

---

**Title 9**  
**Criminal Division**

---

*Chapters 61-Index*

U.S. ATTORNEYS MANUAL 1988

# UNITED STATES ATTORNEYS' MANUAL

## JULY 1994 UPDATE

ENVIRON 2 17 10 1994

SEP 1 1994

### VOLUME IIIb -- TITLE 9

Enclosed are 1994 revisions to update Volume IIIb, Title 9 of your 1988 United States Attorneys' Manual. Please use the following checklist as your guide in the proper placement of materials. If you are missing any material, please contact the Executive Office for United States Attorneys, Manual Staff, Rm. 1627, Main Justice Building, 9th & Pennsylvania Avenue, N.W., Washington, D.C. 20530. The telephone number is 202-514-4053 -- FAX 202-514-5850.

---

The following bluesheet is included in this update:

Vol. IIIb

9-69.410 10/14/92

<u>Section</u> <u>Affected</u>	<u>Remove</u> <u>Pages</u>	<u>Insert Pages</u> <u>Dated 3/01/94</u>	<u>Remove</u> <u>Bluesheet</u>
-----------------------------------	-------------------------------	---	-----------------------------------

Vol. IIIb

9-69.000	1-53 7/92	1-47	9-69.410
----------	-----------	------	----------

\* Title 9 Cumulative Supplemental Index  
(Remove 1991 Supplemental Index pages 1-10)

UNITED STATES ATTORNEYS' MANUAL

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 TO 2313) .....	1
9-61.101 Scope .....	1
9-61.110 <u>Policy Concerning Prosecution</u> .....	1
9-61.111 Organized Rings and Multi-Theft Operations .....	1
9-61.112 Individual Thefts—Exceptional Circumstances .....	2
9-61.113 Individual Thefts—Not Prosecuted Federally .....	2
9-61.114 Notification Requirements if Federal Prosecution is Declined for an Individual Theft Matter .....	3
9-61.120 <u>Investigative Jurisdiction</u> .....	3
9-61.130 <u>Supervising Section</u> .....	3
9-61.140 <u>Discussion of the Offense</u> .....	3
9-61.141 Legislative History .....	3
9-61.142 Stolen .....	4
9-61.143 Definitions .....	4
9-61.144 Elements of 18 U.S.C. § 2312 .....	5
9-61.145 Elements of Former 18 U.S.C. § 2313 .....	6
9-61.146 Elements of New 18 U.S.C. § 2313 .....	6
9-61.147 18 U.S.C. §§ 2312 and 2313 Are Predicate Offenses for a RICO Prosecution .....	7
9-61.150 <u>Venue</u> .....	7
9-61.160 <u>Use of 18 U.S.C. § 5001 to Surrender Motor Vehicle Theft Perpetrators Under 21 Years of Age to State Authorities</u> .....	7
9-61.170 <u>Additional Research Sources</u> .....	8
9-61.200 NATIONAL STOLEN PROPERTY ACT—18 U.S.C. §§ 2311, 2314, AND 2315 .....	8
9-61.210 <u>Policy Concerning Prosecution</u> .....	8
9-61.220 <u>Investigative Jurisdiction</u> .....	9
9-61.230 <u>Supervising Section</u> .....	9
9-61.240 <u>Discussion of the Offense</u> .....	9
9-61.241 General .....	9
9-61.242 Goods, Wares, Merchandise .....	10
9-61.243 Reserved .....	12
9-61.244 Securities .....	12
9-61.245 Money and the Wire Transfer Thereof .....	14

October 1, 1990

(1)

TITLE 9—CRIMINAL DIVISION

		<u>Page</u>
9-61.246	Tax Stamp.....	14
9-61.247	Value .....	14
9-61.248	Stolen, Converted, and Taken by Fraud.....	15
9-61.249	Falsely Made, Forged, Altered, and Counterfeited.....	16
9-61.250	<u>Discussion of the Offense (Cont'd)</u> .....	16
9-61.251	Forged Endorsement .....	18
9-61.252	Tracing.....	18
9-61.253	Exceptions to 18 U.S.C. §§ 2314 and 2315 (Proviso Clause).....	19
9-61.260	<u>Elements of the Offenses Under 18 U.S.C. §§ 2314 and 2315</u> .....	19
9-61.261	First Paragraph of 18 U.S.C. § 2314 .....	19
9-61.262	Second Paragraph of 18 U.S.C. § 2314 .....	20
9-61.263	Third Paragraph of 18 U.S.C. § 2314 .....	20
9-61.264	Fourth Paragraph of 18 U.S.C. § 2314 .....	21
9-61.265	Fifth Paragraph of 18 U.S.C. § 2314 .....	21
9-61.266	First Paragraph of Former 18 U.S.C. § 2315.....	22
9-61.267	Second Paragraph of Former 18 U.S.C. § 2315 .....	23
9-61.268	New First and Second Paragraphs of 18 U.S.C. § 2315 .....	23
9-61.269	Third Paragraph of 18 U.S.C. § 2315 .....	24
9-61.270	<u>Venue</u> .....	24
9-61.280	<u>Additional Research Sources</u> .....	25
9-61.300	<u>THEFT FROM INTERSTATE SHIPMENT (18 U.S.C. § 659)</u> .....	25
9-61.310	<u>Policy Concerning Prosecution</u> .....	25
9-61.320	<u>Investigative Jurisdiction</u> .....	26
9-61.330	<u>Supervising Section</u> .....	26
9-61.340	<u>Discussion of Offense</u> .....	26
9-61.341	General.....	26
9-61.342	State Prosecution a Bar .....	27
9-61.343	Interstate or Foreign Commerce Aspect of Shipment.....	27
9-61.344	Retention of Stolen Character.....	28
9-61.350	<u>Venue</u> .....	28
9-61.360	<u>Evidence</u> .....	28
9-61.361	Proof of Shipment.....	28
9-61.362	Proof of Value .....	28
9-61.370	<u>Drafting Indictment</u> .....	29
9-61.371	Facility From Which the Goods Were Taken.....	29
9-61.372	Election Required Between Theft and Possession.....	29

October 1, 1990

(2)

UNITED STATES ATTORNEYS' MANUAL

		<u>Page</u>
9-61.380	<u>Additional Research Sources</u> .....	29
9-61.400	CRIMINAL REDISTRIBUTION OF STOLEN PROPERTY (FENCING) .....	29
9-61.410	<u>Prosecutive Policy</u> .....	29
9-61.420	<u>Definition</u> .....	30
9-61.430	<u>Indictment</u> .....	30
9-61.500	COUNTERFEITING AND FORGING OF STATE AND CORPORATE SECURITIES—18 U.S.C. § 513 .....	30
9-61.510	<u>Prosecutive Policy</u> .....	30
9-61.520	<u>Investigative Jurisdiction</u> .....	31
9-61.530	<u>Supervising Section</u> .....	31
9-61.540	<u>Discussion of the Offense</u> .....	31
9-61.541	General .....	31
9-61.542	Offenses .....	32
9-61.543	Definitions .....	32
9-61.600	BANK ROBBERY .....	33
9-61.601	Disclosure of Information .....	33
9-61.610	<u>Prosecutive Policy</u> .....	33
9-61.620	<u>Investigative Jurisdiction</u> .....	33
9-61.630	<u>Supervising Section</u> .....	34
9-61.640	<u>Bank Theft—Misrepresentations of Identity</u> .....	34
9-61.641	Assault/Use of Dangerous Weapon During Bank Robbery, 18 U.S.C. § 2113(d) .....	34
9-61.642	Federally Protected Financial Institutions .....	35
9-61.650	<u>Merger and Separate Offenses</u> .....	36
9-61.651	Merger .....	36
9-61.652	Possession Offenses, 18 U.S.C. § 2113(c) .....	37
9-61.660	<u>Bank Messengers, Armored Truck Services</u> .....	38
9-61.661	Night Depositories .....	38
9-61.662	Automated Teller Machines (ATMs) .....	38
9-61.670	<u>Bank Extortion</u> .....	39
9-61.700	MOTOR VEHICLE THEFT LAW ENFORCEMENT ACT OF 1984 .....	40
9-61.701	Summary .....	40
9-61.710	<u>Policy Considerations</u> .....	41
9-61.720	<u>Investigative Jurisdiction</u> .....	41
9-61.730	<u>Supervising Section</u> .....	41
9-61.740	<u>Title I—Improved Identification for Motor Vehicle Components</u> .....	41
9-61.741	Mandatory Theft Prevention Standard .....	41

October 1, 1990

(3)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-61.742	Voluntary Theft Prevention Standard ..... 42
9-61.750	<u>Title II—Anti-Fencing Measures</u> ..... 43
9-61.751	18 U.S.C. § 511—Altering or Removing Motor Vehicle Identification Numbers ..... 43
9-61.752	18 U.S.C. § 512—Forfeiture of Certain Motor Vehicles and Motor Vehicle Parts ..... 44
9-61.753	18 U.S.C. § 2321—Trafficking in Certain Motor Vehicles or Motor Vehicle Parts ..... 44
9-61.754	18 U.S.C. § 2311—Motor Vehicle Titles as "Securities" ..... 45
9-61.755	18 U.S.C. § 2313—Sale or Receipt of Stolen Motor Vehicles ..... 45
9-61.760	<u>Title III—Importation and Exportation Measures</u> ..... 45
9-61.761	18 U.S.C. § 553—Importation or Exportation of Stolen Motor Vehicles, Off-Highway Mobile Equipment, Vessels, or Aircraft ..... 45
9-61.762	19 U.S.C. § 1627—Unlawful Importation or Exportation of Certain Vehicles and Equipment ..... 46
9-61.770	<u>Effective Dates</u> ..... 47
9-61.780	<u>Discussions of Indictments for 18 U.S.C. §§ 511, 2321, and 553</u> ..... 48
9-61.781	Discussion of an Indictment for 18 U.S.C. § 511 ..... 48
9-61.782	Discussion of an Indictment for 18 U.S.C. § 2321 ..... 50
9-61.783	Discussion of an Indictment for 18 U.S.C. § 553 ..... 51

9-61.000 CRIMES INVOLVING PROPERTY

## 9-61.100 NATIONAL MOTOR VEHICLE THEFT ACT—DYER ACT (18 U.S.C. §§ 2311 TO 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. § 2321); and the exportation or importation of stolen road motor vehicles and off-highway mobile equipment (18 U.S.C. § 553). See USAM 9-61.700, *infra*.

9-61.110 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.

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.

## 9-61.111 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 prosecution 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.

#### 9-61.112 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 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 Eye 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 a heavy commercial vehicle or construction or farming equipment, such as a tractor truck, a farm tractor or a bulldozer.

#### 9-61.113 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

---

July 1, 1992

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.

9-61.114 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 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.

9-61.120 Investigative Jurisdiction

Federal Bureau of Investigation.

9-61.130 Supervising Section

General Litigation and Legal Advice Section.

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

---

July 1, 1992

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*. Violations of 18 U.S.C. §§ 2312 and 2313 are predicate offenses for RICO (18 U.S.C. § 1961 *et seq.*) and the wiretap statute (18 U.S.C. § 2516).

#### 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 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, possession, 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 2321. 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 absence of a key part, *e.g.*, the motor, does not mean that the vehicle

---

July 1, 1992

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 2321. See 18 U.S.C. § 511(1)(2), 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 component may violate 18 U.S.C. § 511, and trafficking in such road vehicles or components may violate 18 U.S.C. § 2321. See USAM 9-61.700, *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 in 18 U.S.C. § 513 as a motor vehicle title is an instrument issued by a state evidencing ownership of goods, wares or merchandise (see 18 U.S.C. § 513(c)(3)(B)). See USAM 9-61.500, *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. See *Godwin v. United States*, 687 F.2d 585 (2d Cir.1985). 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).

---

July 1, 1992

## 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).

## 9-61.146 Elements of New 18 U.S.C. § 2313

Section 2313 of Title 18 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 the new 18 U.S.C. § 2313 are that the defendants:

- A. Receive, possess, conceal, store, barter, sell or dispose of;
- B. A stolen motor vehicle or aircraft;

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. 12,244 (1979). 18 U.S.C.

---

July 1, 1992

§ 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.

9-61.150 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 9-61.133C, *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 U.S.C. § 5001 (see USAM 9-61.160, *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, possessing, concealing, selling, etc.) can be instituted only in the district in which those violations occur.

9-61.160 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.

9-61.170 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. 919—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 Vehicles;

D. 15 A.L.R.Fed. 888—Requirements as to Interstate Character of Offense Under Provision of National Motor 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. §§ 2311-1313); 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, AND 2315

9-61.210 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 1981 would be approximately \$40,000. 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.

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 brought in conjunction with other federal charges, or where successful state prosecution appears precluded or the state fails or refuses to entertain prosecution.

#### 9-61.220 Investigative Jurisdiction

Federal Bureau of Investigation.

#### 9-61.230 Supervising Section

General Litigation and Legal Advice Section.

#### 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.

Section 2314 of Title 18, 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.

Section 2315 of Title 18, 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. 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. In 1986, the jurisdictional basis for the first two paragraphs of 18 U.S.C. § 2315 was modified and the offense of possession was added to both paragraphs.

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. § 513 (Securities of the State and private entities). See USAM 9-61.500, *infra*. There is no statutory requirement under 18 U.S.C. § 513 that such corporate and state securities be transported or have been transported in interstate or foreign commerce.

#### 9-61.242 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 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.)

---

July 1, 1992

It has also been held to cover information involving such trade secrets as manufacturing processes, *see United States, Bottone*, 365 F.2d 389 (2d Cir.1966); geological maps, *Seagraves, supra*; and chemical formulas, *United States v. Greenwald*, 479 F.2d 320 (6th Cir.1973). *But see In re Carol Vericker*, 446 F.2d 244, (2d Cir.1971) (stolen FBI documents were not goods, wares, or merchandise because they are not ordinarily bought or sold in commerce).

In the area of copyrighted works a 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*, 473 U.S. 207 (1985). For a further discussion of what aspects of copyright violations may still be covered by 18 U.S.C. § 2314, *see USAM 9-61.260, 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.

*But see* the dictum in *Bottone, supra* at 393.

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 was placed into a tangible object prior to the termination of the interstate transportation. *See, e.g., United States v. Wright*, 791 F.2d 133 (10th Cir.1986) holding the wire transfer of the proceeds of a fraud was covered under 18 U.S.C. § 2314.

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. 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), *United States v. Grenagle*, 588 F.2d 87 (4th Cir.1978).

9-61.243 [Reserved]

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, 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 the 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.)

---

July 1, 1992

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.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).

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. Potti*, 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) (undersigned 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 authority, the safer rule seems to be that whether a particular document is a 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.

The Department takes the position that a stolen or fraudulently obtained credit card is not a security. 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 and the Wire Transfer Thereof

'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.' In holding that 18 U.S.C. § 2314 was applicable to the wire transfer of funds, the Tenth Circuit in *United States v. Wright*, 791 F.2d 133 at 136, (10th Cir.1986) stated:

'What is significant is that when the transaction is completed, money exists at the final destination.'

Accord, *United States v. Gilboe*, 684 F.2d 235 (2d Cir.1982).

## 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 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, possession, 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. Peery*, 638 F.2d 862 (5th Cir.1981).

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. Wigerman*, 549 F.2d 1192 (8th Cir.1977). Of course, the basic rule of what a willing seller and a 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).

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 States v. Jones*, 432 F.Supp. 801 (E.D.Pa.1977), *aff'd sub nom., United States v. Moore*, *supra*; (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. Turley*, 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. Zepin*, 533 F.2d 279 (5th Cir.1976). There must be a deprivation of an existing property right, so 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 9-61.251, *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, possession, 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 their sole possession and is only under their "surveillance," the stolen character remains. See *United States v. Muzii*, 676 F.2d 919 (2d Cir.1982); *United States v. Dove*, 629 F.2d 325 (4th Cir.1980).

#### 9-61.249 Falsely Made, Forged, Altered, and Counterfeited

While the terms "altered" and "counterfeited" are reasonably comprehensible, the concepts "falsely made" and "forged" are very complex 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 1190 (6th Cir.1973); *Stinson v. United States*, 316 F.2d 554 (5th Cir.1973); *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, 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, 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*, 377 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.)

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*, 54 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 endorsement. See *Prussian v. United States*, 287 U.S. 575 (1931); *Streett, supra*; *United States v. Roby*, 499 F.2d 151 (10th Cir.1974). The *Streett* case held that the countersignature on a traveler's check is, in effect, a first endorsement and that a traveler's check issued for value to a purchaser does not thereafter become a forged security by reason of the forgery of the purchaser's countersignature. (See USAM 9-61.251 *infra*.)

A "blank" traveler's check is a security as it has on it all the necessary indicia prior to 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's check issuers no longer require that the purchaser sign the checks in the presence of the issuing clerk. 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 endorsement) 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.

9-61.250 Discussion of the Offense (Cont'd)

## 9-61.251 Forged Endorsement

There has been considerable dispute whether a forged endorsement is covered by the third paragraph of 18 U.S.C. § 2314. Relying in part upon the Supreme Court holding in *Prussian, supra*, that a forged endorsement on a United States government security was not a forged obligation of the United States (as an endorsement can only be an obligation of the endorser), the courts starting with *Streett, supra*, have generally held, when specifically addressing the issue, that forged endorsements 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*. In view of the general prosecutive policy for these offenses (see USAM 9-61.230, *supra*) and the fact that securities with forged endorsements are "'converted or taken by fraud'" (*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 endorsements per se under the third paragraph may not be that detrimental to matters warranting federal prosecution.

It should be noted that the forged endorsement on a state or corporate security is now expressly covered by 18 U.S.C. § 513 (Securities of the State and private entities). See USAM 9-61.500, *infra*.

## 9-61.252 Tracing

To effectuate the legislative purposes of the NSTA, the courts, utilizing the principles of equity, have created a tracing doctrine for the proceeds of such thefts or frauds. 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 blank checks of \$10,000 and \$7,000, respectively, \$3,000 in traveler's 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's 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); *United States v. Wright*, 791 F.2d 133 (10th Cir.1986). 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. In *United States v. Lennon*, 814 F.2d 185 (5th Cir.1987) \$5,000 or more of fraudulent kick-

back proceeds were commingled in interstate checks with legitimate funds. Because the government could prove that each check contained at least \$5,000 of fraudulently obtained funds, the conviction was affirmed.

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. 22, 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. 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:

- 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 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. See *Godwin v. United States*, 687 F.2d 585 (2d Cir.1985).

---

July 1, 1992

Section 2314 of Title 18 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 9-61.252, *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.

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 specific 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 (1st 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 *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

---

July 1, 1992

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 *McElroy, supra*. 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, supra*; 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).

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 603 (3rd 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).

#### 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 endorsements 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.

#### 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 Former 18 U.S.C. § 2315

The elements under the basic offense of the first paragraph of former 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 former first paragraph also prohibited 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 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 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). 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 Former 18 U.S.C. § 2315

The elements for a violation of the second paragraph of former 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.

#### 9-61.268 New First and Second Paragraphs of 18 U.S.C. § 2315

On November 10, 1986, the federal jurisdictional basis for the first two paragraphs of 18 U.S.C. § 2315 was altered by section 76 of the Criminal Law and Procedure Technical Amendments Act of 1986, Pub.L. No. 99-646, 100 Stat. 3618 (1986). The former language in the first two paragraphs of "moving as, or which is a part of, or which constitutes interstate or foreign commerce" was stricken and inserted in lieu thereof in both paragraphs was "which has crossed a State or United States boundary after being stolen, unlawfully converted, or taken." The 1986 amendment also added to the first two paragraphs the offense of possession. The other elements for a violation of the first two paragraphs remain the same as their respective predecessors. See USAM 9-61.266 and .267, *supra*.

The jurisdictional change removes the requirement of proving that the property still retained its commerce nexus at the time of the operative act (*i.e.*, sale, receipt, *etc.*). Hence, under the first paragraph of 18 U.S.C. § 2315, which now parallels the changes made in 1984 to 18 U.S.C. § 2313 (see USAM 9-61.146, *supra*), once such stolen or fraudulently obtained property crosses a State line or a United States boundary, federal jurisdiction

attaches to such property and remains until such property loses its stolen or fraudulent character. Since possession is itself now an offense, the first paragraph may prove more useful in prosecuting fences of property stolen in a different state.

Unfortunately, the Congress committed a technical oversight when it modified the second paragraph of 18 U.S.C. § 2315 in the same manner as the first paragraph. The second paragraph covers "falsely made, forged, altered or counterfeit securities or tax stamps." It does not encompass property that was "stolen, unlawfully converted, or taken." Hence, the second paragraph is presently of little utility. It is anticipated, however, that the 100th Congress will enact corrective legislation. In the interim, the fencing of certain counterfeit and forged securities remains prosecutable under 18 U.S.C. § 513. See USAM 9-61.500 *infra*.

#### 9-61.269 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 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 statute in USAM 9-69.180, *infra*.)

Venue for an offense under 18 U.S.C. § 2315 would normally be where one of the enumerated acts was performed. *But see United States v. Melia*, 741 F.2d 70 (4th Cir.1984).

#### 9-61.280 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.

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*, (3d ed.), Chapter 15, 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 Policy Concerning Prosecution

Thefts from interstate shipment should be prosecuted under federal laws where: (1) there is difficulty in establishing venue for state prosecu-

tion, (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.

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 only cases involving the theft of goods or chattels having more than a certain minimum value. (e.g., \$100 or \$250), and cases involving 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 by 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.

9-61.320 Investigative Jurisdiction

Federal Bureau of Investigation.

9-61.330 Supervising Section

General Litigation and Legal Advice Section.

9-61.340 Discussion of Offense

9-61.341 General

Section 659 of Title 18 proscribes the embezzlement, theft, or unlawful taking from certain listed facilities, including pipelines, railroad cars, motor trucks, depots, aircraft, aircraft terminals, vessels and wharves, of goods or chattels which are moving as, are part of, or constitute an interstate or foreign shipment. Similar acts with regard to the

---

July 1, 1992

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.

Where the value of the goods does not exceed \$100 the theft is punishable as a misdemeanor; otherwise it is a felony.

#### 9-61.342 State Prosecution a Bar

Section 659 of Title 18 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); *Tyers, supra*.

Section 659 of Title 18 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. Wills*, 593 F.2d 285 (7th Cir.1979); *United States v. Gates*, 528 F.2d 1045 (5th Cir.1976).

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. See *Wills, supra*; *Astolas, supra*; *United States v. Parent*, 484 F.2d 726 (7th Cir.1973); *United States v. Sherman*, 171 F.2d 619 (2d Cir.1948); *Gollin, supra*. 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); *Gates, supra*; *Astolas, 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). (Note: The district court's judgment of acquittal notwithstanding the verdict was reversed on September 23, 1981 by the United States Court of Appeals for the Fifth Circuit in an unpublished and unreported opinion. The Court held that as the jury had been properly instructed that it had to find there had been no final delivery in order to convict, its verdict implicitly resolved that issue against the defendant, and, as there was sufficient evidence to support it, it should not have been set aside.)

#### 9-61.344 Retention of Stolen Character

See discussion under USAM 9-61.248 *supra*.

#### 9-61.350 Venue

Section 659 of Title 18 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. The blanks of money orders, checks, stock certificates, etc. may be difficult to value. 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); *Tyers, supra*, *United States v. Ditata*, 469 F.2d 1270 (7th Cir.1972).

9-61.370 Drafting Indictment

## 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 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 Additional Research Sources

There are some authorities that can be consulted when researching various issues under the Theft from Interstate Shipment statute. (Be sure to check the pocket supplement if any.) They include:

A. 8 A.L.R.Fed. 938—What Constitutes Offense Under Provisions of 18 U.S.C. § 659 Penalizing Theft From Interstate of Foreign Shipments;

B. 10 A.L.R.Fed. 476—Interstate or Foreign Commerce Nature of "Shipment" Within Meaning of 18 U.S.C. § 659 Penalizing Thefts or Similar Offenses as to Goods Moving in Interstate or Foreign Commerce; and

C. Devitt and Blackmar, *Federal Jury Practice and Instructions*, (3d ed.) Chapter 46, Theft From Interstate Shipment [18 U.S.C. § 659].

## 9-61.400 CRIMINAL REDISTRIBUTION OF STOLEN PROPERTY (FENCING)

9-61.410 Prosecutive Policy

Unless there exists a special need, priority should be given to the prosecution of fences as opposed to the prosecution of thieves. Normally,

immunity should not be sought for fences in order to prosecute thieves. Highest priority should be given to the prosecution of fences who operate legitimate businesses and sell stolen property to the public. Special consideration should also be given to the possibility of post-conviction grand jury proceedings for thieves in an effort to identify those fences with whom the thief has dealt. Informants familiar with the technicalities of particular fields of business enterprise should be 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.

#### 9-61.420 Definition

For purposes of this subchapter fences are defined as those who are alleged to have assisted in finding or dealing with more than one buyer for stolen property.

#### 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, 2321, and 1961 et seq. Other statutes may, of course, be relevant.

#### 9-61.500 COUNTERFEITING AND FORGING OF STATE AND CORPORATE SECURITIES—18 U.S.C. § 513

#### 9-61.510 Prosecutive Policy

Since 18 U.S.C. § 513 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 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. Second, in regard to the counterfeiting of state securities, there should clearly be an interstate aspect. 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. § 513 offenses. Finally, as to the "implement" provision in subsection 513(b), such implements should bear some connection to state or corporate securities.

---

July 1, 1992

In short, the major responsibility for dealing with counterfeit and forged state and corporate securities should lie with state and local governments. In utilizing 18 U.S.C. § 513, 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. 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.

9-61.520 Investigative Jurisdiction

Federal Bureau of Investigation.

9-61.530 Supervising Section

General Litigation and Legal Advice Section.

9-61.540 Discussion of the Offense

9-61.541 General

Section 513 of Title 18 was created by Part D of Chapter XI of the Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, October 12, 1984. (Originally enacted as 28 U.S.C. § 511, it was redesignated as 18 U.S.C. § 513 by Section 31 of the Criminal Law and Procedure Technical Amendments Act of 1986, Pub.L. No. 99-646, November 10, 1986.)

Section 513 of Title 18 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 traveler's checks. In addition, it includes other commercial instruments. In enacting 18 U.S.C. § 513 the Congress clearly intended to utilize the commerce power to nearly its outer limit. 18 U.S.C. § 513 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.

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.

To understand the elements of 18 U.S.C. § 513, it may be beneficial to consult the discussion of comparable provisions in USAM 9-61.200, *supra*.

It should be noted that 18 U.S.C. § 513 does not require proof of certain elements required under 18 U.S.C. §§ 2314 and 2315 (*e.g.*, there is no need to

---

July 1, 1992

prove actual interstate transportation of the security; forged endorsement of a state or corporate check is expressly covered).

#### 9-61.542 Offenses

Subsection (a) of 18 U.S.C. § 513 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 endorsement on it.

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.

Section 513 of Title 18 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. § 513.

#### 9-61.543 Definitions

The terms "counterfeited," "forged," "security," "organization," and "State" are defined in subsection 513(c).

"Utter," which is not expressly defined in 18 U.S.C. § 513, but 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. § 513(a) does not encompass the initial genuine making of a security which contains false or misleading statements (e.g., true name check for which there are 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 traveler's checks. It also covers letters of credit, warehouse receipts, and negotiable bills of lading. Be-

cause 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, Section 513 may overlap and expand upon some of the criminal activity prohibited by 18 U.S.C. § 1029 (Pub.L. No. 98-473, Title II, Chapter XVI—Credit Card Fund). It would appear that possession of one counterfeit debit card is covered under 18 U.S.C. § 513. 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. § 513 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.

#### 9-61.600 BANK ROBBERY

##### 9-61.601 Disclosure of Information

Department of Justice personnel should not release information concerning amounts of monies taken in any bank robbery until it becomes a matter of public record by virtue of indictment.

##### 9-61.610 Prosecutive Policy

United States Attorneys and FBI SACs should meet with their state and local counterparts to arrive at a proper allocation of investigative and prosecutive resources. It continues to be Department policy to curtail federal involvement in the bank robbery area, and make deliberate progress toward maximum feasible deferral of 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.

##### 9-61.620 Investigative Jurisdiction

Investigative jurisdiction is vested in the Federal Bureau of Investigation.

---

July 1, 1992

9-61.630 Supervising Section

Terrorism and Violent Crime Section. FTS 368-0849.

9-61.640 Bank Theft—Misrepresentations of Identity

A recurring problem in bank robbery prosecutions concerns transactions involving misrepresentations of identity. This type of problem will occur more frequently as a result of computer related crimes directed at banking institutions.

Prior to the Supreme Court's decision in *Bell v. United States*, 462 U.S. 356 (1983), there had been a split in the circuits on the issue of whether the 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. In *Bell, supra*, 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 term "any larceny" as used in the second paragraph of 18 U.S.C. § 2113(a) also has been held to include a taking by false pretenses, *United States v. Registe*, 766 F.2d 408 (9th Cir.1985).

It is important to note, however, that the Supreme Court's opinion in *Bell, supra*, 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 and carrying away. There is, however, some uncertainty as to whether the statute would apply to check-kiting schemes or other situations in which the taking occurs by means of a negotiable instrument or electronic funds transfer. We note, however, that there is at least one reported court of appeals case which affirmed a conviction under 18 U.S.C. § 2113(b) based on the taking of bank funds by means of the check collection process after defendant issued worthless checks to creditors, *United States v. Sterley*, 764 F.2d 530 (8th Cir.1985), cert. denied, 106 S.Ct. 544 (1985).

9-61.641 Assault/Use of Dangerous Weapon During Bank Robbery, 18 U.S.C. § 2113(d)

Although 18 U.S.C. § 2113(d) commonly is characterized 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 successfully prosecuted under 18 U.S.C. § 2113(d).

In the past, there had been considerable uncertainty as to what constitutes use of a dangerous weapon or device under 18 U.S.C. § 2113(d). Clearly, a loaded, operable firearm is a "dangerous weapon." However, uncertainty arose where, for example, the dangerous weapon or device turned out to be a toy gun, a hoax bomb device, an unloaded or inoperable firearm, or where law enforcement officers failed to recover the weapon.

This uncertainty was partially clarified by the Supreme Court's decision in *McLaughlin v. United States*, 106 S.Ct. 1677 (1986) which held that an unloaded handgun is a "dangerous weapon" within the meaning of § 2113(d).

In our view, the rationale of the *McLaughlin* decision can be extended to situations involving simulated weapons such as authentic appearing toy guns and hoax bomb devices.

In situations in which the weapon used in a bank robbery is not recovered, a prosecution under subsection 2113(d) still may be sustained based on credible eyewitnesses testimony that defendant carried a gun during the robbery. See *Parker v. United States*, 801 F.2d 1382 (D.C.Cir.1986), cert. denied, 107 S.Ct. 964 (1987).

#### 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).

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.

---

July 1, 1992

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); *United States v. Washburn*, 758 F.2d 1339 (9th Cir.1985).

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 provisions of 18 U.S.C. § 2113(e) (killing or kidnaping in avoiding apprehension for bank robbery) the various subsections of the federal bank robbery statute simply state different degrees of the crime of bank theft/robbery. Ultimately, a defendant is guilty of and may be sentenced on only one such offense. See *Prince v. United States*, 352 U.S. 322 (1957); see also *United States v. Gaddis*, 424 U.S. 544 (1976).

Subsection 2113(e) prohibits killing and kidnaping in three bank robbery related situations: (1) in the commission of any offense defined in 18 U.S.C. § 2113, (2) in avoiding or attempting to avoid apprehension for the commission of such offense, and (3) in freeing or attempting to free oneself from arrest or confinement for such offense.

A killing or kidnaping during the actual commission of a bank robbery offense is not a separate offense. The less aggravated forms of bank robbery/theft merge into the killing or kidnaping offense. See *United States v. Atkins*, 558 F.2d 133 (3d Cir.1977), cert. denied, 434 U.S. 929 (1977) and cases cited therein; *United States v. Whitley*, 759 F.2d 327 (4th Cir.1985), cert. denied, 106 S.Ct. 196 (1985).

With regard to situations involving categories (2) and (3), above, there is conflict in the circuits as to whether a killing or kidnaping to avoid apprehension or arrest/confinement constitutes a separate offense from the underlying bank robbery. If the killing or kidnaping is a separate and distinct criminal episode, clearly removed in time and place from the underlying robbery, it constitutes a separate offense, *Miller v. United States*, 793 F.2d 786 (6th Cir.1986), cert. denied, 107 S.Ct. 408 (1986); *Gilmore v. United States*, 124 F.2d 537 (10th Cir.1942), cert. denied, 316 U.S. 661 (1942); *United States v. Etheridge*, 424 F.2d 951 (6th Cir.1970), cert. denied, 400 U.S. 993 (1971).

Uncertainty arises, however, when a killing or kidnaping to avoid apprehension occurred as a continuation of or in the immediate aftermath of the bank robbery. The weight of authority seems to be that where the bank robbery and the killing/kidnaping are part of a continuous transaction, only a single offense occurs, *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.1974), cert. denied, 419 U.S. 1071 (1974); *United States v. Faleafine*, 492 F.2d 18 (9th Cir.1974).

