)	64
9-69.282	Indictment (18 U.S.C. §1622)	65
9-69.283	Indictment (18 U.S.C. §1623; Two Inconsistent Statements)	66
9-69.284	Indictment (18 U.S.C. §1623); One False Statement	66
9-69.290	<u>Jury Instructions</u>	67
9-69.291	18 U.S.C. 1621	
	Essential Elements of Offense	
	Willfully	
	Proof of Intent	
	Materiality of Testimony	
	Corroboration of Evidence of Falsity	67
9-69.292	18 U.S.C. §1622	
	Elements of the Offense	
	Perjury Must be Proved	69
9-69.293	18 U.S.C. §1623	
	Essential Elements of Offense	71
	Knowingly	71
	Materiality of Testimony	71
	Specific Intent	71
	Proof of Intent	71
9-69.300	PRISON OFFENSES	72
9-69.301	Introduction	72
9-69.310	<u>Elements of 18 U.S.C. §1791(a)(1)</u>	72
9-69.311	Violation	72
9-69.312	Federal Penal or Correctional Facility	72a
9-69.313	Contraband	72a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-69.320	<u>Elements of 18 U.S.C. §1791(a)(2)</u>	72a
9-69.321	Federal Penal or Correctional Facility	72a
9-69.322	Possess or Provide	72a
9-69.323	Contraband	72a
9-69.330	<u>Elements of 18 U.S.C. §1792</u>	72b
9-69.331	Participation	72b
9-69.332	Mutiny or Riot	72b
9-69.333	Federal Penal or Correctional Facility	72b
9-69.340	<u>Penalties</u>	72b
9-69.341	Grading	72b
9-69.342	[Reserved]	72b
9-69.350	<u>Double Jeopardy</u>	72b
9-69.360	<u>Knowledge of Warden</u>	72c
9-69.400	FUGITIVE FELON ACT--18 U.S.C. §1073	72c
9-69.410	<u>Primary Purpose of Act</u>	72c
9-69.420	<u>Prerequisites to Issuance of Federal Complaint in Aid of States; Policy</u>	72d
9-69.421	Parental Kidnapping	73
9-69.430	<u>Procedure upon Apprehension</u>	74
9-69.431	Conditions of Release--Policy	74
9-69.440	<u>Unlawful Flight</u>	75
9-69.441	To Avoid Custody or Confinement After Conviction	75
9-69.442	To Avoid Giving Testimony	76
9-69.443	To Avoid Service of Process	76
9-69.450	<u>Federal Information or Indictment; Removal--Approval Required</u>	76
9-69.460	<u>Aiding and Abetting</u>	77
9-69.470	<u>Venue</u>	77

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-69.500	ESCAPE FROM CUSTODY RESULTING FROM CONVICTION (18 U.S.C. §§751 and 752)	77
9-69.501	Introduction	77
9-69.502	Legislative History	78
9-69.503	Congressional Purpose	78
9-69.504	Defined	78
9-69.510	<u>Elements of the Offense--Generally</u>	79
9-69.511	Intent	79
9-69.512	Attempt	80
9-69.513	Aiding and Assisting	80
9-69.514	Conspiracy	80
9-69.520	<u>Constructive Custody</u>	80
9-69.521	Institution or Facility in Which Confined	80
9-69.522	Legal Custody by Attorney General	81
9-69.530	<u>Expeditions Authorization of Magistrates'</u> <u>Complaints and Warrants in Federal</u> <u>Escape Cases</u>	82
9-69.531	Policy	82
9-69.532	Case Authority	82
9-69.540	<u>Venue in Furlough and "Walkaway" Cases</u>	85
9-69.550	<u>Prosecution of Escapes by Federal Prisoners</u> <u>Who Have Been Surrendered to the Temporary</u> <u>Custody of State Authorities Pursuant to State</u> <u>Court Writs of Habeas Corpus Ad Testificandum</u> <u>and Ad Prosequendum</u>	86
9-69.560	<u>Defenses--Generally</u>	90
9-69.561	Double Jeopardy	90
9-69.562	Duress	90
9-69.563	Intoxication	91
9-69.564	Insanity	91
9-69.565	Lack of Mental Capacity	91
9-69.566	Investigative Responsibility	91
9-69.600	ESCAPE FROM CUSTODY RESULTING FROM CIVIL COMMITMENT (18 U.S.C. §1826(c))	92
9-69.601	Introduction	92
9-69.602	Legislative History	92

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

		<u>Page</u>
9-69.603	Congressional Intent	92
9-69.610	<u>Elements of the Offense--Generally</u>	92
9-69.611	Intent	93
9-69.612	Custody	93
9-69.613	Commitment	93
9-69.620	<u>Defenses--Generally</u>	93
9-69.630	<u>Investigative Responsibility</u>	93

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.000 PROTECTION GOVERNMENT PROCESSES

9-69.100 OBSTRUCTION OF JUSTICE

This chapter on obstruction of justice covers those statutes that protect the integrity of proceedings before the federal judiciary, federal executive departments and agencies, and Congress, and individuals connected with those proceedings. This area of the law was thoroughly overhauled and revised by Section 4 of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, §4, 96 Stat. 1248, 1249-53, which became effective October 12, 1982. The following statutes are now the chief elements of Chapter 73 of Title 18 of the United States Code, which is entitled "Obstruction of Justice:"

A. 18 U.S.C. §1503, which deals with the intimidation of and retaliation against grand and petit jurors and judicial officers and contains a catchall, or omnibus, clause proscribing the obstruction of "the due administration of justice;"

B. 18 U.S.C. §1505, which deals with the obstruction of antitrust investigations and contains an omnibus clause limited to Congressional and agency proceedings;

C. 18 U.S.C. §1510, which deals with obstruction of criminal investigations through bribery;

D. 18 U.S.C. §1512, which deals with personal intimidation or harassment aimed at affecting the presentation of evidence in official proceedings or impeding the communication of information to law enforcement officers;

E. 18 U.S.C. §1513, which deals with personal or property injury representing retaliation for participation in an official proceeding or for the communication of information to law enforcement officers;

F. 18 U.S.C. §1514, which creates a new civil action to restrain harassment of victims and witnesses in criminal cases; and

G. 18 U.S.C. §1515, which defines terms used in 18 U.S.C. §§1512 and 1513.

The statutes that form the remainder of Chapter 73, 18 U.S.C. §§1501-1502, 1504, 1506-1509, and 1511, are not dealt with in this chapter.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69-101 Overview

Prior to the enactment of the Victim and Witness Protection Act of 1982 (VWPA), the primary objects of Chapter 73's protection were witnesses and parties in ongoing proceedings (former 18 U.S.C. §§1503, 1505) and informants (former 18 U.S.C. §1510). The VWPA transferred most of the work that had been allocated to former 18 U.S.C. §§1503, 1505, and 1510 to 18 U.S.C. §§1512 and 1513, which are new; 18 U.S.C. §§1503, 1505, and 1510 were amended to reflect that change. 18 U.S.C. §1512 and 1513 reorganized and expanded the law.

The former scheme was organized on the basis of the identification of the victim of the illegal act as either a witness or party (former 18 U.S.C. §1503 (judicial proceedings); former 18 U.S.C. §1505 (nonjudicial proceedings) or an informant (former 18 U.S.C. §1510). 18 U.S.C. §§1512 and 1513 do away with these categories and focus instead on the intent of the wrongdoer. If the illegal act was intended to affect the future conduct of any person in connection with his/her participation in federal proceedings or his/her communication of information to federal law enforcement officers, it is covered by 18 U.S.C. §1512. If, on the other hand, the illegal act was intended as a response to past conduct of that nature, it is covered by 18 U.S.C. §1513.

18 U.S.C. §1512 and §1513 also expand the purview of Chapter 73. They protect the victims of crime, as well as witnesses and informants. And they protect any person who is intimidated, harassed, or retaliated against on account of his being, or on account of his relation to, a victim, witness, or informant. Finally, they apply to acts occurring outside of the United States.

18 U.S.C. §1512 is not limited by the pending proceeding requirement of Sections 1503 and 1505 so that "an official proceeding need not be pending or about to be instituted at the time of the offense." In addition, Section 1512 proscribes misleading conduct intended to obstruct justice and thereby fills a gap in the law of those circuits that have held that such conduct is not covered by the omnibus clauses of Sections 1503 and 1505.

18 U.S.C. §1513 also fills gaps in the law by proscribing threats of retaliation and attempts to retaliate.

18 U.S.C. §1514 is entirely new and creates a federal cause of action for injunctive relief against harassment of a victim or witness in a federal criminal case or against existing or imminent violations of 18 U.S.C. §1512 or §1513.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

18 U.S.C. §1503 and §1505, having been cannibalized by 18 U.S.C. §1512 and §1513, are now statutes that deal with special situations, tampering with and retaliating against grand and petit jurors and judicial officers, and obstructing civil antitrust investigations. However, the statutes retain a significant measure of general applicability because their omnibus clauses remain intact.

18 U.S.C. §1510, is also now a specialized statute; it prohibits the obstruction of criminal investigations through bribery. Such obstruction through other means is covered by 18 U.S.C. §1512.

9-69.102 Legislative History

Former 18 U.S.C. §1503 had its genesis in an effort by Congress to curtail the power of the judiciary to summarily punish criminal contempt. In the early nineteenth century, a federal district judge, exercising the power to punish contempt granted in Section 17 of the Judiciary Act of 1789, 1 Stat. 73, 83, imprisoned and disbarred an attorney infelicitously named Lawless for publishing a criticism of one of the judge's decisions. The judge was impeached by the House of Representatives, but acquitted by the Senate. Congress then passed Chapter 99 of the Act of March 2, 1831. See generally Bloom v. Illinois, 391 U.S. 194, 202-04 (1968); Frankfurter & Landis, Power to Regulate Contempts, 37 Harv. L. Rev. 1010, 1024-27 (1924).

Section 1 of that chapter confined conduct punishable by summary contempt to misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, misbehavior of a court's officers, and disobedience to any court process or order. 4 Stat. 487-88 (1831). (The successor to Section 1 is now codified at 18 U.S.C. §401).

Section 2 of Chapter 99 of the 1831 Act was the forerunner of former Section 1503. It provided that any person who "corruptly, or by threats or force endeavour[ed] to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or . . . corruptly, or by threats or force, obstruct[ed], or impede[d], or endeavour[ed] to obstruct or impede, the due administration of justice therein," was liable to prosecution by indictment and trial. 4 Stat. 488 (1831).

The net effect of the 1831 Act was that if conduct amounting to contempt of court occurred in the presence of the court the contemner could be punished summarily. But if contemptuous conduct, principally influencing or injuring officers, jurors, or witnesses, occurred away

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

from the court, the contemner was to be dealt with by indictment. See United States v. Essex, 407 F.2d 214, 217 (6th Cir. 1969).

In 1909, as part of a general revision of the federal penal code, Congress enacted former Section 1503, but without reference to retaliatory conduct. Act of March 4, 1909, Ch. 321, §135, 35 Stat. 1088, 1113. Proscriptions against retaliatory conduct were added in 1945. Act of June 8, 1945, Ch. 178, §159 Stat. 234, 234.

In 1940 former Section 1505, excepting its provisions on retaliatory conduct and antitrust investigations, became law. Act of January 13, 1940, Ch. 1, 54 Stat. 13. The language pertaining to retaliation was added in 1945, Act of June 8, 1945, Ch. 178, §2, 59 Stat. 234, 234, and the language pertaining to civil antitrust investigations was added in 1962, Antitrust Civil Process Act, Pub. L. No. 87-664, §6, 76 Stat. 548, 551-52.

Because it began as a contempt statute, former Section 1503 had always required proof of the pendency of a judicial proceeding. See Pettibone v. United States, 148 U.S. 197, 206-07 (1893). And this requirement was explicitly made a part of former Section 1505. As a consequence, whoever tampered with a witness before the commencement of a proceeding was beyond the reach of these two statutes.

This problem was dealt with in 1967 by the enactment of former Section 1510, Act of Nov. 3, 1967, Pub. L. No. 90-123, 81 Stat. 362, which was specifically designed to cure the problem insofar as it affected criminal investigations, H.R. Rep. No. 658 90th Cong., 1st Sess. 1-3, reprinted in 1967 U.S. Code Cong. and Ad. News 1760, 1760-62.

Still, protection for federal witnesses and informants was inadequate. What is more, federal law provided no protection for the victims of crime. In response to these concerns, Congress enacted the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248. Section 2(b) of the Act states:

The Congress declares that the purposes of this Act are:

- (1) to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process;
- (2) to ensure that the federal government does all that is possible within limits of available resources to assist victims and witnesses of crime

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

without infringing on the constitutional rights of the defendant; and

(3) to provide a model for legislation for state and local governments.

96 Stat. 1248-49 (1982), reprinted in 18 U.S.C. §1512 note.

The Act as a whole received widespread support. Moreover, Section 4 of the Act, which substantially revised the law of obstruction of justice, was strongly backed by the Department of Justice.

9-69.103 Effective Date of the Victim and Witness Protection Act of 1982

Section 4 of the Act went into effect October 12, 1982. Offenses occurring before that date should be handled under the former law.

9-69.110 18 U.S.C. §1512--Generally

81 U.S.C. §1512 proscribes conduct intended to illegitimately affect the presentation of evidence in federal proceedings or the communication of information to federal law enforcement officers. It applies to proceedings before Congress, executive departments, and administrative agencies, and to civil and criminal judicial proceedings, including grand jury proceedings.

The statute specifically abolishes the pending-proceeding requirement of former 18 U.S.C. §1503 and §1505, the scope of which was frequently contested.

18 U.S.C. §1512 also eliminates ambiguity about the class of individuals protected. Although the former law protected witnesses, parties, and informants, it was unclear whether that law reached the intimidation of third parties (for example, the spouse of a witness) for the purpose of intimidating the principal party. 18 U.S.C. §1512 plainly covers such conduct, for it speaks of conduct directed toward "another person." See 128 Cong. Rec. H8203 (daily ed. Sept. 30, 1982). The caption for 18 U.S.C. §1512, therefore, is misleading.

18 U.S.C. §1512 embraces two kinds of tampering that had been beyond the reach of federal law. First, 18 U.S.C. §1512 covers misleading conduct (misleading conduct is defined in 18 U.S.C. §1515), which some courts of appeals have held is not proscribed by the omnibus clauses of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

18 U.S.C. §1503 and §1505. Second, 18 U.S.C. §1512 creates a new misdemeanor for intentional harassment, which is intended to reach conduct less egregious than the corrupt, threatening, or forceful conduct required for a violation of former 18 U.S.C. §1503 and §1505.

Finally, 18 U.S.C. §1512 expands the class of informants protected by federal law.

9-69.111 Scope of 18 U.S.C. §1512

The prohibitions against tampering with witnesses and parties contained in former 18 U.S.C. §1503 and §1505, are now in paragraphs (a)(1) and (2) of 18 U.S.C. §1512. (This statement does not pertain to the omnibus clauses of 18 U.S.C. §1503 and §1505. For a discussion of those clauses, see USAM 9-69.131 to 69.133, 69.141, *infra*.) All forms of tampering with informants covered in former 18 U.S.C. §1510, with the exception of tampering by means of bribery, are now proscribed by 18 U.S.C. §1512(a)(2). Tampering with informants by means of bribery remains an 18 U.S.C. §1510 offense.

18 U.S.C. §1512 augments the prohibitions of the former law in several important respects. To begin with, 18 U.S.C. §1512(a)(3) sweeps more broadly than former 18 U.S.C. §1510. First, it protects individuals having information concerning a violation of a condition of probation, parole, or bail whether or not that violation constitutes a violation of any federal criminal statute. Second, it protects individuals seeking to provide information to federal judges or federal probation and pretrial services officers.

It is unclear whether 18 U.S.C. §1512(a)(3) was intended to widen the prohibition against obstructing investigations contained in former 18 U.S.C. §1510 to include investigations that are not *per se* criminal in nature, such as an FAA investigation of an aircraft accident, or a Senate committee investigation of the trucking industry. A comparison of the difference in phraseology between 18 U.S.C. §1510 and 18 U.S.C. §1512 (a)(3), however, indicates that those differences are differences of style, not substance, and that no such expansion was intended. 18 U.S.C. §1510 proscribes interference with "the communication of information relating to a violation of any criminal statute of the United States . . . to a [federal] criminal investigation;" 18 U.S.C. §1512(a)(3) proscribes interference with "the communication to a [federal] law enforcement officer . . . of information relating to the commission or possible commission of a federal offense." There is nothing to indicate that Congress intended to depart from the generally accepted meaning of "law

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

enforcement" as criminal law enforcement and of "offense" as criminal violation. See 18 U.S.C. §1515(4); 128 Cong. Rec. H8203 (daily ed. Sept. 30, 1982).

Accordingly, prosecutions for interference with legislative or administrative investigations that have not taken on the character of a criminal investigation should be brought under the omnibus clause of 18 U.S.C. §1505. See USAM 9-69.141 infra.

18 U.S.C. §1512 contains two significant additions to the types of tampering barred by federal law. First, it forbids "misleading conduct," which was not covered in those circuits that narrowly construed the omnibus clauses of 18 U.S.C. §1503 and §1505 under the rule of ejusdem generis, see United States v. Metcalf, 435 F.2d 754 (9th Cir. 1970); United States v. Essex, 407 F.2d 214 (6th Cir. 1969). See generally 128 Cong. Rec. H8203 (daily ed. Sept. 30, 1982).

Second, 18 U.S.C. §1512 forbids tampering by means of intentional harassment, which is a misdemeanor. The line between this offense and the felony of knowing intimidation or threat is unclear. The Senate bill was intended to, among other things, respond to the perception that the former law "d[id] not address the most common form of intimidation--verbal [oral] harassment." S. Rep. No. 532, 97th Cong., 2d Sess. 15, reprinted in 1982 U.S. Code Cong. and Ad. News 2515, 2521. Such harassment, oral or otherwise, took the form of statements or conduct not ostensibly threatening but nevertheless conveying an underlying sinister message. Id. The Senate bill made such acts felonies. However, the Senate later amended its bill to create the misdemeanor now set out in 18 U.S.C. §1512. No explanation for the change was given. The House analysis of this offense concludes that it reaches "thinly-veiled threats" but not "mere annoyance." 128 Cong. Rec. H8469 (daily ed. Oct. 1, 1982). But see Proposed Omnibus Victims Protection Act: Hearings on S. 2420 before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 159 (1982) (statement of ABA representative) (recommendation that annoyance unaccompanied by threat be a misdemeanor).

9-69.112 "Official Proceeding" Requirement (18 U.S.C. §1512)

18 U.S.C. §1515(1) defines "official proceeding" as:

- (A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, or a federal grand jury;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(B) a proceeding before the Congress; or

(C) a proceeding before a federal government agency which is authorized by law.

This is a restatement of the former law. As in the former law, "proceeding" is not defined.

A body of case law emerged from former 18 U.S.C. §1503 and §1505 on the meaning of "proceeding" or "pending proceeding." Most of the cases arose under former 18 U.S.C. §1505, see, e.g., United States v. Fruchtman, 421 F.2d 1019 (6th Cir.) (FTC investigation of steel industry), cert. denied, 400 U.S. 849 (1970). The pending-judicial proceeding requirement of 18 U.S.C. §1503 was much less contentious because the beginning of judicial proceedings was well defined and because the 18 U.S.C. §1503 requirement was, for the most part, circumvented by former 18 U.S.C. §1510. Former 18 U.S.C. §1510 did not circumvent the 18 U.S.C. §1505 pending-proceeding requirement because former 18 U.S.C. §1510 protected "criminal" investigations, a label not readily applicable to most investigations carried out by Congress and federal agencies.

18 U.S.C. §1512 does away with the pending-proceeding requirement for judicial matters and matters within the jurisdiction of Congress and federal agencies. In the words of that statute, "[A]n official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. §1512(d)(1).

9-69.113 State of Mind (18 U.S.C. §1512)

18 U.S.C. §1512(a) proscribes conduct "knowingly" undertaken, and 18 U.S.C. §1512(b) proscribes conduct "intentionally" undertaken. Those terms were defined in the House version of the legislation, but the definitions were deleted by the Senate as unnecessarily explicit. 128 Cong. Rec. H8469 (daily ed. Oct. 1, 1982). Nevertheless, the final bill retained the format and conventions of the House bill with respect to state of mind, and thus the section-by-section analysis of the House bill, 128 Cong. Rec. H8202-03 (daily ed. Sept. 30, 1982), is instructive.

In short, that analysis indicates that a state of mind commonly referred to as "general intent" was prescribed by the use of the terms "knowingly" and "intentionally." General intent means that the person is aware of the nature of his conduct and those circumstances incident to his conduct that make the conduct criminal. Beyond this, the mental states referred to in 18 U.S.C. §1512(a) and (b) differ slightly.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

18 U.S.C. §1512(a) requires, in addition to general intent, a specific intent, for example, the intent to influence testimony in a federal proceeding. These requirements of specific intent are self-explanatory.

18 U.S.C. §1512(b), by contrast, prescribes not specific intent but specific results, for example, preventing a witness from testifying at a federal proceeding. However, this distinction is without a difference, and the specific results should be read as forms of specific intent. As the House bill stated, "[T]he term 'intentional,' with respect to an individual's conduct or the results of that conduct, means that engaging in such conduct or causing such result is such individual's conscious objective...." 128 Cong. Rec. H8210 (daily ed. Sept. 30, 1982). (The compound mens rea requirement of 18 U.S.C. §1512, general intent and specific intent, applies as well to 18 U.S.C. §1513, although there the specific intent is different.)

18 U.S.C. §1512(c) codifies existing case law that holds that influencing a witness is not a strict liability offense. See United States v. Johnson, 585 F.2d 119, 128 (5th Cir. 1978). One may influence a witness to tell the truth. See id. However, under 18 U.S.C. §1512(c) the burden of proving this benign intent, which is an affirmative defense, is on the defendant, and preponderance of the evidence is the standard of proof.

18 U.S.C. §1512(e) contains an important qualification of the mens rea required under the statute: it obviates the need to prove that the defendant was aware of the federal nature of the proceeding or investigation interfered with. See 128 Cong. Rec. H8204 (daily ed. Sept. 30, 1982). A reference to Congressional proceedings, however, is not contained in 18 U.S.C. §1512(e).

9-69.114 Constitutionality of 18 U.S.C. §1512(c)

One unique feature of 18 U.S.C. §1512(c) is the way in which it allocates the burden of proof on this defense to witness tampering charges. Under that section, "it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully," 18 U.S.C. §1512(c). This allocation of the burden of proof to the defendant has led some individuals to question the constitutionality of this section.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Affirmative defenses, such as the one created by 18 U.S.C. §1512(c), expose a tension between two principles of constitutional law. Historically, the Supreme Court has held that it is constitutionally permissible for legislatures to establish affirmative defenses to criminal charges and place the burden of proof with respect to these defenses on the defendant. See Leland v. Oregon, 343 U.S. 790 (1952) (insanity defense). Yet the Court has also clearly held that the Constitution requires that the government prove all elements of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970).

In re Winship acts as a constitutional limit on legislative discretion in this area of criminal law. Following Winship, a legislature cannot constitutionally diminish the burden of proof in a criminal case. Nor can it shift this burden from the government to the defendant. In Mullaney v. Wilbur, 421 U.S. 684 (1975), the Supreme Court suggested that Winship, might also limit the discretion of legislatures when establishing affirmative defenses. Construed broadly Mullaney, could be read to prohibit any law which assigns the burden of proof on a factual question to the defendant.

The Supreme Court has, however, subsequently resolved this constitutional question in favor of the continued exercise of legislative discretion over affirmative defenses. For example, in Patterson v. New York, 432 U.S. 197 (1977), the Supreme Court upheld the constitutionality of a New York statute which created an affirmative defense to murder. Under this statutory scheme the government initially bore the burden of proof on all elements of the offense of murder. Once the government had carried its burden with respect to these elements, the defendant could reduce the charge to manslaughter by resorting to this affirmative defense. In order to take advantage of this defense the defendant had to prove by a preponderance of the evidence that he acted "under the influence of an extreme emotional disturbance."

The Court held that this procedure was constitutionally permissible. The Court rejected the argument that In re Winship, limited legislative discretion in this area, noting that:

Long before Winship, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

redefinition of crime and reduction of the prosecution's burden that a new constitutional rule was required. This was not the problem to which Winship was addressed.

