

of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence. Under this policy, the government's disclosure will exceed its constitutional obligations. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court. By doing so, prosecutors will ensure confidence in fair trials and verdicts. Prosecutors are also encouraged to undertake periodic training concerning the government's disclosure obligation and the emerging case law surrounding that obligation.

USAM § 9-5.100

POLICY REGARDING THE DISCLOSURE TO PROSECUTORS OF POTENTIAL IMPEACHMENT INFORMATION CONCERNING LAW ENFORCEMENT AGENCY WITNESSES ("GIGLIO POLICY")

On December 9, 1996, the Attorney General issued a Policy regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"). It applies to all Department of Justice Investigative agencies that are named in the Preface, below. On October 19, 2006, the Attorney General amended this policy to conform to the Department's new policy regarding disclosure of exculpatory and impeachment information, *see USAM § 9-5.001*.

The Secretary of the Treasury has issued the same policy for all Treasury investigative agencies.

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")

Preface: The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility ("the investigative agencies"). It addresses their disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purposes of this policy are to ensure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), and to ensure that trials are fair, while protecting the legitimate privacy rights of Government employees. NOTE: This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *United States v. Caceres*, 440 U.S. 741 (1979).

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. It also includes information that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior

to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees

- 1. Obligation to Disclose Potential Impeachment Information.** It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Nevertheless, in some cases, a prosecutor may also decide to request potential impeachment information from the investigative agency. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.
- 2. Agency Officials.** Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.
- 3. Requesting Officials.** Each of the Department of Justice prosecuting offices shall designate an appropriate senior official(s) to serve as the point(s) of contact concerning potential impeachment information ("the Requesting Official"). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court caselaw, circuit caselaw, and district court rulings and practice governing the definition and disclosure of impeachment information.
- 4. Request to Agency Officials.** When a prosecutor determines that it is necessary to request potential impeachment information from an Agency Official(s) relating to an agency employee identified as a potential witness or affiant ("the employee") in a specific criminal case or investigation, the prosecutor shall notify the appropriate Requesting Official. Upon receiving such notification, the Requesting Official may request potential impeachment information relating to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General ("OIG") and the Department of Justice Office of Professional Responsibility ("DOJ-OPR").

5. **Agency Review and Disclosure.** Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the OIG and DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee. The employing Agency Official(s), the OIG and DOJ-OPR shall advise the Requesting Official of: (a) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during an administrative inquiry; (b) any past or pending criminal charge brought against the employee; and (c) any credible allegation of misconduct that reflects upon the truthfulness or possible bias of the employee that is the subject of a pending investigation.
6. **Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration.** Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration. NOTE: With regard to allegations disclosed to a prosecuting office under this paragraph, the head of the prosecuting office shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraph 13 below. At the conclusion of the case, if such information was not disclosed to the defense, the head of the prosecuting office shall ensure that all materials received from an investigative agency regarding the allegation, including any and all copies, are expeditiously returned to the investigative agency. This does not prohibit a prosecuting office from keeping motions, responses, legal memoranda, court orders, and internal office memoranda or correspondence, in the relevant criminal case file(s).
7. **Prosecuting Office Records.** Department of Justice prosecuting offices shall not retain in any system of records that can be accessed by the identity of an employee, potential impeachment information that was provided by an agency, except where the information was disclosed to defense counsel. This policy does not prohibit Department of Justice prosecuting offices from keeping motions and Court orders and supporting documents in the relevant criminal case file.

8. **Copies to Agencies.** When potential impeachment information received from Agency Officials has been disclosed to a Court or defense counsel, the information disclosed, along with any judicial rulings and related pleadings, shall be provided to the Agency Official that provided the information and to the employing Agency Official for retention in the employing agency's system of records. The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court but not to the defense in a manner that allows expeditious access upon the request of the Requesting Official.
9. **Record Retention.** When potential impeachment information received from Agency Officials has been disclosed to defense counsel, the information disclosed, along with any judicial rulings and related pleadings, may be retained by the Requesting Official, together with any related correspondence or memoranda, in a system of records that can be accessed by the identity of the employee.
10. **Updating Records.** Before any federal prosecutor uses or relies upon information included in the prosecuting office's system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information and shall add any additional information provided to the prosecuting office's system of records.
11. **Continuing Duty to Disclose.** Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the agency's duty to disclose shall cease.
12. **Removal of Records Upon Transfer, Reassignment, or Retirement of Employee.** Upon being notified that an employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the employee could be an affiant or witness, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee.
13. **Prosecuting Office Plans to Implement Policy.** Within 120 days of the effective date of this policy, each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the agency about the disclosure of potential impeachment information to the Court or defense counsel, including allowing the agency to express its views on whether certain information should be disclosed to the Court or defense counsel; (b) preserving the

security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an *ex parte, in camera* review and decision by the Court regarding whether potential impeachment information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; and, (e) allowing the relevant agencies the timely opportunity to fully express their views.

14. **Investigative Agency Plans to Implement Policy.** Within 120 days of the effective date of this policy, each of the investigative agencies shall develop a plan to effectuate this policy.

9-6.000

RELEASE AND DETENTION

PENDING JUDICIAL PROCEEDINGS --

18 U.S.C. §§ 3141 ET SEQ.

9-6.100 Introduction

9-6.200 Pretrial Disclosure of Witness Identity

9-6.100 Introduction

The release and detention of defendants pending judicial proceedings is governed by the Due Process Clause of the Fifth Amendment, the Excessive Bail Clause of the Eighth Amendment, and the Bail Reform Act of 1984. The Bail Reform Act of 1984 provides procedures to detain a dangerous offender, as well as an offender who is likely to flee pending trial or appeal. *See United States v. Salerno*, 481 U.S. 739 (1987).

For a discussion of the provisions of the Bail Reform Act of 1984 (18 U.S.C §§ 3141 *et seq.*) and related case law see the Criminal Resource Manual at 26.

9-6.200 Pretrial Disclosure of Witness Identity

Insuring the safety and cooperativeness of prospective witnesses, and safeguarding the judicial process from undue influence, are among the highest priorities of federal prosecutors. *See* the Victim and Witness Protection Act of 1982, P.L. 97-291, § 2, 96 Stat. 1248-9. The *Attorney General Guidelines for Victim Witness Assistance 2000* provide that prosecutors should keep in mind that the names, addresses, and phone numbers of victims and witnesses are private and should reveal such information to the defense only pursuant to Federal Rule of Procedure 16, any local rules, customs or court orders, or special prosecutorial need.

Therefore, it is the Department's position that pretrial disclosure of a witness' identity or statement should not be made if there is, in the judgment of the prosecutor, any reason to believe that such disclosure would endanger the safety of the witness or any other person, or lead to efforts to obstruct justice. Factors relevant to the possibility of witness intimidation or obstruction of justice include, but are not limited to, the types of charges pending against the defendant, any record or information about the propensity of the defendant or the defendant's confederates to engage in witness intimidation or obstruction of justice, and any threats directed by the defendant or others against the witness. In addition, pretrial disclosure of a witness' identity or statements should not ordinarily be made against the known wishes of any witness.

However, pretrial disclosure of the identity or statements of a government witness may often promote the prompt and just resolution of the case. Such disclosure may enhance the prospects that the defendant will plead guilty or lead to the initiation of plea negotiations; in the event the defendant goes to trial, such disclosure may expedite the conduct of the trial by eliminating the need for a continuance.

Accordingly, with respect to prosecutions in federal court, a prosecutor should give careful consideration, as to each prospective witness, whether absent any indication of potential adverse consequences of the kind mentioned above reason exists to disclose such witness' identity prior to trial. It should be borne in mind that a decision by the prosecutor to disclose pretrial the identity of potential government witnesses may be conditioned upon the defendant's making reciprocal disclosure as to the identity of the potential defense witnesses. Similarly, when appropriate in light of the facts and circumstances of the case, a prosecutor may determine to disclose only the identity, but not the current address or whereabouts of a witness.

Prosecutors should be aware that they have the option of applying for a protective order if discovery of the private information may create a risk of harm to the victim or witness and the prosecutor may seek a temporary restraining order under 18 U.S.C. § 1514 prohibiting harassment of a victim or witness.

In sum, whether or not to disclose the identity of a witness prior to trial is committed to the discretion of the federal prosecutor, and that discretion should be exercised on a case-by-case, and witness-by-witness basis. Considerations of witness safety and willingness to cooperate, and the integrity of the judicial process are paramount.

ELECTRONIC SURVEILLANCE

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9-7.010 Introduction

This chapter contains Department of Justice policy on the use of electronic surveillance. The Federal electronic surveillance statutes (commonly referred to collectively as "Title III") are codified at 18 U.S.C. § 2510, *et seq.* Because of the well-recognized intrusive nature of many types of electronic surveillance, especially wiretaps and "bugs," and the Fourth Amendment implications of the government's use of these devices in the course of its investigations, the relevant statutes (and related Department of Justice guidelines) provide restrictions on the use of most electronic surveillance, including the requirement that a high-level Department official specifically approve the use of many of these types of electronic surveillance prior to an Assistant United States Attorney obtaining a court order authorizing interception.

Chapter 7 contains the specific mechanisms, including applicable approval requirements, for the use of wiretaps, "bugs" (oral interception devices), roving taps, video surveillance, and the consensual monitoring of wire or oral communications, as well as emergency interception procedures and restrictions on the disclosure and evidentiary use of information obtained through electronic surveillance. Additional information concerning use of the various types of electronic surveillance is also set forth in the Criminal Resource Manual at 27.

Attorneys in the Electronic Surveillance Unit of the Office of Enforcement Operations, Criminal Division, are available to provide assistance concerning both the interpretation of Title III and the review process necessitated thereunder. Interceptions conducted pursuant to the Foreign Intelligence Surveillance Act of 1978, which is codified at 50 U.S.C. § 1801, *et seq.*, are specifically excluded from the coverage of Title III. *See* 18 U.S.C. § 2511(2)(a)(ii), (2)(e), and (2)(f).

9-7.100 Authorization of Applications for Wire, Oral, and Electronic Interception Orders -- Overview and History of Legislation

To understand the core concepts of the legislative scheme of Title III, one must appreciate the history of this legislation and the goals of Congress in enacting this comprehensive law. By enacting Title III in 1968, Congress prohibited private citizens from using certain electronic surveillance techniques. Congress exempted law enforcement from this prohibition, but required compliance with explicit directives that controlled the circumstances under which law enforcement's use of electronic surveillance would be permitted. Many of the restrictions upon the use of electronic surveillance by law enforcement agents were enacted in recognition of the strictures against unlawful searches and seizures contained in the Fourth Amendment to the United States Constitution. *See, e.g., Katz v. United States*, 389 U.S. 347 (1967). Still, several of Title III's provisions are more restrictive than what is required by the Fourth Amendment. At the same time, Congress preempted State law in this area, and mandated that States that sought to enact electronic surveillance laws would have to make their laws at least as restrictive as the Federal law.

One of Title III's most restrictive provisions is the requirement that Federal investigative agencies submit requests for the use of certain types of electronic surveillance (primarily the non-consensual interception of wire and oral communications) to the Department of Justice for review and approval before applications for such interception may be submitted to a court of competent jurisdiction for an order authorizing the interception. Specifically, in 18 U.S.C. § 2516(1), Title III explicitly assigns such review and approval powers to the Attorney General, but allows the Attorney General to delegate this review and approval authority to a limited number of high-level Justice Department officials, including Deputy Assistant Attorneys General for the Criminal Division ("DAAGs"). The DAAGs review and approve or deny proposed applications to conduct "wiretaps" (to intercept wire [telephone] communications, 18 U.S.C. § 2510(1)) and to install and monitor "bugs" (the use of microphones to intercept oral [face-to-face] communications, 18 U.S.C. § 2510(2)). It should be noted that only those crimes enumerated in 18 U.S.C. § 2516(1) may be investigated through the interception of wire or oral communications. On those rare occasions when the government seeks to intercept oral or wire communications within premises or over a facility that cannot be identified with any particularity, and a "roving" interception of wire or oral communications is therefore being requested, the Assistant Attorney General or the Acting Assistant Attorney General for the Criminal Division must be the one to review and approve or deny the application. (See the roving interception provision at 18 U.S.C. § 2518(11), discussed at USAM 9-7.111.)

In 1986, Congress amended Title III by enacting the Electronic Communications Privacy Act of 1986. Specifically, Congress added a new category of covered communications, i.e., "electronic communications," which would now be protected, and whose interception would be regulated, by Title III. Electronic communications are those types of non-oral or wire communications that occur, *inter alia*, over computers, digital-display pagers, and facsimile ("fax") machines. *See* 18 U.S.C. § 2510(12).

Although the 1986 amendments permit any government attorney to authorize the making of an application to a Federal court to intercept electronic communications to investigate any Federal felony (18 U.S.C. § 2516(3)), the Department of Justice and Congress agreed informally at the time of ECPA's enactment that, for a three-year period, Department approval would nonetheless be required before applications could be submitted to a court to conduct interceptions of electronic communications. After that period, the Department rescinded the prior approval requirement for the interception of electronic communications over digital-display paging devices, but continued the need for Department approval prior to application to the court for the interception of electronic communications over any other device, such as computers and fax machines. Applications to the court for authorization to intercept electronic communications over digital-display pagers--which are the most commonly targeted type of electronic communications--may be made based solely upon the authorization of a United States Attorney. *See* 18 U.S.C. § 2516(3).

Because there are severe penalties for the improper and/or unlawful use and disclosure of electronic surveillance evidence, including criminal, civil, and administrative sanctions, as well as the suppression of evidence, it is essential that Federal prosecutors and law enforcement agents clearly understand when Departmental review and approval are required, and what such a process entails. *See* 18 U.S.C. §§ 2511, 2515, 2518(10), and 2520.

See the Criminal Resource Manual at 31, for citations to relevant legislation.

9-7.110 Format for the Authorization Request

When Justice Department review and approval of a proposed application for electronic surveillance is required, the Electronic Surveillance Unit of the Criminal Division's Office of Enforcement Operations will conduct the initial review of the necessary pleadings, which include:

- A. The affidavit of an "investigative or law enforcement officer" of the United States who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in 18 U.S.C. § 2516(1) or (3) (which, for any application involving the interception of electronic communications, includes any Federal felony offense), with such affidavit setting forth the facts of the investigation that establish the basis for those probable cause (and other) statements required by Title III to be included in the application;
- B. The application by any United States Attorney or his/her Assistant, or any other attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in 18 U.S.C. § 2516(1) or (3) that provides the basis for the court's jurisdiction to sign an order authorizing the requested interception of wire, oral, and/or electronic communications; and
- C. A set of orders to be signed by the court authorizing the government to intercept, or approving the interception of, the wire, oral, and/or electronic communications that are the subject of the application, including appropriate redacted orders to be served on any relevant providers of "electronic communication service" (as defined in 18 U.S.C. § 2510(15)).

9-7.111 Roving Interception

Pursuant to 18 U.S.C. § 2518(11)(a) and (b), the government may obtain authorization to intercept wire, oral, and electronic communications of specifically named subjects without specifying with particularity the premises within, or the facilities over which, the communications will be intercepted. (Such authorization is commonly referred to as "roving" authorization.) As to the interception of oral communications, the government may seek authorization without specifying the location(s) of the interception when it can be shown that it is not practical to do so. *See United States v. Bianco*, 998 F.2d 1112 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1644 (1994); *United States v. Orena*, 883 F. Supp. 849 (E.D.N.Y. 1995). An application for the interception of wire and electronic communications of specifically named subjects may be made without specifying the facility or facilities over which the communications will be intercepted when it can be shown that the subject or subjects of the interception have demonstrated a purpose to thwart interception by changing facilities. *See United States v. Gaytan*, 74 F.3d 545 (5th Cir. 1996); *United States v. Petti*, 973 F.2d 1441 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 1859 (1993); *United States v. Villegas*, 1993 WL 535013 (S.D.N.Y. December 22, 1993).

When the government seeks authorization for roving interception, the Department's authorization must be made by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an Acting Assistant Attorney General. *See* 18 U.S.C. § 2518(11)(a)(i) and (b)(i).

9-7.112 Emergency Interception

Title III contains a provision which allows for the warrantless, emergency interception of wire, oral, and/or electronic communications. Specifically, under 18 U.S.C. § 2518(7), the Attorney General (AG), the Deputy Attorney General (DAG), or the Associate Attorney General (AssocAG) may specially designate a law enforcement or investigative officer to determine whether an emergency situation exists that requires the interception of wire, oral, and/or electronic communications before a court order authorizing such interception can, with due diligence, be obtained. As defined by 18 U.S.C. § 2518(7), an emergency situation involves either: (1) immediate danger of death or serious bodily injury to any person; (2) conspiratorial activities threatening the national security interest; or (3) conspiratorial activities characteristic of organized crime.

The only situations which will likely constitute an emergency are those involving an imminent threat to life, i.e., a kidnapping or hostage taking. *See United States v. Crouch*, 666 F. Supp. 1414 (N.D. Cal. 1987)(wiretap evidence suppressed because there was no imminent threat of death or serious injury); *Nabozny v. Marshall*, 781 F.2d 83 (6th Cir.)(kidnapping and extortion scenario constituted an emergency situation), *cert. denied*, 476 U.S. 1161 (1986). The emergency provision also requires that grounds must exist under which an order could be entered (viz., probable cause, necessity, specificity of target location/facility) to authorize the interception. Once the AG, the DAG, or the AssocAG authorizes the law enforcement agency to proceed with the emergency Title III, the government then has forty-eight (48) hours, from the time the authorization was granted, to obtain a court order approving the emergency interception. 18 U.S.C. § 2518(7). The affidavit supporting the application for the order must contain only those facts known to the AG, the DAG, or the AssocAG at the time his or her approval was given, and must be accompanied by a written verification from the requesting agency noting the date and time of the authorization. Failure to obtain the court order within the forty-eight-hour period will render any interceptions obtained during the emergency illegal.

Prior to the agency's contact with the AG, the DAG, or the AssocAG, oral approval to make the request must first be obtained from the Assistant Attorney General (AAG) or a Deputy Assistant Attorney General (DAAG) of the Criminal Division. This approval is facilitated by the Office of Enforcement Operation's Electronic Surveillance Unit, which is the initial contact for the requesting United States Attorney's Office and the requesting agency. Once the Electronic Surveillance Unit attorney briefs and obtains oral approval from the AAG or the DAAG, the attorney notifies the agency representative and the Assistant United States Attorney that the Criminal Division recommends that the emergency authorization proceed. The agency then contacts the AG, the DAG, or the AssocAG and seeks permission to proceed with the emergency Title III.

9-7.200 Video Surveillance -- Closed Circuit Television -- Department of Justice Approval Required When There Is A Reasonable Expectation of Privacy

Pursuant to Department of Justice Order No. 985-82, dated August 6, 1982, certain officials of the Criminal Division have been delegated authority to review requests to use video surveillance for law enforcement purposes when there is a constitutionally protected expectation of privacy requiring judicial authorization. This authority was delegated to the Assistant Attorney General, any Deputy Assistant Attorney General, and the Director and Associate Directors of the Office of Enforcement Operations.

When court authorization for video surveillance is deemed necessary, it should be obtained by way of an application and order predicated on Fed. R. Crim. P. 41(b) and the All Writs Act (28 U.S.C. § 1651). The application and order should be based on an affidavit that establishes probable cause to believe that evidence of a Federal crime will be obtained by the surveillance. In addition, the affidavit should comply with certain provisions of the Federal electronic surveillance statutes. See the Criminal Resource Manual at 32 for additional discussion of video surveillance warrants.

Department policy requires that the video surveillance application and order be filed separately from, and not incorporated in, an application and order for electronic surveillance pursuant to 18 U.S.C. § 2518. When appropriate, the same affidavit may be submitted in support of both applications/orders.

9-7.250 Use and Unsealing of Title III Affidavits

When the government terminates a Title III electronic surveillance investigation, it must maintain under seal all of the Title III applications and orders (including affidavits and accompanying material) that were filed in support of the electronic surveillance. *See* 18 U.S.C. § 2518(8)(b); *In re Grand Jury Proceedings*, 841 F.2d 1048, 1053 n.9 (11th Cir. 1988) (although 18 U.S.C. § 2518(8)(b) refers only to "applications" and "orders," "applications" is construed to include affidavits and any other related documentation).

The purpose of this sealing requirement is to ensure the integrity of the Title III materials and to protect the privacy rights of those individuals implicated in the Title III investigation. *See S. Rep. No. 1097, reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2193-2194.* The applications may be unsealed only pursuant to a court order and only upon a showing of good cause under 18 U.S.C. § 2518(8)(b) or in the interest of justice under 18 U.S.C. § 2518(8)(d).

Thus, the government attorney should not attach Title III affidavits or other application material as exhibits to any search warrant affidavit, complaint, indictment, or trial brief. The government attorney may, nevertheless, use information from these materials or the Title III interceptions in documents such as search warrant affidavits, complaints, indictments, and trial briefs. *See 18 U.S.C. § 2517(8)(a); 18 U.S.C. § 2517(1) and (2); and S. Rep. No. 1097 at 2188.* In using this information, however, the government attorney must use care not to disclose publicly information from the Title III affidavits or interceptions that would either abridge the privacy interests of persons not charged with any crime or jeopardize ongoing investigations.

When Title III materials are sought by defense counsel or other persons and the privacy interests of uncharged persons are implicated by the contents of those materials, the government attorney should seek a protective order pursuant to Rule 16(d)(1), Fed. R. Crim. P., that will forbid public disclosure of the contents of the materials. Likewise, a Rule 16 protective order should be sought to deny or defer discovery of those portions of the affidavits and applications that reveal ongoing investigations when disclosure would jeopardize the success of any such investigation.

For discussion about disclosure of intercepted communications in civil litigation see the Criminal Resource Manual at 33-34.

9-7.301 Consensual Monitoring -- General Use

Section 2511(2)(c) of Title 18 provides that "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception...." *See United States v. White*, 401 U.S. 745 (1971). As such, consensual interceptions need not be made under Title III procedures, interception orders under § 2518 are not available, and should not be sought in cases falling within § 2511(2)(c).

The Fourth Amendment to the U.S. Constitution, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986 (18 U.S.C. § 2510, *et seq.*), and the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801, *et seq.*) permit government agents, acting with the consent of a party to a communication, to engage in warrantless interceptions of telephone communications, as well as oral and electronic communications. *White, supra; United States v. Caceres*, 440 U.S. 741 (1979). Similarly, Title III, by its definition of oral communications, permits Federal agents to engage in warrantless interceptions of oral communications when the communicating parties have no justifiable expectation of privacy. 18 U.S.C. § 2510(2). (No similar exception is contained in the definition of wire communications and, therefore, the nonconsensual interception of wire communications violates 18 U.S.C. § 2511 regardless of the communicating parties' expectation of privacy, unless the interceptor complies with the court authorization procedures of Title III or with the provisions of the Foreign Intelligence Surveillance Act of 1978.) Since such interception techniques are particularly effective and reliable, the Department of Justice encourages their use by Federal agents for the purpose of gathering evidence of violations of Federal law, protecting the safety of informants and undercover law enforcement agents, or fulfilling other compelling needs. While these techniques are lawful and helpful, their use is frequently sensitive, so they must remain the subject of careful self-regulation by the agencies employing them.

The Department developed guidelines for the investigative use of consensual monitoring, which were promulgated most recently by the Attorney General on May 30, 2002. The guidelines do not apply to consensual monitoring of telephone conversations or radio transmissions. It was left to the enforcement agencies to develop adequate internal guidelines for the use of those aspects of this investigative tool. The following guidelines cover the investigative use of devices which intercept and record certain consensual verbal conversations where a body transmitter or recorder or a fixed location transmitter or recorder is used during a face-to-face conversation. In certain specified sensitive situations, under the regulations, the

agencies must obtain advance written authorization from the Department of Justice. The guidelines on consensual monitoring set forth in the Attorney General's Memorandum of May 30, 2002, on that subject are contained in USAM 9-7.302.

9-7.302 Consensual Monitoring -- "Procedures for Lawful, Warrantless Monitoring of Verbal Communications"

The following text was taken from a memorandum on "Procedures for Lawful, Warrantless Monitoring of Verbal Communications" issued by the Attorney General on May 30, 2002:

I. DEFINITIONS

As used in this Memorandum, the term "agency" means all of the Executive Branch departments and agencies, and specifically includes United States Attorneys' Offices which utilize their own investigators, and the Offices of the Inspectors General.

As used in this Memorandum, the terms "interception" and "monitoring" mean the aural acquisition of oral communications by use of an electronic, mechanical, or other device. *Cf.* 18 U.S.C. §2510(4).

As used in this Memorandum, the term "public official" means an official of any public entity of government, including special districts, as well as all federal, state, county, and municipal governmental units.

II. NEED FOR WRITTEN AUTHORIZATION

A. Investigations Where Written Department of Justice Approval is Required. A request for authorization to monitor an oral communication without the consent of all parties to the communication must be approved in writing by the Director or Associate Directors of the Office of Enforcement Operations, Criminal Division, U.S. Department of Justice, when it is known that:

- (1) the monitoring relates to an investigation of a member of Congress, a federal judge, a member of the Executive Branch at Executive Level IV or above, or a person who has served in such capacity within the previous two years;
- (2) the monitoring relates to an investigation of the Governor, Lieutenant Governor, or Attorney General of any State or Territory, or a judge or justice of the highest court of any State or Territory, and the offense investigated is one involving bribery, conflict of interest, or extortion relating to the performance of his or her official duties;
- (3) any party to the communication is a member of the diplomatic corps of a foreign country;
- (4) any party to the communication is or has been a member of the Witness Security Program and that fact is known to the agency involved or its officers;
- (5) the consenting or nonconsenting person is in the custody of the Bureau of Prisons or the United States Marshals Service; or
- (6) the Attorney General, Deputy Attorney General, Associate Attorney General, any Assistant Attorney General, or the United States Attorney in the district where an investigation is being conducted has requested the investigating agency to obtain prior written consent before conducting consensual monitoring in a specific investigation.

In all other cases, approval of consensual monitoring will be in accordance with the procedures set forth in part V. below.

B. Monitoring Not Within Scope of Memorandum. Even if the interception falls within one of the six categories above, the procedures and rules in this Memorandum do not apply to:

- (1) extraterritorial interceptions;
- (2) foreign intelligence interceptions, including interceptions pursuant to the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. §1801, *et seq.*);

- (3) interceptions pursuant to the court-authorization procedures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (18 U.S.C. §2510, *et seq.*);
- (4) routine Bureau of Prisons monitoring of oral communications that are not attended by a justifiable expectation of privacy;
- (5) interceptions of radio communications; and
- (6) interceptions of telephone communications.

III. AUTHORIZATION PROCEDURES AND RULES

A. Required Information. The following information must be set forth in any request to monitor an oral communication pursuant to part II.A.:

- (1) Reasons for the Monitoring. The request must contain a reasonably detailed statement of the background and need for the monitoring.
- (2) Offense. If the monitoring is for investigative purposes, the request must include a citation to the principal criminal statute involved.
- (3) Danger. If the monitoring is intended to provide protection to the consenting party, the request must explain the nature of the danger to the consenting party.
- (4) Location of Devices. The request must state where the monitoring device will be hidden: on the person, in personal effects, or in a fixed location.
- (5) Location of Monitoring. The request must specify the location and primary judicial district where the monitoring will take place. A monitoring authorization is not restricted to the original district. However, if the location of monitoring changes, notice should be promptly given to the approving official. The record maintained on the request should reflect the location change.
- (6) Time. The request must state the length of time needed for the monitoring. Initially, an authorization may be granted for up to 90 days from the day the monitoring is scheduled to begin. If there is the need for continued monitoring, extensions for additional periods of up to 90 days may be granted. In special cases (e.g., "fencing" operations run by law enforcement agents or long-term investigations that are closely supervised by the Department's Criminal Division), authorization for up to 180 days may be granted with similar extensions.
- (7) Names. The request must give the names of persons, if known, whose communications the department or agency expects to monitor and the relation of such persons to the matter under investigation or to the need for the monitoring.
- (8) Attorney Advice. The request must state that the facts of the surveillance have been discussed with the United States Attorney, an Assistant United States Attorney, or the previously designated Department of Justice attorney responsible for a particular investigation, and that such attorney advises that the use of consensual monitoring is appropriate under this Memorandum (including the date of such advice). The attorney must also advise that the use of consensual monitoring under the facts of the investigation does not raise the issue of entrapment. Such statements may be made orally. If the attorneys described above cannot provide the advice for reasons unrelated to the legality or propriety of the consensual monitoring, the advice must be sought and obtained from an attorney of the Criminal Division of the Department of Justice designated by the Assistant Attorney General in charge of that Division. Before providing such advice, a designated Criminal Division attorney shall notify the appropriate United States Attorney or other attorney who would otherwise be authorized to provide the required advice under this paragraph.
- (9) Renewals. A request for renewal authority to monitor oral communications must contain all the information required for an initial request. The renewal request must also refer to all previous authorizations and explain why an additional authorization is needed, as well as provide an updated statement that the attorney advice required under paragraph (8) has been obtained in connection with the proposed renewal.

B. Oral Requests. Unless a request is of an emergency nature, it must be in written form and contain all of the information set forth above. Emergency requests in cases in which written Department of Justice approval is required may be made by telephone to the Director or an Associate Director of the Criminal Division's Office of Enforcement Operations, or to the Assistant Attorney General, the Acting Assistant Attorney General, or a Deputy Assistant Attorney General for the Criminal Division, and should later be reduced to writing and submitted to the appropriate headquarters official as soon as practicable after authorization has been obtained. An appropriate headquarters filing system is to be maintained for consensual monitoring requests that have been received and approved in this manner. Oral requests must include all the information required for written requests as set forth above.

C. Authorization. Authority to engage in consensual monitoring in situations set forth in part II.A. of this Memorandum may be given by the Attorney General, the Deputy Attorney General, the Associate Attorney General, the Assistant Attorney General or Acting Assistant Attorney General in charge of the Criminal Division, a Deputy Assistant Attorney General in the Criminal Division, or the Director or an Associate Director of the Criminal Division's Office of Enforcement Operations. Requests for authorization will normally be submitted by the headquarters of the department or agency requesting the consensual monitoring to the Office of Enforcement Operations for review.

D. Emergency Monitoring. If an emergency situation requires consensual monitoring at a time when one of the individuals identified in part III.B. above cannot be reached, the authorization may be given by the head of the responsible department or agency, or his or her designee. Such department or agency must then notify the Office of Enforcement Operations as soon as practicable after the emergency monitoring is authorized, but not later than three working days after the emergency authorization.

The notification shall explain the emergency and shall contain all other items required for a nonemergency request for authorization set forth in part III.A. above.

IV. SPECIAL LIMITATIONS

When a communicating party consents to the monitoring of his or her oral communications, the monitoring device may be concealed on his or her person, in personal effects, or in a fixed location. Each department and agency engaging in such consensual monitoring must ensure that the consenting party will be present at all times when the device is operating. In addition, each department and agency must ensure: (1) that no agent or person cooperating with the department or agency trespasses while installing a device in a fixed location, unless that agent or person is acting pursuant to a court order that authorizes the entry and/or trespass, and (2) that as long as the device is installed in the fixed location, the premises remain under the control of the government or of the consenting party. *See United States v. Yonn*, 702 F.2d 1341, 1347 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983) (rejecting the First Circuit's holding in *United States v. Padilla*, 520 F.2d 526 (1st Cir. 1975), and approving use of fixed monitoring devices that are activated only when the consenting party is present). *But see United States v. Shabazz*, 883 F.Supp. 422 (D.Minn. 1995).

Outside the scope of this Memorandum are interceptions of oral, nonwire communications when no party to the communication has consented. To be lawful, such interceptions generally may take place only when no party to the communication has a justifiable expectation of privacy -- for example, burglars, while committing a burglary, have no justifiable expectation of privacy. *Cf. United States v. Pui Kan Lam*, 483 F.2d 1202 (2d. Cir. 1973), *cert. denied*, 415 U.S. 984 (1974) -- or when authorization to intercept such communications has been obtained pursuant to Title III or the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2510, et seq.) or the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801, et seq.). Each department or agency must ensure that no communication of any party who has a justifiable expectation of privacy is intercepted unless proper authorization has been obtained.

V. PROCEDURES FOR CONSENSUAL MONITORING WHERE NO WRITTEN APPROVAL IS REQUIRED

Prior to receiving approval for consensual monitoring from the head of the department or agency or his or her designee, a representative of the department or agency must obtain advice that the consensual monitoring is both legal and appropriate from the United States Attorney, an Assistant United States Attorney, or the Department of Justice attorney responsible for a particular investigation. The advice may be obtained orally from the attorney. If the attorneys described above cannot provide the advice for reasons unrelated to the legality or propriety of the consensual monitoring, the advice must be sought and obtained from an attorney of the Criminal Division of the Department of Justice designated by the Assistant Attorney General in charge of that Division. Before providing such advice, a designated Criminal Division attorney shall notify the appropriate United States Attorney or other attorney who would otherwise be authorized to provide the required advice under this paragraph.

Even in cases in which no written authorization is required because they do not involve the sensitive circumstances discussed above, each agency must continue to maintain internal procedures for supervising, monitoring, and approving all consensual monitoring of oral communications. Approval for consensual monitoring must come from the head of the agency or his or her designee. Any designee should be a high-ranking supervisory official at headquarters level, but in the case of the FBI may be a Special Agent in Charge or Assistant Special Agent in Charge.

Similarly, each department or agency shall establish procedures for emergency authorizations in cases involving non-sensitive circumstances similar to those that apply with regard to cases that involve the sensitive circumstances described in part III.D. above, including obtaining follow-up oral advice of an appropriate attorney as set forth above concerning the legality and propriety of the consensual monitoring.

Records are to be maintained by the involved departments or agencies for each consensual monitoring that they have conducted. These records are to include the information set forth in part III.A. above.

VI. GENERAL LIMITATIONS

This Memorandum relates solely to the subject of consensual monitoring of oral communications except where otherwise indicated. This Memorandum does not alter or supersede any current policies or directives relating to the subject of obtaining necessary approval for engaging in nonconsensual electronic surveillance or any other form of nonconsensual interception.

9-7.400 Defendant Motion or Discovery Request for Disclosure of Defendant Overhearings and Attorney Overhearings

See the Criminal Resource Manual at 35, for a discussion of the law related to disclosure of defendant overhearings and attorney overhearings.

9-7.500 Prior Consultation with the Computer Crime and Intellectual Property Section of the Criminal Division (CCIPS) for Applications for Pen Register and Trap and Trace Orders Capable of Collecting Uniform Resource Locators (URLs)

In 2001, the USA PATRIOT Act (P.L. 107-56) amended the Pen Register and Trap and Trace Statute (pen/trap statute), 18 U.S.C. § 3121 et seq., to clarify that courts may issue pen/trap orders to collect the non-content information associated with Internet communications. One issue that has been raised in this regard is whether a pen register order may be used to collect (URLs), the terms that a person uses to request information on the World Wide Web (e.g., www.cybercrime.gov/PatriotAct.htm). Because of privacy and other concerns relating to the use of pen register orders in this fashion, use of pen registers to collect all or part of a URL is prohibited without prior consultation with CCIPS. Among the factors that should be

considered in deciding whether to apply for such a pen register are (1) the investigative need for the pen register order, (2) the litigation risk in the individual case, (3) how much of any given URL would be obtained, and (4) the impact of the order on the Department's policy goals.

Consultation with CCIPS can help resolve these issues, as well as ensuring that the contemplated use of a pen register would be consistent with the Deputy Attorney General's May 24, 2002 Memorandum on "Avoiding Collection and Investigative Use of 'Content' in the Operation of Pen Registers and Trap and Trace Devices."

This policy does not apply to applications for pen register orders that would merely authorize collection of Internet Protocol (IP) addresses, even if such IP addresses can be readily translated into URLs or portions of URLs. Similarly, this policy does not apply to the collection, at a web server, of tracing information indicating the source of requests to view a particular URL using a trap and trace order.

No employee of the Department will use the pen register authority to collect URLs without first consulting with the CCIPS of the Criminal Division. Absent emergency circumstances, such an employee will submit a memorandum to CCIPS that contains (a) the basic facts of the investigation, (b) the proposed application and order, (c) the investigative need for the collection of URLs, (d) an analysis of the litigation risk associated with obtaining the order in the context of the particular case, and (e) any other information relevant to evaluating the propriety of the application. In an emergency, such an employee may telephone CCIPS at (202) 514-1026 or, after hours at (202) 514-5000, and be prepared to describe the above information.

USAM 9-7.500

The attached bluesheet creates a new section in the *United States Attorneys' Manual*, 9-7.500, which sets forth policy regarding prior consultation with the Computer Crime and Intellectual Property Section of the Criminal Division of certain applications for pen register orders. Please note that, although the "Subject" line of the Deputy's memorandum refers to "Criminal Division Approval," the text of the memorandum and bluesheet make unambiguously clear that the requirement is one of "prior consultation;" not prior approval.



Office of the Deputy Attorney General
Washington, D.C. 20530

February 6, 2003

MEMORANDUM FOR ALL HOLDERS OF THE UNITED STATES ATTORNEYS' MANUAL

FROM: THE DEPUTY ATTORNEY GENERAL 

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

SUBJECT: Criminal Division Approval of Pen Registers and Trap and
Trace Applications Involving the Collection of Uniform Resource
Locators (URLs)

AFFECTS: All Titles with Criminal Prosecutions
(Titles 3, 4, 5, 6, 7, 8, 9)

The following creates a new section, 9-7.500 (Prior Consultation with the Computer Crime and Intellectual Property Section of the Criminal Division for Applications for Pen Register Orders Capable of Collecting Uniform Resource Locators (URLs)), to Title 9 (Criminal) of the United States Attorneys' Manual, with reference at 9-2.400 (Prior Approvals/Notification table). The new policy similarly has an impact on other titles in regard to their criminal prosecutions and notification/authorization tables. The new section sets forth policy regarding the requirement of prior consultation with the Computer Crime and Intellectual Property Section of the Criminal Division of certain applications for pen register orders.

9-7.500 Prior Consultation with the Computer Crime and Intellectual Property Section of the Criminal Division (CCIPS) for Applications for Pen Register and Trap and Trace Orders Capable of Collecting Uniform Resource Locators (URLs)

In 2001, the USA PATRIOT Act (P.L. 107-56) amended the Pen Register and Trap and Trace Statute (pen/trap statute), 18 U.S.C. § 3121 *et seq.*, to clarify that courts may issue pen/trap orders to collect the non-content information associated with Internet communications. One issue that has been raised in this regard is whether a pen register order may be used to collect (URLs), the terms that a person uses to request information on the World Wide Web (e.g., www.cybercrime.gov/PatriotAct.htm). Because of privacy and other concerns relating to the use of pen register orders in this fashion, use of pen registers to collect all or part of a URL is prohibited without prior consultation with CCIPS. Among the factors that should be considered in deciding whether to apply for such a pen register are (1) the investigative need for the pen register order, (2) the litigation risk in the individual case, (3) how much of any given URL would be obtained, and (4) the impact of the order on the Department's policy goals.

Memorandum For All Holders Of The United States Attorney's Manual
Subject: Criminal Division Approval of Pen Registers and Trap and
Trace Applications Involving the Collection of Uniform
Resource Locators (URLs)

Page 2

Consultation with CCIPS can help resolve these issues, as well as ensuring that the contemplated use of a pen register would be consistent with the Deputy Attorney General's May 24, 2002 Memorandum on "Avoiding Collection and Investigative Use of 'Content' in the Operation of Pen Registers and Trap and Trace Devices."