For the proposition that a separate offense occurs, see *United States v. Fleming*, 594 F.2d 598 (7th Cir.1979), cert. denied, 442 U.S. 931 (1979). In *United States v. Crawford*, 519 F.2d 347 (4th Cir.1975), cert. denied, 423 U.S. 1057 (1976) the court recognized separate offenses. However, in *Whitley*, supra, the Fourth Circuit purportedly overruled *Crawford*. In *Whitley*, however, defendant was charged with kidnaping in the commission of a bank robbery, whereas in *Crawford*, defendant was charged with kidnaping to avoid apprehension for bank robbery.

It should be noted that the offense of conspiracy to rob a bank (18 U.S.C. § 371) and the offense of robbing the same bank are not merged into a single offense. See *United States v. Vasquez*, 504 F.2d 555 (5th Cir.1974). Moreover, a defendant, charged under 18 U.S.C. § 2113(a) and (d) with an armed bank robbery involving a firearm, may also be prosecuted 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.

#### 9-61.652 Possession Offenses. 18 U.S.C. § 2113(c)

Title 18 U.S.C. § 2113(c) prohibits receiving, possessing etc., of property or money taken from a bank in violation of 18 U.S.C. § 2113(b) (larceny). Since larceny merges into robbery and armed robbery, 18 U.S.C. § 2113(c) refers implicitly to 18 U.S.C. § 2113(a) and (d).

In 1984, subsection 2113(c) was amended to reduce substantially the scienter requirement for receiving or possessing stolen bank property. Under the amended 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 money on the grounds that the evidence failed to show that he/she knew it was stolen from a federally protected bank.

Both 18 U.S.C. § 2113(c) (possession) and 18 U.S.C. § 2113(a), (b) or (d) (robbery/theft) may be charged in an indictment and considered by a jury if sufficient evidence exists on both counts. In such a case, however, conviction on both counts is not proper, and the jury must be instructed not to consider the possession/receipt count unless it finds insufficient the proof that defendant participated in the robbery/theft.

Finally, we note that it has been held that a bank employee properly may be charged with receiving and concealing stolen bank property under 18 U.S.C. § 2113(c) even though the employee could have been charged with embezzlement under 18 U.S.C. § 656, *United States v. Hall*, 805 F.2d 1410 (10th Cir.1986).

9-61.660 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 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 federally protected financial institution. See *United States v. Marzano*, 537 F.2d 257 (7th Cir.1976), cert. denied, 429 U.S. 1038 (1977).

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.

9-61.661 Night Depositories

An entry or attempted entry of a bank's night depository with intent to commit a felony or any larceny would violate the second paragraph of 18 U.S.C. § 2113(a). *United States v. Lankford*, 573 F.2d 1051 (8th Cir.1970).

9-61.662 Automated Teller Machines (ATMs)

From time to time, bank customers are robbed shortly after making withdrawals from ATMs. In such circumstances, the federal bank robbery statute would be inapplicable because, at the time of the robbery, the money belongs to and is in the possession of the customer, and is no longer in the care, custody, control, management or possession of the bank.

◆ However, we are aware of an episode in which a bank customer was forced at gun point, to drive to the bank's ATM and withdraw funds from his account. In our view, these facts provided a basis for an investigation under the federal bank robbery statute. The customer never had possession or control of the funds taken from the bank. The perpetrators simply used the customer and his bank card as the instrumentalities for accomplishing a bank robbery. In addition, these facts would support an investigation and prosecution for the aggravated forms of bank robbery under 18 U.S.C. § 2113(d) and (e).

With regard to ATMs actually located on bank premises, a break-in or attempted break-in of such a machine would seem to violate the second paragraph of 18 U.S.C. § 2113(a) (bank burglary) because the ATM, like a night depository, is part of "any building used in whole or in part as a bank . . . ." See *Lankford, supra*.

Some banks operate ATMs at remote locations far removed from the bank itself. It is unclear whether a break-in or attempted break-in of an off-premises ATM would amount to a burglary of a building used in whole or in part as a bank. In this regard, we note that off-premises customer-bank communications terminals have been held to be branch banks for purposes of the National Bank Act. *Independent Bankers Association of America v. Smith*, 534 F.2d 921 (D.C.Cir.1976), cert. denied, 429 U.S. 862 (1976). In any event, if money or other thing of value is actually taken and carried away from an off-premises bank ATM with intent to steal or purloin, there would be a bank larceny violation, 18 U.S.C. § 2113(b).

Some large grocery chains and other retail businesses provide ATMs on their premises for the convenience of their customers. These machines provide a shared electronic network which can access several financial institutions. It is our understanding that generally these machines are owned/leased and operated by the retailer, not the banks. Such facilities are not branch banks for purposes of the National Bank Act, *Independent Bankers Association v. Marine Midland Bank*, 757 F.2d 453 (2d Cir.1985), cert. denied, 106 S.Ct. 2926 (1988). Since the retailers own/lease the machines and are responsible for loading the machines with currency, it would appear that a burglary and theft of the contents of such a machine would not be a bank burglary or bank larceny. The retailer, not the bank, would be the victim of such an offense. If, however, money is obtained by the fraudulent use of a bank card, the transaction may be regarded as a bank larceny.

#### 9-61.670 Bank Extortion

Section 68 of Public Law 99-646 amended the first paragraph of 18 U.S.C. § 2113(a) to specifically include the extortion and attempted extortion of bank property.

The typical bank extortion arises where by telephone call or other communication, an extortionist conveys a threat to a bank official, and instructs the bank official to deliver bank funds to a specified "drop site," away from bank premises. Thus, many extortions involve no face to face confrontation.

Prior to the recent amendment, the first paragraph of § 2113(a) required a taking "from the person or presence of another." Because many extortions involved no *direct* taking from the person or presence of another, there was uncertainty as to whether the bank robbery statute applied to

such situations. Consequently, the Hobbs Act, 18 U.S.C. § 1951, frequently was utilized to prosecute bank extortion cases.

In view of the amendment of the bank robbery statute to include extortion and attempted extortion, the Hobbs Act should no longer be charged in such cases. The legislative history of the amendment clearly reflects that the bank robbery statute is now the exclusive remedy for prosecuting extortions of federally protected financial institutions.

#### 9-61.700 MOTOR VEHICLE THEFT LAW ENFORCEMENT ACT OF 1984

##### 9-61.701 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 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 investiga-

---

July 1, 1992

tive 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.

#### 9-61.710 Policy Considerations

Violations of the 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 to 2313). See USAM 9-61.130 to 9-61.134. Each U.S. Attorney should develop prosecutive understandings on these criminal offenses with state and local authorities through the district's Law Enforcement Coordinating Committee.

#### 9-61.720 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.

#### 9-61.730 Supervising Section

General Litigation and Legal Advice Section.

#### 9-61.740 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 Title VI concerning theft prevention.

#### 9-61.741 Mandatory Theft Prevention Standard

On April 25, 1986, the National Highway Traffic Safety Administration's (NHTSA) mandatory component identification standard for high theft passenger car lines became effective. See Federal Motor Vehicle Theft Prevention Standard, 49 C.F.R. § 541. It was applicable to 81 high theft passen-

ger car lines for model year 1987. See 51 Fed.Reg. 42578, November 25, 1986. For model year 1988, 91 passenger car lines have mandatory component identification. See 53 Fed.Reg. 133, January 5, 1988. The mandatory standard, however, is not applicable to vans, trucks, motorcycles, trailers, buses, or low theft passenger cars. Nor does it cover any component on a 1986 or prior model year vehicle. Once a passenger car line is subject to the standard, coverage remains until the line ceases to be manufactured or the line receives a 'black-box' exception pursuant to 4 C.F.R. § 543 from the NHTSA because of additional anti-theft features that the car contains as standard equipment. As new car lines are introduced in the future that the NHTSA determines likely to be high theft, such lines will be subject to the standard.

The mandatory standard covers these fourteen components and their replacements on the covered passenger car lines: (1) engine; (2) transmission; (3) right front fender; (4) left front fender; (5) hood; (6) right front door; (7) left front door; (8) right rear door (if present); (9) left rear door (if present); (10) front bumper; (11) rear bumper; (12) right rear quarter panel; (13) left rear quarter panel; and (14) decklid, tailgate, or hatchback (whichever is present). In most cases the full 17 character VIN of the vehicle itself must be placed on the original component. While the number can be stamped into the component, most manufacturers are applying a counterfeit resistant label that contains the VIN. The label will self-destruct if it is removed. The number is to remain with the component until the component ceases to exist.

New replacements for the required components must contain the registered trademark of the manufacturer, the letter 'R' to indicate 'replacement,' and the letters 'DOT' which reflects the manufacturer's certification of compliance with the mandatory standard. Only the components originally attached to a car will contain a specific VIN, which, as mentioned above, will be the VIN assigned to the particular passenger car to which the component was attached.

#### 9-61.742 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.

9-61.750 Title II—Anti-Fencing Measures

Title 18, United States Code, was amended by creating three sections (§§ 511, 512, and 2321) and by expanding the coverage of two others (§§ 2311 and 2313).

9-61.751 18 U.S.C. § 511—Altering or Removing Motor Vehicle Identification Numbers

Section 511(a) of Title 18 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.

Section 511(b) of Title 18 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)).

Section 511(c) of Title 18 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 to 565.5) or the Motor Vehicle Information and Cost Savings Act (*see* Federal Motor Vehicle Theft Prevention Standard, 49 C.F.R. § 541.) The former covers the public VIN number on road motor vehicles and the latter contains the mandatory component identification standard for certain high theft passenger car lines starting with model year 1987. The voluntary component identification standard, which could apply to the components of all road vehicles, has 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 discussion of an indictment for 18 U.S.C. § 511, consult USAM 9-61.781, *infra*.

## 9-61.752 18 U.S.C. § 512—Forfeiture of Certain Motor Vehicles and Motor Vehicle Parts

18 U.S.C. § 512 provides that, with certain exceptions, a motor vehicle or motor vehicle part that has a falsified or removed 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 (786-4950).

## 9-61.753 18 U.S.C. § 2321—Trafficking in Certain Motor Vehicles or Motor Vehicle Parts

Section 2321 of Title 18 makes it an offense to deal in motor vehicles or motor vehicle components knowing that the identification numbers have been falsified or removed. (18 U.S.C. § 2321 was originally enacted as 18 U.S.C. § 2320 but Section 42 of the Criminal Law and Procedure Technical Amendments Act of 1986, Pub.L. No. 99-646, November 10, 1986, redesignated it as 18 U.S.C. § 2321.) There is no need to prove that such vehicles or parts have been transported in interstate or foreign commerce. Neither 18 U.S.C. § 2321 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. § 2321 covers the trafficker in such vehicles or components, not a mere possessor. At present, the only component parts covered by 18 U.S.C. § 2321 are these fourteen components specified by the Federal Motor Vehicle Theft Prevention Standard, 49 C.F.R. § 541, for certain high theft passenger car lines starting with model year 1987. See 51 Fed.Reg. 42578, November 25, 1986.

Section 2321 of Title 18 should be of 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. § 2321 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 9-61.770 (Effective Dates), *infra*.

For a discussion of an indictment for 18 U.S.C. § 2321, consult USAM 9-61.782, *infra*.

---

July 1, 1992

## 9-61.754 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. 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 18 U.S.C. § 513 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 9-61.500, *supra*, for the discussion of these new counterfeiting provisions. It should be noted, however, that 18 U.S.C. § 513 is not a predicate offense for a RICO prosecution, while 18 U.S.C. §§ 2314 and 2315 are.

## 9-61.755 18 U.S.C. § 2313—Sale or Receipt of Stolen Motor Vehicles

Section 2313 of Title 18 has been amended by adding the word "possesses" after the word "receives" and by striking out "moving as, or which is a part of, 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, see USAM 9-61.146, *supra*.

9-61.760 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.

## 9-61.761 18 U.S.C. § 553—Importation or Exportation of Stolen Motor Vehicles, Off-Highway Mobile Equipment, Vessels, or Aircraft

Section 553(a) of Title 18 makes it a 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.

Section 553(b) of Title 18 provides that subsection (a)(2) does not apply if the vehicle identification number has been removed, obliterated, tampered with, or altered by a collision or fire, or in a manner that does not violate 18 U.S.C. § 511.

Section 553(c) of Title 18 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.

For a discussion of an indictment for 18 U.S.C. § 553, consult USAM 9-61.783, *infra*.

9-61.762 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 18 U.S.C. § 553.

Section 1627(b) of Title 19 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.

Section 1627(c) of Title 19 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.

Section 1627(d) of Title 19 permits customs officers to exchange information concerning activities covered by 19 U.S.C. § 1627 with other law 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.

On March 17, 1987, the Department of the Treasury published a proposed rule on the Exportation of Used Self-Propelled Vehicles, proposed 19 C.F.R. § 192. See 52 Fed Reg. 8308, March 17, 1987. As of this date, however, the rule has not become final.

#### 9-61.770 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.

The mandatory component identification standard became effective on April 25, 1986 and covered 81 passenger car lines starting with model year 1987. For model year 1988, 91 passenger car lines have mandatory component marking. See USAM 9-61.741, *supra*. The number of car lines subject to the standard in subsequent model years will fluctuate. The voluntary component identification standard has not yet been issued.

While component identification numbers currently have only limited protection under the new criminal provisions (*i.e.*, 18 U.S.C. §§ 511, 512, and 2321), that 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 multi-purpose passenger vehicles, trucks, buses, trailers, and motorcycles man-

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 federally required only 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 Fed.Reg. 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. § 2321. 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 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 to 9-110.413.

9-61.780 Discussions of Indictments for 18 U.S.C. §§ 511, 2321, and 553

9-61.781 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:

---

July 1, 1992

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. Eyewitness 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 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). 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 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 9-61.751, *supra*.

#### 9-61.782 Discussion of an Indictment for 18 U.S.C. § 2321

Section 2321 of Title 18 is a trafficking offense. The previous discussion relating to an indictment for 18 U.S.C. § 511 should be consulted (see USAM 9-61.781, *supra*). In the indictment for 18 U.S.C. § 2321 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. § 2321 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;

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.

---

July 1, 1992

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. § 2321, consult USAM 9-61.753, *supra*.

9-61.783 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 USAM 9-61.218, *supra*. In regard to falsified or removed identification numbers, consult the previous discussions on the indictments for 18 U.S.C. §§ 511 and 2321 in USAM 9-61.781 and USAM 9-61.782, respectively, *supra*.

For a general discussion of 18 U.S.C. § 553, consult USAM 9-61.761, *supra*.

UNITED STATES ATTORNEYS' MANUAL

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 ..... 1
9-63.110	<u>Special Aircraft Jurisdiction of the United States</u> ..... 3
9-63.120	<u>Venue</u> ..... 3
9-63.130	<u>Aircraft Piracy (49 U.S.C.App. § 1472(i))</u> ..... 4
9-63.131	Prosecution Policy ..... 4
9-63.132	Attempts ..... 4
9-63.133	Indictment ..... 4
9-63.134	Death Penalty ..... 4
9-63.135	Negotiated Pleas ..... 5
9-63.140	<u>Interference With Flight Crew Members or Flight Attendants (49 U.S.C.App. § 1472(j))</u> ..... 5
9-63.150	<u>Certain Crimes Aboard Aircraft in Flight (49 U.S.C.App. § 1472(k))</u> ..... 5
9-63.160	<u>Carrying Weapons or Explosives Aboard Aircraft (49 U.S.C.App. § 1472(l))</u> ..... 6
9-63.161	Prosecution Policy ..... 6
9-63.162	Attempts ..... 8
9-63.163	Deadly or Dangerous Weapons ..... 8
9-63.164	Specific Intent ..... 8
9-63.165	Concealment ..... 8
9-63.170	<u>False Information and Threats (49 U.S.C.App. § 1472(m))</u> ..... 8
9-63.171	Prosecution Policy ..... 9
9-63.180	<u>Aircraft Piracy Outside the Special Aircraft Jurisdiction of the United States (49 U.S.C.App. § 1472(n))</u> ..... 9
9-63.181	Prosecution Policy ..... 10
9-63.200	<u>DESTRUCTION OF AIRCRAFT AND MOTOR VEHICLES AND RELATED OFFENSES</u> ..... 10
9-63.201	General ..... 10
9-63.202	Investigative Jurisdiction ..... 10
9-63.203	Supervising Section ..... 10

July 1, 1992

(1)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-63.204	Summary of Changes Made to 18 U.S.C. § 32 by the Aircraft Sabotage Act..... 10
9-63.210	<u>Destruction of Aircraft—18 U.S.C. § 32(a)</u> ..... 11
9-63.220	<u>Extraterritorial Destruction of a Non-United States Civil Aircraft—18 U.S.C. § 32(b)</u> ..... 12
9-63.221	Prosecutive Policy for 18 U.S.C. § 32(b)..... 12
9-63.230	<u>Threats to Destroy Aircraft—18 U.S.C. § 32(c)</u> ..... 12
9-63.231	Prosecutive Policy..... 13
9-63.240	<u>Destruction of Motor Vehicles—18 U.S.C. § 33</u> ..... 13
9-63.241	Prosecutive Policy..... 13
9-63.250	<u>Imparting or Conveying False Information (Bomb Hoax)—18 U.S.C. § 35</u> ..... 13
9-63.251	Prosecutive Policy..... 14
9-63.252	Venue..... 14
9-63.253	Compromise of Civil Penalty..... 15
9-63.254	Jury Trial in Civil Action..... 15
9-63.300	ANTI-RIOT ACT [RESERVED]..... 16
9-63.400	OBSCENE OR HARASSING TELEPHONE CALLS (47 U.S.C. § 223)..... 16
9-63.410	<u>Description</u> ..... 16
9-63.420	<u>Jurisdictional Requirement of the Statute</u> ..... 16
9-63.430	<u>Investigative Jurisdiction</u> ..... 16
9-63.440	<u>Supervisory Jurisdiction</u> ..... 16
9-63.450	<u>Special Considerations</u> ..... 17
9-63.460	<u>Obscene Communications for Commercial Purposes</u> ..... 17
9-63.470	<u>Right to Jury Trial</u> ..... 18
9-63.480	<u>Threatening or Extortionate Telephone Calls</u> ..... 18
9-63.490	<u>Bomb Threats</u> ..... 18
9-63.500	FIREARMS CONTROL: THE GUN CONTROL ACT, AS AMENDED, CODIFIED AT 18 U.S.C. §§ 921 TO 929; THE NATIONAL FIREARMS ACT, AS AMENDED, CODIFIED AT 26 U.S.C. §§ 5801 TO 5872..... 18
9-63.510	<u>Firearms Policies</u> ..... 18
9-63.511	Investigative Jurisdiction and Prosecutive Policy..... 18
9-63.512	Dual Prosecution Policy..... 19
9-63.513	Charging more than One Prior Felony in an Indictment for Violation of Section 922(g)..... 19
9-63.514	The Armed Career Criminal Act is a Sentencing Enhancement Provision..... 19
9-63.515	Use of a Prior Constitutionally Invalid Conviction for Sentence Enhancement..... 20

July 1, 1992

(2)

UNITED STATES ATTORNEYS' MANUAL

	<u>Page</u>
9-63.516	Use of Convictions on Multiple Robbery Counts Arising From a Single Episode..... 20
9-63.517	Charging Possessory Offenses Under the National Firearms Act..... 20
9-63.518	Proof of Non-Registration of Firearms in National Firearms Act Prosecutions ..... 21
9-63.519	Criminal Division Assistance..... 21
9-63.520	<u>Introduction to the Firearms Statutes</u> ..... 21
9-63.600	<u>THE GUN CONTROL ACT, AS AMENDED</u> ..... 22
9-63.611	Unlawful Acts ..... 22
9-63.612	Licensing, Inspection, and Reporting..... 27
9-63.613	The Penalty Provisions: Imprisonment, Fines, and Forfeitures..... 30
9-63.614	Exceptions; Relief from Disabilities ..... 32
9-63.615	Rules and Regulations ..... 33
9-63.616	Interstate Transportation of Firearms ..... 33
9-63.617	Enhanced Penalties for Use of Restricted Ammunition During a Crime of Violence or Drug Trafficking Crime ..... 33
9-63.700	<u>THE NATIONAL FIREARMS ACT, AS AMENDED (26 U.S.C. §§ 5801 TO 5872)</u> ..... 34
9-63.711	Businesses Regulated ..... 34
9-63.712	Importation and Transfer Restrictions ..... 35
9-63.713	Manufacture ..... 35
9-63.714	Registration ..... 36
9-63.715	Penalties..... 37
9-63.800	<u>INSPECTION OF LICENSEE'S RECORDS, AND STOCK OF FIREARMS AND AMMUNITION; FORFEITURE OF FIREARMS AND AMMUNITION; LICENSE REVOCATION</u> ..... 37
9-63.811	Inspections..... 37
9-63.812	Forfeiture of Firearms and Ammunition: The Varying requisite Intent, and the Specificity Requirement..... 37
9-63.813	License Revocation..... 37
9-63.900	<u>THE FEDERAL EXPLOSIVES STATUTE (18 U.S.C. § 841 ET SEQ.)</u> ..... 38
9-63.910	<u>Description</u> ..... 38
9-63.920	<u>Investigative Guidelines</u> ..... 38
9-63.930	<u>Special Considerations</u> ..... 39
9-63.1100	<u>TAMPERING WITH CONSUMER PRODUCTS (18 U.S.C. § 1365)</u> ..... 40
9-63.1110	<u>Prosecutive Policy</u> ..... 40
9-63.1120	<u>Investigative Jurisdiction</u> ..... 40
9-63.1130	<u>Supervising Section</u> ..... 40

July 1, 1992

(3)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-63.1140 <u>Discussion of the Offense</u> .....	40
9-63.1141 <u>General</u> .....	40
9-63.1142 <u>Offenses</u> .....	40
9-63.1143 <u>Definitions</u> .....	41

U.S. ATTORNEYS MANUAL 1988

9-63.000 PROTECTION OF PUBLIC ORDER, SAFETY, HEALTH AND WELFARE

## 9-63.100 AIRCRAFT PIRACY AND RELATED OFFENSES

## 9-63.101 General

Section 1472(i) through (n) of Title 49 App. set forth the offenses of aircraft piracy and attempted piracy while in flight within or outside the special aircraft jurisdiction of the United States, interference with flight crew members or flight attendants while in flight within the special aircraft jurisdiction of the United States, 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 subsections is contained below.

Definitions of terms used in 49 U.S.C.App. § 1472 are found in 49 U.S.C.App. § 1301.

Destroying or damaging 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

Pursuant to 18 U.S.C. § 1472(o), criminal violations of the aircraft piracy and related offense provisions are investigated by 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

Terrorism and Violent Crime 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 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 9-63.204, *infra*), the act also made several significant changes to various provisions

---

July 1, 1992

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(l)(1) was increased to \$10,000. Also, the felony fine for violating 49 U.S.C.App. § 1472(l)(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(l)(1), 1472(l)(2), 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 offense 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 or imprisonment for five years, or both.

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 paragraph (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.

The legislative history of the Aircraft Sabotage Act appears 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 Cong., 2d Sess.; in S.Rep. No. 619 on S. 2623, the *Aircraft Sabotage Act*, 98th Cong. 2d Sess.; and 130 Cong.Rec. E 4567-E 4568 (daily ed. November 14, 1984).

---

July 1, 1992

9-63.110 Special Aircraft Jurisdiction of the United States

The special aircraft jurisdiction of the United States is a jurisdictional requirement for all offenses proscribed by 49 U.S.C.App. § 1472 except carrying weapons aboard an aircraft (49 U.S.C.App. § 1472(l)), conveying 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. An aircraft is in the special aircraft jurisdiction of the United States only while the aircraft is "in flight."

An aircraft is "in flight" 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) should 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 is specified in 49 U.S.C.App. § 1473(a) and is the same as 18 U.S.C. §§ 3237, 3238 and Rule 18 of the Federal Rules of Criminal Procedure. Non-continuing offenses such 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))

Aircraft piracy is the seizure by force or violence or threat of force or violence or any other form of intimidation with wrongful intent of an aircraft within the special aircraft jurisdiction of the United States. This offense is to be distinguished from 18 U.S.C. § 1651 where the term "piracy" is defined by the law of nations. 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. Busic*, 592 F.2d 13, 21 (2d Cir.1978); *United States v. Bohle*, 445 F.2d 54 (7th Cir.1971).

## 9-63.131 Prosecution Policy

This offense warrants vigorous investigation and prosecution.

## 9-63.132 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.

## 9-63.133 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 *Busic, supra*, *United States v. Remling*, 548 F.2d 1274 (6th Cir.1977), and *United States v. Ortiz*, 488 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, any indictment for air piracy may charge other serious offenses, such as kidnapping and interference with a flight crew, arising out of the same transaction.

## 9-63.134 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 *Busic, supra*.

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; and see generally USAM 9-10.000 (capital crimes).

#### 9-63.135 Negotiated Pleas

The Department advocates 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 a lesser offense or decides not to prosecute fully an act of air piracy. The U.S. Attorney should contact the Terrorism and Violent Crime Section for the necessary approval.

#### 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). Still greater punishment may be imposed when the use of a deadly or dangerous weapon is used to effect such interference. ♦ USAM 9-63.163, *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), sexual abuse offenses (18 U.S.C. §§ 2241 to 2244), 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). The ten offenses set forth above are punishable regardless of any connection they may have with aircraft piracy or attempted piracy. See H.R. No. 958, 87th Cong., 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).

9-63.160 Carrying Weapons or Explosives Aboard Aircraft (49 U.S.C. App. § 1472(l))

Subsection (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; (2) placing or attempting to place aboard any such aircraft a loaded firearm in the baggage or other property not accessible to passengers in flight; and (3) placing or attempting to place aboard any such aircraft any bomb or similar explosive or incendiary device. Subsection (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(l)(1). Subsection (3) provides that the section 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.

9-63.161 Prosecution Policy

The Federal Aviation Administration (FAA) pre-board screening procedures have resulted in the detection of relatively large numbers of individuals who have attempted to board aircraft with deadly or dangerous weapons concealed on the individual's person or contained in accessible property.

In the overwhelming number of cases, the violators have an excellent 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."

---

July 1, 1992

Also, individuals other than law enforcement officers have been issued permits by state or local governments to carry firearms 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. § 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; or
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; or
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 unaggravated weapons violations will continue to be referred initially 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 should be sought pursuant to 49 U.S.C.App. § 1471(c).

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 for appropriate civil action. See USAM 9-76.100.

Explosive or incendiary devices, including containers of gasoline or similar flammable liquids, will in all cases be criminally prosecuted under 49 U.S.C.App. § 1472(1).

## 9-63.162 Attempts

In order to prove an attempt to violate 49 U.S.C.App. § 1472(l), the government must show that the defendant intended to board the aircraft. 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 139 (9th 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 416 (2d Cir. 1974).

## 9-63.163 Deadly or Dangerous Weapons

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.

## 9-63.164 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*, 483 F.2d 708 (3d Cir.1973), *Flum*, *supra*, *United States v. Dishman*, 486 F.2d 727 (9th Cir.1973).

## 9-63.165 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 statute. See *Flum*, *supra*.

9-63.170 False Information and Threats (49 U.S.C.App. § 1472(m))

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)). This subsection makes it a crime willfully and maliciously or with reckless disregard for safety to convey false information, knowing such information to be false, concerning an attempt to do an act which would be a felony prohibited by 49 U.S.C.App. § 1472(i), (j), (k) or (l).

With respect to threats, the Aircraft Sabotage Act created a new felony offense for anyone to convey 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 (49 U.S.C.App. § 1472(m)(2)). The defendant must have exhibited an apparent determination and will to carry the threat into execution. 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).

Section 1472(m)(2) of Title 49 App. 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.

#### 9-63.171 Prosecution Policy

To achieve uniform application of 49 U.S.C.App. § 1472(m)(1), the following guidelines should be considered in determining whether an offense is to be prosecuted:

A. Aggravated cases should be fully investigated and prosecuted. Such aggravated cases include, but are not limited to, the following examples:

1. A hijacking hoax made by a person reporting the act attributable to another; or
2. False information not readily disclosed as such resulting in delay of the flight or inconvenience to airport employees and passengers.

B. Federal criminal prosecution under 49 U.S.C.App. § 1472(m)(1) can be declined 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; or
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.

#### 9-63.180 Aircraft Piracy Outside the Special Aircraft Jurisdiction of the United States (49 U.S.C.App. § 1472(n))

In order to fully implement the Hague Convention, the Antihijacking Act of 1974 (Pub.L. No. 93-366) 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 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 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.

#### 9-63.181 Prosecution Policy

Authorization shall be obtained from the Assistant Attorney General of the Criminal Division before indictments are returned alleging this offense. 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 9-63.131 and 9-63.135, *supra*.

#### 9-63.200 DESTRUCTION OF AIRCRAFT AND MOTOR VEHICLES AND RELATED OFFENSES

##### 9-63.201 General

Sections 31 to 35 (Chapter 2 of Title 18) include the offenses of destruction of aircraft and motor vehicles and related offenses. Definitions of terms used in Chapter 2 of Title 18 are found in 18 U.S.C. § 31.

##### 9-63.202 Investigative Jurisdiction

The Federal Bureau of Investigation investigates incidents involving possible violations of Chapter 2 of Title 18, United States Code.

##### 9-63.203 Supervising Section

Terrorism and Violent Crime Section of the Criminal Division.

##### 9-63.204 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 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 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:

---

July 1, 1992

A. The first paragraph of 18 U.S.C. § 32(a) 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."

B. The "with intent to damage" requirement of former paragraphs two and three of 18 U.S.C. § 32(a) was changed to "likely to endanger the safety of any such aircraft."

C. Paragraph (5) of 18 U.S.C. § 32(a) 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 18 U.S.C. § 32(a) was raised from \$10,000 to \$100,000. (The maximum term of imprisonment remains twenty years.)

F. New subsection (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 or imprisonment for up to five years, or both.

The legislative history for the Aircraft Sabotage Act appears 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 Cong., 2d Sess.; in S.Rep. No. 619 on S. 2623, the *Aircraft Sabotage Act*, 98th Cong., 2d Sess.; and at 150 Cong.Rec. E 4567-E 4568 (daily ed. Nov. 14, 1984).

#### 9-63.210 Destruction of Aircraft—18 U.S.C. § 32(a)

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 term "[s]pecial 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)).

It is implicit in the kind of conduct prohibited by paragraph (1) of Section 32(a) that such acts are likely to endanger the safety of the aircraft. The acts described in paragraph (1) can have no other result. Because the acts prohibited by paragraphs (2) through (6) of Section 32(a)

might have other results, however, the Congress believed it necessary to state explicitly that these paragraphs criminalize only that conduct that is likely to threaten 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.

9-63.220 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)).

As with subsection (a) of 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 or 20 years in prison, or both.

9-63.221 Prosecutive Policy for 18 U.S.C. § 32(b)

Authorization shall be obtained from the Assistant Attorney General of the Criminal Division before an indictment is returned alleging a violation of 18 U.S.C. § 32(b). This is consistent with the policy for 49 U.S.C.App. § 1472(n). See USAM 9-63.181, *supra*.

9-63.230 Threats to Destroy Aircraft—18 U.S.C. § 32(c)

Subsection (c) of 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). The

---

July 1, 1992

threat must be made "with an apparent determination and will to carry the threat into execution."

#### 9-63.231 Prosecutive Policy

As with the offense of communicating false information, (see U.S.M. 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. If, however, the threat is issued under circumstances where a reasonable person would believe that it would be carried out and the threat involves an action that would likely endanger the safety of the aircraft, such conduct should be prosecuted vigorously.

#### 9-63.240 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 V of the Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, October 12, 1984.)

#### 9-63.241 Prosecutive Policy

Section 33 of Title 18 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 reflecting the limited nature of the federal role. Questions concerning this statute should be directed to the Terrorism and Violent Crime Section, 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.

#### 9-63.250 Imparting or Conveying False Information (Bomb Hoax)—18 U.S.C. § 35

Section 35 of Title 18 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 or 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 or five years imprisonment or both for conveying or imparting 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.

#### 9-63.251 Prosecutive Policy

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.

#### 9-63.252 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 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.

Section 1395(a) of Title 28 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), '[a]part 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. Since only a few states have enacted such statutes, however, 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.

#### 9-63.253 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), consent judgments should be used for disposition of the case without trial.

#### 9-63.254 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, supra*, 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, 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 consid-

erations 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

Subsection (a) of 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; or
- D. Make repeated telephone calls during which conversation ensues, with intent to harass.

Subsection (b) of 47 U.S.C. § 223 makes it a federal offense for any person, by means of telephone (directly or by recording device) in the District of Columbia or in interstate or foreign communication to 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 unless access by minors to the prohibited communication is restricted in accordance with Federal Communications Commission regulations. There are also civil penalties for violation of subsection (b).

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 subsection (a) of this statute is vested in the General Litigation and Legal Advice Section of the Criminal Division.

Supervisory jurisdiction for subsection (b) is vested in the National Obscenity Enforcement Unit of the Criminal Division.

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 declaration 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(a)(1)(D) rather than 47 U.S.C. § 223(a)(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*,

---

July 1, 1992

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 FCC has promulgated regulations under this provision.