ID. at 211.

Patterson v. New York draws an important distinction between the elements of a criminal offense, which must be proven by the government, and an affirmative defense, which the defendant may be required to prove. Under Patterson, the constitutionality of a statute turns on the language used by the legislature. Due process is satisfied when the government is required to prove all of the elements of the offense, as defined by the legislature. Due process does not require that the government accept the additional burden of disproving every fact constituting an affirmative defense to the charge. Therefore, legislatures may fashion rules which place the burden of proof of affirmative defenses on the defendant. As long as the government's burden of proof on the elements of the offense remains unchanged, this affirmative defense survives constitutional scrutiny.

The affirmative defense established by 18 U.S.C. §1512(c) provides an excellent example of this principle. 18 U.S.C. §1512 generally proscribes someone from knowingly intimidating another person with the intent to influence that person's testimony. Therefore, a prosecution under 18 U.S.C. §1512 would require proof of: (1) an effort to threaten, force or intimidate another person; (2) an intent to influence that person's testimony. On both of these elements the government would bear the burden of proof beyond a reasonable doubt.

Once the government had proven both an act of intimidation and an intent to influence the testimony of another, it would be entitled to a conviction unless the defendant could take advantage of the limited affirmative defense provided by 18 U.S.C. §1512(c). This defense requires that the defendant show by a preponderance that he was engaged solely in lawful conduct and that his sole purpose was to encourage truthful testimony. This defense would only become an issue, however, after the government had carried its initial burden of proof on all of the elements of the offense. Construed in this way, 18 U.S.C. §1512(c) does not shift the burden of proof to the defendant on an essential element of the offense. Therefore, creation of this affirmative defense is a constitutionally permissible exercise of legislative discretion. See Patterson v. New York, 432 U.S. 197 (1977).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.120 18 U.S.C. §1513

9-69.121 Scope of 18 U.S.C. §1513

18 U.S.C. §1513 complements 18 U.S.C. §1512 by proscribing conduct amounting to retaliation for participation in federal legislative, administrative, or judicial proceedings or for the communication of information to federal law enforcement officers. The prohibitions against retaliating against witnesses, parties, and informants contained in former 18 U.S.C. §§1503, 1505, and 1510 are now in 18 U.S.C. §1513(a). (This statement does not pertain to the omnibus clauses of 18 U.S.C. §1503 and §1505. For a discussion of those clauses, see USAM 9-69.131 to 69.133, 69.141 *infra*.) The structure of 18 U.S.C. §1513 is similar to that of 18 U.S.C. §1512.

18 U.S.C. §1513, like 18 U.S.C. §1512, eliminates ambiguity about the class of people protected. Although the former law protected witnesses and parties, it was unclear whether that law reached retaliation against third parties (for example, the spouse of a witness) in response to the participation of the principal party in a federal proceeding. 18 U.S.C. §1513 plainly covers such conduct. See 128 Cong. Rec. H8204 (daily ed. Sept. 30, 1982). The caption for 18 U.S.C. §1513, therefore, is misleading. (Under the plain language of former 18 U.S.C. §1510, retaliation against third parties for the principal party's communication of information to a federal criminal investigator was proscribed. This proscription is carried forward in 18 U.S.C. §1513.)

18 U.S.C. §1513 embraces two types of conduct heretofore beyond the purview of federal law. First, the statute reaches threats of retaliation. Second, it reaches attempts to retaliate.

Finally, 18 U.S.C. §1513, like 18 U.S.C. §1512, expands the class of informants protected by federal law.

9-69.122 State of Mind (18 U.S.C. §1513)

18 U.S.C. §1513, like 18 U.S.C. §1512, proscribes conduct "knowingly" undertaken. As explained in USAM 9-69.113 *supra*, this term designates general intent. In addition to general intent, the prosecutor must prove one of the two forms of specific intent set out in the statute. Thus, 18 U.S.C. §1513, like 18 U.S.C. §1512, has a compound state-of-mind requirement.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Unlike 18 U.S.C. §1512(e), 18 U.S.C. §1513 does not excuse the prosecutor from proving that the defendant knew he was obstructing a federal proceeding or investigation. The section-by-section analysis of H.R. 7191 explains: "By the nature of the offense, the wrongdoer knows that the person retaliated against has been a party to or witness in a federal proceeding or has reported information to a federal law enforcement officer." 128 Cong. Rec. H8206 (daily ed. Sept. 30, 1982).

This explanation is flawed, for it does not allow for the possibility that the wrongdoer will not be the party aggrieved by the federal proceeding or investigation. The wrongdoer, for example, could be hired. Furthermore, it is foreseeable that the aggrieved party will know that a person has been "talking" without knowing whether the recipients of the information are federal or state authorities.

9-69.130 18 U.S.C. §1503

9-69.131 Scope of 18 U.S.C. §1503

18 U.S.C. §1503, as amended by the Victim and Witness Protection Act of 1982 (VWPA), forbids tampering with and retaliating against grand jurors, petit jurors, and officers in or of any court of the United States. Section 1503 also contains an omnibus clause prohibiting obstruction of "the due administration of justice." (The omnibus clause is discussed in USAM 9-69.131 to .133 *infra*.) It is not expected that existing case law under 18 U.S.C. §1503 will be affected by the VWPA.

The term "officer in or of any court of the United States" includes federal district judges, United States v. Jones, 663 F.2d 567 (5th Cir. 1981) (by implication); United States v. Glickman, 604 F.2d 625 (9th Cir. 1979) (by implication), cert. denied, 444 U.S. 1080 (1980); United States v. Fasolino, 586 F.2d 939 (2d Cir. 1978) (per curiam) (by implication); United States v. Margoles, 294 F.2d 371, 373 (7th Cir.), cert. denied, 368 U.S. 930 (1961), and U.S. Attorneys, United States v. Jones, 663 F.2d 567 (5th Cir. 1981) (by implication); see United States v. Polakoff, 112 F.2d 888, 890 (2d Cir.), cert. denied, 311 U.S. 653 (1940). Presumably, on the basis of that case law and in light of 18 U.S.C. §1503's purpose of protecting the integrity of federal judicial proceedings, that term also includes Supreme Court Justices, federal circuit judges, federal bankruptcy judges, federal magistrates, clerks of federal courts, law clerks to federal judges, federal court staff attorneys, federal court reporters, all federal prosecutors, and defense counsel.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Furthermore, because 18 U.S.C. §1503 applies to civil, as well as criminal, judicial proceedings, Roberts v. United States, 239 F.2d 467, 470 (9th Cir. 1956); Sneed v. United States, 298 F.2d 911, 912 (5th Cir.), cert. denied, 265 U.S. 590 (1924); see Nye v. United States, 137 F.2d 73 (4th Cir.) (by implication). cert. denied, 320 U.S. 755 (1943), private attorneys also are, arguably, officers of the court.

A venireman is a "petit juror" within the meaning of section 1503. United States v. Jackson, 607 F.2d 1219, 1222 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980); see United States v. Osborn, 415 F.2d 1021, 1024 (6th Cir. 1969) (en banc), cert. denied, 396 U.S. 1015 (1970).

9-69.132 Pending-Proceeding Requirement (18 U.S.C. §1503)

A prerequisite to prosecution under 18 U.S.C. §1503 (including the omnibus clause) is a pending judicial proceeding. see, e.g., United States v. Johnson, 605 F.2d 729, 730 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); United States v. Baker, 494 F.2d 1262, 1265 (6th Cir. 1974). See generally Pettibone v. United States, 148 U.S. 197, 206-07 (1893).

A grand jury investigation is such a proceeding. See, e.g., United States v. Campanale, 518 F.2d 352, 356 (9th Cir. 1975) (per curiam), cert. denied, 423 U.S. 1050 (1976). It has been held that a grand jury proceeding is pending once a "subpoena [has been] issued in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before [a regularly sitting] grand jury." United States v. Walasek, 527 F.2d 676, 678 (3d Cir. 1975). And the same court, the Third Circuit, has held that a grand jury need not be aware of the issuance of a subpoena in its name or be otherwise involved in the investigation to which the subpoena relates in order for a grand jury proceeding to be pending. United States v. Simmons, 591 F.2d 206, 210 (3d Cir. 1979). It is necessary only that the subpoena meet the Walasek standard set out above. Id. But cf. United States v. Ryan, 455 F.2d 728 (9th Cir. 1972) (grand jury subpoenas issued at request of Internal Revenue Service agents to circumvent problem with administrative subpoenas did not mark beginning of grand jury proceeding for purpose of pending-proceeding requirement.)

The pending-proceeding issue has also arisen in the context of witness tampering after conviction and the filing in the district court of a notice of appeal to the court of appeals. In United States v. Chandler, 604 F.2d 972 (5th Cir. 1979), cert. dismissed, 444 U.S. 1104 (1980), the court held that an attempt to kill the chief prosecution witness during

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the pendency of an appeal from a conviction to prevent him from testifying at a possible new trial was a violation of former 18 U.S.C. §1503, although the court's analysis centered on the term "witness" and not the pending-proceeding requirement. In United States v. Johnson, 605 F.2d 729 (4th Cir.1979), cert. denied, 444 U.S. 1020 (1980), the court held that "a criminal action remains pending in the district court until disposition is made of any direct appeal taken by the defendant assigning error that could result in a new trial." 605 F.2d at 731. Thus, former 18 U.S.C. §1503 embraced the defendant's effort to persuade a witness to falsely recant his trial testimony made while the appeal from the defendant's conviction was pending. Id. at 729.

Insofar as tampering with witnesses goes, the pending-proceeding requirement is now defunct. See 18 U.S.C. §1512(d)(1). Tampering with informants was not fettered to a pending-proceeding requirement under former 18 U.S.C. §1510, see USAM 9-69.150 infra, and this continues to be the case under 18 U.S.C. §1512. Tampering with jurors and court officers, however, continues to be subject to the pending-proceeding requirement.

To the extent that conduct can be characterized as retaliation, as opposed to tampering, the pending-proceeding requirement is and always has been irrelevant. See United States v. Roberts, 638 F.2d 134, 135 (9th Cir.) (per curiam) (18 U.S.C. §1510), cert. denied, 452 U.S. 909 (1981); United State v. Woodmansee, 354 F.2d 235 (2d Cir. 1965) (per curiam) (by implication) (§1503); United States v. Verra, 203 F. Supp. 87, 89 (S.D.N.Y. 1962) (§1503); S. Rep. No. 225, 79th Cong., 1st Sess. 1-2, reprinted in 1945 U.S. Code Cong. Serv. 723, 723-2. H.R. Rep. No. 658, 90th Cong., 1st Sess. 1-3, reprinted in 196 U.S. Code Cong. & Ad. News 1760, 1760-65.

9-69.133 State of Mind (18 U.S.C. §1503)

As one court dryly observed, "The state-of-mind requirement of 18 U.S.C. §1503 has long confused the courts." United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir.), cert. denied, 441 U.S. 963 (1979).

18 U.S.C. §1503 proscribes certain undertakings, for example, tampering with a petit juror or obstructing the due administration of justice, from being carried out in certain ways, for example, by force. The state of mind that together with such conduct constitutes a violation of 18 U.S.C. §1503 is described in the statutory term "corruptly," which is part of both the main clause and the omnibus clause of the statute.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The great weight of authority holds that "corruptly" connotes specific intent. See United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980); United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979); United States v. Harris, 558 F.2d 366, 369 (7th Cir. 1977); United States v. White, 557 F.2d 233, 235 (10th Cir. 1977) (per curiam); United States v. Haldeman, 559 F.2d 31, 114-15 (D.C. Cir. 1976) (per curiam), cert. denied, 431 U.S. 933 (1977). See generally Pettibone v. United States, 148 U.S. 197, 207 (1893). "Corruptly" has been variously stated to mean "for an evil or wicked purpose," United States v. Ryan, 455 F.2d 728, 734 (9th Cir. 1972); "with the purpose of obstructing justice," United States v. Rasheed, 663 F.2d at 852; and "for an improper motive," United States v. Haas, 583 F.2d at 220.

Thus, in addition to proving that the defendant knowingly or deliberately committed the act in question, the government must prove that the defendant had an improper or evil purpose in mind.

"[T]his specific intent may be established by circumstantial evidence." United States v. White, 557 F.2d at 235. But the "intent may [only] be inferred from all the circumstantial evidence introduced at trial"; it "may [not] be presumed as a matter of law from the circumstances." United States v. Haldeman, 559 F.2d at 116 (emphases in original).

The specific intent requirement also entails the burden of proving that the defendant was aware of the pendency of a federal judicial proceeding and acted with the purpose of interfering with that proceeding. See Pettibone v. United States, 148 U.S. at 207; United States v. Haas, 583 F.2d at 220; United States v. White, 557 F.2d at 236; United States v. Baker, 494 F.2d 1262, 1265 (6th Cir. 1974).

The only deviation from the rule that "corruptly" connotes specific intent occurred in United States v. Neiswender, 590 F.2d 1269 (4th Cir.), cert. denied, 441 U.S. 963 (1979). There, during a trial, Mr. Neiswender made an offer to the defense counsel to "guarantee" a jury acquittal. In return for the guarantee, Neiswender wanted money. Unrelated events resulted in the declaration of a mistrial.

For initiating this transaction, Neiswender was charged with violating the omnibus clause of 18 U.S.C. §1503. As a defense, the defendant argued that he intended only to defraud the defense counsel. The defendant never intended, the argument continued, to obstruct justice, to cause the defense counsel to reduce his/her efforts in reliance on the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

guarantee, for such reduced efforts would raise the likelihood of conviction, which in turn would expose Neiswender's scam.

The Fourth Circuit rejected Neiswender's argument, holding that although Neiswender specifically intended not to obstruct justice, the diminution of the defense counsel's efforts was a reasonably foreseeable result of his conduct, and therefore Neiswender had acted with a state of mind cognizable under 18 U.S.C. §1503: "[A] defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates 18 U.S.C. §1503 even if his hope is that the judicial machinery will not be seriously impaired." 590 F.2d at 1274.

It is worth noting that "corruptly" serves two discrete functions. The first, as just discussed, relates to the state-of-mind issue. The second function of that word is to describe some of the means by which the obstruction of justice is prohibited. Accordingly, it is possible to obstruct justice under 18 U.S.C. §1503 by means other than those specifically enumerated, namely, threats, force, and threatening letter or communication. See, e.g., United States v. Rasheed, 663 F.2d 843, 850-52 (9th Cir. 1981) (concealing documents requested by grand jury subpoena is obstructing justice corruptly), cert. denied, 454 U.S. 1157 (1982). See generally USAM 9-69.133 infra.

9-69.134 Omnibus Clause (18 U.S.C. §1503)

The omnibus clause of 18 U.S.C. §1503 provides:

Whoever...corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be (guilty of an offense).

In delimiting the scope of this provision, the courts have not been especially concerned with defining the conduct that constitutes the criminal object the provision proscribes--interference with the due administration of justice. Little improvement could be made on the Ninth Circuit's statement that interference with the due administration of justice is "conduct designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court." Haili v. United States, 260 F.2d 744, 746 (9th Cir. 1958).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The dispute over the omnibus clause has instead been over the means used to achieve the object of interfering with the due administration of justice: What means or methods are forbidden by the omnibus clause?

By its terms, the omnibus clause covers threats, force, and threatening letters and communications. The proscription of other methods of obstructing justice must, by the phraseology of the omnibus clause, be tied to the word "corruptly."

The preferred interpretation of the omnibus clause in this respect is exemplified by United States v. Walasek, 527 F.2d 676 (3d Cir. 1975). There, the defendant was charged with violating the omnibus clause of 18 U.S.C. §1503 for knowingly destroying documents sought by a federal grand jury subpoena. The defendant argued that the rule of ejusdem generis compelled the holding that the omnibus clause proscribed only those obstructions of justice accomplished by means of coercion or intimidation. The Third Circuit rejected the argument, noting that its acceptance would make "corruptly" surplusage. 527 F.2d at 679 n.9. The court held that the destruction of documents came within "the ordinary meaning" of "corruptly . . . obstruct[ing] or impeded[ing] the due administration of justice." Id. at 681.

The Fifth Circuit likewise rejected a slightly broader ejusdem generis argument and held that the omnibus clause's purview reached an attempt to sell grand jury transcripts. United States v. Howard, 569 F.2d 1331, 1333-36 (5th Cir.), cert. denied, 439 U.S. 834 (1978). In Howard, the "defendants argue[d] that the statute's specific language limit[ed] the omnibus clause so that 'obstructing the due administration of justice' mean[t] influencing witnesses, jurors, and officials in ways other than, [but] similar to, those expressly enumerated in the first part of the section." 569 F.2d at 1333. To this argument the court replied:

We cannot agree with this reading of the statute because it renders the omnibus clause superfluous and because the most natural construction of the clause is that it prohibits acts that are similar in result, rather than manner, to the conduct described in the first part of the statute.

Id. (citation and footnote omitted). See United States v. Solow, 138 F. Supp. 812, 815 (S.D.N.Y. 1956).

By contrast, the Sixth and Ninth Circuits accepted, for a time, the ejusdem generis argument and limited the reach of the omnibus clause. See United States v. Ryan, 455 F.2d 728, 733 (9th Cir. 1972) (destruction and falsification of documents subpoenaed by federal grand jury not a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

violation of omnibus clause); United States v. Metcalf, 435 F.2d 754, 756-57 (9th Cir. 1970) (purchase of vehicle previously purchased with bank-robbery proceeds and therefore evidence of a crime not the kind of intimidating action to which omnibus clause is limited); United States v. Essex, 407 F.2d 214, 218 (6th Cir. 1969) (filing false affidavit with court does not alone violate omnibus clause). The holdings of the cases just cited, however, have been undermined by recent decisions in those circuits.

In United States v. Faudman, 640 F.2d 20 (6th Cir. 1981), the Sixth Circuit rejected the eiusdem generis argument and noted its agreement with United States v. Walasek, 527 F.2d 676 (3d Cir. 1975). At issue in Faudman was the destruction and alteration of corporate records sought by a federal grand jury. The court reasoned that the disjunctive wording of the methods phrase of the omnibus clause meant that intimidating conduct was not a prerequisite for a violation of the omnibus clause. 640 F.2d at 23. The court distinguished its Essex decision by limiting it to corrupt conduct that is solely of a personal, testimonial nature, affidavits, testimony, which can be prosecuted only as perjury in the Sixth Circuit. Id.

Similarly, the Ninth Circuit departed from the prevailing understanding of its law and held that the concealment of documents subpoenaed by a federal grand jury amounted to an omnibus clause offense. United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); see United States v. Brown, 688 F.2d 596, 598 (9th Cir. 1982). The Rasheed court read Ryan as a case turning on whether the subpoenaed documents, which were destroyed or falsified, were material to the grand jury investigation. 663 F.2d at 851. And Metcalf was viewed as a case turning on whether a judicial proceeding was pending at the time of the wrongdoing. Id. at 851-52. Statements in those cases indicating acceptance of the eiusdem generis argument were dismissed as dicta. Id. at 851. Like the Sixth Circuit in Faudman, the Rasheed court cited United States v. Walasek, 527 F.2d 676 (3d Cir. 1975) with approval. 663 F.2d at 852.

In light of these developments, it can be fairly said that the courts of appeals have uniformly given a broad reading to the omnibus clause of 18 U.S.C. §1503, whose scope is now principally limited by the pending-judicial proceeding requirement. See USAM 9-69.131 supra.

An equally broad reading was given to the less frequently litigated omnibus clause of 18 U.S.C. §1505, whose pertinent language is nearly identical to 18 U.S.C. §1503's omnibus clause, in United States v. Alo, 439 F.2d 751 (2d Cir.), cert. denied, 404 U.S. 850 (1971). There, the Second Circuit held that false and evasive testimony before an SEC

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

investigative proceeding was an omnibus clause offense, rejecting the eiusdem generis argument. 439 F.2d at 753-54. In light of the Victim and Witness Protection Act of 1982 (VWPA), the question may arise whether the omnibus clause of 18 U.S.C. §1503 still embraces witness tampering. It could be argued that witness tampering is now covered exclusively by new 18 U.S.C. §1512.

The legislative history of the VWPA, as set out below, however, compels the conclusion that the omnibus clause of 18 U.S.C. §1503 still reaches witness tampering.

As reported out of committee, 18 U.S.C. §1512 contained an omnibus clause patterned after the omnibus clauses of 18 U.S.C. §1503 and §1505. It read:

Whoever...with intent corruptly, or by threats of [sic] force, or by any threatening letter or communication, influences, obstructs, impedes, or attempts to corruptly, or by threats of [sic] force, or by threatening letter or communication, influences, obstructs, impedes the --

- (A) enforcement and prosecution of federal law;
- (B) administration of law under which an official proceeding is being or may be conducted; or
- (C) exercise of a federal legislative power of inquiry, shall be [guilty of an offense].

S. 2420, 97th Cong. 2d Sess., 128 Cong. Rec. S11430 (daily ed. Sept. 14, 1982).

The Senate Report explained:

["] The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined. ["]

In the Committee's view, this observation leads to the conclusion that the purpose of preventing an obstruction or miscarriage of justice cannot be fully carried out by a simple enumeration of the commonly prosecuted obstruction offenses. There must also be

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

protection against the rare type of conduct that is the product of the inventive criminal mind and which also thwarts justice.

In order to reach such cases...the Committee determined to include subsection (a)(3). The Committee does not intend that the doctrine of ejusdem generis be applied to limit the coverage of this subsection. Instead, the analysis should be functional in nature to cover conduct the function of which is to tamper with a witness, victim, or informant in order to frustrate the ends of justice. For example, a person who induces another to remain silent or to give misleading information to a federal law enforcement officer would be guilty under subsection (a)(3), irrespective of whether he employed deception, intimidation, threat, or force as to the person.

The first branch of the proposed subsection referring to the "enforcement and prosecution of federal law" is designed to carry forward the basic coverage in 18 U.S.C. §1503. The latter two branches of the subsection, referring to the "administration of a law under which an official proceeding is being conducted" and to the "exercise of a legislative power of inquiry," are designed to continue the general scope of the final paragraphs of 18 U.S.C. §1505.

S. Rep. No. 532, 97th Cong., 2d Sess. 17-19, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2523-25.

As the Report noted, the proposed omnibus clause in all material respects duplicated in phraseology and purpose the existing omnibus clauses of 18 U.S.C. §1503 and §1505. For this reason, and one other, the proposed omnibus clause was omitted from the final version of 18 U.S.C. §1512.

Subsection (3) of section 1512(a) of the Senate passed bill, general obstruction of justice residual clause of the intimidation section, was taken out of the bill as beyond the legitimate scope of this witness protection measure. It also is probably duplicative of abstrusion [sic] of justice statutes already in the books.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

128 Cong. Rec. S13063 (daily ed. Oct. 1, 1982) (remarks of Senator Heinz).

Congress, as the Senate Report reflects, plainly desired that there be a federal obstruction of justice statute as spacious as "the imagination of the criminally inclined." Such a statute was not part of the VWPA, however, but only because (1) it may have been nongermane to the Act and (2) it would have "probably duplicat[ed]" existing law. From this one must conclude that Congress did not intend to contract the purview of the omnibus clause of 18 U.S.C. §1503.

Moreover, the pertinent legislative history of the VWPA evinces no sentiment for the contraction of any obstruction of justice statute. See S. Rep. No. 532, 97th Cong., 2d Sess. 14-22, 27-29, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2520-28, 2533-35; 128 Cong. Rec. H8203-05 (daily ed. Sept. 30, 1982) (Section-by-Section Analysis of H.R. 7191); 128 Cong. Rec. H8469 (daily ed. Oct. 1, 1982) (House analysis of Senate amendments to House-passed bill); 128 Cong. Rec. X13064 (daily ed. Oct. 1, 1982) (statement of Sen. Laxalt) ("S. 2420 deals with th[e] problem [of victim/witness intimidation] by broadening and rewriting the intimidation sections of our federal criminal law.") (Emphasis added).