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No employee of the Department will use the pen register authority to collect URLs without first consulting with the CCIPS of the Criminal Division. Absent emergency circumstances, such an employee will submit a memorandum to CCIPS that contains (a) the basic facts of the investigation, (b) the proposed application and order, (c) the investigative need for the collection of URLs, (d) an analysis of the litigation risk associated with obtaining the order in the context of the particular case, and (e) any other information relevant to evaluating the propriety of the application. In an emergency, such an employee may telephone CCIPS at (202) 514-1026 or, after hours at (202) 514-5000, and be prepared to describe the above information.

JUVENILES

9-8.001 Supervision of Juvenile Prosecutions**9-8.010 Armed Forces Enlistment as an Alternative to Federal Prosecution****9-8.110 Certification****9-8.120 Filing of the Complaint****9-8.130 Motion to Transfer****9-8.140 Arrest of a Juvenile****9-8.150 Detention of Juveniles****9-8.190 Prosecutorial Discretion****9-8.200 Jury Trials****9-8.210 Notification****9-8.220 Public Information Concerning Juveniles****9-8.230 Additional Resource Materials**

9-8.001 Supervision of Juvenile Prosecutions

Juvenile prosecutions are supervised by the Terrorism and Violent Crime Section of the Criminal Division, and its staff attorneys are available for consultation on issues such as whether to file a motion with the court to transfer the juvenile to adult prosecution. *See* USAM 9-8.130. *See also* USAM 9-8.230.

9-8.010 Armed Forces Enlistment as an Alternative to Federal Prosecution

Plea or sentence bargaining agreements should not be contingent on, or contain provisions designed to facilitate, enlistment in the Armed Services. This sort of agreement is contrary to Regulations of the Armed Services, because persons enlisting under such conditions are not properly motivated to become an effective member of the Armed Forces.

There may be exceptional cases in which imminent military service, together with other factors, may be considered in deciding to decline prosecution if the offense is insubstantial, the offender is generally of good character, and has no criminal record.

9-8.110 Certification

With one limited exception (the certification requirement does not apply to violations of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, *see* S. Rep. No. 98-225, at 388), a juvenile cannot be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate United States District Court that (1) the juvenile court or other appropriate state court does not have jurisdiction or refuses to assume jurisdiction over the juvenile with respect to the alleged act of juvenile delinquency; or (2) the state does not have available programs and services adequate for the needs of juveniles; or (3) the offense charged is a crime of violence or an offense described in 18 U.S.C. §§ 922(x), 924(b),(g), or (h), or 21 U.S.C. §§ 841, 952(a), 953, 955, 959, or 960(b)(1), (2), or (3) and there is a substantial federal interest that justifies the exercise of federal jurisdiction. *See* 18 U.S.C. § 5032.

The authority to proceed with this certification was delegated to the United States Attorneys by then Assistant Attorney General Jo Ann Harris in a Memorandum dated July 20, 1995. Consultation with state officials is important in determining the appropriate method of proceeding. In this regard, it is important to note that a number of states consider persons to be adults for purposes of criminal prosecution at an age younger than eighteen years of age.

Sample certification forms are in the Criminal Resource Manual at 42 and 150.

9-8.120 Filing of the Complaint

The Department does not interpret 18 U.S.C. § 5032 as requiring certification prior to the filing of a complaint and issuance of an arrest warrant. That part of 18 U.S.C. § 5032 which states "[i]f the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such state" necessarily implies that an arrest procedure has been completed. Upon a juvenile's arrest, the United States Attorney should expeditiously determine whether there is a substantial basis to file a certification invoking federal jurisdiction. Nor should certification be required in cases where a juvenile is brought before a judge for a Federal Rule of Criminal Procedure 40 removal hearing. The United States Attorney in the district where the crime was committed or the complaint was filed is the only party who can make the proper determination of whether one of the factors necessary for certification exists or whether the case should be turned over to state authorities.

9-8.130 Motion to Transfer

Section 5032 of Title 18 provides several avenues for adult prosecution of a juvenile. The first arises when the juvenile has requested in writing, upon advice of counsel, to be proceeded against as an adult. A second involves the filing of a "motion of transfer" in cases involving juveniles thirteen years or older who have committed certain classes of offenses (Native American juveniles ages 13 and 14 may not be transferred unless their tribe has elected such treatment). In the latter case, after filing of the motion to transfer (Motion to Proceed Against the Juvenile as an Adult) in the United States District Court, the court must conduct a hearing to determine whether such prosecution would be in the interest of justice. In making this determination, the court must separately consider each of the criteria set out in the fifth paragraph of 18 U.S.C. § 5032. In doing so it must receive evidence on each of the factors set out, and make oral or written findings in the record with regard to each of those factors.

Repeat Offenders. When a juvenile, after his or her sixteenth birthday, is charged with certain felonies involving violence or the potential for violence, certain weapons offenses or particular drug crimes, or a particularly dangerous crime, and there has been a previous Federal or State adjudication for those types of offenses, a mandatory transfer of the case may be requested under the statute. *See* 18 U.S.C. § 5032.

The decision to proceed against a juvenile as an adult in district court was delegated to the United States Attorneys by then Assistant Attorney General Jo Ann Harris in a Memorandum dated July 20, 1995. However, to maintain uniformity, United States Attorneys should notify the Domestic Security Section of the Criminal Division (DSS) prior to authorizing that a motion to transfer be filed. Be aware that Native American juveniles who are 13 and 14 years of age may not be transferred unless their tribe has elected such treatment.

If a juvenile is transferred for prosecution and is convicted of a lesser charge which could not have supported the transfer, the disposition of the juvenile is to proceed in the same manner as if he/she had been adjudicated delinquent rather than criminally convicted.

9-8.140 Arrest of a Juvenile

For information concerning the arrest and questioning of a juvenile, see the Criminal Resource Manual at 43 and 44.

9-8.150 Detention of Juveniles

For a discussion of the laws governing the detention of juveniles, see the Criminal Resource Manual at 45.

9-8.190 Prosecutorial Discretion

Prosecutors have discretion to forego prosecutions in the interest of justice. Similarly, selective prosecution is not a denial of equal protection unless the selection is based on an unjustifiable standard such as race or religion. *See United States v. Goodwin*, 457 U.S. 368, 380 n. 11 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *Oyler v. Boles*, 368 U.S. 448, 456 (1962). United States Attorneys should continue to exercise their discretion in a manner consistent with the best interests of society and the criminal justice system.

The use of any pre-trial diversion program, including the "Brooklyn Plan," for juveniles is inappropriate unless the certification requirements of the law have been met and the pre-trial diversion guidelines set out by the Department have been complied with. *See* USAM 9-22.000 *et seq.* (Pretrial Diversion).

9-8.200 Jury Trials

The law does not require jury trial for juveniles, and the Department opposes them. For a summary of decisions, *see United States v. Cuomo*, 525 F.2d 1285 (5th Cir. 1976).

9-8.210 Notification

United States Attorneys should insure that the law enforcement officers in their judicial district are made aware of the notification requirements of 18 U.S.C. § 5033. These include advice to an arrested juvenile of constitutional rights, and notice of custody to the United States Attorney and the juvenile's parents or custodian. The arresting officer must also notify the parents or custodian of the rights of the juvenile, and of the nature of the alleged offense.

9-8.220 Public Information Concerning Juveniles

Subsections (a) through (c) of 18 U.S.C. § 5038 guard against improper disclosure of juvenile records. Subsection (d) provides for the routine fingerprinting and photographing of juveniles prosecuted as adults and juveniles adjudicated delinquent with respect to offenses that are felonies involving violence or serious drug crimes. Fingerprints and photographs of juveniles not prosecuted as adults which were obtained for specific investigative purposes may be made available only in accordance with the provisions of 18 U.S.C. § 5038(a).

Subsection (e) prohibits the publication of the name or picture of any juvenile in connection with a juvenile delinquency proceeding.

Additionally, there are laws that restrict the information that government employees may release about any child victim or witness. See the Criminal Resource Manual at 46.

9-8.230 Additional Resource Materials

Additional materials on handling juvenile cases can be found in the Criminal Resource Manual:	
"Juvenile" Defined	Criminal Resource Manual at 38
The Nature of Juvenile Delinquency Proceedings	Criminal Resource Manual at 39
Disposition Upon Adjudication of Delinquency	Criminal Resource Manual at 40
Certification	Criminal Resource Manual at 41
Form -- Certificate for Juvenile Proceeding	Criminal Resource Manual at 42

Two other valuable resources are the *Step by Step Guide to Juvenile Prosecutions*, prepared by Victor Stone of the Criminal Division, and the *Federal Prosecution of Juveniles* monograph, written by John B. Stevens, Jr., Criminal Chief, Eastern District of Texas. The *Step by Step Guide* is in the Criminal Resource Manual at 48-60, and the Stevens monograph is in the Criminal Resource Manual at 100-153.

9-9.000

MENTAL COMPETENCY
OF AN ACCUSED
(18 U.S.C. §§ 4241 ET SEQ.)

For a discussion of the law and procedures related to determinations of mental competency to stand trial and related commitment proceedings, *see the Criminal Resource Manual at 61 et seq.*

CAPITAL CRIMES

- 9-10.010 Federal Prosecutions in Which the Death Penalty May be Sought**
- 9-10.020 Authorization and Consultation Prior to Seeking the Death Penalty**
- 9-10.030 Notice of Intention to Seek the Death Penalty**
- 9-10.040 Submissions to the Department of Justice in Cases Seeking Death Penalty**
- 9-10.050 Department of Justice Review of Cases Seeking Death Penalty**
- 9-10.055 Review of Recommendations Not to Seek Death Penalty**
- 9-10.060 Notice to Family of Victim**
- 9-10.070 Substantial Federal Interest**
- 9-10.080 Standards for Determination**
- 9-10.090 Withdrawal of Notice of Intention to Seek the Death Penalty**
- 9-10.100 Plea Agreements**
- 9-10.110 Forms and Procedures**
- 9-10.120 Exceptions for the Proper Administration of Justice**
- 9-10.130 Standards for Determination**
- 9.10-140 Post-Decision Actions**
- 9.10-150 Withdrawal of the Notice of Intention to Seek the Death Penalty**
- 9.10-160 Approval Required for Judicial Sentencing Determination**
- 9.10-170 Reporting Requirements**
- 9.10-180 Forms and Procedures**
- 9.10-190 Exceptions for the Proper Administration of Justice**

9-10.010 Federal Prosecutions in Which the Death Penalty May be Sought

This Chapter sets forth the policies and procedures for all Federal cases in which a defendant is charged, or could be charged, with an offense subject to the death penalty. The provisions of this Chapter apply regardless of whether the United States Attorney intends to charge the offense subject to the death penalty or to request authorization to seek the death penalty for such an offense. The provisions in this Chapter are effective July 1, 2007, and they apply to any case currently under indictment.

9-10.020 Relevant Statutory Provisions

Federal death penalty procedure is based on the Federal Death Penalty Act of 1994, codified at 18 U.S.C. § 3591 *et seq.*

The death penalty procedures introduced by the Anti-Drug Abuse Act of 1988, codified in Title 21, were repealed on March 6, 2006, when President Bush signed the USA PATRIOT Improvement and Reauthorization Act of 2005. A district indicting a Title 21 capital offense, *see* 21 U.S.C. § 848, that

occurred before March 6, 2006, should consult with the Capital Case Unit of the Criminal Division regarding indictment and procedure.

9-10.030 Purposes of the Capital Case Review Process

The review of cases under this Chapter culminates in a decision to seek, or not to seek, the death penalty against an individual defendant. Each such decision must be based upon the facts and law applicable to the case and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws. Arbitrary or impermissible factors -- such as a defendant's race, ethnicity, or religion -- will not inform any stage of the decision-making process. The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case.

9-10.040 General Process Leading to the Attorney General's Determination

In all cases subject to the provisions of this Chapter, the Attorney General will make the final decision about whether to seek the death penalty. The Attorney General will convey the final decision to the United States Attorney in a letter authorizing him or her to seek or not to seek the death penalty.

The decision-making process preliminary to the Attorney General's final decision is confidential. Information concerning the deliberative process may only be disclosed within the Department and its investigative agencies as necessary to assist the review and decision-making. This confidentiality requirement does not extend to the disclosure of scheduling matters or the level at which the decision is pending within the Department during the review process. The scope of confidentiality includes, but is not limited to: (1) the recommendations of the United States Attorney's Office, the Attorney General's Review Committee on Capital Cases (hereinafter the "Capital Review Committee"), the Deputy Attorney General, and any other individual or office involved in reviewing the case; (2) a request by a United States Attorney that the Attorney General authorize withdrawal of a previously filed notice of intent to seek the death penalty; (3) a request by a United States Attorney that the Attorney General authorize not seeking the death penalty pursuant to the terms of a proposed plea agreement; and (4) the views held by anyone at any level of review within the Department.

In no event may the information identified in this paragraph be disclosed outside the Department and its investigative agencies without prior approval of the Attorney General. The United States Attorneys may exercise their discretion, however, to place additional limits on the scope of confidentiality in capital cases prosecuted in their Districts.

9-10.050 Preliminary Consideration in the United States Attorney's Office

Prior to seeking an indictment for an offense subject to the death penalty, the United States Attorney is strongly advised, but not required, to consult with the Capital Case Unit.

If possible, before obtaining an indictment charging a capital offense, the United States Attorney should make a preliminary determination of whether he or she will recommend that the death penalty be sought. If the case is sufficiently developed to allow the United States Attorney to make a pre-indictment determination that he or she will not recommend seeking the death penalty, the United States Attorney should submit the case expeditiously for review under the provisions of this Chapter prior to obtaining an indictment charging a capital-eligible offense, unless public safety requires obtaining the indictment more quickly.

In all cases, the United States Attorney must immediately notify the Capital Case Unit when a capital offense is charged and provide the Unit with a copy of the indictment and cause number, even if the materials described in § 9-10.080, *infra*, are not yet ready for submission.

In any post-indictment case in which the United States Attorney is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, for the consideration of the United States Attorney.

9-10.060 Special Findings in Indictments

For all charged offenses subject to the provisions of this Chapter, regardless of whether the United States Attorney ultimately recommends that the Attorney General authorize seeking the death penalty for the charged offense, the indictment shall allege as special findings: (1) that the defendant is over the age of 18; (2) the existence of the threshold intent factors specified in 18 U.S.C. § 3591(a)(2); and (3) the existence of the statutory aggravating factors specified in, as relevant, 18 U.S.C. §§ 3592(b), (c), or (d).

The indictment shall allege threshold intent and statutory aggravating factors that meet the criteria for commencing prosecution as set forth in USAM §§ 9-27.200, 9-27.220. Prosecuting Assistant United States Attorneys are encouraged to consult with the Capital Case Unit regarding the inclusion of special findings in the indictment.

9-10.070 Consultation with the Family of the Victim

Unless extenuating circumstances exist, the United States Attorney should consult with the family of the victim, if reasonably available, concerning the decision on whether to seek the death penalty. The United States Attorney should include the views of the victim's family concerning the death penalty in any submission made to the Department. The United States Attorney should notify the family of the victim of all final decisions regarding the death penalty. This consultation should occur in addition to notifying victims of their rights under 18 U.S.C. § 3771.

9-10.080 Submissions from the United States Attorney

The United States Attorney must submit to the Assistant Attorney General for the Criminal Division every case in which an indictment has been or will be obtained that charges an offense punishable by death or alleges conduct that could be charged as an offense punishable by death.

The United States Attorney must make submissions to the Assistant Attorney General as expeditiously as possible following indictment, but no fewer than 90 days before the Government is required, by an order of the court, to file a notice that it intends to seek the death penalty. In the absence of a court established deadline for the Attorney General's death penalty decision, the United States Attorney must make the submission sufficiently in advance of trial to allow for both the 90 day time period encompassed by the review process plus any additional time necessary to ensure that a notice of intent to seek the death penalty is timely filed under 18 U.S.C. § 3593(a). If a case is not submitted 90 days in advance of a deadline for the Attorney General's decision or 150 days in advance of a scheduled trial date, the prosecution memorandum should include an explanation of why the submission is untimely.

The prosecution memoranda, death penalty evaluation forms, non-decisional information forms and any other internal memoranda informing the review process and the Attorney General's decision are not subject to discovery by the defendant or the defendant's attorney.

Submissions should include the following documents:

A. Prosecution memorandum. This should be sufficiently detailed to fully inform reviewers of the basis for the United States Attorney's recommendation. The prosecution memorandum should include:

- (1) Unusual circumstances. To ensure that subsequent review is appropriately directed, the first page of the memorandum should note plainly whether the case fits any of the following unusual circumstances:
 - a. The case is submitted for "expedited review," as described in § 9-10.100, *infra*.
 - b. The case involves extradition of the defendant from a country where waiver of the authority of the United States to seek the death penalty is necessary for extradition.
 - c. The case presents a significant law enforcement reason for not seeking the death penalty (such as the defendant's willingness to cooperate in an important but otherwise difficult prosecution).
 - d. The case has been submitted for pre-indictment review as suggested in § 9-10.050, *supra*.
- (2) Deadlines. Any deadline established by the Court for the filing of a notice of intent to seek the death penalty, trial dates, or other time considerations that could affect the timing of the review process should also be noted on the first page of the memorandum.
- (3) A narrative delineation of the facts and separate delineation of the supporting evidence. Where necessary for accuracy, a chart of the evidence by offense and offender should be appended.
- (4) Discussion of relevant prosecutorial considerations.
- (5) Death penalty analysis. The analysis must identify applicable threshold intent factors under 18 U.S.C. § 3591, applicable statutory aggravating factors under the subsections of 18 U.S.C. §§ 3592(b)-(d), and applicable mitigating factors under 18 U.S.C. § 3592(a). In addition, the United States Attorney should include his or her conclusion on whether all the aggravating factor(s) found to exist sufficiently outweigh all the mitigating factor(s) found to exist to justify a sentence of death, or in the absence of mitigating factors, whether the aggravating factor(s) alone are sufficient to justify a sentence of death.
- (6) Background and criminal record of the capital defendants.
- (7) Background and criminal record of the victim.
- (8) Victim impact. Views of the victim's family on seeking the death penalty and other victim impact evidence should be provided.
- (9) Discussion of the federal interest in prosecuting the case.
- (10) Foreign citizenship. The memorandum should include a discussion on whether the defendant(s) are citizens of foreign countries, and if so, whether the requirements of the Vienna Convention on Consular Relations have been satisfied.
- (11) Recommendation of the United States Attorney on whether the death penalty should be sought.

B. Death-penalty evaluation form. The Department will specify a standardized death-penalty evaluation form, which should be completed by the United States Attorney for each capital-eligible offense charged against each defendant.

C. Non-decisional information form. This form should be submitted in a sealed envelope clearly labeled as containing the non-decisional information.

D. Indictment. Copies of all existing and proposed superseding indictments should be attached. As described in 9-10.060, *supra*, the indictments should include the special findings necessary for the death penalty to be authorized by statute.

E. Draft notice of intention to seek the death penalty. This document is to be included in the submission only if the United States Attorney recommends seeking the death penalty.

F. Materials provided by defense counsel. Any documents or materials provided by defense counsel to the United States Attorney in the course of the United States Attorney's Office death penalty review process should be provided.

G. Point-of-contact. The name of the assigned attorney in the United States Attorney's Office who is responsible for communicating with the Capital Case Unit about the case should be provided.

H. Relevant court decisions. The first page of the memorandum should highlight court orders and deadlines. The point-of-contact in the United States Attorney's Office is under a continuing obligation to update the Capital Case Unit about developments or changes in court scheduling or any other material aspect of the case.

9-10.090 Substantial Federal Interest

When concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities. *See Principles of Federal Prosecution, USAM Chapter 9-27.000.* The judgment as to whether there is a more substantial interest in Federal, as opposed to State, prosecution may take into account any factor that reasonably bears on the relative interests of the State and the Federal Governments, including but not limited to the following:

A. The relative strength of the State's interest in prosecution as indicated by the Federal and State characteristics of the criminal conduct. One jurisdiction may have a particularly strong interest because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by its investigators or through its informants or cooperators, or the possibility that prosecution will lead to disclosure of violations that are peculiarly within the jurisdiction of either Federal or State authorities or will assist an ongoing investigation being conducted by one of them.

B. The extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction. Relevant to this analysis are the nature, extent, and impact of the criminal activity upon the jurisdictions, the number and location of any murders, and the need to procure evidence from other jurisdictions, in particular other States or foreign countries.

C. The relative ability and willingness of the State to prosecute effectively and obtain an appropriate punishment upon conviction. Relevant to this analysis are the ability and willingness of the authorities in each jurisdiction, the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively, legal or evidentiary problems that might attend prosecution, conditions, attitudes, relationships, and other circumstances that enhance the ability to prosecute effectively or, alternatively, that cast doubt on the likelihood of a thorough and successful prosecution.

9-10.100 Expedited Review Procedures

A. Certain defendants and categories of cases are appropriate for summary disposition on an expedited basis. These include: (1) cases in which the defendant is ineligible for the death penalty because the evidence is insufficient to establish the requisite intent under 18 U.S.C. § 3591 or an applicable statutory aggravating factor under 18 U.S.C. § 3592 (b)-(d); (2) cases that involve the extradition of a defendant

or crucial witness from a country that, as precondition to extradition, requires assurances that the death penalty will not be sought for the defendant or the evidence obtained from the witness will not be used to seek the death penalty; (3) cases in which, but for proffer protected evidence, the evidence is insufficient to convict the defendant of the capital offense to which he will plead guilty; (4) cases that involve a potential cooperator whose testimony is necessary to indict the remaining offenders; and (5) cases that have been submitted for pre-indictment review under § 9-10.050, *supra*.

B. The cover of the submission should indicate in bold lettering that the United States Attorney is seeking expedited review, and it should also indicate the basis on which the case qualifies for expedited review. The accompanying memorandum may be abbreviated, but it should be sufficiently thorough to make clear the basis upon which the case qualifies for expedited review.

C. The Capital Case Unit will screen all cases in which the United States Attorney's Office seeks expedited review to ensure that such review is appropriate. The Unit will then give priority to cases so designated. If the Capital Case Unit finds that the case does not qualify for expedited review, it will be scheduled for review on a non-expedited basis or returned to the United States Attorney's Office for later submission.

9-10.110 Plea Agreements

The death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for the purpose of obtaining a more desirable negotiating position. Absent the authorization of the Attorney General, the United States Attorney may not enter into a binding plea agreement that precludes the United States from seeking the death penalty with respect to any defendant falling within the scope of this Chapter.

The United States Attorney, however, may agree to submit for the Attorney General's review and possible approval, a plea agreement relating to a capital eligible offense or conduct that could be charged as a capital eligible offense. At all times, the United States Attorney must make clear to all parties that the conditional plea does not represent a binding agreement, but is conditioned on the authorization of the Attorney General. The United States Attorney should not inform the defendant, court, or public of whether he or she recommends authorization of the plea agreement.

For proposed plea agreements that precede a decision by the Attorney General to seek or not to seek the death penalty, the United States Attorney should send a request for approval to the Assistant Attorney General for the Criminal Division as early as possible. Absent unavoidable circumstances, the United States Attorney must send the request no later than 90 days prior to the date on which the Government would be required, by an order of the court or by the requirements of 18 U.S.C. § 3593(a), to file a notice that it intends to seek the death penalty. (Proposed plea agreements that would require withdrawing a previously filed notice of intent to seek the death penalty should follow the procedures described in 9-10.150, *infra*.)

Unless a potential capital defendant's testimony is necessary to indict the remaining offenders or other circumstances compel separate consideration, review of the case against the prospective cooperator will occur simultaneously with the review of the cases against the remaining offenders who would be indicted for the offenses at issue. Submissions in support of requests for approval of plea agreements under this section should include a prosecution memorandum that includes an explanation of why the plea agreement is an appropriate disposition of the charges, a death penalty evaluation form for each capital eligible offense that has been or could be charged against the prospective cooperator, and a non-decisional information form. The Capital Review Committee will review requests for authorization to enter into a plea agreement under this subsection and may request a submission from defense counsel and schedule the case for a hearing before the Committee.

See USAM Chapter 9-16.000 for more information on the topic of pleas and plea agreements.

9-10.120 Department of Justice Review

Upon receipt of the materials submitted by the United States Attorney, the Assistant Attorney General for the Criminal Division will forward the materials to the Criminal Division's Capital Case Unit.

In any case in which (1) the United States Attorney recommends that the Attorney General authorize seeking the death penalty, or (2) a member of the Capital Review Committee requests a Committee conference, a Capital Case Unit attorney will confer with representatives of the United States Attorney's Office to establish a date and time for the Capital Review Committee to meet with defense counsel and representatives of the United States Attorney's Office to consider the case. No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.

The Capital Review Committee shall review the materials submitted by the United States Attorney and any materials submitted by defense counsel. The Capital Review Committee will consider all information presented to it, including any allegation of individual or systemic racial bias in the Federal administration of the death penalty. After considering all information submitted to it, the Committee shall make a recommendation to the Attorney General through the Deputy Attorney General.

If the Committee's recommendation differs from that of the United States Attorney, the United States Attorney shall be provided with a copy of the Committee's recommendation memorandum when it is transmitted to the Deputy Attorney General. The United States Attorney may respond to the Committee's analysis in a memorandum directed to the Deputy Attorney General. The Deputy Attorney General will then make a recommendation to the Attorney General. The Attorney General will make the final decision whether the Government should file a notice of intent to seek the death penalty.

9-10.130 Standards for Determination

The standards governing the determination to be reached in cases under this Chapter include fairness, national consistency, adherence to statutory requirements, and law-enforcement objectives.

- A. Fairness requires all reviewers to evaluate each case on its own merits and on its own terms. As with all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin play no role in any recommendation or decision as to whether to seek the death penalty.
- B. National consistency requires treating similar cases similarly, when the only material difference is the location of the crime. Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care to contextualize a given case within national norms or practice. For this reason, the multi-tier process used to make determinations in this Chapter is carefully designed to provide reviewers with access to the national decision-making context, and thereby, to reduce disparities across districts.
- C. In determining whether it is appropriate to seek the death penalty, the United States Attorney, the Capital Review Committee, and the Attorney General will determine whether the applicable statutory aggravating factors and any non-statutory aggravating factors sufficiently outweigh the applicable mitigating factors to justify a sentence of death or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. Reviewers are to resolve ambiguity as to the presence or strength of aggravating or mitigating factors in favor of the defendant. The analysis employed in weighing the aggravating and mitigating factors should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Reviewers may accord

weak aggravating or mitigating factors little or no weight. Finally, there must be substantial, admissible, and reliable evidence of the aggravating factors.

D. In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Capital Review Committee, the Deputy Attorney General, and the Attorney General may consider any legitimate law-enforcement or prosecutorial reason that weighs for or against seeking the death penalty.

9-10.140 Post-Decision Actions

In any case in which the Attorney General has authorized the filing of a notice of intention to seek the death penalty, the United States Attorney shall not file or amend the notice until the Capital Case Unit of the Criminal Division has approved the notice or the proposed amendment. The notice of intention to seek the death penalty shall be filed as soon as possible after transmission of the Attorney General's decision to seek the death penalty.

The United States Attorney should promptly inform the district court and counsel for the defendant once the Attorney General has made the final decision. Expedited communication is necessary so that the court is aware, in cases in which the Attorney General authorizes the United States Attorney not to seek the death penalty, that appointment of counsel under 18 U.S.C. § 3005 is not required or is no longer required. In cases in which the Attorney General authorizes the United States Attorney to seek the death penalty, the district court and defense counsel should be given as much opportunity as possible to make proper scheduling decisions.

9-10.150 Withdrawal of the Notice of Intention to Seek the Death Penalty

Once the Attorney General has authorized the United States Attorney to seek the death penalty, the United States Attorney may not withdraw a notice of intention to seek the death penalty filed with the district court unless authorized by the Attorney General.

If the United States Attorney wishes to withdraw the notice, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division of the reasons for that request. The United States Attorney should base the withdrawal request on material changes in the facts and circumstances of the case from those that existed at the time of the initial determination.

Reviewers should evaluate the withdrawal request under the principles used to make an initial determination, and limit the evaluation to determining if the changed facts and circumstances, had they been known at the time of the initial determination, would have resulted in a decision not to seek the death penalty. For this reason, information or arguments that had been advanced initially are not normally appropriate bases for withdrawal requests. In all cases, however, reviewers should consider all necessary information to ensure every defendant is given the individualized consideration needed for full review and appropriate decision-making.

The Assistant Attorney General for the Criminal Division will review any request by a United States Attorney for reconsideration of the decision to seek the death penalty or authorization to withdraw the notice of intent to seek the death penalty. The Assistant Attorney General will make a recommendation to the Attorney General through the Deputy Attorney General on whether the notice of intent to seek the death penalty should be withdrawn. In making that recommendation, the Assistant Attorney General will be advised by the Capital Case Unit.

In all cases, the Attorney General shall make the final decision on whether to authorize the withdrawal of a notice of intention to seek the death penalty. Until such a decision is made, the United States Attorney should proceed with the case as initially directed by the Attorney General. As with all communications between United States Attorneys and the Department of Justice, the fact that a withdrawal request has been

made is confidential and may not be disclosed to any party outside the Department of Justice and its investigative agencies.

9-10.160 Approval Required For Judicial Sentencing Determination

In cases in which the Attorney General has authorized seeking the death penalty, the United States Attorney must obtain the approval of the Assistant Attorney General for the Criminal Division before agreeing to a request by the defendant pursuant to 18 U.S.C. § 3593(b)(3) for the sentence to be determined by the trial court rather than a jury.

9-10.170 Reporting Requirements

Each United States Attorney's Office must identify a point-of-contact who will be responsible for ensuring compliance with the following reporting requirements.

The Capital Case Unit must be immediately notified when:

- A. A capital offense is charged or when an indictment is obtained pertaining to conduct that could be, but has not been, charged as a capital offense. The point-of contact should provide the Unit with a copy of the indictment and cause number.
- B. A deadline for filing a notice of intent to seek the death penalty or a trial date is established or modified.
- C. There are any developments that could affect the ability to file a notice of intent to seek the death penalty sufficiently in advance of trial to allow the defense and prosecution to prepare for a capital punishment hearing.
- D. A verdict and sentence are reached in a case in which the Attorney General authorized seeking the death penalty.
- E. The Government intends to accept a guilty plea to a capital offense when, but for the defendant's protected proffer, there would be insufficient evidence to charge the offense. The Capital Case Unit may authorize the United States Attorney to proceed with such pleas without submitting the cases to the review process.

The victim's family must be notified of all final decisions regarding the death penalty.

9-10.180 Forms and Procedures

The Assistant Attorney General for the Criminal Division, the Deputy Attorney General, and the Attorney General may promulgate forms and procedures to implement the provisions of this Chapter. The United States Attorney should contact the Capital Case Unit to discuss the applicable procedures and obtain the appropriate forms.

9-10.190 Exceptions for the Proper Administration of Justice

To ensure the proper administration of justice in an appropriate case, the Attorney General may authorize exceptions to the provisions of this Chapter.



Department of Justice

Executive Office for United States Attorneys
Office of the Director

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June 20, 2001

MEMORANDUM FOR ALL MANUAL HOLDERS

Louis De Falaise

FROM: Louis De Falaise
Acting Director

SUBJECT: Capital Case Review

AFFECTS: USAM 9-10.000

Please find attached a revision to the United States Attorneys' Manual, Title 9, Chapter 10, Capital Crimes, issued by the Attorney General which sets forth revised protocol for capital case review. The effective date of this policy is June 7, 2001.

Attachment

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9-10.000
CAPITAL CRIMES

- 9-10.010 Federal Prosecutions in Which the Death Penalty May be Sought
- 9-10.020 Authorization and Consultation Prior to Seeking the Death Penalty
- 9-10.030 Notice of Intention to Seek the Death Penalty
- 9-10.040 Submissions to the Department of Justice in Cases Seeking Death Penalty
- 9-10.050 Department of Justice Review of Cases Seeking Death Penalty
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- 9-10.100 Plea Agreements
- 9-10.110 Forms and Procedures
- 9-10.120 Exceptions for the Proper Administration of Justice

9-10.010 Federal Prosecutions in Which the Death Penalty May be Sought

This Chapter sets forth policy and procedures to be followed in Federal cases in which a defendant is charged with an offense subject to the death penalty, regardless of whether the United States Attorney intends to request authorization to seek the death penalty. The effective date of this policy is June 7, 2001, and it applies to any case currently under indictment. The Federal death penalty is based upon two legislative acts: the Anti-Drug Abuse Act of 1988 and the Federal Death Penalty Act of 1994. See the Criminal Resource Manual at 68 and 69.

For decisions discussing the federal death penalty, see the Criminal Resource Manual at 85.

9-10.020 Authorization and Consultation in Capital Cases

The death penalty shall not be sought without the prior written authorization of the Attorney General. The Deputy Attorney General may authorize the United States to seek the death penalty when the Attorney General is unavailable.

Prior to seeking an indictment for an offense subject to the death penalty (other than an offense under 18 U.S.C. § 1959), the United States Attorney is encouraged, but not required, to consult with the Capital Case Unit and other appropriate sections of the Criminal Division or the Criminal Section of the Civil Rights Division. All indictments that charge Section 1959 must be

submitted for review to the Criminal Division. For further discussion regarding consultation, see the Criminal Resource Manual at 70.

In any case in which the Attorney General has authorized the filing of a notice of intention to seek the death penalty, the United States Attorney shall not file or amend the notice until the Capital Case Unit of the Criminal Division has approved the notice or the proposed amendment.

The United States Attorney should, whenever possible, make a preliminary decision whether to request authorization to seek the death penalty before obtaining an indictment charging a capital offense. In any case in which the defendant is charged with an offense carrying the death penalty (and the indictment includes language sufficient to trigger the death penalty), the United States Attorney should promptly inform the district court if the Department decides not to seek the death penalty, so that the district court is aware that appointment of counsel under 18 U.S.C. § 3005 is not required or is no longer required.

A listing of the capital eligible statutes assigned by section is contained in the Criminal Resource Manual at 71.

9-10.030 Notice of Intention to Seek the Death Penalty

In any case in which a United States Attorney's Office is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the United States Attorney for consideration.

9-10.040 Submissions to the Department of Justice in Death Penalty Cases

In all cases in which the United States Attorney intends to recommend filing a notice of intention to seek the death penalty, the United States Attorney shall prepare a "Death Penalty Evaluation" form and a prosecution memorandum in a form specified by the Department. The Death Penalty Evaluation form is intended primarily to be used as a guideline and worksheet for the internal decision making process and as a source for statistical information concerning death penalty eligible cases. This form and other internal memoranda concerning the decision to seek the death penalty are not subject to discovery to the defendant or his attorney.

The United States Attorney shall send to the Assistant Attorney General for the Criminal Division the above-described documents, copies of all existing, proposed, and superseding indictments, a draft notice of intention to seek the death penalty, any information concerning the impact on the victim's family, and any written material submitted by counsel for the defendant in opposition to the government's seeking the death penalty for the defendant. In no event should these documents be received by the Criminal Division later than 45 days prior to the date on which

the Government is required, by an order of the court or otherwise, to file notice that it intends to seek the death penalty.

In every case in which a United States Attorney has obtained an indictment charging an offense that is punishable by death or conduct that could be charged as an offense punishable by death, but in which the United States Attorney does not intend to request authorization to seek the death penalty, the United States Attorney shall complete and send to the Assistant Attorney General for the Criminal Division a Death Penalty Evaluation form that contains a brief statement of the reason the United States Attorney decided not to seek the death penalty or charge a capital offense. This form should be completed and forwarded to the Criminal Division before or as soon as possible after indictment.

9-10.050 Department of Justice Review of Cases Seeking Death Penalty

When the Assistant Attorney General for the Criminal Division receives the materials submitted by the United States Attorney in support of a request for authorization to seek the death penalty, the Assistant Attorney General will forward those materials to the Criminal Division's Capital Case Unit. The Capital Case Unit attorney will confer with representatives of the United States Attorney's office and defense counsel to consider the case.

Each of the documents provided in support of a recommendation to seek the death penalty and any submissions by defense counsel, shall be reviewed by a Committee appointed by the Attorney General. Counsel for the defendant shall be provided an opportunity to present to the Committee the reasons why the death penalty should not be sought. If the Committee decides to permit an oral presentation, it will ordinarily occur via a video conference. The Committee will consider all information presented to it, including any evidence of racial bias against the defendant or evidence that the Department has engaged in a pattern or practice of racial discrimination in the administration of the Federal death penalty. After considering all information submitted to it, the Committee shall make a recommendation to the Attorney General. The Attorney General will make the final decision whether the Government should file a Notice of Intention to Seek the Death Penalty.

Subsequent to the initial Department of Justice review, the United States Attorney and the Attorney General's Committee shall review any submission defense counsel chooses to make. After considering the information submitted, the Committee will make a recommendation to the Attorney General concerning the application of the death penalty to the case.

9-10.055 Review of Recommendations Not to Seek Death Penalty

In a capital eligible case where the United States Attorney does not seek authorization to seek the death penalty, as early as possible, and in no event later than 45 days prior to the date on which the Government is required, by an order of the court or otherwise, to file notice that it intends to seek the death penalty, the United States Attorney shall submit the form specified by the

Department for such cases which shall be reviewed in a manner to be specified and with a goal towards a decision by the Attorney General within three weeks so that the court may be promptly informed of a decision not to seek the death penalty. No decision to seek the death penalty shall be made without affording defense counsel an opportunity to present evidence and argument in mitigation, but a decision not to seek the death penalty may be made without awaiting any such submissions.

9-10.060 Consultation with Family of Victim

The United States Attorney should consult with the family of the victim concerning the decision whether to seek the death penalty. The United States Attorney should include the views of the victim's family concerning the death penalty in any submission made to the Department. The United States Attorney shall notify the family of the victim of all final decisions regarding the death penalty.

9-10.070 Substantial Federal Interest

Where concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities. *See Principles of Federal Prosecution, USAM 9-27.000. et seq.*

The decision whether there is a more substantial interest in Federal, as opposed to State, prosecution of the offense may take into account any factor that reasonably bears on the relative interests of the State and the Federal Government, including, but not limited to, the following:

- A. The relative strength of the State's interest in prosecution. The Federal and State characteristics of the criminal conduct should be considered. One jurisdiction may have a particularly strong interest because of the nature of the offense; the identity of the offender or victim; the fact that the investigation was conducted primarily by its investigators or through its informants or cooperators; or the possibility that prosecution will lead to disclosure of violations which are peculiarly within the jurisdiction of either Federal or State authorities or will assist an ongoing investigation being conducted by one of them.
- B. The extent to which the criminal activity reached beyond the local jurisdiction. The extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction should be considered. The nature, extent, and impact of the criminal activity upon the jurisdiction, the number and location of any murders, and the need to procure evidence from other jurisdictions, in particular other States or foreign countries, are all relevant to this analysis.
- C. The relative ability and willingness of the State to prosecute effectively. The relative likelihood of effective prosecution and appropriate punishment upon conviction in the State and Federal jurisdictions should be considered, including the ability and willingness of the authorities

in each jurisdiction; the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively; legal or evidentiary problems that might attend prosecution; conditions, attitudes, relationships or other circumstances that enhance the ability to prosecute effectively, or alternatively, that cast doubt on the likelihood of a thorough and successful prosecution.

9-10.080 Standards for Determination

In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Attorney General's Committee and the Attorney General may consider any legitimate law enforcement or prosecutorial reason that weighs for or against seeking the death penalty.

In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee, and the Attorney General must determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death. To qualify for consideration in this analysis, an aggravating factor must be provable by admissible evidence beyond a reasonable doubt. Because there may be little or no evidence of mitigating factors available for consideration at the time of this determination, any mitigating factor reasonably raised by the evidence should be deemed established and weighed against the provable aggravating factors. The analysis employed in weighing the aggravating and mitigating factors that are found to exist should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Weak aggravating or mitigating factors may be accorded little or no weight. Finally, there must be substantial admissible and reliable evidence of the aggravating factors.