#### 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 GUN CONTROL ACT, AS AMENDED, CODIFIED AT 18 U.S.C. §§ 921 TO 929; THE NATIONAL FIREARMS ACT, AS AMENDED, CODIFIED AT 26 U.S.C. §§ 5801 TO 5872

#### 9-63.510 Firearms Policies

#### 9-63.511 Investigative Jurisdiction and Prosecutive Policy

The Department of the Treasury's Bureau of Alcohol, Tobacco and Firearms (BATF) has primary investigative jurisdiction over possible violations of the federal firearms statutes. The Federal Bureau of Investigation, the Postal Service, and the Immigration and Naturalization Service may exercise investigative jurisdiction over possible violations of the federal firearms statutes when such violations are ancillary to investigations within their primary jurisdiction.

The federal firearms statutes are not substitutes for state firearms statutes. In enacting these statutes Congress made it abundantly clear that they were to supplement state firearms statutes, not supplant them.

#### 9-63.512 Dual Prosecution Policy

As noted elsewhere in the USAM (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 transaction unless there is a compelling federal interest supporting the dual prosecution, and authorization has been obtained. Because so 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 Office of Enforcement Operations.

#### 9-63.513 Charging more than One Prior Felony in an Indictment for Violation of Section 922(g)

The Circuit Courts of Appeals have differed as to whether the government may properly charge more than one prior felony in an indictment for violation of 18 U.S.C. § 922(h) and 18 U.S.C. App. § 1202, the predecessor provisions of 18 U.S.C. § 922(g). Recent congressional amendments have not addressed the issue as to whether the government may seek to prove more than one prior felony conviction even if the defendant offers to stipulate that he is a convicted felon. Thus, indictments charging violations of 18 U.S.C. § 922(g) should continue to be drafted in accord with circuit court precedent, and where there is no such precedent, in the manner most advantageous to the government.

#### 9-63.514 The Armed Career Criminal Act is a Sentencing Enhancement Provision

It is the policy of the Criminal Division that the Armed Career Criminal (ACCA)—now codified at 18 U.S.C. § 924(e)—is a sentencing enhancement provision which enhances the penalty for the already existing offense; in short, the ACCA does not create a new federal crime. The Criminal Division's policy has been upheld in *United States v. Gregg*, 803 F.2d 568 (10th Cir.1986), and in *United States v. Hawkins*, 811 F.2d 210 (3rd Cir.1987). The Division's policy was rejected in *United States v. Davis*, 801 F.2d 754 (5th Cir.1986), but, subsequently, the ACCA was amended, and congressional intent as to sentencing enhancement made clearer.

In order to avoid possible constitutional difficulties in the use of the ACCA, prosecutors should follow a notification procedure similar to that

set forth in 21 U.S.C. § 851(a)(1), a procedure explicitly endorsed in the firearms context in *Gregg, supra*. In *Gregg* the government obtained an indictment and subsequently filed a document with the court, with a copy to the defendant, alleging the requisite previous felony convictions. This procedure put the defendant on notice that he would receive enhanced punishment if convicted of violating Section 922(g). In drafting any such notice the following should be included: the specific offense and specific statutory provision violated, the date of the conviction, and the name of the court in which the defendant was convicted.

The ACCA should not be viewed as a substitute for local prosecution, but rather as a supplement to the options available to law enforcement officials in dealing with career criminals.

9-63.515 Use of a Prior Constitutionally Invalid Conviction for Sentence Enhancement

Because the ACCA is a sentencing enhancement statute, a constitutionally invalid felony conviction should not be used to enhance a defendant's sentence. *United States v. Gantt*, 659 F.Supp. 73 (W.D.Pa.1987); *United States v. Clawson*, 644 F.Supp. 187 (D.Cr.1986). *Cf. Lewis v. United States*, 445 U.S. 55 (1980) (firearms statutes prohibit a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds).

9-63.516 Use of Convictions on Multiple Robbery Counts Arising From a Single Episode

In *United States v. Petty*, 798 F.2d 1157 (8th Cir.1986) a court affirmed an enhanced sentence under the ACCA of a defendant whose criminal record consisted of a Missouri conviction for armed robbery, and a New York conviction on six counts of armed robbery based upon a single incident, that is the robbery of six persons in a restaurant. In the government's brief in opposition to the defendant's petition for certiorari, the Solicitor General has stated his disagreement with the *Petty* court's construction of the ACCA, and has moved to have the case remanded for resentencing. Accepting the Solicitor General's position, the Supreme Court remanded the case for resentencing. Please note that the Solicitor General has limited his concession to those cases involving single transactions; his concession does not extend to convictions for several offenses arising from independent transactions treated in the same indictment, or at the same sentencing proceeding.

9-63.517 Charging Possessory Offenses Under the National Firearms Act

The Supreme Court in *United States v. Freed*, 401 U.S. 601 (1971) held that the NFA cured the constitutional defect of its predecessor as applied to possessors of unregistered "gangster-type" weapons. See 26 U.S.C.

§ 5861(d). The *Freed* rationale extends to the NFA's transfer and making provisions. See 26 U.S.C. § 5861(e) and (f). Also, the Court in *Freed* noted that the NFA 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]. Cf. *Gott v. United States*, 432 F.2d 45 (9th Cir.1970) (conviction for possessing an unlawfully made firearm reversed because the government failed to prove that the firearm was made subsequent to the passage of the NFA).

#### 9-63.518 Proof of Non-Registration of Firearms in National Firearms Act Prosecutions

Time and money are wasted if officials from the BATF are unnecessarily called to testify as to the unregistered status of a NFA firearm. The preferable practice in these cases is to introduce a certificate from the custodian of the National Firearms Registration and Transfer Record stating that the custodian 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 BATF.

A certificate from the National Firearms and Transfer Record also may be used to show that there is no approved application for transfer or making of a firearm on file, as required by the NFA. See 26 U.S.C. §§ 5812(a)(6) and 5822(e). 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 that record is incompetent to testify as to 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 such allegations.

#### 9-63.519 Criminal Division Assistance

The Terrorism and Violent Crime Section has supervisory responsibility over the federal firearms statutes. Attorneys who are familiar with these statutes may be reached by calling FTS 368-0849.

#### 9-63.520 Introduction to the Firearms Statutes

In 1968 Congress enacted three separate and distinct firearms statutes; these three statutes governed the possession, transfer, and manufacture of various types of firearms and destructive devices. The first, the Gun

Control Act (GCA) (codified at 18 U.S.C. § 921 *et seq.*) primarily dealt with the transfer and transportation of virtually all firearms and destructive devices, and with the licensing of importers, manufacturers, dealers, and collectors of firearms; the second, the National Firearms Act (NFA) (codified at 26 U.S.C. § 5801 *et seq.*), created a tax and registration scheme for gangster-type weapons and destructive devices, e.g., sawed-off shotguns; the third, the Omnibus Crime Control and Safe Streets Act (then codified at 18 U.S.C.App. § 1201 *et seq.*) made unlawful the receipt, possession, or transportation in commerce, of firearms by specified categories of persons. These three firearms statutes constitute the starting point of any discussion of current federal firearms legislation.

In 1984 Congress revisited the subject of firearms control when it enacted the Comprehensive Crime Control Act (CCCA). This legislation amended the GCA by requiring a mandatory penalty both for use of a firearm during a federal crime of violence (see 18 U.S.C. § 924(d)), and for use of a firearm loaded with armor-piercing ammunition during a federal crime of violence. See 18 U.S.C. § 929. The 1984 CCCA also included the Armed Career Criminal Act (ACCA), which amended the Omnibus Crime Control and Safe Streets Act to provide for enhanced penalties for persons convicted of receiving, possessing, or transporting firearms, who have three or more previous convictions for robbery or burglary.

In 1986 Congress again revisited the subject of firearms control when it enacted the Firearms Owners' Protection Act (FOPA), and the Career Criminals Amendment Act (CCAA). Generally speaking the FOPA did the following: first, it made numerous changes in the 1968 GCA; second, it made a few minor amendments to the 1968 NFA, and third, it repealed the 1968 Omnibus Crime Control and Safe Streets Act and incorporated key provisions of that act in the GCA. In addition, the 1986 CCAA amended the ACCA; it did so by changing the predicate offenses from "robbery" or "burglary" to "violent felony" or "serious drug offense." See 18 U.S.C. § 924(e).

Given the comprehensive nature of these amendments, they will be synthesized by code section with changes important to federal prosecutors noted.

#### 9-63.600 THE GUN CONTROL ACT, AS AMENDED

##### 9-63.611 Unlawful Acts

The GCA makes it unlawful for any person—except a licensed importer, licensed manufacturer, or licensed dealer—to "engage in the business" of importing, manufacturing, or dealing in firearms, or in the course of such business, to ship, transport, or receive any firearm in commerce. See 18 U.S.C. § 922(a)(1)(A). The GCA also makes it unlawful for any person—except a licensed importer or licensed manufacturer—to engage in the business of importing or manufacturing ammunition, or in the course of such business to ship, transport, or receive any ammunition in commerce. See 18

---

July 1, 1992

U.S.C. § 922(a)(1)(B). The GCA no longer requires a dealer in ammunition to have a license. See 18 U.S.C. § 922(a)(1)(B).

Previously the GCA did not define the term "engage in the business." It is now defined at 18 U.S.C. § 921(a)(21). The term "with the principal objective of livelihood and profit"—an integral part of the definition of the term "engaged in the business"—is defined at 18 U.S.C. § 921(a)(22). Proof of profit is not required as to a person "who engages in the regular and repetitive purchase and disposition of firearms for criminal purposes or terrorism." See 18 U.S.C. § 921(a)(22). The term "terrorism" is defined. See 18 U.S.C. § 921(a)(22).

The GCA makes it unlawful for a *licensee* to ship or transport a firearm to a *nonlicensee*. See 18 U.S.C. § 922(a)(2). There are several exceptions. See 18 U.S.C. § 922(a)(2)(A), (B), and (C). One of the exceptions allows a person to mail a firearm—owned in compliance with federal, state, and local law—to any licensee, including a licensed collector. See 18 U.S.C. § 922(a)(2)(A).

The GCA makes it unlawful for a *nonlicensee* to transport into or receive in the State where he resides any firearm purchased or otherwise obtained outside that State. See 18 U.S.C. § 922(a)(3). There are three exceptions. See 18 U.S.C. § 922(a)(3)(A), (B), and (C), especially Section 922(a)(3)(B) which specifically refers to Section 922(b)(3), a provision discussed below.

The GCA makes it unlawful for a *nonlicensee* to transport in commerce any destructive device, machinegun, short-barreled shotgun, or short-barreled rifle. See 18 U.S.C. § 922(a)(4).

The GCA makes it unlawful for a *nonlicensee* to transfer, sell, trade, give, transport, or deliver any firearm to any other *nonlicensee* who the transferor knows, or has reasonable cause to believe, resides in any State other than that in which the transferor resides. See 18 U.S.C. § 922(a)(5). Please note that this provision does not apply to bequests of firearms or acquisitions of firearms by intestate succession, nor does the provision apply to the loan or rental of a firearm for lawful sporting purposes. See 18 U.S.C. § 922(a)(5)(A) and (B).

The GCA makes it unlawful for any *person*, in connection with the acquisition or attempted acquisition of a firearm or ammunition from a licensee, to knowingly make any false or fictitious oral or written statement, or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such licensee with respect to any fact material to the lawfulness of the sale or other disposition of the firearm or ammunition. See 18 U.S.C. § 922(a)(6).

The GCA makes it unlawful for any *person* to manufacture or import armor-piercing ammunition unless manufactured or imported for governmental use,

or unless manufactured or imported for testing or experimental purposes as authorized by the Secretary. See 18 U.S.C. § 922(a)(7)(A) and (C). The GCA does not apply to armor-piercing ammunition that is manufactured for export. See 18 U.S.C. § 922(a)(7)(C).

The GCA makes it unlawful for a *licensee* to sell or deliver any firearm or ammunition to any person the licensee knows, or has reasonable cause to believe, is less than eighteen years of age; if the firearm or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, it is unlawful for the licensee to sell or deliver the firearm or ammunition to any person who the licensee knows, or has reasonable cause to believe, is less than twenty-one years of age. See 18 U.S.C. § 922(b)(1).

The GCA makes it unlawful for any *licensee* to sell or deliver any firearm to any person in any State where the purchase or possession by such person of such firearm would be in violation of applicable State law or published ordinance. See 18 U.S.C. § 922(b)(2). Please note that this provision does not apply to ammunition.

The GCA makes it unlawful for any *licensee* to sell or deliver a firearm to any person who the licensee knows or has reasonable cause to believe does not reside in the State in which the licensee's place of business is located. See 18 U.S.C. § 922(b)(3). This provision contains three exceptions. See 18 U.S.C. § 922(b)(3)(A), (B), and (C). One of the exceptions has been revised to allow "the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States . . . ." See 18 U.S.C. § 922(b)(3)(A). A licensed manufacturer, licensed importer, or licensed dealer is presumed, in the absence of evidence to the contrary, "to have had actual knowledge of the State laws and published ordinances of both States." See 18 U.S.C. § 922(b)(3)(A). This presumption does not apply to licensed collectors. Please note that the so-called "contiguous State exception" has been eliminated.

The GCA makes it unlawful for a *licensee* to sell or deliver to any person any destructive device, machinegun, short-barreled shotgun, or short-barreled rifle without the specific authorization of the Secretary of the Treasury. See 18 U.S.C. § 922(b)(4). Designated research organizations are exempted. See the last paragraph of 18 U.S.C. § 922(b).

The GCA makes it unlawful for a *licensee* to sell or deliver a firearm or armor-piercing ammunition to any person unless the licensee notes in his records—records required to be kept by 18 U.S.C. § 923—the name, age, and place of residence of such person. See 18 U.S.C. § 922(b)(5). Ammunition—other than armor-piercing ammunition—is no longer covered by this provision.

---

July 1, 1992

The GCA allows a licensed importer, licensed manufacturer, or licensed dealer to sell a firearm, intrastate, to a nonlicensee who does not appear in person at the licensee's business premises, but only if certain requirements are met. See 18 U.S.C. § 922(c). These include a sworn statement by the transferee on a prescribed form, the registered mailing of a copy of the transferee's sworn statement to the chief law enforcement officer of the transferee's place of residence, and a waiting period of at least seven days following receipt of the notification of delivery of the copy of the transferee's sworn statement. See 18 U.S.C. § 922(c)(1), (2), and (3).

The GCA makes it unlawful for any *person* to sell or transfer a firearm or ammunition to any person knowing, or having reasonable cause to believe, that such person is one of the following: (1) a person under indictment for a felony, or convicted of a felony in any court; (2) a person who is a fugitive from justice; (3) a person who is an unlawful user of, or who is addicted to any controlled substance as defined in 21 U.S.C. § 802; (4) a person who is an adjudicated mental defective, or who has been committed to a mental institution; (5) a person who is an alien who is illegally or unlawfully in the United States; (6) a person who has been dishonorably discharged from the armed forces; and (7) a person who is a former citizen of the United States and who has renounced his citizenship. See 18 U.S.C. § 922(d). This prohibition on selling or transferring firearms or ammunition now extends to all persons, and not just licensees. See 18 U.S.C. § 922(d).

The GCA makes it unlawful for a *person* knowingly to deliver a package containing a firearm or ammunition to a common or contract carrier for shipment unless the person provides the carrier with written notice that a firearm or ammunition is being shipped. See 18 U.S.C. § 922(e). The provision contains an exception.

The GCA makes it unlawful for a common or contract *carrier* to transport or deliver a firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would violate the GCA. See 18 U.S.C. § 922(f).

The GCA makes it unlawful for seven specified *categories of persons* to ship or transport in commerce, or possess in or affecting commerce, any firearm or ammunition; it also makes it unlawful for persons in these seven categories to receive any firearm or ammunition which has been shipped or transported in commerce. See 18 U.S.C. § 922(g). With respect to possession of a firearm or ammunition by a person in one of the seven specified categories, the government must show a minimal nexus between a person's possession of a firearm or ammunition, and the movement of the firearm or ammunition, at *some time*, in interstate commerce. See *Scarborough v. United States*, 431 U.S. 563 (1977). The seven specified categories are as follows: (1) a person convicted of a felony in any court; (2) a fugitive from justice; (3) an unlawful user of, or one addicted to, a controlled

substance as defined in 21 U.S.C. § 802; (4) an adjudicated mental defective, or a person who has been committed to a mental institution; (5) an alien who is illegally or unlawfully in the United State; (6) a person dishonorably discharged from the armed forces; and (7) a former citizen of the United States who has renounced his citizenship. See 18 U.S.C. § 922(g). The amendments to the GCA revised subsection (3) and added subsections (5), (6), and (7). This amended provision now covers the possession or the receipt of a firearm or ammunition. Cf. Section 922(n) which prohibits persons under indictment from shipping, transporting, or receiving firearms or ammunition, but not from possessing firearms or ammunition.

Any conviction expunged, or set aside, or for which a person has been pardoned, or has had civil rights restored, is not a conviction for purposes of the GCA unless the pardon expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms. See 18 U.S.C. § 921(a)(20).

The GCA makes it unlawful for any *individual*, employed by a person in one of the categories listed in Section 922(g) to knowingly, in the course of such employment, to receive, possess, or transport any firearm or ammunition in or affecting commerce, or to receive any firearm or ammunition which has been shipped or transported in commerce. See 18 U.S.C. § 922(h). The prohibition in this provision is new.

The GCA makes it unlawful for any *person* to transport or ship in commerce any stolen firearm or stolen ammunition, knowing, or having reasonable cause to believe, that the firearm or ammunition was stolen. See 18 U.S.C. § 922(i).

The GCA makes it unlawful for any *person* to receive, conceal, store, barter, sell, or dispose of any stolen firearm or stolen ammunition or pledge or accept as security for a loan any stolen firearm or stolen ammunition, which is moving as, which is part of, or which constitutes commerce, knowing or having reasonable cause to believe that the firearm or ammunition was stolen. See 18 U.S.C. § 922(j).

The GCA makes it unlawful for any *person* knowingly to transport, ship, or receive in commerce, any firearm which has had the importer's or manufacturer's serial number removed, obliterated, or altered. See 18 U.S.C. § 922(k).

The GCA makes it unlawful for any *person* knowingly to import or bring into the United States or its possessions any firearm or ammunition or knowingly to receive any firearm or ammunition, which has been imported or brought into the United States or its possessions in violation of the act; this provision is subject to the exceptions found in 18 U.S.C. § 925(d). See 18 U.S.C. § 922(l).

The GCA makes it unlawful for any *licensee* knowingly to make any false entry in, to fail to make an appropriate entry in, or to fail to properly maintain any record required to be kept by Section 923 and the regulations promulgated thereunder. See 18 U.S.C. § 922(m).

The GCA makes it unlawful for any *person who is under indictment for a felony* to ship or transport in commerce any firearm or ammunition, or to receive any firearm or ammunition which has been shipped or transported in commerce. See 18 U.S.C. § 922(n). Cf. 18 U.S.C. § 922(g) (prohibits *convicted felons* from shipping, transporting or possessing firearms or ammunition).

The GCA makes it unlawful for any *person* to transfer or possess a machinegun; the prohibition does not apply to transfers to or by, or possession by or under the authority of the departments or agencies of the United States, a State, or a State's political subdivisions, or to any lawful transfer or possession of a machinegun lawfully possessed before May 19, 1986, the date this provision took effect. See 18 U.S.C. § 922(o).

The NFA continues to be applicable to any lawful transfer or possession of a machinegun lawfully possessed before May 19, 1986. However, the vitality of the NFA with respect to machineguns manufactured after that date is in question following *United States v. Rock Island Armory, Inc.*, 773 F.Supp. 117 (C.D.Ill.1991). In *Rock Island*, the court held that the NFA's tax and registration provisions as applied to machineguns had been rendered unconstitutional, or had been repealed by implication, by the passage of 18 U.S.C. § 922(o) because, since its enactment, the Bureau of Alcohol, Tobacco and Firearms has refused to approve any application to register and pay the \$200 tax on any machinegun made after May 19, 1986. The government did not appeal. In order to avoid dismissal of the indictment in any case involving the transfer or possession of a machinegun made after May 19, 1986, such counts should be charged pursuant to Section 922(o).

#### 9-63.612 Licensing, Inspection, and Reporting

The GCA provides that no person shall engage in the business of importing, manufacturing, or dealing in firearms, or engage in the business of importing or manufacturing ammunition, without a license. See 18 U.S.C. § 923(a). Previously, an ammunition dealer was required to have a license.

The GCA explicitly directs that its language not be construed to prohibit a licensed manufacturer, importer, or dealer from maintaining and disposing of a personal collection of firearms. See 18 U.S.C. § 923(c). If, however, a licensed manufacturer, importer, or dealer disposes of a firearm within one year after its transfer from his business inventory to his personal collection, or if such disposition or acquisition is made for the purpose of willfully evading the statutory restrictions on licensees, then

such firearm will be deemed part of the licensee's business inventory. See 18 U.S.C. § 923(c). Also, if any licensed manufacturer, importer, or dealer who has maintained a firearm as part of a personal collection for one year, sells or otherwise disposes of such firearm, he is required to record the description of the firearm in a bound volume, along with the name, place of residence, and date of birth of the transferee. See 18 U.S.C. § 923(c). All of these provisions are new.

The GCA provides that any application for a license submitted under § 923(c) shall be approved if various conditions are met. See 18 U.S.C. § 923(d)(1)(A), (B), (C), (D), and (E). Also, the Secretary must act on the application within forty-five days; if he does not, the applicant may file an action to compel the Secretary to act. See 18 U.S.C. § 923(d)(2).

The GCA provides that the Secretary may, after notice and opportunity for a hearing, revoke any license that has been issued if the holder of the license has *willfully* violated any provision of the statute, or any rule or regulation promulgated pursuant to the statute. See 18 U.S.C. § 923(e). The "willful" requirement is new.

The GCA provides that any person whose application for a license is denied, and any holder of a license whose license has been revoked, shall receive written notice specifically stating the grounds for the denial or revocation. See 18 U.S.C. § 923(f)(1). If an application is denied, or a license revoked, the aggrieved party may request a hearing to review the denial or revocation. See 18 U.S.C. § 923(f)(2). If after a hearing the Secretary decides not to reverse the decision to deny an application, or to revoke a license, notice shall be given to the aggrieved party. The aggrieved party then has sixty days to file a petition in United States District Court for de novo judicial review of such denial or revocation. See 18 U.S.C. § 923(f)(3). The provision for de novo judicial review is new.

The GCA provides that if criminal proceedings are instituted against a licensee alleging any violation of the statute, or regulations promulgated thereto, and the licensee is acquitted of such charges—or such proceedings are terminated, other than upon motion of the government before trial—the Secretary shall be absolutely barred from denying or revoking a license where such denial or revocation is based in whole or in part on facts which form the basis of such criminal charges. See 18 U.S.C. § 923(f)(4). This provision is new.

The GCA requires *licensees* to maintain, at their places of business, records of importation, production, shipment, receipt, sale, or other disposition of firearms. See 18 U.S.C. § 923(g)(1)(A). Most importantly, the GCA now provides that before the Secretary may enter a licensee's business premises for the purpose of inspecting records, or for the purpose of inspecting inventory, there must be "reasonable cause" to believe the

GCA has been violated, and that evidence of the violation will be found on the licensee's premises; thus, the Secretary no longer has broad authority to enter a licensee's business premises during normal business hours in order to inspect or examine records or inventory, and must generally obtain a search warrant from a Federal magistrate before he may inspect a licensee's records or inventory. See 18 U.S.C. § 923(g)(1)(A).

There are, however, three exceptions to the warrant requirement: first, a warrant is not required when reasonable inquiries are being made during the course of a criminal investigation of a person *other than* the licensee, importer, manufacturer, or dealer; second, a warrant is not required when the Secretary conducts an inspection to ensure that the licensee is complying with the record-keeping requirements of the GCA—but he may not make more than one such inspection during any twelve month period; and third, a warrant is not required when an inspection is necessary to determine the disposition of a particular firearm during the course of a bona fide criminal investigation. See 18 U.S.C. § 923(g)(1)(A).

With respect to multiple sales, the GCA requires licensed importers, manufacturers, and dealers to prepare reports of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of—at one time, or during any five consecutive business days—two or more pistols or revolvers, or any combination thereof, to an unlicensed person. See 18 U.S.C. § 923(g)(3).

The GCA contains several provisions dealing with licensed collectors; the Secretary may inspect the inventory and records of a licensed collector, *without* such "reasonable cause" or warrant, to determine compliance with the record keeping requirements of the GCA—but not more than once during any twelve month period—or when such inspection or examination may be required for determining the disposition of a firearm in the course of a bona fide criminal investigation. See 18 U.S.C. § 923(g)(1)(C). The GCA also requires a licensed collector to maintain a "bound volume" in which to record the receipt, sale, or other disposition of firearms, and to include the name and address of any person to whom the collector sells, or otherwise disposes of, a firearm. See 18 U.S.C. § 923(g)(2). Virtually all of these provisions are new.

The GCA requires that licenses issued pursuant to the act be kept posted and made available for inspection on the premises covered by the license. See 18 U.S.C. § 923(h).

The GCA requires licensed importers and licensed manufacturers to place a serial number on the receiver or frame of the weapon for identification purposes. See 18 U.S.C. § 923(i).

The GCA allows a licensed importer, manufacturer or dealer to temporarily conduct business at a location other than the location specified on the license, but only if the temporary location is one involving a gun show or

similar event sponsored by various firearms associations, and such location is in the State specified on the license. See 18 U.S.C. § 923(j). The GCA also provides that records of all firearms transactions conducted at a temporary location shall specify where the sale or other disposition took place, and that a record of such sale or disposition shall be entered in the permanent records of the licensee, and shall be retained at the location specified on the license. See 18 U.S.C. § 923(j). All of these provisions are new.

9-63.613 The Penalty Provisions: Imprisonment, Fines, and Forfeitures

The GCA provides—with significant exceptions noted below—than whoever *knowingly* makes any false statement or representation with respect to the information required to be kept in the records of a person licensed under the statute, or who *knowingly* makes any false statement or representation in applying for any license, or exemption, or relief from disability pursuant to the statute, shall be imprisoned not more than five years, fined not more than \$5,000, or both. See 18 U.S.C. § 924(a)(1)(A). These same penalties apply to a person who *knowingly* violates 18 U.S.C. § 922(a)(4), (a)(6), (f), (g), (i), (j), or (k), to a person who *knowingly* brings into the United States or any possession thereof any firearm or ammunition in violation of 18 U.S.C. § 922(1), and to a person who *willfully* violates any other provision of the statute. See 18 U.S.C. § 924(a)(1)(B), (C), and (D). It is important to note that the above provisions are inapplicable to 18 U.S.C. § 924(a)(2), to 18 U.S.C. § 924(b) and (c), and to 18 U.S.C. § 929. See 18 U.S.C. § 924(a)(1). The GCA provides that any licensee who *knowingly* makes any false statement or representation with respect to the information required to be kept in the licensee's records, or who *knowingly* violates 18 U.S.C. § 922(m), shall be imprisoned not more than one year, fined not more than \$1,000, or both. See 18 U.S.C. § 924(a)(2). All of these provisions are new.

The GCA provides that whoever ships, transports, or receives a firearm or ammunition in commerce, with intent to use the firearm or ammunition to commit a felony, or who ships, transports, or receives a firearm or ammunition with knowledge or reasonable cause to believe that the firearm or ammunition will be used in the commission of a felony, shall be imprisoned for not more than ten years, fined not more than \$10,000, or both. See 18 U.S.C. § 924(b).

The "reasonable cause to believe" standard of § 924(b) does *not* apply to a defendant who crosses a state or national border with a firearm—with no intent to commit a felony—harboring a reasonable belief that at a later and unspecified time he might commit a felony with the firearm. *United States v. Arrellano*, 812 F.2d 1209 (9th Cir.1987).

The GCA provides that whoever uses or carries a firearm during and in relation to any "crime of violence" or "drug trafficking crime" for

which he may be prosecuted in a court of the United States—including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device—shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years; if the firearm that is used or carried is a short-barreled rifle or short-barreled shotgun, the person shall be sentenced to imprisonment for ten years; and if the firearm that is used or carried is a machinegun, or is a firearm equipped with a silencer or a muffler, the person shall be sentenced to imprisonment for thirty years. See 18 U.S.C. § 924(c)(1). In the case of a subsequent Section 924(c) violation the person convicted shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or is a firearm equipped with a silencer or a muffler, the person convicted shall be sentenced to life imprisonment without release. See 18 U.S.C. § 924(c)(1). The Court of Appeals for the Eleventh Circuit has held that the enhanced penalty would apply to "second or subsequent" § 924(c) violations charged in the same indictment. *United States v. Rawlings*, 821 F.2d 1543 (11th Cir.), cert. denied, 474 U.S. 979 (1987). To date, four other circuit courts of appeals have followed *Rawlings*. See *United States v. Raynor*, 939 F.2d 191 (4th Cir. 1991); *United States v. Bennett*, 908 F.2d 189 (7th Cir.), cert. denied, 111 S.Ct. 534 (1990); *United States v. Nabors*, 901 F.2d 1351 (6th Cir.), cert. denied, 111 S.Ct. 192 (1990); *United States v. Foote*, 898 F.2d 659 (8th Cir.), cert. denied, 111 S.Ct. 112 (1990). This subsection explicitly prohibits all probationary and suspended sentences, and all sentences that would run concurrently with that for the predicate crime or for any other offense; in addition, persons sentenced under this subsection are not eligible for parole. See 18 U.S.C. § 924(c)(1). This subsection defines the terms "crime of violence" and "drug trafficking crime." See 18 U.S.C. § 924(c)(2) and (3). The amendment of Section 924(c) is, *inter alia*, an expression of congressional disapproval of the Supreme Court's decisions in *Simpson v. United States*, 435 U.S. 6 (1978), and *Busic v. United States*, 446 U.S. 398 (1980).

The GCA provides that a firearm or ammunition may be seized and forfeited if the firearm or ammunition is involved or used in any *knowing* violation of 18 U.S.C. § 922(a)(4), (a)(6), (f), (g), (h), (i), (j), or (k), if the firearm or ammunition is *knowingly* brought into the United States in violation of 18 U.S.C. § 924, or if there is a *willful* violation of any other provision of the GCA. Where the seizure and forfeiture is based upon the involvement of the firearm or ammunition in a violation of the GCA, the intent element applicable to a criminal prosecution under that provision must be established. See 18 U.S.C. § 924(d). Moreover, firearms or ammunition are subject to forfeiture if a person *intended* to use a firearm or ammunition in one of the many offenses specified in the subsection. These offenses include specified GCA offenses, crimes of violence, various drug offenses, and illegal exportation of firearms or ammunition. The intent to use the firearms or ammunition in these specified offenses must be demon-

strated by "clear and convincing" evidence. See 18 U.S.C. § 924(d)(1) and (3).

The GCA, of which the ACCA is now a part, provides that a person who violates 18 U.S.C. § 922(g)—which prohibits the shipment of, the transportation of, the possession of, or the receipt of, a firearm or ammunition by persons in seven specified categories—and who has three previous convictions in any court for a violent felony, or a serious drug offense, or both, shall be imprisoned for not less than fifteen years, and fined not more than \$25,000; in addition, the subsection specifically precludes suspension of sentence, probation, and parole. See 18 U.S.C. § 924(e)(1). This subsection defines the terms "serious drug offense" and "violent felony." See 18 U.S.C. § 924(e)(2)(A) and (B). Thus, the amended ACCA is now codified at 18 U.S.C. § 924(e), and the terms "serious drug offense," and "violent felony" have replaced the terms "robbery" and "burglary."

#### 9-63.614 Exceptions; Relief from Disabilities

The GCA's provisions do not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any of its departments or agencies, or issued for the use of any State or any of its departments, agencies, or political subdivisions. See 18 U.S.C. § 925(a)(1). Nor do the GCA's provisions apply to the shipment or receipt of a firearm or ammunition sold or issued by the Secretary of the Army pursuant to statutory authority. See 18 U.S.C. § 925(a)(2). Also excepted are shipments of firearms or ammunition to members of the United States Armed Forces on active duty overseas, or to authorized clubs whose entire membership is composed of such members. See 18 U.S.C. § 925(a)(3). The Secretary may authorize the transportation, shipment, receipt, or importation into the United States of any firearm "particularly suitable" for sporting purposes, or which is normally classified as a war souvenir; this authorization is limited to members of the armed forces of the United States who are, or who have recently been, on active duty outside the United States, and who want the firearm for personal use. See 18 U.S.C. § 925(a)(4).

With respect to a licensee who has been indicted for a felony, the GCA provides that the licensee may continue operations until any conviction stemming from the indictment becomes final. See 18 U.S.C. § 925(b).

With respect to a person under a firearms disability, the GCA permits that person to apply to the Secretary for relief from the disability imposed by federal law "with respect to the acquisition, receipt, transfer, shipment, transportation, or possession of firearms...." See 18 U.S.C. § 925(c). Previously, a person convicted of a federal firearms felony could not obtain relief pursuant to any provision in the GCA.

---

July 1, 1992

The GCA provides that the Secretary "shall authorize" firearms or ammunition to be brought into the United States if the firearms or ammunition fall into one of four specified categories. See 18 U.S.C. § 925(d)(1), (2), (3), and (4). These categories include, *inter alia*, firearms or ammunition brought into the United States for scientific or research purposes, and firearms or ammunition brought back into the United States by the persons who took the firearms or ammunition out.