It is against this backdrop that the following statement of Senator Heinz on the relation between 18 U.S.C. §1512 and §1503 must be read:

As mentioned above, 18 U.S.C. 1503 already provides some witness protections—but only as to witnesses under subpoena [sic] in active cases. The Senate-passed bill allowed a slight overlap between old section 1503 and new sections 1512 and 1513. The House version amends section 1503 so it will make no mention of, and provide no protection to, subpoenaed [sic] witnesses. The compromise accepts the House position. By amending section 1503 in this way, the proposal will contribute to a clearer and less duplicative law.

128 Cong. Rec. S13063 (daily ed. Oct. 1, 1982).

The assertion that "section 1503 [as amended]...will provide no protection to...witnesses" cannot be construed as a comment about the omnibus clause of 18 U.S.C. §1503. The elimination of 18 U.S.C. §1503's references to witnesses was intended only to avoid an overlap between 18

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S.C. §1512 and §1503, not to diminish the omnibus clause. This is clear from the legislative history set out and discussed above and from the following statement taken from the House analysis of the bill that became the VWPA:

Section 3(c) [which later became section 4(c)] of the legislation makes technical amendments to 18 U.S.C. §1503, which deals with tampering with federal witnesses, jurors, and court officers. The amendments delete language from section 1503 pertaining to witness intimidation and retaliation because the conduct dealt with by that language is covered in new sections 1512 and 1513.

128 Cong. Rec. H8295 (daily ed. Sept. 30, 1982) (emphasis added).

Convictions under the omnibus clause of 18 U.S.C. §1503 have been based on the following conduct:

A. Endeavoring to suborn perjury, United States v. Partin, 552 F.2d 621 (5th Cir.), cert. denied, 434 U.S. 903 (1977); Falk v. United States, 370 F.2d 472 (9th Cir. 1966), cert. denied, 387 U.S. 926 (1967).

B. Endeavoring to influence a witness to make himself unavailable to testify, United States v. Partin, 552 F.2d 621 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

C. Giving false denials of knowledge and memory, United States v. Griffin, 589 F.2d 200 (5th Cir.), cert. denied, 444 U.S. 825 (1979), or false and evasive testimony, United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972). But see United States v. Faudman, 640 F.2d 20 (6th Cir. 1981) (construing United States v. Essex, 407 F.2d 214 (6th Cir. 1969)) (perjury alone does not violate omnibus clause).

D. Falsifying a report likely to be submitted to a grand jury, United States v. Shoup, 608 F.2d 950 (3d Cir. 1979).

E. Destroying, altering, or concealing subpoenaed documents, United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Faudman, 640 F.2d 20 (6th Cir. 1981); United States v. Simmons, 591 F.2d 206 (3d Cir. 1979); United States v. Walasek, 527 F.2d 676 (3d Cir. 1975); United States v. Weiss, 491 F.2d 460 (2d Cir.), cert. denied, 419 U.S. 833 (1974).

MARCH 12, 1984

Ch. 69, p. 23

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

F. Endeavoring to sell grand jury transcripts, United States v. Howard, 569 F.2d 1331 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

G. Endeavoring to warn the target of a valid search warrant, United States v. Brown, 688 F.2d 596 (9th Cir. 1982) (dicta).

H. Offering to sell a guarantee of a jury acquittal to a defense counsel, United States v. Neiswender, 590 F.2d 1269 (4th Cir.), cert. denied, 441 U.S. 963 (1979).

I. Endeavoring to influence through a third party a judge, United States v. Glickman, 604 F.2d 625 (9th Cir. 1979), cert. denied, 444 U.S. 1080 (1980); United States v. Fasolino, 586 F.2d 939 (2d Cir. 1978) (per curiam), or a juror, United States v. Ogle, 613 F.2d 233 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

9-69.140 18 U.S.C. §1505

9-69.141 Scope of 18 U.S.C. §1505

18 U.S.C. §1505 was changed radically by the Victim and Witness Protection Act of 1982. A prohibition against obstruction of process issued under the Antitrust Civil Process Act, 15 U.S.C. §§1311-1314, and an omnibus clause pertaining to pending proceedings before Congress and federal departments and agencies are all that remain.

Tampering with witnesses and retaliating against witnesses and parties in connection with administrative or legislative proceedings, offenses under former 18 U.S.C. §1505, are now covered by 18 U.S.C. §1512 (tampering) and §1513 (retaliation).

9-69.142 Omnibus Clause (18 U.S.C. §1505)

The omnibus clause of 18 U.S.C. §1505 parallels its counterpart in 18 U.S.C. §1503 in language and purpose, and most of the law construing the latter is applicable to the former.

The omnibus clause of 18 U.S.C. §1505 requires a corrupt state of mind. See United States v. Browning, 630 F.2d 694, 700-01 (10th Cir. 1980), cert. denied, 451 U.S. 988 (1981). See generally USAM 9-69.132 supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The provision is not limited by the rule of ejusdem generis. United States v. Alo, 439 F.2d 751, 753-54 (2d Cir.), cert. denied, 404 U.S. 850 (1971); see United States v. Browning, Inc., 572 F.2d 720, 724-25 (10th Cir.), cert. denied, 439 U.S. 822 (1978). See generally USAM 9-69.133 supra.

But it is contrained, like its counterpart in 18 U.S.C. §1503, by the rule that the obstruction of justice in question must be material to a pending proceeding. This rule has been the focus of many of the reported decisions arising out of 18 U.S.C. §1505.

Some courts have applied the pending-proceeding requirement in a relaxed manner. In United States v. Fruchtman, 421 F.2d 1019 (6th Cir.), cert. denied, 400 U.S. 849 (1970), the Sixth Circuit rejected the "contention that the word 'proceeding' refers only to those steps before a federal agency which are juridical or administrative in nature." 421 F.2d at 1021. Instead, the court held that "'proceeding' is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency." Id. The court concluded that the submission of falsified documents to the attorney in charge of a Federal Trade Commission investigation of the steel industry during the investigation was a 18 U.S.C. §1505 offense. See id.

A similar ruling was handed down by the Tenth Circuit in a case nvolving an investigation by the United States Customs Service of the corporate defendants' practice of importing firearms. United States v. Browning, Inc., 572 F.2d 720 (10th Cir.), cert. denied, 439 U.S. 822 (1978). While the Customs Service was undertaking "an initial or preliminary evaluation . . . which was a prelude to a criminal investigation," 572 F.2d at 724, of the matter, the individual defendant advised a foreign exporter of firearms to lie to Customs Service investigators. The court held the pending-proceeding requirement satisfied:

In sum, the term "proceeding" is not, as one might be inclined to believe, limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is much more inclusive and which no longer limits itself to formal activities in a court of law. Rather, the investigation or search for the true facts such as that which is described in the indictment here is not to be ruled as a non-proceeding simply because it is preliminary to indictment and trial.

Id.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Other cases, however, can be read as establishing a slightly stricter pending-proceeding requirement, one that calls for a formal act. In Rice v. United States, 356 F.2d 709 (8th Cir. 1966), a case arising under the non-omnibus portion of former section 1505, acts of witness intimidation against union members were carried out prior to the filing of a formal complaint of unfair labor practices with the National Labor Relations Board by the general counsel of the NLRB. The court noted that "(g)overnmental agency proceedings frequently embrace both investigative and adjudicative proceedings," id. at 713, and held that acts in question occurred while a proceeding was pending, id. at 715. But the court took pains to point out that the act followed the filing of unfair labor charges with the regional director of the NLRB by the individuals who were intimidated.

In United States v. Batten, 226 F. Supp. 492 (D.D.C. 1964), aff'd mem., No. 18610 (D.C. Cir. Oct. 15, 1964), cert. denied, 380 U.S. 912 (1965), the 18 U.S.C. §1505 offense involved the subornation of perjury before a Securities and Exchange Commission hearing that was part of an investigation instituted by formal order of the SEC. The court held "that the term 'proceeding' as used in 18 U.S.C. §1505, should be construed broadly enough to include any investigation directed by a formal order of the Commission, at which a designated officer takes testimony under oath." 226 F. Supp. at 494.

Investigations by the Internal Revenue Service are Section 1505 proceedings. See United States v. Lewis, 657 F.2d 44, 45 (4th Cir.) (ploy to frustrate IRS effort to collect delinquent taxes), cert. denied, 454 U.S. 1086 (1981); United States v. Vixie, 592 F.2d 1277, 1278 (9th Cir. 1976) (per curiam) (submission of false document in response to IRS subpoena); United States v. Persico, 520 F. Supp. 96, 101-02 (E.D.N.Y. 1981) (endeavor to bribe IRS agent to influence IRS's criminal investigation of individual's tax liability).

Investigations by the Federal Bureau of Investigation, on the other hand, are not. United States v. Higgins, 511 F. Supp. 453, 455-56 (W.D. Ky. 1981); cf. United States v. Scratow, 137 F. Supp. 620, 621-22 (W.D. Pa. 1956) (FBI investigation is not a §1503 "proceeding"). But cf. 18 U.S.C. §§1510, 1512(a)(3), (b)(2).

The omnibus clause of 18 U.S.C. §1505 continues to embrace witness tampering. See USAM 9-69.133, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.150 18 U.S.C. §1510

Former 18 U.S.C. §1510 proscribed endeavors to obstruct federal criminal investigations "by means of bribery, misrepresentation, intimidation, or force or threats thereof," and it proscribed retaliation against informants. Enacted in 1967, it was intended "to plug a loophole in the protection the government [could] provide to its own witnesses and informants" as a result of the pending-proceeding requirement of Sections 1503 and 1505. H.R. Rep. No. 658, 90th Cong., 1st Sess. 2, reprinted in 1967 U.S. Code Cong. & Ad. News 1760, 1761; see United States v. San Martin, 515 F.2d 317, 320 (5th Cir. 1975).

The chief objective of the provision was the protection of the flow of information to federal investigators concerning organized crime and racketeering activities before the institution of formal judicial proceedings. See H.R. Rep. No. 658, 90th Cong., 1st Sess. 2-3, reprinted in 1967 U.S. Code Cong. & Ad. News 1760, 1761-62.

Obstructions of federal criminal investigations by all means enumerated in former 18 U.S.C. §1510 other than bribery are now covered by 18 U.S.C. §1512(a). Obstructions by bribery remain 18 U.S.C. §1510 offenses. Obstructions by intentional harassment, a new misdemeanor, is a 18 U.S.C. §1512(b) offense. Retaliation against informants is now covered by 18 U.S.C. §1513.

Although former 18 U.S.C. §1510 barred threats aimed at deterring the future communication of information to federal criminal investigators, it did not cover threats of retaliation for such past communication. See United States v. Segal, 649 F.2d 599, 602-03 (8th Cir. 1981); United States v. San Martin, 515 F.2d 317, 320-21 (5th Cir. 1975). Only acts of retaliation were within the statute's purview. See id. at 320. This flaw has been corrected by 18 U.S.C. §1513.

18 U.S.C. §1510 proscribes endeavors "willfully" undertaken. "The word 'willfully' as used here means proceeding from a conscious motion of the will. It means designedly or intentionally and does not include an accidental or involuntary act." H.R. Rep. No. 658, 90th Cong., 1st Sess. 3, reprinted in 1967 U.S. Code Cong. & Ad. News 1760, 1762. Section 1510 "require[s] proof of a specific intent to obstruct justice." United States v. Carleo, 576 F.2d 846, 849 (10th Cir.), cert. denied, 439 U.S. 850 (1978); see United States v. Lippman, 492 F.2d 314, 317 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975). And "[i]t is required that the defendant have actual knowledge that the intended recipient of the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

information be a federal criminal investigator." United States v. Lippman, *supra*, at 317; accord United States v. Grande, 620 F.2d 1026, 1036-37 (4th Cir.), *cert. denied*, 449 U.S. 830, 919 (1980); United States v. Williams, 470 F.2d 1339, 1342 (8th Cir.), *cert. denied*, 411 U.S. 936 (1973). However, the defendant need not actually know that information has been or is about to be supplied to a federal criminal investigator. Rather, it is required only that "the accused reasonably believed that information had been, or would be, supplied to [a federal] investigator." United States v. Kozak, 438 F.2d 1062, 1066 (3d Cir.), *cert. denied*, 402 U.S. 996 (1971). See United States v. Zemek, 634 F.2d 1159, 1176 (9th Cir. 1980), *cert. denied*, 450 U.S. 916, 985, 452 U.S. 905 (1981). It follows that it is unnecessary to show that the victim actually intended to give information to a federal investigator. See United States v. Kozak, *supra*, at 1065-66. Finally, it is unnecessary to show that the victim in fact felt threatened. United States v. Carzoli, 447 F.2d 774, 777-78 (7th Cir. 1971), *cert. denied*, 402 U.S. 1015 (1972).

For the statute to be violated there is no requirement that an investigation be underway; only the obstruction of a communication to a criminal investigator is required. United States v. Lippman, *supra*. The fact that the criminal act occurred after the institution of judicial proceedings is immaterial, and this is true whether the act was retaliatory, United States v. Roberts, 638 F.2d 134, 135 (9th Cir.) (*per curiam*) (offense occurred 18 days after conviction), *cert. denied*, 452 U.S. 909 (1981), or intended to impede the future communication of information to federal criminal investigators, United States v. Koehler, 544 F.2d 1326, 1329-30 (5th Cir. 1977) (offense occurred subsequent to indictment).

18 U.S.C. §1510 cannot be used against a person who gives false or misleading information to a criminal investigator.

The sole purpose of the [section] is to protect informants and witnesses against intimidation or injury by third parties with the purpose of preventing or discouraging the informants or witnesses from supplying or communicating information to the federal investigator. The informants or witnesses cannot themselves be subject to prosecution under this [section] on account of any information they may furnish to the investigator.

H.R. Rep. No. 658, 90th Cong., 1st Sess. 3, reprinted in 1967 U.S. Code Cong. & Ad. News 1760, 1762; see United States v. Cameron, 460 F.2d 1394, 1401-02 (5th Cir. 1972).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.160 Inchoate Obstruction of Justice Offenses

Former 18 U.S.C. §1503 and §1505 prohibited "endeavors" to tamper with witnesses. 18 U.S.C. §1503 prohibits "endeavors" to tamper with jurors and officers of the court. The omnibus clauses of 18 U.S.C. §1503 and §1505 prohibit "endeavors" to obstruct justice as well as actual obstructions of justice. 18 U.S.C. §1510 prohibits "endeavors" to obstruct criminal investigations through bribery.

Although "endeavor" might be thought of as a synonym for "attempt," the Supreme Court has concluded that "endeavor" is broader than "attempt." United States v. Russell, 255 U.S. 138 (1921). In Russell, the defendant was charged with violating former 18 U.S.C. §1503 by relating to the spouse of a venireman the suggestion that money would be forthcoming in return for the venireman's favoring an acquittal in a certain case if he was chosen to be a juror. Because the spouse, it appears, did not act on the suggestion, the defendant argued that his conduct was not an endeavor or attempt to influence a juror but was merely preparation for an endeavor or attempt. The Court rejected the argument, saying:

The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent...The section...is not directed at success in corrupting a juror but at the "endeavor" to do so. Experimental approaches to the corruption of a juror are the "endeavor" of the section.

Id. at 143. Accord Osborn v. United States, 385 U.S. 323, 333 (1966). In enacting former 18 U.S.C. §1510 in 1967, Congress clearly intended to import this case law into that provision as well:

This [section] also uses the word "endeavors." Here "endeavor" means any effort or essay to accomplish the evil purpose that this [section] is designed to prevent. The use of the word "endeavor" avoids the technical difficulties which would be involved by the use of the word "attempt." Thus, where a person's acts have not progressed far enough to amount to an attempt, under the [section] such acts would come within the scope of the word "endeavor" and thus be subject to punishment.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

H.R. Rep. No. 658, 90th Cong., 1st Sess. 3, reprinted in 1967 U.S. Code Cong. & Ad. News 1760, 1762. (For discussion of the "technical difficulties" attending the term "attempt," see United States v. Mandujano, 499 F.2d 370, 372-77 (5th Cir. 1974) cert. denied, 419 U.S. 1114 (1975), and W. LaFave & A. Scott, Handbook on Criminal Law §§59-60 (1972).)

"Attempt" and "endeavor" are points on the continuum, or axis, of actus reus, and the cases have sought to illuminate the gray area between the two points. In United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981), the defendant suggested to the government witness several times after the indictment of a third party but before the trial that the third party "could do a lot" for the witness if he, the witness, would not "add any more wood to the fire" at the trial. (The witness had testified before the grand jury.) The court rejected the defendant's argument that an explicit offer of a bribe or a request for specific testimony was required for an endeavor to influence a witness under former 18 U.S.C. §1503. The court observed "that 'endeavor' connotes a somewhat lower threshold of purposeful activity than 'attempt,'" id. at 907, and remarked that "'the fact that the effort to influence was subtle or circuitous' made no difference," id. (quoting United States v. Roe, 529 F.2d 629, 632 (4th Cir. 1975)).

In United States v. Fasolino, 586 F.2d 939 (2d Cir. 1978) (per curiam), the conduct in question was the defendant's importuning of a third party to approach a federal judge, whom the third party knew, on a pending sentencing matter. The court held that the conduct was a 18 U.S.C. §1503 "endeavor," noting that the statute was "very similar to a criminal solicitation statute," id. at 940, and that an endeavor "can be committed merely by words," id. at 941. See generally Osborn v. United States, 385 U.S. 323, 332-33 (1966); United States v. Lazzarini, 611 F.2d 940, 941-42 (1st Cir. 1979); United States v. Roe, 529 F.2d 629, 631-32 (4th Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1228-29 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); United States v. Missler, 414 F.2d 1293, 1306 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970); Knight v. United States, 310 F.2d 305, 307 (5th Cir. 1962) (per curiam).

It follows that an endeavor to obstruct justice need not be successful to be criminal. See, e.g., Osborn v. United States, 385 U.S. at 333. Accordingly, the defense of factual impossibility, which arises when the defendant solicits a third party to obstruct justice and the third party is a government informant, may not be interposed. See, e.g., Osborn v. United States, 385 U.S. at 333; United States v. Rosner, 485 F.2d at 1228-29.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The Victim and Witness Protection Act of 1982 was designed to, among other things, expand the reach of federal law in relation to inchoate offenses. 18 U.S.C. §1513 "covers attempted retaliation against witnesses and informants. [The former] law [did] not cover attempted retaliation." 128 Cong. Rec. H8204 (daily ed. Sept. 30, 1982) (section-by-section analysis of H.R. 7191).

With all this in mind, then, it is disquieting to note that "attempt," not "endeavor," is the term used in Sections 1512 and 1513. This word substitution, it is submitted, was an oversight, for there was no discussion in the legislative history of the 1982 Act on this point and no hint that Congress intended to contract the purview of the obstruction of justice statutes on this or any other matter. Compare S. 1630, 97th Cong., 2d Sess. (1982) (proposed new 18 U.S.C. §§1001, 1329). Nevertheless, the government, having convinced the Supreme Court that there is an important distinction between "endeavor" and "attempt," United States v. Russell, 255 U.S. 138, 143 (1921), will, absent congressional action, be forced in some cases to argue incongruously that the term "attempt" in 18 U.S.C. §1512 and §1513 is as broad as the term "endeavor" in 18 U.S.C. §§1503, 1505 and 1510.

9-69.170 Civil Action to Enjoin the Obstruction of Justice

The Victim and Witness Protection Act of 1982 created a federal cause of action in restraint of existing harassment of criminal victims and witnesses or existing or imminent violations of 18 U.S.C. §1512 (excluding those consisting of misleading conduct) and section 1513. The cause of action, codified at 18 U.S.C. §1514, is to be prosecuted by a government attorney.

Specifically, 18 U.S.C. §1514 authorizes a federal district court to enjoin "harassment of an identified victim or witness in a Federal criminal case." ("Harassment" is defined as a course of conduct directed at a specific person that causes substantial emotional distress and serves no legitimate purpose. 18 U.S.C. §1514(c).) This equitable relief may take one of two forms: a temporary restraining order (TRO) or a protective order.

A TRO may be sought and may be issued without notice to the adverse party if it is shown that notice should not be given and that the government has "a reasonable probability" of prevailing on the merits. The standard of proof for a TRO is described as "reasonable grounds."

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

The standard of proof for a TRO is described as "reasonable grounds." The life of a TRO cannot exceed 10 days, unless good cause to prolong the order is shown before its expiration, in which case a district judge may extend the order for up to 10 days (or for a longer period agreed to by the adverse party).

A protective order, by contrast, must be preceded by an adversary hearing, and the standard of proof for the government is "preponderance of the evidence." The life of a protective order cannot exceed three (3) years, but a second protective order may be sought during the last 90 days of the first.

On its face, 18 U.S.C. §1514 limits for no apparent reason the scope of equitable relief permitted, for it speaks only of TROs and protective orders "prohibiting harassment of a victim or witness in a federal criminal case." Since "'harassment' means a course of conduct directed at a specific person that...causes substantial emotional distress in such person," it could be argued that section 1514 does not comprehend third-party harassment, for example, the intimidation of a witness' friend for the purpose of dissuading the witness from testifying at a trial. The statute is, at best, needlessly ambiguous on this point. What is not ambiguous is that the statute does not cover the harassment of jurors and officers of the court.

For the legislative history of 18 U.S.C. §1514, see S. Rep. No. 532, 97th Cong., 2d Sess. 27-29, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2533-35; and 128 Cong. Rec. H8204-05 (daily ed. Sept. 30, 1982).

9-69.175 Offenses Related to Obstruction of Justice Offenses

Conduct within the purview of the obstruction of justice statutes may also violate one or more of the following statutes:

A. 18 U.S.C. §§1111, 1111, 1112, 1114--interference with, assaults on, or killing of federal judges and prosecutors (overlap with 18 U.S.C. §1503).

B. 18 U.S.C. §201(b), (d), (f), (h)--bribery of federal public officials and witnesses (overlap with 18 U.S.C. §§1503 and 1505 (public officials) and 18 U.S.C. §1512 (witness)). (Note 18 U.S.C. §201 (k).) See United States v. DeAlessandro, 361 F.2d 694, 699-700 (2d Cir.), cert. denied, 385 U.S. 842 (1966).

C. 18 U.S.C. §241--conspiracy to injure or intimidate any citizen on account of exercise or possibility of exercise of federal right (overlap

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

with 18 U.S.C. §§1503, 1510, 1512, 1513).

D. 18 U.S.C. §245(b)(1)(D), (2)(D), (4)(A), (5)--intimidating or retaliating against individuals on account of their serving or possibly serving as a grand or petit juror in a federal court (overlap with 18 U.S.C. §1503) (or on account of their serving or possibly serving as a grand or petit juror in a state court if the conduct is motivated by the race, color, religion, or national origin of the victim).

E. 18 U.S.C. §§371-372--conspiracies to commit any offense against the United States, or to prevent or retaliate in response to the lawful discharge of the duties of federal officers (overlap with 18 U.S.C. §§1503, 1505, 1510, 1512, 1513).

F. 18 U.S.C. §401--contempt of court (overlap with 18 U.S.C. §1503).

G. 18 U.S.C. §1001--false statements and concealment of material facts before federal departments and agencies (overlap with 18 U.S.C. §1505).

H. 18 U.S.C. §§1621-1623--perjury, subornation of perjury, and false declarations before grand juries and courts (overlap with 18 U.S.C. §§1503, 1505, 1512).

I. 26 U.S.C. §7212--interference with or endeavors to interfere with the due administration of Internal Revenue laws (overlap with 18 U.S.C. §1505).

Under 18 U.S.C. §241, it is a federal offense to conspire to injure a citizen for having exercised a federal right or to conspire to intimidate a citizen from exercising a federal right. One such right is the right to be a witness in a federal court, United States v. Thevis, 665 F.2d 616, 626 (5th Cir. 1982), cert. denied, 102 S. Ct. 2300, 3489, 103 S. Ct. 57 (1982), or other federal proceeding, United States v. Smith, 623 F.2d 627, 629 (9th Cir. 1980). "So is the right to inform federal officials of violations of federal laws." Id.