The authorization process is designed to promote consistency and fairness. As is the case in all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin may play no role in the decision whether to seek the death penalty.

9-10.090 Withdrawal of Notice of Intention to Seek the Death Penalty

Once the Attorney General has authorized the United States Attorney to seek the death penalty, a notice of intention to seek the death penalty filed with the court may not be withdrawn unless authorized by the Attorney General. If the United States Attorney wishes to withdraw the notice, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division of the reasons for that request, including any changes in facts or circumstances.

If time permits, a request to withdraw a notice shall be reviewed by the Committee appointed by the Attorney General, which will make a recommendation to the Attorney General. If exigent circumstances make it impossible to obtain review by the full Committee, the United

States Attorney should contact the Assistant Attorney General for the Criminal Division or the Deputy Attorney General or his or her designee, who will make a recommendation to the Attorney General.

In all cases, the Attorney General shall make the final decision whether to authorize the withdrawal of a notice of intention to seek the death penalty.

9-10.100 Plea Agreements

The death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for the purpose of obtaining a more desirable negotiating position. In cases in which a defendant has been charged with an offense for which death is a penalty but in which the United States Attorney decides not to seek the death penalty, the United States Attorney may approve any plea agreement subject to the approval, on an expedited basis where appropriate, of the Attorney General.

Once the Attorney General has authorized the United States Attorney to seek the death penalty, the United States Attorney may not enter into a plea agreement that requires withdrawal of the notice of intention to seek the death penalty without the prior approval of the Attorney General.

See USAM 9-16.000 for more information on the topic of pleas and plea agreements.

9-10.110 Forms and Procedures

The Assistant Attorney General for the Criminal Division, the Deputy Attorney General, and the Attorney General may promulgate forms and procedures to implement this Protocol. The United States Attorney should contact the Capital Case Unit to obtain the appropriate forms both for authorization to seek and not to seek the death penalty.

9-10.120 Exceptions for the Proper Administration of Justice

In an appropriate case to ensure the proper administration of justice the Attorney General may authorize exceptions to the provisions of this Protocol.

Policy dated: June 7, 2001



U.S. Department of Justice

*Executive Office for United States Attorneys
Office of the Director*

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JUN 29 2007

MEMORANDUM TO: Holders of the United States Attorneys' Manual

FROM:

Kenneth E. Nelson
Director

Nelson
United States Attorneys' Manual Staff
Executive Office for United States Attorneys

SUBJECT: Final Death Penalty Protocol

AFFECTS: USAM 9-10.000

The attached supersedes bluesheet USAM 9-10.000, Capital Crimes, issued by the Deputy Attorney General on June 25, 2007. Section 9-10.110 has been modified to insert one sentence in the first paragraph of that section which was omitted from the revised policy. Because its omission was mistakenly construed as a policy change, the Department chose to reinsert it before the revised protocol goes into effect. The sentence reads: "The death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for the purpose of obtaining a more desirable negotiating position."

Please refer to the Deputy Attorney General's memorandum emailed to all United States Attorneys on June 25, 2007, entitled U.S. Attorneys' Manual, Death Penalty Protocol Revisions, which sets forth the most significant changes to the death penalty protocol.

Attachment

CAPITAL CRIMES

9-10.010 Federal Prosecutions in Which the Death Penalty May be Sought

This Chapter sets forth the policies and procedures for all Federal cases in which a defendant is charged, or could be charged, with an offense subject to the death penalty. The provisions of this Chapter apply regardless of whether the United States Attorney intends to charge the offense subject to the death penalty or to request authorization to seek the death penalty for such an offense. The provisions in this Chapter are effective July 1, 2007, and they apply to any case currently under indictment.

9-10.020 Relevant Statutory Provisions

Federal death penalty procedure is based on the Federal Death Penalty Act of 1994, codified at 18 U.S.C. § 3591 *et seq.*

The death penalty procedures introduced by the Anti-Drug Abuse Act of 1988, codified in Title 21, were repealed on March 6, 2006, when President Bush signed the USA PATRIOT Improvement and Reauthorization Act of 2005. A district indicting a Title 21 capital offense, *see* 21 U.S.C. § 848, that occurred before March 6, 2006, should consult with the Capital Case Unit of the Criminal Division regarding indictment and procedure.

9-10.030 Purposes of the Capital Case Review Process

The review of cases under this Chapter culminates in a decision to seek, or not to seek, the death penalty against an individual defendant. Each such decision must be based upon the facts and law applicable to the case and be set within a framework of consistent and even-handed national application of Federal capital sentencing laws. Arbitrary or impermissible factors -- such as a defendant's race, ethnicity, or religion -- will not inform any stage of the decision-making process. The overriding goal of the review process is to allow proper individualized consideration of the appropriate factors relevant to each case.

9-10.040 General Process Leading to the Attorney General's Determination

In all cases subject to the provisions of this Chapter, the Attorney General will make the final decision about whether to seek the death penalty. The Attorney General will convey the final decision to the United States Attorney in a letter authorizing him or her to seek or not to seek the death penalty.

The decision-making process preliminary to the Attorney General's final decision is confidential. Information concerning the deliberative process may only be disclosed within the Department and its investigative agencies as necessary to assist the review and decision-making. This confidentiality requirement does not extend to the disclosure of scheduling matters or the level at which the decision is pending within the Department during the review process. The scope of confidentiality includes, but is not limited to: (1) the recommendations of the United States Attorney's Office, the Attorney General's Review Committee on Capital Cases (hereinafter the "Capital Review Committee"), the Deputy Attorney General, and any other individual or office involved in reviewing the case; (2) a request by a United States Attorney that the Attorney General authorize withdrawal of a previously filed notice of intent to seek the death penalty; (3) a request by a United States Attorney that the Attorney General authorize not seeking the death penalty pursuant to the terms of a proposed plea agreement; and (4) the views held by anyone at any level of review within the Department.

In no event may the information identified in this paragraph be disclosed outside the Department and its investigative agencies without prior approval of the Attorney General. The United States Attorneys may exercise their discretion, however, to place additional limits on the scope of confidentiality in capital cases prosecuted in their Districts.

9-10.050 Preliminary Consideration in the United States Attorney's Office

Prior to seeking an indictment for an offense subject to the death penalty, the United States Attorney is strongly advised, but not required, to consult with the Capital Case Unit.

If possible, before obtaining an indictment charging a capital offense, the United States Attorney should make a preliminary determination of whether he or she will recommend that the death penalty be sought. If the case is sufficiently developed to allow the United States Attorney to make a pre-indictment determination that he or she will not recommend seeking the death penalty, the United States Attorney should submit the case expeditiously for review under the provisions of this Chapter prior to obtaining an indictment charging a capital-eligible offense, unless public safety requires obtaining the indictment more quickly.

In all cases, the United States Attorney must immediately notify the Capital Case Unit when a capital offense is charged and provide the Unit with a copy of the indictment and cause number, even if the materials described in § 9-10.080, *infra*, are not yet ready for submission.

In any post-indictment case in which the United States Attorney is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, for the consideration of the United States Attorney.

9-10.060 Special Findings in Indictments

For all charged offenses subject to the provisions of this Chapter, regardless of whether the United States Attorney ultimately recommends that the Attorney General authorize seeking the death penalty for the charged offense, the indictment shall allege as special findings: (1) that the defendant is over the age of 18; (2) the existence of the threshold intent factors specified in 18 U.S.C. § 3591(a)(2); and (3) the existence of the statutory aggravating factors specified in, as relevant, 18 U.S.C. §§ 3592(b), (c), or (d).

The indictment shall allege threshold intent and statutory aggravating factors that meet the criteria for commencing prosecution as set forth in USAM §§ 9-27.200, 9-27.220. Prosecuting Assistant United States Attorneys are encouraged to consult with the Capital Case Unit regarding the inclusion of special findings in the indictment.

9-10.070 Consultation with the Family of the Victim

Unless extenuating circumstances exist, the United States Attorney should consult with the family of the victim, if reasonably available, concerning the decision on whether to seek the death penalty. The United States Attorney should include the views of the victim's family concerning the death penalty in any submission made to the Department. The United States Attorney should notify the family of the victim of all final decisions regarding the death penalty. This consultation should occur in addition to notifying victims of their rights under 18 U.S.C. § 3771.

9-10.080 Submissions from the United States Attorney

The United States Attorney must submit to the Assistant Attorney General for the Criminal Division every case in which an indictment has been or will be obtained that charges an offense punishable by death or alleges conduct that could be charged as an offense punishable by death.

The United States Attorney must make submissions to the Assistant Attorney General as expeditiously as possible following indictment, but no fewer than 90 days before the Government is required, by an order of the court, to file a notice that it intends to seek the death penalty. In the absence of a court established deadline for the Attorney General's death penalty decision, the United States Attorney must make the submission sufficiently in advance of trial to allow for both the 90 day time period encompassed by the review process plus any additional time necessary to ensure that a notice of intent to seek the death penalty is timely filed under 18 U.S.C. § 3593(a). If a case is not submitted 90 days in advance of a deadline for the Attorney General's decision or 150 days in advance of a scheduled trial date, the prosecution memorandum should include an explanation of why the submission is untimely.

The prosecution memoranda, death penalty evaluation forms, non-decisional information forms and any other internal memoranda informing the review process and the Attorney General's decision are not subject to discovery by the defendant or the defendant's attorney.

Submissions should include the following documents:

A. Prosecution memorandum. This should be sufficiently detailed to fully inform reviewers of the basis for the United States Attorney's recommendation. The prosecution memorandum should include:

- (1) Unusual circumstances. To ensure that subsequent review is appropriately directed, the first page of the memorandum should note plainly whether the case fits any of the following unusual circumstances:
 - a. The case is submitted for "expedited review," as described in § 9-10.000, *infra*.
 - b. The case involves extradition of the defendant from a country where waiver of the authority of the United States to seek the death penalty is necessary for extradition.
 - c. The case presents a significant law enforcement reason for not seeking the death penalty (such as the defendant's willingness to cooperate in an important but otherwise difficult prosecution).
 - d. The case has been submitted for pre-indictment review as suggested in § 9-10.050, *supra*.
- (2) Deadlines. Any deadline established by the Court for the filing of a notice of intent to seek the death penalty, trial dates, or other time considerations that could affect the timing of the review process should also be noted on the first page of the memorandum.
- (3) A narrative delineation of the facts and separate delineation of the supporting evidence. Where necessary for accuracy, a chart of the evidence by offense and offender should be appended.
- (4) Discussion of relevant prosecutorial considerations.
- (5) Death penalty analysis. The analysis must identify applicable threshold intent factors under 18 U.S.C. § 3591, applicable statutory aggravating factors under the subsections of 18 U.S.C. §§ 3592(b)-(d), and applicable mitigating factors under 18 U.S.C. § 3592(a). In addition, the United States Attorney should include his or her conclusion on whether all the aggravating factor(s) found to exist sufficiently outweigh all the mitigating factor(s) found to exist to justify a sentence of death, or in the absence of mitigating factors, whether the aggravating factor(s) alone are sufficient to justify a sentence of death.
- (6) Background and criminal record of the capital defendants.
- (7) Background and criminal record of the victim.
- (8) Victim impact. Views of the victim's family on seeking the death penalty and other victim impact evidence should be provided.
- (9) Discussion of the federal interest in prosecuting the case.

- (10) Foreign citizenship. The memorandum should include a discussion on whether the defendant(s) are citizens of foreign countries, and if so, whether the requirements of the Vienna Convention on Consular Relations have been satisfied.
- (11) Recommendation of the United States Attorney on whether the death penalty should be sought.

B. Death-penalty evaluation form. The Department will specify a standardized death-penalty evaluation form, which should be completed by the United States Attorney for each capital-eligible offense charged against each defendant. *See* <http://10.173.2.12/usao/eousa/ole/usabook/deat/01deat.htm>

C. Non-decisional information form. This form should be submitted in a sealed envelope clearly labeled as containing the non-decisional information.

D. Indictment. Copies of all existing and proposed superseding indictments should be attached. As described in 9-10.060, *supra*, the indictments should include the special findings necessary for the death penalty to be authorized by statute.

E. Draft notice of intention to seek the death penalty. This document is to be included in the submission only if the United States Attorney recommends seeking the death penalty.

F. Materials provided by defense counsel. Any documents or materials provided by defense counsel to the United States Attorney in the course of the United States Attorney's Office death penalty review process should be provided.

G. Point-of-contact. The name of the assigned attorney in the United States Attorney's Office who is responsible for communicating with the Capital Case Unit about the case should be provided.

H. Relevant court decisions. The first page of the memorandum should highlight court orders and deadlines. The point-of-contact in the United States Attorney's Office is under a continuing obligation to update the Capital Case Unit about developments or changes in court scheduling or any other material aspect of the case.

9-10.090 Substantial Federal Interest

When concurrent jurisdiction exists with a State or local government, a Federal indictment for an offense subject to the death penalty generally should be obtained only when the Federal interest in the prosecution is more substantial than the interests of the State or local authorities. *See* Principles of Federal Prosecution, USAM § 9-27.000 *et seq.* The judgment as to whether there is a more substantial interest in Federal, as opposed to State, prosecution may take into account any factor that reasonably bears on the relative interests of the State and the Federal Governments, including but not limited to the following:

A. The relative strength of the State's interest in prosecution as indicated by the Federal and State characteristics of the criminal conduct. One jurisdiction may have a

particularly strong interest because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by its investigators or through its informants or cooperators, or the possibility that prosecution will lead to disclosure of violations that are peculiarly within the jurisdiction of either Federal or State authorities or will assist an ongoing investigation being conducted by one of them.

B. The extent to which the criminal activity reached beyond the boundaries of a single local prosecutorial jurisdiction. Relevant to this analysis are the nature, extent, and impact of the criminal activity upon the jurisdictions, the number and location of any murders, and the need to procure evidence from other jurisdictions, in particular other States or foreign countries.

C. The relative ability and willingness of the State to prosecute effectively and obtain an appropriate punishment upon conviction. Relevant to this analysis are the ability and willingness of the authorities in each jurisdiction, the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively, legal or evidentiary problems that might attend prosecution, conditions, attitudes, relationships, and other circumstances that enhance the ability to prosecute effectively or, alternatively, that cast doubt on the likelihood of a thorough and successful prosecution.

9-10.100 Expedited Review Procedures

A. Certain defendants and categories of cases are appropriate for summary disposition on an expedited basis. These include: (1) cases in which the defendant is ineligible for the death penalty because the evidence is insufficient to establish the requisite intent under 18 U.S.C. § 3591 or an applicable statutory aggravating factor under 18 U.S.C. § 3592 (b)-(d); (2) cases that involve the extradition of a defendant or crucial witness from a country that, as precondition to extradition, requires assurances that the death penalty will not be sought for the defendant or the evidence obtained from the witness will not be used to seek the death penalty; (3) cases in which, but for proffer protected evidence, the evidence is insufficient to convict the defendant of the capital offense to which he will plead guilty; (4) cases that involve a potential cooperator whose testimony is necessary to indict the remaining offenders; and (5) cases that have been submitted for pre-indictment review under § 9-10.050, *supra*.

B. The cover of the submission should indicate in bold lettering that the United States Attorney is seeking expedited review, and it should also indicate the basis on which the case qualifies for expedited review. The accompanying memorandum may be abbreviated, but it should be sufficiently thorough to make clear the basis upon which the case qualifies for expedited review.

C. The Capital Case Unit will screen all cases in which the United States Attorney's Office seeks expedited review to ensure that such review is appropriate. The Unit will then give priority to cases so designated. If the Capital Case Unit finds that the case does not qualify for expedited review, it will be scheduled for review on a non-expedited basis or returned to the United States Attorney's Office for later submission.

9-10.110 Plea Agreements

The death penalty may not be sought, and no attorney for the Government may threaten to seek it, solely for purpose of obtaining a more desirable negotiating position. Absent the authorization of the Attorney General, the United States Attorney may not enter into a binding plea agreement that precludes the United States from seeking the death penalty with respect to any defendant falling within the scope of this Chapter.

The United States Attorney, however, may agree to submit for the Attorney General's review and possible approval, a plea agreement relating to a capital eligible offense or conduct that could be charged as a capital eligible offense. At all times, the United States Attorney must make clear to all parties that the conditional plea does not represent a binding agreement, but is conditioned on the authorization of the Attorney General. The United States Attorney should not inform the defendant, court, or public of whether he or she recommends authorization of the plea agreement.

For proposed plea agreements that precede a decision by the Attorney General to seek or not to seek the death penalty, the United States Attorney should send a request for approval to the Assistant Attorney General for the Criminal Division as early as possible. Absent unavoidable circumstances, the United States Attorney must send the request no later than 90 days prior to the date on which the Government would be required, by an order of the court or by the requirements of 18 U.S.C. § 3593(a), to file a notice that it intends to seek the death penalty. (Proposed plea agreements that would require withdrawing a previously filed notice of intent to seek the death penalty should follow the procedures described in 9-10.150, *infra*.)

Unless a potential capital defendant's testimony is necessary to indict the remaining offenders or other circumstances compel separate consideration, review of the case against the prospective cooperator will occur simultaneously with the review of the cases against the remaining offenders who would be indicted for the offenses at issue. Submissions in support of requests for approval of plea agreements under this section should include a prosecution memorandum that includes an explanation of why the plea agreement is an appropriate disposition of the charges, a death penalty evaluation form for each capital eligible offense that has been or could be charged against the prospective cooperator, and a non-decisional information form. The Capital Review Committee will review requests for authorization to enter into a plea agreement under this subsection and may request a submission from defense counsel and schedule the case for a hearing before the Committee.

See USAM § 9-16.000 for more information on the topic of pleas and plea agreements.

9-10.120 Department of Justice Review

Upon receipt of the materials submitted by the United States Attorney, the Assistant Attorney General for the Criminal Division will forward the materials to the Criminal Division's Capital Case Unit.

In any case in which (1) the United States Attorney recommends that the Attorney General authorize seeking the death penalty, or (2) a member of the Capital Review Committee requests a Committee conference, a Capital Case Unit attorney will confer with representatives of the United States Attorney's Office to establish a date and time for the Capital Review Committee to meet with defense counsel and representatives of the United States Attorney's Office to consider the case. No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.

The Capital Review Committee shall review the materials submitted by the United States Attorney and any materials submitted by defense counsel. The Capital Review Committee will consider all information presented to it, including any allegation of individual or systemic racial bias in the Federal administration of the death penalty. After considering all information submitted to it, the Committee shall make a recommendation to the Attorney General through the Deputy Attorney General.

If the Committee's recommendation differs from that of the United States Attorney, the United States Attorney shall be provided with a copy of the Committee's recommendation memorandum when it is transmitted to the Deputy Attorney General. The United States Attorney may respond to the Committee's analysis in a memorandum directed to the Deputy Attorney General. The Deputy Attorney General will then make a recommendation to the Attorney General. The Attorney General will make the final decision whether the Government should file a notice of intent to seek the death penalty.

9-10.130 Standards for Determination

The standards governing the determination to be reached in cases under this Chapter include fairness, national consistency, adherence to statutory requirements, and law-enforcement objectives.

A. Fairness requires all reviewers to evaluate each case on its own merits and on its own terms. As with all other actions taken in the course of Federal prosecutions, bias for or against an individual based upon characteristics such as race or ethnic origin play no role in any recommendation or decision as to whether to seek the death penalty.

B. National consistency requires treating similar cases similarly, when the only material difference is the location of the crime. Reviewers in each district are understandably most familiar with local norms or practice in their district and State, but reviewers must also take care to contextualize a given case within national norms or practice. For this reason, the multi-tier process used to make determinations in this Chapter is carefully designed to provide reviewers with access to the national decision-making context, and thereby, to reduce disparities across districts.

C. In determining whether it is appropriate to seek the death penalty, the United States Attorney, the Capital Review Committee, and the Attorney General will determine whether the applicable statutory aggravating factors and any non-statutory aggravating factors sufficiently outweigh the applicable mitigating factors to justify a sentence of death or, in the absence of any mitigating factors, whether the aggravating

factors themselves are sufficient to justify a sentence of death. Reviewers are to resolve ambiguity as to the presence or strength of aggravating or mitigating factors in favor of the defendant. The analysis employed in weighing the aggravating and mitigating factors should be qualitative, not quantitative: a sufficiently strong aggravating factor may outweigh several mitigating factors, and a sufficiently strong mitigating factor may outweigh several aggravating factors. Reviewers may accord weak aggravating or mitigating factors little or no weight. Finally, there must be substantial, admissible, and reliable evidence of the aggravating factors.

D. In deciding whether it is appropriate to seek the death penalty, the United States Attorney, the Capital Review Committee, the Deputy Attorney General, and the Attorney General may consider any legitimate law-enforcement or prosecutorial reason that weighs for or against seeking the death penalty.

9-10.140 Post-Decision Actions

In any case in which the Attorney General has authorized the filing of a notice of intention to seek the death penalty, the United States Attorney shall not file or amend the notice until the Capital Case Unit of the Criminal Division has approved the notice or the proposed amendment. The notice of intention to seek the death penalty shall be filed as soon as possible after transmission of the Attorney General's decision to seek the death penalty.

The United States Attorney should promptly inform the district court and counsel for the defendant once the Attorney General has made the final decision. Expedited communication is necessary so that the court is aware, in cases in which the Attorney General authorizes the United States Attorney not to seek the death penalty, that appointment of counsel under 18 U.S.C. § 3005 is not required or is no longer required. In cases in which the Attorney General authorizes the United States Attorney to seek the death penalty, the district court and defense counsel should be given as much opportunity as possible to make proper scheduling decisions.

9-10.150 Withdrawal of the Notice of Intention to Seek the Death Penalty

Once the Attorney General has authorized the United States Attorney to seek the death penalty, the United States Attorney may not withdraw a notice of intention to seek the death penalty filed with the district court unless authorized by the Attorney General.

If the United States Attorney wishes to withdraw the notice, the United States Attorney shall advise the Assistant Attorney General for the Criminal Division of the reasons for that request. The United States Attorney should base the withdrawal request on material changes in the facts and circumstances of the case from those that existed at the time of the initial determination.

Reviewers should evaluate the withdrawal request under the principles used to make an initial determination, and limit the evaluation to determining if the changed facts and circumstances, had they been known at the time of the initial determination, would

have resulted in a decision not to seek the death penalty. For this reason, information or arguments that had been advanced initially are not normally appropriate bases for withdrawal requests. In all cases, however, reviewers should consider all necessary information to ensure every defendant is given the individualized consideration needed for full review and appropriate decision-making.

The Assistant Attorney General for the Criminal Division will review any request by a United States Attorney for reconsideration of the decision to seek the death penalty or authorization to withdraw the notice of intent to seek the death penalty. The Assistant Attorney General will make a recommendation to the Attorney General through the Deputy Attorney General on whether the notice of intent to seek the death penalty should be withdrawn. In making that recommendation, the Assistant Attorney General will be advised by the Capital Case Unit.

In all cases, the Attorney General shall make the final decision on whether to authorize the withdrawal of a notice of intention to seek the death penalty. Until such a decision is made, the United States Attorney should proceed with the case as initially directed by the Attorney General. As with all communications between United States Attorneys and the Department of Justice, the fact that a withdrawal request has been made is confidential and may not be disclosed to any party outside the Department of Justice and its investigative agencies.

9-10.160 Approval Required For Judicial Sentencing Determination

In cases in which the Attorney General has authorized seeking the death penalty, the United States Attorney must obtain the approval of the Assistant Attorney General for the Criminal Division before agreeing to a request by the defendant pursuant to 18 U.S.C. § 3593(b)(3) for the sentence to be determined by the trial court rather than a jury.

9-10.170 Reporting Requirements

Each United States Attorney's Office must identify a point-of-contact who will be responsible for ensuring compliance with the following reporting requirements.

The Capital Case Unit must be immediately notified when:

A. A capital offense is charged or when an indictment is obtained pertaining to conduct that could be, but has not been, charged as a capital offense. The point-of contact should provide the Unit with a copy of the indictment and cause number.

B. A deadline for filing a notice of intent to seek the death penalty or a trial date is established or modified.

C. There are any developments that could affect the ability to file a notice of intent to seek the death penalty sufficiently in advance of trial to allow the defense and prosecution to prepare for a capital punishment hearing.

D. A verdict and sentence are reached in a case in which the Attorney General authorized seeking the death penalty.

E. The Government intends to accept a guilty plea to a capital offense when, but for the defendant's protected proffer, there would be insufficient evidence to charge the offense. The Capital Case Unit may authorize the United States Attorney to proceed with such pleas without submitting the cases to the review process.

The victim's family must be notified of all final decisions regarding the death penalty.

9-10.180 Forms and Procedures

The Assistant Attorney General for the Criminal Division, the Deputy Attorney General, and the Attorney General may promulgate forms and procedures to implement the provisions of this Chapter. The United States Attorney should contact the Capital Case Unit to discuss the applicable procedures and obtain the appropriate forms.

9-10.190 Exceptions for the Proper Administration of Justice

To ensure the proper administration of justice in an appropriate case, the Attorney General may authorize exceptions to the provisions of this Chapter.

GRAND JURY

9-11.010 Introduction

9-11.101 Powers and Limitations of Grand Juries -- The Functions of a Grand Jury

9-11.120 Power of a Grand Jury Limited by Its Function

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9-11.140 Limitation on Grand Jury Subpoenas

9-11.141 Fair Credit Reporting Act and Grand Jury Subpoenas

9-11.142 Grand Jury Subpoenas for Financial Records

9-11.150 Subpoenaing Targets of the Investigation

9-11.151 Advice of "Rights" of Grand Jury Witnesses

9-11.152 Requests by Subjects and Targets to Testify Before the Grand Jury

9-11.153 Notification of Targets

**9-11.154 Advance Assertions of an Intention to Claim the Fifth Amendment Privilege
Against Compulsory Self-Incrimination**

9-11.155 Notification to Targets when Target Status Ends

**9-11.160 Limitation on Resubpoenaing Contumacious Witnesses Before Successive Grand
Juries**

9-11.231 Motions to Dismiss Due to Illegally Obtained Evidence Before a Grand Jury

9-11.232 Use of Hearsay in a Grand Jury Proceeding

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**9-11.241 Department of Justice Attorneys Authorized to Conduct Grand Jury
Proceedings**

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**9-11.250 Disclosure of Matters Occurring Before the Grand Jury to Department of
Justice Attorneys and Assistant United States Attorneys**

9-11.254 Guidelines for Handling Documents Obtained by the Grand Jury

**9-11.255 Prior Department of Justice Approval Requirements -- Grand Jury Subpoenas
to Lawyers and Members of the News Media**

**9-11.260 Rule 6(e)(3)(E)(iv) Disclosure of Grand Jury Material to State and Local Law
Enforcement Officials**

9-11.300 The Special Grand Jury -- 18 U.S.C. § 3331

9-11.330 Consultation With the Criminal Division About Reports

9-11.010 Introduction

This chapter contains the Department's policy on grand jury practice. For a discussion of the law, and a list of resource materials on grand jury practice, see the Criminal Resource Manual at 154 et seq.

In dealing with the grand jury, the prosecutor must always conduct himself or herself as an officer of the court whose function is to ensure that justice is done and that guilt shall not escape nor innocence suffer. The prosecutor must recognize that the grand jury is an independent body, whose functions include not only the investigation of crime and the initiation of criminal prosecution but also the protection of the citizenry from unfounded criminal charges. The prosecutor's responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, the prosecutor must be scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jurors.

9-11.101 Powers and Limitations of Grand Juries -- The Functions of a Grand Jury

While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions -- to indict or, in the alternative, to return a "no-bill." *See Wright, Federal Practice and Procedure*, Criminal Section 110.

At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under Title 18 U.S.C. § 3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees. This is discussed at USAM 9-11.300 and 9-11.330, and the Criminal Resource Manual at 158-59. *See Jenkins v. McKeithen*, 395 U.S. 411, 430 (1969); *Hannah v. Larche*, 363 U.S. 420 (1960). Whether a regular grand jury enjoys a comparable authority to issue a report is a difficult and complex question. *Cf. United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975). The Criminal Division of the Department of Justice should be consulted before any grand jury report is initiated, whether by a regular or special grand jury. *See also* USAM 9-11.330.

9-11.120 Power of a Grand Jury Limited by Its Function

The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. *Costello v. United States*, 350 U.S. 359, 362 (1956). Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. *United States v. Woods*, 544 F.2d 242, 250 (6th Cir. 1976), *cert. denied sub nom.*, *Hurt v. United States*, 429 U.S. 1062 (1977). Nor can the grand jury be used solely for pre-trial discovery or trial preparation. *United States v. Star*, 470 F.2d 1214 (9th Cir. 1972). After indictment, the grand jury may be used if its investigation is related to a superseding indictment of additional defendants or additional crimes by an indicted defendant. *In re Grand Jury Subpoena Duces Tecum, Dated January 2, 1985*, 767 F.2d 26, 29-30 (2d Cir. 1985); *In re Grand Jury Proceedings*, 586 F.2d 724 (9th Cir. 1978).

A. Approval Required Prior to Resubmission of Same Matter to Grand Jury. Once a grand jury returns a no-bill or otherwise acts on the merits in declining to return an indictment, the same matter (i.e., the same transaction or event and the same putative defendant) should not be presented to another grand jury or resubmitted to the same grand jury without first securing the approval of the responsible United States Attorney.

B. Use of Grand Jury to Locate Fugitives. It is improper to utilize the grand jury solely as an investigative aid in the search for a fugitive in whose testimony the grand jury has no interest. *In re Pedro Archuleta*, 432 F. Supp. 583 (S.D.N.Y. 1977); *In re Wood*, 430 F. Supp. 41 (S.D.N.Y. 1977), *aff'd sub nom* *In re Cueto*, 554 F.2d 14 (2d Cir. 1977). However, if the grand jury has a legitimate interest in the testimony of a fugitive, it may subpoena other witnesses and records in an effort to locate the fugitive. *Wood, supra*,

citing *Hoffman v. United States*, 341 U.S. 479 (1951). If the present whereabouts of a fugitive is related to a legitimate grand jury investigation of offenses such as harboring, 18 U.S.C. §§ 1071, 1072, 1381, misprision of felony, 18 U.S.C. § 4, accessory after the fact, 18 U.S.C. § 3, escape from custody, 18 U.S.C. §§ 751, 752, or failure to appear, 18 U.S.C. § 3146, the grand jury properly may inquire as to the fugitive's whereabouts. *See In re Grusse*, 402 F. Supp. 1232 (D.Conn. 1975). Unless such collateral interests are present, the grand jury should not be employed in locating fugitives in bail-jumping and escape cases since, as a rule, those offenses relate to the circumstances of defendant's disappearance rather than his or her current whereabouts.

Generally, grand jury subpoenas should not be used to locate fugitives in investigations of unlawful flight to avoid prosecution. 18 U.S.C. § 1073. Normally an unlawful flight complaint will be dismissed when a fugitive is apprehended and turned over to State authorities to await extradition. Prosecutions for unlawful flight are rare and the statute requires prior written approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General. *See USAM 9-69.460* (containing prior approval requirement for § 1073 indictments). Since indictments for unlawful flight are rarely sought, it would be improper to routinely use the grand jury in an effort to locate unlawful flight fugitives.

C. Obtaining Records to Aid in Location of Federal Fugitives: Alternatives to Grand Jury Subpoenas. Since the enactment of the Electronic Communications Privacy Act of 1986, law enforcement access to telephone records is covered by Federal statute. *See 18 U.S.C. § 2703*. Pursuant to 18 U.S.C. §§ 2703(c)(1)(B) and 2703(c)(2) the government may obtain a "record or other information pertaining to a subscriber" (telephone toll records) without notice to the subscriber by obtaining: (1) an administrative or grand jury subpoena; (2) a search warrant pursuant to State or Federal law; or (3) a court order pursuant to 18 U.S.C. § 2703(d) based on a finding that the information is relevant to a legitimate law enforcement inquiry. *See USAM 9-7.000 et seq.* for information regarding the Electronic Communications Privacy Act of 1986.

Occasionally, there may be records other than telephone toll records which might be useful in a fugitive investigation but which cannot be obtained by grand jury subpoena, administrative subpoena, or search warrant. In such instances, it is appropriate to seek a court order for production of the records under the All Writs Act, 28 U.S.C. § 1651. The All Writs Act provides:

The Supreme Court and all courts established by the Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The United States Supreme Court has recognized the power of a Federal court to issue orders under the All Writs Act "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in the exercise of its jurisdiction." *See United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

Because the purpose of the All Writs Act is to aid the court in the exercise of its jurisdiction, an application for an order under the act must be sought only from the United States District Court in which the complaint or indictment is pending.

The use of the All Writs Act to obtain records in a fugitive investigation is not a procedure to be used in every fugitive case. The willingness of courts to issue such orders may depend on the selectivity with which such applications are made, and the courts will not condone a wholesale use of the act for this purpose. Thus, the procedure should be used only in extraordinary cases where a strong showing can be made that the records are likely to lead to ascertaining the whereabouts of the fugitive.

9-11.121 Venue Limitations

A case should not be presented to a grand jury in a district unless venue for the offense lies in that district.

9-11.130 Limitation on Naming Persons as Unindicted Co-Conspirators

The practice of naming individuals as unindicted co-conspirators in an indictment charging a criminal conspiracy has been severely criticized in *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975).

Ordinarily, there is no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty. For purposes of indictment itself, it is sufficient, for example, to allege that the defendant conspired with "another person or persons known." The identity of the person can be supplied, upon request, in a bill of particulars. *See USAM 9-27.760*. With respect to the trial, the person's identity and status as a co-conspirator can be established, for evidentiary purposes, through the introduction of proof sufficient to invoke the co-conspirator hearsay exception without subjecting the person to the burden of a formal accusation by a grand jury.

In the absence of some significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments. *See USAM 9-16.500; 9-27.760*.

9-11.140 Limitation on Grand Jury Subpoenas

Subpoenas in Federal proceedings, including grand jury proceedings, are governed by Rule 17 of the Federal Rules of Criminal Procedure. Grand jury subpoenas may be served at any place within the United States. Under Rule 17(g) of the Federal Rules of Criminal Procedure, a failure by a person without adequate excuse to obey a subpoena served upon him or her may be deemed a contempt of the court.

There are special considerations involved when evidence sought by United States investigators and prosecutors is located in a foreign country. Before initiating any process to obtain testimony or evidence from abroad, prior consultation with the Criminal Division is required pursuant to *USAM 9-13.500*. Inquiries should be directed to the Office of International Affairs. *See USAM 9-13.500*.

"Forthwith" subpoenas should be used only when an immediate response is justified and then only with the prior approval of the United States Attorney.

Policies regarding the issuance of subpoenas to members of the news media and the issuance of subpoenas for telephone toll records of members of the news media are discussed elsewhere in the USAM. *See USAM 9-13.400* (prior approval required).

9-11.141 Fair Credit Reporting Act and Grand Jury Subpoenas

Disclosure of consumer credit information is controlled by the Fair Credit Reporting Act, 15 U.S.C. § 1681. The Fair Credit Reporting Act, 15 U.S.C. § 1681(b), has been amended to permit prosecutors to obtain consumer credit report records by using a federal grand jury subpoena without applying to the district court for an order.

Regarding access, disclosure and transfer of financial records, see *USAM 9-13.800*.

9-11.142 Grand Jury Subpoenas for Financial Records

A bank depositor lacks the necessary Fourth Amendment interest to challenge a subpoena duces tecum issued to a bank for its records of the depositor's transactions. *United States v. Miller*, 425 U.S. 435 (1976). Because of procedures imposed by the Right to Financial Privacy Act of 1978, it is important, nevertheless, that United States Attorneys exercise close control over the process of obtaining for law enforcement purposes business records of banks and other financial institutions.

Sound grand jury practice requires that:

- The prosecutor personally authorize the issuance of a subpoena duces tecum to obtain financial institution account records to avoid any appearance that the matter was left to the discretion of an investigative agent serving the subpoena;

- The subpoena be returnable on a date when the grand jury is in session and the subpoenaed records be produced before the grand jury unless the grand jury itself has previously agreed upon some different course, *see United States v. Hilton*, 534 F.2d 556, 564, 565 (3d Cir. 1976), *cert. denied*, 429 U.S. 828; and
- If, for the sake of convenience and economy, the subpoenaed party is permitted voluntarily to relinquish the records to the government agent serving the subpoena, a formal return of the records be made in due course to the grand jury.

Every recipient of a grand jury subpoena for financial institution records should be made aware that civil and criminal penalties exist for making certain disclosures involving (FIF) offenses regarding the subpoena. The prohibited notifications and applicable penalties are set out in 12 U.S.C. § 3402(b) and 18 U.S.C. § 1510(b), respectively. The criminal penalties include fines and a maximum prison term of five years if an officer of a financial institution (as defined in 18 U.S.C. § 1510(b)) notifies, directly or indirectly, any person regarding the existence or contents of this subpoena with the intent to obstruct a judicial proceeding. In addition, fines and a maximum prison term of one year may be imposed if the notification is made, directly or indirectly, to a customer of the financial institution whose records are sought by the subpoena or to any other person named in the subpoena. Section 3420(b) of the Right to Financial Privacy Act contains a provision to be read *in pari materia* with 18 U.S.C. § 1510(b) under which civil penalties may also be imposed. *See also* USAM 9-13.800 *et seq.*

9-11.150 Subpoenaing Targets of the Investigation

A grand jury may properly subpoena a subject or a target of the investigation and question the target about his or her involvement in the crime under investigation. *See United States v. Wong*, 431 U.S. 174, 179 n. 8 (1977); *United States v. Washington*, 431 U.S. 181, 190 n. 6 (1977); *United States v. Mandujano*, 425 U.S. 564, 573-75 and 584 n. 9 (1976); *United States v. Dionisio*, 410 U.S. 1, 10 n. 8 (1973). However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known "target" (as defined in USAM 9-11.151) is subpoenaed to testify before the grand jury about his or her involvement in the crime under investigation, an effort should be made to secure the target's voluntary appearance. If a voluntary appearance cannot be obtained, the target should be subpoenaed only after the grand jury and the United States Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a "target," careful attention will be paid to the following considerations:

- The importance to the successful conduct of the grand jury's investigation of the testimony or other information sought;
- Whether the substance of the testimony or other information sought could be provided by other witnesses; and
- Whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

9-11.151 Advice of "Rights" of Grand Jury Witnesses

It is the policy of the Department of Justice to advise a grand jury witness of his or her rights if such witness is a "target" or "subject" of a grand jury investigation. See the Criminal Resource Manual at 160 for a sample target letter.

A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officer's or employee's conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

The Supreme Court declined to decide whether a grand jury witness must be warned of his or her Fifth Amendment privilege against compulsory self-incrimination before the witness's grand jury testimony can be used against the witness. *See United States v. Washington*, 431 U.S. 181, 186 and 190-191 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Mandujano*, 425 U.S. 564, 582 n. 7. (1976). In *Mandujano* the Court took cognizance of the fact that Federal prosecutors customarily warn "targets" of their Fifth Amendment rights before grand jury questioning begins. Similarly, in *Washington*, the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting. *See Washington*, at 188.

Notwithstanding the lack of a clear constitutional imperative, it is the policy of the Department that an "Advice of Rights" form be appended to all grand jury subpoenas to be served on any "target" or "subject" of an investigation. See the advice of rights list below.

In addition, these "warnings" should be given by the prosecutor on the record before the grand jury and the witness should be asked to affirm that the witness understands them.