#### 9-63.615 Rules and Regulations

The GCA explicitly prohibits the issuance of any rule or regulation requiring a registration system for firearms, firearm owners, or firearms transactions; the GCA also prohibits the issuance of any rule or regulation requiring the transfer of firearms records—or the information contained therein—to any facility owned or controlled by any government entity. See 18 U.S.C. § 926. While this section limits the Secretary's discretion with respect to prescribing rules and regulations, it does provide that "[n]othing in this section expands or restricts the Secretary's authority to inquire into the disposition of any firearm in the course of a criminal investigation." See 18 U.S.C. § 926.

#### 9-63.616 Interstate Transportation of Firearms

The GCA provides that any person who is not otherwise prohibited by the GCA from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm, for any lawful purpose, from any place where he may lawfully possess and carry such firearm, to any other place where he may lawfully possess and carry such firearm. See 18 U.S.C. § 926A. The transportation of a firearm is to be permitted "[n]otwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof." See 18 U.S.C. § 926A. During such transportation the firearm must be unloaded, and neither the firearm nor any ammunition being transported may be "readily" or "directly" accessible from the passenger compartment of the transporting vehicle. See 18 U.S.C. § 926A. This section represents a significant change in the GCA.

#### 9-63.617 Enhanced Penalties for Use of Restricted Ammunition During a Crime of Violence or Drug Trafficking Crime

The GCA mandates an enhanced penalty for one who—during and in relation to the commission of a crime of violence or drug trafficking crime—uses or carries a firearm and is in possession of armor-piercing ammunition capable of being fired in that firearm; this is so even if the predicate crime provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device. See 18 U.S.C. § 929. Whoever uses or carries a firearm, and is in possession of armor-piercing ammunition capable of being fired from that firearm shall, in addition to the punishment provided

for the commission of such crime of violence or drug trafficking crime, be sentenced to imprisonment for not less than five years, nor more than ten years. See 18 U.S.C. § 929(a). Notwithstanding any other provision of law, the court shall not suspend the sentence of any person who violates this provision, or place the person on probation. See 18 U.S.C. § 929(a). Moreover, the term of imprisonment may not run concurrently with any other term of imprisonment, including a term of imprisonment imposed for the felony in which the armor-piercing handgun ammunition was used or carried; in addition, no person sentenced under this provision is eligible for parole. See 18 U.S.C. § 929(a).

9-63.700 THE NATIONAL FIREARMS ACT, AS AMENDED (26 U.S.C. §§ 5801 TO 5872)

The National Firearms Act (NFA) deals with a relatively limited class of weapons often referred to as "gangster-type" weapons. The NFA's coverage extends to machineguns, sawed-off and short-barreled shotguns and rifles, mufflers, silencers, machinegun frames and receivers, any part designed and intended *solely and exclusively* for use in converting a weapon into a machinegun, any combination of parts designed and intended for use in converting a weapon into a machinegun, 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, the NFA includes within its coverage "destructive device[s]," such 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).

The NFA exempts from its coverage antique firearms and devices which are primarily collector's items, and which are unlikely to be used as weapons; the NFA also exempts devices which are neither designed nor redesigned for use as weapons, and any devices which the Secretary finds are not likely to be used as weapons, or which the Secretary finds are antiques or rifles which the owners intend to use solely for sporting purposes. See 26 U.S.C. § 5845(a) and (f).

9-63.711 Businesses Regulated

The NFA imposes a series of restrictions upon those businesses which deal in "gangster type" weapons, that is, the weapons listed in the previous section. The NFA imposes a special occupational tax on importers, manufacturers, and dealers in firearms. See 26 U.S.C. § 5801. The NFA

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 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 any licensing requirements contained in the GCA.

The NFA requires all 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 the NFA 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 (general false statements statute), given the more stringent penalties provided by the NFA.

#### 9-63.712 Importation and Transfer Restrictions

The NFA 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 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. The NFA makes it unlawful for any person to receive or possess a firearm which has been imported in violation of Section 5844. See 26 U.S.C. § 5861(k).

The NFA imposes a tax on the transfer of any firearm within its coverage. 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). The NFA makes it incumbent upon the transferor to file an application, to receive the Secretary's approval, and to pay the applicable tax prior to executing the transfer; 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. The NFA makes it unlawful for any person to transfer a firearm in violation of the NFA, or to receive or possess a firearm so transferred. See 26 U.S.C. § 5861(b) and (e). It should be noted that the GCA (18 U.S.C. § 922) also is applicable to many transfers of NFA weapons.

#### 9-63.713 Manufacture

The NFA imposes a tax upon the "making" of a firearm, and requires the Secretary's approval 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. Section 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.

#### 9-63.714 Registration

The NFA establishes a central registry for "'gangster-type'" weapons; the registration procedures of the NFA were restructured after the Supreme Court's decision in *Haynes v. United States*, 390 U.S. 85 (1968), a decision which struck down—as violative of the Fifth Amendment's self-incrimination clause—the NFA's old registration procedure. Cf. *United States v. Freed*, 401 U.S. 601 (1971) (registration procedures of the NFA do not violate the 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.

The NFA imposes upon every manufacturer, importer, or maker of firearms covered by the act, a legal obligation to register each and every firearm manufactured, imported, or made. See 26 U.S.C. § 5841. The NFA also provides that each firearm transferred must have been registered by the transferor, and must be registered to the transferee by the transferor; in addition, the statute provides that when a manufacturer produces a firearm, and notifies the Secretary of the firearm's production, such notice constitutes registration. See 26 U.S.C. § 5841.

The NFA makes it unlawful for any person to receive or possess a firearm which is not registered to him, or to transport, deliver, or receive in commerce an unregistered firearm. See 26 U.S.C. § 5861.

By specifically providing that registration information may not, directly or indirectly, be 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), the NFA surmounts the constitutional disability of its predecessor. See *Freed, supra*. Because the NFA was specifically drafted to protect a registrant from criminal prosecution because of 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, a past crime involving the use of a registered firearm, or illegal possession of a registered firearm. See 26 U.S.C. § 5848. There is no immunity from prosecution, however, if the government obtains independent evidence of the offense. Furthermore, Section 5848 does not preclude the use of registration information in a false statements prosecution.

## 9-63.715 Penalties

The maximum penalty for a violation of the NFA is ten years imprisonment, a \$10,000 fine, or both. See 26 U.S.C. § 5871. In addition, this provision mandates the seizure and forfeiture of all firearms, all ammunition, and all destructive devices involved in violations of the NFA.

## 9-63.800 INSPECTION OF LICENSEE'S RECORDS, AND STOCK OF FIREARMS AND AMMUNITION; FORFEITURE OF FIREARMS AND AMMUNITION; LICENSE REVOCATION

## 9-63.811 Inspections

The GCA now provides that before the Secretary may enter a licensee's business premises for the purpose of inspecting records, or firearms or ammunition kept on the premises there must be *reasonable cause* to believe that the GCA has been violated, and that evidence of such violation will be found on the licensee's premises. See 18 U.S.C. § 923(g). The GCA states that the Secretary "upon demonstrating such reasonable cause before a Federal magistrate and securing from such magistrate a warrant authorizing entry," may enter the licensee's business premises. See 18 U.S.C. § 923(g). Please note the three exceptions to the warrant requirement.

## 9-63.812 Forfeiture of Firearms and Ammunition: The Varying Requisite Intent, and the Specificity Requirement

The GCA now provides that firearms and ammunition may be seized and forfeited only if the firearms and ammunition are involved or used in any *knowing* violation of specified subsections of Section 922, or are *knowingly* imported or brought into the United States in violation of Section 924, or are used in a *willful* violation of any other provision of the GCA or any other criminal law of the United States. In addition, firearms and ammunition are subject to seizure and forfeiture if *intended* for use in one of the many offenses specified in Section 924(d)(3), including, specified GCA offenses, crimes of violence, various drug offenses, and illegal exportation of firearms or ammunition; the intent must be shown by *clear and convincing* evidence. Also, "[o]nly those firearms or quantities of ammunition particularly named and individually identified" are subject to seizure and forfeiture. See 18 U.S.C. § 924(d).

## 9-63.813 License Revocation

The GCA now provides that the Secretary may only revoke a license if the licensee has *willfully* violated the Act, or a regulation promulgated pursuant thereto. See 18 U.S.C. § 923(e). Moreover, the GCA explicitly provides that if criminal proceedings—alleging a violation of the GCA or its regulations—are brought against a licensee, and the licensee is acquitted of such charges, the Secretary is "absolutely barred" from revoking a license where such revocation would be based on facts forming the basis of

such criminal charges. See 18 U.S.C. § 923(f)(4). Given the criminal and regulatory nature of the federal firearms statutes, and the multi-agency interests in firearms violations by licensees, it is essential that U.S. Attorneys consult the BATF in all firearms cases involving licensees so that the criminal and administrative aspects of a case may be coordinated.

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 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).

The federal explosives statute strengthened federal law with its prohibitions on the illegal use, transportation or possession of explosives. 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 explosive 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) (1) (i) and 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 Section 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 (Section 842); offenses against property used in commerce or affecting commerce (Section 844(i)); violations directed at Treasury buildings or functions (Section 844 generally); and, unless the explosives are mailed, interstate transportation of explosives with unlawful intent (Section 844(d)). The Federal Bureau of Investigation has primary jurisdiction to investigate all other violations of Section 844, except those involving the use of explosives or the carrying of explosives in commission of a felony (Section 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 Section 844 violations perpetrated by terrorist or revolutionary groups or individuals carrying out terrorist or revolutionary activities. In addition, the Federal Bureau of Investigation has primary jurisdiction over all Section 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, Section 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 Section 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 Section 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 explosives statute. State and local authorities still have primary responsibility for the investigation and prosecution of most arson fires.

---

July 1, 1992

## 9-63.1100 TAMPERING WITH CONSUMER PRODUCTS (18 U.S.C. § 1365)

9-63.1110 Prosecutive Policy

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 wrongdoer has been identified and state or local authorities are prepared to handle the case, etc.).

9-63.1120 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 taintings intended to cause, and false claims resulting in, serious injury to a product's reputation.

9-63.1130 Supervising Section

Terrorism and Violent Crime Section.

9-63.1140 Discussion of the Offense9-63.1141 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.

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

---

July 1, 1992

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 "tamper." 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 Definitions

Section 1365(g) of Title 18 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 11 U.S.C. § 321(k)) on the immediate container of the product, but any other written material accompanying the product.

U.S. ATTORNEYS MANUAL 1988

UNITED STATES ATTORNEYS' MANUAL

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>Coins and Currency in the Likeness or Similitude of Genuine Currency</u> ..... 1
9-64.111	Prosecutive Policy With Respect to 18 U.S.C. § 489 ..... 1
9-64.120	<u>Counterfeiting of Foreign Obligations or Securities (18 U.S.C. § 478)</u> ..... 1
9-64.130	<u>Forged Endorsements on Government Obligations and Se- curities are to be Charged Under 18 U.S.C. § 495 or § 510</u> ..... 2
9-64.131	Elements of the Offense of Forgery Under 18 U.S.C. § 495 ..... 2
9-64.132	Sections 495 and 510 Distinguished ..... 2
9-64.133	Prosecutive Policy Regarding the Charging of 18 U.S.C. § 495 or § 510 ..... 3
9-64.134	Prosecutive Policy on Interspousal Forgery of Gov- ernment Checks ..... 4
9-64.140	<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 Responsibility ..... 4
9-64.220	<u>Use of U.S. Magistrate to Reduce Postal Violation Caseload</u> ..... 4
9-64.221	Misdemeanor to be Considered ..... 5
9-64.230	<u>Libelous Matter on Wrappers or Envelopes—18 U.S.C. § 2718</u> ..... 5
9-64.231	Special Considerations ..... 5
9-64.300	FALSE PERSONATION ..... 5
9-64.310	<u>Purpose of the Statute</u> ..... 5
9-64.310	<u>Elements of the Offenses</u> ..... 6
9-64.321	Methods of Proof ..... 6
9-64.322	Falsely Defined ..... 7
9-64.323	Intent to Defraud ..... 7
9-64.324	Acts as Such ..... 7
9-64.325	Demanding or Obtaining a Thing of Value ..... 8
9-64.326	Acting Under the Authority of the United States ..... 8
9-64.330	<u>Prosecution of 18 U.S.C. § 912 Violations—Criminal Division Recommendations</u> ..... 9

July 1, 1992

(1)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-64.400	FALSE IDENTIFICATION CRIME CONTROL ACT OF 1982 ..... 10
9-64.401	Overview ..... 10
9-64.410	<u>Prosecutive Policy</u> ..... 10
9-64.420	<u>Investigative Jurisdiction</u> ..... 10
9-64.430	<u>Supervising Section</u> ..... 10
9-64.440	<u>18 U.S.C. § 1028—Fraud and Related Activity in Connection With Identification Documents</u> ..... 11
9-64.441	Purpose ..... 11
9-64.442	Covered Instruments ..... 11
9-64.443	Governmental Issuers ..... 13
9-64.444	Types of Identification Documents ..... 15
9-64.445	Specifically Mentioned Identification Documents ..... 15
9-64.446	Operative Terms ..... 16
9-64.447	Culpable States of Mind ..... 17
9-64.448	Relevant Circumstances ..... 18
9-64.449	Prohibited Acts ..... 21
9-64.450	<u>18 U.S.C. § 1028—Fraud and Related Activity in Connection With Identification Documents (Cont'd)</u> ..... 22
9-64.451	Federal Jurisdictional Circumstances ..... 22
9-64.452	United States Identification Document ..... 23
9-64.453	United States Document-Making Implement ..... 23
9-64.454	Possession With the Intent to Defraud the United States ..... 23
9-64.455	Is in or Affects Interstate or Foreign Commerce ..... 23
9-64.456	Transported in the Mail ..... 24
9-64.457	Penalties ..... 24
9-64.458	Venue ..... 25
9-64.459	Selection of Counts ..... 25
9-64.460	<u>18 U.S.C. § 1028—Fraud and Related Activity in Connection With Identification Documents (Cont'd)</u> ..... 26
9-64.461	Exceptions for Law Enforcement Activities ..... 26
9-64.470	<u>18 U.S.C. § 1738—Mailing Private Identification Documents Without a Disclaimer</u> ..... 27
9-64.471	Purpose ..... 27
9-64.472	Elements of the Offense ..... 27
9-64.473	Penalty ..... 28
9-64.474	Venue ..... 28

9-64.000 PROTECTION OF GOVERNMENT FUNCTIONS

## 9-64.100 COUNTERFEITING

9-64.110 Coins and Currency in the Likeness or Similitude of Genuine Currency

Section 489 of Title 18 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, note, 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.

## 9-64.111 Prosecutive Policy With Respect to 18 U.S.C. § 489

Sections 489 and 475 of Title 18 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 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.

9-64.120 Counterfeiting of Foreign Obligations or Securities (18 U.S.C. § 478)

Section 478 of Title 18 has been deemed applicable only to obligations of securities of currently existing governments. See *United States v. Gertz*, 249 F.2d 622 (9th Cir.1957). The statute has only questionable application to demonetized obligations and securities of currently existing governments.

---

July 1, 1992

9-64.130 Forged Endorsements on Government Obligations and Securities Are to be Charged Under 18 U.S.C. § 495 or § 510

Section 471 of Title 18 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 to 473. Accordingly, forged endorsements on government obligations or securities must be charged under 18 U.S.C. §§ 495 or 510.

9-64.131 Elements of the Offense of Forgery Under 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.

9-64.132 Sections 495 and 510 Distinguished

Prior to the enactment of 18 U.S.C. § 510, Section 495 was relied on to prosecute the forgery and uttering of U.S. Treasury checks under that statute's proscription against falsely forging any writing, or uttering any such writing, for the purpose of obtaining money from the United States.

In addition to sharing dominion over forgery and uttering offenses with 18 U.S.C. § 495, Section 510 also creates a criminal offense. Section 510(b) makes it an offense to buy, sell, exchange, receive, deliver, retain, or conceal any Treasury check, bond, or security of the United States knowing that such instrument is stolen or that it bears a falsely made or forged endorsement or signature. This language was specifically drafted to reach fences and fencing rings who traffic in stolen Treasury checks but who may not themselves forge or pass such checks.

Another distinction of 18 U.S.C. § 510 is its misdemeanor provision. Section 510(c) reduces the crimes defined by 18 U.S.C. § 510(a) and (b) to

misdemeanors if the face value of the instrument, or the aggregate face value if more than one instrument, does not exceed \$500.

9-64.133 Prosecutive Policy Regarding the Charging of 18 U.S.C. § 495 or § 510

Since the enactment of 18 U.S.C. § 510 it has been the position of the Criminal Division that 18 U.S.C. § 510 merely supplements 18 U.S.C. § 495 and that it was neither drafted by the Department nor enacted by the Congress for the purpose of repealing 18 U.S.C. § 495. As a result, in cases in which criminal activities have fallen under the proscription of both 18 U.S.C. §§ 495 and 510, the Criminal Division has advised that the case may be prosecuted under *either* statute. The Department's interpretation of 18 U.S.C. § 510 was rejected in a series of district court cases in the Eastern District of Washington but was ultimately vindicated in the consolidated appeal of those cases in *United States v. Edmonson*, 792 F.2d 1492 (9th Cir.1986). In that opinion the Ninth Circuit stated: "The fact that there are two criminal statutes applying to exactly the same criminal conduct, and one provides a different penalty than the other, does not create 'irreconcilable conflict' to support a claim of implied repeal." The court further noted that, "[n]othing in the legislative history of Section 510 indicates that it was intended to prevail over Section 495—in whole or in part." In fact, one purpose of 18 U.S.C. § 510 was to close a loophole because 18 U.S.C. § 495 was inapplicable to stolen Treasury checks that were not falsely endorsed. See *United States v. Fields*, 783 F.2d 1382, 1384 (9th Cir.1986); S.Rep. No. 225, 98th Cong. 1st Sess. 371-372 (1983).

Prosecutive decisions should be made on a case by case basis in accordance with the requirements of the particular case and Department policy. Thus, for example, a forgery of a Treasury check with a face value under \$500, while prosecutable as a misdemeanor under 18 U.S.C. § 510(c), could nevertheless be prosecuted as a felony under 18 U.S.C. § 495 if the defendant is a repeat offender or involved in ring activity. A case involving the forgery of several instruments exceeding \$500 in aggregate value could be brought under the misdemeanor provision of 18 U.S.C. § 510(c) if the facts warrant (by not including all the instruments in the charge), or if brought under 18 U.S.C. § 495 or § 510(a), could be plea bargained down to a misdemeanor under 18 U.S.C. § 510(c). As a general rule, however, when the choice is between charging under the felony provisions of either 18 U.S.C. § 495 or § 510, the Criminal Division prefers charging under 18 U.S.C. § 510 because of the greater penalties provided in that section.

The primary thrust of the Department's enforcement program under 18 U.S.C. §§ 495 and 510 is aimed at the organized rings of check forgers and 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.

---

July 1, 1992

## 9-64.134 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.

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.

9-64.140 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 completing 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 order 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)

Section 2114 of Title 18 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 *Garcia v. United States*, 469 U.S. 70 (1984), the Supreme Court held that the legislative history of 18 U.S.C. § 2114 shows no intent by Congress to limit the statute to postal crimes and 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.'" 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.

## 9-64-211 Supervisory Responsibility

The Terrorism and Violent Crime Section has supervisory responsibility over violations of 18 U.S.C. § 2114 and § 1715 and, when the nonmailable article is an explosive or is intended to cause violent injury to a person or property, § 1716. All other violations are assigned to the General Litigation and Legal Advice Section.

9-64.220 Use of U.S. Magistrate to Reduce Postal 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 the range of punishment which could be imposed by a Magistrate for a minor offense, serious thought should be given in such cases to accepting pleas to misdemeanors before Magistrates instead of proceeding with the cases as felonies. Factors which would tend to favor felony prosecution are the lengthy prior criminal record of a defendant and the degree to which his/her activities and that of others created a substantial interference with the functioning of the postal system. Bearing especially on the latter consideration are the existence and extent of any conspiracy and the 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 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

This section prohibits the mailing of any postal cards, packages or envelopes which have any language of a libelous, defamatory or threatening character written upon them. The statute is of primary importance in the area of bill collection. Its effect is to prevent overly threatening dunning notices being sent on post cards.

#### 9-64.231 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 undertaken after a careful examination of the factual situation.

#### 9-64.300 FALSE PERSONATION

#### 9-64.310 Purpose of the Statute

The legislative history of 18 U.S.C. § 912 indicates a congressional intent to punish persons who falsely represent themselves as officers or

employees of the United States. 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. Robbins*, 613 F.2d 688 (8th Cir.1979).

#### 9-64.320 Elements of the Offenses

The statute defines two separate and distinct offenses. False personation of an officer or employee of the United States is an element of both offenses. The impersonation must be of a federal officer (see *Massengale v. United States*, 240 F.2d 781, 782 (6th Cir.1957)), and may be affected 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. *Lepowitch, supra*. 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).

#### 9-64.321 Methods of Proof

The most general allegations of impersonation of a government official sufficiently charge this element of the offense. *Lepowitch, supra*. 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 by a properly authenticated affidavit of the person having custody of the personnel records of the assumed office reciting that a diligent search reveals no record of defendant's employment. *T'Kach v. United States*, 242 F.2d 937, 937-38 (9th Cir.1957).

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 *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.Cir. 1957).

#### 9-64.322 Falsely Defined

"Falsely" is sometimes used to imply scienter and 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, perfidiously or treacherously." Black's Law Dictionary 540 (Rev. 5th ed. 1979).

#### 9-64.323 Intent to Defraud

Before the 1948 revision, the statute made an "intent to defraud" an essential element of both offenses. The words are omitted from the present statute because it was thought the decision in *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 defendant had, 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 of 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, 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. Cora*, 654 F.2d 490 (7th Cir.1981); *United States v. Rosser*, 528 F.2d 654 (D.C.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).

#### 9-64.324 Acts as Such

The distinguishing element of the first offense is acting as the officer impersonated. 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. *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 acted as the officer impersonated by representing that he was an FBI agent engaged in the investigation of a criminal violation, has been held to not state an offense in *Larson, supra*. But an allegation that a defendant acted as such by representing himself 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. Hart*, 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 were in fact the officer he represents himself to be. *Lamar, supra*; *Hamilton, supra*. It is not necessary that there in fact be such an officer as the defendant pretends to be. *Barnow, supra*; *Caruso v. United States*, 414 F.2d 225, 227 (5th Cir.1969).

#### 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. 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*, 618 F.2d 607 (9th Cir.1980). Within the second offense, some courts further distinguish two separate violations, demanding on the one hand and obtaining on the other. *Ekberg, supra*; see *Elliot v. Hudspeth*, 110 F.2d 389, 390 (10th Cir.1940); *United States v. York*, 202 F.Supp. 275, 276, 277 (E.D.Va.1962).

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, 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/she 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); *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 Prosecution of 18 U.S.C. § 912 Violations—Criminal Division Recommendations

The Criminal 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 be acting under color of federal authority or has expressly or implicitly suggested that the valuable thing demanded or obtained was necessary for the performance of his/her 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. In the case of the latter, there should be no prosecution under the second part of 18 U.S.C. § 912. See *Grewe, supra*; *York, supra*.

The alternatives to prosecution under the first part of 18 U.S.C. § 912 are prosecution under 18 U.S.C. §§ 701, 702, and action by state and local authorities. 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 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. 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 an 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, 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-1970s. The Department of Justice strongly supported the legislative effort and believes this act could have a significant impact upon all aspects of the complex false identification problem. The act created two new statutes: (1) 18 U.S.C. § 1028, entitled "Fraud and related activity in connection with identification documents," which deals with governmental identification documents and (2) 18 U.S.C. § 1738, entitled "Mailing private identification documents without a disclaimer," which deals with non-governmental identification documents.

##### 9-64.410 Prosecutive Policy

Section 1028 of Title 18 does not supplant or replace any existing criminal provision which may be applicable to a particular identification document. However, because of its broad coverage and realistic penalties, it will normally be the vehicle by which many false identification violations are pursued. 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.

##### 9-64.420 Investigative Jurisdiction

Sections 1028 and 1738 of Title 18 do not specifically assign investigative responsibility guidelines for the federal investigative agencies. 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 state and foreign government identification documents is assigned to the Secret Service. In regard to 18 U.S.C. § 1738, the Postal Inspection Service has investigative responsibility when the private identification document was transported through the United States mails; otherwise the FBI has investigative jurisdiction over 18 U.S.C. § 1738 violations.

##### 9-64.430 Supervising Section

General Litigation and Legal Advice Section.

---

July 1, 1992

9-64.440 18 U.S.C. § 1028—Fraud and Related Activity in Connection With Identification Documents

It is essential to understand certain terminology used in 18 U.S.C. § 1028. The various terms have been divided into 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.)

9-64.441 Purpose

Section 1028 of Title 18 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 a more modern statutory format. 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.

9-64.442 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.

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, oc-

cupation, 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 when originally issued, but have, nevertheless, become such a 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 all circumstances, but rather that 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).) A Social Security card itself, however, is clearly an identification document under 18 U.S.C. § 1028. See *United States v. Quanteros*, 769 F.2d 968 (4th Cir.1985).

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 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.

#### 9-64.443 Governmental Issuers

While 18 U.S.C. § 1028 does not use the term "government 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(3)(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 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:

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).

---

July 1, 1992

## 9-64.444 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 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 an identification document purports to be issued by a governmental entity, which in fact does not actually exist. See *Finis 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 blank. "Altered" would be the unauthorized changing of a material fact contained in the document. "Forged" would relate to the unauthorized creation 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).

## 9-64.445 Specifically Mentioned Identification Documents

Section 1028 of Title 18 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 it 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 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 § 1-156, revised 1987) As of 1978, approximately 35 state jurisdictions issued such cards. In 32 of these states, they are issued by the motor vehicle department. H.Rep., p. 12.

#### 9-64.445 Operative Terms

Section 1028 of Title 18 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.'

---

July 1, 1992

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, 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 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.

#### 9-64.447 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) "know-

ingly''; (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(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 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 v. Bailey*, 444 U.S. 394, 404 (1980), quoted in, H.Rep., p. 10.

#### 9-64.448 Relevant Circumstances

There are seven non-jurisdictional circumstances in 18 U.S.C. § 1028(a). They are (A) ''false''; (B) ''stolen''; (C) ''lawful authori-

July 1, 1992

ty''; (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 9-64.444, *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*, 462 U.S. 356 (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 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 law-

fully'' 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 potentially 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 genuine (i.e., actually issued by a government agency) the meaning of the phrase is susceptible to different interpretations and legislative history is not very 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.

Section 1028(a)(4) of Title 18, 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 originally issued or ''turned over'' by 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.

#### 9-64.449 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 and 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)(4));

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));

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 18 U.S.C. § 1028—Fraud and Related Activity in Connection With False Identification Documents (Cont'd)

9-64.451 Federal Jurisdictional Circumstances

There are five different bases for federal jurisdiction over the offenses 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.

#### 9-64.452 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.

#### 9-64.453 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.)

#### 9-64.454 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).

#### 9-64.455 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.

#### 9-64.456 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.

#### 9-64.457 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.

##### A. 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:

1. The production or transfer of an identification document or false identification document that is or appears to be
  - a. A United States identification document; or
  - b. A birth certificate, driver's license, or personal identification card;
2. The production or transfer of more than five identification documents or false identification documents; or
3. The production, transferring or possession of a document-making implement under 18 U.S.C. § 1028(a)(5).

## B. 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:

1. 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

2. 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).

## C. 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.

## 9-64.458 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.

## 9-64.459 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.

9-64.460 18 U.S.C. § 1028—Fraud and Related Activity in Connection With False Identification Documents (Cont'd)

9-64.461 Exceptions for Law Enforcement Activities

Section 1028(e) of Title 18 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 chapter 224 of this title.

Chapter 224 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.

---

July 1, 1992

9-64.470 18 U.S.C. § 1738—Mailing Private Identification Documents Without a Disclaimer

9-64.471 Purpose

Section 1738 of Title 18 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.

9-64.472 Elements of the Offense

Section 1738 of Title 18 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

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.

---

July 1, 1992

## 9-64.473 Penalty

Section 1738 of Title 18 specifies a fine of not more than \$1,000 and/or imprisonment not more than one year for each offense. However, because 18 U.S.C. § 1738 is a Class A misdemeanor, a higher fine of up to not more than \$100,000 is possible pursuant to 18 U.S.C. § 3571. The gist of the offense is the 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.

## 9-64.474 Venue

Venue is governed by the provisions of 18 U.S.C. § 2237. Hence, violations may be prosecuted in any district where the mailing or transportation was initiated, continued, or concluded.

U.S. ATTORNEYS MANUAL 1980

UNITED STATES ATTORNEYS' MANUAL

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>Supervisory Responsibility</u> .....	1
9-65.130 <u>Investigative Jurisdiction</u> .....	1
9-65.140 <u>Publicity Concerning Threats Against Government Offi- cials</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 Threat</u> .....	2
9-65.230 <u>Conditional Threat</u> .....	3
9-65.260 <u>Threats Against Former Presidents, and Certain Other Secret Service Protectees</u> .....	3
9-65.300 PRESIDENTIAL AND PRESIDENTIAL STAFF ASSASSINATION STATUTE—18 U.S.C. § 1751 .....	4
9-65.301 <u>Constitutionality</u> .....	4
9-65.302 <u>Investigation; 18 U.S.C. § 1751(i)</u> .....	4
9-65.310 <u>Killing the President, President Elect, Vice Presi- dent, Members of Presidential Staff—18 U.S.C. § 1751(a)</u> .....	5
9-65.311 <u>Murder—Definition and Degrees</u> .....	5
9-65.312 <u>Manslaughter Defined</u> .....	5
9-65.320 <u>Kidnaping the President; 18 U.S.C. § 1751(b)</u> .....	5
9-65.321 <u>Elements</u> .....	5
9-65.330 <u>Attempting to Kill or Kidnap the President; 18 U.S.C. § 1751(c)</u> .....	6
9-65.340 <u>Conspiracy to Kill or Kidnap the President; 18 U.S.C. § 1751(d)</u> .....	6
9-65.350 <u>Assault; 18 U.S.C. § 1751(e)</u> .....	6
9-65.360 <u>Definitions; 18 U.S.C. § 1751(f)</u> .....	6
9-65.370 <u>Rewards; 18 U.S.C. § 1751(g)</u> .....	6
9-65.380 <u>Suspension of State and Local Jurisdiction; 18 U.S.C. § 1751(h)</u> .....	7
9-65.400 PROTECTION OF TEMPORARY RESIDENCES AND OFFICES OF THE PRESIDENT AND OTHER SECRET SERVICE PROTECTEES—18 U.S.C. § 1752 .....	7
9-65.401 <u>Constitutionality</u> .....	7

July 1, 1992

(1)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-65.402	Presidential Visit—U.S. Attorney's Responsibility ..... 8
9-65.403	Investigative Responsibility..... 9
9-65.410	<u>Protected Premises</u> ..... 9
9-65.411	Designation of Protected Premises ..... 9
9-65.420	<u>Penalties, Venue, Effect on Other Laws</u> ..... 9
9-65.430	<u>Local Law Enforcement</u> ..... 9
9-65.440	<u>Sectional Analysis</u> ..... 10
9-65.442	Other Elements ..... 10
9-65.443	Designated Temporary Residences or Offices ..... 10
9-65.444	Posted, Cordoned Off or Restricted Area—Presidential Visit ..... 11
9-65.445	Disruption of Government Business ..... 11
9-65.446	Interference With Ingress and Egress ..... 11
9-65.447	Violence Within Premises ..... 11
9-65.460	<u>Other Considerations</u> ..... 12
9-65.461	General Services Administration ..... 12
9-65.462	U.S. Secret Service—Uniformed Division ..... 12
9-65.463	Competency—Utilization of Federal Facility ..... 12
9-65.500	INTERFERENCE WITH OR OBSTRUCTION OF SECRET SERVICE—18
	U.S.C. § 3056(d) ..... 12
9-65.501	Investigative Responsibility ..... 13
9-65.502	Supervising Section ..... 13
9-65.600	ASSAULTS ON AND KIDNAPING OF FEDERAL OFFICERS ..... 13
9-65.601	Supervisory Jurisdiction ..... 13
9-65.602	Investigative Jurisdiction ..... 13
9-65.610	<u>Assaults in General</u> ..... 14
9-65.611	General Prosecutive Policy Under 18 U.S.C. § 111 ..... 14
9-65.612	Requirement Under 18 U.S.C. § 111 That the Act in Opposition of the Federal Officer be Forcible: Application of Statute to Threats ..... 15
9-65.613	Knowledge of Victim's Status as a Federal Officer in Prosecution Under 18 U.S.C. §§ 111 and 1114 ..... 15
9-65.614	Applicability of 18 U.S.C. §§ 111 and 1114 to Assault Upon and Killing of Informants ..... 15
9-65.620	<u>Assaults on Specific Officials</u> ..... 15
9-65.621	Assaults on Staff Members of Federal Penal and Correctional Institutions ..... 16
9-65.622	Assaults on Postal Employees ..... 16
9-65.623	Assaults Between Postal Employees ..... 17
9-65.624	Assaults Upon Internal Revenue Service Personnel ..... 17

July 1, 1992

(2)

UNITED STATES ATTORNEYS' MANUAL

	<u>Page</u>
9-65.630	<u>Kidnapping of Federal Officers</u> ..... 18
9-65.631	Kidnapping in General ..... 18
9-65.632	Offense ..... 18
9-65.633	Applicability of Case Law Under 18 U.S.C. §§ 111 and 1114 ..... 18
9-65.700	CONGRESSIONAL, CABINET AND SUPREME COURT ASSASSINA- TION, KIDNAPPING, AND ASSAULT (18 U.S.C. § 351) ..... 19
9-65.701	Supervisory Jurisdiction ..... 19
9-65.702	Investigative Responsibility: 18 U.S.C. § 351(g) ..... 19
9-65.703	Background ..... 19
9-65.710	<u>Killing Individuals Designated in 18 U.S.C. § 351(a)</u> ..... 19
9-65.711	Member of Congress—Defined ..... 19
9-65.712	Member of Congress—Elect—Defined ..... 20
9-65.720	<u>Kidnapping: 18 U.S.C. § 351(b)</u> ..... 20
9-65.730	<u>Attempts to Kill or Kidnap: 18 U.S.C. § 351(c)</u> ..... 21
9-65.731	Dangerous Proximity Test ..... 21
9-65.732	Any Act or Endeavor Test ..... 21
9-65.740	<u>Conspiracy to Kill or Kidnap: 18 U.S.C. § 351(d)</u> ..... 22
9-65.750	<u>Assault: 18 U.S.C. § 351(e)</u> ..... 22
9-65.760	<u>Federal Investigative and Prosecutive Jurisdiction: 18 U.S.C. § 351(f)—Effect on State and Local Author- ity</u> ..... 23
9-65.770	<u>Authorization for Interception of Wire or Oral Commu- nications: 18 U.S.C. § 2516(1)(c)</u> ..... 23
9-65.800	PROTECTION OF FOREIGN OFFICIALS (18 U.S.C. §§ 112, 878, 970, 1116, 1117 AND 1201) ..... 23
9-65.801	Investigative Jurisdiction ..... 24
9-65.802	Responsibilities of the Treasury ..... 24
9-65.803	Authority to Initiate Prosecution ..... 24
9-65.804	Preference for Local Disposition ..... 24
9-65.805	Supervisory Jurisdiction ..... 24
9-65.806	Offenses Against Officials of the Coordination Coun- cil for North American Affairs (Taiwan) ..... 24
9-65.810	<u>Murder (18 U.S.C. § 1116)</u> ..... 26
9-65.811	Foreign Official ..... 26
9-65.812	Foreign Government ..... 27
9-65.813	International Organization ..... 27
9-65.814	Family ..... 27
9-65.815	Official Guest ..... 27
9-65.816	Internationally Protected Person ..... 28

July 1, 1992

(3)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-65.820	<u>Conspiracy to Murder (18 U.S.C. § 1117)</u> ..... 28
9-65.830	<u>Kidnapping (18 U.S.C. § 1201)</u> ..... 28
9-65.840	<u>Assault (18 U.S.C. § 112)</u> ..... 29
9-65.841	Legislative History..... 29
9-65.842	First Amendment..... 30
9-65.850	<u>Threats and Extortion (18 U.S.C. § 878)</u> ..... 30
9-65.860	<u>Protection of Temporary Residences and Offices-1</u> <u>U.S.C. § 1752</u> ..... 30
9-65.870	<u>Destruction of Property (18 U.S.C. § 970)</u> ..... 30
9-65.880	<u>Demonstrations</u> ..... 31
9-65.881	Procedures..... 32
9-65.882	Opinions by U.S. Attorneys..... 32
9-65.900	PROTECTION OF A MEMBER OF FEDERAL OFFICIAL'S FAMILY..... 33
9-65.901	General..... 33
9-65.902	Investigative Jurisdiction..... 33
9-65.903	Policy Considerations..... 33
9-65.904	Supervising Section..... 34

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, 879, 1751, 1752, and 3056(d).