Contemptuous conduct in the presence of the court is specifically covered by 18 U.S.C. §401. But such conduct may also satisfy the elements of 18 U.S.C. §1503. It has been held that in that situation a prosecutor is not confined to charging the contemner with a violation of 18 U.S.C. §401; conduct within the purview of 18 U.S.C. §1503 may be charged under 18 U.S.C. §1503 even though it occurred in the presence of the court. E.g., United States v. Jones, 663 F.2d 567, 569 (5th Cir. 1981) (threat directed at judge and prosecutor).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Simple perjury, the assertion of a false affirmative statement by an individual testifying under oath, is not, at least in one circuit, an obstruction of justice under the omnibus clause of 18 U.S.C. §1503. See United States v. Faudman, 640 F.2d 20, 23 (6th Cir. 1981); United States v. Essex, 407 F.2d 214, 218 (6th Cir. 1969). But see United States v. Griffin, 589 F.2d 200, 203, 204 (5th Cir.) (dicta), cert. denied, 444 U.S. 825 (1979); cf. Smith v. United States, 234 F.2d 385 (5th Cir. 1956) (submission of false affidavits of others violates omnibus clause).

However, if simple perjury is accompanied by other obstructive, truth-suppressing acts, an omnibus clause offense may be made out. In United States v. Alo, 439 F.2d 751 (2d Cir.), cert. denied, 404 U.S. 850 (1971), the Second Circuit held that evasive testimony, a false denial of knowledge or memory, was comprehended by the omnibus clause of 18 U.S.C. §1505. The court rejected the argument that the clause proscribed only those efforts that interfered with other witnesses or documentary evidence, reasoning:

So restrictive a gloss. . . would produce the anomalous result that concealing information recorded in one's papers would constitute, as the appellant concedes, an offense under §1505, but concealing data recorded in one's memory would not. No rational basis for differentiating between these two types of evidence has been suggested to us, and without a clear statement of contrary Congressional intent we cannot attribute such an arbitrary distinction to the legislature. Like the specific provisions which precede it [e.g., §1503], §1505 deals with the deliberate frustrations through the use of corrupt or false means of an agency's attempt to gather relevant evidence. The blatantly evasive witness achieves this effect as surely by erecting a screen of feigned forgetfulness as one who burns files or induces a potential witness to absent himself.

Alo objects that such an interpretation of §1505 will open an avenue for wholesale evasion of the so-called "two-witness rule" to which perjury convictions must conform. We disagree. It is true, that to convict Alo the jury had to conclude that he was lying when he professed loss of memory, but the gist of his offense was not the falsehood of his statements, but the deliberate concealment of his knowledge.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

439 F.2d at 754 (footnote omitted). This reasoning applies as well to the omnibus clause of 18 U.S.C. §1503. United States v. Griffin, 589 F.2d 200, 203-05 (5th Cir.) (false denial of knowledge and memory before grand jury), cert. denied, 444 U.S. 825 (1979); United States v. Cohn, 452 F.2d 881, 883-84 (2d Cir. 1971) (same), cert. denied, 405 U.S. 975 (1972).

Suborning perjury, 18 U.S.C. §1622, is a 18 U.S.C. §1503 omnibus clause offense. See United States v. Griffin, 589 F.2d at 203 (construing United States v. Partin, 552 F.2d 621, 630-31 (5th Cir.), cert. denied, 434 U.S. 903 (1977)); Catrino v. United States, 176 F.2d 884, 886-87 (9th Cir. 1949). Subornation of perjury requires proof that perjury was in fact committed. E.g., United States v. Brumley, 560 F.2d 1268, 1278 n.5 (5th Cir. 1977). Because the omnibus clauses do not require that endeavors to obstruct justice be successful, they allow the prosecution of attempts to suborn perjury. See Catrino v. United States, 176 F.2d at 886-87.

9-69.180 Venue

The question of venue arises when the unlawful act occurs in a district other than the district in which the affected investigation or proceeding is pending. The lower federal courts have split on this issue, but the greater weight of authority holds that venue lies in the district of the pending investigation or proceeding. United States v. Kibler, 667 F.2d 452 (4th Cir.) (§1503), cert. denied, 102 S. Ct. 2037 (1982); United States v. Barham, 666 F.2d 521 (11th Cir.) (§1503), cert. denied, 102 S. Ct. 2015 (1982); United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980) (§1503), cert. denied, 452 U.S. 962 (1981); United States v. O'Donnell, 510 F.2d 1190 (6th Cir.) (§1503), cert. denied, 421 U.S. 1001 (1975); United States v. Elliott, 446 F. Supp. 209 (W.D. Va. 1978). These decisions, however, reserved the question whether venue lies only in the district of the pending investigation or proceeding. United States v. Kibler, 667 F.2d at 455 n.2; United States v. Barham, 666 F.2d at 524 n.2; United States v. Tedesco, 635 F.2d at 906 n.5; United States v. O'Donnell, 510 F.2d at 1193.

The minority of courts hold that venue lies where the unlawful act occurred. United States v. Nadolny, 601 F.2d 940 (7th Cir. 1979) (18 U.S.C. §1510); United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971) (18 U.S.C. §1503); United States v. Bachert, 449 F. Supp. 508 (E.D. Pa. 1978) (18 U.S.C. §1503); see United States v. Brothman, 191 F.2d 70 (2d Cir. 1951) (18 U.S.C. §1503) (alternative implied holding).

MARCH 12, 1984

Ch. 69, p. 35

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.181 Extraterritorial Federal Jurisdiction

There is extraterritorial federal jurisdiction over offenses under 18 U.S.C. §1512 and §1513. This means that there is federal jurisdiction over an 18 U.S.C. §1512 or §1513 offense that occurs outside of the United States. See 128 Cong. Rec. H8469 (daily ed. Oct. 1, 1982); H.R. Rep. No. 1396, 96th Cong., 2d Sess. 20-22 (1980).

9-69.190 Penalties

Under the former law, the maximum penalty for an obstruction of justice offense was five (5) years' imprisonment and a \$5,000 fine.

Now 18 U.S.C. §1512(a) and §1513 allow the imposition of a 10-year prison term or a \$250,000 fine or both.

With respect to the enlarged incarceration sanction, a House analysis said, "this will permit the court to impose a greater penalty when sentencing someone who has committed a particularly aggravated form of the offense (such as where the offense causes the death of, or serious bodily injury to, a witness)." 128 Cong. Rec. H8469 (daily ed. Oct. 1, 1982). As for fines, another House analysis averred, "The fine levels in existing criminal provisions need to be increased because those fine levels do not provide federal courts with sufficient flexibility to impose fines that will adequately deter future criminal conduct. See House Report No. 96-1396, at 466." 128 Cong. Rec. H8203 (daily ed. Sept. 30, 1982); see id. at H8204. (The House Report cited refers to white-collar crime and corporate defendants.)

18 U.S.C. §1512(b), describing a new misdemeanor, provides a maximum penalty of one (1) year in prison and a \$25,000 fine.

9-69.195 Research Sources

9-69.196 Pleadings Bank

A central bank of pleadings filed under this statute has been established in the Office of Enforcement Operations. Copies of all pleadings should be sent to: Office of Enforcement Operations, Criminal Division, Room 303, Federal Triangle Building, 315 9th St. NW, Washington, DC 20530 (FTS 724-7184).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.197 Other Research Aids

Analyses of former 18 U.S.C. §§1503, 1505, and 1510 are respectively set out at Annot. 20 A.L.R. Fed. 731 (1974); Annot., 8 A.L.R. Fed. 893 (1971); and Annot., 18 A.L.R. Fed. 875 (1974).

9-69.200 PERJURY AND FALSE DECLARATIONS BEFORE GRAND JURY OR COURT

This section will deal primarily with the two principal perjury statutes in Title 18 of the United States Code, 18 U.S.C. §1621 and §1623. Although the Code contains over 150 statutes which proscribe perjury, virtually all perjuries occurring in the course of governmental inquiries, proceedings, and the federal judicial process are prosecuted under 18 U.S.C. §1621 or §1623. A third statute, 18 U.S.C. §1622, subornation of perjury, will be dealt with in passing. For a complete list of "perjury" statutes see "Working Papers of the National Commission on Reform of Federal Criminal Laws Vol. I" (cited hereafter as "Working Papers") p. 675 et seq.

In the past, several important political figures have been charged with violating 18 U.S.C. §1001. This statute provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

This section punishes what is essentially a fraud perpetrated against the government in a variety of contexts. An oath is not a prerequisite for prosecution under this section. See USAM 9-42.000.

18 U.S.C. §1621 and §1623 have been amended to reflect the enactment of 28 U.S.C. §1746, which makes unsworn declarations, under certain circumstances, subject to the penalties of perjury. Such unsworn declarations must be substantially in the language set out in the statute. Further, care should be exercised to verify that the unsworn declaration is of the nature permitted under the terms of 28 U.S.C. §1746, to be subject to the penalties of perjury.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.201 Perjury - 18 U.S.C. §1621

Whoever -

(1) having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States. As amended Oct. 18, 1976, Pub. L. 94-550, §2, 90 Stat. 2534.

9-69.202 False Declarations Before Grand Jury Or Court - 18 U.S.C. §1623

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if--

A. each declaration was material to the point in question, and

B. each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

18 U.S.C. §1623 became effective October 15, 1970, and was amended by Pub. L. 94-550, §6, Oct. 18, 1976.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.210 Elements of Perjury

While there are differences between 18 U.S.C. §1621 and §1623, the elements of each offense are substantially the same. The elements are as follows:

A. First, it is necessary that the defendant be under oath during his/her testimony, declaration, or certification (except in the case of unsworn declarations under penalty of perjury as permitted by 28 U.S.C. §1746). So long as the oath is of sufficient clarity that the defendant was aware that he was under oath and required to speak the truth, no particular form of oath is required. Holy v. United States, 278 F. 521 (7th Cir. 1921). However, it has been held that prosecutions under 18 U.S.C. §1621 require proof of who administered the oath, as well as the competency and authorization of the oath giver. United States v. Molinares, 700 F.2d 647, 651 (11th Cir. 1983). The identity of the oath giver is not an essential element under 18 U.S.C. §1623, nor is proof that such person was competent or authorized to administer the oath. Instead, 18 U.S.C. §1623 merely requires that the government prove that the maker of a knowingly false declaration be under oath at the time of the statement. Id. at 651-52. One court has stated that although it would be better practice for someone present at the grand jury proceedings during which the perjury was committed to testify to the giving of an oath, the transcript of the defendant's grand jury testimony was sufficient to prove that he testified under oath. United States v. Picketts, 655 F.2d 837, 840 (7th Cir. 1981). In addition, it is no defense that subsequent to the defendant's perjury before a grand jury, it is discovered that such grand jury had been constituted in violation of the Jury Selection and Service Act. United States v. Caron, 551 F. Supp. 662, 666 (E.D. Va. 1982). However, false swearing before a court having no jurisdiction would not be prosecutable under section 1623. United States v. Young, 113 F. Supp. 20 (D.D.C. 1953), aff'd, 212 F.2d 236 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954); United States v. Cuddy, 39 F. 696 (S.D. Cal. 1889). See Working Papers at 664.

B. The second necessary element of perjury is that the defendant make a false statement. It is this element which is subject to the so-called two-witness rule for prosecutions under 18 U.S.C. §1621. See USAM 9-69.265. Falsity is a question of fact for the jury to decide. United States v. Sampol, 636 F.2d 621, 655 (D.C. Cir. 1980). Words clear on their face are to be understood in their common sense and usage unless it is clear in the context in which they are used that a different sense or usage was intended. Government of the Canal Zone v. Thrush, 616 F. 2d 188, 190-91 (5th Cir. 1980). In United State v. Harrison, 671 F.2d 1159 (8th Cir.), cert. denied, 103 S. Ct. 104 (1982), defendants argued that

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

the grand jurors misunderstood their slang. The court decided that "[i]t was up to the jury to decide whether [defendants'] statements were slang or lies." Id. at 1162.

C. The false statement must be material to the proceedings. Materiality has been defined broadly to include anything "capable of influencing the tribunal on the issue before it." United States v. Cuesta, 597 F.2d 903, 920 (5th Cir.), cert. denied, 444 U.S. 964 (1979). Thus, the testimony need not actually have influenced, misled or hampered the proceeding. United States v. Harrison, supra, at 1162; United States v. Brown, 666 F.2d 1196, 1200 (8th Cir. 1981), cert. denied, 457 U.S. 1108 (1982); United States v. Whimpey, 531 F.2d 768, 770 (5th Cir. 1976); United States v. Vesich, 558 F. Supp. 1192, 1199 (E.D. La. 1983). A potential interference with a line of inquiry suffices to establish materiality. United States v. Raineri, 670 F.2d 702, 718 (7th Cir.), cert. denied, 103 S. Ct 446 (1982); United States v. Howard, 560 F.2d 281, 284 (7th Cir. 1977). The statement need not be material to a particular issue, but may be material to collateral matters that might influence the outcome of decisions before the grand jury. United States v. Ostertag, 671 F.2d 262, 264 (8th Cir. 1982); United States v. Cosby, 601 F.2d 754, 756 (5th Cir. 1979); United States v. Cuesta, supra at 921; United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980). Thus, a statement is material if it is relevant to a subsidiary issue under consideration, United States v. Percell, 526 F.2d 189, 190 (9th Cir. 1975), or if relevant to an issue of credibility, United States v. Nacrelli, 543 F. Supp. 798, 800 (E.D. Pa. 1982). It is of no consequence that the information sought would be merely cumulative or that the response was believed by the grand jury to be perjurious at the time it was uttered. United States v. Berardi, 629 F.2d 723, 728 (2d Cir.), cert. denied, 449 U.S. 995 (1980).

The issue of materiality is a question of law to be decided by the court. United States v. Ostertag, supra at 265; United States v. Raineri, supra at 718; United States v. Bell, 623 F.2d 1132, 1134 (5th Cir. 1980). It has been held that the court should decide the issue of materiality at the earliest opportunity, certainly prior to submission of the case to the petit jury. United States v. Berardi, supra at 728; United States v. Watson, 623 F.2d 1198, 1201 n.5 (7th Cir. 1980).

The government must satisfy the burden of establishing materiality, although it need not be proven beyond a reasonable doubt. United States v. Berardi, supra at 727; United States v. Watson, supra at 1202. ("As a question of law, there cannot appropriately be any evidentiary or factual burden with respect to the issue of materiality."); United States v. Ostertag, supra at 264; United States v. Giarratano, supra at 156. A

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

finding of materiality does not depend on the admissibility of evidence received by a grand jury or possession of the power of a grand jury to indict for substantive offenses about which a witness is questioned. United States v. Epifanio, 448 F. Supp. 784 (S.D.N.Y.), aff'd, 586 F.2d 832 (2d Cir. 1978). The government may prove materiality in various ways. It may introduce a transcript of the grand jury proceedings; produce testimony from the foreperson of the grand jury; produce the testimony of the defendant before the grand jury; or produce the testimony of the prosecutor concerning the scope of the grand jury's charter, and the relationship to it of the questions which elicited the perjury. United States v. Berardi, supra at 727; United States v. Ostertag, supra at 265; United States v. Cosby, supra at 756-57 ("[W]e have generally looked with disfavor on prosecutions brought under section 1623 that have not used complete transcripts or testimony of members of the grand jury."); United States v. Bell, supra at 1135; United States v. Thompson, 637 F.2d 267, 268 (5th Cir. 1981) ("The scope of the grand jury's inquiry and the materiality of the declaration to that inquest are generally, and usually best, proved by introduction of a complete transcript of the grand jury proceedings or by testimony of the foreman or some other member of the grand jury.").

D. The fourth necessary element is that the defendant make the false statement with knowledge of its falsity. Perjury requires a showing of specific intent. It cannot be the result of inadvertence, honest mistake, carelessness, misunderstanding, mistaken conclusions, unjustified inferences testified to negligently, or even recklessly. United States v. Martellano, 675 F.2d 940, 942 (7th Cir. 1982); Government of the Canal Zone v. Thrush, supra at 190-91; Dale v. Bartels, 552 F. Supp. 1253, 1266 (S.D.N.Y. 1982). Actual knowledge of falsity may be proven from circumstantial evidence. United States v. Gaucci, 635 F.2d 441, 444 (5th Cir.), cert. denied, 454 U.S. 831 (1981). However, proof of an intent to commit perjury does not constitute perjury. United States v. Laikin, 583 F.2d 968, 971 (7th Cir. 1978). 18 U.S.C. §1621 states that one who "willfully...states...any material matter which he does not believe to be true, is guilty of perjury..." 18 U.S.C. §1623 punishes one who "knowingly makes any false material declaration..." There does not appear to be any effective difference between these two definitions of the mens rea of the offense. In its report on the Organized Crime Control Act, the Senate Judiciary Committee stated that in Section 1623(a), "language changes have been made in the provision as introduced to achieve economy of words..." (Senate Report No. 91-617, at 149).

There are four principal differences 18 U.S.C. §1623 and §1621. First, 18 U.S.C. §1623 applies only to perjury occurring in the course of grand jury and court proceedings. Second, under 18 U.S.C. §1623 the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

government's evidentiary burden is greatly reduced as 18 U.S.C. §1623(e) does away with the two-witness rule which still hampers prosecutions 18 U.S.C. §1621. See USAM 9-69.265. In addition, 18 U.S.C. §1623(c) allows a conviction for making two or more statements which are inconsistent to the degree that one of them is necessarily false; the government does not have to prove which statement is false, but it is a defense to such a prosecution that, at the time each statement was made, the defendant believed he was speaking the truth. 18 U.S.C. §1623 is also different from 18 U.S.C. §1621 in that under the former, in certain circumstances, a recantation is a bar to prosecution for perjury. 18 U.S.C. §1623(d). A detailed discussion of the recantation provision will be found at USAM 9-69.274. 18 U.S.C. §1621 and §1623 provide for maximum prison terms of five years, but the maximum fine under 18 U.S.C. §1621 is \$2,000, while under 18 U.S.C. §1623 it is \$10,000. For sample indictments and jury instructions, see USAM 9-69.280-.293.

9-69.220 Subornation of Perjury - 18 U.S.C. §1622

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Prosecution for subornation of perjury requires that the perjury sought must have taken place. United States v. Brumley, 560 F.2d 1268, 1278 n. 5 (5th Cir. 1977); United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972). But a conspiracy to suborn perjury may be prosecuted whether or not perjury has been committed. Outlaw v. United States, 81 F.2d 805 (5th Cir.), cert. denied, 298 U.S. 665 (1936); Williamson v. United States, 207 U.S. 425 (1908). Where perjured testimony is solicited, either by an individual or through a conspiracy, an obstruction of justice has occurred whether or not the perjured testimony has taken place. 18 U.S.C. §1503.

It is quite common to join both obstruction of justice and subornation of perjury counts in a single indictment when they arise from the same transaction. For example, see United States v. Kahn, 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966); United States v. Root, 366 F.2d 377 (9th Cir. 1966), cert. denied, 386 U.S. 912 (1967). Because the crime of subornation of perjury is distinct from that of perjury itself, the suborner and perjurer are not accomplices. United States v. Thompson, 31 F. 331 (C.C. Ore. 1887); Segal v. United States, 246 F.2d 814 (8th Cir.), cert. denied, 355 U.S. 894 (1957).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.221 Elements

The gravamen of the offense of subornation is the procuring of perjury with knowledge that the testimony to be given is false, and that the one testifying is aware of the falsity of his statement; Boren v. United States, 144 F. 801 (9th Cir. 1906). To establish a prima facie case for subornation of perjury a prosecutor must show:

- A. That perjury was committed;
- B. That the defendant procured the perjury corruptly, knowing, believing or having reason to believe it to be false testimony; and
- C. That the defendant knew, believed, or had reason to believe that the perjurer had knowledge of the falsity of his testimony.

The existence of the perjury must be proved under the same standards as required by the applicable perjury statute. Thus if 18 U.S.C. §1621 applies to the underlying perjury, the demands of the two-witness rule must be met; Hammer v. United States, 271 U.S. 620 (1926), see USAM 9-69.265. If 18 U.S.C. §1623 is applicable to the perjury, the two-witness rule does not apply; United States v. Gross, 375 F. Supp. 971 (D. N.J. 1974). If the charge consists only of conspiracy to suborn perjury, compliance with the two-witness rule is not necessary; Hall v. United States, 78 F.2d 168 (10th Cir. 1935).

For sample indictments and jury instructions, see USAM 9-69.282 and 69.292.

9-69.230 Investigative Responsibility

The Federal Bureau of Investigation has primary investigative responsibility for perjury violations in all cases and matters involving departments and agencies of the United States, except those arising out of a substantive matter being investigated by the Secret Service, Internal Revenue Service, Immigration and Naturalization Service, Bureau of Customs, Drug Enforcement Administration, Bureau of Alcohol, Tobacco and Firearms, and the Postal Inspection Service.

The FBI investigates violations relating to cases and matters not involving the United States, or a department or agency thereof. For example, the FBI will investigate a perjury violation committed in connection with a civil case in a federal court to which the United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States, or a department or agency, is not a party. The FBI also investigates perjury violations committed in connection with any inquiry or investigation being held by either House, or by any committee of either House, or by any joint committee of the Congress on the written request of the Department.

9-69.240 Supervisory Jurisdiction

Generally, perjury is under the supervisory jurisdiction of the Division and Section of the Department having responsibility for the basic subject matter. Where such responsibility for subject matter cannot be identified, supervisory responsibility is with the General Litigation and Legal Advice Section of the Criminal Division.

9-69.250 No Prior Authorization Required

Because false declarations affect the integrity of the judicial fact-finding process, all offenders should be vigorously prosecuted. The Supreme Court has stressed that "[p]erjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." United States v. Mandujano, 425 U.S. 564, 576 (1976). The Supreme Court has emphasized also that "perjury is not a permissible way of objecting to the Government's questions. 'Our legal system provides methods for challenging the Government's right to ask questions--lying is not one of them.'" United States v. Wong, 431 U.S. 174, 180 (1977). The U.S. Attorney in each district is authorized to direct such further investigation of any alleged false declaration as he may think necessary. Cases may be submitted to the grand jury for its consideration or an information may be filed without prior authorization from the Criminal Division, except with regard to Congressional matters. See USAM 9-69.230.

9-69.260 Special Problems

9-69.261 Prosecutorial Discretion to Indict under 18 U.S.C. §1621 or §1623

A latent problem in the area of prosecutorial discretion and 18 U.S.C. §1623 has surfaced but not yet crystalized in the case law under that section. Two decisions by different panels of the Second Circuit

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

touch upon this issue as does a decision of the Ninth Circuit. In United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973), appellant argued that he was denied equal protection of the law by the prosecutor's decision to proceed against him under 18 U.S.C. §1623 rather than under 18 U.S.C. §1621 because the evidentiary burden of the prosecution is greater and the penalty less severe under the latter statute. The response of the court was to cite Yick Wo v. Hopkins, 118 U.S. 356 (1886), for the proposition that "where criminal statutes overlap the government is entitled to choose among them provided it does not discriminate against any class of defendants." The court found no discrimination because Ruggiero had failed to demonstrate membership in a specific class of defendants.

In United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973), however, the specter of such a class was raised in dictum. Kahn was charged under 18 U.S.C. §1621 and claimed that, had he been charged under 18 U.S.C. §1623, his subsequent "recantation" would have barred perjury prosecution. The court failed to confront the issue directly, by holding that Kahn's subsequent "recantation" would not have barred prosecution under 18 U.S.C. §1623, because at the time it was made it had become manifest that Kahn's original falsity was exposed. However, the court said, "...we find not a little disturbing the prospect of the government employing §1621 whenever a recantation exists, and §1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position." Kahn, supra, at 283. Thus, defendants charged under 18 U.S.C. §1621 whose perjury would not be prosecutable under 18 U.S.C. §1623 because of a valid "recantation," might constitute a class denied equal protection under Ruggiero.

Attorneys for Kahn also advanced the argument that a statute aimed at specific conduct (i.e., 18 U.S.C. §1623) must prevail over an otherwise applicable general statute (i.e., 18 U.S.C. §1621). See Kepner v. United States, 195 U.S. 100, 125 (1904); Shelton v. United States, 165 F.2d 241, 244 (D.C. Cir. 1947); Wechsler v. United States, 158 F. 579, 581 (2d Cir. 1907). The Second Circuit did not reach this question in Kahn. While it may be advisable to use 18 U.S.C. 1623 when it applies to a given factual setting, it is clear that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants... Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." United States v. Batchelder, 442 U.S. 114, 123-24 (1979). Illustrative of unconstitutional selective enforcement would be the application of standards such as race, religion, or some other arbitrary classification. Id. at 125 n. 9; United States v. Andrews, 370 F. Supp. 365, 370 (D. Conn. 1974) (no class

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

discrimination demonstrated in a case involving 18 U.S.C. §1621 and §1623). The equal protection argument in a perjury case was also rejected in United States v. Devitt, 499 F.2d 135, 139 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975), where the court stressed: "Defendant cites no case in support of the novel proposition that where conduct is proscribed by two or more separate criminal statutes, the government must elect to prosecute under the statute imposing the greatest burden of proof."