Although the Court in *Washington, supra*, held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant(s)," the Department of Justice continues its longstanding policy to advise witnesses who are known "targets" of the investigation that their conduct is being investigated for possible violation of Federal criminal law. This supplemental advice of status of the witness as a target should be repeated on the record when the target witness is advised of the matters discussed in the preceding paragraphs.

When a district court insists that the notice of rights not be appended to a grand jury subpoena, the advice of rights may be set forth in a separate letter and mailed to or handed to the witness when the subpoena is served.

Advice of Rights.

- The grand jury is conducting an investigation of possible violations of Federal criminal laws involving: (State here the general subject matter of inquiry, e.g., conducting an illegal gambling business in violation of 18 U.S.C. § 1955).
- You may refuse to answer any question if a truthful answer to the question would tend to incriminate you.
- Anything that you do say may be used against you by the grand jury or in a subsequent legal proceeding.
- If you have retained counsel, the grand jury will permit you a reasonable opportunity to step outside the grand jury room to consult with counsel if you so desire.

Additional Advice to be Given to Targets. If the witness is a target, the above advice should also contain a supplemental warning that the witness's conduct is being investigated for possible violation of federal criminal law.

9-11.152 Requests by Subjects and Targets to Testify Before the Grand Jury

It is not altogether uncommon for subjects or targets of the grand jury's investigation, particularly in white-collar cases, to request or demand the opportunity to tell the grand jury their side of the story. While the prosecutor has no legal obligation to permit such witnesses to testify, *United States v. Leverage Funding System, Inc.*, 637 F.2d 645 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); *United States v. Gardner*, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1976)), a refusal to do so can create the appearance of unfairness. Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a "subject" or "target" of an investigation, as defined above, to testify personally before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his or her privilege against self-incrimination, on the record before the grand jury, and is represented by counsel or voluntarily and knowingly appears without counsel and consents to full examination under oath.

Such witnesses may wish to supplement their testimony with the testimony of others. The decision whether to accommodate such requests or to reject them after listening to the testimony of the target or the subject, or to seek statements from the suggested witnesses, is a matter left to the sound discretion of the grand jury. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either an adversary proceeding or the arbiter of guilt or innocence. *See, e.g., United States v. Calandra*, 414 U.S. 338, 343 (1974).

9-11.153 Notification of Targets

When a target is not called to testify pursuant to USAM 9-11.150, and does not request to testify on his or her own motion (see USAM 9-11.152), the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify before the grand jury, subject to the conditions set forth in USAM 9-11.152. Notification would not be appropriate in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

9-11.154 Advance Assertions of an Intention to Claim the Fifth Amendment Privilege Against Compulsory Self-Incrimination

A question frequently faced by Federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify the witness will refuse to testify on Fifth Amendment grounds. If a "target" of the investigation and his or her attorney state in a writing, signed by both, that the "target" will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the United States Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry.

Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and make it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself or herself.

9-11.155 Notification to Targets when Target Status Ends

The United States Attorney has the discretion to notify an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target by the United States Attorney's Office. Such a notification should be provided only by the United States Attorney having cognizance over the grand jury investigation.

Discontinuation of target status may be appropriate when:

- The target previously has been notified by the government that he or she was a target of the investigation; and,
- The criminal investigation involving the target has been discontinued without an indictment being returned charging the target, or the government receives evidence in a continuing investigation that conclusively establishes that target status has ended as to this individual.

There may be other circumstances in which the United States Attorney may exercise discretion to provide such notification such as when government action has resulted in public knowledge of the investigation.

The United States Attorney may decline to issue such notification if the notification would adversely affect the integrity of the investigation or the grand jury process, or for other appropriate reasons. No explanation need be provided for declining such a request.

If the United States Attorney concludes that the notification is appropriate, the language of the notification may be tailored to the particular case. In a particular case, for example, the language of the notification may be drafted to preclude the target from using the notification as a "clean bill of health" or testimonial.

The delivering of such a notification to a target or the attorney for the target shall not preclude the United States Attorney's Office or the grand jury having cognizance over the investigation (or any other grand jury) from reinstituting such an investigation without notification to the target, or the attorney for the target, if, in the opinion of that or any other grand jury, or any United States Attorney's Office, circumstances warrant such a reinstitution.

9-11.160 Limitation on Resubpoenaing Contumacious Witnesses Before Successive Grand Juries

Witnesses who refuse to answer questions properly put to them by the grand jury may be held in contempt and either fined or imprisoned until they comply with the directions of the grand jury. The contempt may extend for the life of the grand jury.

While the Supreme Court in *Shillitani v. United States*, 384 U.S. 364, 371 n. 8 (1963), appears to approve the reimposition of civil contempt sanctions in successive grand juries, it is the policy of the Department of Justice generally not to resubpoena a contumacious witness before successive grand juries for the purpose of instituting further contempt proceedings. Resubpoenaing a contumacious witness may be justified in certain circumstances, however, such as when the questions to be asked the witness relate to matters not covered in the previous proceedings or when there is an indication from the witness or the witness's counsel that the witness will testify if called before the new grand jury. If the prosecutor believes that the witness possesses information essential to the investigation, resubpoenaing the witness may also be justified when the witness himself or herself is involved to a significant degree in the criminality about which the witness can testify. Prior authorization must be obtained from the Assistant Attorney General, Criminal Division, to resubpoena a witness before the successive grand jury as well as to seek civil contempt sanctions should the witness persist in his or her refusal to testify. To obtain approval, the prosecutor must show either: (a) that the witness is prepared to testify; or (b) that the appearance of the witness is justified since the witness possesses information essential to the investigation.

If the grand jury's term is about to expire, the Department recommends that a subpoena ordinarily should not be issued to a witness who has advised the prosecutor that he or she will refuse to testify before such grand jury. The coercive effect of a civil contempt adjudication is substantially diluted if a grand jury is approaching its expiration date. This is a matter within the discretion of the United States Attorney and there may well be situations when it is necessary to subpoena a witness and institute contempt proceedings for recalcitrance in such circumstances. In most situations, however, it would seem preferable to subpoena the witness before a new grand jury.

9-11.231 Motions to Dismiss Due to Illegally Obtained Evidence Before a Grand Jury

A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation.

9-11.232 Use of Hearsay in a Grand Jury Proceeding

As a general rule, it is proper to present hearsay to the grand jury, *United States v. Calandra* 414 U.S. 338 (1974). Each United States Attorney should be assured that hearsay evidence presented to the grand jury

will be presented on its merits so that the jurors are not misled into believing that the witness is giving his or her personal account. *See United States v. Leibowitz*, 420 F.2d 39 (2d Cir. 1969); *but see United States v. Trass*, 644 F.2d 791 (9th Cir. 1981).

9-11.233 Presentation of Exculpatory Evidence

In *United States v. Williams*, 112 S.Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

9-11.241 Department of Justice Attorneys Authorized to Conduct Grand Jury Proceedings

Federal Rule of Criminal Procedure 6(d) authorizes attorneys for the government to appear before the grand jury. For purposes of that rule, an "attorney for the government" is defined in Fed. R. Crim. P. 54(c) as the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, an authorized assistant of a United States Attorney, and certain other persons in cases arising under the laws of Guam.

The authority for a United States Attorney to conduct grand jury proceedings is set forth in the statute establishing United States Attorney duties, 28 U.S.C. § 547. United States Attorneys are directed in that statute to "prosecute for all offenses against the United States." Assistant United States Attorneys similarly derive their authority to conduct grand jury proceedings in the district of their appointment from their appointment statute, 28 U.S.C. § 542.

When a United States Attorney or Assistant United States Attorney needs to appear before a grand jury in a district other than the district in which he or she has been appointed, the United States Attorney for either the district of appointment or the district of the grand jury should complete an appointment letter, appointing the attorney as a Special Assistant United States Attorney (SAUSA). The United States Attorney's Office (USAO) completing the appointment letter should send a copy of the letter to the Executive Office for United States Attorneys, Personnel Office. USAOs should also send a copy of any letter extending the appointment of the SAUSA.

Departmental attorneys, other than United States Attorneys and Assistant United States Attorneys, may conduct grand jury proceedings when authorized to do so by the Attorney General or a delegate pursuant to 28 U.S.C. § 515(a). The Attorney General has delegated the authority to direct Department of Justice Attorneys to conduct grand jury proceedings to all Assistant Attorneys General and Deputy Assistant Attorneys General in matters supervised by them. (Order No. 725-77.) Requests in Criminal Division cases should be submitted to the supervising Deputy Assistant Attorney General.

9-11.242 Non-Department of Justice Government Attorneys

Federal Rule of Criminal Procedure 6(d) provides that the only prosecution personnel who may be present while the grand jury is in session are "attorneys for the government." Rule 54(c) defines attorney for the government for Federal Rules of Criminal Procedure purposes as "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney."

An agency attorney or other non-Department of Justice attorney must be appointed as a Special Assistant or a Special Assistant to the Attorney General, pursuant to 28 U.S.C. § 515, or a Special Assistant

to a United States Attorney, pursuant to 28 U.S.C. § 543, in order to appear before a grand jury in the district of appointment. When the less common Special Assistant or Special Assistant to the Attorney General appointment is to be used in cases or matters within the jurisdiction of the Criminal Division, the Office of Enforcement Operations should be contacted for information.

A letter of appointment is executed and the oath of office as a Special Assistant to a United States Attorney must be taken (see 28 U.S.C. §§ 515, 543 and 544). Requests for such appointments must be made in writing through the Director of the Executive Office for United States Attorneys and should include the information described in the Criminal Resource Manual at 155.

9-11.244 Presence of an Interpreter

Attorneys for the government should ensure that any interpreter used in a grand jury proceeding is aware of his or her secrecy obligation, and that the interpreter has received the necessary security clearance and has been properly sworn.

9-11.250 Disclosure of Matters Occurring Before the Grand Jury to Department of Justice Attorneys and Assistant United States Attorneys

Disclosure of materials covered by Federal Rule of Criminal Procedure 6(e) may be made without a court order "to an attorney for the government for use in the performance of such attorney's duty." See Fed. R. Crim. P. 6(e)(3)(A)(i). "Attorney for the government" is defined in Fed. R. Crim. P. 54(c). See discussion of *United States v. Forman*, 71 F.3d 1214 (6th Cir. 1996) in the Criminal Resource Manual at 156.

9-11.254 Guidelines for Handling Documents Obtained by the Grand Jury

In 1996, the Deputy Attorney General approved the following Guidelines for "Handling Documents Obtained by the Grand Jury." The Guidelines, written by a working group composed of representatives of each of the litigating Divisions, the Executive Office for United States Attorneys, and the Office of Information and Privacy, address the need to establish and follow proper recordkeeping procedures regarding evidence obtained by the grand jury.

The Department of Justice routinely receives requests for access to documents from Congress, from individuals or entities filing requests pursuant to the Freedom of Information Act (FOIA), and from private and government lawyers engaged in civil litigation. Records retention practices can make it difficult to identify what evidence may properly be provided in response to a request and may hamper the proper use of non-grand jury information by civil attorneys of the Department. For example, if a file marked "Grand Jury" includes documents obtained by grand jury subpoena and documents otherwise obtained, it is difficult in some instances to determine whether the Rule 6 limitations on disclosure apply to certain documents in the file. The task is more difficult in those situations where the prosecutor who handled the grand jury matter is no longer in government service. The Guidelines, which apply to the United States Attorneys and to the litigating Divisions of the Department, will make it easier to determine those documents that reveal matters occurring before the grand jury and those that do not.

Although local practice, local rules, and case law varies to some extent among the Circuits, every effort should be made to apply a consistent procedure that will maintain the integrity of evidence obtained by the grand jury and, at the same time, assist in identifying what are "matters occurring before a grand jury." This will enable a clear and proper determination of what material can and should be released to a FOIA requestor and what documents may be shared with attorneys for the government engaged in civil litigation. Generally, government attorneys who are handling only civil cases do not have automatic access to grand jury materials but may obtain access to such materials only upon court order issued pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i). See *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 427 (1983). A specific exception has been created for certain banking financial matters. See 18 U.S.C. § 3322.

Accordingly, whenever it is practicable to do so, prosecutors obtaining evidence in a criminal investigation should use the following procedures. These procedures supplement those described in the Department's Federal Grand Jury Practice Manual, January 1993, pages 106 through 120. The procedures do not create any rights in third parties:

Guidelines for Handling Documents Obtained by the Grand Jury

1. Consider Alternatives. Before issuing a grand jury subpoena, prosecutors should consider what evidence has already been collected through other means and whether a voluntary request, contractual obligation, inspector general subpoena, civil investigative demand or other compulsory process is available to obtain the information sought. Those methods may be just as effective as a grand jury subpoena in obtaining information but their use may avoid grand jury secrecy issues.

2. Identify a Custodian. As early as practicable, a prosecutor should determine who will have custody of original documents and real evidence, and where such documents and evidence will be maintained. If the case agent is to have custody, the grand jury should authorize him to maintain the evidence; but, unless required by local rule, the grand jury should not make him an "agent" of the grand jury. (As explained at footnote 234 on page 107 of the Federal Grand Jury Practice Manual, prosecutors are discouraged from swearing in an investigator as an agent of the grand jury). Prosecutors should not commingle original documents and real evidence obtained by grand jury subpoena with evidence obtained by other means.

3a. Create an Identification System. Upon receipt, prosecutors should number, then copy, documents and real evidence -- however they are obtained. The originals should then be secured. If the volume of documents is great, prosecutors should consider microfilming them. Numbering and securing the originals in the order in which they are obtained will facilitate access to the evidence and make it easier for prosecutors to create a record of how, and from whom, the evidence was obtained. For example, use of an identification system, such as a list of the documents by their identifying numbers under topic headings, permits the government to respond more efficiently to FOIA requests and better enables prosecutors to support a decision to withhold documents should a court demand an explanation of the basis for claiming that the documents are covered by Rule 6(e). See *Church of Scientology International v. United States Dep't of Justice*, 30 F.3d 224 (1st Cir. 1994). As the Federal Grand Jury Practice Manual explains (at pp. 157-59), documents not covered by Rule 6(e) include materials obtained or created independently of the grand jury, so long as their disclosure does not otherwise reveal what transpired before or at the direction of the grand jury, see *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982). Similarly, Rule 6(e) does not cover documents, even subpoenaed documents, that are sought for the information they contain, rather than to reveal the direction or strategy of the grand jury. See, e.g., *DiLeo v. Commissioner of Internal Revenue*, 959 F.2d 16, 19 (2d Cir. 1992). Accord *Washington Post Co. v. United States Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988); *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 582-84 (D.C. Cir. 1987).

3b. Make the System Simple. The identification system should be simple but it should permit the prosecutor to determine the source of the evidence and how it was obtained (*i.e.*, whether the evidence was in response to a grand jury subpoena and, if so, which subpoena). The identification system also should permit the prosecutor to determine what use the grand jury made of the evidence: what evidence generally was made available to the grand jury, what evidence was physically offered and made available to the grand jury, and what evidence was entered as an exhibit or otherwise formally presented to the grand jury.

4. At All Times, Maintain an Unmarked Set of Documents. Where appropriate, prosecutors should clearly mark the file cabinet, box or file in which subpoenaed evidence is maintained as containing grand jury subpoenaed records. But as the Department's Guide on Rule 6(e) advises, no grand jury marking or stamp should be affixed to the original documents themselves. See United States Department of Justice Guide on Rule 6(e) After *Sells* and *Baggot*, Jan. 1984, at 53. If a document is to be marked as an exhibit and presented to the grand jury, prosecutors should use a copy of the original or, if for some reason the original of a document must be entered as an exhibit before the grand jury, prosecutors should endeavor to place the exhibit sticker on a folder or an envelope containing the document and not on the document itself. (If a document is placed in an envelope, it should be adequately identified for the record.)

5. The Security of Evidence Must be Maintained. Prosecutors should take whatever precautions are necessary to protect grand jury materials, including, generally, keeping them in a locked file cabinet in a

locked room. If information from the documents is entered into a computer, the prosecutor should make sure that the data *are* secure or kept on a disc that can be secured.

6. Informing the Grand Jury of Available Evidence. The practice of bringing all subpoenaed documents before the grand jury varies among jurisdictions. Providing notice to the grand jury that the custodian or case agent has reviewed the documents may be legally sufficient, regardless of local custom. At a minimum, however, prosecutors should keep the grand jury apprised of the location and organization of the documents.

The foregoing procedures should help ensure that documents obtained during an investigation are maintained in a system that allows easy access to original documents, that clearly separates documents that were obtained by subpoena from those obtained by other means, and that enables identification of evidence the grand jury actually considered.

9-11.255 Prior Department of Justice Approval Requirements -- Grand Jury Subpoenas to Lawyers and Members of the News Media

Prior approval of the Assistant Attorney General of the Criminal Division is required before a grand jury subpoena may be issued to an attorney for information relating to the representation of a client or the fees paid by such client. *See* USAM 9-13.410.

Prior approval of the Attorney General is required before a grand jury subpoena may be issued to members of the news media for information relating to the news gathering function. *See* 28 C.F.R. § 50.10(e); USAM 9-13.400. However, such approval is not required if the news media organization has expressly agreed to provide the subpoenaed materials which have been previously published or broadcast and the United States Attorney or responsible Assistant Attorney General is satisfied that the requirements of 28 C.F.R. § 50.10 have been satisfied.

9-11.260 Rule 6(e)(3)(C)(iv) Disclosure of Grand Jury Material to State and Local Law Enforcement Officials

In 1985, the Supreme Court adopted an amendment to the Federal Rules of Criminal Procedure that added a new subdivision, 6(e)(3)(E)(iv). This change was for the stated purpose of eliminating "an unreasonable barrier to the effective enforcement of our two-tiered system of criminal laws (by allowing) a court to permit disclosure to a State or local official for the purpose of enforcing State law when an attorney for the government so requests and makes the requisite showing." (See the notes of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States.) The subdivision now reads as follows:

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter...

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law.

It is both the intent of the amended rule, and the policy of the Department of Justice, to share grand jury information whenever it is appropriate to do so. Thus, the phrase "appropriate official of a State or subdivision of a State" shall be interpreted to mean any official whose official duties include enforcement of the State criminal law whose violation is indicated in the matters for which disclosure authorization is sought. This policy is, however, subject to the caution in the Advisory Committee notes that "(t)here is no intention to have Federal grand juries act as an arm of the State."

It is clear that the decision to release or withhold grand jury information may have a significant impact upon relations between Federal prosecutors and their state and local counterparts, and disclosure may raise issues that go to the heart of the Federal grand jury process. In this respect, the then Assistant Attorney General in charge of the Criminal Division, who was a member of the Advisory Committee at the time of this change, promised the Advisory Committee that prior to any request to a court for permission to disclose

grand jury information, authorization would be required from the Assistant Attorney General in charge of the Division having jurisdiction over the matters that were presented to the grand jury. In the case of a multiple-jurisdiction investigation (e.g., joint tax/non-tax investigations) requests should be made to the Assistant Attorney General of the Division having supervisory responsibility for the principal offense(s) being investigated. It is the policy of the Department that such prior authorization be requested in writing in all cases. A copy of such requests shall be sent to all investigating agencies involved in the grand jury investigation. See the Criminal Resource Manual at 157, for instructions regarding submitting requests to the Criminal Division for approval to disclose grand jury information under Rule 6(e)(3)(E)(iv).

9-11.300 The Special Grand Jury -- 18 U.S.C. § 3331

Empanelment of Special Grand Juries for organized crime (18 U.S.C. § 3331) requires certification obtained through the Chief of the Organized Crime and Racketeering Section. See the Criminal Resource Manual at 158 for further discussion.

9-11.330 Consultation With the Criminal Division About Reports

If a special grand jury will be considering the issuance of a report at the culmination of its service, United States Attorneys are requested to notify the Chief of the Organized Crime and Racketeering Section promptly of the fact and explain why an indictment cannot be found to obviate the issuance of a grand jury report. It should also be explained how the facts developed during a criminal investigation support one of the authorized types of reports. Before any draft report is furnished to the grand jury, it must be submitted to the Chief of the Organized Crime and Racketeering Section for approval. When a United States Attorney learns that a grand jury is preparing a report which he/she has not requested, he/she should advise the Criminal Division.

It is not clear what remedy the government would have if a court acted wrongly in sealing a special grand jury report and refusing to make it public. The Chief of the Organized Crime and Racketeering Section should be notified promptly if a court finally determines for any reason that a grand jury report is deficient or not properly to be released, so that consideration may be given to the possibility of taking the matter to the court of appeals. For further discussion on this issue, see the Criminal Resource Manual at 159.

9-12.000

INDICTMENT AND INFORMATIONS

Ctrl F to Search this Chapter

A discussion of the law and practice relating to the drafting of indictments is available in the Criminal Resource Manual at 201 *et seq.*

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Obtaining an Information	<u>Criminal Resource Manual at 203</u>
Use of an Indictment or Information	<u>Criminal Resource Manual at 204</u>
When an Indictment is Required	<u>Criminal Resource Manual at 205</u>
When an Information May be Used	<u>Criminal Resource Manual at 206</u>
When Neither an Indictment Nor an Information is Required	<u>Criminal Resource Manual at 207</u>
Presentments	<u>Criminal Resource Manual at 208</u>
Waiver of an Indictment	<u>Criminal Resource Manual at 209</u>
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Prosecutorial Discretion to Allow	<u>Criminal Resource Manual at 211</u>
Judicial Discretion to Set Aside	<u>Criminal Resource Manual at 212</u>
Effect at New Trial	<u>Criminal Resource Manual at 213</u>
Drafting Indictments and Informations	<u>Criminal Resource Manual at 214</u>
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OBTAINING EVIDENCE

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9-13.900 Access to and Disclosure of Tax Returns in a Non-tax Criminal Case

9-13.100 Out of Court Identification Procedures

See the Criminal Resource Manual at 238 et seq. for a discussion of the law on lineups and showups, photographic lineups, fingerprinting, handwriting, voice exemplars and voice prints and other physical evidence issues.

9-13.200 Communications with Represented Persons

Department attorneys are governed in criminal and civil law enforcement investigations and proceedings by the relevant rule of professional conduct that deals with communications with represented persons. 28 U.S.C. Section 530B. In determining which rule of professional conduct is relevant, Department attorneys should be guided by 28 C.F.R. Part 77 (1999). Department attorneys are strongly encouraged to consult with

their Professional Responsibility Officers or supervisors -- and, if appropriate, the Professional Responsibility Advisory Office -- when there is a question regarding which is the relevant rule or the interpretation or application of the relevant rule. *See also*

the *Criminal Resource Manual* at 296 through 298.

9-13.300 Polygraphs -- Department Policy

The Department opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Government attorneys should refrain from seeking the admission of favorable examinations that may have been conducted during the investigatory stage for the following reasons.

Though certain physiological reactions such as a fast heart beat, muscle contraction, and sweaty palms are believed to be associated with deception attempts, they do not, by themselves, indicate deceit. Anger, fear, anxiety, surprise, shame, embarrassment, and resentment can also produce these same physiological reactions. S. Rep. No. 284, 100th Cong., 2d Sess. 3-5 (1988). Moreover, an individual is less likely to produce these physiological reactions if he is assured that the results of the examination will not be disclosed without his approval. Given the present theoretical and practical deficiencies of polygraphs, the government takes the position that polygraph results should not be introduced into evidence at trial. On the other hand, in respect to its use as an investigatory tool, the Department recognizes that in certain situations, as in testing the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use should be effectuated by using the trained examiners of the federal investigative agencies, primarily the FBI, in accordance with internal procedures formulated by the agencies. *E.g.*, R. Ferguson, *Polygraph Policy Model for Law Enforcement, FBI Law Enforcement Bulletin*, pages 6-20 (June 1987). The case agent or prosecutor should make clear to the possible defendant or witness the limited purpose for which results are used and that the test results will be only one factor in making a prosecutive decision. If the subject is in custody, the test should be preceded by *Miranda* warnings. Subsequent admissions or confessions will then be admissible if the trial court determines that the statements were voluntary. *Wyrick v. Fields*, 459 U.S. 42 (1982); *Keiper v. Cupp*, 509 F.2d 238 (9th Cir. 1975).

See the *Criminal Resource Manual* at 259 et seq. for a discussion of case law on polygraph examinations.

9-13.400 News Media Subpoenas; Subpoenas for Telephone Toll Records of News Media; Interrogation, Arrest, or Criminal Charging of Members of the News Media

In recognition of the importance of freedom of the press to a free and democratic society, it is the Department's policy that the prosecutorial power of the Government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. Accordingly, Government attorneys should ordinarily refrain from imposing upon members of the news media forms of compulsory process which might impair the news gathering function. In all cases, members of the Department must balance the public's interest in the free dissemination of ideas and information with the public's interest in effective law enforcement and the fair administration of justice. The policies, procedures and standards governing the issuance of subpoenas to members of the news media, subpoenas for the telephone toll records of members of the news media, and the interrogation,

indictment, or arrest of members of the news media are set forth in 28 C.F.R. § 50.10, *available at* <http://www.gpoaccess.gov/cfr/index.html>.

The Attorney General's authorization is normally required before the issuance of any subpoena to a member of the news media, or for the telephone toll records of a member of the news media. However, in those cases where the media member or his or her representative agrees to provide the material sought *and* that material has been published or broadcast, the United States Attorney or the responsible Assistant Attorney General may authorize issuance of the subpoena, thereafter submitting a report to the Office of Public Affairs detailing the circumstances surrounding the issuance of the subpoena. 28 C.F.R. § 50(e).

Before considering issuing a subpoena to a member of the news media, or for telephone toll records of a member of the news media, Department attorneys should take all reasonable steps to attempt to obtain the information through alternative sources or means. 28 C.F.R. § 50.10(b). In addition, Department attorneys contemplating issuing a subpoena to a member of the news media must first attempt negotiations with the media aimed at accommodating the interests of the trial or grand jury with the interests of the media. 28 C.F.R. § 50.10(c). Negotiations with the affected media member must also precede any request to subpoena the telephone toll records of any member of the news media, so long as the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the investigation at issue. 28 C.F.R. § 50.10(d).

Department attorneys seeking the Attorney General's authorization to issue a subpoena to a member of the news media, or for telephone toll records of a media member, must submit a written request summarizing the facts of the prosecution or investigation, explaining the essentiality of the information sought to the investigation or prosecution, describing attempts to obtain the voluntary cooperation of the news media through negotiation, and explaining how the proposed subpoena will be fashioned as narrowly as possible to obtain the necessary information in a manner as minimally intrusive and burdensome as possible. Specific principles applicable to authorization requests for subpoenas to members of the news media are set forth in 28 C.F.R. § 50.10(f)(1)-(6), and for subpoenas for telephone toll records of members of the news media in 28 C.F.R. § 50.10(g)(1)-(4). The Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists.

Except in cases involving exigent circumstances, Department attorneys must also obtain the express approval of the Attorney General prior to the interrogation or arrest of a member of the news media for an offense which he or she is suspected of having committed during the course of, or arising out of, his or her coverage or investigation of a news story, or while he or she was engaged in the performance of his or her official duties as a member of the news media. The Attorney General's authorization must also precede the presentment of an indictment to a grand jury or the filing of an information against a member of the news media for any such offense. 28 C.F.R. § 50.10(h)-(l).

In cases or matters under the supervision of the Criminal Division, any request for the Attorney General's authorization pursuant to 28 C.F.R. § 50.10, and any related questions or concerns, should be directed to the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations. In cases or matters under the supervision of other Divisions of the Department of Justice, the appropriate Division should be contacted.

In light of the intent of the regulation to protect freedom of the press, news gathering functions, and news media sources, the requirements of 28 C.F.R. § 50.10 do not apply to demands for purely commercial or financial information unrelated to the news gathering function. 28 C.F.R. § 50.10(m).

9-13.410 Guidelines for Issuing Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients

A. Clearance with the Criminal Division. Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. All such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General for the Criminal Division before they may issue.

B. Preliminary Steps. When determining whether to issue a subpoena to an attorney for information relating to the attorney's representation of a client, the Assistant United States Attorney must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. To that end, all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful.

C. Evaluation of the Request. In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General of the Criminal Division applies the following principles:

- The information sought shall not be protected by a valid claim of privilege.
- All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
- In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information.
- In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.
- The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.
- The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

See also the Criminal Resource Manual at 263.

D. Submitting the Request. Requests for authorization are submitted on a standardized form to the Witness Immunity Unit, Office of Enforcement Operations, Criminal Division. (This form, "Request for Authorization To Issue A Subpoena To An Attorney for Information Relating To Representation Of A Client," is set out in the Criminal Resource Manual at 264). When documents are sought in addition to the testimony of the attorney witness, a draft of the subpoena *duces tecum* must accompany the completed form.

The completed form and draft subpoena may be mailed to the Witness Immunity Unit, 1001 G Street, N.W., Room 945 West, Washington, D.C. 20001, or faxed to (202) 514-1468. Because of the sensitive nature of these requests, the Witness Immunity Unit will not accept completed forms and draft subpoenas over e-mail. The Witness Immunity Unit will respond to questions concerning attorney subpoenas by telephone, (202) 514-5541.

E. No Rights Created by Guidelines. These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

9-13.420 Searches of Premises of Subject Attorneys¹

NOTE: For purposes of this policy only, "subject" includes an attorney who is a "suspect, subject or target," or an attorney who is related by blood or marriage to a suspect, or who is believed to be in possession of contraband or the fruits or instrumentalities of a crime. This policy also applies to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization. Search warrants for "documentary materials" held by an attorney who is a "disinterested third party" (that is, any attorney who is not a subject) are governed by 28 C.F.R. 59.4 and USAM 9-19.221 *et seq.* See also 42 U.S.C. Section 2000aa-11(a)(3).

There are occasions when effective law enforcement may require the issuance of a search warrant for the premises of an attorney who is a subject of an investigation, and who also is or may be engaged in the practice of law on behalf of clients. Because of the potential effects of this type of search on legitimate attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search. Therefore, the following guidelines should be followed with respect to such searches:

A. Alternatives to Search Warrants. In order to avoid impinging on valid attorney-client relationships, prosecutors are expected to take the least intrusive approach consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law. Consideration should be given to obtaining information from other sources or through the use of a subpoena, unless such efforts could compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective.

NOTE: Prior approval must be obtained from the Assistant Attorney General for the Criminal Division to issue a subpoena to an attorney relating to the representation of a client. See USAM 9-13.410.

B. Authorization by United States Attorney or Assistant Attorney General. No application for such a search warrant may be made to a court without the express approval of the United States Attorney or pertinent Assistant Attorney General. Ordinarily, authorization of an application for such a search warrant is appropriate when there is a strong need for the information or material and less intrusive means have been considered and rejected.

C. Prior Consultation. In addition to obtaining approval from the United States Attorney or the pertinent Assistant Attorney General, and before seeking judicial authorization for the search warrant, the federal prosecutor must consult with the Criminal Division.

NOTE: Attorneys are encouraged to consult with the Criminal Division as early as possible regarding a possible search of an attorney's office. Telephone No. (202) 514-5541; Fax No. (202) 514-1468.

To facilitate the consultation, the prosecutor should submit the attached form (*see* Criminal Resource Manual at 265) containing relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents

regarding search procedures and procedures to be followed to ensure that the prosecution team is not "tainted" by any privileged material inadvertently seized during the search. This information should be submitted to the Criminal Division through the Office of Enforcement Operations. This procedure does not preclude any United States Attorney or Assistant Attorney General from discussing the matter personally with the Assistant Attorney General of the Criminal Division.

If exigent circumstances prevent such prior consultation, the Criminal Division should be notified of the search as promptly as possible. In all cases, the Criminal Division should be provided as promptly as possible with a copy of the judicially authorized search warrant, search warrant affidavit, and any special instructions to the searching agents.

The Criminal Division is committed to ensuring that consultation regarding attorney search warrant requests will not delay investigations. Timely processing will be assisted if the Criminal Division is provided as much information about the search as early as possible. The Criminal Division should also be informed of any deadlines.

D. Safeguarding Procedures and Contents of the Affidavit. Procedures should be designed to ensure that privileged materials are not improperly viewed, seized or retained during the course of the search. While the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized.

E. Conducting the Search. The search warrant should be drawn as specifically as possible, consistent with the requirements of the investigation, to minimize the need to search and review privileged material to which no exception applies.

While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the warrant. Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a "privilege team" should be designated, consisting of agents and lawyers not involved in the underlying investigation.

Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team. Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.

The affidavit in support of the search warrant may attach any written instructions or, at a minimum, should generally state the government's intention to employ procedures designed to ensure that attorney-client privileges are not violated.

If it is anticipated that computers will be searched or seized, prosecutors are expected to follow the procedures set forth in *Federal Guidelines for Searching and Seizing Computers* (July 1994), published by the Criminal Division Office of Professional Training and Development.

F. Review Procedures. The following review procedures should be discussed prior to approval of any warrant, consistent with the practice in your district, the circumstances of the investigation and the volume of materials seized.

- Who will conduct the review, i.e., a privilege team, a judicial officer, or a special master.

- Whether all documents will be submitted to a judicial officer or special master or only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege.
- Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: a) disruption of the law firm's operation is minimized; and b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation.
- Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

See the Criminal Resource Manual at 265, for an attorney office search warrant form.

9-13.500 International Legal Assistance

The Criminal Division's Office of International Affairs (514-0000) must be consulted before contacting any foreign or State Department official in matters relating to extradition of a fugitive or the obtaining of evidence in a criminal investigation or prosecution.

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

Before attempting to do any act outside the United States relating to a criminal investigation or prosecution, including contacting a witness by telephone or mail, prior approval must be obtained from the Office of International Affairs.

See the Criminal Resource Manual at 266, for additional background regarding the Office of International Affairs.

9-13.510 Obtaining Evidence Abroad -- General Considerations

Because virtually every nation enacts laws to protect its sovereignty and can react adversely to American law enforcement efforts to gather evidence within its borders as a violation of that sovereignty, contact the Office of International Affairs initially to evaluate methods for securing assistance from abroad and to select an appropriate one. *See the Criminal Resource Manual at 267 et seq.*

9-13.512 Intended Use of the Evidence

When a country grants assistance for a particular purpose, contact the Office of International Affairs (OIA) before using it for a different purpose. OIA will determine whether it can be used for a different purpose without the express permission of the country that provided it and, if not, for guidance in securing such permission. *See the Criminal Resource Manual at 269.*

9-13.514 Time Required

Contact the Office of International Affairs as soon as it appears that assistance from overseas will be needed. *See the Criminal Resource Manual at 271-272.*

9-13.516 Cost of Obtaining Evidence

Be sure funds are available before making a costly request. *See the Criminal Resource Manual at 273.*

9-13.520 Methods of Obtaining Evidence from Abroad

There are many different methods of obtaining evidence from abroad, including the use of letters rogatory, treaty requests, executive agreements and memoranda of understanding, subpoenas (*see USAM 9-13.525*), and other informal means. Contact the Office of International Affairs before choosing a method. *See the Criminal Resource Manual at 274-279.*

9-13.525 Subpoenas

Since the use of unilateral compulsory measures can adversely affect United States law enforcement relationship with a foreign country, all Federal prosecutors must obtain written approval through the Office of International Affairs (OIA) before issuing any subpoenas to persons or entities in the United States for records located abroad. *See the Criminal Resource Manual at 279*, for a description of the requirements of requesting such approval. OIA must also be consulted prior to initiating enforcement proceedings relating to such subpoenas.

OIA's approval must be obtained prior to serving a subpoena ad testificandum on an officer of, or attorney for, a foreign bank or corporation who is temporarily in or passing through the United States when the testimony sought relates to the officer's or attorney's duties in connection with the operation of the bank or corporation.

9-13.526 Forfeiture of Assets Located in Foreign Countries

International and domestic coordination are needed in matters relating to the forfeiture of assets located in foreign countries. *See the Criminal Resource Manual at 280.* Consequently, any attorney for the Federal government who plans to file a civil forfeiture action for assets located in another country pursuant to 28 U.S.C. § 1335(b)(2) is directed to notify the Office of International Affairs (OIA) of the Criminal Division before taking such action. Notification to OIA should be in writing and include the information listed in the Criminal Resource Manual at 280.

Within ten days of receipt of such notification, OIA, in consultation with the Asset Forfeiture and Money Laundering Section, will review the notification information, consult with foreign and U.S. authorities as appropriate to the facts and circumstances of the specific proposal, and communicate its findings to the attorney for the Federal government who submitted the notification.

Attorneys for the Federal government are also directed to consult with the OIA before taking steps to present to a foreign government, for enforcement or recognition, any civil or criminal forfeiture order entered in the United States for property located within the foreign jurisdiction.

In cases where it appears that the property in question is likely to be removed, destroyed, or dissipated so as to defeat the possibility of the forfeiture under U.S. law, the attorney for the Federal government may, of course, request the OIA to seek the assistance of the authorities of the foreign government where the

property is located in seizing or taking whatever action is necessary and appropriate to preserve the property for forfeiture.

9-13.530 Special Considerations -- Translations

In every case requiring a translation, prosecutors must reach a clear understanding with the Office of International Affairs (OIA) about who will secure the translation and send it overseas. Generally, arrangements for translation must be made and paid for by the United States Attorney's Office. *See* the Criminal Resource Manual at 282.

9-13.534 Foreign Travel by Prosecutors

Foreign travel must be authorized in advance either by the Executive Office for United States Attorneys (EOUSA) (travel involving Assistant United States Attorneys) or by the Office of International Affairs (OIA) (travel involving Departmental prosecutors). EOUSA will not authorize the travel unless the prosecutor has obtained the approvals required in USAM 3-8.730. Prosecutors should contact EOUSA and OIA well in advance of their intended departure date because foreign clearances take time.

9-13.535 Depositions

If an essential witness who is not subject to a subpoena (*see* USAM 9-13.525) is unwilling to come to the United States to testify, the prosecutor may attempt to proceed by means of a deposition. *See* Fed. R. Crim. P. 15 and 18 U.S.C. § 3503. *See* the Criminal Resource Manual at 285 for additional discussion regarding depositions and for the procedures which should be followed.

9-13.540 Assisting Foreign Prosecutors

To avoid undercutting Departmental policy, when prosecutors receive requests for assistance from foreign prosecutors, prosecutors should discuss all such requests with the Office of International Affairs before executing. *See* the Criminal Resource Manual at 286.

Costs of executing foreign requests (including court reporter's fees) are the responsibility of the country making the request unless an applicable treaty requires the United States to pay; in that event, the United States Attorney's Office pays the costs.

9-13.600 Use of Hypnosis

For a discussion of the law relating to the use of hypnosis, *see* the Criminal Resource Manual at 287-294.

9-13.800 Access to and Disclosure of Financial Records

The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 et seq., governs federal agencies' access to and disclosure of all "financial records" of any "customer" from a "financial institution." This statute sets forth a complex set of procedures which United States Attorneys (along with other federal officials) must follow in obtaining the records covered by the Act. These procedures must be followed by law enforcement officials if they are to obtain records needed in an investigation without alerting the target(s) of that investigation.

For additional information, see the *Treatise on the Right to Financial Privacy Act* in the Criminal Resource Manual at 400, or contact the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations.

9-13.900 Access to and Disclosure of Tax Returns in a Non-tax Criminal Case

Title 26 U.S.C. § 6103 prohibits disclosure of tax returns and tax return information except as specifically provided in § 6103, or other sections of the Code. Among the disclosures authorized are those in 26 U.S.C. § 6103(i) concerning access to returns and return information by certain Department of Justice personnel for use in the investigation and prosecution of federal criminal statutory violations and related civil forfeitures not involving tax administration. The access procedures and use restrictions in such a case are set forth in the Criminal Resource Manual at 501 et seq.