9-65.120 Supervisory Responsibility

Supervisory authority over 18 U.S.C. §§ 871, 879 and 1751 rests with the Terrorism and Violent Crime Section while authority over 18 U.S.C. §§ 1752 and 3056(d) rests with the General Litigation and Legal Advice Section of the Criminal Division. The Terrorism and Violent Crime Section (FTS-368-0849) 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 Concerning Threats Against Government Officials

Media attention given to certain kinds of criminal activity seems to generate further criminal activity; this "contagion hypothesis" appears substantiated by data supplied by the United States Secret Service. In the six-month period following the March 30, 1981, attempt on the life of President Reagan, the average number of threats against protectees of the Secret Service increased by over 150 percent from a similar period during the year before.

Of the individuals who come to the Service's attention as creating a possible danger to Service protectees, approximately 75 percent are mentally ill. The Service is particularly concerned that media attention given to cases involving threats against protectees may provoke violent acts from such mentally unstable persons.

The Criminal Division requests that U.S. Attorneys carefully consider the possible adverse effect before releasing information to the public concerning cases and matters involving threats against the President (18 U.S.C. § 871) as well as other Secret Service protectees (18 U.S.C. § 879). This exercise of caution should extend to secondary sources of press

---

July 1, 1992

information as well (search warrants, affidavits, etc.), and the use of tools such as sealed affidavits should be considered.

9-65.200 THREATS AGAINST THE PRESIDENT AND SUCCESSORS TO THE PRESIDENCY—18 U.S.C. § 871

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 Terrorism and Violent Crime Section of the Criminal Division.

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), held that neither idle talk nor mere jest qualify as a true threat.

9-65.220 Intent to Carry Out Threat

In *Roy v. United States*, 416 F.2d 874 (9th Cir.1969), the court dealt 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." See also *United States v. Vincent*, 681 F.2d 462 (6th Cir.1982); USAM 9-65.260

July 1, 1992

(Threats Against Former Presidents and Certain Other Secret Service Protectees) *infra*.

9-65.230 Conditional Threat

The use of conditional language is pertinent in evaluating the "threat" content of a statement for purposes of 18 U.S.C. § 871. Such evaluation must take the full context of an alleged threat into consideration. *Alexander, supra*. Motive of the defendant may well be germane to the inquiry. Other factors for consideration would include such matters as 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.

U.S. Attorneys should not decline prosecution on the 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 require direct resort to the grand jury.

9-65.260 Threats Against Former Presidents, and Certain Other Secret Service Protectees

Section 879 of Title 18 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;
- F. Spouses of major candidates for the Office of President and Vice President and
- 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

---

July 1, 1992

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.

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.

H.Rep. No. 725, 97th Cong., 2d Sess. 4 (1982) (footnotes omitted).

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, 504-05 (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.

9-65.302 Investigation; 18 U.S.C. § 1751(i)

Under 18 U.S.C. § 1751(i), the Federal Bureau of Investigation has lead responsibility for the investigation of violations of § 1751. This section does not diminish the existing authority and responsibility of the Secret Service for the protection of the President or for making arrests for violation of the act. 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.

---

July 1, 1992

9-65.310 Killing the President; President Elect, Vice President, Members of Presidential Staff—18 U.S.C. § 1751(a)

In 1982, the coverage of 18 U.S.C. § 1751 was expanded 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 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). The government need not prove that the defendant knew the victim of the offense was an official protected by this section. The statute specifically contemplates the assertion of extraterritorial jurisdiction.

9-65.311 Murder—Definition and Degrees

Section 1751(a) of Title 18 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, and divides it into two degrees. Murder in the first degree 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

Section 1112 of Title 18 defines manslaughter as the unlawful killing of a human being without malice. Manslaughter is of two kinds: voluntary and involuntary.

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)

Under 18 U.S.C. § 1751(b), whoever kidnaps any individual designated in § 1751(a) is punishable (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.

9-65.321 Elements

Section 1751(b) of Title 18 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), does not incorporate transportation across a state line as an element of the offense. The jurisdictional basis for this statute derives from the substantial relation exist-

ing between the denounced acts and the execution of the powers of the executive branch of the United States government.

The penalty for kidnapping the President is imprisonment for any term of years or for life. The maximum penalty for assaulting the President is imprisonment for ten years and a fine of \$10,000. 18 U.S.C. § 1751(e).

9-65.330 Attempting to Kill or Kidnap the President; 18 U.S.C. § 1751(c)

Section 1751(c) of Title 18 proscribes attempts to kill or kidnap any individual designated in § 1751(a). The crime of attempt is punishable by imprisonment for any term of years or for life.

For cases applying the various concept of criminal attempts, see *United States v. Robles*, 185 F.Supp. 82 (N.D.Cal.1960) and *United States v. DeBolt*, 253 F. 78 (S.D.Ohio 1918). 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).

For cases applying the dangerous proximity doctrine, see *United States v. Coplton*, 185 F.2d 629 (2d Cir.1950); *Gregg v. United States*, 113 F.2d 687 (8th Cir.1940); and *United States v. Duane*, 56 F.Supp. 459 (D.Neb.1946).

9-65.340 Conspiracy to Kill or Kidnap the President; 18 U.S.C. § 1751(d)

Section 1751(d) of Title 18 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).

9-65.350 Assault; 18 U.S.C. § 1751(e)

Section 1751(e) proscribes assaults on persons designated in § 1751(a). Depending upon the individual assaulted and the extent of the injury, such assaults are punishable by terms of imprisonment of up to ten years and fine of up to \$10,000.

9-65.360 Definitions; 18 U.S.C. § 1751(f)

Section 1751(f) of Title 18 defines who is "President-elect" and "Vice President-elect" for purposes of prosecution under § 1751.

9-65.370 Rewards; 18 U.S.C. § 1751(g)

Rewards of up to \$100,000 are available from the Department of Justice under this section for information and services concerning a violation of

---

July 1, 1992

§ 1751(a)(1). Government employees are not eligible for such reward payments if the information or service is rendered in performance of official duties.

9-65.380 Suspension of State and Local Jurisdiction; 18 U.S.C. § 1751(h)

This section provides that federal investigative or prosecutive jurisdiction asserted for a violation of Section 1751 suspends the exercise of jurisdiction by a State or local authority, under any applicable State or local law, until Federal action is terminated.

The suspension of state jurisdiction is not a final preclusion of state jurisdiction and 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); 11 Cong.Rec. 18035 (1965).

9-65.400 PROTECTION OF TEMPORARY RESIDENCES AND OFFICES OF THE PRESIDENT AND OTHER SECRET SERVICE PROTECTEES—18 U.S.C. § 1752

Section 1752 of Title 18 provides for the exercise of federal jurisdiction over disorders and misconduct in relation to Presidential residences, offices, and areas 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 off the area.

In 1982, 18 U.S.C. § 1752 was expanded by an extension of 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, as major Presidential and Vice Presidential candidates and their 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 provides for a fine of not more than \$1000 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: vagueness or violation of the First Amendment.

Allegations of vagueness should be overcome by the formal designation of the buildings and grounds that are subject to the regulations published in the Federal Register. In addition to appropriate signs, giving notice of a temporary residence or of a restricted area, 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. Presidential security, however, will no longer depend upon differing local ordinances.

The basic legal theory underlying the provisions of this statute is that of trespass. The government has the right to control presence on government property, and physical presence on the designated grounds is clearly covered by regulations. Since demonstrations involve conduct, they are subject to reasonable regulations when necessary to protect other legitimate government interest. See *Cox v. Louisiana*, 379 U.S. 559 (1965). Even-handed application of a precise and narrowly drawn regulatory statute should pass constitutional muster. See *Edwards v. South Carolina*, 372 U.S. 229, 236 (1963).

Section 1752 of Title 18 is aimed at specific categories of knowing and willful conduct, and 18 U.S.C. § 1752(a)(1) is far more circumscribed than the general trespass statute upheld in *Adderly v. Florida*, 385 U.S. 39 (1966).

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. Section 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 *Adderly*, *supra*, and the opinion of the Court in *Cox v. Louisiana*, *supra*.

Section 1752(a)(2) of Title 18 might also be challenged for vagueness for use of the phrase "within such proximity to." However, the Court in *Cox v. Louisiana*, *supra*, upheld the language "near," and stated that although there was some lack of specificity inherent in the term, "near," the statute was not unconstitutionally vague because administrators were properly given a narrow discretion to construe the term.

Section 1752(a)(3) of Title 18 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). Similar prohibitions have been upheld by the Supreme Court. See *Cameron v. Johnson*, 390 U.S. 611 (1968); *Schneider v. State*, 308 U.S. 147 (1939).

#### 9-65.402 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

---

July 1, 1992

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 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.

#### 9-65.403 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 or offices of the President and other Secret Service protectees and to restrict 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 Office of the Chief Counsel, U.S. Secret Service (202-435-5771).

The statute makes it a misdemeanor for a person or group of persons willfully and knowingly to engage in certain conduct in violation of the statute or regulations issued thereunder.

#### 9-65.420 Penalties, Venue, Effect on Other Laws

Section 1752 of Title 18 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

Section 1752 of Title 18 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. 9-10 (1970).

Difficulties in proving 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 serve to prove the defendant acted willfully and with knowledge.

#### 9-65.440 Sectional Analysis

In 18 U.S.C. § 1752(a)(1), (3) and (4), the phrase "willfully" and "knowingly" precedes the description of activities prohibited thereunder. This clearly limits the reach of those provisions to acts of entering, remaining, obstructing, impeding, or engaging in physical violence, resulting from deliberate informed decision of the defendant to take such actions. 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 access thereto and to restricted areas are published in the Federal Register. By obtaining judicial notice of such publication the benefit of certain presumptions follows, and publication is a fact tending to prove scienter though probably not conclusive on the issue. See 44 U.S.C. § 1107. The legislative history discusses publication in terms of its usefulness in avoiding a chilling effect on free speech and possible problems of vagueness. The legislative history does not address whether the purpose of publication is to provide some form of constructive notice of knowledge.

#### 9-65.442 Other Elements

Aside from questions of 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 is similar to 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.

#### 9-65.443 Designated Temporary Residences or Offices

Section 1752(a) applies to 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. The locations 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), 1752(a)(3), and 1752(a)(4) make those subsections also applicable to such designated places.

#### 9-65.444 Posted, Cordoned Off or Restricted Area—Presidential Visit

Section 1752(a) also applies to any posted, cordoned off, or otherwise restricted area where the President is or will be temporarily visiting. This provides protection for the President during his/her travels *without* requiring advance formal designation. Cross reference in 18 U.S.C. § 1752(a)(3) and 18 U.S.C. § 1752(a)(4) makes those subsections applicable to restricted areas. However, 18 U.S.C. § 1752(a)(2) does not apply to temporary visit areas. See S.Rep. No. 91-1252, 91st Cong., 2d Sess. 9, 11 (1970). This appears to reflect an accommodation with First Amendment considerations.

#### 9-65.445 Disruption of Government Business

Section 1752(a)(2) of Title 18 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 impediment or disruption. A showing of specific intent is not required; a showing of reckless disregard of consequences would suffice. S.Rep. No. 91-1252, *supra*, at 11. "Government business or official functions" does not include purely "political party" business or functions. Prosecution under this subsection requires allegation and proof of the fact of designation, but does not appear to require proof of knowledge of such designation.

#### 9-65.446 Interference With Ingress and Egress

Section 1752(a)(3) of Title 18 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). The government is clearly entitled to regulate crowds to preserve free ingress and egress to buildings. Similar statutes have been upheld by the Supreme Court. See *Cameron v. Johnson*, 390 U.S. 611 (1968); *Box v. Louisiana*, 379 U.S. 536 (1965) and cases cited therein.

#### 9-65.447 Violence Within Premises

Section 1752(a)(4) of Title 18 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" implies external physical contact. The statutory term "physical

---

July 1, 1992

violence'' therefore encompasses physical assaults on the person of another but not circumstances involving only an intention to use force against a person.

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 41 C.F.R. §§ 101-19.7. These regulations have been upheld as constitutional against attacks for vagueness and overbreadth. See *United States v. Cassagnol*, 420 F.2d 868 (4th Cir.), cert. denied, 397 U.S. 1044 (1970); *United States v. Sroka*, 307 F.Supp. 400 (E.D.Wis.1969); *United States v. Akeson*, 290 F.Supp. 212 (D.Colo.1968).

9-65.462 U.S. Secret Service-Uniformed Division

Chapter 3 of 3 U.S.C. relates to the Uniformed Division of the U.S. Secret Service. The direction of the Uniformed Division 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 Uniformed Division 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, in Butner, North Carolina, or Rochester, New York, is recommended as an exception to the policy favoring utilization of the services of the local or nearest available psychiatrist or hospital.

9-65.500 INTERFERENCE WITH OR OBSTRUCTION OF SECRET SERVICE—18 U.S.C. § 3056(d)

Section 3056(d) of Title 18 prohibits knowingly and willfully obstructing, resisting, or interfering with a Federal law enforcement agent who is engaged in protective functions. It is a felony under 18 U.S.C. § 111

---

July 1, 1992

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, it is not necessary to show that the defendant used force against a Federal law enforcement agent. 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 Federal law enforcement agent. See S.Rep. No. 1252, 91st Cong., 2d Sess. 14 (1970). This statute authorizes 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 requiring proof that such interference was forcible or aggressive. 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).

### 9-65.600 ASSAULTS ON AND KIDNAPPING 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 Terrorism and Violent Crime Section of the Criminal Division. Attorneys responsible for these statutes can be reached at FTS 368-0849.

#### 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. 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.

#### 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. § 241(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 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

---

July 1, 1992

9-64.121). 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.

9-65.612 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." Force is an essential element of the crime. *Long v. United States*, 191 F.2d 717 (4th Cir.1952). 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."

9-65.613 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 it is not necessary to prove that the accused had knowledge of such capacity.

9-65.614 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.

9-65.620 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). These regulations can be found in 28 C.F.R. Part 64.

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 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.

---

July 1, 1992

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, only those involving forcible assault need be presented to a U.S. Attorney for evaluation. Incidents not involving physical abuse can 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 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 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

For 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

---

July 1, 1992

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.1963). 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.

#### 9-65.630 Kidnapping of Federal Officers

##### 9-65.631 Kidnapping in General

The kidnapping of any of the federal officers and employees listed in or designated under 18 U.S.C. § 1114 is made a federal crime under 18 U.S.C. § 1201(a)(5). The individuals covered by § 1114 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 would 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 discussion of kidnapping in general and the crime of hostage taking in particular, see USAM 9-60.100 and 9-60.700, respectively.)

##### 9-65.632 Offense

The gist of the offense defined in 18 U.S.C. § 1201(a)(5) is the kidnapping of a designated federal official which is done while the federal official 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 kidnapping of internationally protected persons (see USAM 9-65.830, *infra*), there is no attempt provision for 18 U.S.C. § 1201(a)(5).

##### 9-65.633 Applicability of Case Law Under 18 U.S.C. §§ 111 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.

§§ 111 and 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).

9-65.700 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 Terrorism and Violent Crime Section of the Criminal Division. Attorneys responsible for the enforcement of the statute can be reached at FTS 360-0849. Such attorneys should be notified telephonically immediately upon the initiation of an investigation under this statute.

9-65.702 Investigative Responsibility: 18 U.S.C. § 351(g)

Section 351(g) of Title 18 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 posse comitatus or otherwise to execute the law.

9-65.703 Background

Section 351 of Title 18 makes it a federal offense to kill or kidnap a Member of Congress, a Member-of-Congress elect, certain specified executive branch officials, a major Presidential or Vice Presidential candidate, a Justice of the Supreme Court or a person nominated to be a Justice. Attempts and conspiracies to commit such offenses or to assault any such individual are also made criminal by this section.

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 the 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 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).

#### 9-65.720 Kidnapping: 18 U.S.C. § 351(b)

As with the Federal Kidnapping Act (18 U.S.C. § 1201) 18 U.S.C. § 351(b) 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, 465 (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.

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)

Refer to USAM 9-65.330 *supra*, for a discussion of the term "attempt".

9-65.731 Dangerous Proximity Test

The dangerous proximity test was 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 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 was used 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 under 18 U.S.C. § 351(d) 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)

Section 351(d) of Title 18 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)

9-65.750 Assault: 18 U.S.C. § 351(e)

The assault provision of 18 U.S.C. § 351(e) divides assault into two categories: those that result in personal injury, which are punishable by 10 years of imprisonment and a fine of \$10,000; and all others, which are punishable by one year of imprisonment and a fine of \$5,000. The legislative history of the section shows that the lower penalty was intended for situations in which a person strikes with his or her fist at a Member of Congress without landing the blow, or strikes only with an open hand and causes no lasting injury.

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.

*Guarino 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. Note also that a condition in an offer of violence may negate the element of apprehension. For an excellent discussion of this concept see

*Watts v. United States*, 402 F.2d 676 (D.C.Cir.1968), reversed on other grounds, 394 U.S. 705 (1969).

As the statute does not provide for aggravated assaults, involving use of deadly or dangerous weapons without inflicting personal injury, application of the attempted homicide provision should be considered in those cases where 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

When and if federal investigative or prosecutive jurisdiction is asserted subsection (f) suspends state or local jurisdiction in cases of possible violation of 18 U.S.C. § 351, until all federal action is terminated. This subsection does not, however, prevent the states from cooperating with federal authorities in an investigation of violations of the act. See 18 U.S.C. § 351(d).

9-65.770 Authorization for Interception of Wire or Oral Communications: 18 U.S.C. § 2516(1)(c)

Section 18 U.S.C. § 351 is 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.

9-65.800 PROTECTION OF FOREIGN OFFICIALS (18 U.S.C. §§ 112, 878, 970, 1116, 1117 AND 1201)

Courts of the United States have jurisdiction over offenders who have committed crimes against foreign officials, official guests, and other internationally protected persons, whether or not the offense occurred within the United States, when the offenders are found within the jurisdiction of the United States. Crimes for which there is extra-territorial 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)). Such jurisdiction was provided for in Public Law No. 94-467.

An alternate basis for Public Law 94-467 is Congress' power to "define and punish offenses against the law of nations." Art. I, § 8, cl. 10. Since the OAS and UN conventions international law, *cf. The Paquete Habana*, 175 U.S. 677, 700 (1900), Congress can legislate to effect that law. *Cf. In re Rashita*, 327 U.S. 1, 7 (1946).

While federal courts have jurisdiction over offenses against internationally protected persons if the alleged offender is present within the United States, regardless of the place where the offense was committed,

they may exercise jurisdiction over the murder or attempted murder of a foreign official or official guest only if the offense occurred when the victim was in the United States. See 18 U.S.C. § 1116(b)(3), (6).

#### 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 the Treasury

The assignment of sole federal jurisdiction to the FBI to investigate crimes against internationally protected persons does not limit or interfere with the power of the Secretary of the Treasury in the discharge of his/her statutory protective responsibilities. See 18 U.S.C. § 202; 18 U.S.C. § 3056. U.S. Attorneys should immediately furnish information indicating the existence of any hazard or planned, deliberate attack or conspiracy against foreign officials to the FBI Field Office for FBI dissemination to the U.S. Secret Service, Department of State, and other interested persons and agencies. U.S. Attorneys should also provide ongoing assistance to the U.S. Secret Service in coordinating and obtaining the support of local agencies in the provision of protective services.

#### 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 Public Law 94-167 (enacted in 1976) and Public Law 92-539 (enacted in 1972) include specific provisions precluding the preemption of local law. In so doing they recognize the traditional primary responsibility of local law enforcement agencies for handling common crimes.

#### 9-65.805 Supervisory Jurisdiction

Supervisory jurisdiction over the protection of foreign officials statutes rests with the Terrorism and Violent Crime Section of the Criminal Division except for 18 U.S.C. § 970 which rests with the General Litigation and Legal Advice Section.

#### 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.

---

July 1, 1992

§ 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).

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.

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*, 597 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. 925 (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, who is prepared to certify that such persons are "duly notified" within the meaning of 18 U.S.C. § 1116(b)(3)(B), 22 C.F.R. § 2.3(b).

#### 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, 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)

Section 1116 of Title 18 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. § 1113) 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's 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 a person has been "duly notified" or received "designation", contact the Office of the Chief of Protocol, Department of State,

---

July 1, 1992

Washington, D.C. 20520. As proof of status that office will furnish on request a certificate in proper form admissible in evidence under Federal Rule of Evidence 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

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

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.

#### 9-65.814 Family

Section 1116(b)(1) of Title 18 defines "family" 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. Although the definition excludes the families of "official guests," where appropriate family members may be designated "official guests" in their own right.

#### 9-65.815 Official Guest

Section 1116(b)(6) of Title 18 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

The definition of "internationally protected person" 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)

Section 1117 of Title 18 makes conspiracy to violate 18 U.S.C. § 1111 (murder within the special 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 punishable by imprisonment for any term of years or for life.

Because of the extraterritoriality provision in 18 U.S.C. § 1116(c), a conspiracy within the United States or outside of 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 proof of harm to the

---

July 1, 1992

victim is required to support any sentence which may be adjudged. The court may, of course, consider harm to the victim in imposing sentence.

Because of the extraterritorial reach of 18 U.S.C. § 1201(e), a conspiracy within the United States or outside of 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)

Section 112(a) of Title 18 covers assaults against foreign officials, official guests, and internationally protected persons, and attacks upon the official premises, private accommodations, or means of transport of such persons. The provision also covers attempts. 18 U.S.C. § 112(b) prohibits acts of intimidation against foreign officials and official guests, and willful obstruction of foreign officials in the performance of their duties.

Unlike 18 U.S.C. § 111, the word "forcibly" does not appear in relation to "obstructs" in 18 U.S.C. § 112(b). See *Lozano 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 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.

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

Senate Report No. 93-1105, 92d Cong., 2d Sess. 18, lists the following acts 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 requested 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 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 state and federal law of more general applicability will also reach most other, 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.

9-65.842 First Amendment

Section 112(d) of Title 18 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. In responding to a constitutional challenge to a similar but more restrictive provision of the D.C.Code prohibiting the display of banners and placards near foreign embassies, the Supreme Court spoke approvingly of § 112 and held it up as a model of careful legislative draftsmanship which was designed to withstand First Amendment scrutiny. *Boos v. Barry*, 56 U.S.L.W. 4254 (1988).

9-65.850 Threats and Extortion (18 U.S.C. § 878)

Section 878 of Title 18 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 UCM 9-65.400, *supra*.

9-65.870 Destruction Of Property (18 U.S.C. § 970)

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 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,

July 1, 1992

*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.

Section 970(b) of Title 18 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 an arrest may be made without obtaining 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 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.

---

July 1, 1992

## 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 (FTS 647-1512) 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 by the U.S. Attorney's 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

---

July 1, 1992

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 access 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 647-1512) 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

Section 115 of Title 18 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. In 1986 this section was also made applicable to threats against federal officials themselves. 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 or by threats to assault, murder, or kidnap the officials themselves.

##### 9-65.902 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*.

##### 9-65.903 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.

9-65.904 Supervising Section

The Terrorism and Violent Crime Section has supervisory responsibility over 18 U.S.C. § 115.

U.S. ATTORNEYS MANUAL 1988

UNITED STATES ATTORNEYS' MANUAL

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 66

	<u>Page</u>
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	<u>PROTECTION OF GOVERNMENT PROPERTY—REAL PROPERTY</u> ..... 2
9-66.110	<u>Jurisdiction Over Federal Land and the Federal En-     clave Statute, 18 U.S.C. § 7</u> ..... 2
9-66.120	<u>Protection of Federal Real Property—Other Laws</u> ..... 4
9-66.121	National Parks and Forests ..... 4
9-66.122	Natural Resources ..... 5
9-66.123	Military Bases ..... 6
9-66.124	Other Federal Buildings and Offices ..... 7
9-66.200	<u>PROTECTION OF GOVERNMENT PROPERTY—PERSONALTY</u> ..... 7
9-66.210	<u>Acts Prohibited by 18 U.S.C. § 641</u> ..... 8
9-66.211	Embezzlement ..... 8
9-66.212	To Steal or Purloin ..... 9
9-66.213	Knowing Conversion ..... 9
9-66.214	Sell, Convey or Dispose of Government Property With- out Authority ..... 10
9-66.215	Receiving, Concealing or Retaining Stolen Property ..... 10
9-66.220	<u>Property Protected by 18 U.S.C. § 641</u> ..... 11
9-66.221	Title in the United States ..... 11
9-66.222	State and Local Programs Financed by the Federal Government ..... 11
9-66.223	Nonappropriated Funds ..... 12
9-66.224	National Guard Property ..... 13
9-66.225	Civil Air Patrol Property ..... 13
9-66.226	Goods in Transit ..... 13
9-66.227	United States Government Checks ..... 14
9-66.228	Seized Property ..... 14
9-66.229	Intangible Property Interests ..... 14
9-66.230	<u>Custody in the United States</u> ..... 15
9-66.231	''Or Any Property Made or Being Made Under Contract for the United States or Any Department or Agency Thereof'' ..... 15
9-66.240	<u>Intent</u> ..... 16
9-66.250	<u>Value</u> ..... 16

October 1, 1988

(1)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-66.260	<u>Problems of Proof in Section 641 Prosecutions</u> ..... 18
9-66.270	<u>Jurisdiction and Venue</u> ..... 20
9-66.300	OTHER EMBEZZLEMENT PROVISIONS ..... 20
9-66.310	<u>Embezzlement by Court Officers</u> ..... 20
9-66.320	<u>Embezzlement of Public Funds</u> ..... 21
9-66.330	<u>Miscellaneous Theft of Government Property Statutes</u> ..... 22
9-66.400	PROTECTION OF PUBLIC RECORDS AND DOCUMENTS ..... 25
9-66.500	DESTRUCTION OF GOVERNMENT PROPERTY; 18 U.S.C. § 1361... 26
9-66.510	<u>Malicious Mischief; Communication Lines, Stations or Systems, 18 U.S.C. § 1362</u> ..... 27
9-66.511	Application of 18 U.S.C. § 1362 to Commercial Radio Stations ..... 28

U.S. ATTORNEYS MANUAL 1988

**9-66.000 PROTECTION OF GOVERNMENT PROPERTY**

One of the principal 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**

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 principal 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) to (3).

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.

---

July 1, 1992

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 most crimes against government property rests with the General Litigation and Legal Advice Section of the Criminal Division. However, responsibility for certain violent crimes and those involving willful destruction of government property may rest with the Terrorism and Violent Crime Section. 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 Criminal Division for assistance.

#### 9-66.100 PROTECTION OF GOVERNMENT PROPERTY—REAL PROPERTY

##### 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

July 1, 1992

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 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

---

July 1, 1992

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.

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. Also, 16 U.S.C. § 470ee prohibits removal, defacing or trafficking in archeological resources on public or Indian lands.

---

July 1, 1992

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 National Park
16 U.S.C. § 204c-d	Lassen Volcanic National Park
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 National Park
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

#### 9-66.122 Natural 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.

Currently there are several statutes which protect the natural resources found on federal land. For example, 18 U.S.C. § 1851 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. §§ 1852-56. 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*, 274 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 year imprisonment, a \$1,000 fine, or both. See 43 U.S.C. § 1064. Finally, 18 U.S.C. § 1857 prescribes 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 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 year imprisonment, a \$1,000 fine, or both.

#### 9-66.123 Military Bases

Section 1382 of Title 18 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

---

July 1, 1992

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 property. See 40 U.S.C. § 318a. Violations of these regulations are criminal offenses, punishable by thirty 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 Capitol 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

Section 641 of Title 18 attempts to reach all possible offenses involving the loss or misuse of government property. As the Supreme Court noted in *Morissette 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 wrongful advantages from another's property. The codifiers wanted to reach all such instances.

Section 641 of Title 18 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

Section 641 of Title 18 was drafted broadly to encompass a full range of offenses relating to government property. The offenses included in Section 641 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;
- 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).

---

July 1, 1992

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
- 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. See *Morisette v. United States, supra*, 342 U.S. at 271-72, for a description of this broad provision.

## 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 so.

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

Section 641 of Title 18 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;
- 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. 1072 (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."

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 jurisdiction under 18 U.S.C. § 641 will depend upon the degree of control which the federal government retains over the funds:

In determining if stolen funds are things of value of the United States, the key factor is whether the federal government still maintained supervision and control over the funds at the point when the funds were stolen. See *United States v. Bailey*, 734 F.2d 296, 300-01 (7th Cir.), cert. denied, 469 U.S. 931, 105 S.Ct. 327, 83 L.Ed.2d 263 (1984). Evidence that the federal government monitors and audits programs, regulates expenditures, and has the right to demand repayment of funds is adequate evidence that stolen funds or property were a thing of value of the United States under § 641. See *id.*; *Brown*, 742 F.2d at 362; *United States v. Mitchell*, 625 F.2d 158, 161 (7th Cir.), cert. denied, 445 U.S. 984, 101 S.Ct. 402, 66 L.Ed.2d 247 (1980); *United States v. Maxwell*, 588 F.2d 568, 572 (7th Cir. 1978), cert. denied, 444 U.S. 877, 100 S.Ct. 163, 62 L.Ed.2d 106 (1979); *United States v. Smith*, 596 F.2d 662, 664 (5th Cir. 1979); see also *United States v. Harris*, 729 F.2d 441, 446 (7th Cir.1984) (analogous crime under 18 U.S.C. § 657).