In United States v. Clizer, 464 F.2d 121, 125 (9th Cir.), cert. denied, 409 U.S. 1086 (1972), a different approach was taken by the Ninth Circuit. Although appellant had been charged with making false statements before a grand jury, the indictment was under 18 U.S.C. §1621. The court disregarded the statutory reference in the indictment and considered it as an indictment under 18 U.S.C. §1623: "The government, despite its reference to 18 U.S.C. §1621, in fact charged Clizer with a violation of 18 U.S.C. §1623."

9-69.262 Venue

Venue for perjury actions lies in the district where the false oath was made. See United States ex rel. Starr v. Mulligan, 59 F.2d 200 (2d Cir. 1932) and Jones v. Gasch, 404 F.2d 1231 (D.C. Cir. 1967).

9-69.263 Unresponsive Answers: The Case Against Samuel Bronston

Occasionally a witness under oath will give answers to questions which, although literally true, are evasive or unresponsive in order to deceive the questioner and mislead the inquiry. Is such action perjury? In Bronston v. United States, 409 U.S. 352 (1973), the Supreme Court unanimously held that such conduct does not violate 18 U.S.C. §1621.

Bronston, the sole owner of Samuel Bronston Productions Inc., a motion picture production company, had the following colloquy with a lawyer for a creditor of the company at a bankruptcy hearing:

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston? A. No, Sir. Q. Have you ever? A. The company had an account there, for about six months, in Zurich. Q. Have you any nominees who have bank accounts in Swiss banks? A. No, sir. Q. Have you ever? A. No, Sir." 409 U.S. at 354.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

For a period of nearly five years Bronston had a personal account at a bank in Geneva, Switzerland. Although it was undisputed that Bronston's answers were literally truthful, the government prosecuted for perjury on the theory that Bronston gave an unresponsive answer to the second question--by referring to the company's assets instead of his own--in order to mislead the questioner with the implication that he had no personal Swiss bank account. In order to fulfill the historic purpose of the perjury statute, the government argued, it should be construed broadly to include Bronston's false implication.

The Chief Justice, writing for the Court, rejected this effort to expand the scope of the perjury statute, noting that "if a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." 409 U.S. 352, 358-59. Thus, ". . .any special problems arising from the literally true but unresponsive answer are to be remedied through the questioner's acuity and not by a federal perjury prosecution." 409 U.S. at 362. Gebhard v. U.S., 422 F.2d 281, 287-88 (9th Cir. 1970); U.S. v. Nicoletti, 310 F.2d 359 (7th Cir. 1962).

9-69.264 The "I Don't Remember" Syndrome

Prosecutors are often faced with witnesses who, rather than deny a fact, claim that they do not remember it. The question arises as to whether these witnesses may be prosecuted for perjury. The answer is clearly yes. In re Battaglia, 653 F.2d 419, 421 (9th Cir. 1981); Gebhard v. United States, *supra*; United States v. Nicoletti, *supra*. To prove that a witness actually remembered something it is necessary to prove both that the witness at one time knew the fact and that he must have remembered it at the time he testified.

For instance, a witness testifies that he/she does not remember having ever paid money to a police officer. The first element of proof in a perjury prosecution against him would be that he/she had, in fact, paid money to a police officer. It would then be necessary to prove that he/she must have remembered that payment when he/she testified. If the dates of the transaction and testimony are sufficiently close, memory may be inferred. Probative of his/her memory at the time of his/her testimony would be evidence that he/she mentioned such payments either before or after his/her testimony or that he/she remembered other events which occurred at the same time or earlier than the event in question.

It has been held in perjury prosecutions under 18 U.S.C. §1621, that proof that a defendant lied, when he/she stated that he/she could not

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

remember an event, need not be by direct evidence or meet the standards of the two-witness rule. Id. These cases reason that since no direct evidence as to what defendant actually believed is possible, circumstantial evidence is sufficient.

9-69.265 "Two-Witness Rule"

The so-called two-witness rule applies only to prosecutions for perjury brought under 18 U.S.C. §1621. Congress has eliminated the rule for prosecutions under §1623, and, since the rule is not of constitutional dimension, the courts have deferred to legislative judgment. Weiler v. United States, 323 U.S. 606 (1945); United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979); United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir. 1973). Thus, because 18 U.S.C. §1623 is the preferred, if not the exclusive, vehicle for prosecutions of perjury occurring before a court or grand jury, see: Prosecutorial discretion to indict under 18 U.S.C. §1621 or §1623, supra, USAM 9-69.261, the handicap of the two-witness rule is greatly ameliorated.

The "two-witness rule" is somewhat of a misnomer. It provides that the falsity of a statement alleged to be perjurious must be established either by the testimony of two independent witnesses, or by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused. United States v. Forrest, 639 F.2d 1224, 1226 (5th Cir. 1981); United States v. Maultasch, 596 F.2d 19, 25 (2d Cir. 1979); Vitello v. United States, 425 F.2d 416, 419 (9th Cir.), cert. denied, 400 U.S. 822 (1970); United States v. Edmondson, 410 F.2d 670, 674 (5th Cir.), cert. denied, 396 U.S. 966 (1969). Thus, the rule is satisfied by the testimony of a second witness who has given testimony independent of another which, if believed, would prove that what the accused said under oath was false. In the case of a second witness, it is immaterial whether such witness corroborates the first witness. United States v. Maultasch, supra at 25. Alternatively, the rule is satisfied by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused and of a quality to assure that a guilty verdict is solidly founded. United States v. Forrest, supra at 1226; United States v. Maultasch, supra at 25 n.9. The "two-witness rule" applies only to proof that a given statement was objectively false. Circumstantial evidence may be used to establish that a perjury defendant made the false statement willfully or with knowledge of its falsity. United States v. Hagarty, 388 F.2d 713 (7th Cir. 1968).

The two-witness rule does not apply to 18 U.S.C. §1621 prosecutions where the defendant is prosecuted for falsely testifying that he was

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

unable to remember a certain event. See USAM 9-69.264. Neither does it apply to prosecution for obstruction of justice (18 U.S.C. §§1503, 1505), even if the gravamen of the obstruction is that the defendant perjured himself. In United States v. Alo, 439 F.2d 751 (2d Cir.), cert. denied, 404 U.S. 850 (1971), the court of appeals rejected appellant's contention that his prosecution for obstruction of justice, rather than for perjury, was an improper evasion of the two-witness rule.

Nevertheless, a prosecutor should utilize a prosecution for obstruction of justice as an alternative to a perjury prosecution only with great circumspection and in cases where a witness' evasions are blatant and clearly constitute an obstruction.

9-69.266 The "Use" of Material Containing False Statements

In addition to prohibiting the making of false statements, 18 U.S.C. §1623 applies to one who:

. . . under oath in any proceeding . . . makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration . . .

The legislative history of 18 U.S.C. §1623 is silent as to what type of conduct the "makes or uses" part of the statute is intended to apply to. In United States v. Pommerening, 500 F.2d 92 (10th Cir. 1974), convictions for violation of §1623 by "using" documents were affirmed. In that case the prosecutor subpoenaed defendants and their corporate records. The defendants altered the records, brought them to the grand jury and "relied upon these false documents in answering the U.S. Attorney's questions . . ." 500 F.2d at 98. The appellate court found such conduct to constitute "use" of the documents before the grand jury. In United States v. Dudley, 581 F.2d 1193, 1197 (5th Cir. 1978), the court held that physical delivery by the alleged user is not a necessary prerequisite to use under 18 U.S.C. §1623. It is sufficient that the testimony of the accused tended to give verity to the document.

9-69.267 False Affidavits Submitted in Federal Court Proceedings Do Not Constitute Perjury Under 18 U.S.C. §1623

In Dunn v. United States, 442 U.S. 100 (1979), the Supreme Court held that a false affidavit submitted to a federal court in support of a motion

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

to dismiss an indictment could not be prosecuted as perjury under 18 U.S.C. §1623 since such an affidavit lacked the formality required of court proceedings or depositions and therefore was not given in a "proceeding before or ancillary to any court or grand jury of the United States" as required by 18 U.S.C. §1623(a).

In refusing to extend the interpretation of the statutory language "ancillary to any court or grand jury" to include affidavits given in anticipation of their submission to a court, the Supreme Court stated:

Congress enacted §1623 as part of 1970 Organized Crime Control Act, Pub. L. 91-452, 84 Stat. 922, et seq., to facilitate perjury prosecutions and thereby enhance the reliability of testimony before federal courts and grand juries. S. Rep. No. 91-617, pp. 58-59 (1969). Invoking this broad congressional purpose, the Government argues for an expansive construction of the term ancillary proceeding. Under the Government's analysis, false swearing in an affidavit poses the same threat to the fact finding process as false testimony in open court. Thus, the Government contends that any statements made under oath for submission to a court, whether given in an attorney's office or in a local bar and grill, fall within the ambit of §1623. . . . In our judgment, the term "proceeding," which carries a somewhat more formal connotation, suggests that Congress had a narrower end in view when enacting §1623. And the legislative history of the organized Crime Control Act confirms that conclusion.

Id. at 107.

We cannot conclude here that Congress in fact intended or clearly expressed an intent that §1623 should encompass statements made in contexts less formal than a deposition. Accordingly, we hold that petitioner's September 30 declarations were not given in a proceeding ancillary to a court or grand jury within the meaning of the statute.

Id. at 113 (footnote omitted).

In United States v. Tibbs, 600 F.2d 19, 21 (6th Cir. 1979), the court described an "ancillary proceeding" for purposes of 18 U.S.C. §1623:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

"[C]ommon experience indicates that every proceeding, including an ancillary proceeding, must incorporate certain notions of formality and convention. Consistent with these notions, an action conducted by a judicial representative or an action conducted pursuant to explicit statutory or judicial procedures may properly be considered an 'ancillary proceeding' . . . However, an impromptu conversation between an individual and an attorney in the attorney's office inherently lacks the formality and convention required. These missing elements cannot be supplied by the administration of an oath, the signing of an affidavit, or the disclosure of the affiant's rights and potential liabilities.

See also United States v. Krogh, 366 F. Supp. 1255, 1256 (D.D.C. 1973) (sworn deposition taken in Office of Assistant Attorney General was a proceeding ancillary to Watergate grand jury).

While Dunn makes it clear that false affidavits cannot be prosecuted under 18 U.S.C. §1623, it is also clear that prosecutions for false affidavits submitted in federal court proceedings can be prosecuted under 18 U.S.C. §1621. Venue for such prosecutions is in the district where the affidavit is sworn to. Thus, in those cases in which an affidavit filed in U.S. District Court in one district was sworn to in another district, the perjury prosecution under 18 U.S.C. §1621 must be brought in the latter district.

In addition to prosecutions under 18 U.S.C. §1621, false affidavits submitted in federal court proceedings may be prosecuted under the omnibus clause of 18 U.S.C. §1503 in some circuits as an endeavor to obstruct the due administration of justice. United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972); United States v. Griffin, 589 F.2d 200 (5th Cir. 1979). It should, however, be noted that several circuits, applying the doctrine of ejusdem generis, limit prosecutions under the omnibus clause of 18 U.S.C. §1503, to conduct described in the earlier clauses of the statute. United States v. Essex, 407 F.2d 214 (6th Cir. 1969); Haiti v. United States, 260 F.2d 744 (9th Cir. 1958); United States v. Ryan, 455 F.2d 728 (9th Cir. 1972). In these circuits, prosecutions under 18 U.S.C. §1503 would not lie for submission of false affidavits in federal judicial proceedings.

Prosecutions should not be brought under 18 U.S.C. §1001 for false statements submitted in federal court proceedings. Morgan v. United

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

States, 309 F.2d 234 (D.C. Cir. 1962); United States v. D'Amato, 507 F.2d 26 (2d Cir. 1974); United States v. Erhardt, 381 F.2d 173 (6th Cir. 1967); United States v. Allen, 193 F. Supp. 954 (S.D. Calif. 1961).

9-69.268 Indictments

Case law appears to give the government some discretion as to how to charge separate, but related, false statements. It has been held that all of the false declarations pertaining to a particular subject matter may be embraced in one count. United States v. Isaacs, 493 F.2d 1124, 1155 (7th Cir.), cert. denied sub nom. Kerner v. United States, 417 U.S. 976 (1974); United States v. Edmondson, 410 F.2d 670, 673 n.6 (5th Cir.), cert. denied, 396 U.S. 966 (1969). In such a situation, proof of the falsity of any one statement charged will sustain the count. Id.; United States v. Dilworth, 524 F.2d 470, 471 n.1 (5th Cir. 1975). However, false statements made during one grand jury session which are separate, distinct and unrelated can be charged in multiple counts with separate sentences imposed for a conviction on each count. United States v. De La Torre, 634 F.2d 792, 794-95 (5th Cir. 1981) ("Edmondson [cited above] permits but does not require that all of the allegedly false declarations be joined in one count"). Likewise in United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982), the court held that separate and distinct false declarations which require different factual proof of falsity may be charged in separate counts even though they are all related and arise out of the same transaction.

A perjury indictment must set forth the precise falsehoods alleged and the factual basis of their falsity with sufficient clarity to permit a jury to determine their verity and to allow meaningful judicial review of the materiality of those falsehoods. United States v. Slawik, 548 F.2d 75, 83 (3d Cir. 1977). However, the materiality requirement of a perjury indictment may be satisfied by a general statement that the matter was material. United States v. Ponticelli, 622 F.2d 985, 989 (9th Cir.), cert. denied, 449 U.S. 1016 (1980); United States v. Davis, 548 F.2d 840, 845 (9th Cir. 1977).

There is no requirement that the perjury occur before the grand jury that issues the indictment. United States v. Sun Myung Moon, 532 F. Supp. 1360, 1371 (S.D.N.Y. 1982). Nor is it required that the grand jury could not have indicted for the substantive offense inquired into. A grand jury may ask questions about events outside of the statute of limitations, or about acts which otherwise would not lead to indictments. United States v. Picketts, 655 F.2d 837, 841 (7th Cir.), cert. denied, 454 U.S. 1056 (1981); United States v. Reed, 647 F.2d 849, 853 (8th Cir. 1981).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

However, the courts will strictly scrutinize for fairness any indictment and conviction for perjury before a grand jury that rests upon a defendant's responses to leading questions. United States v. Boberg, 565 F.2d 1059, 1063 (8th Cir. 1977) ("We think that a grand jury witness, particularly one who may be the target of a prosecution, ought to be given a fair opportunity to respond fully to questions and not be limited to the 'yes' or 'no' that typifies answers to leading questions.").

9-69.270 Defenses and Bars to Prosecution

9-69.271 In General

A primary defense to an indictment for perjury is that the defendant believed his statement to be true at the time he made it. Belief that a declaration was true when made is specifically a defense to prosecution under 18 U.S.C. §1623(c). The major element the government must prove under 18 U.S.C. §1621 and §1623 is that the defendant made a false statement knowing it to be false. If the government is unable to prove this element beyond a reasonable doubt the defendant is entitled to a directed verdict. Proof that a defendant believed a declaration was true defeats a charge of perjury even if the statement was in fact false. United States v. Winter, 348 F.2d 204 (2d Cir. 1965). The defense of advice of counsel usually may only be considered by the jury in determining whether the defendant willfully or knowingly gave false testimony. United States v. Becker, 203 F. Supp. 467 (E.D. Va. 1962).

A detailed discussion of additional defenses and bars to prosecution follows.

9-69.272 Collateral Estoppel

Res judicata, though sometimes used interchangeably with collateral estoppel, has a distinct meaning and refers to "the preclusion of a claim or cause of action where that claim has been fully litigated and decided in prior suit." United States v. Drevcetzki, 338 F. Supp. 403, 405 (N.D. Ill. 1972).

Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit." Ashe v. Swenson, 397 U.S. 436, 443 (1970). Collateral estoppel has been an established rule of federal law at least since United States v.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Oppenheimer, 242 U.S. 85 (1916) and is now viewed as an integral part of the fifth amendment ban against double jeopardy. Harris v. Washington, 404 U.S. 55 (1971).

A prosecutor encounters no double jeopardy or collateral estoppel problem when prosecuting a convicted defendant for perjury committed during his/her former trial on a substantive offense. United States v. Williams, 341 U.S. 58, 62 (1951). Nor is there any collateral estoppel problem when prosecuting a trial witness for perjury, since a witness is not a party to the suit.

The question of whether collateral estoppel bars prosecution for perjury usually arises where a defendant, who has taken the stand and perjured himself, has been acquitted of the substantive offense and is charged with perjury for testimony given at his/her trial. The collateral estoppel claim is that the jury, by acquitting the defendant, adjudicated the truthfulness of his/her testimony in his/her favor and that the government is barred from litigating that issue again.

The problem with such a claim is that, since the government must prove every element of its case beyond a reasonable doubt, and since the jury's general verdict does not indicate which element(s) it found lacking in proof, it is difficult to determine whether the jury's acquittal was based on a finding that the defendant's testimony was credible or whether, even though it disbelieved the defendant, the jury found the government's case deficient in some other respect.

Clearly, if the defendant's only testimony is a general denial of guilt, an acquittal would be a bar to a perjury prosecution. In most situations, however, an inquiry must be made into what issue(s) the jury's acquittal "necessarily" adjudicated. Sealfon v. United States, 332 U.S. 575 (1948). In Sealfon, the Supreme Court held that the determination "depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial."

In confirming and elucidating this point, Ashe v. Swenson, 397 U.S. at 444, held that:

The Federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration.

Thus, the acquittal of a defendant following a trial on criminal charges does not bar his subsequent prosecution for perjury committed during the course of the trial. It is only when an issue of ultimate fact or an element essential to conviction has once been determined by a final judgment in a criminal case that the same issue cannot be relitigated. United States v. Sarno, 596 F.2d 404, 407 (9th Cir. 1979); United States v. Fayer, 573 F.2d 741, 745 (2d Cir.), cert. denied, 439 U.S. 831 (1978). In such situations, the collateral estoppel doctrine requires (1) an identification of the issues in the two actions to determine whether they are sufficiently similar and material; (2) an examination of the record of the prior case to decide whether the issue was litigated in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case. United States v. Dipp, 581 F.2d 1323, 1325 (9th Cir. 1978), cert. denied, 439 U.S. 1071 (1979); United States v. Giarratano, 622 F.2d 153, 155 (5th Cir. 1980). Significantly, the burden is on the defendant to establish that the verdict in the prior trial necessarily determined in his/her favor the issue which he/she contends should not be considered. Id. at 156 n.4; United States v. Fayer, supra at 745.

An examination of two cases in this area reveals the type of analysis a court or prosecutor must make to determine if collateral estoppel dictates that an acquittal in a prior trial forecloses a subsequent perjury indictment.

In United States v. Haines, 485 F.2d 564 (7th Cir. 1973), the defendant, who had been acquitted of a charge of bank robbery, was later convicted of perjury for testifying during the bank robbery trial that the defendant had been in Terre Haute on the morning of the robbery, and at the time of robbery was en route to Indianapolis. The robbery took place in Laneville, Indiana.

The defendant contended that his acquittal on the bank robbery charge constituted a prior determination of the veracity of his alibi testimony. The court of appeals did not agree.

In the context of a perjury indictment relating to testimony given at a former trial on a substantive

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

charge, the doctrine of collateral estoppel does not bar the perjury prosecution unless the issues of fact central to that prosecution were necessarily determined in the former trial. (Emphasis by the court.) 485 F.2d at 565.

For the jury to have found that the defendant was not in Laneville robbing the bank, it would not necessarily have had to believe that the defendant was in Terre Haute.

Haines is typical of most situations in which the defendant takes the stand to put forth an alibi defense. See Adams v. United States, 287 F.2d 701 (5th Cir. 1961). Because one who advances an alibi defense provides facts beyond the confines of the prosecution's case, a verdict against the government on the issue of guilt does not necessarily mean that the alibi testimony was judged credible by the jury. Occasionally, however, the defendant provides an explanation for his conduct which goes no further than to counteract the contention of the prosecution and thus a verdict against the government on the issue of guilt operates as a total vindication of the defendant's testimony.

One such case is United States v. Nash, 447 F.2d 1382 (4th Cir. 1971). Another case, dismissing a perjury indictment based on collateral estoppel, is United States v. Drevetzki, 338 F. Supp. 403 (N.D. Ill. 1972). Estelle Nash, a postal employee, was charged with stealing a letter from the mails. Postal inspectors testified that they saw the defendant take, from a post office box, a letter containing \$2.75, which the inspectors had previously marked with a fluorescent powder. The inspectors followed her into the ladies rest area and, after a search of her person, discovered three marked quarters. At trial Ms. Nash admitted that she went into the rest area and that she was in possession of the three marked quarters. She claimed, however, that she had obtained four quarters from a change machine.

Although the government contended that the interval between the time the inspectors saw Ms. Nash remove the envelope and the time she was searched did not allow for access to the change machine, and also provided evidence that the marked quarters she claimed to have received from the machine could not have been deposited for change, she was acquitted of the mail theft charge. In a subsequent trial for perjury, however, upon the same evidence as was introduced in mail theft trial, Estelle Nash was convicted.

The court of appeals reversed the conviction, concluding that the jury in the mail theft trial undoubtedly passed upon the credibility of

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Estelle Nash's statements under oath. "There were but two conflicting explanations of her possession to be considered. Thus, the jury 'necessarily' had to pass upon the truthfulness of her account." 447 F.2d at 1385. Accordingly the government was collaterally estopped from raising the issue again. In his concurring opinion, Judge Winter suggests that collateral estoppel is a bar only when there is no new evidence introduced at a subsequent perjury trial. Accord, United States v. Sarno, supra at 407 ("unless the subsequent perjury indictment is based upon evidence which was not available at the first trial. . . it would appear that the government would be merely trying to recover from its initial failure to convince the trier of fact of the falsity of defendant's testimony at the first trial"). While this approach has an equitable appeal, such a suggestion was explicitly rejected in Harris v. Washington, 404 U.S. 55 (1971).

Before prosecuting an acquitted defendant for perjury based upon his testimony at trial, the possibility that such a prosecution has been foreclosed should be explored fully so the government will avoid the appearance of vindictive prosecution or waste of government resources.

9-69.273 Lack of Miranda Warning

Generally an indictment for perjury before a grand jury will not be dismissed for failure to advise the witness of his right not to incriminate himself. United States v. Orta, 253 F.2d 312 (5th Cir.), cert. denied, 357 U.S. 905 (1958). The issue, however, of the warnings required to be given to a grand jury witness who is a virtual or putative defendant has been the subject of considerable controversy. The Supreme Court confronted this issue in United States v. Mandujano, 425 U.S. 564 (1976).

In United States v. Mandujano, supra, the defendant was called before a grand jury several months after he had attempted to procure quantities of heroin at the behest of an undercover agent. Though he was unable to obtain any heroin for sale to the agent, Mandujano had taken \$650 in front money. Before the grand jury the government attorney warned Mandujano against committing perjury, advised him he had a right not to incriminate himself and told him he could have an attorney outside the grand jury room with whom he could confer. Although Mandujano indicated he could not afford an attorney, the prosecutor did not tell him he had the right to appointed counsel or that his statements could be used against him. During questioning, Mandujano denied he had ever been approached to procure heroin and that he had ever accepted \$650 front money. Mandujano was later indicted for perjury, under 18 U.S.C. §1623, and for attempting to distribute heroin, under 21 U.S.C. §846.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

In affirming the district court's suppression of Mandujano's grand jury testimony, the court of appeals held that, although a witness before a grand jury is not entitled to a Miranda warning, where the witness is a putative defendant due process requires that a Miranda warning be given. The court noted that the prosecutor knew he was putting the witness in the position of either perjuring or incriminating himself. 496 F.2d 1050 (5th Cir. 1974).