Applications for the ex parte order authorized by this paragraph may be authorized by: the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, a United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a Criminal Division organized crime strike force established pursuant to 28 U.S.C. § 510. It is anticipated that most applications will be authorized by United States Attorneys or Strike Force Chiefs.

It is the Department's policy that an Ex Parte Application For Returns and Return Information be filed under seal. Prosecutors should file the motion to seal simultaneously with the Application. The motion should request the court to seal the application and its order granting or denying the application. United States Attorneys should notify Internal Revenue Service whenever a motion to seal is granted, and whenever the records are subsequently unsealed.



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Room 2261, RFK Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

(202) 514-2121

MEMORANDUM - Sent via Electronic Mail

DATE: September 6, 2006

TO: ALL UNITED STATES ATTORNEYS
ALL FIRST ASSISTANT UNITED STATES ATTORNEYS
ALL CRIMINAL CHIEFS
ALL CIVIL CHIEFS

FROM:

Michael A. Battle
Michael A. Battle

Director

SUBJECT: Approval Requirements for Media Subpoenas

ACTION REQUIRED: None. Information Only.

CONTACT PERSON: John A. Nowacki
Principal Deputy Director
Executive Office for United States Attorneys
(202) 514-2121

Please find attached a bluesheet signed by Alice Fisher, Assistant Attorney General, Criminal Division, on September 5, 2006, which affects USAM 9-13.400 and sets forth updated policy with regard to approval requirements for media subpoenas. The new policy extends the requirements for subpoenas for the journalistic materials and telephone toll records to include subpoenas directed to materials and telephone toll records of deceased journalists.

cc: All United States Attorneys' Secretaries

Attachment



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

September 5, 2006

MEMORANDUM

TO: Holders of the United States Attorneys' Manual

FROM: Alice S. Fisher
Assistant Attorney General, Criminal Division

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

SUBJECT: Approval Requirements for Media Subpoenas

The attached revision to the USAM 9-13.400 extends the requirements set forth for subpoenas for the journalistic materials and telephone toll records to include subpoenas directed to materials and telephone toll records of deceased journalists.

The following is revised language - 3rd paragraph of 9-13.400: News Media Subpoenas – Subpoenas for News Media Telephone Toll Records – Interrogation, Indictment, or Arrests of Members of the News Media

Except in cases involving exigent circumstances, such as where immediate action is required to avoid the loss of life or the compromise of a security interest, the express approval of the Attorney General is necessary prior to the interrogation, indictment, or arrest of a member of the news media for an offense which he is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of his official duties as a member of the news media. The Attorney General's authorization is also required before issuance of any subpoena to a member of the news media, except in those cases where both a media representative agrees to provide the material sought *and* that material has been published or broadcast. In addition, the Attorney General's permission is required before the issuance of a subpoena for the telephone toll records of a member of the news media. **The Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists.** Failure to obtain the prior approval of the Attorney General, when required, may constitute grounds for disciplinary action.

9-14.000

TRANSFERS AND OBTAINING PRISONERS FOR PROSECUTION

Guidance on these issues is available in the Criminal Resource Manual

Rule 20 transfers of Prisoners From the District For Plea and Sentence (Fed. R. Crim. P. 20)	<u>Criminal Resource Manual at 523</u>
Rule 21 transfers of trials from one district to another (Fed. R. Crim. P. 21)	<u>Criminal Resource Manual at 530</u>
Interstate Agreement on Detainers Act (18 U.S.C. Appendix III)	<u>Criminal Resource Manual at 534</u>

9-15.000

**INTERNATIONAL EXTRADITION
AND RELATED MATTERS**

- 9-15.100 Definition and General Principles**
- 9-15.200 Procedures For Requesting Extradition From Abroad**
- 9-15.210 Role of the Office of International Affairs**
- 9-15.220 Determination of Extraditability**
- 9-15.225 Procedure When Fugitive is Non-Extraditable**
- 9-15.230 Request for Provisional Arrest**
- 9-15.240 Documents Required in Support of Request for Extradition**
- 9-15.250 Procedure After Assembling Documents**
- 9-15.300 Procedure in the Foreign Country**
- 9-15.400 Return of the Fugitive**
- 9-15.500 Post Extradition Considerations -- Limitations on Further Prosecution**
- 9-15.600 Alternatives To Extradition**
- 9-15.610 Deportations, Expulsions, or other Extraordinary Renditions**
- 9-15.620 Extradition From a Third Country**
- 9-15.630 Lures**
- 9-15.635 Interpol Red Notices**
- 9-15.640 Revocation of United States Passports**
- 9-15.650 Foreign Prosecution**
- 9-15.700 Foreign Extradition Requests**
- 9-15.800 Plea Agreements and Related Matters -- Prohibition**

9-15.100 Definition and General Principles

International extradition is the formal process by which a person found in one country is surrendered to another country for trial or punishment. The process is regulated by treaty and conducted between the Federal Government of the United States and the government of a foreign country. It differs considerably from interstate rendition, commonly referred to as interstate extradition, mandated by the Constitution, Art. 4, Sec. 2.

Generally under United States law (18 U.S.C. § 3184), extradition may be granted only pursuant to a treaty. However, some countries grant extradition without a treaty. However, every such country requires an offer of reciprocity when extradition is accorded in the absence of a treaty. Further, the 1996 amendments to 18 U.S.C. 3181 and 3184 permit the United States to extradite, without regard to the existence of a treaty, persons (other than citizens, nationals or permanent residents of the United States), who have committed crimes of violence against nationals of the United States in foreign countries. A list of countries with which the United States has an extradition treaty relationship can be found in the Federal Criminal Code and Rules, following 18 U.S.C. § 3181, but consult the Criminal Division's Office of International

Affairs (OIA) to verify the accuracy of the information. *See the Criminal Resource Manual at 535 for the text of § 3184, and at 536 for links to some of the extradition treaties the United States has negotiated.*

Because the law of extradition varies from country to country and is subject to foreign policy considerations, prosecutors should consult OIA for advice on any matter relating to extradition before taking any action in such a case, especially before contacting any foreign official.

See the Criminal Resource Manual at 601, for a discussion of the constitutionality of 18 U.S.C. § 3184.

9-15.200 Procedures For Requesting Extradition From Abroad

See the Criminal Resource Manual at 602.

9-15.210 Role of the Office of International Affairs

The Office of International Affairs (OIA) provides information and advice to Federal and State prosecutors about the procedure for requesting extradition from abroad. OIA also advises and provides support to Federal prosecutors handling foreign extradition requests for fugitives found in the United States.

Every formal request for international extradition based on Federal criminal charges must be reviewed and approved by OIA. At the request of the Department of State, formal requests based on State charges are also reviewed by OIA before submission to the Department of State.

Acting either directly or through the Department of State, OIA initiates all requests for provisional arrest of fugitives pursuant to extradition treaties. Neither prosecutors nor agents are permitted to contact their foreign counterparts to request the arrest of a fugitive for extradition. Unauthorized requests cause serious diplomatic difficulties and may subject the requester to financial liability or other sanctions.

Every extradition treaty is negotiated separately, and each contains different provisions. Experience with one treaty is not a guide to all others. Therefore, after reviewing this section of the United States Attorneys' Manual, the first step in any extradition case should be to contact OIA. Attorneys in OIA will advise prosecutors about the potential for extradition in a given case and the steps to be followed.

9-15.220 Determination of Extraditability

See the Criminal Resource Manual at 603.

9-15.225 Procedure When Fugitive is Non-Extraditable

If the fugitive is not extraditable, other steps may be available to return him or her to the United States or to restrict his or her ability to live and travel overseas. *See USAM 9-15.600 et*

seq. These steps, if taken, should likewise be documented.

Courts may require the government to request the extradition of a fugitive as soon as his or her location becomes known, unless the effort would be useless. If the decision is made to not seek extradition in a particular case, the prosecutor and the Office of International Affairs (OIA) will make a record to document why extradition was not possible in the event of a subsequent Speedy Trial challenge.

9-15.230 Request for Provisional Arrest

Every extradition treaty to which the United States is a party requires a formal request for extradition, supported by appropriate documents. Because the time involved in preparing a formal request can be lengthy, most treaties allow for the provisional arrest of fugitives in urgent cases. Once the United States requests provisional arrest pursuant to the treaty, the fugitive will be arrested and detained (or, in some countries, released on bail) as soon as he or she is located. Thereafter, the United States must submit a formal request for extradition, supported by all necessary documents, duly certified, authenticated and translated into the language of the country where the fugitive was arrested, within a specified time (from 30 days to three months, depending on the treaty). *See USAM 9-15.240.* Failure to follow through on an extradition request by submitting the requisite documents after a provisional arrest has been made will result in release of the fugitive, strains on diplomatic relations, and possible liability for the prosecutor.

The Office of International Affairs (OIA) determines whether the facts meet the requirement of urgency under the terms of the applicable treaty. If they do, OIA requests provisional arrest; if not, the prosecutor assembles the documents for a formal request. The latter method is favored when the defendant is unlikely to flee because the time pressures generated by a request for provisional arrest often result in errors that can damage the case. If provisional arrest is necessary because of the risk of flight, the prosecutor should complete the form for requesting provisional arrest and forward it, along with a copy of the charging document and arrest warrant, to OIA by fax (*see the Criminal Resource Manual at 604*); alternatively, this exchange of forms and completed requests between the United States Attorney and OIA can be made by Email. State prosecutors who request provisional arrest must also certify that the necessary documents will be submitted on time and that all expenses, including the cost of transportation by United States Marshals, will be covered.

Prosecutors should complete the form in any case in which it appears that provisional arrest may be necessary. Once it is completed, it may be emailed directly to the Office of International Affairs (OIA) attorney or team responsible for the country in which the fugitive has been found or emailed to the general OIA email address, CRM03(OIAINBOX), and OIA's docketing unit will forward it to the appropriate attorney in OIA. The form may also be faxed to OIA at (202) 514-0080. A copy of the charging document and warrant should be faxed to OIA.

The form was created with both Federal and State cases in mind. Thus, Assistant United States Attorneys are free to print the form and give it to state and local prosecutors working on extradition cases. State prosecutors should fax the form to OIA at (202) 514-0080.

9-15.240 Documents Required in Support of Request for Extradition

The request for extradition is made by diplomatic note prepared by the Department of State and transmitted to the foreign government through diplomatic channels. It must be accompanied by the documents specified in the treaty. The Office of International Affairs (OIA) will advise the prosecutor of the documentary requirements, but it is the responsibility of the prosecutor to prepare and assemble them and forward the original and four copies to OIA in time to be reviewed, authenticated, translated, and sent through the Department of State to the foreign government by the deadline.

OIA will provide samples of the documents required in support of the request for extradition. Although every treaty varies, all generally require:

- An affidavit from the prosecutor explaining the facts of the case. *See Criminal Resource Manual at 605.*
- Copies of the statutes alleged to have been violated and the statute of limitations. *See Criminal Resource Manual at 607.*
- If the fugitive has not been convicted, certified copies of the arrest warrant and complaint or indictment. *See Criminal Resource Manual at 606.*
- Evidence, in the form of affidavits or grand jury transcripts, establishing that the crime was committed, including sufficient evidence (i.e., photograph, fingerprints, and affidavit of identifying witness) to establish the defendant's identity (CAVEAT: The use of grand jury transcripts or trial transcripts should, if at all possible, be avoided). *See Criminal Resource Manual at 608.*
- If the fugitive has been convicted, a certified copy of the order of judgment and committal establishing the conviction, an affidavit stating the sentence was not or was only partially served and the amount of time remaining to be served, and evidence concerning identity. *See Criminal Resource Manual at 609.*

Prosecutors should be aware that there are few workable defenses to extradition, although appeals and delays are common. Fugitives, however, may be able to contest extradition on the basis of minor inconsistencies resulting from clerical or typographical errors. Although these can be remedied eventually, they take time to untangle. Therefore, pay careful attention to detail in preparing the documents.

9-15.250 Procedure After Assembling Documents

After assembling the documents required in support of extradition, the prosecutor must review them carefully to ensure that all dates and charges mentioned in the affidavit and accompanying exhibits are consistent.

Unless told that the foreign country will require a different number of copies of the documents, the prosecutor should forward the original and four copies of the entire package to Office of International Affairs (OIA).

Attorneys in OIA review the package for completeness and send a copy to the Department of State for translation, which can take three weeks even for common languages. The cost of translation will be billed to the district requesting extradition. OIA secures the required certifications on the original and transmits it to the Department of State.

9-15.300 Procedure in the Foreign Country

The Department of State will send the extradition documents and the translation to the American Embassy in the foreign country, which will present them under cover of a diplomatic note formally requesting extradition to the appropriate agency of the foreign government, usually the foreign ministry. The request and supporting documents are then forwarded to the court or other body responsible for determining whether the requirements of the treaty and the country's domestic law have been met.

In general, the foreign government's decision on our extradition request is based on the request itself and any evidence presented by the fugitive. Because the American prosecutor will not have the opportunity to appear before the foreign court, the written submission, particularly the prosecutor's affidavit, must be as persuasive as possible. This is particularly essential when the charges are based on statutes unique to United States law, such as RICO or CCE.

Though factual defenses to extradition are limited, the fugitive may delay a decision through procedural challenges. The determination of extraditability is often subject to review or appeal. Prediction of the time required to return an individual to the United States is difficult and depends on the circumstances of the individual case and the practice of the foreign country involved.

9-15.400 Return of the Fugitive

Once the foreign authorities notify the American Embassy that the fugitive is ready to be surrendered, the Office of International Affairs (OIA) will inform the prosecutor and arrange with the United States Marshals Service for agents to escort the fugitive to the United States. United States Marshals must provide the escort even in a State case. However, in rare cases arrangements are sometimes made for State or other federal law enforcement agents to accompany the U.S. Marshals. If the fugitive is an alien, OIA will ask the INS to issue a "parole letter" authorizing the alien to enter the country.

9-15.500 Post Extradition Considerations – Limitations on Further Prosecution

Every extradition treaty limits extradition to certain offenses. As a corollary, all extradition treaties restrict prosecution or punishment of the fugitive to the offense for which extradition was granted unless (1) the offense was committed after the fugitive's extradition or (2) the fugitive remains in the jurisdiction after expiration of a "reasonable time" (generally specified in the extradition treaty itself) following completion of his punishment. This limitation is referred to as

the Rule of Specialty. Prosecutors who wish to proceed against an extradited person on charges other than those for which extradition was granted must contact the Office of International Affairs (OIA) for guidance regarding the availability of a waiver of the Rule by the sending State.

Frequently, defendants who have been extradited to the United States attempt to dismiss or limit the government's case against them by invoking the Rule of Specialty. There is a split in the courts on whether the defendant has standing to raise specialty: some courts hold that only a party to the Treaty (i.e., the sending State) may complain about an alleged violation of the specialty provision, other courts allow the defendant to raise the issue on his own behalf, and other courts take a middle position and allow the defendant to raise the issue if it is likely that the sending State would complain as well. Whenever a defendant raises a specialty claim, the prosecutor should contact OIA for assistance in responding.

Defendants also occasionally make other substantive or procedural challenges to their extradition. It is impossible to anticipate all the creative challenges that may be devised; if a returned defendant challenges his extradition, you should contact OIA.

9-15.600 Alternatives To Extradition

A fugitive may be non-extraditable for any number of reasons, including but not limited to instances where he or she is a national of the country of refuge, the crime is not an extraditable offense, the statute of limitations has run in the foreign country, or extradition was requested and denied. (If, after discussing the case with the Office of International Affairs (OIA), the prosecutor concludes that the fugitive is not extraditable, that conclusion and the reasons should be documented. *See USAM 9-15.225.*)

There may be available alternatives that will result either in the return of the fugitive or limitations on his or her ability to live or travel overseas. OIA will advise the prosecutor concerning the availability of these methods. These alternative methods are discussed in USAM 9-15.610-650.

9-15.610 Deportations, Expulsions, or other Extraordinary Renditions

If the fugitive is not a national or lawful resident of the country in which he or she is located, the Office of International Affairs (OIA), through the Department of State or other channels, may ask that country to deport or expel the fugitive.

In *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), the Supreme Court ruled that a court has jurisdiction to try a criminal defendant even if the defendant was abducted from a foreign country against his or her will by United States agents. Though this decision reaffirmed the long-standing proposition that personal jurisdiction is not affected by claims of abuse in the process by which the defendant is brought before the court, it sparked concerns about potential abuse of foreign sovereignty and territorial integrity.

Due to the sensitivity of abducting defendants from a foreign country, prosecutors may not take steps to secure custody over persons outside the United States (by government agents or the

use of private persons, like bounty hunters or private investigators) by means of *Alvarez-Machain* type renditions without advance approval by the Department of Justice. Prosecutors must notify the Office of International Affairs before they undertake any such operation. If a prosecutor anticipates the return of a defendant, with the cooperation of the sending State and by a means other than an *Alvarez-Machain* type rendition, and that the defendant may claim that his return was illegal, the prosecutor should consult with OIA before such return. *See Criminal Resource Manual at 610*, for further discussion of the law on this issue.

9-15.620 Extradition From a Third Country

If the fugitive travels outside the country from which he or she is not extraditable, it may be possible to request his or her extradition from another country. This method is often used for fugitives who are citizens in their country of refuge. Some countries, however, will not permit extradition if the defendant has been lured into their territory. Such ruses may also cause foreign relations problems with both the countries from which and to which the lure takes place. Prosecutors must notify the Office of International Affairs before pursuing any scenario involving an undercover or other operation to lure a fugitive into a country for law enforcement purposes (extradition, deportation, prosecution).

9-15.630 Lures

A lure involves using a subterfuge to entice a criminal defendant to leave a foreign country so that he or she can be arrested in the United States, in international waters or airspace, or in a third country for subsequent extradition, expulsion, or deportation to the United States. Lures can be complicated schemes or they can be as simple as inviting a fugitive by telephone to a party in the United States.

As noted above, some countries will not extradite a person to the United States if the person's presence in that country was obtained through the use of a lure or other ruse. In addition, some countries may view a lure of a person from its territory as an infringement on its sovereignty. Consequently, a prosecutor must consult with the Office of International Affairs before undertaking a lure to the United States or a third country.

9-15.635 Interpol Red Notices

An Interpol Red Notice is the closest instrument to an international arrest warrant in use today. Please be aware that if a Red Notice is issued, the prosecutor's office is obligated to do whatever work is required to produce the necessary extradition documents within the time limits prescribed by the controlling extradition treaty whenever and wherever the fugitive is arrested. Further, the prosecutor's office is obliged to pay the expenses pursuant to the controlling treaty.

Interpol Red Notices are useful when the fugitive's location or the third country to which he or she may travel (*see USAM 9-15.620*), is unknown. For additional information about Interpol Red Notices, *see the Criminal Resource Manual at 611*.

9-15.640 Revocation of United States Passports

The Department of State may revoke the passport of a person who is the subject of an outstanding Federal warrant. Revocation of the passport can result in loss of the fugitive's lawful residence status, which may lead to his or her deportation. If the fugitive is wanted on State charges only, it will be necessary to obtain a warrant on a UFAP complaint because the Department of State is only authorized to revoke the passports of persons named in Federal warrants.

9-15.650 Foreign Prosecution

If the fugitive has taken refuge in the country of which he or she is a national, and is thereby not extraditable, it may be possible to ask that country to prosecute the individual for the crime that was committed in the United States. This can be an expensive and time consuming process and in some countries domestic prosecution is limited to certain specified offenses. In addition, a request for domestic prosecution in a particular case may conflict with U.S. law enforcement efforts to change the "non-extradition of nationals" law or policy in the foreign country. Whether this option is available or appropriate should be discussed with OIA.

9-15.700 Foreign Extradition Requests

Foreign requests for extradition of fugitives from the United States are ordinarily submitted by the embassy of the country making the request to the Department of State, which reviews and forwards them to the Criminal Division's Office of International Affairs (OIA). The requests are of two types: formal requisitions supported by all documents required under the applicable treaty, or requests for provisional arrest. (Requests for provisional arrest may be received directly by the Department of Justice if the treaty permits. See USAM 9-15.230 for an explanation of provisional arrest.)

When OIA received a foreign extradition request, in summary, the following occurs:

1. OIA reviews both types of requests for sufficiency and forwards appropriate ones to the district.
2. The Assistant United States Attorney assigned to the case obtains a warrant and the fugitive is arrested and brought before the magistrate judge or the district judge.
3. The government opposes bond in extradition cases.
4. A hearing under 18 U.S.C. § 3184 is scheduled to determine whether the fugitive is extraditable. If the court finds the fugitive to be extraditable, it enters an order of extraditability and certifies the record to the Secretary of State, who decides whether to surrender the fugitive to the requesting government. In some cases a fugitive may waive the hearing process.
5. OIA notifies the foreign government and arranges for the transfer of the fugitive to the agents appointed by the requesting country to receive him or her. Although the order following the extradition hearing is not appealable (by either the fugitive or the government), the fugitive may petition for a writ of habeas corpus as soon as the order is

issued. The district court's decision on the writ is subject to appeal, and the extradition may be stayed if the court so orders.

See Criminal Resource Manual at 612, for a more detailed discussion of foreign extradition requests.

9-15.800 Plea Agreements and Related Matters -- Prohibition

Persons who are cooperating with a prosecutor may try to include a "no extradition" clause in their plea agreements. Such agreements, whether formal or informal, may be given effect by the courts. If a foreign country subsequently requests the person's extradition, the United States faces the unpleasant dilemma of breaching its solemn word either to the person involved or to its treaty partner. *Petition of Geisser*, 627 F.2d 745 (5th Cir. 1980), describes the enormous practical problems of resolving such a dilemma. Related matters involve agreements with potential witnesses to prevent or delay their deportation.

Prosecutors may not agree either formally or informally to prevent or delay extradition or deportation unless they submit a written request for authorization, and receive an express written approval from the Assistant Attorney General, Criminal Division. Requests should be submitted to the Office of International Affairs after endorsement by the head of the section or office responsible for supervising the case.

**PLEAS -- FEDERAL RULE
OF CRIMINAL PROCEDURE 11**

- 9-16.001 Legal Considerations**
- 9-16.010 Approval Required for Consent to Plea of Nolo Contendere**
- 9-16.015 Approval Required for Consent to Alford Plea**
- 9-16.020 Approval Required for Plea Agreements Involving Members of Congress, Federal Judges, Extradition, Deportation, and Air Piracy Cases**
- 9-16.030 Investigative Agency and Victim to be Consulted**
- 9-16.040 Plea Bargains in Fraud Cases**
- 9-16.050 Pleas by Corporations**
- 9-16.060 Miscellaneous Sections Requiring Consultation or Approval of Plea Agreements**
- 9-16.110 Plea Negotiations with Public Officials**
- 9-16.300 Plea Agreements -- Federal Rule of Criminal Procedure 11(e)**
- 9-16.320 Plea Agreements and Restitution**
- 9-16.330 Plea Agreements and Sentencing Appeal Waivers**
- 9-16.400 Inadmissibility of Pleas: Federal Rule of Criminal Procedure 11(e)(6)**
- 9-16.500 Identifying Uncharged Third-Parties During Plea and Sentencing Proceedings**

9-16.001 Legal Considerations

A defendant may plead guilty, not guilty, or with the consent of the court, nolo contendere. Fed. R. Crim. P. 11.

See the Criminal Resource Manual at 623 et seq. for a discussion of the law relating to pleas

Pleas -- Federal Rule of Criminal Procedure 11	Criminal Resource Manual at 623
Plea Negotiations with Public Officials -- United States v. Richmond	Criminal Resource Manual at 624
Federal Rule of Criminal Procedure 11(e)	Criminal Resource Manual at 625
Plea Agreements and Sentencing Appeal Waivers -- Discussion of the Law	Criminal Resource Manual at 626
Inadmissibility of Pleas: Federal Rule of Criminal Procedure 11(e)(6)	Criminal Resource Manual at 627

9-16.010 Approval Required for Consent to Plea of Nolo Contendere

United States Attorneys may not consent to a plea of *nolo contendere* except in the most unusual circumstances and only after a recommendation for doing so has been approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, Deputy Attorney General, or the Attorney General. *See also* 9-27.500, Principles of Federal Prosecution, which discusses the policy of opposing pleas of *nolo contendere* except when the circumstances of the case are so unusual that acceptance of the plea would be in the public interest.

The Policy and Statutory Enforcement Unit (PSEU) of the Office of Enforcement Operations will coordinate the review of requests for approval to consent to *nolo contendere* pleas in matters for which the Criminal Division is responsible. Such requests should be submitted to the PSEU in a memorandum which 1) describes the facts of the case; 2) sets out the specific statutory violations charged; 3) states the charges to which the defendant agrees to plead; 4) explains the circumstances supporting the requested consent to the plea; and 5) provides any other information that may be helpful in rendering a decision on the request. The PSEU will obtain the views of the Criminal Division section responsible for the substantive area involved in the case and will forward the request and the section's views to the Assistant Attorney General for the Criminal Division for decision.

Questions regarding this approval requirement in matters under the supervision of the Criminal Division may be directed to the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations at 202-305-4023.

9-16.015 Approval Required for Consent to Alford Plea

United States Attorneys may not consent to the plea known as an Alford plea (*see North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970)) (when a defendant maintains his or her innocence with respect to the charge to which he or she offers to plead guilty) except in the most unusual of circumstances and only after recommendation for doing so has been approved by the Assistant Attorney General responsible for the subject matter or by the Associate Attorney General, the Deputy Attorney General, or the Attorney General. In any case in which the defendant tenders a plea of guilty, but denies that he or she has in fact committed the offense, the attorney for the Government should make an offer of proof of all facts known to the Government to support the conclusion that the defendant is in fact guilty. *See* USAM 9-027.440, Principles of Federal Prosecution, which discusses the rationale of this policy; USAM 6-4.330 (Approval of Alford pleas in tax cases).

The Policy and Statutory Enforcement Unit (PSEU) of the Office of Enforcement Operations will coordinate the review of requests for approval to consent to Alford pleas in matters for which the Criminal Division is responsible. Such requests should be submitted to the PSEU in a memorandum which 1) describes the facts of the case; 2) sets out the specific statutory violations charged; 3) states the charges to which the defendant agrees to plead; 4) explains the circumstances supporting the requested consent to the plea; and 5) provides any other information that may be helpful in rendering a decision on the request. The PSEU will obtain the views of the Criminal Division section

responsible for the substantive area involved in the case and will forward the request and the section's views to the Assistant Attorney General for the Criminal Division for decision.

Questions regarding this approval requirement in matters under the supervision of the Criminal Division may be directed to the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations at 202-305-4023.

9-16.020 Approval Required for Plea Agreements Involving Members of Congress, Federal Judges, Extradition, Deportation, and Air Piracy Cases

United States Attorneys should also be cognizant of the sensitive areas where plea agreements involve either extradition or deportation. No United States Attorney or Assistant United States Attorney has the authority to negotiate regarding an extradition or deportation order in connection with any case. If extradition has been requested or there is reason to believe that such a request will be made, or if a deportation action is pending or completed, United States Attorneys or Assistant United States Attorneys, before entering negotiations regarding such matters, must seek specific approval from the Assistant Attorney General, Criminal Division. *See USAM 9-15.800, and 9-73.510.*

The Department continues to advocate severe penalties for aircraft hijackers as a deterrent to future acts of piracy. Consequently, authorization from the Criminal Division must be obtained by the United States Attorney before he/she enters into any agreement to forego an air piracy prosecution in return for a guilty plea to a lesser offense, or decides otherwise not to fully prosecute an act of air piracy. *See USAM 9-63.181.*

For policy regarding approval required for plea agreements involving defendants who are Members of Congress, candidates for Congress, or Federal judges, see USAM 9-16.110.

9-16.030 Investigative Agency and Victim to be Consulted

Although United States Attorneys have wide discretion in negotiating guilty pleas in criminal cases, this power should be exercised only after appropriate consultation with the federal investigative agency involved. In addition, the *Attorney General Guidelines for Victim and Witness Assistance 2000* provides that United States Attorneys should make reasonable efforts to notify identified victims of, and consider victims' views about, any proposed or contemplated plea negotiations. *See the Victim and Witness Protection Act of 1982, P.L. 97-291, § 6, 96 Stat. 1256.*

9-16.040 Plea Bargains in Fraud Cases

When possible, United States Attorneys should require an explicit stipulation of all facts of a defendant's fraud against the United States when agreeing to a plea bargain, including acknowledgement of the financial consequences or damages to the government. A good example of this approach and its usefulness in ensuing civil litigation may be found in *United States v. Podell*, 436 F. Supp. 1039, 1042-1044 (S.D.N.Y. 1977), *aff'd* 572 F.2d 31, 36 (2d Cir. 1978). Concerning such pleas, United States Attorneys should also be aware of USAM 9-2.159; 9-27.641 (Multi-District (global) Agreement Requests); 9-42.010 (Coordination of Civil and Criminal Fraud Against the Government); 9-42.451 (Plea Bargaining in Medicare/Medicaid Cases); and 9-16.030 (Investigative Agency and Victim to be Consulted).

9-16.050 Pleas by Corporations

Charges against an individual defendant should not be dismissed on the basis of a plea of guilty by a corporate defendant unless there are special circumstances justifying the dismissal. See also the Criminal Resource Manual at 162.

9-16.060 Miscellaneous Sections Requiring Consultation or Approval of Plea Agreements

In addition to the sections listed above, see the USAM at 9-138.040, which states that the Secretary of Labor's statutory right to notice and representation in disability proceedings under 29 U.S.C §§ 504 and 1111 may not be waived or negotiated away as part of a plea agreement or sentencing bargain.

9-16.110 Plea Negotiations with Public Officials

Plea bargains with defendants who are elected public officers can present issues of federalism and separation of powers when they require the public officer defendant to take action that affects his or her tenure in office. The same issues can also arise when the defendant is a candidate for elective office, or when plea negotiations call for withdrawal from candidacy or an undertaking by the defendant not to seek or hold public office in the future.

GENERAL RULE: Resignation from office, withdrawal from candidacy for elective office, and forbearance from seeking or holding future public offices, remain appropriate and desirable objectives in plea negotiations with public officials who are charged with federal offenses that focus on abuse of the office(s) involved. Where the office involved is *not* one within the Legislative or Judicial Branches of the federal government, such negotiated terms may be also be enforced involuntarily against the will of the defendant by a sentencing judge pursuant to the Federal Probation Act. *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979).

However, when the position that is the subject of a negotiated resignation, withdrawal from candidacy, or an agreement to forbear occupying future office, is a position within the Legislative or the Judicial Branches of the *federal* government (i.e., Member of Congress, United States Senator or federal judge), the inclusion of required withdrawal, resignation or forbearance may raise questions involving the separation of powers doctrine when included in a plea agreement negotiated by employees of the Executive Branch of government.

Resignation, withdrawal or forbearance from holding offices in the Legislative or the Judicial branches of the federal government may appropriately be made the subject of plea negotiations, and offers of resignation, withdrawal or forbearance concerning such offices may be incorporated into plea agreements with incumbent Members of Congress and federal judges. However, resignation, withdrawal or forbearance with respect to Congressional or federal judicial office may *not be imposed involuntarily* against the will of the judge or Member of Congress involved because of the separation of powers doctrine. See *Powell v. McCormack*, 395 U.S. 846 (1969); *United States v. Richmond*, 550 F. Supp. 144 (E.D.N.Y. 1982). See the Criminal Resource Manual at 624, for a discussion of *Richmond*.

To assure uniformity and fairness, all proposed plea agreements involving defendants who are Members of Congress, candidates for Congress, or federal judges shall be subject to prior approval by the Public Integrity Section of the Criminal Division.

The Public Integrity Section has substantial experience and expertise in the issues presented by taking pleas from federal public officials. Assistant United States Attorneys are encouraged to contact Public Integrity should questions arise concerning this issue.

9-16.300 Plea Agreements -- Federal Rule of Criminal Procedure 11(e)

Federal Rule of Criminal Procedure 11(e) recognizes and codifies the concept of plea agreements. Plea agreements should honestly reflect the totality and seriousness of the defendant's conduct, and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate Sentencing Guideline provisions. *See USAM 9-27.400*. The Department's policy is to stipulate only to facts that accurately represent the defendant's conduct. *See USAM 9-27.430*. In addition, in accordance with USAM 9-27.630, United States Attorneys may not make agreements which prejudice civil or tax liability without the express agreement of all affected Divisions and/or agencies. For additional discussion regarding plea agreements, see the Principles of Federal Prosecution, USAM 9-27.400 et seq. See the Criminal Resource Manual at 625 for additional discussion of the law relating to plea agreements.

9-16.320 Plea Agreements and Restitution

The Antiterrorism and Effective Death Penalty Act of 1996, specifically Title II, Subtitle A, the Mandatory Victims Restitution Act ("the Act"), amended restitution laws and, by altering 18 U.S.C. § 3663 et seq., strengthened enforcement. On July 24, 1996, in response to a Congressional directive in the Act, the Attorney General issued a memorandum to all Department of Justice Attorneys and Victim-Witness Coordinators that addressed, among other things, plea agreements and restitution. The following language was taken from that memorandum and Article V of the *Attorney General Guidelines for Victim and Witness Assistance 2000*:

Section 209 of the Act mandates that when negotiating plea agreements, prosecutors must give consideration to "requesting that the defendant provide full restitution to all victims of all charges contained in the indictment or information, without regard to the count to which the defendant actually plead[s]." In addition to this mandate, the following general guidelines summarize the responsibilities of prosecutors with regard to plea agreements that include provisions regarding restitution:

First, 18 U.S.C. § 3663A mandates that restitution be ordered for crimes of violence, for offenses against property under the criminal code (unless the court makes a special finding described in subsection (c)(3) of that section), and for offenses described in 18 U.S.C. § 1365, if an identifiable victim or victims suffered a physical injury or pecuniary loss. There are also several other previously enacted statutes that mandate restitution: 18 U.S.C. § 2248; 18 U.S.C. § 2259; 18 U.S.C. § 2264; and 18 U.S.C. § 2327. In cases that fall under these statutes, the court is obligated to impose a restitution order.

Second, even when restitution is not mandatory, federal prosecutors should give careful consideration to seeking full restitution to all victims of all charges contained in the indictment or information as part of any plea agreement.

Third, when an indictment contains both charges for which restitution is mandatory, and charges for which restitution is not mandatory, prosecutors should give careful consideration to requiring either a plea to a mandatory restitution charge, or an acknowledgement by the defendant in the plea agreement that a mandatory restitution charge gave rise to the plea agreement, which acknowledgement will trigger the mandatory restitution provisions of 18 U.S.C. § 3663A. 18 U.S.C. § 3663A(c)(2).

Fourth, prosecutors should also be mindful that the United States Sentencing Guidelines (USSG) generally require the imposition of restitution when it is authorized by the law, and should not enter into

agreements regarding restitution that would violate the Sentencing Guidelines. *See USSG § 5E1.1; USAM 9-27.400.*

Fifth, supervisory attorneys who approve plea agreements, as is required by the Principles of Federal Prosecution (USAM 9-27.450), should ensure that plea agreements comply with the law and these guidelines. The Principles of Federal Prosecution list the factors that should be considered when determining whether to enter into a plea agreement. These factors include, among other factors, the effect the plea agreement will have upon a victim's right to restitution. USAM 9-27.420-430.

9-16.330 Plea Agreements and Sentencing Appeal Waivers

Some districts incorporate waivers of sentencing appeal rights and post-conviction rights into plea agreements. The use of these waivers in appropriate cases can be helpful in reducing the burden of appellate and collateral litigation involving sentencing issues. See the Criminal Resource Manual at 626 for a more extensive discussion of the law on this issue.

9-16.400 Inadmissibility of Pleas: Federal Rule of Criminal Procedure 11(e)(6)

See the Criminal Resource Manual at 627.

9-16.500 Identifying Uncharged Third-Parties During Plea and Sentencing Proceedings

In the absence of some significant justification, it is generally not appropriate for a United States Attorney to identify (either by name or unnecessarily-specific description), or cause a defendant to identify, a third-party wrongdoer unless that party has been officially charged with the misconduct at issue. *See USAM 9-11.130; 9-27.760.*

9-17.000
SPEEDY TRIAL
ACT OF 1974

Title I of the Speedy Trial Act of 1974, 88 Stat. 2080, as amended August 2, 1979, 93 Stat. 328, is set forth in 18 U.S.C. §§ 3161-3174. The Act establishes time limits for completing the various stages of a federal criminal prosecution. Government attorneys should comply with the time limits established by the act. For more information, *see the Criminal Resource Manual at 628.*

9-18.000 DEFENSES

Information on defenses to federal crimes is contained in the Criminal Resource Manual

Alibi

Discovery of Alibi Witnesses -- Fed. R.Crim. P. 12.1	Criminal Resource Manual at 629
Practice Under Fed. R. Crim. P. 12.1	Criminal Resource Manual at 630
Unsolicited Disclosure by the Defendant	Criminal Resource Manual at 631
Specific Incident During a Continuing Offense	Criminal Resource Manual at 632
Suggested Form of Demand for Disclosure of Alibi Defense	Criminal Resource Manual at 633

Insanity

Insanity Defense Reform Act of 1984	Criminal Resource Manual at 634
Mental Competency to Stand Trial Distinguished	Criminal Resource Manual at 635
Prior Law	Criminal Resource Manual at 636
Present Statutory Test -- 18 U.S.C. § 17(a)	Criminal Resource Manual at 637
Burden of Proving Insanity -- 18 U.S.C. § 17(b)	Criminal Resource Manual at 638
Scope of Expert Testimony	Criminal Resource Manual at 639
Special Verdict -- "Not Guilty Only By Reason of Insanity" -- Related Commitment Procedures at 18 U.S.C. § 4243	Criminal Resource Manual at 640
Hospitalization of a Convicted Person Suffering from a Mental Disease or Defect -- 18 U.S.C. § 4244	Criminal Resource Manual at 641
Hospitalization of an Imprisoned Person Suffering from a Mental Disease or Defect	Criminal Resource Manual at 642
Hospitalization of a Person Due for Release But Suffering from Mental Disease/Defect -- 18 U.S.C. § 4246	Criminal Resource Manual at 643
Criminal Division Contacts	Criminal Resource Manual at 644

Entrapment

Elements	Criminal Resource Manual at 645
Recent Entrapment Cases	Criminal Resource Manual at 646
Proving Predisposition	Criminal Resource Manual at 647
Outrageous Government Conduct	Criminal Resource Manual at 648

Statute of Limitations

Statute of Limitations Defenses	Criminal Resource Manual at 649
Length of Limitations Period	Criminal Resource Manual at 650
Statute of Limitations for Continuing Offenses	Criminal Resource Manual at 651
Statute of Limitations for Conspiracy	Criminal Resource Manual at 652

Statute of Limitations and the Assimilative Crimes Act	Criminal Resource Manual at 653
Statute of Limitations and RICO	Criminal Resource Manual at 654
Statute of Limitations and Defective Indictments -- Superseding Indictments	Criminal Resource Manual at 655
Waiver of the Statute of Limitations	Criminal Resource Manual at 656
Tolling of Statute of Limitations	Criminal Resource Manual at 657
Statute of Limitations and Tax Offenses	Criminal Resource Manual at 658

**DOCUMENTARY MATERIAL
HELD BY THIRD PARTIES****9-19.200 Introduction**

9-19.210 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party Other than a Person Possessing the Materials for Purposes of Public Communication

9-19.220 Procedures Where Privileged Materials Sought Are in Possession of a Disinterested Third Party Physician, Lawyer, or Clergyman

9-19.221 Request for Authorization to the Deputy Assistant Attorney General

9-19.230 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party Professional Involved in a Doctor-Like Therapeutic Relationship

9-19.240 Procedures Where Materials Sought Are in Possession of a Person Holding Them in Relation to Some Form of Public Communication

9.19.300 Considerations Bearing on Choice of Methods

9-19.400 Non-Applicability in Certain Situations

9-19.500 Sanctions

9-19.700 Contact Points for Advice and Approval

9-19.200 Introduction

This chapter focuses on the means by which federal prosecutors may obtain, for evidentiary purposes, documentary material believed to be in the possession of disinterested third parties. These provisions have been drafted to be consistent with the previously published Attorney General's "Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties," 28 C.F.R., Part 59, as well as with Section 201 of Title II of the Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa, *et seq.*

The intent of the regulations (28 C.F.R., Part 59) is to protect against unnecessary invasions of personal privacy and to recognize the potential for such invasions when the government seeks to obtain documentary materials from third parties not themselves under investigation. The general thrust of these guidelines is that a search warrant should not be used to obtain documentary materials from a non-suspect, except where the use of a subpoena or other less intrusive means would jeopardize the availability or usefulness of the materials sought.