*United States v. Scott*, 784 F.2d 787, 791 (7th Cir.1986).

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 9-66.530, *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

---

July 1, 1992

(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). Cases involving property in the possession of the National Guard furnished by the United States under 32 U.S.C. § 702 or a similar provision would come under 18 U.S.C. § 641. Property purchased by the National Guard with its own funds pursuant to 32 U.S.C. § 703 or § 705 would be the property of the state and would not be covered by section 641.

#### 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.

---

July 1, 1992

## 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.

## 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 836 (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). Moreover, the Ninth Circuit appears to depart from *Chappell* in *United States v. Friedman*, 445 F.2d 1076, 1087 (9th Cir.1971), when it approved a jury charge that information in a grand jury transcript is government property regardless of the ownership of the sheets of paper on which the information is recorded.

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. 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 522 (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 or 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. See *United States v. Anderson*, 45 F.Supp. 943, 949 (S.D.Cal.1942). 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*, *supra*, at 273. However, as noted, there is no single intent requirement for the offenses included under 18 U.S.C. § 641.

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.

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 1257 (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. Wilson*, 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, 335 (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.

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 "damages" 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 spe-

cial 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 *Ciongo-li, 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).

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*

---

July 1, 1992

*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" may be found in *Aaron v. United States*, 382 F.2d 965, 971 (9th Cir.1967). See also *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 343, 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.

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:

- 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.

Section 646 of Title 18, 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.

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 depositary 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 depositary 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 *Morissette v. United States*, *supra*, at 266-67 (1952).

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. §§ 634 to 647. 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 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 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.<sup>1</sup> 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. § 714m(b) to (d)	Whoever shall willfully steal, conceal, remove,

<sup>1</sup> With respect to violations of any of these statutes, the defendant may be sentenced to higher fines pursuant to 18 U.S.C. §§ 3559(b) and 3571. These provisions became effective on November 1, 1987. The Department has determined as a matter of policy to apply these provisions only to offenses arising after November 1, 1987. However, similar enhanced fine provisions are available for offenses occurring between January 1, 1985, and November 1, 1987, pursuant to former 18 U.S.C. § 3623, enacted by Public Law No. 98-596, October 30, 1984.

<u>Agency or Program</u>	<u>Statute</u>	<u>Offense</u>
Farm Credit Administration	18 U.S.C. § 657	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. Whoever, being an officer, agent or employee of or connected in any capacity with the agency, embezzles, abstracts, 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 Corporation	18 U.S.C. §§ 657, 658	See F.C.A. above.
Federal Deposit Insurance Corporation	18 U.S.C. §§ 657, 658	See F.C.A. above.
Farmers' Home Administration; Farmers' Home Corporation	18 U.S.C. §§ 657, 658	See F.C.A. above.
Home Owners' Corporation	18 U.S.C. § 657	See F.C.A. above.
Housing and Urban Development	18 U.S.C. § 657	See F.C.A. above.
Indian Tribal Organizations	18 U.S.C. §§ 666, 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. §§ 1691 through 1713	Theft, embezzlement, misappropriation and destruction of mails and postal property.
Public Works and Economic Development Act of 1965 (42 U.S.C. 3121 et seq.)	42 U.S.C. § 3220(b)(1)	Whoever connected in any capacity with the Secretary of Commerce, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, securi-

<u>Agency or Program</u>	<u>Statute</u>	<u>Offense</u>
Reconstruction Finance Corporation	18 U.S.C. § 657	ties or other things of value entrusted to him/her under the Act. See 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. § 4195	Embezzlement of moneys or property entrusted to consular officers as administrators or guardians.
	22 U.S.C. § 4217	Embezzlement by a consular officer of moneys or property received by 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. § 831t(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 <i>United States v. Hall</i> , 98 U.S. 343 (1878); <i>United States v. Summers</i> , 19 F.2d 627 (W.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. § 2071. 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:

- 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 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

Section 1361 of Title 18 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. 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 years imprisonment, or both. Property damage which does not exceed \$100 is punishable by a \$1,000 fine, one 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 working 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 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;

---

July 1, 1992

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 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.

---

July 1, 1992

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 11,000 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 582 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, 250 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 fall-out protected environment. Within the reorganized EBS, there are approximately 932 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.

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.

UNITED STATES ATTORNEYS' MANUAL

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 68

	<u>Page</u>
9-68.000 <u>THE TRADEMARK COUNTERFEITING ACT OF 1984</u> .....	1
9-68.001     Introduction .....	1
9-68.100     PROSECUTIVE POLICY .....	1
9-68.200     ASSIGNMENT OF RESPONSIBILITIES .....	2
9-68.300     ELEMENTS OF THE OFFENSE UNDER 18 U.S.C. § 2320 .....	2
9-68.310 <u>The Defendant Trafficked or Attempted to Traffic in</u> <u>Goods or Services</u> .....	2
9-68.320 <u>The Defendant's Trafficking or Attempt to Traffic Was</u> <u>Intentional</u> .....	3
9-68.330 <u>The Defendant Used a "'Counterfeit Mark'" on or in</u> <u>Connection With Such Goods or Services</u> .....	3
9-68.331     Requirements for a "'Counterfeit Mark'" .....	3
9-68.332     Specific Exclusions.....	5
9-68.340 <u>The Defendant Knew the Mark Was Counterfeit</u> .....	6
9-68.400     DEFENSES .....	6
9-68.500     NOTIFICATION TO THE UNITED STATES ATTORNEY OF APPLICA- TIONS FOR EX PARTE SEIZURE ORDERS .....	7

---

October 1, 1988

(1)

9-68.000 THE TRADEMARK COUNTERFEITING ACT OF 1984

## 9-68.001 Introduction

The Trademark Counterfeiting Act of 1984 is intended to address the problem of trademark piracy, which has primarily involved the clandestine manufacture and distribution of imitations of well known trademarked merchandise. The act creates a new criminal offense, codified at 18 U.S.C. § 2320, which provides that "[w]hoever intentionally traffics or attempts to traffic in goods and services and knowingly uses a counterfeit mark on or in connection with such goods or services" shall be guilty of a felony. 18 U.S.C. § 2320(a). The statute also enables the United States to obtain an order for the destruction of articles in the possession of a defendant in a prosecution under this section upon a determination by the preponderance of the evidence that such articles bear counterfeit marks. 18 U.S.C. § 2320(b).

In addition to creating a new criminal offense, the act amends the Lanham Act to create stronger civil remedies in those civil trademark infringement cases which involve the intentional use of a counterfeit trademark. The act provides for treble damages and attorney's fees in such cases, unless the court finds extenuating circumstances. 15 U.S.C. § 1117(b). The act also provides for *ex parte* application by a trademark owner for a court order to seize counterfeit materials and instrumentalities where it can be shown that the defendant is likely to conceal or transfer the materials. 15 U.S.C. § 1116(d). The act requires notice of application for an *ex parte* seizure order to the United States Attorney, who may participate in such proceedings if they may affect evidence of a federal crime. 15 U.S.C. § 1116(d)(2).

## 9-68.100 PROSECUTIVE POLICY

This provision is not intended to criminalize every trademark infringement for which remedies may exist under the Lanham Act. It is intended to deal vigorously with the burgeoning and lucrative trade in outright copies of well-known trademarked merchandise.

Appropriate discretionary factors to be considered in deciding whether to initiate a prosecution under this section include: (a) any threat to public health or safety, (b) the degree of injury to the trademark owner, in terms of both economic loss and reputation, (c) the scope of the criminal activity, (d) the potential for deception of the public, (e) the effectiveness of available civil remedies, and (f) the potential deterrent value of the prosecution. Defendants who persist in their activities despite prior resort to civil remedies may be particularly good candidates for prosecution, as may defendants who deal in counterfeit goods which pose a danger to the public health or safety. It is preferable that prosecutions include

---

October 1, 1988

culpable defendants from as far up the manufacturing and distribution chain as is feasible.

In evaluating a prospective prosecution under 18 U.S.C. § 2320, no single factor should be regarded as a prerequisite to prosecution. All appropriate discretionary factors should be considered in light of the merits of the case as a whole.

#### 9-68.200 ASSIGNMENT OF RESPONSIBILITIES

Supervisory responsibility for prosecutions brought under 18 U.S.C. § 2320 rests with the General Litigation and Legal Advice Section of the Criminal Division. Investigative responsibility for complaints arising under these sections rests with the Federal Bureau of Investigation. Cases involving importation of infringing articles may also be investigated by the United States Customs Service. *See, e.g.,* 18 U.S.C. § 545.

Prior authorization from the Criminal Division is not required for initiating prosecutions under 18 U.S.C. § 2320. However, the United States Attorneys are encouraged to consult with the General Litigation and Legal Advice Section on such matters.

#### 9-68.300 ELEMENTS OF THE OFFENSE UNDER 18 U.S.C. § 2320

In order to establish the criminal offense under 18 U.S.C. § 2320, the government must prove:

- (1) that the defendant trafficked or attempted to traffic in goods or services;
- (2) that such trafficking, or attempt to traffic, was intentional;
- (3) that the defendant used a "counterfeit mark" on or in connection with such goods or services; and
- (4) that the defendant knew that the mark so used was counterfeit.

We consider each element in turn.

#### 9-68.310 The Defendant Trafficked or Attempted to Traffic in Goods or Services

The term "traffic" is broadly defined in the statute to mean "transport, transfer, or otherwise dispose of, to another, as consideration for anything of value, or make or obtain control of with intent so to transport, transfer or dispose of." 18 U.S.C. § 2320(d)(2). This definition limits the scope of the Act to commercial activities, but appears to be broad enough to cover virtually every aspect of the commercial manufacture,

---

October 1, 1988

storage, transportation, and sale of goods and services, from initial manufacture to retail sale. See Joint Statement on Trademark Counterfeiting Legislation [hereinafter "'Joint Statement'"], 130 Cong.Rec. H12076, H12078, 98th Cong., 2d Sess. (October 10, 1984). The knowing purchase of goods bearing counterfeit marks for the purchaser's personal use is not covered by this statute. *Id.*

Attempts to traffic are prohibited to the same extent as the completed act, and would be governed by the applicable general law of attempt. Conspiracies to violate Section 2320 are prosecutable under 18 U.S.C. § 371.

9-68.320 The Defendant's Trafficking or Attempt to Traffic Was Intentional

The statute contains two distinct mental state requirements. Joint Statement, 130 Cong.Rec. H12076. The first of these is the requirement that the defendant's trafficking be "'intentional.'" This means that the government must show that the defendant trafficked in the goods or services deliberately or "'on purpose.'" *Id.* Note that it is the trafficking and not the use of the counterfeit mark which must be intentional. The statute does not require specific intent to deceive or defraud. *United States v. Gantos*, 817 F.2d 41, 42-43 (8th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 108 S.Ct. 175 (1987). See *United States v. Torkington*, 812 F.2d 1347, 1353 n. 7 (11th Cir.1987).

9-68.330 The Defendant Used a "'Counterfeit Mark'" on or in Connection With Such Goods or Services

For purposes of the criminal statute, the term "'counterfeit mark'" is defined in 18 USC 2320(d).

The marks protected from counterfeiting by this statute are registered trademarks in use and Olympic designations protected under 36 U.S.C. § 380.

9-68.331 Requirements for a "'Counterfeit Mark'"

In order to show that a trademark used by the defendant was a "'counterfeit mark,'" the government must prove the following:<sup>1</sup>

A. *The mark is spurious.* 18 U.S.C. § 2320(d)(1)(A). A mark is "'spurious'" if it is "'not genuine or authentic.'" Joint Statement, 130 Cong. Rec. H12078.

<sup>1</sup> The requirements for establishing that a counterfeit Olympic designation is a "'counterfeit mark'" appear to be somewhat simpler. According to the language of the statute, the mark must be: (1) a spurious designation, (2) "'identical to or substantially indistinguishable from,'" (3) a designation as to which the remedies of the Lanham Act are made available by reason of Section 110 of the Olympic Charter Act. The designations protected are set forth at 36 U.S.C. § 380.

B. *The mark was used in connection with goods or services.* 18 U.S.C. § 2320(d)(1)(A)(i).

C. *The mark is "identical to or substantially indistinguishable from" the genuine trademark.* 18 U.S.C. § 2320(d)(1)(A)(ii). This element assures that not every case of trademark infringement amounts to trademark counterfeiting. The drafters intended that the phrase "substantially indistinguishable from" be interpreted on a case by case basis. Joint Statement, 130 Cong.Rec. H12078. The phrase is intended to prevent a counterfeiter from escaping liability by modifying a protected trademark in trivial ways, while excluding arguable cases of trademark infringement involving trademarks which are merely "reminiscent of" protected trademarks. *Id.* The act does not extend to imitations of "trade dress," such as the color, shape, or design of packaging, unless those features have been registered as trademarks. *Id.* at H12079.

D. *The genuine mark is registered on the principal register in the United States Patent Office.* 18 U.S.C. § 2320(d)(1)(A)(ii). This element limits the class of trademarks covered by the statute. It also establishes the basis for federal jurisdiction under the Commerce Clause, since use in commerce is a requirement for registration. See 15 U.S.C. § 1051, 1057. Registration on the principal register is prima facie evidence that the mark has been in interstate commerce prior to registration. *Maternally Yours v. Your Maternity Shop*, 234 F.2d 538 (2d Cir.1956); 15 U.S.C. § 1057(b). It is not necessary to prove that the defendant knew the mark was registered.

E. *The genuine mark is in use.* The genuine mark must not only be registered, it must also be in use. 18 U.S.C. § 2320(d)(1)(A)(ii).

F. *The goods or services are those for which the genuine mark is registered.* 18 U.S.C. § 2320(d)(1)(A)(ii). The definition of counterfeit mark extends only to imitations of registered marks which are used in connection with the goods or services for which the mark is registered. See 18 U.S.C. § 2320(d)(1)(A)(i), (ii). For example, a mark used in connection with typewriter paper which is identical to or substantially indistinguishable from a mark registered only for use on typewriters would not be a counterfeit mark, although civil remedies might be available under the Lanham Act. See 130 Cong.Rec. H12079.

G. *The use of the counterfeit mark is "likely to cause confusion, to cause mistake, or to deceive."* The phrase "use of which is likely to cause confusion, to cause mistake, or to deceive" is taken from the remedial section of the Lanham Act, 15 U.S.C. § 1114, and is included in the criminal provision to insure that no conduct will be criminalized which does not constitute trademark infringement under the Lanham Act. 130 Cong.Rec. H12079. This element is the essence of a trademark infringement.

---

October 1, 1988

The issue of likelihood of confusion, mistake, or deception is a question of fact for the jury. *United States v. Gonzales*, 630 F.Supp. 894, 896 (S.D.Fla.1986). In the civil context, courts interpreting the Lanham Act have looked to a number of factors in assessing the likelihood of confusion. These factors include the type of trademark, the similarity of design, similarity of products, identity of retail outlets and purchasers, identity of advertising media utilized, the defendant's intent, and actual confusion. See, e.g., *John A. Harland Co. v. Clark's Checks, Inc.*, 711 F.2d 966, 972 (11th Cir.1983); *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366, 381-82 (7th Cir.1976). See also *Kiki Undies Corp. v. Promenade Hosiery Mills, Inc.*, 411 F.2d 1097, 1099 (2d Cir.1969) and *Polaroid Corporation v. Polaroid Electronics Corp.*, 287 F.2d 492, 495 (2d Cir.1961), for a slightly different formulation of factors.

These factors may be argued to a jury in a criminal case. *United States v. McEvoy*, 820 F.2d 1170, 1172 (11th Cir.1987). However, in a criminal case, which involves the same goods and marks which are identical to or substantially indistinguishable from each other, the factual determination is less complex than it might be in a civil case in which different goods and a mark which is merely similar were involved. Where counterfeit goods are involved, the trier of fact may resolve the issue by a side by side comparison of the two products. See *Rolex Watch USA, Inc. v. Canner*, 645 F.Supp. 484, 489 (S.D.Fla.1986). Expert testimony and the inability of a defense witness to tell the counterfeit item from the genuine may also be used to establish this element. See *McEvoy, supra*.

The statute does not require a showing that direct purchasers would be confused, mistaken, or deceived. It is sufficient that there is a likelihood of confusion, mistake, or deception to any member of the buying public, even a person who sees the product after its purchase. *Torkington, supra*, at 1349; *Gantos, supra*; *United States v. Infurnari*, 647 F.Supp. at 59-60 (W.D.N.Y.1986). Because likelihood of confusion, mistake, or deception applies to members of the general purchasing public and not just to the immediate purchaser, this factor may be present even where the defendant told the immediate purchaser the item was not genuine, *Gantos, supra*, at 43; *Infurnari, supra*, at 59, or where the sale of counterfeit goods for a fraction of the price of expensive trademarked goods might alert a prospective purchaser that the item was not genuine, *Torkington, supra*, at 1350 (replica Rolex watches sold for \$27).

#### 9-68.332 Specific Exclusions

There are two situations which the Congress intended to exclude from the definition of "counterfeit mark." The first involves so-called "over-run goods." The second involves so-called "parallel imports" or "gray market" goods.

---

October 1, 1988

A. *Overrun goods.* The statutory definition explicitly excludes marks "used in connection with goods and services of which the manufacturer or producer was, at the time of the manufacture or production in question, authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use such mark or designation." 18 U.S.C. § 2320(d). An example of this so-called "overrun exemption" would be in a case in which a manufacturer is licensed by a trademark owner to produce 500,000 umbrellas using the trademark owner's mark, and the licensee produces an additional 500,000 umbrellas using that mark without authorization. See 130 Cong.Rec. H12079. Congress intended that the burden be on the defendant to prove that the goods or services in question fall within the overrun exemption. *Id.*

B. "*Gray Market*" or "*Parallel Imports*" Congress did not intend the criminal provisions to apply to marks on so-called "parallel imports" or "gray market" goods, in which both the goods and the marks are genuine, but which are sold outside of the trademark owner's authorized distribution channels. See 130 Cong.Rec. H12077, H12079.

#### 9-68.340 The Defendant Knew the Mark Was Counterfeit

The second mental state requirement of the statute is that the defendant "knew" the mark used on or in connection with the goods or services in which he trafficked was counterfeit. Such knowledge is established by proof that the defendant "had an awareness or firm belief to that effect." Joint Statement, 130 Cong.Rec. H12076. The government's burden may also be met by showing that the defendant was "willfully blind" to the counterfeit nature of the mark. *Id.* at H12077. The government need not prove that it was the defendant's purpose or objective to use a counterfeit mark, but only that the defendant knew that he or she was doing so. *Id.* It is not necessary for the government to prove that the defendant knew that a trademark was registered. 18 U.S.C. § 2320(d)(1)(A)(ii); *Infurnari, supra*, at 57, 58-59 (W.D.N.Y.1986). Knowledge of the criminality of the conduct is not an element of the offense. *United States v. Baker*, 817 F.2d 427 (5th Cir.1986).

#### 9-68.400 DEFENSES

The act provides that all defenses, affirmative defenses, and limitations on remedies which would be applicable in an action under the Lanham Act for trademark infringement are applicable in a criminal prosecution for trademark counterfeiting under 18 U.S.C. § 2320. See 18 U.S.C. § 2320(c). The apparent intent of the incorporation of defenses is to insure that no person will be found guilty of the criminal offense of trademark counterfeiting who could have prevailed on a defense to an infringement action brought by the trademark owner. The Joint Statement, which was intended to be the final and authoritative explanation of legis-

---

October 1, 1988

lative intent, 130 Cong.Rec. H12076, states that only those defenses "that are relevant under the circumstances will be applicable in a prosecution under this chapter." 130 Cong.Rec. H12078.

Among the defenses to a civil infringement suit which are arguably available in a criminal prosecution are the defenses to the incontestibility of a trademark owner's exclusive right to use the trademark in commerce set forth at 15 U.S.C. § 1115(b). These include fraud, abandonment, use to misrepresent source, fair use, innocent adoption, prior registration and use, and the so-called "antitrust" defense. 15 U.S.C. § 1115(b)(7). Also arguably relevant to a criminal prosecution are equitable defenses to an infringement action, such as laches or acquiescence. Although highly unlikely in a criminal prosecution, laches is specifically mentioned in the legislative history as a possible defense. 130 Cong.Rec. H12078.

As a practical matter, factual situations which give rise to prima facie criminal cases with prosecutive merit are unlikely to give rise to viable defenses. Trademark counterfeiting typically involves commercial trafficking in outright copies of well-established and well-known trademarks which are in use and actively defended. Under these circumstances defenses such as abandonment, acquiescence, laches, fair use, or innocent adoption are virtually precluded. Where affirmative defenses are raised, case law under the Lanham Act, 15 U.S.C. § 1051, et. seq., may be consulted.

#### 9-68.500 NOTIFICATION TO THE UNITED STATES ATTORNEY OF APPLICATIONS FOR EX PARTE SEIZURE ORDERS

The act requires trademark owners seeking an *ex parte* seizure order to give such notice as is reasonable under the circumstances to the United States Attorney. 15 U.S.C. § 1115(d)(2). Upon receipt of such notice, the United States Attorney should take steps to determine whether the order sought would affect the investigation of any federal crime, and participate in the proceedings where appropriate. The court is authorized to deny the application if it determines that the public interest in a potential prosecution so requires. *Id.*

---

October 1, 1988

UNITED STATES ATTORNEYS' MANUAL

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 69

	<u>Page</u>
9-69.000 <u>PROTECTION OF GOVERNMENT PROCESSES</u> .....	1
9-69.100 OBSTRUCTION OF JUSTICE .....	1
9-69.101 Overview .....	1
9-69.102 Supervisory Responsibility .....	2
9-69.110 <u>18 U.S.C. § 1503</u> .....	3
9-69.111 Scope of 18 U.S.C. § 1503.....	3
9-69.112 Pending Proceeding Requirement of 18 U.S.C. § 1503 .....	3
9-69.113 State of Mind Required for a Section 1503 Offense .....	5
9-69.114 Omnibus Clause (18 U.S.C. § 1503) .....	5
9-69.120 <u>18 U.S.C. § 1505</u> .....	8
9-69.121 Scope of 18 U.S.C. § 1505.....	8
9-69.122 Omnibus Clause (18 U.S.C. § 1505) .....	9
9-69.130 <u>18 U.S.C. § 1510</u> .....	10
9-69.140 <u>18 U.S.C. § 1512</u> .....	11
9-69.141 Scope of 18 U.S.C. § 1512.....	11
9-69.142 "'Official Proceeding'" Requirement (18 U.S.C. § 1512) .....	13
9-69.143 State of Mind (18 U.S.C. § 1512).....	13
9-69.144 Constitutionality of 18 U.S.C. § 1512(d).....	14
9-69.150 <u>18 U.S.C. § 1513</u> .....	15
9-69.151 Scope of 18 U.S.C. § 1513.....	15
9-69.152 State of Mind (18 U.S.C. § 1513).....	16
9-69.160 <u>Inchoate Obstruction of Justice Offenses</u> .....	16
9-69.170 <u>Civil Action to Enjoin the Obstruction of Justice</u> .....	17
9-69.180 <u>Miscellaneous Matters</u> .....	18
9-69.181 Venue .....	18
9-69.182 Offenses Related to Obstruction of Justice Offenses.....	19
9-69.183 Pleadings Bank.....	21
9-69.184 Other Research Aids.....	21
9-69.200 <u>PERJURY AND FALSE DECLARATIONS BEFORE GRAND JURY OR COURT</u> .....	21
9-69.210 <u>Elements of Perjury</u> .....	21
9-69.211 Defendant Must Be Under Oath .....	22
9-69.212 Making of a False Statement.....	22
9-69.213 False Statement Must Be Material to the Proceedings.....	22

July 1, 1992

(1)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-69.214	Statement Made With Knowledge of Falsity ..... 23
9-69.215	Differences Between 18 U.S.C. §§ 1621 and 1623 ..... 24
9-69.220	<u>Subornation of Perjury—18 U.S.C. § 1622</u> ..... 24
9-69.221	Elements ..... 25
9-69.230	<u>Investigative Responsibility</u> ..... 26
9-69.240	<u>Supervisory Jurisdiction</u> ..... 26
9-69.250	<u>No Prior Authorization Required</u> ..... 26
9-69.260	<u>Special Problems</u> ..... 26
9-69.261	Prosecutorial Discretion to Indict Under 18 U.S.C. § 1621 or § 1623 ..... 26
9-69.262	Venue ..... 28
9-69.263	Unresponsive Answers: The Case Against Samuel Bron- ston ..... 28
9-69.264	The "I Don't Remember" Syndrome ..... 28
9-69.265	"Two-Witness Rule" ..... 28
9-69.266	The "Use" of Material Containing False Statements ..... 29
9-69.267	False Affidavits Submitted in Federal Court Proceed- ings Do Not Constitute Perjury Under 18 U.S.C. § 1623 ..... 30
9-69.268	Indictments ..... 31
9-69.270	<u>Defenses and Bars to Prosecution</u> ..... 32
9-69.271	Belief that Statement is True ..... 32
9-69.272	Collateral Estoppel ..... 32
9-69.273	Lack of <u>Miranda</u> Warning ..... 33
9-69.274	Recantation ..... 34
9-69.275	Miscellaneous Defenses ..... 36
9-69.300	PRISON OFFENSES ..... 36
9-69.301	Introduction ..... 36
9-69.310	<u>Elements of 18 U.S.C. § 1791(a)(1)</u> ..... 37
9-69.311	Violation ..... 37
9-69.312	Prison ..... 37
9-69.313	Contraband ..... 37
9-69.320	<u>Elements of 18 U.S.C. § 1791(a)(2)</u> ..... 38
9-69.321	Prison ..... 38
9-69.322	Possess or Provide ..... 38
9-69.323	Contraband ..... 38
9-69.330	<u>Elements of 18 U.S.C. § 1792</u> ..... 38
9-69.331	Participation ..... 38
9-69.332	Mutiny or Riot ..... 38

July 1, 1992

(2)

UNITED STATES ATTORNEYS' MANUAL

	<u>Page</u>
9-69.333	Federal Penal, Detention, or Correctional Facility ..... 38
9-69.340	<u>Sentencing in Prison Contraband Case</u> ..... 38
9-69.350	<u>Double Jeopardy</u> ..... 39
9-69.360	<u>Knowledge of Warden</u> ..... 39
9-69.400	FUGITIVE FELON ACT—18 U.S.C. § 1073 ..... 39
9-69.410	<u>Primary Purpose of Act</u> ..... 39
9-69.420	<u>Prerequisites to Issuance of Federal Complaint in Aid of States</u> ..... 40
9-69.421	Parental Kidnapping ..... 40
9-69.430	<u>Unlawful Flight to Avoid Custody or Confinement After Conviction</u> ..... 40
9-69.440	<u>Unlawful Flight to Avoid Giving Testimony</u> ..... 41
9-69.450	<u>Unlawful Flight to Avoid Service of Process</u> ..... 41
9-69.460	<u>Federal Information; Indictment; Removal—Approval Required</u> ..... 41
9-69.500	ESCAPE FROM CUSTODY RESULTING FROM CONVICTION (18 U.S.C. §§ 751 AND 752) ..... 42
9-69.501	Introduction ..... 42
9-69.502	Policy ..... 42
9-69.503	Defined ..... 43
9-69.510	<u>Elements of the Offense—Generally</u> ..... 43
9-69.511	Intent ..... 43
9-69.512	Attempt ..... 44
9-69.513	Aiding and Assisting ..... 44
9-69.514	Conspiracy ..... 44
9-69.520	<u>Constructive Custody</u> ..... 44
9-69.521	Institution or Facility in Which Confined—Generally ..... 44
9-69.522	Legal Custody by Attorney General ..... 44
9-69.530	<u>Expeditious Authorization of Magistrates Complaints and Warrants in Federal Escape Cases</u> ..... 45
9-69.532	Case Authority ..... 45
9-69.540	<u>Venue in Furlough and "Walkaway" Cases</u> ..... 47
9-69.550	<u>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</u> ..... 47
9-69.560	<u>Defenses—Generally</u> ..... 50
9-69.561	Double Jeopardy ..... 50
9-69.562	Duress ..... 50
9-69.563	Intoxication ..... 51

July 1, 1992

(3)

TITLE 9—CRIMINAL DIVISION

	<u>Page</u>
9-69.564	Insanity ..... 51
9-69.565	Lack of Mental Capacity ..... 51
9-69.566	Investigative Responsibility..... 51
9-69.600	ESCAPE FROM CUSTODY RESULTING FROM CIVIL COMMITMENT (28 U.S.C. § 1826(c))..... 51
9-69.601	Introduction ..... 51
9-69.602	Congressional Intent ..... 52
9-69.610	<u>Elements of the Offense—Generally</u> ..... 52
9-69.611	Intent ..... 52
9-69.612	Custody..... 52
9-69.613	Commitment ..... 52
9-69.620	<u>Defenses—Generally</u> ..... 53
9-69.630	<u>Investigative Responsibility</u> ..... 53

U.S. ATTORNEYS MANUAL 1988

9-69.000 PROTECTION OF GOVERNMENT PROCESSES

## 9-69.100 OBSTRUCTION OF JUSTICE

## 9-69.101 Overview

This chapter on obstruction of justice covers those statutes in Title 18, Chapter 73, that protect the integrity of proceedings before the federal judiciary, federal executive departments and agencies, and Congress, as well as individuals connected with those proceedings. Section 4 of the Victim and Witness Protection Act of 1982 (hereinafter "VWPA"), Pub.L. No. 97-291, § 4, 96 Stat. 1248, 1249-53, thoroughly overhauled and revised this area of the law. Several provisions were amended further by the Criminal Law and Procedure Technical Amendments Act of 1986 (hereinafter "CLPTA"), Pub.L. No. 99-646.

Prior to the enactment of the VWPA, the primary objects of the protection of Chapter 73 were witnesses and parties in ongoing proceedings (former 18 U.S.C. §§ 1503, 1505) and informants (former 18 U.S.C. § 1510). The VWPA reorganized and expanded the coverage of Chapter 73 and transferred most of the work that had been allocated to former 18 U.S.C. §§ 1503, 1505, and 1510 to the new sections of 1512 and 1513. In addition, the former scheme was organized on the basis of the identification of the victim of the illegal act as either a witness or party. Sections 1512 and 1513 eliminate 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.

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 prohibits 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 prohibits the obstruction of antitrust investigations and contains an omnibus clause limited to the obstruction of congressional, departmental and agency proceedings;

C. 18 U.S.C. § 1510 prohibits the obstruction of criminal investigations through bribery;

D. 18 U.S.C. § 1512 prohibits the use of intimidation, harassment, threats or physical force, including killing or attempts to kill, that is aimed at affecting the presentation of evidence in official proceedings or at impeding the communication of information to law enforcement officers. Section 1512 protects victims of crime, witnesses and informants. Included within this protection is any person who is intimidated, harassed, or retaliated against on account of his/her being, or on account

---

March 1, 1994

of his/her relation to, a victim, witness or informant. The provision applies to acts occurring inside as well as outside of the United States.

18 U.S.C. § 1512 is not limited by the "pending proceeding" requirement of Sections 1503 and 1505. Accordingly, it is not necessary to show that an official proceeding is 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.

E. 18 U.S.C. § 1513 fills gaps in the law by proscribing threats of retaliation and attempts to retaliate by causing or threatening to cause bodily injury or damage to tangible property of a witness, victim or informant who participated in an official proceeding or who communicated information to law enforcement officers. Like Section 1512, the federal courts have extraterritorial jurisdiction over acts occurring outside the United States.

F. 18 U.S.C. § 1514 creates a new civil action for injunctive relief to restrain harassment of victims and witnesses in criminal cases or against existing or imminent violations of 18 U.S.C. §§ 1512 and 1513.

G. 18 U.S.C. § 1515 defines the terms used in 18 U.S.C. §§ 1512 and 1513. As enacted in the Criminal Law and Procedure Technical Amendments Act of 1986, Pub.L. No. 99-646, Congress made it clear that the bona fide provision of legal representation services in connection with or in anticipation of an official proceeding does not constitute an obstruction of justice offense. See 18 U.S.C. § 1515(b).

The statutes that form the remainder of Chapter 73, 18 U.S.C. §§ 1501, 1502, 1504, 1506 to 1509, and 1511, are not discussed in this chapter.

#### 9-69.102 Supervisory Responsibility

Violations of 18 U.S.C. § 1501 and 18 U.S.C. §§ 1512 and 1513, when violence (including a threat thereof) is directed at a person or property, are within the supervisory responsibility of the Terrorism and Violent Crime Section. 18 U.S.C. § 1511 is supervised by the Organized Crime and Racketeering Section. General Litigation and Legal Advice Section has supervisory responsibility over all other obstruction of justice offenses.