In the Court's plurality opinion reversing the Court of Appeals, the Chief Justice joined by Mr. Justice White, Mr. Justice Powell, and Mr. Justice Rehnquist concluded that Miranda warnings need not be given to a grand jury witness who is called to testify about criminal matters in which he may have played a part. Moreover, the failure to have given such witness Miranda warnings is no basis for having false statements made to the jury suppressed in a subsequent prosecution of the witness for perjury based on those statements.

Mr. Justice Brennan, joined by Mr. Justice Marshall, although concurring in the judgment, also believed that in the absence of a knowing waiver of the privilege against compulsory self-incrimination, the fifth amendment requires that testimony acquired by calling a putative defendant before a grand jury and compelling the defendant to testify regarding the suspected crime be unavailable as evidence in a later prosecution for that crime. In addition, because of the potential prejudice to a putative defendant's privilege against compulsory self-incrimination when called to the grand jury, some guidance by counsel is required.

Mr. Justice Stewart, joined by Mr. Justice Blackmun, concluded that the fifth amendment privilege against compulsory self-incrimination did not require the witness's grand jury testimony to be suppressed because that testimony was relevant only to the witness's prosecution for perjury and was not introduced in the prosecution of the witness for attempting to distribute heroin. Furthermore, this was not a case where the perjury prosecution should be prohibited because of prosecutorial misconduct that amounted to a denial of due process.

While the Supreme Court in Mandujano clearly held that a putative defendant is not entitled to full Miranda warnings before testifying before a grand jury, the plurality opinion did not address the question of whether it is necessary to advise such a witness of his fifth amendment privilege against self-incrimination. 425 U.S. at 582 n.7. Indeed, the Court has reserved for later decision the question whether a prosecutor must advise a grand jury witness of his fifth amendment rights. United States v. Washington, 431 U.S. 181, 186 (1977). However, Department of Justice guidelines require prosecutors to give grand jury witnesses

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

warnings resembling Miranda warnings and to advise putative defendants of their status as such. See USAM 9-11.250; United States v. Jacobs, 547 F.2d 772, 774-75 (2d Cir. 1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978) (per curiam) (court may exercise supervisory power to suppress perjured testimony when prosecutor fails to advise grand jury witness of putative defendant status in accordance with practice of U.S. attorneys in circuit).

9-69.274 Recantation

A. In General

18 U.S.C. §1623(d) provides that in certain limited circumstances a retraction and correction of false testimony by a witness will act as a bar to prosecution for the initial perjury. Before the enactment of 18 U.S.C. §1623, the federal law, under 18 U.S.C. §1621, was the crime of perjury was complete as soon as the false statement was made, United States v. Norris, 300 U.S. 564 (1937), and that a subsequent retraction and correction of the testimony did not have the effect of erasing the perjury, but was only relevant as an affirmative defense in showing the absence of intent to commit perjury, United States v. Kahn, 472 F.2d 272, 284 (2d Cir. 1973), cert. denied 411 U.S. 982 (1973). Thus, since recantation is a bar to prosecution under 18 U.S.C. §1623 rather than an affirmative defense, the issue of recantation is an issue of law to be decided by the court. United States v. D'Auria, 672 F.2d 1085, 1091 (2d Cir. 1982); United States v. Kahn, supra at 283 n.9; United States v. Tucker, 495 F. Supp. 607, 613 (E.D.N.Y. 1980). The defense of recantation must be raised before trial under Fed. R. Crim. P. 12(b)(2), as a jurisdictional bar to prosecution. United States v. Denison, 663 F.2d 611, 618 (5th Cir. 1981).

18 U.S.C. §1623(d) which was adopted in modified form from the New York Penal Code, Section 210.5 (see People v. Ezaugli, 141 N.E. 2d 580 (1957)), provides that:

Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It is clear from the above that a witnesses' admission of the falsity of his declarations does not automatically bar prosecution, but that prosecution is barred only if the admission occurs at a time when the false declarations have 'not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.' Thus, if either of these prerequisites has already occurred prior to the time of the witnesses' reappearance to correct (his) testimony, the recantation provisions of 18 U.S.C. §1623(d) are inapplicable and cannot be invoked to bar prosecution. Stated another way, recantation bars prosecution only when the defendant has established that neither of the conditions in 18 U.S.C. §1623(d) has occurred. United States v. Denison, supra at 615; United States v. Scrimgeour, 636 F.2d 1019, 1024 (5th Cir.), cert. denied, 454 U.S. 878 (1981); United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980). Moreover, the burden is on the defendant to show that he/she is within the protection of the recantation exemption. United States v. Scrimgeour, supra at 1024; United States v. Moore, supra at 1044. his/her

In ruling on the timeliness of claimed recantation by a witness the courts have generally interpreted the 'manifest' proviso of 18 U.S.C. §1623(d) as applying specifically to the witnesses' knowledge, derived either from independent sources or directly from the government prosecutor, that the falsity of his prior statements 'has been or will be exposed.' In the cases where the witness possesses such knowledge, the courts have consistently held that no effective recantation can thereafter be made. United States v. Del Toro, 513 F.2d 656, 666 (2d Cir. 1975), cert. denied, 423 U.S. 826 (1975); United States v. Mitchell, 397 F. Supp. 166, 177 (D. D.C. 1974); United States v. Krogh, 366 F. Supp. 1255, 1256 (D. D.C. 1973); United States v. Crandall, 363 F. Supp. 648, 655 (W.D. Pa. 1973), aff'd, 493 F.2d 1401 (3d Cir.), cert. denied, 419 U.S. 852 (1974).

At least one case, however, appears to indicate, at least by implication, that 'manifest' can also be interpreted to mean that the falsity of the witnesses' statements has merely become known to the government or the grand jury, as opposed to the witness himself/herself. In United States v. Kahn, supra, the Second Circuit Court of Appeals held that a 18 U.S.C. §1623(d) defense was not available to defendant Kahn since at the time of his alleged recantation several other witnesses had already testified concerning the bribes that Kahn had falsely denied knowledge of during his initial grand jury appearance. There is no indication in the opinion of a finding by the court that at the time of his attempted recantation Kahn had any knowledge of the contradictory testimony heard by the grand jury. While the position taken by the Kahn court is at least arguable, such an interpretation appears to be in conflict with the legislative intent and the other case law interpreting this provision.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

There is also some question as to the standards to be applied in determining when the false declarations of a witness will be considered as having 'substantially affected the proceedings', thereby precluding an effective recantation. Certainly, a timely recantation would be precluded in any case where the grand jury has already acted. As the court stated in United States v. Krogh, supra, at 1256, in rejecting the defendant's recantation claim as untimely:

As a matter of law such a statement must be presumed to have been considered by the Grand Jury and to have substantially affected the proceedings where the Grand jury has subsequently acted. Section 1623(d) does not contemplate a detailed inquiry into the thought processes of Grand Jurors.

Further, in United States v. Crandall, supra, the court found that the defendant's false declarations had substantially affected the proceedings since the grand jury had been deprived initially of relevant testimony as to the guilt of other individuals which resulted in a several month delay in the grand jury's investigation.

While these cases offer some guidance, the determination of whether a given proceeding has been substantially affected by the witnesses' false declarations can probably only be made after a consideration of the facts and circumstances of the particular court or grand jury proceeding. It is not relevant that the grand jury had no authority to indict the defendant for the substantive offense inquired into, for statute of limitations reasons or otherwise. United States v. Doulin, 538 F.2d 466, 470 (2d Cir.), cert. denied, 429 U.S. 895 (1976). Obviously, however, by the time the defendant is indicted for perjury, the defendant has lost the ability to recant. United States v. Baldwin, 506 F. Supp. 300, 301 (M.D. Tenn. 1980).

While the statutory language of 18 U.S.C. §1623(d) indicates that a recantation will not bar prosecution if either of the two prerequisites has already occurred, the courts in rejecting defendants' recantation claims have generally made factual determinations as to both conditions. Accordingly, it is recommended that the government argue in all cases, assuming the facts of the particular case so permit, that the defendant's efforts to recant occurred only after the proceedings had been substantially affected and at a time when it had already become manifest that the falsity had been or would be exposed.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

B. Necessity of Advising a Witness of Recantation Provision of 18 U.S.C. §1623(d)

The government is not required by due process principles or otherwise to inform a grand jury witness of his/her statutory right to recant. United States v. D'Auria, *supra* at 1092 ("A witness who has lied remains obligated by his oath to tell the truth, without prodding."); United States v. Scrimgeour, *supra* at 1026; United States v. Anfield, 539 F.2d 674, 679 (9th Cir. 1976); United States v. Doulin, *supra* at 471 n.4. Such is the case even if the prosecutor advises the witness of the penalties of perjury. United States v. Lardieri, 497 F.2d 317 (3d Cir. 1974). In addition, there is no requirement that the government reveal to a perjurer that it has evidence of the untruthfulness of his/her statements. Nor must the government delay revealing incriminating evidence to allow the witness to reflect on his/her perjury. United States v. D'Auria, *supra* at 1093; United States v. Scrimgeour, *supra* at 1025; United States v. Denison, *supra* at 616-17 ("Denison would have us limit this condition to ensure that a witness who commits perjury always must have an opportunity to escape prosecution if he has a change of heart. We decline to do so. Such a holding would expand the recantation defense far beyond the purpose it is designed to serve."); United States v. Sun Myung Moon, 532 F. Supp. 1360, 1371 (S.D.N.Y. 1982).

C. Witness' Right to Recant

If a witness who has completed his/her testimony requests that he/she be allowed to reappear before the grand jury for the purpose of recantation, the prosecutor should grant the request if timely made, in keeping with the legislative intent of 18 U.S.C. §1623(d), promotion of truthful testimony. In the course of debate in the Senate on this section, Senator McClellan stated:

. . . [T]he recantation provision of Title IV establishes the right of a witness to protect himself from prosecution for perjury he has already committed, by righting the wrong before it has harmed the proceedings during which he lied. Congressional Record - Senate, June 9, 1970, S. 8656.

In order to recant the witness must, as a condition precedent to giving truthful testimony, admit that his/her perjurious testimony was false. An outright retraction and repudiation of the false testimony is essential to a recantation within the meaning of the statute; United States v. D'Auria, *supra* at 1091-92; United States v. Scrimgeour, *supra* at 1025 (defendant's lack of access to defendant's grand jury transcript until the day of defendant's reappearance is not inconsistent with purposes of 18 U.S.C. §1623(d)).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It is clear, however, that the reappearance by the witness after it has become 'manifest' that the falsity of his/her previous testimony 'has been or will be exposed' does not preclude the government from prosecuting the witness for his/her prior false declarations before the grand jury. United States v. Del Toro, supra; United States v. Mitchell, supra; United States v. Krogh, supra; United States v. Crandall, supra.

9-69.280 Suggested Forms of Indictments

9-69.281 Indictment (18 U.S.C. §1621)

A. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, John Doe, having duly taken an oath, before \_\_\_\_\_, a competent officer of the Securities and Exchange Commission during an investigation duly authorized by the Commission, a case in which Title \_\_\_\_\_ Section \_\_\_\_\_ authorizes an oath to be administered, that he would testify truly, did willfully and knowingly and contrary to said oath state material matter which he did not believe to be true, that is to say:

B. At the time and place aforesaid the Commission was conducting an investigation into the practices and financial conditions of the XYZ Corporation to determine whether said corporation had violated Title \_\_\_\_\_ Section \_\_\_\_\_.

C. It was material to the aforesaid investigation to determine whether John Doe had ever borrowed money from the XYZ Corporation.

D. At the time and place aforesaid in paragraph 1, John Doe appeared as a witness before the Commission, and then and there being under oath as aforesaid, testified falsely before the Commission with respect to the aforesaid material matter as follows:

"Q. Have you ever borrowed money from XYZ Corporation? A. No."

E. The aforesaid testimony of John Doe, as he then and there well knew and believed, was false in that on January 13, 1974, John Doe did in fact borrow money from the XYZ Corporation. All in violation of 18 U.S.C. §1621.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.282 Indictment (18 U.S.C. §1622)

A. On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_ in the \_\_\_\_\_ District of \_\_\_\_\_ Richard Roe was adjudicated a bankrupt by the United States District Court for said District and said matter and proceeding was duly referred to James Smith, Referee in bankruptcy of said Court for further proceedings (Referee's No. \_\_\_\_\_).

B. From on or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, continuing thereafter up to and including the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_ JOHN DOE, the defendant herein, did wilfully suborn, instigate, induce and procure one Jane Doe to duly take an oath before the said Referee in said bankruptcy proceeding that she would testify truly to material matters relative to the said proceeding concerning the goods, property and debts of the bankrupt and to wilfully and contrary to such oath, state material matter hereinafter more particularly set forth, which neither JOHN DOE nor the said Jane Doe believed to be true.

C. On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, the said Jane Doe did appear as required before the said Referee as a witness, was duly sworn and took her oath as a witness in said proceeding, the oath being administered by the said Referee; the said matter and proceeding aforesaid and the hearing thereon before the said Referee as a case in which a law of the United States authorized an oath to be administered.

D. The said Jane Doe, being duly sworn as aforesaid, it did then and there become and at all times mentioned herein was a material matter in the said proceeding whether one \_\_\_\_\_ had theretofore and prior to the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, loaned to the said Richard Roe the sum of \_\_\_\_\_.

E. The said Jane Doe, in consequence of said wilful subornation, inducement and procurement of JOHN DOE, being under oath as aforesaid, did falsely and knowingly and contrary to said oath, testify in substance and to the following effect that the said \_\_\_\_\_ had theretofore and prior to the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_, loaned to the said Richard Roe the sum of \_\_\_\_\_.

F. Said testimony was false and contrary to the oath taken by Jane Doe, as Jane Doe and JOHN DOE then and there well knew and believed, in that \_\_\_\_\_. All in violation of 18 U.S.C. §1622.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.283 Indictment (18 U.S.C. §1623; Two Inconsistent Statements)

A. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, Richard Roe, while under oath as a witness in a criminal case then being tried before the United States District Court for said District entitled, United States v. John Doe, No. \_\_\_\_\_, did knowingly make a material declaration which was inconsistent with a prior material declaration made by RICHARD ROE while testifying in a proceeding before a duly empanelled and sworn grand jury for the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_, such material declarations being inconsistent to the degree that one of them is necessarily false, that is:

B. The said RICHARD ROE on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, while under oath as a witness in United States v. John Doe, No. \_\_\_\_\_, a criminal trial in the \_\_\_\_\_ District of \_\_\_\_\_, did knowingly declare with respect to a material matter as follows:

Q. Have you ever to your knowledge received a loan of money from John Doe?

A. No.

C. The said RICHARD ROE, on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, while appearing as a witness under oath before the federal grand jury in the \_\_\_\_\_ District of \_\_\_\_\_, did knowingly declare with respect to a material matter as follows:

Q. Have you ever to your knowledge received a loan of money from John Doe?

A. Yes.

D. The irreconcilably contradictory declarations of the said RICHARD ROE quoted in paragraphs 2 and 3 herein were material to the point in question in each of the proceedings before which such declarations were made because it was material to each proceeding to ascertain whether or not John Doe had ever made a loan of money in any amount to RICHARD ROE. All in violation of 18 U.S.C. §1623.

9-69.284 Indictment (18 U.S.C. §1623); One False Statement

A. On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, in the \_\_\_\_\_ District of \_\_\_\_\_, RICHARD ROE, while under oath as a

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

witness in a criminal case then being tried before the United States District Court for the said District entitled, United States v. John Doe, Indictment No. \_\_\_\_\_ knowingly did make a false material declaration, that is to say:

B. At the time and place aforesaid, the Court and Jury were engaged in the trial of the aforementioned case wherein JOHN DOE, the defendant therein, was charged with making an extortionate extension of credit to Richard Roe.

C. It was a matter material to said trial to determine whether or not JOHN DOE had ever made a loan of money in any amount to Richard Roe.

D. At the time and place aforesaid, RICHARD ROE, while under oath, did knowingly declare before said Court and Jury with respect to the aforesaid material matter, as follows:

"Q. Have you ever to your knowledge received a loan of money from John Doe? A. No."

E. The aforesaid testimony of RICHARD ROE, as he then and there well knew and believed, was false in that, on or about \_\_\_\_\_, RICHARD ROE did receive a loan of money from John Doe.

All in violation of 18 U.S.C. §1623.

9-69.290 Jury Instructions

9-69.291 18 U.S.C. §1621

18 U.S.C. §1621 provides in part that:

Whoever . . . having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify . . . truly, . . . willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury, . . .

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. Essential Elements of Offense

Three essential elements are required to be proved in order to establish the offense charged in the indictment:

1. That the testimony was given under oath taken by the accused before the \_\_\_\_\_ "Agency, Department or Commission" as charged.

2. That the testimony so given was false in one or more of the respects charged; and

3. That the false testimony was willfully given, as charged.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

B. Willfully

An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

C. Proof of Intent

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his/her state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

Section 1306 Federal Jury Practice and Instructions Devitt and Blackmar.

D. Materiality of Testimony

Whether a statement made by a witness before the grand jury of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_ is material to the investigation then being carried on by the grand jury of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

\_\_\_\_\_ is a question of law to be decided by the trial judge, and not by the jury.

If you find beyond a reasonable doubt that the defendant, \_\_\_\_\_, did testify to those matters alleged in the indictment, then I instruct you as a matter of law that such testimony was material to the investigation then being conducted by the grand jury.

E. Corroboration of Evidence of Falsity

The law requires in a case such as this that the falsity of the testimony in question be proved by the sworn testimony of at least one witness, and that the testimony as to falsity, given by such witness, be corroborated or supported by other testimony, or by documentary evidence, or by some other evidence in the case.

As to the inapplicability of "two-witness" rule to specified types of cases, see notes to 47.05, Devitt and Blackmar, Federal Jury Practice and Instructions.

9-69.292 Jury Instructions - 18 U.S.C. §1622

18 U.S.C. §1622 provides in part that "whoever procures another to commit perjury" in violation of the laws of the United States "is guilty of subornation of perjury," which is an offense against the United States.

A. Elements of the Offense

Three essential elements are required to be proved in order to establish the offense charged in the indictment, as follows:

1. That the defendant knowingly and wilfully procured \_\_\_\_\_ to testify before the referee in bankruptcy as to material matters in the bankruptcy proceeding of \_\_\_\_\_, a corporation;
2. That the defendant knew that the testimony which \_\_\_\_\_ intended to give before the referee was false in one or more of the respects charged in the indictment, and that \_\_\_\_\_ knew that it was false in one or more of these respects;
3. That \_\_\_\_\_ knowingly and wilfully testified falsely before the said referee in one or more of the respects charged.

MARCH 12, 1984

Ch. 69, p. 69

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

B. Perjury Must Be Proved

Under the law the actual commission of perjury is a necessary element of the crime of subornation of perjury, and must be established by the same degree of proof required when the alleged perjurer himself is on trial. This means that the falsity of the testimony in question must be proved by the sworn testimony of at least one witness and that the testimony as to falsity must be corroborated or supported by other testimony, or by documentary evidence, or by some other evidence in the case. The proof required for the element of suborning or inducing the perjury, however, is that of proof beyond reasonable doubt just as in the case of other crimes.

(If the perjury suborned was prosecutable under 18 U.S.C. §1623, the requirement that it be proved by "two-witnesses" is obviated. See United States v. Gross, 375 F. Supp. 971 (D. N.J., 1974)).

9-69.293 Jury Instructions - 18 U.S.C. §1623

The statute which it is alleged the defendant has violated reads in pertinent part as follows:

'Whoever under oath . . . in any proceeding before . . .  
. . . any . . . grand jury of the United States knowingly  
makes any false material declaration . . . shall be . . .  
. . . ' punished as provided by law.

A. Essential Elements of Offense

Three essential elements are required to be proved in order to establish the offense charged in the indictment:

1. That the testimony was given under oath taken by the accused before the grand jury as charged.
2. That the testimony so given was false in one or more of the respects charged.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

3. That the false testimony was knowingly given, as charged.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

B. Knowingly

An act is done "knowingly" if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

C. Materiality of Testimony

Whether a statement made by a witness before the grand jury of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_ is material to the investigation then being carried on by the grand jury of the United States District Court for the \_\_\_\_\_ District of \_\_\_\_\_ is a question of law to be decided by the trial judge, and not by the jury. If you find beyond a reasonable doubt that the defendant, \_\_\_\_\_, did testify to those matters alleged in the indictment, then I instruct you as a matter of law that such testimony was material to the investigation then being conducted by the grand jury.

D. Specific Intent

The crime charged in this case required proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law.

E. Proof of Intent

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his/her state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.300 PRISON OFFENSES

9-69.301 Introduction

Chapter 87 of Title 18 United States Code, defines and punishes prison offenses. Specifically, those statutes are as follows:

A. 18 U.S.C. §1791(a)(1) - prohibits providing or attempting to provide any contraband item to an inmate of a federal penal or correctional facility.

B. 18 U.S.C. §1791(a)(2) - prohibits any inmate of a federal penal or correctional facility from making, possessing or procuring any contraband item or attempting to do so.

C. 18 U.S.C. §1791(b) - sets forth penalties commensurate with the dangerousness of the contraband item.

D. 18 U.S.C. §1792 - sets forth a penalty of up to ten years imprisonment and/or up to a \$25,000 fine for inciting, causing or attempting to cause a riot or mutiny at any federal penal or correctional facility.

9-69.310 Elements of 18 U.S.C. §1791(a)(1)

9-69.311 Violation

The prohibited conduct under 18 U.S.C. §1791(a)(1) must violate a "statute, or a regulation, rule, or order issued pursuant thereto." This includes rules and regulations promulgated both by the Attorney General and the Bureau of Prisons.

Prior law prohibited introducing any prohibited item into or taking any prohibited item from a federal penal facility. As amended by the Comprehensive Crime Control Act of 1984, 18 U.S.C. §1792(a)(1) prohibits providing or attempting to provide contraband. Since the new amendment eliminates the "taking or sending" language, this section probably can no longer be used to punish smuggling items out of a federal penal facility.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.312 Federal Penal or Correctional Facility

18 U.S.C. §1791(a)(1) only extends to activity in federal facilities. Congress intended that it apply only to inmates (whether convicted in federal or state court) in a federal penal institution. Congress did not seek to extend coverage to federal defendants incarcerated in state institutions since the primary interest in barring contraband from those institutions lies with state and local officials. S. Rep. No. 98-225, 98th Cong., 1st Sess. 382 (1984).

9-69.313 Contraband

18 U.S.C. §1791(a)(1)(A) through (1)(E) list five specific types of contraband and a residual or omnibus clause which covers "any other object." Most of the categories of contraband are either defined or are self-defining (e.g., currency). It should be noted, however, that subsection (a)(B), concerning objects which can be used as weapons or means of facilitating escapes, provides a broad, objective standard. The government need only show that the item could be used as a weapon or to aid an escape, not that it was intended for such use.

9-69.320 Elements of 18 U.S.C. §1791(a)(2)

9-69.321 Federal Penal or Correctional Facility

The same analysis applies as for 18 U.S.C. §1791(a)(1). See USAM 9-69.312, supra.

9-69.322 Possess or Provide

This subsection prohibits making, possessing, procuring, or otherwise providing oneself with contraband. Under this new language, the mere possession of contraband is punishable. It is no longer necessary to prove that the inmate conveyed the contraband from place to place within the facility.

9-69.323 Contraband

This subsection prohibits the same categories of contraband as subsection (a)(1). See USAM 9-69.313, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.330 Elements of 18 U.S.C. §1792

9-69.331 Participation

18 U.S.C. §1792 prohibits instigating, willfully attempting to cause, assisting or conspiring to cause a mutiny or riot. Participation in a federal prison riot constitutes assisting and willfully attempting to cause such a riot. See United States v. Farries, 459 F.2d 1057 (3d Cir. 1972), cert. denied, 410 U.S. 912 (1973). Thus, mere participation is prohibited and punishable as a crime. United States v. Bryant, 563 F.2d 1227 (5th Cir. 1977), cert. denied, 435 U.S. 972 (1978).

9-69.332 Mutiny or Riot

Resisting a federal warden or subordinate officer in the free and lawful exercise of his or her authority constitutes a mutiny. See United States v. Bryson, 423 F.2d 724 (4th Cir. 1970).

9-69.333 Federal Penal or Correctional Facility

See USAM 9-69.312, supra.