For Government attorneys contemplating the use of a search warrant directed at seizing materials from disinterested third parties, different provisions apply depending on whether the person from whom the materials are sought is: (1) a disinterested third party (*see* USAM 9-19.210); (2) a disinterested third party who is a physician, lawyer, or clergyman (*see* USAM 9-19.220 and 230); or (3) a person possessing the materials sought for the purposes of public communication (e.g., a newspaper, book, or broadcast) (*see* USAM 9-19.240). The use of search warrants directed at seizing documentary materials from the media or any "person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of communication" is strictly regulated by statute, *see* 42 U.S.C. §§ 2000aa, *et seq.*

Search warrants directed at seizing materials from other categories of disinterested third parties are governed by the regulations promulgated in accordance with that statute, *see* 28 C.F.R., Part 59. For definitions used in this chapter, see the Criminal Resource Manual at 660, restating those set forth at 28 C.F.R. § 59(2).

9-19.210 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party Other than a Person Possessing the Materials for Purposes of Public Communication

Normally a search warrant should not be used to obtain documentary materials held by a disinterested third party. A search warrant may be sought, however, if the use of a subpoena or other less intrusive means would substantially jeopardize the availability or usefulness of the materials sought. Except as provided in USAM 9-19.220, the application for such a warrant must be authorized by an attorney for the government. "Attorney for the government" is defined in the regulations as having the same meaning as found in Rule 54(c) of the Federal Rules of Criminal Procedure and includes all United States Attorneys and Assistant United States Attorneys. In addition, the Department takes the position that the phrase "an authorized assistant of the Attorney General" set forth in Rule 54(c) as part of the definition of the term "attorney for the government" is broad enough to include all Department of Justice attorneys assigned to investigate or prosecute cases and their supervisors.

An exception to the authorization requirement may be made in emergency situations, where the immediacy of the need to seize the materials does not permit an opportunity to secure authorization from the attorney for the government. In such situations the application may be authorized by a supervisory law enforcement officer in the applicant's department or agency. However, the United States Attorney or supervising Department of Justice attorney (in a case in which a division of the Department is directly handling the investigation or prosecution) must be notified of the authorization and its justifying basis within 24 hours of the authorization. 28 C.F.R. § 59.4(a).

9-19.220 Procedures Where Privileged Materials Sought Are in Possession of a Disinterested Third Party Physician, Lawyer, or Clergyman

A similar but somewhat different procedure is followed when the disinterested third party is a physician, lawyer, or clergyman and the materials sought or other materials likely to be reviewed during the execution of the search warrant contain confidential information concerning patients, clients, or parishioners that was furnished or developed for the purposes of professional counseling or treatment. As with other disinterested third parties, a search warrant should normally not be used to obtain such confidential materials. A warrant should be used only if the use of a subpoena, or other less intrusive means of obtaining the materials, such as a request, (1) would substantially jeopardize the availability or usefulness of the materials sought; (2) access to the materials is of substantial importance to the investigation or prosecution for which they are sought; and (3) the application of the warrant has been approved by the appropriate Deputy Assistant Attorney General (DAAG) upon the recommendation of the United States Attorney or supervising Department of Justice attorney (in a case in which a division of the Department is directly handling the investigation or prosecution). The appropriate DAAG would be a DAAG for the division which supervises the underlying offense being investigated or prosecuted.

If the documentary materials were created or compiled by a physician but, as a matter of practice, the physician's files are maintained at a hospital or clinic, the files, for purposes of these regulations, are to be deemed in the private possession of the physician; therefore, the regulations would apply if the physician is

a disinterested third party. Such records would, however, not be deemed in the private possession of the physician if the hospital or clinic itself were a suspect.

Again, an exception to the authorization requirement may be made in emergency situations where there is an immediate need to seize the materials and not enough time to secure DAAG approval. In such situations, the application may be authorized by the United States Attorney or the supervising Department of Justice attorney. However, the appropriate DAAG must be notified of the authorization and its justifying basis within 72 hours of the authorization. However, in these cases (physician, lawyer, or clergyman), there is no provision for an emergency authorization by a supervisory law enforcement officer in the applicant's department or agency (as is the case where the materials sought are held by other disinterested third parties). 28 C.F.R. § 59.4(b)(1) and (2).

9-19.221 Request for Authorization to a Deputy Assistant Attorney General

Where the materials sought are in the possession of a disinterested third party physician, lawyer, or clergyman, application for a warrant must be approved by the appropriate Deputy Assistant Attorney General as described in 9-19.220. The request for authorization from the Deputy Assistant Attorney General should be made in writing and include a copy of the warrant application as well as a brief description of the facts and circumstances that form the basis for the recommendation of the authorization. In addition, the request must include a statement that it is authorized by the United States Attorney or the supervising Department of Justice attorney. If the request for authorization is made orally, or if, in an emergency situation, the application is authorized by the United States Attorney or the supervising Department of Justice attorney, a written record, as described above, must be sent to the Deputy Assistant Attorney General within seven days. 28 C.F.R. § 59.4(b)(3).

9-19.230 Procedures Where Materials Sought Are in Possession of a Disinterested Third Party Professional Involved in a Doctor-Like Therapeutic Relationship

There may be additional third-party professionals (e.g., psychologists, psychiatric social workers, or nurses) who possess materials containing private information similar to that held by doctors. The regulations are intended to cover these relationships as well. In such cases, the United States Attorney (or supervising Department of Justice attorney) should determine whether a search for such materials would involve review of extremely confidential information furnished or developed for purposes of professional counseling or treatment, and if it would, the provisions described in USAM 9-19.220 for obtaining materials from physicians, lawyers, or clergymen must be followed. At a minimum, the requirements for third party search warrants described in USAM 9-19.210 must be observed in all cases. 28 C.F.R. § 59.4(b)(5).

9-19.240 Procedures Where Materials Sought Are in Possession of a Person Holding Them in Relation to Some Form of Public Communication

Search warrants directed at the seizure of any work product materials or other documentary materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication are governed by the Privacy Protection Act of 1980 ("PPA"), 42 U.S.C. §§ 2000aa, *et seq.* See Criminal Resource Manual 661 for the text of 42 U.S.C. § 2000aa *et seq.*, available at http://www.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00002000--aa000-.htm.

The PPA prohibits the use of search warrants to obtain any work product materials or other documentary materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, except under the following limited circumstances: (1) when there is probable cause to believe that the person possessing the materials has committed a criminal act to which the materials relate, *unless* the alleged offense is the receipt, possession, communication, or withholding of the materials or the information contained within, in which case a search warrant may not be sought unless the alleged offense involves classified materials or child pornography; or (2) when there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.

If the pertinent documents do *not* involve work product materials, the Government may also seek a search warrant under the following additional circumstances: (1) when there is reason to believe that giving notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials; or (2) when the materials have not been produced in response to a court order directing compliance with a subpoena and either all appellate remedies have been exhausted or there is reason to believe that the delay caused by further proceedings relating to the subpoena would threaten the interests of justice. Considerations pertinent to the determination as to whether giving advance notice of the Government's interest in obtaining the materials would be likely to result in the destruction, alteration, concealment, or transfer of the materials may be found at 28 C.F.R. § 59.4(c).

The PPA provides that violations of the Act may result in the imposition of civil penalties against the Government. Government attorneys should be particularly aware of the potential for triggering the protections of the PPA in executing computer searches, since computers that may contain non-protected evidence of a crime, such as child pornography, often also contain legitimate, PPA-protected materials, such as draft newsletters on topics of public interest.

All applications for warrants issued under the PPA must be authorized by a Deputy Assistant Attorney General of the Criminal Division. Questions and requests for approval regarding computer-related search warrants should be directed to the Computer Crime and Intellectual Property Section (CCIPS) of the Criminal Division. Whenever proposed computer-related searches involve the traditional media, CCIPS will coordinate its review with the Policy and Statutory Enforcement Unit of the Criminal Division's Office of Enforcement Operations. Questions and requests for approval regarding all non-computer media-related searches should be directed to the PSEU at (202) 305-4023.

9-19.300 Considerations Bearing on Choice of Methods

The guidelines applicable to obtaining documentary materials held by disinterested third parties (other than those held in relation to some form of public communication) set forth certain factors to be considered in determining whether the use of a subpoena or other means less intrusive than a search warrant would substantially jeopardize the availability or usefulness of the materials sought. These factors are set forth in 28 C.F.R. § 59.4(c).

9-19.400 Non-Applicability in Certain Situations

The guidelines do not apply to certain types of investigatory activities and searches. These include audits; examinations; regulatory, compliance, or administrative inspections; foreign intelligence or counterintelligence activities by a government authority pursuant to otherwise applicable law; border and customs searches; access to documentary materials for which valid consent has been obtained; and access to documentary materials that have been abandoned at a known location or that cannot be obtained by a subpoena because they are in the possession of a person whose identity is not known and cannot be determined with reasonable effort.

The guidelines do not supersede any other statutory, regulatory, or policy limitations on access to or the use or disclosure of particular types of documentary materials.

9-19.500 Sanctions

Any Federal officer or employee who violates the guidelines set forth in 28 C.F.R. , Part 59 is subject to appropriate disciplinary action by the agency or department by which he/she is employed. *See* 28 C.F.R. § 59.6.

9-19.700 Contact Points for Advice and Approval

In cases involving offenses supervised by the Criminal Division, questions as to the provisions governing methods of obtaining documentary materials held by disinterested third parties, as well as inquiries concerning the Deputy Assistant Attorney General's authorization, should be directed to the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations (OEO), at (202) 305-4023, except when the materials at issue are held by an attorney, in which case inquiries should be directed to the OEO's Immunity Unit, at (202) 514-5541.

For offenses under the jurisdiction of the Tax Division, contact the Chief of the appropriate regional Criminal Enforcement Section of the Tax Division.

For offenses under the jurisdiction of the Civil Rights Division, contact the Chief of the Criminal Section of the Civil Rights Division at (202) 514-3204.

For offenses under the jurisdiction of any other division contact the office of the Assistant Attorney General or Deputy Assistant Attorney General for the appropriate division.

9-20.000

MARITIME, TERRITORIAL AND INDIAN JURISDICTION

9-20.100	Introduction
9-20.115	Prosecution of Military Personnel
9-20.220	Investigative Jurisdiction – Indian Country Offenses
9-20.230	Supervising Section – Indian Country Offenses

9-20.100 Introduction

This chapter contains the Department's policy relating to maritime, territorial and Indian jurisdiction. Useful background material can also be found in the Criminal Resource Manual:

Maritime, Territorial and Indian Jurisdiction – Generally	Criminal Resource Manual at 662
Special Maritime and Territorial Jurisdiction	Criminal Resource Manual at 663
Territorial Jurisdiction	Criminal Resource Manual at 664
Determining Federal Jurisdiction	Criminal Resource Manual at 665
Proof of Territorial Jurisdiction	Criminal Resource Manual at 666
Assimilative Crimes Act, 18 U.S.C. § 13	Criminal Resource Manual at 667
Limited Criminal Jurisdiction Over Property Held Proprietorially	Criminal Resource Manual at 668
Prosecution of Military Personnel	Criminal Resource Manual at 669
Maritime Jurisdiction	Criminal Resource Manual at 670
Great Lakes Jurisdiction	Criminal Resource Manual at 671
General Maritime Offenses	Criminal Resource Manual at 672
Aircraft Jurisdiction	Criminal Resource Manual at 673

Indian Jurisdiction

Indian Country -- Introduction	Criminal Resource Manual at 674
Investigative Jurisdiction	Criminal Resource Manual at 675
MOU re Indian Law Enforcement Reform Act	Criminal Resource Manual at 676
Indian Country Defined	Criminal Resource Manual at 677
The General Crimes Act -- 18 U.S.C. § 1152	Criminal Resource Manual at 678
The Major Crimes Act -- 18 U.S.C. § 1153	Criminal Resource Manual at 679
Lesser Included Offenses Under 18 U.S.C. § 1153	Criminal Resource Manual at 680
Indian Jurisdiction – Tribal Options	Criminal Resource Manual at 681
Successive Prosecutions	Criminal Resource Manual at 682
"Victimless Crimes"	Criminal Resource Manual at 683
Memorandum for Benjamin R. Civiletti Re Jurisdiction Over "Victimless" Crimes Committed by Non-indians on	Criminal Resource Manual at 684

Indian Reservations	
Exclusive Federal Jurisdiction Over Offenses by Non-Indians Against Indians	Criminal Resource Manual at 685
Who is an "Indian"?	Criminal Resource Manual at 686
Tribal Court Jurisdiction	Criminal Resource Manual at 687
State Jurisdiction	Criminal Resource Manual at 688
Jurisdictional Summary	Criminal Resource Manual at 689
Embezzlement and Theft from Tribal Organization	Criminal Resource Manual at 690
Indian Gaming	Criminal Resource Manual at 691

9-20.115 Prosecution of Military Personnel

Many violations of Federal criminal law are also violations of the Uniform Code of Military Justice (U.C.M.J.) for which military personnel are subject to court martial (e.g., drug offenses, theft of government property, etc.). The U.C.M.J. also punishes a number of acts which are not otherwise specifically declared to be Federal crimes, but which may become such when committed on a facility over which the United States exercises legislative jurisdiction as a result of the assimilation of state law under the Assimilative Crimes Act. *See* Criminal Resource Manual at 667.

To avoid conflict over investigative and prosecutive jurisdiction, the Attorney General and the Secretary of Defense executed a memorandum of understanding (MOU) relating to the investigation and prosecution of crimes over which the Department of Justice and Department of Defense have concurrent jurisdiction. The agreement provides generally that all crimes committed on military reservations by individuals subject to the Uniform Code of Military Justice shall be investigated and prosecuted by the military department concerned, with certain exceptions. The agreement permits civil investigation and prosecution in Federal district court in any case when circumstances render such action more appropriate. If questions arise concerning the operation of the agreement, the United States Attorney should contact the section of the Criminal Division having responsibility over the Federal statute allegedly violated. See the Criminal Resource Manual at 669, for the text of the MOU.

9-20.220 Investigative Jurisdiction -- Indian Country Offenses

In 1993, the Department of Justice and the Department of the Interior entered into a memorandum of understanding (MOU) that established guidelines regarding the respective jurisdictions of the Bureau of Indian Affairs (BIA) and the Federal Bureau of Investigation (FBI). *See* the Criminal Resource Manual at 675. Part IV of the MOU requires each United States Attorney whose criminal jurisdiction includes Indian country to develop local written guidelines outlining the responsibilities of the BIA, FBI, and the Tribal Criminal Investigators, if applicable. See the Criminal Resource Manual at 676, for the full text of the MOU.

9-20.230 Supervising Section -- Indian Country Offenses

The Office of Enforcement Operations of the Criminal Division has general supervisory responsibility for Indian country offenses. However, the Child Exploitation and Obscenity Section has responsibility for child abuse offenses, and other Sections, such as the Terrorism and Violent Crime Section, should be consulted on questions involving the substantive elements of offenses within their areas of responsibility. See USAM 9-4.000 for statutory assignments of the various Sections. The Appellate, General Litigation, and Indian Resources Sections of the Environment and Natural Resources Division have Indian country expertise and should be consulted on questions of tribal rights, treaties, boundaries and related matters.

9-21.000
WITNESS SECURITY

- 9-21.010 Introduction**
- 9-21.020 Scope**
- 9-21.050 Utilization of Persons in Custody of BOP or USMS for Investigative Purposes, or as Targets of Investigative Activity**
- 9-21.100 Eligibility for the Witness Security Program**
- 9-21.110 Informants**
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9-21.010 Introduction

The purpose of this chapter is to provide information and guidance to Department of Justice (DOJ) attorneys with respect to the Witness Security Reform Act of 1984, Part F of Chapter XII of the Comprehensive Crime Control Act of 1984 (Pub.L. No. 98-473). This chapter contains regulations and provides general information about the Witness Security Program (the Program), and sets forth the procedures by which a government attorney may apply for the services of the Program in order to protect a witness against dangers that may be related to the witness's testimony. This chapter also provides information concerning the investigative use, or targeting, of persons who are in the custody of the United States Marshals Service (USMS) or the Bureau of Prisons (BOP), or who are under BOP supervision.

For information concerning the Emergency Witness Assistance Program see USAM 3-7.340, or contact any USAO Victim-Witness Coordinator or the Executive Office for United States Attorneys' LECC/Victim-Witness Office.

9-21.020 Scope

The procedures set forth *infra* apply to all organizations within DOJ and all organizations that use the Witness Security Program or use individuals in the custody of the USMS or BOP. The Office of Enforcement Operations (OEO), Criminal Division, is charged with overseeing both of these programs.

The Witness Security Reform Act of 1984 (the Act) extends the authority of the Attorney General established as part of the Organized Crime Control Act of 1970 to provide protection and security by means of relocation for persons who are witnesses in official proceedings brought against persons involved in organized criminal activity or other serious offenses where it is determined that an offense described in Title 18, United States Code, Chapter 73 (obstruction of justice) or relating to a similar State or local offense involving a crime of violence directed at a witness is likely to occur. The Act also sets forth the authority by which the Attorney General may provide protective services to certain relatives and associates of protected witnesses. In this regard, 28 U.S.C. 524 authorizes the use of DOJ appropriations for the payment of "compensation and expenses of witnesses... at the rates authorized or approved by the Assistant Attorney General for Administration."

9-21.050 Utilization of Persons in Custody of BOP or USMS for Investigative Purposes, or as Targets of Investigative Activity

Requests to use, for investigative purposes, persons who are in the custody of the USMS or BOP, or who are under BOP supervision, or to target such individuals in covert investigations, must be submitted to OEO for review and prior approval. Such requests must first be approved by the designated official(s) at the agency's headquarters, and then submitted, in writing, by personnel at the agency's headquarters to the Chief, Special Operations Unit, OEO, Criminal Division, U.S. Department of Justice, P.O. Box 7600, Washington, D.C. 20044-7600.

As part of the review process, OEO coordinates with personnel at the headquarters of all appropriate agencies (BOP, USMS, investigative agencies). Upon approval or denial of the request, OEO advises the requesting agency's headquarters of the decision.

If there are exigent circumstances requiring an immediate response from OEO, oral requests for approval will be accepted from personnel at the agency's headquarters. However, confirmation of the request and appropriate supporting information must be submitted to OEO in writing as soon as possible after approval. This information will be held in the strictest confidence; no dissemination of the information will be made without prior approval from the appropriate personnel at the agency's headquarters.

Although it is not encouraged, if extraordinary circumstances warrant the investigative utilization of a person in the custody of the BOP or the USMS by a state or local law enforcement agency, OEO will consider that request. Such a request must be submitted in writing and endorsed by the United States Attorney for the district in which the investigative use is to occur, or where the charges will be brought, whichever is more appropriate.

In those situations in which OEO has approved the request, but the person whose release is being sought for investigative purposes is being held in the USMS or BOP custody *by order of a court*, the Assistant United States Attorney must obtain a court order authorizing the release from custody by the USMS or BOP to the approved investigative agency. Such order should be sealed by the court for the security of both the prisoner and the investigation. *No court order shall be obtained transferring the custody of an individual from the USMS or BOP to an investigative agency without the prior approval of OEO.*

In addition, any cases involving video surveillance and/or consensual monitoring must comply with USAM 9-7.000 (Electronic Surveillance).

NOTE: Federal *investigative* agencies are also required to seek the approval of OEO to use or target a BOP employee in an undercover capacity. See the Criminal Resource Manual at 704, for additional information about the use of BOP employees.

See the Criminal Resource Manual at 703, for a more detailed description of the information which must be submitted to OEO.

9-21.100 Eligibility For the Witness Security Program

A witness may be considered for acceptance into the Witness Security Program if they are an essential witness in a specific case of the following types:

- A. Any offense defined in Title 18, United States Code, Section 1961(1) (organized crime and racketeering);
- B. Any drug trafficking offense described in Title 21, United States Code;
- C. Any other serious Federal felony for which a witness may provide testimony that may subject the witness to retaliation by violence or threats of violence;
- D. Any State offense that is similar in nature to those set forth above; and
- E. Certain civil and administrative proceedings in which testimony given by a witness may place the safety of that witness in jeopardy.

In order to facilitate the processing of a request by a government attorney for a witness's acceptance into the Witness Security Program, OEO's Witness Security Unit has designed an application form that requests the specific information needed to support the request. This form requires a summarization of the testimony to be provided by the witness and other information evidencing the witness's cooperation, the threat to the witness, and any risk the witness may pose if relocated to a new community. Government attorneys may obtain application forms and instructions concerning a witness's entry into the Witness Security Program (the Program) from the:

Witness Security Unit
Office of Enforcement Operations, Criminal Division
U.S. Department of Justice
P.O. Box 7600
Washington, D.C. 20044-7600
or call OEO at (202) 514-3684.

Much of the above information is mandated by the Act, which requires the Attorney General to obtain and evaluate all available information regarding the suitability of a witness for inclusion in the Program. This information must include threats against the witness, the witness's criminal history, and a psychological evaluation for the witness and each adult member of the household (18 years and older) that will be entering the Program. Additionally, the Attorney General is required to make a written assessment of the risk the witness and his/her adult family members may present to their new community. Factors which must be evaluated in the risk assessment include, but are not limited to, criminal record, alternatives other than Program protection which have been considered, and the possibility of securing the testimony from other sources. If it is determined that the need for prosecution of the case is outweighed by the danger that the witness or adult family members would pose to the relocation community, the Attorney General is required to exclude the witness from the Program.

Prior to Program authorization, witnesses will be required to make payment of any known debt for which there is a valid judgment, or make satisfactory arrangements to pay the debt; to satisfy all outstanding criminal and civil obligations (e.g., fines, community service, restitution); to provide appropriate child custody documents; and to provide appropriate immigration documents, as necessary. In addition, as a condition of authorization into the Program, the Department may, at its discretion, notify local law enforcement of the presence of the witness in the community and his or her criminal history; mandate random drug or alcohol testing and/or substance abuse counseling; and set other conditions believed to be in the best interests of the Program.

To avoid any unnecessary delay in processing a Program application, government attorneys should note the following:

A. In order to make certain that each application for entry of a witness into the Program is both appropriate and timely, the witness should, prior to his/her acceptance into the Program, either appear and testify before the grand jury or in some other manner have committed himself/herself to providing testimony at trial. This requirement relates to the commitment of the witness to testify, and is intended to ensure that the witness's testimony is available at the time of trial. It is equally as important a requirement that the prosecutor intend to have the witness testify, and that the witness's testimony be significant and essential to the success of the prosecution.

B. The protection and relocation of witnesses and family members are expensive and complicated. In addition, DOJ is obligated to provide for the safety and welfare of a protected witness and family members long after the witness has testified. It is imperative, therefore, that the request for entry of a witness into the Program be made only after the sponsoring attorney has determined that the witness's testimony is significant and essential to the success of the prosecution, as well as credible and certain in coming.

9-21.110 Informants

The safety/security of an informant assisting in an investigation is the responsibility of the investigative agency utilizing the informant. An informant is only eligible for participation in the Witness Security Program if he/she is also a bona fide witness as defined in 18 U.S.C. 3521, *et seq.*

Please note that merely requiring an informant to testify with the intent that he or she might become eligible for the Program is not sufficient qualification. He or she must still meet the requirements of being a significant and essential witness.

9-21.130 Prisoner-Witnesses

Prisoners in a State or Federal institution are eligible for participation in the Witness Security Program provided all other criteria are met. If the prisoner is in State custody, the State must agree to the prisoner serving his/her sentence in the custody of BOP. The application should be made as prescribed for other witnesses; however, because there is no assessment of the risk to the public unless a witness is to be relocated in the community, there is also no need for a psychological evaluation nor an assessment of the risk to the public (normally submitted by the sponsoring attorney or investigative agency). No preliminary interview is conducted by the USMS until the prisoner is between six to nine months from release and is being considered for the full services of the Program - including relocation. If application is being made for the prisoner's family to be relocated while the prisoner is incarcerated, psychological evaluations and risk assessments are needed for all adult family members, and it must be demonstrated that there is no alternative to placement of the family in the Program at that time.

9-21.140 State and Local Witnesses

The Witness Security Reform Act of 1984 authorizes the Attorney General to provide protection to State and local witnesses. If such a request is received, the State is asked to reimburse the United States for expenses incurred in providing protection, and to enter into an agreement in which the State agrees to cooperate with the Attorney General in carrying out the provisions of the Witness Security Reform Act. The terms of the reimbursement agreements will be determined by the USMS. If the State or local witness is under State or local supervision, the supervising agency must agree to transfer jurisdiction and supervision to Federal supervising authorities, prior to the witness's acceptance into the Witness Security Program.

Requests from State or local authorities should be directed to the appropriate United States Attorney and should contain all of the information normally required in a Federal witness's Witness Security Program application. The United States Attorney should review the application and furnish his/her recommendation to OEO for consideration.

9-21.200 Approval Authority

The Witness Security Reform Act provides that the Attorney General may delegate the authority to place individuals into the Witness Security Program to the Deputy Attorney General, the Associate Attorney General, the Assistant Attorneys General of the Criminal and Civil Rights Divisions, and one other person. By Attorney General Order No. 1072-84, the Attorney General has specially designated those individuals named above and the OEO Senior Associate Director to authorize applications for witnesses or prospective witnesses to be admitted into the Program. In the absence of the OEO Senior Associate Director, the OEO Director is authorized to exercise this authority.

9-21.220 Emergency Authorization

Protection of a witness for whom relocation is being requested remains the responsibility of the sponsoring investigative agency until such time as (1) OEO has reviewed the application and all other relevant information (including the results of the psychological examination), (2) OEO has approved admission of the witness into the Witness Security Program, and (3) the USMS has had the opportunity to arrange the safe removal of the witness and his/her family.

If it is determined that a witness is in imminent danger of harm and the investigative agency is not able to provide the necessary protection, emergency Program protection may be authorized by OEO and provided by the USMS before completion of the written risk assessment and all parties have entered into a Memorandum of Understanding. However, before this emergency protection can occur, the USMS must first conduct a preliminary interview (see USAM 9-21.300) to ensure that there are no obstacles to temporary relocation. The assessment and Memorandum of Understanding must be completed as soon as practicable following the authorization for emergency protection.

9-21.300 Requests for Preliminary Interviews

Upon receiving a Witness Security Program application, OEO will arrange for the USMS to interview the prospective witness as part of the application review process. Because of the need for this preliminary interview, it will be necessary for OEO to receive the application for the witness's participation in the Program as soon as it is clear that the individual (1) is an essential witness, (2) is endangered, and (3) will need to enter the Program. This USMS's "Preliminary Interview" is designed to provide the witness with an overview of Program guidelines and the services that the witness can - and cannot - expect to receive. It will also ensure that all parties involved are aware of the issues which need to be resolved prior to Program authorization and relocation.

The USMS will coordinate the preliminary interview directly with the prosecutor or agent. The USMS requires that a copy of the application and threat assessment be provided to it prior to, or at the time of, the scheduled interview. Before providing a copy of the threat assessment, the agent should contact his or her headquarters Witness Security Program contact concerning any special instructions.

9-21.310 Representations and Promises

Investigative agents and government trial attorneys are *not* authorized to make representations to witnesses regarding funding, protection, or other Witness Security Program services, including admission into the Program. Representations or agreements, including those contained in plea agreements, concerning the Program are not authorized and will not be honored without specific authorization from OEO.

9-21.320 Expenses

Any expenses incurred by investigative agencies or divisions for witnesses and/or their dependents prior to authorization into the Witness Security Program and pickup by the USMS are the responsibility of the concerned agency or division.

9-21.330 Psychological Testing and Evaluation

Before authorizing any witness to enter the Witness Security Program, OEO will arrange for psychological testing and evaluation for each prospective witness and all adult (18 years of age and older) members of the witness's household that are also to be protected. This testing will, to the extent possible, determine if the individuals may present a danger to their relocation communities. Because the reports of the psychologists may contain information that is discoverable as potentially exculpatory *Brady* material in the criminal prosecution in which the witness is to testify, all materials submitted by the psychologists will be forwarded by OEO to the appropriate United States Attorney's Office (USAO) for review.

Before undergoing psychological evaluation, the witness must sign a release form authorizing the Department to use the results of the psychological evaluation to the extent necessary in connection with the witness's application for acceptance into the Program or for other lawful uses. The release form is contained in the Criminal Resource Manual at 710. It is the responsibility of the sponsoring prosecutor or agent to have the witness sign the form prior to the evaluation.

9-21.340 Polygraph Examinations for Prisoner-Witness Candidates

A polygraph examination is required of all Witness Security Program candidates who are incarcerated in order to maintain the security of those individuals who are now, or will be, housed in a BOP Protective Custody Unit. Authorization for the Program may be rescinded or denied if the results of the polygraph examination reflect that the candidate intends to harm or disclose other protected witnesses or disclose information obtained from such witnesses.

The prisoner-witness Program candidate will be expected to sign the polygraph examination form acknowledging voluntary submission to the examination. The witness's release form authorizes the Department to use the results of the polygraph examination to the extent necessary in connection with the witness's application for acceptance into the Program or for other lawful uses. It will be the responsibility of the prosecutor/agent to advise the Witness Security candidate of this requirement prior to submitting the Program application to OEO. Depending on the location of the witness and other pertinent factors, the prosecutor/agent or BOP will be asked to disseminate the form to the prisoner. The Polygraph Examination Release Form is contained in the Criminal Resource Manual at 711. After an individual has been polygraphed, the examining authority will prepare and submit a report to OEO.

9-21.400 Procedures for Securing Protection

Requests for protection of witnesses must be made as soon as it is known that the Witness Security Program candidate will be a significant and essential witness and will need relocation. Because of security concerns regarding the witness and his/her family, a witness's pending or actual participation in the Program is *not* to be publicly disclosed without the prior authorization of OEO. It is incumbent upon each United States Attorney, Assistant United States Attorney, and the investigative agencies to present to OEO at the earliest possible time the request for authorization to place an individual in the Program. This will allow time for the USMS preliminary interview, psychological testing, appropriate review, and the actual preparation of assistance by the USMS and/or BOP, thereby minimizing the disruption both to the witness and the concerned government agencies.

United States Attorneys and Criminal Division Attorneys should transmit requests (applications) to OEO. Communications should be addressed to the Chief, "WSU," OEO, P.O. Box 7600, Washington, D.C. 20044-7600, or sent by fax to OEO at (202) 514-5143. (For security reasons, documents containing sensitive information are not to be e-mailed to OEO.) Program requests must be signed by the United States Attorney or, in the United States Attorney's absence and pursuant to 28 C.F.R. Sec. 0.131, the Acting United States Attorney. In cases being handled by the Criminal Division, the appropriate Division Section Chief/Office Director must sign the request. All other divisions, agencies, and entities applying for Program use must contact OEO for application information and directions.

For a list of the required information in these requests, see the Criminal Resource Manual at 701.

9-21.410 Illegal Aliens

Upon the submission of a Witness Security Program application for an illegal alien, the sponsoring attorney and/or investigative agency must obtain from the Immigration and Naturalization Service (INS) appropriate documents which authorize the prospective witness and family members to remain in the United States and facilitate relocation by the USMS out of the state in which they registered. Program candidates who are illegal aliens cannot be relocated by the USMS until all INS requirements are satisfied and necessary documents have been provided to OEO or the USMS. In cases where the INS procedure to legalize the alien's status may require a lengthy time period, the sponsor or agent should secure from INS a letter of intent to change the witness's status as part of the requirements for relocation under the Program. Excludable alien witnesses who do not need the protective services of the USMS, but who need to remain in the United States, should have their sponsoring government attorneys apply for S Visa classification (see USAM 9-72.000 S VISA Program) instead of seeking assistance from the Witness Security Program.

9-21.500 Responsibilities and Prerogatives of the United States Marshals Service

When it has been determined that a witness is a suitable candidate for the Witness Security Program, the witness and his/her adult family members that are to be protected will be asked to sign a Memorandum of Understanding. The USMS is obligated to satisfy each commitment documented, as long as the witness remains in good standing in the Program, and the USMS will not be required to provide amenities or services not included in the document. The witness will likewise be obligated to satisfy his or her documented commitments.

The Criminal Resource Manual contains further information on this topic

Witness Services

Criminal Resource Manual at 705

Subsistence Guidelines

Criminal Resource Manual at 706

Employment of Protected Witnesses

Criminal Resource Manual at 707

9-21.600 Prisoner-Witnesses

A. Non-Program Cooperating Prisoners (not in, or to be placed in, the Witness Security Program). The prosecutor handling a case, whether an Assistant United States Attorney or a Division attorney, will be responsible for notifying the BOP regional office that has jurisdiction over the area in which a Federal prisoner is incarcerated and the warden of the institution in which the prisoner is incarcerated of the prisoner's cooperation with the government, and the names/descriptions of other prisoners from whom that person should be separated. If the prisoner is in state or local custody, notification should be made to the highest level official possible of the facility in which the prisoner is incarcerated, and, if it is a Federal prisoner in local custody, the United States Marshals Service and the Bureau of Prisons Community Corrections Manager in the prisoner's sentencing district.

The prosecutor must provide BOP the following information:

1. Name of offender;
2. Date of birth;
3. Race and Sex;
4. Whether State or Federal prisoner (if State, indicate whether reimbursable or non-reimbursable);
5. Current offense;
6. Current sentence (and judge's name);
7. FBI rap sheet;
8. Outstanding warrants or detainers;
9. Names of all those from whom witness should be separated, biographical data, FBI numbers, and current locations;

10. Pre-sentence investigation and/or prison classification material;
11. Judgment and Commitment papers; and
12. Bail bond status.

B. Witness Security Program Prisoner-Witnesses. As soon as the prisoner begins cooperating, if the prisoner is in BOP custody, the prosecutor or investigative agency will be responsible for notifying officials at the institution in which the witness is incarcerated of his/her security needs, to ensure that appropriate security precautions are taken prior to possible acceptance in the Program. This information should include the names of individuals and groups from which the prisoner should be separated and the level of danger to the witness. Any special requirements, such as being transported alone, should be communicated also. If the prisoner is in state or local custody, the prosecutor or investigative agency is responsible for making appropriate arrangements for the prisoner's security by contacting the highest level official at the institution in which the prisoner is incarcerated, and providing the information described above. If the prisoner is a Federal prisoner in local custody, the United States Marshals Service and the Bureau of Prisons Community Corrections Manager in the prisoner's sentencing district should be advised as well. Once the Program application is submitted, OEO will notify BOP of the application, so that, if the prisoner is in BOP's custody, whatever additional security measures are necessary can be taken. OEO will consult with the prosecutor concerning whether the prisoner should be placed in administrative detention for security reasons, whether there is any objection to arranging the Program polygraph examination immediately, and whether there is any objection to arranging BOP's precommitment interview (similar to the USMS's preliminary interview).

1. BOP has advised that because of the extraordinary difficulty in determining the appropriate institution for the safe housing of a prisoner-witness, it is imperative that they be furnished the name, alias, DOB, FBI#, race, sex, ethnic origin, offense/charge and any other pertinent factors, such as state of appeal, fugitive escape, non-incarcerated, etc., on all persons who have been identified as posing a threat to the witness.

Compliance in providing this information is essential, regardless of whether the prisoner will be housed in a Protective Custody Unit (PCU) or in the general population of a Federal institution, as it will enable BOP to adequately monitor the separation needs of protected prisoner-witnesses.

The information must be provided to BOP at the time witness security is being requested for a prisoner-witness in accordance with the other provisions of this Chapter.

2. Requests to house prisoner-witnesses in a PCU must be directed to, and approved by, OEO.
3. Interviews of a prisoner-witness by prosecutors or agents must take place at the prisoner's designated institution, and must be arranged through OEO. Requests must be made at least five (5) working days in advance, and must include the purpose, date, and estimated duration of the interview, and name of contact person (if other than the requestor), as well as the name of each person (noting USAO/agency) to attend the interview.

9-21.700 Requests for Witness's Return to Danger Area for Court Appearances and Requests for Pre-Trial Conferences and Interviews

Requests for the appearance of a relocated witness for trial or pre-trial conferences and interviews in the case for which the witness entered the Witness Security Program should be made by the prosecutor to the Witness Security Inspector of the USMS in the prosecutor's area at least **ten (10) working days** in advance of the appearance date. Requests should include the following: purpose of appearance, date/time, place, estimated duration of appearance, and, if applicable, name of contact person (if other than the requestor). Investigative agents should make requests for interviews of a relocated witness for cases other than the Program case through authorized agency channels for approval by OEO. Requests should include purpose, date, and estimated duration of the appearance, and, if applicable, any other persons to be present in addition to the requestor. OEO will forward approved requests to the USMS or to BOP (whichever is appropriate).

Communications should be addressed to the Chief, "WSU," Office of Enforcement Operations, P.O. Box 7600, Washington, D.C. 20044-7600. In case of emergency, you may contact OEO by phone at (202) 514-3684. In order to conserve the USMS's personnel resources, emergency requests should be avoided.

Prosecutors and investigative agents will be requested to conduct conferences or interviews of relocated witnesses at neutral sites, or, for prisoner-witnesses, at the prisoner's assigned BOP facility, which will substantially reduce the personnel requirements of the USMS. The USMS will determine the location of all "neutral sites" for relocated witness interviews, and will advise the requestor directly.

It will be the responsibility of the prosecutor and the investigative agents to ensure that maximum use is made of the witness's appearance in the danger area. In the interests of security and limiting the expenses involved, the witness must be returned to the relocation area or designated facility as soon as practicable.

9-21.800 Use of Relocated Witnesses or Former Protected Witnesses as Informants

A witness, having entered the Witness Security Program, maintains an ongoing relationship with DOJ. Even after subsistence allowances and other support are terminated, the residual relationship requires that investigative agencies and attorneys observe certain restraints in dealing with these persons in connection with investigations and/or new cases.

The consent of OEO is required before any of the following persons may be used as an informant: a currently protected witness, anyone relocated because of a witness's cooperation, or a former protected witness.

The information that must be supplied to OEO for its use in evaluating requests to use anyone as an informant who has received protective services through the Program can be found in the Criminal Resource Manual at 702.

After a request for use of a witness currently in the Program has been granted, OEO requires that status reports be filed with it after the first 45 days of use, and, thereafter, quarterly during the length of such use. Status reports will not ordinarily be required for witnesses no longer in the Program. In addition to the above, any case involving the use of video surveillance and/or consensual monitoring must comply with the requirements of USAM 9-7.000 *et seq.*

9-21.910 Dual Payments Prohibited

The USMS is authorized to provide for the maintenance and housing of protected witnesses whenever they appear for trial, pre-trial conferences, or return to a danger area for other appearances approved by OEO. The USMS is authorized to pay for the costs of travel and other associated maintenance expenses. Attorneys should not prepare "Fact Witness Certificates," and Fact Witness fees and allowances should not be disbursed to protected witnesses who are under the protection and maintenance of the USMS. (Witnesses who voluntarily withdraw from participation in the Witness Security Program are exempt from this restriction.)