#### 9-69.110 18 U.S.C. § 1503

##### 9-69.111 Scope of 18 U.S.C. § 1503

Section 1503 of Title 18, as amended by the VWPA, forbids tampering with and retaliating against grand jurors, petit jurors, and officers in or of any court of the United States by threats or force or by "endeavors to influence, intimidate, or impede." Section 1503 also contains an omnibus clause prohibiting the obstruction of "the due administration of justice." By virtue of the omnibus clause, it is possible to obstruct justice under Section 1503 by means other than those specifically enumerated

in the first part of the provision. See *United States v. Rasheed*, 663 F.2d 843, 850-52 (9th Cir.1981), cert. denied, 454 U.S. 1157 (1982). A party may be prosecuted under Section 1503 for endeavoring to obstruct justice; it is no defense that such obstruction was impossible to accomplish. See *United States v. Brimberry*, 744 F.2d 580 (7th Cir.1984).

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, Jones, supra*; see *United States v. Polakoff*, 112 F.2d 888, 890 (2d Cir.), cert. denied, 311 U.S. 653 (1940). Based on this authority and in light of the purpose of Section 1503 to protect the integrity of federal judicial proceedings, an "officer" 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. 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*, 250 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).

#### 9-69.112 Pending Proceeding Requirement of 18 U.S.C. § 1503

Most courts have held that 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. Guzzino*, 810 F.2d 387 (7th Cir.1987); *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). But see *United States v. Blohm*, 585 F.Supp. 1112 (S.D.N.Y.1984) (coverage of omnibus clause not limited to situations where an action is pending; alternatively, action was pending since defendant was appealing the case at the time he committed the obstructive conduct). A proceeding is pending once the judicial machinery has been activated. See, e.g., *United States v. Gonzalez-Mares*, 752 F.2d 1485 (9th Cir.), cert. denied, 105 S.Ct. 3540 (1985) (although a complaint had not been filed at time of interview with the probation officer, the proceeding was pending since the defendant was in custody and had signed a waiver of her right to trial and sentencing by the court). The defendant must also have knowledge or notice of the pending proceeding. See *United States v. Vesich*, 724 F.2d 451 (5th Cir.1984). However, there is no requirement to show that the defendant knew that the proceedings were federal in nature. *United States v. Ardito*, 782 F.2d 358 (2d Cir.), cert. denied, 106 S.Ct. 2281 (1986).

---

March 1, 1994

A grand jury investigation is a pending proceeding. See, e.g., *United States v. Campanale*, 518 F.2d 353, 356 (9th Cir.1975) (per curiam), cert. denied, 423 U.S. 1050 (1976). The Third Circuit has 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). Cf. *United States v. Ellis*, 652 F.Supp. 1451 (S.D.Miss.1987) (no pending proceeding when grand jury was impaneled but no subpoenas were issued and grand jury was unaware of drug investigation allegedly obstructed). That same court 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 VWPA eliminated the pending proceeding requirement with respect to tampering with witnesses and informants. See 18 U.S.C. § 1512(e)(1). However, tampering with jurors and court officers 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 States v. Woodmansee*, 354 F.2d 235 (2d Cir.1965) (per curiam) (by implication) (18 U.S.C. § 1503); *United States v. Verra*, 203 F.Supp. 87, 89 (S.D.N.Y.1962) (18 U.S.C. § 1503); S.Rep. No. 225, 79th Cong., 1st Sess. 1-2, reprinted in 1945 U.S.Code Cong. & Ad.News 723, 723-24. H.R.Rep. No. 658, 90th Cong., 1st Sess. 1-3, reprinted in 1967 U.S.Code Cong. & Ad.News 1760, 1760-65.

#### 9-69.113 State of Mind Required for a Section 1503 Offense

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 Section 1503.

The great weight of authority holds that "corruptly" connotes specific intent. See *Rasheed*, *supra*, at 352; *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*, *supra*, at 207. "Corruptly" has also been 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," *Rasheed*, *supra*, at 852, "for an improper motive," *Haas*, *supra*, at 220, or prompted, at least in part, by a corrupt motive. *United States v. Brand*, 775 F.2d 1460 (11th Cir.1985).

March 1, 1994

The only deviation from the rule that "corruptly" connotes specific intent occurred in *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir.) cert. denied, 441 U.S. 963 (1979). In *Neiswender*, the defendant defended the charged violation of Section 1503 by arguing that he intended only to defraud the defense counsel not to obstruct justice. The Fourth Circuit rejected this argument and held that "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. See also *United States v. Silverman*, 745 F.2d 1386 (11th Cir.1984) (government need only show that the defendant had knowledge that his/her conduct was likely to obstruct justice).

9-69.114 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 delineating the scope of this provision, the courts have not been especially concerned with defining the conduct that constitutes interference with the due administration of justice. The Ninth Circuit has defined interference with the due administration of justice as "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). The courts have construed this language as including conduct taking a wide variety of forms. See, e.g., *United States v. Plascencia-Crozco*, 768 F.2d 1074, (9th Cir.1985) (a party who assumes a false identity before a court obstructs justice since his/her actions prevent the court from gathering information necessary to exercise its sentencing discretion).

The dispute over the scope of the omnibus clause has instead focused on determining what means are unlawful to achieve the object of interfering with the due administration of justice. By its terms, the omnibus clause explicitly prohibits the use of threats, force, and threatening letters and communications. To the extent its coverage is broader and includes other unlawful means, the proscription of other methods of obstructing justice must be derived from 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 court rejected the defendant's argument 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 held that such a construction of the provision would render the word "corruptly" mere surplusage. *Id.* at 679 n. 9. The court held that the destruction of documents came within the "ordinary meaning" of "corruptly . . . obstruct[ing or] imped[ing] the due administration of justice." *Id.* at 681.

---

March 1, 1994

Similarly, courts have rejected arguments that the omnibus clause only prohibits those types of acts explicitly enumerated in the provision. See *United States v. Howard*, 569 F.2d 1331, 1333-36 (5th Cir.), cert. denied, 439 U.S. 834 (1978) (the omnibus clause "prohibits acts that are similar in result, rather than manner, to the conduct described in the first part of the statute").

The Sixth and Ninth Circuits have modified their earlier stance and have adopted positions consistent with the other circuit courts. See, e.g., *United States v. Brown*, 688 F.2d 596 (9th Cir.1982); *United States v. Rasheed*, 663 F.2d 843, 851-52 (9th Cir.1981), cert. denied, 454 U.S. 1157 (1982); *United States v. Faudman*, 640 F.2d 20 (6th Cir.1981).

The current case law demonstrates that the courts of appeals have uniformly given a broad reading to the omnibus clause of 18 U.S.C. § 1503. The principal limitation to the scope of this provision is the pending judicial proceeding requirement. See USAM 9-69.112, *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. See, e.g., *United States v. Allen*, 639 F.2d 751, 753-54 (2d Cir.), cert. denied, 404 U.S. 850 (1971).

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 not to testify or to make himself/herself unavailable to testify, *United States v. Arnold*, 773 F.2d 823 (7th Cir.1985); *United States v. Harrelson*, 754 F.2d 1153 (5th Cir.1985), cert. denied, 106 S.Ct. 277, 599 (1985); *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, or evasive answers, *United States v. Langella*, 776 F.2d 1073 (2d Cir.1985), cert. denied, 106 S.Ct. 1207 (1986), *United States v. Perkins*, 748 F.2d 1519 (11th Cir.1984), *United States v. Spalliero*, 602 F.Supp. 417 (C.D.Cal.1984); *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 *Faudman*, *supra* (construing *Esse*, *supra* (perjury alone does not violate omnibus clause)).

D. Falsifying a report likely to be submitted to a grand jury, *United States v. Shoup*, 600 F.2d 950 (3d Cir.1979).

E. Destroying, altering, or concealing subpoenaed documents, *United States v. McNight*, 779 F.2d 443 (8th Cir.1986); *United States v. Brimberry*, 744 F.2d 580 (7th Cir.1984); *Rasheed*, *supra*; *Faudman*, *supra*; *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 1, 1994

F. Endeavoring to sell grand jury transcripts, *Howard, supra*.

G. 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).

H. 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).

I. Deliberately concealing one's identity thereby preventing court from gathering information necessary to exercise its discretion in imposing a sentence, *United States v. Plascencia-Orozco*, 768 F.2d 1074 (9th Cir.1985).

J. Obtaining secret grand jury testimony, *United States v. Jeter*, 775 F.2d 670 (6th Cir.1985), cert. denied, 106 S.Ct. 1796 (1986).

K. Submitting false or misleading information to the grand jury, *United States v. Beatty*, 587 F.Supp. 1325 (E.D.N.Y.1984).

With the passage of the VWPA in 1982, the question may arise whether the omnibus clause of 18 U.S.C. § 1503 still embraces witness tampering or whether witness tampering is now covered exclusively by 18 U.S.C. § 1512. The VWPA deleted the reference to witnesses in the main body of the provision but did not amend the omnibus clause. The legislative history of the VWPA compels the conclusion that the omnibus clause of 18 U.S.C. § 1503 still reaches witness tampering.

Nothing in the legislative history indicates that Congress intended to contract the purview of the omnibus clause of 18 U.S.C. § 1503. Indeed, the pertinent legislative history of the VWPA evinces no sentiment for the contraction of any obstruction of justice statute. See S.Rep. No. 507, 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).

Courts considering the issue have agreed and have held that Congress by amending Section 1503 and adding Section 1512 did not intend that threats against witnesses would fall exclusively under Section 1512. *United States v. Rovetuso*, 768 F.2d 809 (7th Cir.1985), cert. denied, 106 S.Ct. 838 (1986); *United States v. Lestee*, 749 F.2d 1288 (9th Cir.1984) (omnibus clause still prohibits types of witness tampering that defies enumeration); *United States v. Wesley*, 748 F.2d 962 (5th Cir.1984), cert. denied, 471 U.S. 1130 (1985). As these courts have recognized, Congress intended that conduct involving the tampering with witnesses which interfered with the due administration of justice would still be chargeable under the omnibus clause of Section 1503.

9-69.120 18 U.S.C. § 1505

9-69.121 Scope of 18 U.S.C. § 1505

As amended by the VWPA, the prohibitions in section 1505 are limited to: obstructions of process issued under the Antitrust Civil Process Act, 15 U.S.C. §§ 1311 to 1314,

and under the omnibus clause; and to obstructions pertaining to pending proceedings before Congress and federal departments and agencies. Tampering with witnesses and retaliating against witnesses and parties in connection with administrative or legislative proceedings, are offenses now covered by 18 U.S.C. §§ 1512 (tampering) and 1513 (retaliation).

9-69.122 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. Like Section 1503, 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 9-69.113 *supra*.

However, Section 1505 is constrained, 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. Some courts have applied the pending proceeding requirement in a relaxed manner. For example, in *United States v. Fruchtman*, 421 F.2d 1019, 1021 (6th Cir.), cert. denied, 400 U.S. 849 (1970), the Sixth Circuit held that 'proceeding' is a term of broad scope, encompassing both the investigative and adjudicative functions of a department or agency."

Other cases appear to impose a slightly stricter pending proceeding requirement that requires a formal act. See *Rice v. United States*, 356 F.2d 709, 713, 715 (8th Cir. 1966) (in case arising under the nonomnibus portion of former Section 1505, the court found the requisite proceeding and stressed that the intimidating act followed the filing of unfair labor charges with the regional director of the NLRB by the individuals who were intimidated).

Investigations by the Internal Revenue Service constitute a Section 1505 proceeding. See *United States v. Lewis*, 657 F.2d 44, 45 (4th Cir.), cert. denied, 454 U.S. 1086 (1981) (ploy to frustrate IRS effort to collect delinquent taxes); *United States v. Vixie*, 532 F.2d 1277, 1278 (11th 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). However, investigations by the Federal Bureau of Investigation are not Section 1505 proceedings. *United States v. Higgins*, 511 F.Supp. 453, 455-56 (W.D. Ky. 1981); see also *United States v. Scoratow*, 137 F.Supp. 620, 621-22 (W.D. Pa. 1956) (FBI investigation is not a 18 U.S.C. § 1503 "proceeding"). *But cf.* 18 U.S.C. §§ 1510 and 1512(a)(3), (b)(2).

9-69.130 18 U.S.C. § 1510

Section § 1510 proscribes endeavors to obstruct federal criminal investigations "by means of bribery." Prior to its amendment by the VWPA, the provision also prohibited

obstruction of criminal investigations by "misrepresentation, intimidation, or force or threats thereof" as well as prohibiting the retaliation against informants. 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 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.

Section 1510 of Title 18 proscribes endeavors "willfully" undertaken. 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). "[T]he defendant [must] have actual knowledge that the intended recipient of the information [is] a federal criminal investigator." *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, all that is required is that the "accused reasonably believe 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). Thus, it is unnecessary to show that the victim actually intended to give information to a federal investigator. See *Kozak*, *supra*, at 1065-66. Nor is it necessary 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. *Lippman*, *supra*. The scienter requirement is satisfied by showing that the defendant had a reasonably founded belief that information had been or was about to be given. *United States v. Abrams*, 543 F.Supp. 1184 (S.D.N.Y.1982). 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.) (offense occurred 18 days after conviction), cert. denied, 452 U.S. 909 (1981), or was 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).

Section 1510 cannot be used against a person who gives false or misleading information to a criminal investigator.

9-69.140 18 U.S.C. § 1512

9-69.141 Scope of 18 U.S.C. § 1512

Section 1512 of Title 18 constitutes a broad prohibition against tampering with a witness, victim or informant. It 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. In addition, the section provides extraterritorial federal jurisdiction over the offenses created therein. See 18 U.S.C. § 1512(g); 128 Cong.Rec. H8469 (daily ed. Oct. 1, 1980); H.R.Rep. No. 1369, 96th Cong.2d Sess. 20-22 (1980).

The express prohibitions against tampering with witnesses and parties contained in former 18 U.S.C. §§ 1503 and 1505, are now in paragraphs (b)(1) and (2) of 18 U.S.C. § 1512. (As discussed at USAM 9-69.114 and 9-69.122, *supra*, the omnibus clauses of these provisions still cover witnesses.) 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(b)(2). Tampering with informants by means of bribery remains an 18 U.S.C. § 1510 offense.

Section 1512 augments the prohibitions of the former law in several important respects. First, Section 1512(b)(3) sweeps more broadly than former 18 U.S.C. § 1510 and expands the class of informants protected by federal law. For example, 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 other federal criminal statute. Second, it protects individuals seeking to provide information to federal judges or federal probation and pretrial services officers.

Section 1512 also includes attempts in its list of prohibited conduct. There is no requirement that the defendants' actions have the intended obstructive effect. See, e.g., *United States v. Murray*, 751 F.2d 1528 (9th Cir.), cert. denied, 106 S.Ct. 381 (1985). As amended by the Criminal Law and Procedure Technical Amendments Act of 1986, Pub.L. 99-646, it is clear that the killing of a witness or attempts to kill a witness in order to prevent his/her testimony constitutes an act of force intended to "influence the witness' testimony." See 18 U.S.C. § 1512(a). This change was necessitated by one court interpreting Section 1512 to not reach an act of attempted murder that was intended to prevent a witness from testifying. See *United States v. Dawlett*, 787 F.2d 771 (1st Cir.1986).

The section specifically abolishes the pending proceeding requirement of 18 U.S.C. §§ 1503 and 1505. The provision 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).

Section 1512 protects potential as well as actual witnesses. With the addition of the words, "any person", it is clear that a witness is "one who knew or was expected to know material facts and was expected to testify to them before pending judicial proceedings." *United States v. DiSalvo*, 631 F.Supp. 1398 (E.D.Pa.1986). Under Section 1512, an individual retains his/her status as a witness even after testifying. *United States v. Wilson*, 796 F.2d 55 (4th Cir.1986), cert. denied, 107 S.Ct. 896 (1987) (protection of witness under Section 1512 continues throughout the trial); *United*

*States v. Patton*, 721 F.2d 159 (6th Cir.1983) (witness retains status while defendant's motion for a new trial is pending); *United States v. Chandler*, 604 F.2d 972 (5th Cir.1979) (witness retains status while case is pending on direct appeal). Cf. *United States v. Risken*, 788 F.2d 1361 (8th Cir.), cert. denied, 107 S.Ct. 329 (1986) (party was a witness after asserting his Fifth Amendment privilege and being dismissed from the stand since he could be recalled at any time).

Section 1512 of Title 18 contains two significant additions to the types of tampering barred by federal law. First, it forbids "misleading conduct," as defined in 18 U.S.C. § 1515. Such conduct was not covered in those circuits that had 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 creates a new misdemeanor for intentional harassment. This offense 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. Harassing conduct has been defined as that intended to annoy, disturb or pester. *Wilson*, supra.

Despite its coverage, Section 1512 was not intended to reach all forms of witness tampering. Its coverage is limited to tampering accomplished by the specific means enumerated in the provision. *United States v. King*, 762 F.2d 232 (2d Cir.1985), cert. denied, 106 S.Ct. 1203 (1986). The more imaginative types of witness tampering as well as forms of tampering defying enumeration were still prohibited by the omnibus provision of Section 1503. *United States v. Lester*, 749 F.2d 1288 (9th Cir.1984).

It is unclear whether 18 U.S.C. § 1512(b)(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 1512(b)(3), however, indicates that those differences are differences of style, not substance, and that no such expansion was intended. Section § 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(b)(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 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 9-69.121 supra.

#### 9-69.142 "Official Proceeding" Requirement (18 U.S.C. § 1512)

Congress limits the coverage of Section 1512 to official proceedings. 18 U.S.C. § 1515(1) defines "official proceeding" as:

---

March 1, 1994

- (A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge or a Federal grand jury;
- (B) a proceeding before the Congress; or
- (C) a proceeding before a Federal Government agency which is authorized by law.

This definition is a restatement of the judicial interpretation of the word "proceeding" in Sections 1503 and 1505. However the case law interpreting these provisions also required that the proceeding had to be pending. See USAM 9-69.112 and 9-69.122 *supra*. 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 Section 1512, "an official proceeding need not be pending or about to be instituted at the time of the offense." 18 U.S.C. § 1512(e)(1). See *United States v. Scaife*, 749 F.2d 338 (6th Cir.1984).

#### 9-69.143 State of Mind (18 U.S.C. § 1512)

Section 1512(a) proscribes conduct intentionally undertaken, Section 1512(b) proscribes conduct "knowingly" undertaken, and Section 1512(c) proscribes conduct "intentionally" undertaken. 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/her conduct and those circumstances incident to his/her conduct that make the conduct criminal. Beyond this, the mental states referred to in Sections 1512(a), 1512(b), and 1512(c) differ slightly.

Sections 1512(a) and 1512(b) require, in addition to general intent, a specific intent, for example, the intent to influence testimony in an official proceeding. These requirements of specific intent are self-explanatory. In contrast, Section 1512(c) does not require specific intent but specific results, for example, preventing a witness from testifying at an official proceeding. However, this distinction is probably without a difference, and the specific results should be read as forms of specific intent. Section 1512(d) 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(d), the burden of proving this benign intent, which is an affirmative defense, is on the defendant. A preponderance of the evidence is the standard of proof.

Section 1512(e) of Title 18 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 official nature of the proceedings or investigation with which he/she interfered. See 128 Cong. Rec. H8204 (daily ed. Sept. 30, 1982). A reference to congressional proceedings, however, is omitted from the proceedings enumerated in 18 U.S.C. § 1512(e).

#### 9-69.144 Constitutionality of 18 U.S.C. § 1512(d)

Under Section 1512(d) "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(d). This allocation of the burden of proof to the defendant has led some to question the constitutionality of this section.

Affirmative defenses, such as the one created by 18 U.S.C. § 1512(d), 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).

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.

The affirmative defense established by 18 U.S.C. § 1512(d) 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, delay or prevent that person's testimony. Therefore, a prosecution under 18 U.S.C. § 1512 would require the government to prove beyond a reasonable doubt: (1) an effort to threaten, force or intimidate another person; and (2) an intent to influence that person's testimony. 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(d). 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. Courts considering this issue have held that the provision does not unconstitutionally shift the burden of proof. See *United States v. Karavas*, 622 F.Supp. 1523 (S.D.N.Y.1985).

9-69.150 18 U.S.C. § 1513

9-69.151 Scope of 18 U.S.C. § 1513

Section 1513 of Title 18 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. Section 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. With the exception of the omnibus clauses of Sections 1503 and 1505, the express 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).

The structure of 18 U.S.C. § 1513 is similar to that of 18 U.S.C. § 1512. Section 1513, like Section 1512, eliminates ambiguity about the class of people protected. Although the former law protected witnesses and parties, it was unclear whether that law

---

March 1, 1994

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. Section 1513 plainly covers such conduct even though the caption of the provision may indicate otherwise. See 128 Cong.Rec. H8204 (daily ed. Sept. 30, 1982). Section 1513, like 18 U.S.C. § 1512 expands the class of informants protected by federal law. It also confers extraterritorial federal jurisdiction over the offenses cited in the provision.

9-69.152 State of Mind (18 U.S.C. § 1513)

Section 1513 proscribes conduct "knowingly" undertaken. As explained in USAM 9-69.143 *supra*, this term designates general intent. In addition to general intent, the prosecutor must prove that the defendant took his/her actions with intent to retaliate for one of the two actions set out in the statute. See 18 U.S.C. § 1513(a)(1), (2). See also *United States v. Maggitt*, 784 F.2d 590 (5th Cir.1986) (need to show intent to retaliate; no need to show intent to execute threat). Thus, Section 1513, like Section 1512, has a compound state-of-mind requirement.

However, unlike Section 1512, Section 1513 does not excuse the prosecutor from proving that the defendant knew he/she was obstructing an official 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.

9-69.160 Inchoate Obstruction of Justice Offenses

Several of the obstruction of justice provisions prohibit "endeavors" to obstruct. Section 1503 prohibits "endeavors" to tamper with jurors and officers of the court. The omnibus clauses of Sections 1503 and 1505 prohibit "endeavors" to obstruct justice as well as actual obstructions of justice. Section 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 Supreme Court held:

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.

---

March 1, 1994

*Id.* at 143. Accord *Osborn v. United States*, 385 U.S. 323, 333 (1966). See also *United States v. Tedesco*, 635 F.2d 902 (1st Cir.1980), cert. denied, 452 U.S. 962 (1981) (court rejected 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 Section 1503); *United States v. Fasolino*, 586 F.2d 939 (2d Cir.1978), (defendant's importuning of a third party to approach a federal judge, whom the third party knew, on a pending sentencing matter constituted an endeavor). See generally *Osborn*, *supra*, at 332-33 (1966); *United States v. Lazzerini*, 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. Miesler*, 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). The legislative history of Section 1510 indicates that Congress intended to incorporate this case law into that provision. H.R.Rep. No. 658, 90th Cong., 1st Sess. 3, reprinted in 1967 U.S.Code Cong. & Ad.News 1760, 1762.

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.

The Victim and Witness Protection Act of 1982 was intended to expand the reach of federal law in relation to inchoate offenses. Section 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). However, in light of the prior use of the word "endeavor" in other provisions, it is disquieting to note that "attempt", not "endeavor," is the term used in Sections 1512 and 1513. This word substitution was probably an oversight since 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. Nevertheless, the government, having previously convinced the Supreme Court that there is an important distinction between "endeavor" and "attempt," *Russell*, *supra*, at 143 (1921), absent congressional action, may 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 civil cause of action authorizing a federal district court to restrain the "harassment" of criminal victims and witnesses or to prevent and restrain existing or imminent violations of 18 U.S.C. § 1512 (excluding those consisting of misleading conduct) and Section 1513. This provision, which is codified at 18 U.S.C. § 1514, defines "harassment" as "a course of conduct directed at a specific person that causes substantial emotional dis-

ress . . . and serves no legitimate purpose." 18 U.S.C. § 1514(c). See *United States v. Tison*, 780 F.2d 1569 (11th Cir.1986) (it was harassing conduct for a party to intimidate another into not providing accurate information to federal law enforcement officials and to file a civil lawsuit in order to obtain information not discoverable in a pending criminal proceeding). A government attorney is responsible for bringing such an action.

A court may provide two forms of equitable relief: 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." 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. In contrast, a protective order 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, Section 1514 appears to limit the scope of equitable relief permitted since it makes express provision only for 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. Although the statute is needlessly ambiguous on this point, it is not ambiguous 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).

9-69.180 Miscellaneous Matter

9-69.181 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. Bachert*, 773 F.2d 477 (2d Cir.1985); *United States v. Johnson*, 713 F.2d 654 (5th Cir.1983), cert. denied, 465 U.S. 1030 (1984); *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.) (18 U.S.C. § 1503), cert. denied, 102 S.Ct. 2015 (1982); *United States v. Tedesco*, 635 F.2d 902 (1st Cir.1980) (18 U.S.C. § 1503), cert. denied, 452 U.S. 962 (1981); *United States v. O'Donnell*, 510 F.2d 1190 (6th Cir.) (18 U.S.C. § 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. *Kibler, supra*, 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; *O'Donnell, supra*, at 1193.

A minority of courts hold that venue lies where the unlawful act occurred. See *United States v. Moore*, 582 F.Supp. 1575 (D.D.C.1984); *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).

#### 9-69.182 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, 1112, and 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), and (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. DeAlesandro*, 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 with 18 U.S.C. §§ 1503, 1510, 1512, and 1513). 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. 3489 and 103 S.Ct. 5 (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.*

D. 18 U.S.C. § 245(b)(1)(D), (2)(D), (4)(A), and (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, and 1513).

F. 18 U.S.C. § 401—contempt of court (overlap with 18 U.S.C. § 1503). 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 contemnor 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. See, e.g., *United States v. Jones*, 663 F.2d 567, 569 (5th Cir.1981) (threat directed at judge and prosecutor).

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 to 1623—perjury, subornation of perjury, and false declarations before grand juries and courts (overlap with 18 U.S.C. §§ 1503, 1505, and 1512). It has been held by at least one court that simple perjury, the assertion of a false affirmative statement by an individual testifying under oath, is not an obstruction of justice under the omnibus clause of 18 U.S.C. § 1503. See *United States v. Fardman*, 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 325 (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 exist. In *United States v. A.O.*, 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 included within the coverage of 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. *Id.* at 754.

This reasoning applies as well to the omnibus clause of 18 U.S.C. § 1503. *Griffin*, supra, at 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, may also be an 18 U.S.C. § 1503 omnibus clause offense. See *Griffin*, supra, 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). That offense requires proof that perjury was in fact committed. See, 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, this permits the prosecution of attempts to suborn perjury. See *Catrino*, supra, at 886-87.

I. 26 U.S.C. § 7212—interference with or endeavors to interfere with the due administration of the Internal Revenue laws (overlap with 18 U.S.C. § 1505).

#### 9-69.183 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 10207, Bond Building, 1400 New York Avenue, N.W., Washington, D.C. 20530 (FTS 786-5000).

---

March 1, 1994

## 9-69.184 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

The discussion in this section deals primarily with the two principal perjury statutes in Title 18: 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 briefly discussed.

Sections 1621 and 1623 of Title 18 have been amended to reflect the enactment of 28 U.S.C. § 1746. These provisions make unsworn declarations under certain circumstances, subject to the penalties of perjury. Such unsworn declarations must be substantially in the language set out in 28 U.S.C. § 1746.

9-69.210 Elements of Perjury

Although there are differences between 18 U.S.C. §§ 1621 and 1623, the four elements of each offense are substantially the same. These elements are detailed below.

## 9-69.211 Defendant Must Be Under Oath

The first element of a perjury offense is that the defendant must be under oath when giving his/her testimony, declaration, or certification unless it falls within the exception permitted by 28 U.S.C. § 1746 for unsworn declarations. Provided that the oath is of sufficient clarity that the defendant was aware that he/she 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 Section 1621 require proof of who administered the oath, as well as the competency and authorization of the administrator of the oath. *United States v. Molinares*, 700 F.2d 647, 651 (11th Cir.1983). In contrast, the identity of the oath administrator 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. Section 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, 652.

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/she testified under oath. *United States v. Picketts*, 655 F.2d 837, 840 (7th Cir.1981).

## 9-69.212 Making of a False Statement

The second necessary element of perjury is that the defendant must make a false statement. 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 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 States v. Harrison*, 671 F.2d 1159, 1162 (8th Cir.), cert. denied, 103 S.Ct. 104 (1982), "[i]t was up to the jury to decide whether [defendants'] statements were slang or lies."

## 9-69.213 False Statement Must Be Material to the Proceedings

The third element is that 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); accord, *United States v. Drape*, 753 F.2d 660 (6th Cir.), cert. denied, 106 S.Ct. 71 (1985). The testimony need not actually have influenced, misled or hampered the proceeding. *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). Thus, 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). Nor must the statement be material to a particular issue; it may be sufficient if it is 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); *Cuesta, supra*, at 921; *United States v. Giarratano*, 622 F.2d 153, 156 (5th Cir.1980). Accordingly, 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 it is 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 government must satisfy the burden of establishing materiality, although it need not prove it beyond a reasonable doubt. *Berardi, supra*, at 727; *Watson, supra*, at 1202. A 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 of it to the questions which elicited the perjury. *Berardi, supra*, at 727; *Ostertag, supra*, at 265. When transcripts of the

grand jury proceedings are used, it is best to use complete transcripts of the proceeding or testimony. *Cosby, supra*, at 756-57.

The issue of materiality is a question of law to be decided by the court. *United States v. Larranga*, 787 F.2d 489 (10th Cir.1986); *United States v. Weiss*, 752 F.2d 777 (2d Cir.), cert. denied, 106 S.Ct. 308 (1985); *Ostertag, supra*, at 265; *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, and certainly prior to submitting the case to the petit jury. *Berardi, supra*, at 728; *United States v. Watson*, 623 F.2d 1198, 1201 n. 5 (7th Cir.1980).

#### 9-69.214 Statement Made With Knowledge of Falsity

Section 1621 states that one who "willfully . . . states . . . any material matter which he does not believe to be true, is guilty of perjury . . . ." Section 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. Both require that the defendant must make the false statement with knowledge of its falsity.

Perjury requires a showing of specific intent. The false statement cannot be the result of inadvertence, honest mistake, carelessness, misunderstanding, mistaken conclusions, unjustified inferences testified to negligently, or even recklessness. *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. Caucci*, 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). In determining whether a party falsely answered a question, it must first be determined how a reasonable person would have interpreted the question. The subjective understanding of the defendant is not part of this determination. *United States v. Lighte*, 782 F.2d 367 (2d Cir.1986). Cf. *United States v. Sainz*, 772 F.2d 159 (9th Cir.1985) (when a question that the defendant allegedly answered falsely is comprised of several questions, the government must prove that its construction of the question is plausible as well as consistent with the content of the question).

#### 9-69.215 Difference Between 18 U.S.C. §§ 1621 and 1623

There are five principal differences between Sections 1623 and 1621. First, Section 1623 applies only to perjury occurring in the course of grand jury and court proceedings. Second, under Section 1623 the government's evidentiary burden is greatly reduced since Section 1623(e) does away with the two-witness rule which still hampers prosecutions under Section 1621. See USAM 9-69.265 *infra*. 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. However, it is a defense to such a prosecution that, at the time each statement was made, the defendant believed he/she was speaking the truth.

Section 1623 is also different from Section 1621 in that under the former, in certain circumstances, a recantation is a bar to prosecution for perjury. 18 U.S.C. § 1623(d); see USAM 9-69.274 *infra*.

9-69.220 Subornation of Perjury—18 U.S.C. § 1622

Section 1622 provides:

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 occurred. *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). However, 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, 297 U.S. 665 (1936); *Williamson v. United States*, 207 U.S. 425 (1908). Moreover, when 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 occurred. 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. 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 (D.Ore.1887); *Segal v. United States*, 246 F.2d 814 (8th Cir.), cert. denied, 355 U.S. 894 (1957).

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/her statement. See, e.g., *Boren v. United States*, 144 F. 801 (9th Cir.1906). See also *Indesco v. Mishkin*, 629 F.Supp. 1474 (S.D.N.Y.1986) (attorney violated Section 1622 by not advising his client to testify truthfully after learning that client's proposed testimony was false). To establish a prima facie case for subornation of perjury, a prosecutor must show: that perjury was committed; that the defendant procured the perjury corruptly, knowing, believing or having reason to believe it to be false testimony; and that the defendant knew, believed, or had reason to believe that the perjurer had knowledge of the falsity of his/her testimony.

The government must prove the existence of the perjury 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. See *Hammer v. United States*, 271 U.S. 620 (1926); USAM 9-69.265, *infra*. If 18 U.S.C. § 1623 is applicable to the perjury, the two-witness rule does not apply. See *United States v. Gross*, 375 F.Supp. 971 (D.N.J.1974). Similarly, if the charge consists only of

---

March 1, 1994

conspiracy to suborn perjury, compliance with the two-witness rule is not necessary. *Hall v. United States*, 78 F.2d 168 (10th Cir.1935).

#### 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 Postal Inspection Service. The FBI also 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 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). See also *United States v. Wong*, 431 U.S. 174, 180 (1977) (lying is not a way to challenge Government's right to ask questions). The U.S. Attorney in each district is authorized to direct such further investigation of any alleged false declaration as he/she 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, *supra*.

#### 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. Two decisions by different panels of the Second Circuit 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 court in rejecting this argument cited *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 since Ruggiero had failed to demonstrate membership in a specific class of defendants.

In *United States v. Kahn*, 472 F.2d 272, 283 (2d Cir.), cert. denied, 411 U.S. 981 (1973), however, the specter of such a class was raised in dictum. The court suggested that defendants charged under Section 1621 whose perjury would not be prosecutable under Section 1623 because of a valid "recantation," might constitute a class denied equal protection under *Ruggiero*.