9-69.340 Penalties

9-69.341 Grading

18 U.S.C. §1791(b) provides a range of penalties—from a prison term of ten years and a fine of \$25,000 to a prison term of six months and a fine of \$1,000—corresponding to the danger represented by the different types of contraband.

9-69.342 [Reserved] *New BS*

9-69.350 Double Jeopardy

When an inmate possesses a weapon and subsequently uses that weapon to commit a separate offense (e.g., assault or murder), conviction and

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

consecutive sentencing on both charges does not constitute double jeopardy because possession of contraband is not a lesser included offense of the substantive crime. See United States v. Fountain, 642 F.2d 1083 (7th Cir.), cert. denied, 451 U.S. 993 (1981).

9-69.360 Knowledge of Warden

Lack of knowledge by the warden becomes an issue if the regulation being violated under 18 U.S.C. §1791 is 28 C.F.R. §6.1. 28 C.F.R. §6.1 requires that the offense occur without the knowledge of the warden.

In United States v. Berrigan, 482 F.2d 171, 188 (3d Cir. 1973), the Court of Appeals held that the warden's lack of knowledge regarding the sending and receiving of letters was an essential element of the crime. If the warden knew of the letters there could be no crime. This constituted "legal" impossibility and, therefore, was a valid defense to a charge of attempt. This analysis has not, however, been accepted by all courts of appeals. See United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y. 1973), aff'd, 484 F.2d 1271 (2d Cir. 1973) (per Curiam), cert. denied, 415 U.S. 978 (1974); United States v. Quijada, 588 F.2d 1253 (9th Cir. 1978); United States v. Frazier, 560 F.2d 884 (8th Cir. 1977), cert. denied, 435 U.S. 968 (1978).

In contrast to the Berrigan situation, however, when the contraband is intercepted and then allowed to proceed, the attempt would be already complete prior to the interception. Therefore, subsequent knowledge of the warden does not negate the knowledge element of the offense. See United States v. York, 578 F.2d 1036 (5th Cir.), cert. denied, 439 U.S. 1005 (1978).

9-69.400 FUGITIVE FELON ACT--18 U.S.C. §1073

9-69.410 Primary Purpose of Act

Though drawn as a penal statute, and therefore permitting prosecution by the federal government for its violation, the primary purpose of the Act is to permit the federal government to assist in the location and apprehension of fugitives from state justice. Accordingly, the Fugitive Felon Act does not supersede nor is it intended to provide an alternative for state extradition proceedings. No prior Division approval is required to authorize issuance of a complaint under the Act in aid of the states. United States v. McCarthy, 249 F. Supp. 199 (E.D.N.Y. 1966); United States

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

v. Diaz, 351 F. Supp. 1050 (D. Conn. 1972). Normally the federal complaint will be dismissed when the fugitive has been apprehended and turned over to state authorities to await interstate extradition. Under an amendment passed in 1961, the Act applies to all state felonies, including crimes punishable by death, and the fact that the flight may occur prior to institution of state prosecution does not defeat the operation of the statute. Lupino v. United States, 268 F.2d 799 (8th Cir. 1959), cert. denied, 361 U.S. 834 (1959).

9-69.420 Prerequisites to Issuance of Federal Complaint in Aid of States;  
Policy

No action should be taken to authorize the issuance of a complaint for violation of the Act unless there is probable cause to believe that the fugitive has fled and that his/her flight was for the purpose of avoiding prosecution and that he/she has moved or travelled in interstate or foreign commerce. The breadth of the statute as amended in 1961 requires that care be exercised to prevent its application to assist in the enforcement of any statute whose purpose is clearly discriminatory or in the discriminatory application of an otherwise lawful statute. Requests for federal assistance should be scrutinized carefully to avoid such cases. See H. Rep. No. 827, 87th Cong., 1st Sess. (1961), reprinted in (1961) U.S. Code Cong. & Adm. News, p. 3242. In doubtful instances, the advice of the General Litigation and Legal Advice Section of the Criminal Division should be sought. Attorneys familiar with the policies may be reached at 724-6893, 724-6971, and 724-7526.



U.S. Department of Justice

Executive Office for United States Attorneys

---

Washington, D.C. 20530

February 20, 1985

TO: Holders of United States Attorneys' Manual Title 9

FROM: United States Attorneys' Manual Staff  
Executive Office for United States Attorneys

Stephen S. Trott  
Assistant Attorney General  
Criminal Division

RE: Sentencing in Prison Contraband Cases

NOTE: 1. This is issued pursuant to USAM 1-1.550.  
2. Distribute to Holders of Title 9.  
3. Insert at the end of USAM Title 9.

AFFECTS: USAM 9-69.342

---

The following is a new section:

9-69.342 Sentencing in Prison Contraband Cases

In order to maximize the deterrent effect of a conviction for a violation of section 1791 or 1792, the attorney for the government should seek a sentence of imprisonment which is not suspended or allowed to run concurrently with any other term of imprisonment.

BS 9.004

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

It should be clear that the state or local authorities are determined to take all necessary steps to secure the return of the fugitive, and that it is their intention to bring him/her to trial on the state charge for which he is sought. Accordingly, caution should be exercised to guard against use of the investigative services of the FBI to compel the discharge of civil obligations. Requests for federal assistance in instances of state worthless check violations or of desertion or nonsupport of a spouse or child by a spouse or parent, should be examined with particular care, and the advice of the Criminal Division should be sought in doubtful instances.

Because the primary purpose of the Act is to assist the states in locating and apprehending fugitives, a complaint should not be filed in cases in which the location of the fugitive is already known by state authorities.

State prosecution of the fugitive should have been commenced by complaint, warrant, indictment, or information. In this regard, it is suggested that U.S. Attorneys, when authorizing a federal complaint, secure a certified copy of the state warrant and have the same readily available to deliver to a U.S. Marshal for transmission to the apprehending state when the fugitive is apprehended. Commencement of a state action is theoretically not an absolutely essential prerequisite to the issuance of a federal complaint under the Act, but prior issuance of a state warrant would seem to be possible in every instance. Where a request by a state for issuance of a federal complaint does not contain satisfactory evidence of violation of the Act the state should first be requested to supply evidence of the requisite character. In particularly serious cases, the FBI may be requested to make an investigation for the purpose of establishing the jurisdictional facts of apparent flight after the commission of a state felony. If the FBI Special Agent in Charge does not concur that a case is serious enough to warrant the making of an investigation to establish the jurisdictional facts of apparent interstate flight, the U.S. Attorney should report the matter at once to the Criminal Division, General Litigation and Legal Advice Section, so that it can be discussed with FBI Headquarters.

If the fugitive was released on bond, it should be clear that the bond has been forfeited.

9-69.421 Parental Kidnapping

State requests for the filing of unlawful flight to avoid prosecution complaints in parental abduction cases are to be treated in the same

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

fashion as other requests. See section 10, Parental Kidnapping Prevention Act of 1980, Pub. L. 96-611, §10, 94 Stat. 3573, reprinted in notes to 18 U.S.C.A. §1073.

Note that the warrant of arrest does not authorize a search for the minor child or the taking of the child into custody or its removal from the state.

9-69.430 Procedure Upon Apprehension

The fugitive should remain in federal custody or on bail or other conditions of release only so long as is necessary to permit his/her commitment to the custody of authorities in the state where apprehended. Upon arrest of the fugitive under federal warrant, he/she should be taken before the U.S. Magistrate without unnecessary delay in compliance with Rule 40, Fed. R. Crim. P. Under no circumstances should a federal officer solicit or accept waiver of interstate extradition by a fugitive in federal custody or release a fugitive to state authorities for extradition or any other purpose without the approval of the magistrate.

The requesting state authority should be notified immediately and requested to institute extradition proceedings at once. By the time the fugitive is brought before the magistrate, state authorities in the state of arrest should have been contacted and it should have been ascertained whether they are ready and willing to take him into custody to await extradition. Concerning the authority of a state to arrest and hold in custody a felon fleeing from another state, see 35 C.J.S., Extradition, section 12; D.C. Code, Sections 23-701 et seq.; Uniform Criminal Extradition Act (enacted in 48 states, Puerto Rico and the Virgin Islands). Concerning waiver of extradition, see Uniform Criminal Extradition Act.

9-69.431 Conditions of Release--Policy

Under ordinary circumstances, no useful purpose will be served by the setting of stringent conditions of release on the federal charge. Where the asylum state authorities are ready to immediately receive the fugitive and hold him to await interstate extradition or under waiver of extradition, and the requesting state is ready and able to extradite him/her, release of the defendant on his/her own recognizance or dismissal of the federal action in the requesting state is justified to expeditiously effect his/her transfer to asylum state authorities. In this event, the U.S. Attorney in whose district the original federal

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

complaint was filed should be contacted at once and informed of the circumstances and requested to dismiss the complaint. Prompt communication with the U.S. Attorney in the requesting state is particularly important if the magistrate refuses to release the fugitive on his/her own recognizance. This procedure can be expedited if the U.S. Attorney in the initiating district will transmit with the federal warrant an indication that he/she consents to discharge of the defendant and that he/she will seek dismissal of the federal action on the condition that custody of the fugitive will be accepted by state authorities where apprehended and that the requesting state will immediately move to extradite him/her. A simple notice to the U.S. Attorney in the initiating district will then quickly lead to termination of the federal proceedings.

Asylum state authorities in some localities refuse to accept custody of a fugitive except upon receipt of a copy of the warrant outstanding in the requesting state. If the state warrant has not yet been received when the fugitive appears before the U.S. Magistrate, pursuant to Rule 40, Fed. R. Crim. P., for release under 18 U.S.C. §3146 pending receipt of the warrant, the U.S. Attorney should request that stringent conditions of release be imposed in light of the apparent high likelihood of flight. In these cases, it is highly desirable to forward the state warrant to the asylum state as quickly as possible. If as previously suggested, the U.S. Attorney in the initiating district has already made available to the U.S. Marshal in that district a certified copy of the state warrant, the marshal when notified of the defendant's apprehension can immediately send to the marshal in the apprehending district the federal warrant, together with the certified copy of the state warrant for presentation to asylum state authorities.

If for any reason the demanding state is unwilling to extradite, or if extradition is attempted but fails, a complete statement of all the facts should be forwarded immediately to the Criminal Division and instructions awaited before proceeding further.

9-69.440 Unlawful Flight

9-69.441 To Avoid Custody or Confinement After Conviction

This portion of the statute apparently covers inmates of jails or prisons as well as those on conditional liberty, whether probation or parole. The government must show that flight was for the purpose of avoiding custody or confinement; therefore, the evidence should indicate that the subject knew or believed that his conditional liberty was about

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

to be revoked or was at least in jeopardy. Selective handling by U.S. Attorneys in this regard will obviate indiscriminate use of the Act to locate parolees who have simply failed to report to the parole board or failed to notify the board of a change of address.

9-69.442 To Avoid Giving Testimony

No complaint should be authorized under that portion of the statute punishing flight to avoid giving testimony in criminal proceedings involving a felony until the state criminal proceeding, to which such testimony related, has actually been instituted in the state court. See Durbin v. United States, 221 F.2d 520 (D. D.C. 1954). Before authorizing the filing of a complaint, the U.S. Attorney should be satisfied that there is substantial evidence to indicate that the witness fled in order to avoid giving testimony.

The majority of states have adopted the Uniform Act to Secure the Return of Witnesses From Without the State in Criminal Cases. The state should be required to exhaust existing remedies for securing the return of the witness. If the demanding state is unable to effect the return of the fugitive witness, a complete statement of all the facts should be forwarded to the Division and instructions awaited before proceeding further.

9-69.443 To Avoid Service of Process

The Act was amended in 1970 to include unlawful flight to avoid service of lawful process "requiring the giving of testimony or the production of documentary evidence before an agency of a state empowered by the law of such state to conduct investigations of alleged criminal activities . . ."

Unlawful flight to avoid contempt proceedings for alleged disobedience of the lawful process of a state agency was also brought under 18 U.S.C. §1703 by the 1970 amendment.

9-69.450 Federal Information or Indictment; Removal--Approval Required

The 1961 amendment to the Act incorporated existing administrative practice by requiring approval by the Attorney General or Assistant Attorney General, in writing, before initiation of prosecution for unlawful flight to avoid prosecution, or custody or confinement after

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

conviction, or to avoid giving testimony. Accordingly, under no circumstances should an indictment under the Act be sought nor an information be filed nor should removal proceedings under Rule 40, Fed. R. Crim. P., be instituted without the written approval of the Assistant Attorney General, Criminal Division. See H. Rep. No. 827, 87th Cong., 1st Sess. (1961), reprinted in (1961) U.S. Code Cong. & Adm. News, p. 3242 United States v. McCord, 695 F.2d 823 (5th Cir.), cert. denied, \_\_\_\_\_ U.S. \_\_\_\_\_, 103 S. Ct. 1533 (Apr. 4, 1983).

9-69.460 Aiding and Abetting

One who aids and abets an unlawful flight made a federal offense by 18 U.S.C. §1073 also commits a federal offense, 18 U.S.C. §2. See United States v. Thurman, 687 F.2d 11 (3d Cir. 1982); Hett v. United States, 353 F.2d 761 (9th Cir. 1965).

The venue and requisite authorizations to institute a prosecution for aiding and abetting a violation of §1073 would be the same as for 18 U.S.C. §1073. United States v. Thurman, supra. See USAM 9-69.470, infra, and USAM 9-69.450, infra.

9-69.470 Venue

A violation of 18 U.S.C. §1073 may be prosecuted only in the federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement or in which an avoidance of service of process or the contempt is alleged to have been committed.

9-69.500 ESCAPE FROM CUSTODY RESULTING FROM CONVICTION (18 U.S.C. §§751 and 752)

9-69.501 Introduction

This chapter deals with the criminal sanctions for escape or attempted escape from lawful custody or confinement following conviction, or from custody or confinement prior to conviction. Criminal sanctions are further delineated for aiding or assisting the escape or attempt to escape. The applicable sections are contained in Chapter 35 of Title 18, U.S. Code. Specifically those statutes are as follows:

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

A. 18 U.S.C. §751(a)--sets forth a penalty of up to 5 years imprisonment and/or a fine of \$5,000 for escape on a felony, and one year confinement and/or a fine of \$1,000 for escape on a misdemeanor;

B. 18 U.S.C. §751(b)--provides for a penalty of one year imprisonment and/or a fine of \$1,000 for escape if the offense for which the person was arrested or confined was committed prior to his/her 18th birthday and said person had been confined was committed or is being or may be proceeded against as a juvenile delinquent under the Federal Juvenile Delinquency Act, 18 U.S.C. §§5031-5037;

C. 18 U.S.C. §752(a)--sets for the same penalty as provided in 18 U.S.C. §751, for a person who instigates, aids or assists the escape or attempt to escape; and

D. 18 U.S.C. §752(b)--prescribes the same penalty as under 18 U.S.C. §751(b) for a person who instigates, aids or assists the escape or attempt to escape of any person who had been committed or may be proceeded against as a juvenile delinquent under the Federal Juvenile Delinquency Act.

9-69.502 Legislative History

The prohibition against escape and the aiding, abetting and assisting thereof, was initially incorporated as sections 9 and 10 of "A Bill to Reorganize the Administration of Federal Prisons; To Authorize the Administration of Federal Prisons; To Authorize the Attorney General to Contract For The Care of United States Prisoners; To Establish Federal Jails; and For Other Purposes." S. Rep. No. 533, 71st Cong., 2d Sess. 325-327 (1930).

9-69.503 Congressional Purpose

The intent of Congress in enacting the criminal sanctions against escape was to make it unlawful for a person properly committed to the custody of the Attorney General or who is confined in a penal or correctional institution, to escape or attempt to escape said custody or confinement. It is likewise unlawful for a person to procure the escape of any person properly committed to the custody of the Attorney General or confined in any penal or correctional institution or to assist in such escape.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.504 Defined

Escape is a "voluntary departure" from custody which requires that the escapee have knowledge that his/her actions would result in his/her leaving physical confinement without permission. See United States v. Bailey, 444 U.S. 394 (1980); United States v. Tapio, 634 F.2d 1092 (8th Cir. 1980); United States v. Cluck, 542 F.2d 728 (8th Cir.), cert. denied, 429 U.S. 986 (1976); United States v. Nix, 501 F.2d 516 (7th Cir. 1974).

9-69.510 Elements of the Offense--Generally

There are three elements necessary to constitute the federal offense of escape; (1) an escape; (2) from the custody of the Attorney General, or confinement in an institution where the prisoner is confined by the direction of the Attorney General; (3) when such custody or confinement is pursuant to a judgment of conviction or other process issued under the laws of the United States. See United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976); United States v. McCray, 468 F.2d 466 (10th Cir. 1972); United States v. Chapman, 455 F.2d 746 (5th Cir. 1972); Hardwick v. United States, 296 F.2d 24 (9th Cir. 1961).

9-69.511 Intent

As a general rule, specific intent is not an element required to be proven under the statute. United States v. Bailey, supra. See also, United States v. Tapio, supra. However, a number of cases have required a showing of specific intent pursuant to the "law of the case". See United States v. Cluck, supra; United States v. Woodring, 464 F.2d 1248 (10th Cir. 1972).

The government need not prove the existence of unlawful intent at the moment at which a prisoner or convict departs from custody. It is sufficient to sustain a conviction of escape if a person who leaves his place of confinement involuntarily or inadvertently, voluntarily forms an intent to remain at large at a later time. See United States v. Bailey, supra; United States v. Phipps, 543 F.2d 576 (5th Cir. 1976), cert. denied, 429 U.S. 110 (1977); United States v. Cluck, supra; United States v. Woodring, supra; and Chandler v. United States, 378 F.2d 906 (9th Cir. 1967).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.512 Attempt

In order to establish an "attempt" to escape under this section, the government must prove an intent to escape coupled with an overt act in the accomplishment thereof, United States v. McPherson, 436 F.2d 1066 (5th Cir.), cert. denied, 403 U.S. 997 (1971). See also Shockley v. United States, 166 F.2d 704 (9th Cir.), cert. denied, 334 U.S. 850 (1948); and Giles v. United States, 157 F.2d 588 (9th Cir. 1946), cert. denied, 331 U.S. 813 (1947).

9-69.513 Aiding and Assisting

The degree of culpability necessary to prove a violation of 18 U.S.C. §752(a), "aiding and assisting" an escape, is governed by the same principles as those under the general aiding and assisting statute, 18 U.S.C. §2. United States v. Castro, 621 F.2d 127 (5th Cir. 1980).

9-69.514 Conspiracy

Defendants may be charged with the separate offense of conspiracy to aid and assist an escape under the conspiracy statute, 18 U.S.C. §371, as well as the offense of aiding and assisting an escape under 18 U.S.C. §752(a). United States v. Bridgeman, 523 F.2d 1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961 (1976). See also United States v. Eaglin, 571 F.2d 1069 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978); United States v. Gorham, 523 F.2d 1088 (D.C. Cir. 1975); and United States v. Hobson, 519 F.2d 765 (9th Cir.), cert. denied, 423 U.S. 931 (1975).

9-69.520 Constructive Custody

Under 18 U.S.C. §751, custody need only be minimal and an escape from the "constructive custody" of the Attorney General may constitute a violation thereof. United States v. Cluck, *supra*.

9-69.521 Institution or Facility in Which Confined - Generally

This section is applicable to any person who escapes or attempts to escape from any institution in which he/she is confined by direction of the Attorney General. United States v. Cluck, *supra*.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.522 Legal Custody by Attorney General

The courts have held that escape from a local sheriff and the county jail where defendant was detained in custody under process issued by the United States Commissioner (now magistrate) was a violation of this section. See United States v. Stead, 528 F.2d 257 (8th Cir. 1975), cert. denied, 425 U.S. 953 (1976); Credille v. United States, 354 F.2d 652 (10th Cir. 1965).

A defendant who escaped from a federally approved prison detention center was properly charged under this section. Milhouse v. Levi, 548 F.2d 357 (D.C. Cir. 1976); United States v. Allen, 432 F.2d 939 (10th Cir. 1970). Courts have likewise held that a defendant who left a halfway house without permission, or a defendant participating in a pre-release program who willfully violated the terms of his extended confinement, committed an escape within the meaning of this section. See United States v. Tapio, supra; United States v. Jones, 569 F.2d 499 (9th Cir.), cert. denied, 436 U.S. 908 (1978); United States v. Taylor, 485 F.2d 1077 (D.C. Cir. 1973); McCullough v. United States, 369 F.2d 548 (8th Cir. 1966). The escape statute does not punish an escape from state custody even though the escape took place on a federal reservation. United States v. Howard, 654 F.2d 522 (8th Cir.), cert. denied, 454 U.S. 944 (1981).

An escape may further be from a hospital in which the escapee was properly confined. See United States v. Schaffer, 664 F.2d 824 (11th Cir. 1981); United States v. Cluck, supra; United States v. Powell, 503 F.2d 195 (D.C. Cir. 1974); Frazier v. United States, 339 F.2d 745 (D.C. Cir. 1964).

An escape from incarceration pursuant to the civil contempt statute, 28 U.S.C. §1826, does not appear to constitute an offense under 18 U.S.C. §751. Where the prisoner is also serving a criminal sentence which is suspended for the term of the civil contempt confinement, the prisoner's reversionary status as a prisoner on the criminal conviction may provide a basis for an escape charge. However, no law on this issue currently exists.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.530 Expeditious Authorization of Magistrates Complaints and Warrants  
in Federal Escape Cases

9-69.531 Policy

As a result of recent decisions handed down by the United States Supreme Court, it is now clear that warrants are required to enter premises to arrest escapees from federal custody under 18 U.S.C. §751 in all cases except where consent or exigent circumstances exist. It is clear from these decisions that in some cases an arrest warrant coupled with a reasonable belief that the escapee is in the premises is sufficient for a lawful entry. As a result of these decisions, discussed more fully herein, and in order to provide federal law enforcement officers with all available legal process for the accomplishment of arrests of federal escapees, you are instructed that in all federal escape cases the issuance of a magistrate's complaint and arrest warrant should be authorized promptly upon completion of the investigation and presentation of the matter to you by the agency involved. Many local law enforcement agencies will not assist in the search for federal escapees if there is no arrest warrant for the escapee. Thus, by promptly issuing the arrest warrant, you insure the full cooperation of local law enforcement agencies in the search for and apprehension of the escapee.

The present practice in some districts (over 50 percent of U.S. Attorneys' offices) of deferring authorization of a complaint and arrest warrant until after apprehension of the escapee should be discontinued. Reevaluation of the prosecutive merit of the individual escape case in which a complaint is authorized may be made after the escapee has been apprehended. At that later time, you may determine that the case does not merit proceeding further and dismiss the complaint, or you may indict the escapee within thirty or sixty days, 18 U.S.C. §3161(b), depending on the availability of a grand jury, and proceed with the prosecution. However, by prompt authorization of the issuance of a magistrate's complaint and warrant, you will make available to the enforcement agencies legal process which will be sufficient to permit entry into private premises.

9-69.532 Case Authority

Recent decisions by the United States Supreme Court support the necessity for an arrest warrant to arrest escapees. Although, in a limited number of cases, consent or exigent circumstances may justify entries into private premises to make these arrests, in all other cases warrantless entries are prohibited. The prohibition of warrantless

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

entries in the absence of consent or exigent circumstances, long recognized by federal courts, was clearly enunciated by the United States Supreme Court in Steagald v. United States, 451 U.S. 204 (1981), and Payton v. New York, 445 U.S. 573 (1980). Thus, absent consent or exigent circumstances, "the threshold may not be reasonably crossed without a warrant."