9-21.920 Payments of Reward Monies

OEO must be advised of the payment of any reward monies to Witness Security Program participants. The appropriate investigative agency headquarters must provide a written report of such payments reflecting the reason(s) for the payment and the fact that the prosecuting attorney has approved the payment. Payments to relocated witnesses must be sent to the Chief, Witness Security Program, Judicial Security Division, U.S. Marshals Service, 600 Army/Navy Drive, Arlington, Virginia 22202-4210. Payments to prisoners must be sent to the Assistant Administrator, Inmate Monitoring Section, Bureau of Prisons, 320 First Street, N.W., Room 524, Washington, D.C. 20534.

9-21.940 Special Handling

All documents relating to a protected witness or an individual nominated for protection will be accorded special handling to ensure disclosure on a strict "need to know" basis. All documents should be marked

with the security designation "Sensitive Investigative Matter." All court matters discussing a Witness Security Program participant, i.e., prisoner litigation, child custody, etc., must be filed under seal.

9-21.950 Relocation Site

The area of relocation should be known only to the USMS, and must not be made known to the case attorney or agent, or their staffs. All contact with the witness should be made through OEO or the USMS Witness Security Inspector as detailed in USAM 9-21.700. The witness should be instructed to keep secret the area of his/her relocation and all associated matters.

9-21.960 Duty Officers

Calls concerning a protected witness placed during non-business hours, weekends, and holidays should first be directed to the OEO duty officer through the Justice Command Center.

9-21.970 Other Requests

All requests for information related to any aspect of the Witness Security Program should be handled as follows:

- A. Requests by members of Congress or their staffs shall be forwarded to the DOJ Office of Legislative Affairs which, in turn, will refer the requests to OEO for processing;
- B. Requests by the news media or the public should be referred to the DOJ Office of Public Affairs;
- C. Other inquiries not covered herein should be referred directly to OEO.

9-21.990 Continuing Protection Responsibilities

Once a witness has been accepted into the Witness Security Program, even if the witness is no longer in the Program, he or she will receive protection in the courtroom for testimony in the case or cases for which the witness entered the Program. If the witness is no longer in the Program, but not living in an area considered to be dangerous to them, the USMS may also produce them for the testimony. If there is clear evidence that a witness who has had their participation in the Program terminated is in immediate jeopardy arising out of the former cooperation, through no fault of the witness, the need for further protective services will be evaluated, and provided, if appropriate.

9-21.1000 Arrests of Relocated Witnesses

See the Criminal Resource Manual at 709, for a discussion of this issue.

9-21.1010 Results of Witnesses' Testimony

OEO is responsible for the collection and maintenance of the results of the testimony provided by protected witnesses. Therefore, it is essential that prosecutors provide the following information to OEO as soon as it becomes available:

- A. Name of witness;
- B. Name of case;
- C. Jurisdiction;
- D. Did the witness testify before grand jury? Trial? If so, provide the dates. If the witness did not testify, explain why;
- E. Status of witness in case (defendant, unindicted co-conspirator, prisoner, victim, other);
- F. Names of all defendants;
- G. Statutory violations charged;

- H. Date of indictment;
- I. Date of conviction;
- J. Disposition of the case as to each defendant;
- K. If convictions, details of sentence imposed on each defendant, including fines levied, restitution, etc.;
- L. Any information as to significant forfeitures or seizures accomplished because of witness's assistance; and
- M. Any information as to contributions made by this witness to the overall law enforcement effort - Federal, State, and/or local, - in your district and elsewhere; for example, furnishing probable cause for Title III's, search warrants, locations of fugitives.

Without the cooperation of prosecutors in assembling this information, it is impossible to demonstrate, through statistics and anecdotal case information, that the Witness Security Program is vital to the successful prosecution of significant cases. Congress's interest is high in obtaining statistics relating to the effectiveness of the Program. This information is used by Congress to set the level of funding for and to determine the continued viability and long range existence of the Program.

9-21.1020 Victims Compensation Fund (18 U.S.C. 3525)

Pursuant to the provisions of 18 U.S.C. 3525, the Victims Compensation Fund has been established to compensate victims of certain crimes committed by participants in the Witness Security Program. In general, the fund will, up to a statutory limit, cover expenses for medical and/or funeral costs and lost wages that are not reimbursable from any other source. OEO has been delegated the authority to administer the operations of the fund and should be contacted if information about the fund and the payment of claims is needed.

PRETRIAL DIVERSION PROGRAM

9-22.010 Introduction

9-22.100 Eligibility Criteria

9-22.200 Pretrial Diversion Procedures

9-22.010 Introduction

Pretrial diversion (PTD) is an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed; unsuccessful participants are returned for prosecution.

The major objectives of pretrial diversion are:

- To prevent future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services.
- To save prosecutive and judicial resources for concentration on major cases.
- To provide, where appropriate, a vehicle for restitution to communities and victims of crime.
- The period of supervision is not to exceed 18 months, but may be reduced.

9-22.100 Eligibility Criteria

The U.S. Attorney, in his/her discretion, may divert any individual against whom a prosecutable case exists and who is not:

1. Accused of an offense which, under existing Department guidelines, should be diverted to the State for prosecution;
2. A person with two or more prior felony convictions;
3. An addict;
4. A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or

5. Accused of an offense related to national security or foreign affairs.

9-22.200 Pretrial Diversion Procedures

For the procedures to be followed for pretrial diversion agreements, *see the Criminal Resource Manual at 712.*

9-23.000
WITNESS IMMUNITY

9-23.100 Witness Immunity -- Generally

9-23.110 Statutory Authority to Compel Testimony

9-23.130 Approval by Assistant Attorney General to Compel Testimony

9-23.140 Authority to Initiate Immunity Requests

9-23.210 Decision to Request Immunity -- The Public Interest

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9-23.214 Granting Immunity to Compel Testimony on Behalf of a Defendant

9-23.250 Immunity for the Act of Producing Records

9-23.400 Authorization to Prosecute after Compulsion

9-23.100 Witness Immunity – Generally

This chapter contains the Department's policy and procedures for seeking "use immunity" under Title 18 U.S.C. §§ 6001-6005. Sections 6001 to 6005 provide a mechanism by which the government may apply to the court for an order granting a witness limited immunity in all judicial, administrative, and congressional proceedings when the witness asserts his or her privilege against self-incrimination under the Fifth Amendment. (Section 6003 covers court and grand jury proceedings, Section 6004 covers administrative hearings, and Section 6005 covers congressional proceedings.)

See the Criminal Resource Manual at 716 through 719, for an overview of the differences between the various types of immunity, including use immunity, derivative use immunity, transactional immunity and informal immunity.

NOTE: Although Title 21 of the United States Code contains similar immunity provisions to those contained in Title 18, the Department of Justice utilizes only those provisions contained in Title 18.

9-23.110 Statutory Authority to Compel Testimony

Section 6003 of Title 18, United States Code, empowers a United States Attorney, after obtaining the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General in the Department of Justice (DOJ), to seek a court order to compel testimony of a witness appearing in court proceedings or before the grand jury. Additional information regarding the approval process is set forth in USAM 9-23.130, below, and the Criminal Resource Manual at 720.

9-23.130 Approval by Assistant Attorney General to Compel Testimony

The Attorney General has designated the Assistant Attorneys General and Deputy Assistant Attorneys General of the Criminal, Antitrust, Civil, Civil Rights, Environmental and Natural Resources, and Tax Divisions to review (and approve or deny) requests for immunity (viz., authorization to seek compulsion orders) in matters assigned to their respective divisions (28 C.F.R. Sec. 0.175), although this approval is still subject to Criminal Division clearance. This authority extends to requests for immunity from administrative agencies under 18 U.S.C. § 6004. This delegation also applies to the power of the Attorney General under 18 U.S.C. § 6005 to apply to the district court to defer the issuance of an order compelling the testimony of a witness in a congressional proceeding.

NOTE: All requests for immunity, including those whose subject matter is assigned to a Division other than the Criminal Division, must be submitted to the Criminal Division, and no approval may be granted unless the Criminal Division indicates that it has no objection to the proposed grant of immunity (28 C.F.R. Sec. 0.175).

Requests for authorization to seek to compel testimony should be processed as described in the Criminal Resource Manual at 720, using the form contained in the Criminal Resource Manual at 721.

Obtaining the Court Order	<u>Criminal Resource Manual at 723</u>
Expiration of Authority to Compel	<u>Criminal Resource Manual at 724</u>
Use of Immunized Testimony by Sentencing Court	<u>Criminal Resource Manual at 725</u>
Steps to Avoid Taint	<u>Criminal Resource Manual at 726</u>
Civil Contempt	<u>Criminal Resource Manual at 727</u>
Criminal Contempt	<u>Criminal Resource Manual at 728</u>

9-23.140 Authority to Initiate Immunity Requests

Assistant United States Attorneys, with the approval of the United States Attorney or, in his or her absence, a supervisory Assistant United States Attorney, and Department attorneys, with the approval of an appropriate Assistant Attorney General or Deputy Assistant Attorney General of DOJ, may initiate requests to compel testimony under the use immunity statute.

9-23.210 Decision to Request Immunity -- The Public Interest

Section 6003(b) of Title 18, United States Code, authorizes a United States Attorney to request immunity when, in his/her judgment, the testimony or other information that is expected to be obtained from the witness "may be necessary to the public interest." Some of the factors that should be weighed in making this judgment include:

- A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;
- B. The value of the person's testimony or information to the investigation or prosecution;
- C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;
- D. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his or her criminal history;
- E. The possibility of successfully prosecuting the person prior to compelling his or her testimony;
- F. The likelihood of adverse collateral consequences to the person if he or she testifies under a compulsion order.

These factors are not intended to be all-inclusive or to require a particular decision in a particular case. They are, however, representative of the kinds of factors that should be considered when deciding whether to seek immunity.

9-23.211 Decision to Request Immunity -- Close-Family Exception

When determining whether to request immunity for a witness, consideration should be given to whether the witness is a close family relative of the person against whom the testimony is sought. A close family relative is a spouse, parent, child, grandparent, grandchild or sibling of the witness. Absent specific justification, the Department will ordinarily avoid seeking to compel the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing. Such specific justification exists, among other circumstances, where (i) the witness and the relative participated in a common business enterprise and the testimony to be elicited relates to that enterprise or its activities; (ii) the testimony to be elicited relates to illegal conduct in which there is reason to believe that both the witness and the relative were active participants; or (iii) testimony to be elicited relates to a crime involving overriding prosecutorial concerns.

9-23.212 Decision to Request Immunity -- Conviction Prior to Compulsion

It is preferable as a matter of policy to punish offenders for their criminal conduct prior to compelling them to testify. While this is not feasible in all cases, a successful prosecution of the witness, or obtaining a plea of guilty to at least some of the charges against the witness, will avoid or mitigate arguments of co-defendants made to the court or jury that the witness "cut a deal" with the government to avoid the witness's own conviction and punishment.

9-23.214 Granting Immunity to Compel Testimony on Behalf of a Defendant

As a matter of policy, 18 U.S.C. § 6002 will not be used to compel the production of testimony or other information on behalf of a defendant except in extraordinary circumstances

where the defendant plainly would be deprived of a fair trial without such testimony or other information. This policy is not intended to preclude compelling a defense witness to testify if the prosecutor believes that to do so is necessary to a successful prosecution.

9-23.250 Immunity for the Act of Producing Records

The Supreme Court has interpreted the Fifth Amendment privilege against self-incrimination to include the act of producing business records of a sole proprietorship. *United States v. Doe*, 465 U.S. 605 (1984). The act of producing records concedes the existence and possession of the records called for by the subpoena as well as the respondent's belief that such records are those described in the subpoena. Requests for immunity for the limited purpose of obtaining records pursuant to *Doe* should clearly state this fact in the application.

The same letter of authority is issued by DOJ for the production of records as for testimony. See the Criminal Resource Manual at 722 (Letter of Authority). Therefore, prosecutors should draft the court order to clearly limit the grant of immunity to the act of producing records pursuant to *Doe, supra*.

9-23.400 Authorization to Prosecute after Compulsion

After a person has testified or provided information pursuant to a compulsion order--except in the case of act-of-production immunity--an attorney for the government shall not initiate or recommend prosecution of the person for an offense or offenses first disclosed in, or closely related to, such testimony or information without the express written authorization of the Attorney General. Such requests for authorization should be sent to the Assistant Attorney General for the division that issued the letter of authority for requesting the original compulsion order.

The request to prosecute should indicate the circumstances justifying prosecution and the method by which the government will be able to establish that the evidence it will use against the witness will meet the government's burden under *Kastigar v. United States*, 406 U.S. 441 (1972).

**REQUESTS FOR SPECIAL
CONFINEMENT CONDITIONS –
28 C.F.R. § 501.3**

9-24.100 Procedures for Requesting Special Confinement Conditions for Bureau of Prisons Inmates Whose Communications Pose a Substantial Risk of Death or Serious Bodily Injury to Persons

9-24.200 Renewals

9-24.300 Disclosure of Classified Information -- 28 C.F.R. § 501.2

9-24.400 Effect of BOP Policy

9-24.100 Procedures for Requesting Special Confinement Conditions for Bureau of Prisons Inmates Whose Communications Pose a Substantial Risk of Death or Serious Bodily Injury to Persons

Pursuant to 28 C.F.R. § 501.3, which became effective on May 17, 1996, the Attorney General may authorize the Director of the Bureau of Prisons (BOP) to implement "special administrative measures" upon written notification to BOP "that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons." The regulation provides that such notification to BOP may be provided by the Attorney General, "or, at the Attorney General's direction by the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community." These special administrative measures ordinarily may be imposed "may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism."

Although 28 C.F.R. § 501.3(a) allows *notification* to BOP by the Attorney General, or at the Attorney General's discretion, by the head of a federal law enforcement agency, or the head of a member agency of the intelligence community, that an inmate's ability to communicate with other persons may create a substantial risk of death or serious bodily injury, only the Attorney General is authorized to *direct* the BOP to implement the special administrative measures with respect to an inmate. Accordingly, the following measure will apply whenever a federal law enforcement agency, which for these purposes includes a United States Attorney's Office, or a member agency of the intelligence community (hereafter "requesting entity") believes that special confinement conditions are necessary to prevent an inmate from inciting or ordering persons (whether inside or outside a BOP facility) to commit crimes that entail the risk of death or serious bodily injury or substantial damage to property that would entail the risk of death or serious bodily injury to persons.

- A. The requesting entity will submit a letter or memorandum to the Attorney General setting forth the request which must include:
 - o A full and complete statement of the inmate's background and proclivity for violence or for ordering or inciting crimes of violence.
 - o A discussion of why special measures should be implemented.
 - o A description of what special measures (e.g., no visitors except attorneys, no contact with the news media) should be imposed with a justification for each.
- B. The requesting agency's correspondence to the Attorney General will be sent to the Director's Office of Enforcement Operations (OEO) in the Criminal Division for processing.
- C. OEO will obtain from BOP, in writing if necessary, a summary of the inmate's current confinement conditions (e.g., a statement that the inmate is already in segregation for violation of BOP rules), any special needs of the inmate (e.g., special medical or religious requirements), and other information necessary to indicate clearly to the Attorney General how the inmate's confinement conditions would be altered by the imposition of the requested special administrative conditions.
- D. If the requesting agency is a U.S. Attorney's Office, OEO will obtain from the FBI or other involved law enforcement agency a statement of concurrence with or objection to the proposed special administrative measures. To facilitate the FBI's response, a U.S. Attorney's Office submitting a request for special confinement conditions should contact FBI field personnel likely to be familiar with the inmate to inform them of the pending request and to allow them to discuss the request with FBI headquarters.
- E. OEO will prepare a decision memorandum from the Criminal Division to the Attorney General discussing the requesting entity's request for special administrative measures with a recommendation of action to be taken by the Attorney General.
- F. In instances in which the Criminal Division recommends that the Attorney General direct BOP to impose special administrative measures, the Criminal Division will prepare a memorandum from the Attorney General to the BOP setting out the measures to be implemented and the notification to be given the inmate. The inmate shall be notified of all special conditions and the basis therefor at the time they are imposed. However, the regulation provides, in part 501(3)(b), that the reasons for imposing the special conditions "may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism."

9-24.200 Renewals

Section 501.3(c) provides that placement of the inmate in administrative detention or any limitation of privileges in accordance with the section may be imposed for up to a maximum of 120 days, but may be successively renewed in 120 day increments. Requests for renewal will be handled similarly to initial requests, i.e., the requesting entity will prepare a memorandum for the

Attorney General referencing the earlier request and the Attorney General's decision to impose special conditions; the memorandum should state whether the circumstances identified in the last request to the Attorney General for special administrative measures have changed and, if so, what changes are recommended either to tighten up or loosen the restrictions; the memorandum will be referred to OEO; and OEO will prepare a recommendation to the Attorney General and any required instructions from the Attorney General to BOP. Requests for renewal should be submitted to the OEO *at least 30 days* prior to the expiration date of any previously imposed special conditions to allow the Criminal Division sufficient time to prepare another decision memorandum for the Attorney General and for the Attorney General's review.

9-24.300 Disclosure of Classified Information -- 28 C.F.R. § 501.2

Although the provisions of this section, which allows the BOP to implement special administrative measures reasonably necessary to prevent disclosure of classified information by an inmate (typically a convicted spy or a person awaiting trial on a charge of espionage or similar offense), are similar to those in 28 C.F.R. § 501.3, classified information cases are less susceptible of uniform processing. Moreover, special measures to prevent the disclosure of classified information may only be implemented upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of such information would pose a threat to the national security, and that there is a danger that the inmate will disclose such information. When a member agency of the intelligence community wishes to request special administrative measures with respect to an inmate to prevent the disclosure of classified information, the agency should contact the Executive Office for National Security for instructions on how to proceed.

9-24.400 Effect of BOP Policy

Conditions of confinement for all persons in BOP custody are set in accordance with various BOP policies. Any additional restrictions imposed pursuant to 28 C.F.R. § 501.3 will not affect the implementation of BOP policies unless specifically set forth in the memorandum from the Attorney General directing the implementation of special administrative measures. The Bureau of Prisons will continue to have authority to take any other measures with respect to an inmate subject to special administrative measures deemed necessary to maintain the order, safety, security, and discipline of any BOP institution.

9-25.000
[RESERVED]

9-26.000
[RESERVED]

PRINCIPLES OF FEDERAL PROSECUTION

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9-27.001 Preface

These principles of Federal prosecution provide to Federal prosecutors a statement of sound prosecutorial policies and practices for particularly important areas of their work. As such, it should promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the Federal criminal laws.

The manner in which Federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances--recognizing both that serious violations of Federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct. The rare decision to consent to pleas of nolo contendere may affect the success of related civil suits for recovery of damages. Also, the government's position during the sentencing process will help assure that the court imposes a sentence consistent with the Sentencing Reform Act.

These principles of Federal prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility.

The availability of this statement of principles to Federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case. The Principles provide convenient reference points for the process of making prosecutorial decisions; they facilitate the task of training new attorneys in the proper discharge of their duties; they contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of all United States Attorney's offices and between their activities and the Department's law enforcement priorities; they make possible better coordination of investigative and prosecutorial activity by enhancing the understanding of investigating departments and agencies of the considerations underlying prosecutorial decisions by the Department; and they inform the public of the careful process by which prosecutorial decisions are made.

Important though these principles are to the proper operation of our Federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the Federal criminal justice process. It is with their help that these principles have been prepared, and it is with their efforts that the purposes of these principles will be achieved.

These principles were originally promulgated by Attorney General Benjamin R. Civiletti on July 28, 1980. While they have since been updated to reflect changes in the law and current policy of the Department of Justice, the underlying message to Federal prosecutors remains unchanged.

9-27.110 Purpose

A. The principles of Federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

1. Initiating and declining prosecution;
2. Selecting charges;
3. Entering into plea agreements;
4. Opposing offers to plead nolo contendere;
5. Entering into non-prosecution agreements in return for cooperation; and
6. Participating in sentencing.

B. Comment. Under the Federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of Federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. *See, e.g., Oyler v. Boles*, 368 U.S. 448 (1962); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell v. Ratzenbach*, 359 F.2d 234 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966). This discretion exists by virtue of his/her status as a member of the Executive Branch, which is charged under the Constitution with ensuring that the laws of the United States be "faithfully executed." U.S. Const. Art. § 3. *See Nader v. Saxbe*, 497 F.2d 676, 679 n. 18 (D.C. Cir. 1974).

Since Federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice in the Federal system, that all Federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.

Although these principles deal with the specific situations indicated, they should be read in the broader context of the basic responsibilities of Federal attorneys: making certain that the general purposes of the criminal law--assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders--are adequately met, while making certain also that the rights of individuals are scrupulously protected.

9-27.120 Application

A. In carrying out criminal law enforcement responsibilities, each Department of Justice attorney should be guided by the principles set forth herein, and each United States Attorney and each Assistant Attorney General should ensure that such principles are communicated to the attorneys who exercise prosecutorial responsibility within his/her office or under his/her direction or supervision.

B. Comment. It is expected that each Federal prosecutor will be guided by these principles in carrying out his/her criminal law enforcement responsibilities unless a modification of, or departure from, these principles has been authorized pursuant to USAM 9-27.140. See also Criminal Resource Manual 792 ("Incentives for Subjects and Targets of Criminal Investigations and Defendants in Criminal Cases to Provide Foreign Intelligence Information"). However, it is not intended that reference to these principles will require a

particular prosecutorial decision in any given case. Rather, these principles are set forth solely for the purpose of assisting attorneys for the government in determining how best to exercise their authority in the performance of their duties.

9-27.130 Implementation

A. Each United States Attorney and responsible Assistant Attorney General should establish internal office procedures to ensure:

1. That prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles; and
2. That serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions, when warranted, as are deemed appropriate.

B. Comment. Each United States Attorney and each Assistant Attorney General responsible for the enforcement of Federal criminal law should supplement the guidance provided by the principles set forth herein by establishing appropriate internal procedures for his/her office. One purpose of such procedures should be to ensure consistency in the decisions within each office by regularizing the decision making process so that decisions are made at the appropriate level of responsibility. A second purpose, equally important, is to provide appropriate remedies for serious, unjustified departures from sound prosecutorial principles. The United States Attorney or Assistant Attorney General may also wish to establish internal procedures for appropriate review and documentation of decisions.

9-27.140 Modifications or Departures

A. United States Attorneys (USA) may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district. Any significant modification or departure contemplated as a matter of policy or regular practice must be approved by the appropriate Assistant Attorney General and the Deputy Attorney General.

B. Comment. Although these materials are designed to promote consistency in the application of Federal criminal laws, they are not intended to produce rigid uniformity among Federal prosecutors in all areas of the country at the expense of the fair administration of justice. Different offices face different conditions and have different requirements. In recognition of these realities, and in order to maintain the flexibility necessary to respond fairly and effectively to local conditions, each United States Attorney is specifically authorized to modify or depart from the principles set forth herein, as necessary in the interests of fair and effective law enforcement within the district. In situations in which a modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted.

9-27.150 Non-Litigability

A. The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

B. Comment. This statement of principles has been developed purely as matter of internal Departmental policy and is being provided to Federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices pursuant hereto

creates any rights or benefits. By setting forth this fact explicitly, USAM 9-27.150 is intended to foreclose efforts to litigate the validity of prosecutorial actions alleged to be at variance with these principles or not in compliance with internal office procedures that may be adopted pursuant hereto. In the event that an attempt is made to litigate any aspect of these principles, or to litigate any internal office procedures adopted pursuant to these materials, or to litigate the applicability of such principles or procedures to a particular case, the United States Attorney concerned should oppose the attempt and should notify the Department immediately.

9-27.200 Initiating and Declining Prosecution -- Probable Cause Requirement

A. If the attorney for the government has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;
2. Commence or recommend prosecution;
3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
4. Decline prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or
5. Decline prosecution without taking other action.

B. Comment. USAM 9-27.210 sets forth the courses of action available to the attorney for the government once he/she has probable cause to believe that a person has committed a Federal offense within his/her jurisdiction. The probable cause standard is the same standard as that required for the issuance of an arrest warrant or a summons upon a complaint (See Fed. R. Crim. P. 4(a)), for a magistrate's decision to hold a defendant to answer in the district court (See Fed. R. Crim. P. 5.1(a)), and is the minimal requirement for indictment by a grand jury. *See Branzburg v. Hayes*, 408 U.S. 665, 686 (1972). This is, of course, a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions, in deciding upon his/her course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a Federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions as well.

9-27.220 Grounds for Commencing or Declining Prosecution

A. The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial Federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate non-criminal alternative to prosecution.

B. Comment. USAM 9-27.220 expresses the principle that, ordinarily, the attorney for the government should initiate or recommend Federal prosecution if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. Evidence sufficient to sustain a conviction is required under Rule 29(a), Fed. R. Crim. P., to

avoid a judgment of acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand all the evidence upon which he/she intends to rely at trial: it is sufficient that he/she have a reasonable belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence a prosecution though a key witness is out of the country, so long as the witness's presence at trial could be expected with reasonable certainty.

The potential that--despite the law and the facts that create a sound, prosecutable case--the fact finder is likely to acquit the defendant because of the unpopularity of some factor involved in the prosecution or because of the overwhelming popularity of the defendant or his/her cause, is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt--viewed objectively by an unbiased fact finder--would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.

Merely because the attorney for the government believes that a person's conduct constitutes a Federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution: USAM 9-27.220 notes three situations in which the prosecutor may properly decline to take action nonetheless: when no substantial Federal interest would be served by prosecution; when the person is subject to effective prosecution in another jurisdiction; and when there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government whether such a situation exists. In exercising that judgment, the attorney for the government should consult USAM 9-27.230, 9-27.240, or 9-27.250, as appropriate.

9-27.230 Initiating and Declining Charges -- Substantial Federal Interest

A. In determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

B. Comment. USAM 9-27.230 lists factors that may be relevant in determining whether prosecution should be declined because no substantial Federal interest would be served by prosecution in a case in which the person is believed to have committed a Federal offense and the admissible evidence is expected to be sufficient to obtain and sustain a conviction. The list of relevant considerations is not intended to be all-inclusive. Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

1. Federal Law Enforcement Priorities. Federal law enforcement resources and Federal judicial resources are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources so as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus Federal law enforcement efforts on those matters within the Federal jurisdiction that are most deserving of Federal attention and are most likely to be handled effectively at the Federal level. In addition, individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. In weighing the Federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with established priorities.

2. Nature and Seriousness of Offense. It is important that limited Federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial Federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature and what the public attitude is toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute whether on substantive grounds, or because of a history of nonenforcement, or because the offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

Economic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been made. Care should be taken in weighing the matter of restitution, however, to ensure against contributing to an impression that an offender can escape prosecution merely by returning the spoils of his/her crime.

3. Deterrent Effect of Prosecution. Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.

4. The Person's Culpability. Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offenses, both in the abstract and in comparison with any others involved in the offense. If for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.

5. The Person's Criminal History. If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should, be considered in determining whether to initiate or recommend Federal prosecution. In this connection particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship if any to the present offense, and whether he/she previously avoided prosecution as a result of an agreement not to prosecute in return for cooperation or as a result of an order compelling his/her testimony. By the same token, a person's lack of prior criminal involvement or his/her previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.

6. The Person's Willingness to Cooperate. A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a Federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not by itself relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the Federal interest in prosecuting him/her. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.

7. The Person's Personal Circumstances. In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circumstances peculiar to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to his/her offense; other circumstances, such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.

8. The Probable Sentence. In assessing the strength of the Federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him/her in the future will be aware of the risk of releasing him/her on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution," depending on whether the earlier prosecution was Federal or nonfederal. *See USAM 9-2.031 (Petite Policy).*

Just as there are factors that are appropriate to consider in determining whether a substantial Federal interest would be served by prosecution in a particular case, there are considerations that deserve no weight and should not influence the decision. These include the time and resources expended in Federal investigation of the case. No amount of investigative effort warrants commencing a Federal prosecution that is not fully justified on other grounds.

9-27.240 Initiating and Declining Charges -- Prosecution in Another Jurisdiction

A. In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

1. The strength of the other jurisdiction's interest in prosecution;
2. The other jurisdiction's ability and willingness to prosecute effectively; and
3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

B. **Comment.** In many instances, it may be possible to prosecute criminal conduct in more than one jurisdiction. Although there may be instances in which a Federal prosecutor may wish to consider deferring to prosecution in another Federal district, in most instances the choice will probably be between Federal prosecution and prosecution by state or local authorities. USAM 9-27.240 sets forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: the strength of the jurisdiction's interest in prosecution; its ability and willingness to prosecute effectively; and the probable sentence or other consequences if the person is convicted. As indicated with respect to the considerations listed in paragraph 3, these factors are illustrative only, and the attorney for the government should also consider any others that appear relevant to his/her in a particular case.

1. The Strength of the Jurisdiction's Interest. The attorney for the government should consider the relative Federal and state characteristics of the criminal conduct involved. Some offenses, even though in violation of Federal law, are of particularly strong interest to the authorities of the state or local jurisdiction in which they occur, either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by state or local investigators, or some other circumstance. Whatever the reason, when it appears that the Federal interest in prosecution is less substantial than the interest of state or local authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a Federal prosecution.

2. Ability and Willingness to Prosecute Effectively. In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the Federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.

3. Probable Sentence Upon Conviction. The ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. In considering this factor, the attorney for the government should bear in mind not only the statutory penalties in the jurisdiction and sentencing patterns in similar cases, but also, the particular characteristics of the offense or, of the offender that might be relevant to sentencing. He/she should also be alert to the possibility that a conviction under state law may, in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under Federal law.

9-27.250 Non-Criminal Alternatives to Prosecution

A. In determining whether prosecution should be declined because there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

1. The sanctions available under the alternative means of disposition;
2. The likelihood that an effective sanction will be imposed; and
3. The effect of non-criminal disposition on Federal law enforcement interests.

B. Comment. When a person has committed a Federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pretrial diversion. *See USAM 9-22.000.*

Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on Federal law enforcement interests. It should be noted that referrals for non-criminal disposition may not include the transfer of grand jury material unless an order under Rule 6(e), Federal Rules of Criminal Procedure, has been obtained. *See United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983).

9-27.260 Initiating and Declining Charges -- Impermissible Considerations

A. In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person's race, religion, sex, national origin, or political association, activities or beliefs;
2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or
3. The possible affect of the decision on the attorney's own professional or personal circumstances.

B. Comment. USAM 9-27.260 sets forth various matters that plainly should not influence the determination whether to initiate or recommend prosecution or take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his/her judgment, but in order to make clear that Federal prosecutors will not be influenced by such improper considerations. Of course, in a case in which a particular characteristic listed in subparagraph (1) is pertinent to the offense (for example, in an immigration case the fact that the offender is not a United States national, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering it for the purpose intended by the Congress.

9-27.270 Records of Prosecutions Declined

A. Whenever the attorney for the government declines to commence or recommend Federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files.

B. Comment. USAM 9-27.270 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in Federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up.

9-27.300 Selecting Charges -- Charging Most Serious Offenses

A. Except as provided in USAM 9-27.330, (precharge plea agreements), once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. If mandatory minimum sentences are also involved, their effect must be considered, keeping in mind the fact that a mandatory minimum is statutory and generally overrules a guideline. The "most serious" offense is generally that which yields the highest range under the sentencing guidelines.

However, a faithful and honest application of the Sentencing Guidelines is not incompatible with selecting charges or entering into plea agreements on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime. Thus, for example, in determining "the most serious offense that is consistent with the nature of the defendant's conduct that is likely to result in a sustainable conviction," it is appropriate that the attorney for the government consider, *inter alia*, such factors as the Sentencing Guideline range yielded by the charge, whether the penalty yielded by such sentencing range (or potential mandatory minimum charge, if applicable) is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation. Note that these factors may also be considered by the attorney for the government when entering into plea agreements. USAM 9-27.400.

To ensure consistency and accountability, charging and plea agreement decisions must be made at an appropriate level of responsibility and documented with an appropriate record of the factors applied.

B. Comment. Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. Moreover, selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be both fair and effective.

At the outset, the attorney for the government should bear in mind that at trial he/she will have to produce admissible evidence sufficient to obtain and sustain a conviction or else the government will suffer a dismissal. For this reason, he/she should not include in an information or recommend in an indictment

charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.

In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribe provisions of 18 U.S.C. § 201 require proof of "corrupt intent," while the "gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. § 1621 but not under 18 U.S.C. § 1623.

As stated, a Federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct.

USAM 9-27.300 expresses the principle that the defendant should be charged with the most serious offense that is encompassed by his/her conduct and that is readily provable. Ordinarily, as noted above this will be the offense for which the most severe penalty is provided by law and the guidelines. Where two crimes have the same statutory maximum and the same guideline range, but only one contains a mandatory minimum penalty, the one with the mandatory minimum is the more serious. This principle provides the framework for ensuring equal justice in the prosecution of Federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he/she commits. Of course, he/she may also be charged with other criminal acts (as provided in USAM 9-27.320), if the proof and the government's legitimate law enforcement objectives warrant additional charges.

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. *See, e.g.*, 21 U.S.C. §§ 841 (b)(1)(A),(B), and (C), 848(a), 960 (b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon 21 U.S.C. § 851.

Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. § 851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which the sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney or within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing. Such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement; (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence; and (3) dismissing a previously filed enhancement.

A negotiated plea which uses any of the options described in this section must be made known to the sentencing court. In addition, the sentence which can be imposed through the negotiated plea must adequately reflect the seriousness of the offense.

Prosecutors are reminded that when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include 18 U.S.C. § 924 (c).

9-27.320 Additional Charges

A. Except as hereafter provided, the attorney for the government should also charge, or recommend that the grand jury charge, other offenses only when, in his/her judgement, additional charges:

1. Are necessary to ensure that the information or indictment:
 - a. Adequately reflects the nature and extent of the criminal conduct involved; and
 - b. Provides the basis for an appropriate sentence under all the circumstances of the case; or
2. Will significantly enhance the strength of the government's case against the defendant or a codefendant.

B. Comment. It is important to the fair and efficient administration of justice in the Federal system that the government bring as few charges as are necessary to ensure that justice is done. The bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive--and potentially unfair--exercise of power. To ensure appropriately limited exercises of the charging power, USAM 9-27.320 outlines three general situations in which additional charges may be brought: (1) when necessary adequately to reflect the nature and extent of the criminal conduct involved; (2) when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; and (3) when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant.

1. **Nature and Extent of Criminal Conduct.** Apart from evidentiary considerations, the prosecutor's initial concern should be to select charges that adequately reflect the nature and extent of the criminal conduct involved. This means that the charges selected should fairly describe both the kind and scope of unlawful activity; should be legally sufficient; should provide notice to the public of the seriousness of the conduct involved; and should negate any impression that, after committing one offense, an offender can commit others with impunity.
2. **Basis for Sentencing.** Proper charge selection also requires consideration of the end result of successful prosecution--the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she, may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea). What is important is that the person be charged in such a manner that, if he/she is convicted, the court may impose an appropriate sentence. Under the sentencing guidelines, if the offense actually charged bears a true relationship with the defendant's conduct, an appropriate guideline sentence will follow. However, the prosecutor must take care to be sure that the charges brought allow the guidelines to operate properly. For instance, charging a significant participant in a major drug conspiracy only with using a communication facility would result in a sentence which, even if it were the maximum possible under the charged offense, would be artificially low given the defendant's actual conduct.
3. **Effect on the Government's Case.** When considering whether to include a particular charge in the indictment or information, the attorney for the government should bear in mind the possible effects of inclusion or exclusion of the charge on the government's case against the defendant or a codefendant. If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges. For example, in a case in which a substantive offense was committed pursuant to an unlawful agreement, inclusion of a conspiracy count is permissible and may be desirable to ensure the introduction of all relevant evidence at trial. Similarly, it might be important to include a perjury or false statement count in an indictment charging other offenses, in order to give the jury a complete picture of the defendant's criminal conduct. Failure to include appropriate charges for which the proof is sufficient may not only result in the exclusion, of relevant evidence, but may impair the prosecutor's ability to prove a coherent case, and lead to jury confusion as well. In this connection, it is important to remember that, in multi-defendant cases, the presence or absence of a particular charge against one

defendant may affect the strength of the case against another defendant. In short, when the evidence exists, the charges should be structured so as to permit proof of the strongest case possible without undue burden on the administration of justice.

9-27.330 Pre-Charge Plea Agreements

Before filing or recommending charges pursuant to a precharge plea agreement, the attorney for the government should consult the plea agreement provisions of USAM 9-27.430, thereof, relating to the selection of charges to which a defendant should be required to plead guilty.

9-27.400 Plea Agreements Generally

A. The attorney for the government may, in an appropriate case, enter into an agreement with a defendant that, upon the defendant's plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, he/she will move for dismissal of other charges, take a certain position with respect to the sentence to be imposed, or take other action. Plea agreements, and the role of the courts in such agreements, are addressed in Chapter Six of the Sentencing Guidelines. See also USAM 9-27.300 which discusses the individualized assessment by prosecutors of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime.

B. Comment. USAM 9-27.400 permits, in appropriate cases, the disposition of Federal criminal charges pursuant to plea agreements between defendants and government attorneys. Such negotiated dispositions should be distinguished from situations in which a defendant pleads guilty or nolo contendere to fewer than all counts of an information or indictment in the absence of any agreement with the government. Only the former type of disposition is covered by the provisions of USAM 9-27.400 et seq.

Negotiated plea dispositions are explicitly sanctioned by Rule 11(e)(1), Fed. R. Crim. P., which provides that:

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

- (A) Move for dismissal of other charges; or
- (B) Make a recommendation, or agree not to oppose, the defendant's request for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) Agree that a specific sentence is the appropriate disposition of the case.

Three types of plea agreements are encompassed by the language of USAM 9-27.400, agreements whereby in return for the defendant's plea to a charged offense or to a lesser or related offense, other charges are dismissed ("charge agreements"); agreements pursuant to which the government takes a certain position regarding the sentence to be imposed ("sentence agreements"); and agreements that combine a plea with a dismissal of charges and an undertaking by the prosecutor concerning the government's position at sentencing ("mixed agreements").

Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Charge agreements envision dismissal of counts in exchange for a plea. As with the indictment decision, the prosecutor should seek a plea to the most serious readily provable offense charged. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to

protect the identity of a particular witness until he or she testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be documentation, however, in a case in which charges originally brought are dropped.

The language of USAM 9-27.400 with respect to sentence agreements is intended to cover the entire range of positions that the government might wish to take at the time of sentencing. Among the options are: taking no position regarding the sentence; not opposing the defendant's request; requesting a specific type of sentence (e.g., a fine or probation), a specific fine or term of imprisonment, or not more than a specific fine or term of imprisonment; and requesting concurrent rather than consecutive sentences. Agreement to any such option must be consistent with the guidelines.

There are only two types of sentence bargains. Both are permissible, but one is more complicated than the other. First, prosecutors may bargain for a sentence that is within the specified United States Sentencing Commission's guideline range. This means that when a guideline range is 18 to 24 months, the prosecutor has discretion to agree to recommend a sentence of 18 to 20 months rather than to argue for a sentence at the top of the range. Such a plea does not require that the actual sentence range be determined in advance. The plea agreement may have wording to the effect that once the range is determined by the court, the United States will recommend a low point in that range. Similarly, the prosecutor may agree to recommend a downward adjustment for acceptance of responsibility if he or she concludes in good faith that the defendant is entitled to the adjustment. Second, the prosecutor may seek to depart from the guidelines. This is more complicated than a bargain involving a sentence within a guideline range. Departures are discussed more generally below.