Although 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). Unconstitutional selective enforcement only occurs when the prosecution bases the decision to prosecute on improper 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 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), the Ninth Circuit took a different approach. 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, based on the facts, opined that the government intended to charge a violation of Section 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); *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. The Supreme Court unanimously held in *Bronston v. United States*, 409 U.S. 352 (1973) that such conduct does not violate 18 U.S.C. § 1621.

The government prosecuted Bronston for perjury on the theory that although his answers were literally truthful one answer was unresponsive and ambiguous in order to mislead the questioner. 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." *Bronston, supra*, at 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.'" *Bronston, supra*, at 362. See also *Gebhard v. United States*, 422 F.2d 201, 287-88 (9th Cir.1970); *United States v. Nicoletti*, 310 F.2d 359 (7th Cir.1962). Cf. *United States v. Fulbright*, 804 F.2d 847, 851 (5th Cir.1986) (*Bronston* defense inapplicable to situation where defendant's statements to grand jury "were responsive but deliberately false"; immaterial that "the defendant can postulate unsavory premises of the question that would make his answer true"); *United States v. Valentine*, 644 F.Supp. 818, 823-24 (S.D.N.Y.1986) (literal truth to be determined by "natural meaning" of the words used" not by the legal effect of a UCC provision).

#### 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. Such witnesses may be prosecuted for perjury. See, e.g., *In re Battaglia*, 653 F.2d 419, 421 (9th Cir.1981); *Gebhard, supra*; *Nicoletti, supra*. For a prosecution to succeed, it must be proved that the witness at one time knew the fact and that he/she must have remembered it at the time he/she testified.

#### 9-69.265 "Two-Witness Rule"

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 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. It is immaterial whether the second witness corroborates the first witness. *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. *Forrest, supra*, at 1226; *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

15087

statement willfully or with knowledge of its falsity. *United States v. Hagarty*, 388 F.2d 713 (7th Cir.1968).

The "two-witness rule" applies only to prosecutions for perjury brought under 18 U.S.C. § 1621. Congress has eliminated the rule for prosecutions under Section 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 Section 1623 is the preferred, if not the exclusive, vehicle for prosecutions of perjury occurring before a court or grand jury, the hardship of the two-witness rule is greatly ameliorated. USAM 9-69.261, *supra*.

The "two-witness rule" does not apply to 18 U.S.C. § 1621 prosecutions where the defendant is prosecuted for falsely testifying that he/she was unable to remember a certain event. See USAM 9-69.264, *supra*. Neither does it apply to prosecutions for obstruction of justice (18 U.S.C. §§ 1503 and 1505), even if the gravamen of the obstruction is that the defendant perjured himself/herself. See *United States v. Alo*, 439 F.2d 751 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971). 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. In *United States v. Pommerening*, 500 F.2d 92 (10th Cir.1974), the court upheld a conviction under Section 1623 when the defendant's altered subpoenaed 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. See also *United States v. Dudley*, 581 F.2d 1193, 1197 (5th Cir.1978) (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

Section 1623(a) requires that the false declaration must be made in "any proceeding before or ancillary to any court or grand jury of the United States." Some question has existed as to the meaning of ancillary in this provision. The Supreme Court addressed this issue in *Dunn v. United States*, 442 U.S. 100 (1979). It held that a false affidavit submitted to a federal court in support of a motion 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). *Id.* at 107, 113. See also *United States v. Tibbs*, 600 F.2d 19, 21 (6th Cir.1979) ("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'"); 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).

Although *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 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 (1971); *United States v. Griffin*, 589 F.2d 200 (5th Cir.1979). Prosecutions should not be brought under 18 U.S.C. § 1001 for false statements submitted in federal court proceedings.

#### 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 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 conviction on each count. *United States v. De La Torre*, 634 F.2d 792, 794-95 (5th Cir.1981). See also *United States v. Scott*, 682 F.2d 695, 698 (8th Cir.1982) (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 into which inquiry was made. 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). 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) ("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 Belief that Statement is True

A primary defense to an indictment for perjury is that the defendant believed his/her statement to be true at the time he/she 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. 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). See also *United States v. Lighte*, 782 F.2d 367 (2d Cir.1986) before evaluating the falsity of an answer to a question have to determine how a reasonable person would have interpreted the question. Perjury does not exist if the statements are literally true. *Lighte, supra*; *United States v. Eddy*, 737 F.2d 564 (6th Cir.1984).

##### 9-69.272 Collateral Estoppel

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). 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. See *United States v. Williams*, 341 U.S. 58, 62 (1951); *United States v. Baugus*, 761 F.2d 506 (8th Cir.1985).

The question of whether collateral estoppel bars prosecution for perjury usually arises where a defendant, who has taken the stand and perjured himself/herself, has been acquitted of the substantive offense and is charged with perjury for testimony given at the trial. The collateral estoppel claim is that the jury, by acquitting the defendant, adjudicated the truthfulness of his/her testimony in favor of the witness and that the

government is barred from litigating that issue again. 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."

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 (1979). 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. Giarratano*, 622 F.2d 153, 155 (5th Cir.1980); *United States v. Dipp*, 581 F.2d 1323, 1325 (9th Cir.1978), cert. denied, 439 U.S. 1071 (1979). 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. *Giarratano*, supra, at 156 n. 4; *Fayer*, supra, at 745; *United States v. Haines*, 485 F.2d 564, 565 (7th Cir.1973).

#### 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/her right not to incriminate himself/herself. *United States v. Orta*, 253 F.2d 312 (5th Cir.), cert. denied, 357 U.S. 905 (1958). The issue, however, of the warning required to be given a grand jury witness who is a virtual or putative defendant has been the subject of considerable controversy. The Supreme Court addressed this issue in *United States v. Mandujano*, 425 U.S. 564 (1976).

The Supreme Court held that *Miranda* warnings need not be given to a grand jury witness who is called to testify about criminal matters in which he/she may have participated. The plurality opinion did not address the question of whether it is necessary to advise such a witness of his/her Fifth Amendment privilege against self-incrimination. *Mandujano*, supra, 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/her 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 warnings resembling *Miranda* warnings and to advise putative defendants of their status as such. See USAM 9-11.250, supra; *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). See also *United States v. Caputo*, 633

F.Supp. 1479 (E.D.Pa.1986) (the defendants were targets in matters related to those before the grand jury and thus should have received target warnings).

#### 9-69.274 Recantation

##### A. In General

Section 1623(d) of Title 18 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. That provision provides:

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.

The defendant must explicitly admit that the statement was false; an implicit admission will not suffice. *United States v. Scivola*, 766 F.2d 37 (1st Cir.1985); *United States v. Spalliero*, 602 F.Supp. 417 (C.D.Cal.1984).

Before the enactment of 18 U.S.C. § 1623, the federal law, under 18 U.S.C. § 1621, was that 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). 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*, 772 F.2d 1085, 1091 (2d Cir.1982); *Kahn*, supra, at 283 n. 9; *United States v. Tucker*, 195 F.Supp. 607, 613 (E.D.N.Y.1980). The defense of recantation must be raised before trial under Federal Rule of Criminal Procedure 12(b)(2), as a jurisdictional bar to prosecution. *United States v. Denison*, 663 F.2d 611, 618 (5th Cir.1981).

The fact that a witness admits the falsity of his/her declarations does not automatically bar prosecution. 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/her testimony, the recantation provisions of 18 U.S.C. § 1623(d) are inapplicable and cannot be invoked to bar prosecution. *Scivola*, supra; *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. *Scrimgeour*, supra, at 1024; *Moore*, supra, at 1044.

---

March 1, 1994

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/her 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).

In *Kahn, supra*, the court implied 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. Such an interpretation appears to be in conflict with the legislative intent and the other case law interpreting this provision.

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. *D'Auria, supra*, at 1092 ("A witness who has lied remains obligated by his oath to tell the truth, without prodding."); *Scrimgeour, supra*, at 1026; *United States v. Anfield*, 539 F.2d 674, 679 (9th Cir.1976); *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).

C. *Witness' Right to Recant*

If a witness, after completing 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 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; *D'Auria, supra*, at 1091-92; *Scrimgeour, supra*, at 1025.

9-69.275 Miscellaneous Defenses

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). Nor is it a defense if a party perjures himself/herself in court about having authorization to make certain expenditures if the party later makes restitution of the unauthorized expenditures. *United States v. Stockton*, 788 F.2d 210 (4th Cir.), cert. denied, 107 S.Ct. 147 (1986).

For a party to be successful with an entrapment defense, he/she must show that the false answer was illegally procured by the government or the grand jury. *United States v. Fiorillo*, 376 F.2d 180 (4th Cir.1967). Such a defense is rebutted by evidence that

the defendant was informed and reminded that he/she was obligated to tell the truth and that the failure to do so could subject him/her to criminal penalties. *United States v. Hubbard*, 474 F.Supp. 90 (D.D.C.1979), *aff'd*, 668 F.2d 1238 (D.C.Cir.1981), *cert. denied*, 456 U.S. 926 (1982).

A grant of immunity does not protect a party from a perjury charge if he/she testifies falsely. See, e.g., *Glickstein v. United States*, 222 U.S. 139 (1911); *United States v. Johnson*, 414 F.2d 22 (6th Cir.1969), *cert. denied*, 397 U.S. 991 (1970).

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. 982). 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).

#### 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 prison.

B. 18 U.S.C. § 1791(a)(2)—prohibits any inmate of a federal prison from making, possessing, or obtaining 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, detention, or correctional facility.

E. 18 U.S.C. § 1793—sets forth a penalty of up to six months imprisonment and/or up to \$500 fine for trespassing on a reservation, land, or facility of the Bureau of Prisons.

##### 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 rule, or an order issued under a statute." This includes rules and orders 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

March 1, 1994

1984, 18 U.S.C. § 1791(a)(1) prohibits providing or attempting to provide contraband. Since the new amendment eliminates the "taking or sending" language, this section can no longer be used to punish smuggling items out of a federal penal facility.

#### 9-69.312 Prison

Section 1791 of Title 18 defines "prison" to mean a "federal, correctional, detention, or penal facility." The section now applies to illegal aliens awaiting deportation in federal detention facilities. Only activity in federal facilities is covered by Section 1791. Congress intended that this law 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 (1983).

#### 9-69.313 Contraband

Section 1791(c)(1) of Title 18 lists five specific types of contraband and a residual or omnibus clause which covers "any other object that threatens the order, discipline, or security of a prison, or the life, health, or safety of an individual." Ammunition, lysergic acid, diethylamide, phencyclidine, and foreign currency were added to the list of prohibited objects by the Criminal Law and Procedure Technical Amendments Act of 1986.

#### 9-69.320 Elements of 18 U.S.C. § 1791(a)(2)

#### 9-69.321 Prison

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, obtaining, or attempting to make or obtain contraband. Under this language, the mere possession of contraband is punishable. It is not 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*.

#### 9-69.330 Elements of 18 U.S.C. § 1792

#### 9-69.331 Participation

Section 1792 of Title 18 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, Detention, or Correctional Facility

See USAM 9-69.312, *supra*.

Section 1792 refers to "Federal penal, detention, or correctional facility," whereas Section 1791(a) refers to "prison," which is in turn defined in Section 1791(b) as a "federal correctional, detention, or penal facility." Indictments under Section 1792 for mutiny or riot should avoid the use of the term "prison."

#### 9-69.340 Sentencing in Prison Contraband Cases

In order to maximize the deterrent effect of a conviction for a violation of 18 U.S.C. § 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.

#### 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 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 Fugitive Felon Act is to permit the federal government to assist in the location and apprehension of fugitives from state justice. No prior Division approval is required to authorize unlawful flight complaints in aid of the states.

The act does not supersede nor is it an alternative for state extradition proceedings. Normally, the federal complaint will be dismissed when the fugitive has been apprehended and turned over to state authorities to await interstate extradition. Thus, an unlawful flight complaint should not be filed in cases in which the location of the fugitive is already known by state authorities unless the location was ascertained through active investigation conducted, or participated in, by the FBI or other federal investigative agency, and the warrant request is made by that agency.

Since the primary purpose of the act is to assist the states in apprehending fugitives from state justice, the act should not be applied to the interstate or international flight of federal fugitives.

9-69.420 Prerequisites to Issuance of Federal Complaint in Aid of States

A complaint for violation of the act should not be authorized unless there is probable cause to believe that the fugitive moved in interstate or foreign commerce with the intent of avoiding a felony prosecution under the laws of the place from which he/she fled. In addition, it should be clear that the requesting state authorities are determined to take all necessary steps to extradite or otherwise 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/she is sought.

In considering requests for issuing complaints under the act, care should be exercised to prevent use of the act to assist in enforcement of any state statute with a clearly discriminatory purpose or in the discriminatory application of an otherwise lawful statute. Similarly, caution should be exercised to prevent use of FBI investigative resources to compel discharge of civil obligations. Thus, requests for federal involvement in worthless check violations, or in desertion/non-support cases should be scrutinized carefully.

9-69.421 Parental Kidnapping

State requests for the filing of unlawful flight complaints in felony parental abduction cases are to be treated in the same manner as other unlawful flight 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. § 1073.

Note that an unlawful flight warrant for the arrest of the absconding parent 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 Unlawful Flight to Avoid Custody or Confinement After Conviction

This portion of the statute covers convicted inmates of jails or prisons as well as those on conditional liberty. The government must show that the flight was for the purpose of avoiding custody or confinement; therefore the evidence should indicate that the subject knew or believed that his/her conditional liberty was about 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 parole board of a change of address.

9-69.440 Unlawful Flight 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 proceedings, to which such testimony related, has actually been instituted in the state court. See *Durban v. United States*, 321 F.2d 520 (D.D.C.1954).

The majority of states have adopted the Uniform Act to Secure the Return of Witnesses From Without the State in Criminal Cases. Therefore, a state should be required to exhaust existing remedies for securing the return of witnesses before seeking federal assistance.

9-69.450 Unlawful Flight 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. § 1073 by the 1970 amendment.

9-69.460 Federal Information; Indictment; Removal-Approval Required

In 1961, the act was amended to require 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 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, Federal Rules of Criminal Procedure, 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, 460 U.S. 1073 (1983).

Requests for written approval to prosecute for unlawful flight should be forwarded to the General Litigation and Legal Advice Section. Generally, such requests are approved only if it clearly appears that the interests of justice would be frustrated by a failure to prosecute.

#### 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.

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 forth 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 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

March 1, 1994

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.

#### 9-69.503 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*, 414 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; and (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. *Bailey, supra*. See also *Tapio, supra*. However, a number of cases have required showing of specific intent pursuant to the "law of the case". See *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 *Bailey, supra*; *United States v. Phipps*, 543 F.2d 576 (5th Cir.1976), cert. denied, 429 U.S. 110 (1977);

*Cluck, supra; Woodring, supra; and Chandler v. United States*, 378 F.2d 906 (9th Cir.1967).

#### 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. § 37, 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. *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. *Cluck, supra*.

#### 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 *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 1122 (8th Cir.), cert. denied, 454 U.S. 944 (1981).

An escape from incarceration pursuant to the civil contempt statute, 18 U.S.C. § 1826, is an offense under 18 U.S.C. § 1826(c) although not an offense under 18 U.S.C. § 751. See USAM 9-69.610 *infra*. 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 under Section 751. However, no law on this issue currently exists.

9-69.530 Expedition Authorization of Magistrates' Complaints and Warrants in Federal Escape Cases

9-69.532 Case Authority

An arrest warrant is generally required 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 entries in the absence of consent or exigent circumstances 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).

"Exigent circumstances" justifying entries on probable cause without a warrant are narrowly drawn and strictly enforced. Numerous appellate courts have defined what constitutes exigent circumstances for probable cause to enter premises to arrest fugitives. See *Dorman v. United States*, 435 F.2d 385 (D.C.Cir.1970); *United States v. Acevedo*, 627 F.2d 68 (4th Cir.), cert. denied, 449 U.S. 1021 (1980); *United States v. Prescott*, 581 F.2d 1043 (9th Cir.1978); *United States v. Reed*, 573 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*, 467 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 on 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

March 1, 1994

(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. But see *United States v. Adams*, 621 F.2d 41 (1st Cir.1980), holding there is no pass/fail checklist for determining exigency and that the ultimate test is whether there is such a compelling necessity for immediate action "as will not brook the delay of obtaining a warrant."

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 arrest a fugitive, it is important that the investigating officers be armed with a warrant.

In those cases where an officer seeks to enter an escapee's own premises to arrest him/her, entry is permitted with an arrest warrant and reasonable belief that the fugitive is inside; it is not necessary for the officer to also obtain a search warrant. See *Payton v. New York*, *supra*.

When, however, entry is sought into the premises of a third party to arrest a fugitive escapee, a search warrant must be obtained. *Steagald*, *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.

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);

---

March 1, 1994

*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. See *United States v. Wray*, 608 F.2d 722 (8th Cir.1979), cert. denied, 444 U.S. 1048 (1980); *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. Pessor*, 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. § 4082(b), as discussed herein.

In the past, federal prisoners whose temporary custody was sought by state authorities on writs of habeas corpus *ad testificandum* were transported to the requesting state Deputy United States Marshals and remained in the actual custody of the Marshals Service. Escapes were prosecuted under 18 U.S.C. § 751(a). Today, however, the transportation of federal prisoners to state courts and the custody of such prisoners is generally assumed by state authorities. Consequently, older case law regarding escapes from custody by prisoners on writs of habeas corpus *ad prosequendum* and *ad testificandum* will not be helpful. To find a basis for federal prosecution for escapes by federal prisoners in the custody of state authorities, it has been necessary to make a careful analysis of the escape statute, 18 U.S.C. § 751, and related statutes.

Our analysis 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 pro-*

March 1, 1994

*quendum* 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;

C. When the escape is from custody under any federal process; and

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); and

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 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. See *Hobson, supra*.

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. *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. 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. *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 *Stead, supra*; and *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); *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. *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).

## 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 95 (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 *Clark, supra*; *United States v. Joiner*, 496 F.2d 1314 (5th Cir.), cert. denied, 419 U.S. 1002 (1974); *Frazier, 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 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 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; and (3) when such custody is pursuant to civil commitment either under 28 U.S.C. § 1826 or 18 U.S.C. § 4243.

#### 9-69.611 Intent

Title 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

DETAILED  
TABLE OF CONTENTS  
FOR CHAPTER 70

	<u>Page</u>
9-70.000 <u>HARBORING OFFENSES</u> .....	1
9-70.100 SUPERVISORY AND INVESTIGATIVE JURISDICTION AND CONSUL- TATION REQUIREMENT .....	1
9-70.200 APPLICABLE STATUTES .....	1
9-70.300 18 U.S.C. § 1071—ELEMENTS OF OFFENSE .....	1
9-70.310 <u>A Federal Warrant</u> .....	2
9-70.320 <u>Harboring or Concealing</u> .....	2
9-70.330 <u>Prevent Discovery or Arrest</u> .....	3
9-70.400 NO FAMILIAL EXCEPTION .....	4
9-70.500 NO JUSTIFICATION DEFENSE .....	4
9-70.600 AFTER CONVICTION OF ANY OFFENSE .....	4
9-70.700 18 U.S.C. § 1072—ELEMENTS OF OFFENSE .....	5
9-70.710 <u>'Willful' State of Mind</u> .....	5
9-70.720 <u>Harboring or Concealing</u> .....	5
9-70.730 <u>Custody of the Attorney General</u> .....	5

---

October 1, 1988

(1)

9-70.000 HARBORING OFFENSES

## 9-70.100 SUPERVISORY AND INVESTIGATIVE JURISDICTION AND CONSULTATION REQUIREMENT

The General Litigation and Legal Advice Section of the Criminal Division has supervisory jurisdiction over 18 U.S.C. §§ 1071 and 1072. Violations of the statutes are investigated by the F.B.I. U.S. Attorney's offices are required to consult with the General Litigation and Legal Advice Section prior to instituting grand jury proceedings for violations of Sections 1071 or 1072. See USAM 9-2.133 and 9-11.220B. The primary purpose of this consultation requirement is to assure that harboring investigations involving the use of the grand jury are not instituted solely to locate the fugitive or escaped prisoner.

## 9-70.200 APPLICABLE STATUTES

This chapter covers the two statutes in Title 18 which criminalize the harboring of fugitives from justice. These statutes are 18 U.S.C. § 1071 (Concealing person from arrest) and 18 U.S.C. § 1072 (Concealing escaped prisoner). Other related statutes which are not discussed in this chapter include the escape and rescue provisions, 18 U.S.C. §§ 751 to 757, and flight to avoid prosecution or giving testimony, 18 U.S.C. §§ 1073 to 1074.

Section 1071 of Title 18 makes it an offense to harbor or conceal any person for whose arrest a warrant or process has been issued, so as to prevent the fugitive's discovery and arrest, after notice or knowledge of the fact that a warrant or process has been issued for the fugitive's apprehension. An offender is subject to imprisonment for not more than one year, unless the warrant or process issued on a felony charge, or after conviction of the fugitive of any offense, in which case the offender faces a maximum term of imprisonment of five years. In addition, the fine provisions of 18 U.S.C. § 3623 are applicable for harboring offenses committed before November 1, 1987, and the fine provisions of 18 U.S.C. § 3571 are applicable for offenses committed on or after November 1, 1987.

Section 1072 of Title 18 makes it an offense to willfully harbor or conceal a prisoner after his escape from the custody of the Attorney General or from a federal penal or correctional institution. An offender is subject to a maximum term of imprisonment of three years, and a fine under Title 18, as discussed above.

## 9-70.300 18 U.S.C. § 1071—ELEMENTS OF OFFENSE

Under 18 U.S.C. § 1071, the government must establish four essential elements. The government must prove:

- (1) that a federal warrant has been issued for the fugitive's arrest;

---

October 1, 1988

(2) that the defendant had knowledge that a warrant had been issued for the fugitive's arrest;

(3) that the defendant actually harbored or concealed the fugitive; and

(4) that the defendant intended to prevent the fugitive's discovery or arrest.

*United States v. Silva*, 745 F.2d 840, 848 (4th Cir.1984), cert. denied, 470 U.S. 1031 (1985). Accord, *United States v. Udey*, 748 F.2d 1231, 1235-36 (8th Cir.1984), cert. denied, 472 U.S. 1017 (1985); *United States v. Bissonette*, 586 F.2d 73, 77 (8th Cir.1978).

#### 9-70.310 A Federal Warrant

The government must establish that a federal warrant was issued for the arrest of the fugitive. In *Silva, supra*, at 848, the Fourth Circuit stated that the government should prove this element by introducing the warrant itself into evidence. The warrant must, of course, be issued "under the provisions of any law of the United States." It has been held that an arrest warrant issued by a judge of the District of Columbia Superior Court is one issued under a "law of the United States" within the terms of Section 1071. See *United States v. Boeticher*, 588 F.2d 89 (4th Cir.1978).

With respect to proving that the defendant had knowledge of the warrant, it is clear that the government may establish such knowledge by inference. *United States v. Gros*, 824 F.2d 1405, 1496 (6th Cir.1987); *United States v. Udey*, 748 F.2d at 1235-36 ("Direct proof of knowledge of the existence of a warrant is rarely available. Rather, the knowledge element can be established by evidence from which the jury can properly infer knowledge and guilt beyond a reasonable doubt."); *Silva, supra*, at 848; *United States v. Giampa*, 290 F.2d 83, 84-85 (2d Cir.1961) (inference of knowledge from the act of harboring itself). Additionally, it is no defense to a Section 1071 prosecution that the defendant was made aware of a warrant that was not actually outstanding at the time, when another outstanding warrant existed. *Bissonette, supra*, at 77. However, the knowledge element cannot be satisfied merely by proof that the defendant was "willfully blind" as to the existence of a warrant. *United States v. Wyatt*, 807 F.2d 1480, 1481-82 (9th Cir.1987); *United States v. Hogg*, 670 F.2d 1358, 1362 (4th Cir.1982).

#### 9-70.320 Harboring or Concealing

The government must establish that the defendant actually harbored or concealed the fugitive. The courts uniformly hold that 18 U.S.C. § 1071 does not prohibit all forms of aid to a fugitive. What is generally required to make out a violation is "any physical act of providing assistance, including food, shelter, and other assistance to aid the prisoner in

avoiding detection and apprehension.'" *Silva, supra*, at 849, quoting *United States v. Kutas*, 542 F.2d 527, 528 (9th Cir.1976), cert. denied, 429 U.S. 1073 (1977) (18 U.S.C. § 1072 case). The following instruction for the meaning of the terms "harbor" and "conceal" was upheld in *United States v. Whitman*, 480 F.2d 1028 (6th Cir.), cert. denied, 414 U.S. 1026 (1973):

The word "harbor" . . . means to lodge or to aid or to care for one who is secreting himself from the processes of the law. The word "conceal" . . . means to hide or to secrete or to keep out of sight or to aid in preventing the discovery of one who is secreting himself from the processes of the law.

Several cases have construed the terms "harbor" and "conceal" narrowly, so as not to cover the mere payment of money to a fugitive, *United States v. Shapiro*, 113 F.2d 891 (2d Cir.1940), or the making of a false statement to law enforcement officers as to the whereabouts of the fugitive, *United States v. Magness*, 456 F.2d 976, 978 (9th Cir.1972); *United States v. Foy*, 416 F.2d 940 (7th Cir.1969). As stated by the court in *United States v. Foy, id.* at 941:

The statute proscribes acts calculated to obstruct the efforts of the authorities to effect arrest of the fugitive, but it does not impose a duty on one who may be aware of the whereabouts of the fugitive, although having played no part in his flight, to reveal this information on pain of criminal prosecution.

But see *United States v. Donaldson*, 791 F.2d 498, 502 (2d Cir.1986), cert. denied, 107 S.Ct. 932 (1987) (Defendant "by lying to the agents about [the fugitive's] presence, had taken a positive step to prevent the agents from discovering [the fugitive]"); *United States v. Biarni*, 243 F.Supp. 917, 918 (E.D.Wis.1965) (refusal to admit police to enter defendant's apartment "was an active measure taken by the defendant to prevent the discovery and arrest of [the fugitive]. If the government officials knew where [the fugitive] was, this would not alter the nature of the defendant's conduct.').

Other cases which have upheld convictions under 18 U.S.C. § 1071 include situations where the defendant: had rented a room for the fugitive and supplied him with guns and disguises, *Silva, supra*; *United States v. Thornton*, 178 F.Supp. 42, 43 (E.D.N.Y.1959); allowed the fugitive to stay in his home and instructed a family member to remain silent about the fugitive's presence, *Udey, supra*; had purchased cars for the fugitive and paid repair bills, *United States v. Arguelles*, 594 F.2d 109 (5th Cir.), cert. denied, 444 U.S. 860 (1979); and had signed a lease, installed a telephone, and shopped for groceries for the fugitive, *Giampa, supra*.

#### 9-70.330 Prevent Discovery or Arrest

The final element that must be established in a Section 1071 prosecution is that the defendant harbored or concealed the fugitive "so as to prevent

his discovery and arrest.'" This element is satisfied principally by inference from the evidence offered to prove that the defendant harbored or concealed the fugitive. For example, the Fourth Circuit in *Silva, supra*, at 849, concluded that renting a room for the fugitive and supplying him with guns and disguises was "'clearly the type of assistance which would aid a fugitive'" in avoiding detection and apprehension. In addition, Section 1071 does not require a showing of intent by the defendant to prevent, for all time, the discovery and arrest of the fugitive. *Bissonette, supra*, at 78.

#### 9-70.400 NO FAMILIAL EXCEPTION

Section 1071 contains no exception for familial relationships between the harborer and the fugitive. The courts have unanimously refused to recognize such an exception. *E.g.*, *United States v. Pittman*, 527 F.2d 444 (4th Cir.1975), *cert. denied*, 424 U.S. 923 (1976) (wife harbored husband); *Blankenship v. United States*, 328 F.2d 19 (5th Cir.1964), (brother harbored brother); *United States v. Graham*, 487 F.Supp. 1317 (W.D.Ky.1980) (father harbored son); *United States v. Oley*, 21 F.Supp. 281 (E.D.N.Y.1937) (wives harbored husbands).

#### 9-70.500 NO JUSTIFICATION DEFENSE

Similarly, the courts have refused to recognize a defense to a harboring prosecution that the defendant believed that the government's charges were false or a product of government harassment. *E.g.*, *United States v. Bissonette*, 586 F.2d at 78; *United States v. Forrest*, 356 F.Supp. 343, 344 (W.D.Mich.1973) ("An alleged wrongdoer is not justified in fleeing from the authorities because he believes himself to be innocent, nor would his friends be justified in knowingly concealing him.').

#### 9-70.600 AFTER CONVICTION OF ANY OFFENSE

As discussed above, 18 U.S.C. § 1071 creates a five year felony for harboring a person sought on a felony warrant, or "after conviction of such person of any offense." The felony provision was added to Section 1071 in 1954. See S.Rep. No. 2141, 83rd Cong., 2d Sess., reprinted in 1954 U.S.Code Cong. & Ad.News 3072; H.R.Rep. No. 1928, 83rd Cong., 2d Sess. 2-3 (1954). An issue that has been raised in connection with the 1954 amendment is whether the harboring of a convicted misdemeanor for whose arrest a warrant has been issued constitutes a felony under Section 1071. The only reported decision to consider the issue held that because the statutory term "offense" includes both felonies and misdemeanors, 18 U.S.C. § 1, the harboring of a convicted misdemeanor constitutes a felony under 18 U.S.C. § 1071. See *United States v. Faul*, 748 F.2d 1204, 1223 (8th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985). However, the court in *Faul* emphasized that its ruling is "limited to the situation where the offense

---

October 1, 1988

for which the fugitive is sought is directly related to the crime—misdemeanor or felony—for which the fugitive was convicted, as is the case here." *Id.* at 1223 n. 12.

#### 9-70.700 18 U.S.C. § 1072—ELEMENTS OF OFFENSE

Under 18 U.S.C. § 1072, the government must establish that the defendant: (i) willfully; (ii) harbored or concealed; (iii) a prisoner after his escape from "the custody of the Attorney General" or from a "Federal penal or correctional institution."

#### 9-70.710 "Willful" State of Mind

This element of a Section 1072 violation has been read to require that the defendant have knowledge that the person whom he/she aided was an escapee. *E.g.*, *United States v. Eaglin*, 571 F.2d 1069, 1074 (9th Cir. 1977); *United States v. Deaton*, 468 F.2d 541, 543 (5th Cir.1972), *cert. denied*, 410 U.S. 934 (1973). However, it is not necessary to prove that the defendant knew that the escapee had escaped from federal custody. *Eaglin*, *supra*, at 1074 n. 4. See *United States v. Foola*, 420 U.S. 671, 684-85 (1975); *United States v. Lentz*, 524 F.2d 69, 71 (5th Cir.1975).

#### 9-70.720 Harboring or Concealing

These terms have the same meaning as in 18 U.S.C. § 1071. See USAM 9-70.220, *supra*. In *United States v. Kutas*, 542 F.2d 527, 528 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977), the court upheld a Section 1072 conviction in which the words "harbor" and "conceal" were defined to "refer to any physical act of providing assistance, including food, shelter, and other assistance to aid the prisoner in avoiding detection and apprehension."

#### 9-70.730 Custody of the Attorney General

A number of cases have considered the question of whether a federal prisoner who is incarcerated in a state or local institution is in the "custody of the Attorney General" for purposes of 18 U.S.C. § 1072. The courts have unanimously held that a federal prisoner who escapes from a non-federal facility is in the custody of the Attorney General for purposes of the harboring statute. In *United States v. Howard*, 545 F.2d 1044 (6th Cir. 1976), the prisoner had been incarcerated in a local county jail by the U.S. Marshal. The court held that regardless of where the prisoner was confined, commitment to the U.S. Marshal can only be construed as a commitment to the Attorney General. Otherwise, the court reasoned, the words "from the custody of the Attorney General or" in Section 1072 would be entirely without meaning. *Id.* at 1045.

Likewise in *United States v. Hobson*, 519 F.2d 765 (9th Cir.), cert. denied, 423 U.S. 931 (1975), the prisoner, who had been convicted of a federal offense, escaped from a state prison. The state facility had been designated by the Attorney General as the prisoner's place of confinement, pursuant to 18 U.S.C. § 4082(b), which authorizes the Attorney General to designate as a place of confinement any appropriate facility "whether maintained by the Federal Government or otherwise." The court noted that the term "custody" in Section 1072 is not limited to actual physical custody, but denotes a type of legal custody which remains in the Attorney General even though the prisoner is assigned to an institution over which the Department of Justice has no control. Accord, *Frazier v. United States*, 339 F.2d 745, 746 (1964); *Tucker v. United States*, 251 F.2d 794 (9th Cir.1958).

Finally, in *Eaglin, supra*, the prisoner had failed to return from a four-hour social pass granted by the Oregon State Penitentiary where he was confined, pursuant to a contract with the Federal Government. The court agreed that an escape from a state institution is an escape from the custody of the Attorney General if the prisoner had been confined there under the authority of the Attorney General, and held that the custody of the Attorney General continues despite the unsupervised nature of the temporary release from confinement. *Eaglin, supra*, at 1073.