"Exigent circumstances" justifying entries on probable cause without a warrant are narrowly drawn and strictly enforced. As a result, few entries are justified on the basis of "exigent circumstances." Following the lead of the Circuit Court of Appeals for the District of Columbia in Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), numerous appellate courts have defined what constitutes exigent circumstances for probable cause to enter premises to arrest fugitives. United States v. Acevedo, 627 F.2d 68 (7th Cir.), cert. denied, 449 U.S. 1021 (1980); United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978); United States v. Reed, 572 F.2d 412 (2d Cir.), cert. denied, 439 U.S. 913 (1978); United States v. Brown, 540 F.2d 1048 (10th Cir. 1976), cert. denied, 429 U.S. 1100 (1977); Salvador v. United States, 505 F.2d 1348 (8th Cir. 1974); United States v. Skye, 492 F.2d 886 (6th Cir. 1974); United States v. Davis, 461 F.2d 1026 (3d Cir. 1972); Vance v. North Carolina, 432 F.2d 984 (4th Cir. 1970). The exigent circumstances are: (1) The violent nature of the offense with which the suspect is to be charged, (2) whether the suspect is reasonably believed to be armed, (3) a "clear showing" of probable cause to believe that the suspect committed the crime, (4) "strong reason" to believe that the suspect is in the premises, (5) a likelihood that the suspect will escape if not swiftly apprehended, (6) peaceful circumstance of the entry, and (7) entry to be in the daytime. In addition, "hot pursuit" will justify a warrantless entry. United States v. Santana, 427 U.S. 38 (1976); Warden v. Hayden, 387 U.S. 294 (1947). The courts generally hold that all of these exigencies must exist to justify warrantless entry to arrest a fugitive, and in a recent case by the First Circuit Court of Appeals, the court added a further requirement stating:

While the Dorman analysis has value, it is not to be used in the way the government does, as a pass or fail checklist for determining exigency. The ultimate test is whether there is such a compelling necessity for immediate action as will not brook the delay of obtaining a warrant. United States v. Adams, 621 F.2d 41 (1st Cir. 1980).

Because the exigent circumstances exception to the warrant requirement is available in only a few cases, and because there is no certainty that consent will be given every time an entry is sought to

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

arrest a fugitive, it is important that the investigating officers be armed with a warrant.

In all of those cases in which officers seek to enter the escapee's own premises to arrest him/her, entry is permitted with an arrest warrant and reasonable belief that the fugitive is inside. In discussing the nature of the process necessary to justify an entry into premises to arrest a fugitive, the United States Supreme Court said in Payton v. New York, supra,

. . . It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his door to the officer of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. 445 U.S. at 602-602.

Payton, therefore, makes clear that in those cases where the officers seek to enter the fugitive's own premises, an arrest warrant is sufficient legal process if the officer also has a reasonable belief that the suspect is inside. It is not necessary in such cases that the officer also obtain a search warrant.

When, however, entry is sought into the premises of a third party to arrest a fugitive escapee, a search warrant must be obtained. Steagald v. United States, supra.

Refusal to authorize the issuance of the arrest warrant for a federal escapee until after he/she has been apprehended denies the law enforcement agents the legal process which is recognized as sufficient for entry into the premises of the fugitive to arrest him/her. In addition, refusal to promptly issue arrest warrants for federal escapees seriously curtails the very necessary assistance of local law enforcement agencies in the search for and apprehension of federal escapees. Thus, you should authorize complaints and arrest warrants promptly upon completion of the investigation and presentation of the matter to you by the investigative agency.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

After the federal escapee has been apprehended on the arrest warrant, the U.S. Attorney may re-evaluate the case and may determine that the escape prosecution does not merit proceeding further. In such event, the complaint may be dismissed and the escapee returned to prison. If the U.S. Attorney determines that the escape prosecution should continue, he/she should obtain an indictment within thirty or sixty days pursuant to 18 U.S.C. §3161(b), depending on the availability of the grand jury in the district.

9-69.540 Venue in Furlough and "Walkaway" Cases

The "furlough" or "work release" statute, 18 U.S.C. §4082(c) and (d), provides a means of extending the limits of confinement of a federal prisoner for certain reasons consistent with the public interest and makes a failure to return to a prescribed institution or facility an escape from custody under 18 U.S.C. §751. 18 U.S.C. §4082(d) is consistent with a substantial body of case law holding that prisoners not in the actual custody of an institution can escape from the custody of the Attorney General as provided by 18 U.S.C. §751. See Murphy v. United States, 481 F.2d 57 (8th Cir. 1973) (escape from a county jail); Nace v. United States, 334 F.2d 235 (8th Cir. 1964) (failure to return to guidance center from private employment); United States v. Taylor, 485 F.2d 1077 (D.C. Cir. 1973) (failure to return to privately owned halfway house); United States v. Hollen, 393 F.2d 479 (4th Cir. 1968) (failure to return from work release program); Read v. United States, 361 F.2d 830 (10th Cir. 1966) (failure to return from speech contest at a school); and Frazier v. United States, 339 F.2d 745 (D.C. Cir. 1964) (escape from a psychiatric hospital). See also USAM 9-19.260, Legal Custody by Attorney General, *supra*.

The question of venue for such "furlough" or "walkaway" escape prosecutions is resolved by reliance on the well established and long standing rule that when the crime involved is failure to perform a legally required act, the place fixed for performance of the act determines the situs of the crime. See Johnston v. United States, 351 U.S. 215 (1956).

In like manner, 18 U.S.C. §4082(d) makes failure to report to the designated institution the basis for the crime. Therefore, the situs of the crime is the place where the failure to report occurred. Johnston, supra, and its progeny dictate that an inmate released to report to another institution and who fails to report as ordered must be prosecuted for that failure in the district in which he/she was to have reported. In United States v. Wray, 608 F.2d 722 (8th Cir. 1979), cert. denied, 444

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

U.S. 1048 (1980), the defendant was confined by the Attorney General in the Federal Corrections Institution at Lompoc, California, and subsequently released with directions to travel by bus and report to the Community Treatment Center in Kansas City, Missouri. When the defendant failed to report, the Eighth Circuit held that venue was in the place where the prisoner failed to "return," that is, the facility to which he was to report. See also United States v. Dyson, 469 F.2d 735 (5th Cir. 1972); United States v. Clark, 468 F.2d 708 (3d Cir. 1972); United States v. Daniels, 429 F.2d 1273 (6th Cir. 1970); United States v. Scott, 424 F.2d 285 (4th Cir. 1970); Pitt v. United States, 378 F.2d 608 (8th Cir. 1967); United States v. Neill, 248 F.2d 383 (7th Cir. 1957); United States v. Turner, 244 F.2d 404 (2d Cir. 1957); and Jones v. Pescor, 169 F.2d 853 (8th Cir. 1948).

9-69.550 Prosecution of Escapes by Federal Prisoners Who Have Been Surrendered to the Temporary Custody of State Authorities Pursuant to State Court Writs of Habeas Corpus Ad Testificandum and Ad Prosequendum

In cases where federal prisoners are released to the temporary custody of a state institution and state officials on state writs of habeas corpus ad testificandum or ad prosequendum, indictments and informations for escape from such custody should be drafted to reflect that the defendant escaped from the custody of the Attorney General in a named state institution in which he/she was confined by direction of the Attorney General pursuant to 18 U.S.C. §4062(b), as discussed herein.

In the past, federal prisoners whose temporary custody was sought by state authorities on writs of habeas corpus ad testificandum and ad prosequendum were always transported to the requesting state by Deputy U.S. Marshals. Custody of these federal prisoners was not relinquished to state officials and the prisoners were housed in federally approved local jails as federal prisoners during the time they were appearing in state courts on these writs. Consequently, federal prosecutions for escapes which occurred while these federal prisoners were so held were upheld under the provision of 18 U.S.C. §751(a) which punishes escapes or attempts to escape "from any custody under or by virtue of any process issued under any law of the United States," and because actual custody of the prisoners always remained in the U.S. Marshal during this time.

The Deputy Attorney General, however, has approved the action of the United States Marshals Service (USMS) in discontinuing transportation and custody by the USMS of all federal prisoners to answer writs of habeas corpus ad prosequendum and ad testificandum for production of these

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

federal prisoners in state courts. As a result, in most cases the transportation of federal prisoners to state courts on writs and their custody thereunder will be assumed by state officials. (The Bureau of Prisons may still refuse those transfers to state custody where the safety or parole of the inmate may be affected or where other "federal interests" may be harmed. Bureau of Prisons Memorandum No. 183-80 (5875), August 5, 1980.) This change resulted from the severe strain placed on the USMS personnel by this responsibility together with other new responsibilities undertaken by the USMS.

This change has an impact on the manner in which federal escape prosecutions should be brought if these prisoners escape while in the custody of the state officials. There are no reported cases in which federal escape charges have been brought when a federal prisoner escapes from state custody on state-issued writs of habeas corpus ad testificandum or ad prosequendum. Existing case law regarding escapes from custody by prisoners on writs of habeas corpus ad prosequendum and ad testificandum will not be helpful because these cases involve federal process which is specifically covered in the escape statute, United States v. Bailey, 585 F.2d 1087 (D.C. Cir. 1978), rev'd on other grounds, 444 U.S. 394 (1980); United States v. Hall, 451 F.2d 347 (4th Cir. 1971); United States v. Farley, 424 F.2d 255 (4th Cir. 1970); Derengowski v. United States, 404 F.2d 778 (8th Cir. 1968), cert. denied, 394 U.S. 1024 (1969); or are cases in which federal custody was not relinquished, United States v. Viger, 530 F.2d 846 (9th Cir. 1976); United States v. Stead, 528 F.2d 257 (8th Cir. 1975), cert. denied, 425 U.S. 953 (1976). It has been necessary, therefore, to make a careful analysis of the escape statute, 18 U.S.C. §751, and related statutes to find a basis for federal prosecution in these cases.

Our analysis of the various statutory provisions relating to escape leads to the conclusion that there are, in all, six situations in which federal escape charges may be brought. Of these, two may provide a basis for escape prosecution of federal prisoners being held in state custody under writs of ad prosequendum and ad testificandum. Under 18 U.S.C. §751(a), escape prosecutions may be brought in the following situations:

A. When the escape is from the custody of the Attorney General or his authorized representative;

B. When the escape is from any institution designated by the Attorney General. This provision should be read in conjunction with 18 U.S.C. §4082(b), which authorizes the Attorney General to designate any institution or facility whether maintained by the federal government or otherwise;

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

- C. When the escape is from custody under any federal process;
- D. When the escape is from custody pursuant to a lawful arrest.

In addition, there are two other statutory provisions which provide a basis for escape prosecutions:

E. Under 18 U.S.C. §4082(c), the Attorney General may extend the limits of a place of confinement by placing a prisoner on leave or furlough not to exceed thirty days to visit a specifically designated place. The Attorney General may also permit prisoners confined in an institution to attend work-release or training programs on a daily basis. 18 U.S.C. §4082(d) makes escapes from furlough or work/training release programs prosecutable under 18 U.S.C. §751(a);

F. Under the Interstate Agreement on Detainers Act, Public Law 91-538, 18 U.S.C. Appendix, Section 2, Article V(g), any escape from temporary custody of a prisoner surrendered to a state authority pursuant to a writ ad prosequendum "may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law."

Of these six, only the second provides a basis for federal escape prosecution in all cases where temporary custody is surrendered to states on state writs of habeas corpus ad testificandum and ad prosequendum. Thus, it is recommended that if a federal prisoner is temporarily transferred pursuant to 18 U.S.C. §4082(b) to a state institution or jail-type facility in order to respond to a state writ of habeas corpus ad testificandum or ad prosequendum, he/she may be prosecuted for his/her escape therefrom under 18 U.S.C. §751(a), which proscribes escapes from any institution designated by the Attorney General. An escape from a state facility which has been designated as a place of confinement for a federal prisoner is an escape from the custody of the Attorney General. United States v. Hobson, 519 F.2d 765, 770 (9th Cir.), cert. denied, 423 U.S. 931 (1975).

The Bureau of Prisons will process these transfers to temporary state custody on state writs as transfers pursuant to 18 U.S.C. §4082(b). Thus, if the warden of the federal institution, upon receipt of a state writ, determines pursuant to Bureau of Prisons Operations Memorandum No. 183-80 (5875), dated August 5, 1980, or pursuant to the requirements of the Interstate Agreement on Detainers, that the prisoner should be released to state custody, then the warden will take the same administrative steps to effect the transfer to the state facility as is taken to transfer any

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

prisoner to any other institution. The Bureau of Prisons' records will reflect that the prisoner was temporarily transferred pursuant to 18 U.S.C. §4082(b) to a named state or local facility, and to the temporary custody of a named state official for transportation, until the writ is discharged and thereafter to be returned to the federal institution. The time spent in custody of the state institution counts toward the satisfaction of the federal sentence. Such a transfer pursuant to 18 U.S.C. §4082(b) will permit an escape prosecution under 18 U.S.C. §751, and venue for the prosecution will be in the federal district in which the local facility is located.

Escape indictments or informations in these cases should, therefore, be drafted to reflect that the defendant escaped or attempted to escape from the custody of the Attorney General in a named state institution or facility in which he was confined by direction of the Attorney General pursuant to 18 U.S.C. §4082(b). If the federal prisoner escapes from the designated local officer while being transported to court or otherwise, the escape is still from the custody of the Attorney General. In United States v. Hobson, *supra*, a federal prisoner serving federal time in a state institution escaped from state guards while he was being transported to state court. The Court of Appeals sustained the harboring conviction of Hobson, stating that the federal prisoner had escaped from the custody of the Attorney General. See also Frazier v. United States, *supra*, where it was held that escape from a mental hospital constituted escape from the custody of the Attorney General; Tucker v. United States, 251 F.2d 794 (9th Cir. 1958), where it was held that escape by a federal prisoner from a county hospital was an escape from the custody of the Attorney General where U.S. Marshals delivered the defendant to the county sheriff to give testimony.

In those cases in which a federal prisoner is sought on a state court writ of habeas corpus ad prosequendum under the provisions of the Interstate Agreement on Detainers, there will be an additional basis for federal escape prosecution. Article V(g) of the Agreement states that escapes "may be dealt with in the same manner as an escape from the original place of confinement or in any other manner permitted by law." This language, though somewhat ambiguous, can also be used to support federal escape prosecutions where the prisoner was obtained by the state in accordance with the Interstate Agreement on Detainers. One court of appeals has, in dicta, assumed that this language confers federal escape jurisdiction. United States v. Bailey, *supra*, at 1104. However, not all escapes by federal prisoners from state custody while on state writs may be justified on this ground. The Agreement does not cover any writs of habeas corpus ad testificandum, and some writs ad prosequendum will not be covered because a number of states are not parties to the Agreement.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

Because Article V(g) will be available in only some of these cases, and because it has not yet been sufficiently judicially interpreted, it is recommended that in all of these escape cases, the prosecution proceed on the additional theory that the escape was from custody of the Attorney General as a result of a transfer pursuant to 18 U.S.C. §4082(b), as indicated supra.

9-69.560 Defenses - Generally

The subsequent dismissal of an indictment charging a defendant with an offense for which he/she had been arrested and imprisoned was no defense to a prosecution for escape. United States v. Cluck, supra. See also United States v. Allen, 432 F.2d 939 (10th Cir. 1970).

9-69.561 Double Jeopardy

The fact that a defendant has been administratively punished in prison for his/her attempted escape does not preclude, on double jeopardy grounds, a conviction for attempted escape, United States v. Boomer, 571 F.2d 543 (10th Cir.), cert. denied, 436 U.S. 911 (1978). See also United States v. Stead, supra; and United States v. Cluck, supra.

9-69.562 Duress

The courts have generally been unwilling to recognize duress as a defense to escape except in the most egregious of situations. As a general rule, one who escapes from a penal institution is not excused even though faced with an immediate threat of death or serious bodily harm if there is a reasonable and viable alternative to the act of escaping. See United States v. Bryan, 591 F.2d 1161 (5th Cir. 1979), cert. denied, 444 U.S. 1071 (1980); United States v. Boomer, supra; United States v. Michelson, 559 F.2d 567 (9th Cir. 1977); and United States v. Chapman, 455 F.2d 746 (5th Cir. 1972).

An indispensable element of such a defense is evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force. United States v. Bailey, supra; United States v. Garza, 664 F.2d 135 (7th Cir. 1981), cert. denied, 455 U.S. 993 (1982); United States v. Trapnell, 638 F.2d 1016 (7th Cir. 1980).

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.563 Intoxication

At least one court has been willing to recognize intoxication as a defense where the convict was so intoxicated that the convict was unable to form an intent to escape. United States v. Nix, 501 F.2d 516 (7th Cir. 1974).

9-69.564 Insanity

A defendant's acquittal by reason of insanity was not a "conviction" within 18 U.S.C. §751(a); and, therefore, escape from a mental hospital did not constitute an offense punishable thereunder. United States v. Wood, 628 F.2d 554 (D.C. Cir. 1980). See also United States v. Powell, 503 F.2d 195 (D.C. Cir. 1974). Such an escape from civil commitment may be punished, however, under 28 U.S.C. §1826(c). See USAM 9-69.600 et seq.

9-69.565 Lack of Mental Capacity

A defendant bears a heavy burden of proof to establish lack of mental capacity as a defense for escape. See United States v. Cluck, supra; United States v. Joiner, 496 F.2d 1314 (5th Cir.), cert. denied, 419 U.S. 1002 (1974); Frazier v. United States, supra; and Mills v. United States, 193 F.2d 174 (5th Cir. 1951), cert. denied, 343 U.S. 969 (1952).

9-69.566 Investigative Responsibility

It is the Department's policy that the U.S. Marshals Service shall have investigative jurisdiction over the federal escape statute. In the event that a federal escapee becomes a subject of an ongoing FBI substantive investigation, the FBI will seek the fugitive's apprehension in coordination with the U.S. Marshals Service.

9-69.600 ESCAPE FROM CUSTODY RESULTING FROM CIVIL COMMITMENT (28 U.S.C. §1826(c))

9-69.601 Introduction

Section 1826(c) of Title 28, United States Code, deals with the criminal sanctions for escape or attempted escape from lawful custody or

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

confinement following civil commitment as a recalcitrant witness or as a dangerous person who has been acquitted by reason of insanity. These sanctions are also made applicable to persons aiding or assisting the escape or attempt to escape.

9-69.602 Legislative History

The prohibition against escape from custody resulting from civil commitment and the aiding, abetting and assisting of such an escape was initially incorporated as Title X, Part L of the Comprehensive Crime Control Act of 1984. S. Rep. No. 98-225, 98th Cong., Sess. 330-31 (1984).

9-69.603 Congressional Intent

Under prior law, a judge could order any person who, without just cause, refused to testify before a federal court or grand jury to be confined up to the life of the proceeding or term of the grand jury. Persons who escaped or attempted to escape from such confinement could not be prosecuted since the general federal escape statute, 18 U.S.C. §751, is limited to escapes from custody resulting from arrest or conviction. This section was intended to close the gap left by 18 U.S.C. §751, thus allowing criminal sanctions to be imposed for an escape from custody ordered for refusing to testify.

In addition, prior to the Comprehensive Crime Control Act, there was no provision for detention of a defendant upon a verdict of not guilty by reason of insanity. Under the Act, if the court makes a finding that due to mental disease or defect the person's release would pose a danger to another person or the community, the court must commit the person to the custody of the Attorney General. This section was intended to allow criminal sanctions to be imposed against persons who escape or attempt to escape from such confinement either before or after the hearing to determine present mental illness and dangerousness.

9-69.610 Elements of the Offense--Generally

There are three elements necessary to constitute a violation of 28 U.S.C. §1826(c): (1) an escape or attempted escape or the aiding of an escape or attempted escape; (2) from custody; (3) when such custody is pursuant to civil commitment either under 28 U.S.C. §1826 or 18 U.S.C. §4243.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-69.611 Intent

28 U.S.C. §1826(c) is drafted to parallel the provisions of 18 U.S.C. §751. Congress intended that the general scienter elements of 18 U.S.C. §751 also apply here. See USAM 9-69.511, supra.

9-69.612 Custody

A person is still in the custody of a facility or place to which he/she is confined even if only receiving treatment on an outpatient basis. See S. Rep. No. 98-225, supra at 331. In addition, as with the scienter elements, Congress intends that the cases under 18 U.S.C. §751 which hold that custody may be minimal, or even merely constructive, apply also to 28 U.S.C. §1826(c). See USAM 9-69.520, supra.

9-69.613 Commitment

The commitment must be pursuant to either the recalcitrant witness provisions of 28 U.S.C. §1826 or pursuant to 18 U.S.C. §4243. A person is subject to this escape provision from the moment the verdict of not guilty by reason of insanity is announced until that person is released after a hearing to determine present mental illness and dangerousness, taken into state custody, or unconditionally released by federal authorities.

9-69.620 Defenses--Generally

Since 28 U.S.C. §1826(c) was drafted parallel to 18 U.S.C. §§751 to incorporate the general scienter elements of 18 U.S.C. §751, the intent defenses of duress, intoxication, and lack of mental capacity are probably equally applicable here. See USAM 9-69.560, supra.

9-69.630 Investigative Responsibility

It is the Department's policy that the U.S. Marshals Service shall have investigative jurisdiction over the federal escape statutes. In the event a federal escape becomes the subject of an on-going FBI substantive investigation, the FBI will seek the fugitive's apprehension in coordination with the U.S. Marshals Service. See USAM 9-69.566, supra.

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 70

	<u>Page</u>
9-70.000 <u>AGRICULTURE AND MINING</u>	1
9-70.001 Federal Mine Safety and Health Act	1
9-70.002 Migrant and Seasonal Agricultural Worker Protection Act	1
9-70.100 TWENTY-EIGHT HOUR LAW	1
9-70.110 <u>Elements of an Offense</u>	1
9-70.120 <u>Judgments</u>	2

1984 USAM (superseded)

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

9-70.000 AGRICULTURE AND MINING

9-70.001 Federal Mine Safety and Health Act

See Worker Protection Statutes, USAM 9-78.200 through USAM 9-78.220.

9-70.002 Migrant and Seasonal Agricultural Worker Protection Act

See Worker Protection Statutes, USAM 9-78.300.

9-70.100 TWENTY-EIGHT HOUR LAW

The Office of the Solicitor of the Department of Agriculture will refer directly to the appropriate U.S. Attorneys cases involving violations of the Twenty-Eight Hour Law (45 U.S.C. §71, et seq.), except those which involve novel questions of law or policy. The referral will include a copy of each report made by Agriculture's inspectors relating to the case, one copy of each letter forwarded to and received from the carrier, and an original and two copies of a proposed form of complaint. In addition, the transmittal letter will recommend the amount of the penalty which Agriculture believes should be exacted. U.S. Attorneys may assume that the Criminal Division approves the amount recommended unless advised to the contrary. Cases involving novel questions of law or policy will be submitted to the General Litigation and Legal Advice Section.

9-70.110 Elements of an Offense

In construing the Twenty-Eight Hour Law, the courts have held that the word "knowingly" means simply "with knowledge of the facts," and that a carrier knowingly violates the statute when, with knowledge of how long animals have been confined without rest, feed, and water, it prolongs the confinement beyond the statutory limit. See St. Louis-S.F.R. Co. v. United States, 169 Fed. 69 (8th Cir. 1909); St. Joseph S.Y. Co. v. United States, 187 Fed. 105 (8th Cir. 1913); United States v. Illinois Central R. Co., 303 U.S. 239 (1938). They have construed the word "wilfully" under the Act to mean "intentionally," "purposely," or "voluntarily." See also United States v. Union Pacific R. Co., 169 Fed. 65 (8th Cir. 1909); United States v. New York C. and H.R.R. Co., 165 Fed. 833 (1st Cir. 1908); United States v. Atchison T. & S.F.R. Co., 166 Fed. 160 (7th Cir. 1908). A

UNITED STATES ATTORNEYS' MANUAL  
TITLE 9--CRIMINAL DIVISION

knowing confinement becomes wilful also, when it was due to a cause which could have been anticipated or avoided by the exercise of due diligence and foresight. See Boston & M.R.R. v. United States, 117 F.2d 428 (1st Cir. 1941); United States v. Atlantic C.L.R. Co., 173 Fed. 764 (4th Cir. 1909). The burden of proof that the overconfinement was not due to such a cause is upon the carrier. See Boston & M.R.R. v. United States, *supra*; New York & H.R.R. Co. v. United States, *supra*; United States v. Atchison T. & S.F.R. Co., *supra*; Chicago & N.W.R. Co. v. United States, 246 U.S. 512 (1918).

Where animals are loaded on a train at different times, a separate penalty accrues when the statutory period for the animals first loaded expires, and separate penalties accrue as the statutory period expires with respect to the animals loaded at later periods. See Baltimore & Ohio Southwestern Railways Company v. United States, 220 U.S. 94 (1911).

9-70.120 Judgment

Every judgment in favor of the government must be in an amount not less than the statutory minimum penalty of \$100 per violation, in addition to costs to which the government is entitled.