Department policy requires honesty in sentencing; Federal prosecutors are expected to identify for the court departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

Plea bargaining, both charge bargaining and sentence bargaining, must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in Part D of Chapter 3 of the guidelines and the relevant conduct standard set forth in Sentencing Guideline 1B1.3(a)(2) will mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that Federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be. For example, in the case of a defendant who could be charged with five bank robberies, a decision to charge only one or to dismiss four counts pursuant to a bargain precludes any consideration of the four uncharged or dismissed robberies in determining a guideline range, unless the plea agreement included a stipulation as to the other robberies. In contrast, in the case of a defendant who could be charged with five counts of fraud, the total amount of money involved in a fraudulent scheme will be considered in determining a guideline range even if the defendant pleads guilty to a single count and there is no stipulation as to the other counts.

Second, Federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This

exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the Federal criminal justice system. For example, approvals to drop charges in a particular case might be given because the United States Attorney's office is particularly over-burdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.

In Chapter 5, Part K of the Sentencing Guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. Moreover, Guideline 5K2.0 recognizes that a sentencing court may consider a ground for departure that has not been adequately considered by the Commission. A departure requires approval by the court. It violates the spirit of the guidelines and Department policy for prosecutor to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the existence of the departure and thus afford the court an opportunity to reject it.

The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part X, approval of the United States Attorney or designated supervisory officials is required. This approval is required whether or not a case is resolved through a negotiated plea.

Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom of Information Act considerations may suggest that a separate form showing the final decision be maintained.

The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.

The concession required by the government as part of a plea agreement, whether it be a "charge agreement," a "sentence agreement," or a "mixed agreement," should be weighed by the responsible government attorney in the light of the probable advantages and disadvantages of the plea disposition proposed in the particular case. Particular care should be exercised in considering whether to enter into a plea agreement pursuant to which the defendant will enter a nolo contendere plea. As discussed in USAM 9-27.500 and USAM 9-16.000, there are serious objections to such pleas and they should be opposed unless the responsible Assistant Attorney General concluded that the circumstances are so unusual that acceptance of such a plea would be in the public interest.

9-27.420 Plea Agreements—Considerations to be Weighed

A. In determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh all relevant considerations, including:

1. The defendant's willingness to cooperate in the investigation or prosecution of others;

2. The defendant's history with respect to criminal activity;
3. The nature and seriousness of the offense or offenses charged;
4. The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;
5. The desirability of prompt and certain disposition of the case;
6. The likelihood of obtaining a conviction at trial;
7. The probable effect on witnesses;
8. The probable sentence or other consequences if the defendant is convicted;
9. The public interest in having the case tried rather than disposed of by a guilty plea;
10. The expense of trial and appeal;
11. The need to avoid delay in the disposition of other pending cases; and
12. The effect upon the victim's right to restitution.

B. Comment. USAM 9-27.420 sets forth some of the appropriate considerations to be weighed by the attorney for the government in deciding whether to enter into a plea agreement with a defendant pursuant to the provisions of Rule 11(e), Fed. R. Crim. P. The provision is not intended to suggest the desirability or lack of desirability of a plea agreement in any particular case or to be construed as a reflection on the merits of any plea agreement that actually may be reached; its purpose is solely to assist attorneys for the government in exercising their judgement as to whether some sort of plea agreement would be appropriate in a particular case. Government attorneys should consult the investigating agency involved and the victim, if appropriate or required by law, in any case in which it would be helpful to have their views concerning the relevance of particular factors or the weight they deserve.

1. **Defendant's Cooperation.** The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under 18 U.S.C. §§ 6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction. If the defendant's cooperation is sufficiently substantial to justify the filing of a 5K1.1 Motion for a downward departure, the procedures set out in USAM 9-27.400 (B) shall be followed.

2. **Defendant's Criminal History.** One of the principal arguments against the practice of plea bargaining is that it results in leniency that reduces the deterrent impact of the law and leads to recidivism on the part of some offenders. Although this concern is probably most relevant in non-federal jurisdictions that must dispose of large volumes of routine cases with inadequate resources, nevertheless it should be kept in mind by Federal prosecutors, especially when dealing with repeat offenders or "career criminals." Particular care should be taken in the case of a defendant with a prior criminal record to ensure that society's need for protection is not sacrificed in the process of arriving at a plea disposition. In this connection, it is proper for the government attorney to consider not only the defendant's past, but also facts of other criminal involvement not resulting in conviction. By the same token, of course, it is also proper to consider a defendant's absence of past criminal involvement and his/her past cooperation with law enforcement officials. Note that 18 U.S.C. § 924(e), as well as Sentencing Guidelines 4B1.1 and 4B1.4 address "career criminals" and "armed career criminals." 18 U.S.C. § 3559(c)--the so-called "three strikes" statute--addresses serious violent recidivist offenders.

The application of these provisions to a particular case may affect the plea negotiation posture of the parties.

3. Nature and Seriousness of Offense Charged. Important considerations in determining whether to enter into a plea agreement may be the nature and seriousness of the offense or offenses charged. In weighing those factors, the attorney for the government should bear in mind the interests sought to be protected by the statute defining the offense (e.g., the national defense, constitutional rights, the governmental process, personal safety, public welfare, or property), as well as nature and degree of harm caused or threatened to those interests and any attendant circumstances that aggravate or mitigate the seriousness of the offense in the particular case.

4. Defendant's Attitude. A defendant may demonstrate apparently genuine remorse or contrition, and a willingness to take responsibility for his/her criminal conduct by, for example, efforts to compensate the victim for injury or loss, or otherwise to ameliorate the consequences of his/her acts. These are factors that bear upon the likelihood of his/her repetition of the conduct involved and that may properly be considered in deciding whether a plea agreement would be appropriate. Sentencing Guideline 3E1.1 allows for a downward adjustment upon acceptance of responsibility by the defendant. It is permissible for a prosecutor to enter a plea agreement which approves such an adjustment if the defendant otherwise meets the requirements of the section.

It is particularly important that the defendant not be permitted to enter a guilty plea under circumstances that will allow him/her later to proclaim lack of culpability or even complete innocence. Such consequences can be avoided only if the court and the public are adequately informed of the nature and scope of the illegal activity and of the defendant's complicity and culpability. To this end, the attorney for the government is strongly encouraged to enter into a plea agreement only with the defendant's assurance that he/she will admit, the facts of the offense and of his/her culpable participation therein. A plea agreement may be entered into in the absence of such an assurance, but only if the defendant is willing to accept without contest a statement by the government in open court of the facts it could prove to demonstrate his/her guilt beyond a reasonable doubt. Except as provided in USAM 9-27.440, the attorney for the government should not enter into a plea agreement with a defendant who admits his/her guilt but disputes an essential element of the government's case.

5. Prompt Disposition. In assessing the value of prompt disposition of a criminal case, the attorney for the government should consider the timing of a proffered plea. A plea offer by a defendant on the eve of trial after the case has been fully prepared is hardly as advantageous from the standpoint of reducing public expense as one offered months or weeks earlier. In addition, a last minute plea adds to the difficulty of scheduling cases efficiently and may even result in wasting the prosecutorial and Judicial time reserved for the aborted trial. For these reasons, governmental attorneys should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date well in advance of the trial date. *See USSG § 3E1.1(b)(1).* However, avoidance of unnecessary trial preparation and scheduling disruptions are not the only benefits to be gained from prompt disposition of a case by means of a guilty plea. Such a disposition also saves the government and the court the time and expense of trial and appeal. In addition, a plea agreement facilitates prompt imposition of sentence, thereby promoting the overall goals of the criminal justice system. Thus, occasionally it may be appropriate to enter into a plea agreement even after the usual time for making such agreements has passed.

6. Likelihood of Conviction. The trial of a criminal case inevitably involves risks and uncertainties both for the prosecution and for the defense. Many factors, not all of which can be anticipated, can affect the outcome. To the extent that these factors can be identified, they should be considered in deciding whether to accept a plea or go to trial. In this connection, the prosecutor should weigh the strength of the government's case relative to the anticipated defense case, bearing in mind legal and

evidentiary problems that might be expected, as well as the importance of the credibility of witnesses. However, although it is proper to consider factors bearing upon the likelihood of conviction in deciding whether to enter into a plea agreement, it obviously is improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if he/she is not satisfied that the legal standards for guilt are met.

7. Effect on Witnesses. Attorneys for the government should bear in mind that it is often burdensome for witnesses to appear at trial and that sometimes to do so may cause them serious embarrassment or even place them in jeopardy of physical or economic retaliation. The possibility of such adverse consequences to witnesses should not be overlooked in determining whether to go to trial or attempt to reach a plea agreement. Another possibility that may have to be considered is revealing the identity of informants. When an informant testifies at trial, his/her identity and relationship to the government become matters of public record. As a result, in addition to possible adverse consequences to the informant, there is a strong likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed. These are considerations that should be discussed with the investigating agency involved, as well as with any other agencies known to have an interest in using the informant in their investigations.

8. Probable Sentence. In determining whether to enter into a plea agreement, the attorney for the government may properly consider the probable outcome of the prosecution in terms of the sentence or other consequences for the defendant in the event that a plea agreement is reached. If the proposed agreement is a "sentence agreement" or a "mixed agreement," the prosecutor should realize that the position he/she agrees to take with respect to sentencing may have a significant effect on the sentence that is actually imposed. If the proposed agreement is a "charge agreement," the prosecutor should bear in mind the extent to which a plea to fewer or lesser offenses may reduce the sentence that otherwise could be imposed. In either event, it is important that the attorney for the government be aware of the need to preserve the basis for an appropriate sentence under all the circumstances of the case. Thorough knowledge of the Sentencing Guidelines, any applicable statutory minimum sentences, and any applicable sentence enhancements is clearly necessary to allow the prosecutor to accurately and adequately evaluate the effect of any plea agreement.

9. Trial Rather Than Plea. There may be situations in which the public interest might better be served by having a case tried rather than by having it disposed of by means of a guilty plea. These include situations in which it is particularly important to permit a clear public understanding that "justice is done" through exposing the exact nature of the defendant's wrongdoing at trial, or in which a plea agreement might be misconstrued to the detriment of public confidence in the criminal justice system. For this reason, the prosecutor should be careful not to place undue emphasis on factors which favor disposition of a case pursuant to a plea agreement.

10. Expense of Trial and Appeal. In assessing the expense of trial and appeal that would be saved by a plea disposition, the attorney for the government should consider not only such monetary costs as juror and witness fees, but also the time spent by judges, prosecutors, and law enforcement personnel who may be needed to testify or provide other assistance at trial. In this connection, the prosecutor should bear in mind the complexity of the case, the number of trial days and witnesses required, and any extraordinary expenses that might be incurred such as the cost of sequestering the jury.

11. Prompt Disposition of Other Cases. A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined. This may occur simply because prosecutorial, judicial, or defense resources will become available for use in other cases, or because a plea by one of several defendants may have a "domino effect," leading to pleas by other defendants. In weighing the importance of these possible consequences, the attorney for the government should consider the state of the criminal docket and the speedy trial requirements in the

district, the desirability of handling a larger volume of criminal cases, and the work loads of prosecutors, judges, and defense attorneys in the district.

9-27.430 Selecting Plea Agreement Charges

A. If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

1. That is the most serious readily provable charge consistent with the nature and extent of his/her criminal conduct;
2. That has an adequate factual basis;
3. That makes likely the imposition of an appropriate sentence and order of restitution, if appropriate, under all the circumstances of the case; and
4. That does not adversely affect the investigation or prosecution of others.

B. Comment. USAM 9-27.430 sets forth the considerations that should be taken into account in selecting the charge or charges to which a defendant should be required to plead guilty once it has been decided to dispose of the case pursuant to a plea agreement. The considerations are essentially the same as those governing the selection of charges to be included in the original indictment or information. *See* USAM 9-27.300.

1. Relationship to Criminal Conduct. The charge or charges to which a defendant pleads guilty should be consistent with the defendant's criminal conduct, both in nature and in scope. Except in unusual circumstances, this charge will be the most serious one, as defined in USAM 9-27.300. This principle governs the number of counts to which a plea should be required in cases involving different offenses, or in cases involving a series of familiar offenses. Therefore the prosecutor must be familiar with the Sentencing Guideline rules applicable to grouping offenses (Guideline 3D) and to relevant conduct (USSG § 1B1.3) among others. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are likely to result in no greater a potential penalty than is a single offense. The requirement that a defendant plead to a charge, that is consistent with the nature and extent of his/her criminal conduct is not inflexible. Although cooperation is usually acknowledged through a Sentencing Guideline 5K1.1 filing, there may be situations involving cooperating defendants in which considerations such as those discussed in USAM 9-27.600, take precedence. Such situations should be approached cautiously, however. Unless the government has strong corroboration for the cooperating defendant's testimony, his/her credibility may be subject to successful impeachment if he/she is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates, the full extent of the defendant's involvement in the criminal activity, giving rise to the prosecution.

2. Factual Basis. The attorney for the government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure against conviction after a guilty plea of a person who is not in fact guilty. Moreover, under Rule 11(f) of the Fed. R. Crim. P., a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that, there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could be prosecuted independently of the plea under these principles. However, as noted, in cases in which Alford or nolo contendere pleas are tendered, the attorney for the government may wish to make

a stronger factual showing. In such cases there may remain some doubt as to the defendant's guilt even after the entry of his/her plea. Consequently, in order to avoid such a misleading impression, the government should ask leave of the court to make a proffer of the facts available to it that show the defendant's guilt beyond a reasonable doubt.

In addition, the Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant's effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a prosecutor has joined, the prosecutor should object to the report or add a statement explaining the prosecutor's understanding of the facts or the reason for the stipulation.

Recounting the true nature of the defendant's involvement in a case will not always lead to a higher sentence. Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others and the government agrees that self-incriminating information so provided will not be used against the defendant, Sentencing Guideline 1B1.8 provides that the information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. The existence of an agreement not to use information should be clearly reflected in the case file, the applicability of Guideline 1B1.8 should be documented, and the incriminating information must be disclosed to the court or the probation officer, even though it may not be used in determining a guideline sentence. Note that such information may still be used by the court in determining whether to depart from the guidelines and the extent of the departure. *See USSG § 1B1.8.*

3. Basis for Sentencing. In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maxim term authorized by statute as well as the Sentencing Guideline range for the offense, to which the guilty plea is entered. Thus, as noted in USAM 9-27.320 above the prosecutor should take care to avoid a "charge agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes (including mandatory minimum penalties), the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject. In addition, if restitution is appropriate under the circumstances of the case, the plea agreement should specify the amount of restitution. *See 18 U.S.C. § 3663 et seq.; 18 U.S.C. §§ 2248, 2259, 2264 and 2327; United States v. Arnold, 947 F.2d 1236, 1237-38 (5th Cir. 1991); and USAM 9-16.320.*

4. Effect on Other Cases. In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

9-27.440 Plea Agreements When Defendant Denies Guilt

A. The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his/her innocence with respect to the charge or charges to which he/she offers to plead guilty. In a case in which the defendant tenders a plea of guilty but denies committing the offense to which he/she offers to plead guilty, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty. *See also* USAM 9-16.015, which discusses the approval requirement.

B. Comment. USAM 9-27.440 concerns plea agreements involving "Alford" pleas--guilty pleas entered by defendants who nevertheless claim to be innocent. In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court held that the Constitution does not prohibit a court from accepting a guilty plea from a defendant who simultaneously maintains his/her innocence, so long as the plea is entered voluntarily and intelligently and there is a strong factual basis for it. The Court reasoned that there is no material difference between a plea of nolo contendere, where the defendant does not expressly admit his/her guilt, and a plea of guilty by a defendant who affirmatively denies his/her guilt.

Despite the constitutional validity of Alford pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges. Such pleas are particularly undesirable when entered as part of an agreement with the government. Involvement by attorneys for the government in the inducement of guilty pleas by defendants who protest their innocence may create an appearance of prosecutorial overreaching. As one court put it, "the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail." *See United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971). Consequently, it is preferable to have a jury resolve the factual and legal dispute between the government and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or unfair. For this reason, government attorneys should not enter into Alford plea agreements, without the approval of the responsible Assistant Attorney General. Apart from refusing to enter into a plea agreement, however, the degree to which the Department can express its opposition to Alford pleas may be limited. Although a court may accept a proffered plea of nolo contendere "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice" (Rule 11 (b), Fed. R. Crim. P.), at least one court has concluded that it is an abuse of discretion to refuse to accept a guilty plea "solely because the defendant does not admit the alleged facts of the crime." *United States v. Gaskins*, 485 F.2d 1046, 1048 (D.C. Cir. 1973); *See United States v. Bednarski, supra; United States v. Boscoe*, 518 F.2d 95 (1st Cir. 1975). Nevertheless, government attorneys can and should discourage Alford pleas by refusing to agree to terminate prosecutions where an Alford plea is proffered to fewer than all of the charges pending. As is the case with guilty pleas generally, if such a plea to fewer than all the charges is tendered and accepted over the government's objection, the attorney for the government should proceed to trial on any remaining charges not barred on double jeopardy grounds unless the United States Attorney or in cases handled by Departmental attorneys, the responsible Assistant Attorney General, approves dismissal of those charges.

Government attorneys should also take full advantage of the opportunity afforded by Rule 11(f) of the Fed. R. Crim. P. in an Alford case to thwart the defendant's efforts to project a public image of innocence. Under Rule 11(f) of the Fed. R. Crim. P. the court must be satisfied that there is "a factual basis" for a guilty plea. However, the Rule does not require that the factual basis for the plea be provided only by the defendant. *See United States v. Navedo*, 516 F.2d 29 (2d Cir. 1975); *Irizarry v. United States*, 508 F.2d 960 (2d Cir. 1974); *United States v. Davis*, 516 F.2d 574 (7th Cir. 1975). Accordingly, attorneys for the government in Alford cases should endeavor to establish as strong a factual basis for the plea as possible not

only to satisfy the requirement of Rule 11(f) Fed. R. Crim. P., but also to minimize the adverse effects of Alford pleas on public perceptions of the administration of justice.

9-27.450 Records of Plea Agreements

A. All negotiated plea agreements to felonies or to misdemeanors negotiated from felonies shall be in writing and filed with the court.

B. Comment. USAM 9-27.450 is intended to facilitate compliance with Rule 11 of the Federal Rules of Criminal Procedure and to provide a safeguard against misunderstandings that might arise concerning the terms of a plea agreement. Rule 11(e) (2), Fed. R. Crim. P., requires that a plea agreement be disclosed in open court (except upon a showing of good cause in which case disclosure may be made in camera), while Rule 11(e)(3) Fed. R. Crim. P. requires that the disposition provided for in the agreement be embodied in the judgment and sentence. Compliance with these requirements will be facilitated if the agreement has been reduced to writing in advance, and the defendant will be precluded from successfully contesting the terms of the agreement at the time he/she pleads guilty, or at the time of sentencing, or at a later date. Any time a defendant enters into a negotiated plea, that fact and the conditions of the agreement should also be maintained in the office case file. Written agreements will facilitate efforts by the Department or the Sentencing Commission to monitor compliance by prosecutors with Department policies and the guidelines. Documentation may include a copy of the court transcript at the time the plea is taken in open court.

There shall be within each office a formal system for approval of negotiated pleas. The approval authority shall be vested in at least a supervisory criminal Assistant United States Attorney, or a supervisory attorney of a litigating division in the Department of Justice, who will have the responsibility of assessing the appropriateness of the plea agreement under the policies of the Department of Justice pertaining to pleas. Where certain predictable fact situations arise with great frequency and are given identical treatment, the approval requirement may be met by a written instruction from the appropriate supervisor which describes with particularity the standard plea procedure to be followed, so long as that procedure is otherwise within Departmental guidelines. An example would be a border district which routinely deals with a high volume of illegal alien cases daily.

The plea approval process will be part of the office evaluation procedure.

The United States Attorney in each district, or a supervisory representative, should, if feasible, meet regularly with a representative of the district's Probation Office for the purpose of discussing guideline cases.

9-27.500 Offers to Plead Nolo Contendere -- Opposition Except in Unusual Circumstances

A. The attorney for the government should oppose the acceptance of a plea of nolo contendere unless the Assistant Attorney General with supervisory responsibility over the subject matter concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest. See USAM 9-16.010, which discusses the approval requirement.

B. Comment. Rule 11(b) of the Federal Rules of Criminal Procedure, requires the court to consider "the views of the parties and the interest of the public in the effective administration of justice" before it accepts a plea of nolo contendere. Thus it is clear that a criminal defendant has no absolute right to enter a nolo contendere plea. The Department has long attempted to discourage the disposition of criminal cases by means of nolo pleas. The basic objections to nolo pleas were expressed by Attorney General Herbert Brownell, Jr. in a Departmental directive in 1953.

One of the factors which has tended to breed contempt for Federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are not deterrent to crime. As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in this denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.

For these reasons, government attorneys have been instructed for many years not to consent to nolo pleas except in the most unusual circumstances, and to do so then only with departmental approval. Federal prosecutors should oppose the acceptance of a nolo plea, unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of the plea would be in the public interest.

9-27.520 Offers to Plead Nolo Contendere -- Offer of Proof

- A. In any case in which a defendant seeks to enter a plea of nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. *See also* USAM 9-16.010.
- B. Comment. If a defendant seeks to avoid admitting guilt by offering to plead nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. This should be done even in the rare case in which the government does not oppose the entry of a nolo plea. In addition, as is the case with respect to guilty pleas, the attorney for the government should urge the court to require the defendant to admit publicly the facts underlying the criminal charges. These precautions should minimize the effectiveness of any subsequent efforts by the defendant to portray himself/herself as technically liable perhaps, but not seriously culpable.

9-27.530 Argument in Opposition of Nolo Contendere Plea

- A. If a plea of nolo contendere is offered over the government's objection, the attorney for the government should state for the record why acceptance of the plea would not be in the public interest; and should oppose the dismissal of any charges to which the defendant does not plead nolo contendere.
- B. Comment. When a plea of nolo contendere is offered over the government's objection, the prosecutor should take full advantage of Rule 11(b), Federal Rules of Criminal Procedure, to state for the record why acceptance of the plea would not be in the public interest. In addition to reciting the facts that could be proved to show the defendant's guilt, the prosecutor should bring to the court's attention whatever arguments exist for rejecting the plea. At the very least, such a forceful presentation should make it clear to the public that the government is unwilling to condone the entry of a special plea that may help the defendant avoid legitimate consequences of his/her guilt. If the nolo plea is offered to fewer than all charges, the prosecutor should also oppose the dismissal of the remaining charges.

9-27.600 Entering into Non-prosecution Agreements in Return for Cooperation -- Generally

A. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

B. Comment.

1. In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself/herself implicated in the criminal conduct being investigated or prosecuted. However, because of his/her involvement, the person may refuse to cooperate on the basis of his/her Fifth Amendment privilege against compulsory self-incrimination. In this situation, there are several possible approaches the prosecutor can take to render the privilege inapplicable or to induce its waiver.

a. First, if time permits, the person may be charged, tried, and convicted before his/her cooperation is sought in the investigation or prosecution of others. Having already been convicted himself/herself, the person ordinarily will no longer have a valid privilege to refuse to testify and will have a strong incentive to reveal the truth in order to induce the sentencing judge to impose a lesser sentence than that which otherwise might be found appropriate.

b. Second, the person may be willing to cooperate if the charges or potential charge against him/her are reduced in number or degree in return for his/her cooperation and his/her entry of a guilty plea to the remaining charges. An agreement to file a motion pursuant to Sentencing Guideline 5K1.1 or Rule 35 of the Federal Rules of Criminal Procedure after the defendant gives full and complete cooperation is the preferred method for securing such cooperation. Usually such a concession by the government will be all that is necessary, or warranted, to secure the cooperation sought. Since it is certainly desirable as a matter of policy that an offender be required to incur at least some liability for his/her criminal conduct, government attorneys should attempt to secure this result in all appropriate cases, following the principles set forth in USAM 9-27.430 to the extent practicable.

c. The third method for securing the cooperation of a potential defendant is by means of a court order under 18 U.S.C. §§ 6001-6003. Those statutory provisions govern the conditions under which uncooperative witnesses may be compelled to testify or provide information notwithstanding their invocation of the privilege against compulsory self-incrimination. In brief, under the so-called "use immunity" provisions of those statutes, the court may order the person to testify or provide other information, but neither his/her testimony nor the information he/she provides may be used against him/her, directly or indirectly, in any criminal case except a prosecution for perjury or other failure to comply with the order. Ordinarily, these "use immunity" provisions should be relied on in cases in which attorneys for the government need to obtain sworn testimony or the production of information before a grand jury or at trial, and in which there is reason to believe that the person will refuse to testify or provide the information on the basis of his/her privilege against compulsory self-incrimination. *See* USAM 9-23.000. Offers of immunity and immunity agreements should be in writing. Consideration should be given to documenting the evidence available prior to the immunity offer.

d. Finally, there may be cases in which it is impossible or impractical to employ the methods described above to secure the necessary information or other assistance, and in which the person is willing to cooperate only in return for an agreement that he/she will not be prosecuted at all for

what he/she has done. The provisions set forth hereafter describe the conditions that should be met before such an agreement is made, as well as the procedures recommended for such cases.

It is important to note that these provisions apply only if the case involves an agreement with a person who might otherwise be prosecuted. If the person reasonably is viewed only as a potential witness rather than a potential defendant, and the person is willing to cooperate, there is no need to consult these provisions.

USAM 9-27.600 describes three circumstances that should exist before government attorneys enter into non-prosecution agreements in return for cooperation: the unavailability or ineffectiveness of other means of obtaining the desired cooperation; the apparent necessity of the cooperation to the public interest; and the approval of such a course of action by an appropriate supervisory official

2. Unavailability or Ineffectiveness of Other Means. As indicated above, non-prosecution agreements are only one of several methods by which the prosecutor can obtain the cooperation of a person whose criminal involvement makes him/her a potential subject of prosecution. Each of the other methods--seeking cooperation after trial and conviction, bargaining for cooperation as part of a plea agreement, and compelling cooperation under a "use immunity" order--involves prosecuting the person or at least leaving open the possibility of prosecuting him/her on the basis of independently obtained evidence. Since these outcomes are clearly preferable to permitting an offender to avoid any liability for his/her conduct, the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance.

Another reason for using an alternative to a non-prosecution agreement to obtain cooperation concerns the practical advantage in terms of the person's credibility if he/she testifies at trial. If the person already has been convicted, either after trial or upon a guilty plea, for participating in the events about which he/she testifies, his/her testimony is apt to be far more credible than if it appears to the trier of fact that he/she is getting off "scot free." Similarly, if his/her testimony is compelled by a court order, he/she cannot properly be portrayed by the defense as a person who has made a "deal" with the government and whose testimony is, therefore, suspect; his/her testimony will have been forced from him/her, not bargained for.

In some cases, however, there may be no effective means of obtaining the person's timely cooperation short of entering into a non-prosecution agreement. The person may be unwilling to cooperate fully in return for a reduction of charges, the delay involved in bringing him/her to trial might prejudice the investigation or prosecution in connection with which his/her cooperation is sought and it may be impossible or impractical to rely on the statutory provisions for compulsion of testimony or production of evidence. One example of the latter situation is a case in which the cooperation needed does not consist of testimony under oath or the production of information before a grand jury or at trial. Other examples are cases in which time is critical, or where use of the procedures of 18 U.S.C. §§6001-6003 would unreasonably disrupt the presentation of evidence to the grand jury or the expeditious development of an investigation, or where compliance with the statute of limitations or the Speedy Trial Act precludes timely application for a court order.

Only when it appears that the person's timely cooperation cannot be obtained by other means, or cannot be obtained effectively, should the attorney for the government consider entering into a non-prosecution agreement.

3. Public Interest. If he/she concludes that a non-prosecution agreement would be the only effective method for obtaining cooperation, the attorney for the government should consider whether, balancing the cost of foregoing prosecution against the potential benefit of the person's cooperation, the cooperation sought appears necessary to the public interest. This "public interest" determination is one of the conditions precedent to an application under 18 U.S.C. § 6003 for a court order compelling

testimony. Like a compulsion order, a non-prosecution agreement limits the government's ability to undertake a subsequent prosecution of the witness. Accordingly, the same "public interest" test should be applied in this situation as well. Some of the considerations that may be relevant to the application of this test are set forth in USAM 9-27.620.

4. Supervisory Approval. Finally, the prosecutor should secure supervisory approval before entering into a non-prosecution agreement. Prosecutors working under the direction of a United States Attorney must seek the approval of the United States Attorney or a supervisory Assistant United States Attorney. Departmental attorneys not supervised by a United States Attorney should obtain the approval of the appropriate Assistant Attorney General or his/her designee, and should notify the United States Attorney or Attorneys concerned. The requirement of approval by a superior is designed to provide review by an attorney experienced in such matters, and to ensure uniformity of policy and practice with respect to such agreements. This section should be read in conjunction with USAM 9-27.640, concerning particular types of cases in which an Assistant Attorney General or his/her designee must concur in or approve an agreement not to prosecute in return for cooperation.

9-27.620 Entering into Non-prosecution Agreements in Return for Cooperation -- Considerations to be Weighed

A. In determining whether, a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:

1. The importance of the investigation or prosecution to an effective program of law enforcement;
2. The value of the person's cooperation to the investigation or prosecution; and
3. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

B. Comment. This paragraph is intended to assist Federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case. Rather they are meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.

1. Importance of Case. Since the primary function of a Federal prosecutor is to enforce the criminal law, he/she should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions. Rather, he/she should reserve the use of such agreements for cases in which the cooperation sought concerns the commission of a serious offense or in which successful prosecution is otherwise important in achieving effective enforcement of the criminal laws. The relative importance or unimportance of the contemplated case is therefore a significant threshold consideration.

2. Value of Cooperation. An agreement not to prosecute in return for a person's cooperation binds the government to the extent that the person carries out his/her part of the bargain. *See Santobello v. New York* 404 U.S. 257 (1971); *Wade v. United States*, 112 S. Ct. 1840 (1992). Since such an agreement forecloses enforcement of the criminal law against a person who otherwise may be liable to prosecution, it should not be entered into without a clear understanding of the nature of the quid pro quo and a careful assessment of its probable value to the government. In order to be in a position adequately to assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his/her attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which cooperation is sought. In doing so, he/she should consider such questions as whether the cooperation will in fact be

forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.

3. Relative Culpability and Criminal History. In determining whether it may be necessary to the public interest to agree to forego prosecution of a person who may have violated the law in return for that person's cooperation, it is also important to consider the degree of his/her apparent culpability relative to others who are subjects of the investigation or prosecution as well as his/her history of criminal involvement. Of course, ordinarily it would not be in the public interest to forego prosecution of a high-ranking member of a criminal enterprise in exchange for his/her cooperation against one of his/her subordinates, nor would the public interest be served by bargaining away the opportunity to prosecute a person with a long history of serious criminal involvement in order to obtain the conviction of someone else on less serious charges. These are matters with regard to which the attorney for the government may find it helpful to consult with the investigating agency or with other prosecuting authorities who may have an interest in the person or his/her associates.

It is also important to consider whether the person has a background of cooperation with law enforcement officials, either as a witness or an informant, and whether he/she has previously been the subject of a compulsion order under 18 U.S.C. §§6001-6003 or has escaped prosecution by virtue of an agreement not to prosecute. The information regarding compulsion orders may be available by telephone from the Immunity Unit in the Office of Enforcement Operations of the Criminal Division.

9-27.630 Entering into Non-prosecution Agreements in Return for Cooperation -- Limiting the Scope of Commitment

A. In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to:

1. Non-prosecution based directly or indirectly on the testimony or other information provided; or
2. Non-prosecution within his/her district with respect to a pending charge, or to a specific offense then known to have been committed by the person.

B. Comment. The attorney for the government should exercise extreme caution to ensure that his/her non-prosecution agreement does not confer "blanket" immunity on the witness. To this end, he/she should, in the first instance, attempt to limit his/her agreement to non-prosecution based on the testimony or information provided. Such an "informal use immunity" agreement has two advantages over an agreement not to prosecute the person in connection with a particular transaction: first, it preserves the prosecutor's option to prosecute on the basis of independently obtained evidence if it later appears that the person's criminal involvement was more serious than it originally appeared to be; and second, it encourages the witness to be as forthright as possible since the more he/she reveals the more protection he/she will have against a future prosecution. To further encourage full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution.

Even if it is not practicable to obtain the desired cooperation pursuant to an "informal use immunity" agreement, the attorney for the government should attempt to limit the scope of the agreement in terms of

the testimony and transactions covered, bearing in mind the possible effect of his/her agreement on prosecutions in other districts.

It is important that non-prosecution agreements be drawn in terms that will not bind other Federal prosecutors or agencies without their consent. Thus, if practicable, the attorney for the government should explicitly limit the scope of his/her agreement to non-prosecution within his/her district. If such a limitation is not practicable and it can reasonably be anticipated that the agreement may affect prosecution of the person in other districts, the attorney for the government contemplating such an agreement shall communicate the relevant facts to the Assistant Attorney General with supervisory responsibility for the subject matter. United States Attorneys may not make agreements which prejudice civil or tax liability without the express agreement of all affected Divisions and/or agencies. See also 9-16.000 et seq. for more information regarding plea agreements.

Finally, the attorney for the government should make it clear that his/her agreement relates only to non-prosecution and that he/she has no independent authority to promise that the witness will be admitted into the Department's Witness Security program or that the Marshal's Service will provide any benefits to the witness in exchange for his/her cooperation. This does not mean, of course, that the prosecutor should not cooperate in making arrangements with the Marshal's Service necessary for the protection of the witness in appropriate cases. The procedures to be followed in such cases are set forth in USAM 9-21.000.

9-27.640 Agreements Requiring Assistant Attorney General Approval

A. The attorney for the government should not enter into a non-prosecution agreement in exchange for a person's cooperation without first obtaining the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, or his/her designee, when:

1. Prior consultation or approval would be required by a statute or by Departmental policy for a declination of prosecution or dismissal of a charge with regard to which the agreement is to be made; or
2. The person is:
 - a. A high-level Federal, state, or local official;
 - b. An official or agent of a Federal investigative or law enforcement agency; or
 - c. A person who otherwise is, or is likely to become of major public interest.

B. Comment. USAM 9-27.640 sets forth special cases that require approval of non-prosecution agreements by the responsible Assistant Attorney General or his/her designee. Subparagraph (1) covers cases in which existing statutory provisions and departmental policies require that, with respect to certain types of offenses, the Attorney General or an Assistant Attorney General be consulted or give his/her approval before prosecution is declined or charges are dismissed. For example, see USAM 6-4.245 (tax offenses); USAM 9-41.010 (bankruptcy frauds); USAM 9-90.020 (internal security offenses); (see USAM 9-2.400 for a complete listing of all prior approval and consultation requirements). An agreement not to prosecute resembles a declination of prosecution or the dismissal of a charge in that the end result in each case is similar: a person who has engaged in criminal activity is not prosecuted or is not prosecuted fully for his/her offense. Accordingly, attorneys for the government should obtain the approval of the appropriate Assistant Attorney General, or his/her designee, before agreeing not to prosecute in any case in which consultation or approval would be required for a declination of prosecution or dismissal of a charge.

Subparagraph (2) sets forth other situations in which the attorney for the government should obtain the approval of an Assistant Attorney General, or his/her designee, of a proposed agreement not to prosecute in exchange for cooperation. Generally speaking, the situations described will be cases of an exceptional or extremely sensitive nature, or cases involving individuals or matters of major public interest. In a case

covered by this provision that appears to be of an especially sensitive nature, the Assistant Attorney General should, in turn, consider whether it would be appropriate to notify the Attorney General or the Deputy Attorney General.

9-27.641 Multi-District (Global) Agreement Requests

A. No district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the express written approval of the United States Attorney(s) in each affected district and/or the Assistant Attorney General of the Criminal Division.

The requesting district/division shall make known to each affected district/division the following information:

1. The specific crimes allegedly committed in the affected district(s) as disclosed by the defendant. (No agreement should be made as to any crime(s) not disclosed by the defendant.)
2. Identification of victims of crimes committed by the defendant in any affected district, insofar as possible.
3. The proposed agreement to be made with the defendant and the applicable Sentencing Guideline range.

See the USAM at 16.030, for a discussion of the consultation with investigative agencies and victims requirement regarding pleas.

9-27.650 Records of Non-Prosecution Agreements

A. In a case in which a non-prosecution agreement is reached in return for a person's cooperation, the attorney for the government should ensure that the case file contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialed by the person with whom the agreement is made or his/her attorney.

B. Comment The provisions of this section are intended to serve two purposes. First, it is important to have a written record in the event that questions arise concerning the nature or scope of the agreement. Such questions are certain to arise during cross-examination of the witness, particularly if the existence of the agreement has been disclosed to defense counsel pursuant to the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The exact terms of the agreement may also become relevant if the government attempts to prosecute the witness for some offense in the future. Second, such a record will facilitate identification by government attorneys (in the course of weighing future agreements not to prosecute, plea agreements, pre-trial diversion, and other discretionary actions) of persons whom the government has agreed not to prosecute.

The principal requirements of the written record are that it be sufficiently detailed that it leaves no doubt as to the obligations of the parties to the agreement, and that it be signed or initialed by the person with whom the agreement is made and his/her attorney, or at least by one of them.

9-27.710 Participation in Sentencing -- Generally

A. During the sentencing phase of a Federal criminal case, the attorney for the government should assist the sentencing court by:

1. Attempting to ensure that the relevant facts are brought to the court's attention fully and accurately; and
2. Making sentencing recommendations in appropriate cases.

B. **Comment.** Sentencing in Federal criminal cases is primarily the function and responsibility of the court. This does not mean, however, that the prosecutor's responsibility in connection with a criminal case ceases upon the return of a guilty verdict or the entry of a guilty plea; to the contrary, the attorney for the government has a continuing obligation to assist the court in its determination of the sentence to be imposed. The prosecutor must be familiar with the guidelines generally and with the specific guideline provisions applicable to his or her case. In discharging these duties, the attorney for the government should, as provided in USAM 9-27.720 and 9-27.750, endeavor to ensure the accuracy and completeness of the information upon which the sentencing decisions will be based. In addition, as provided in USAM 9-27.730, in appropriate cases the prosecutor should offer recommendations with respect to the sentence to be imposed.

9-27.720 Establishing Factual Basis for Sentence

A. In order to ensure that the relevant facts are brought to the attention of the sentencing court fully and accurately, the attorney for the government should:

1. Cooperate with the Probation Service in its preparation of the presentence investigation report;
2. Review material in the presentence investigation report;
3. Make a factual presentation to the court when:
 - a. Sentence is imposed without a presentence investigation and report;
 - b. It is necessary to supplement or correct the presentence investigation report;
 - c. It is necessary in light of the defense presentation to the court; or
 - d. It is requested by the court; and
4. Be prepared to substantiate significant factual allegations disputed by the defense.

B. **Comment.**

1. **Cooperation with Probation Service.** To begin with, if sentence is to be imposed following a presentence investigation and report, the prosecutor should cooperate with the Probation Service in its preparation of the presentence report for the court. Under Rule 32(b), Federal Rules of Criminal Procedure, the report should contain information about the history and characteristics of the defendant, including any prior criminal record, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant. While much of this information may be available to the Probation Service from sources other than the government, some of it may be obtainable only from prosecutorial or investigative files to which probation officers do not have access. For this reason, it is important that the attorney for the government respond promptly to Probation Service requests by providing the requested information whenever possible. The attorney for the government should also recognize the occasional desirability of volunteering information to the Probation Service especially in a district where the Probation Office is overburdened. Doing so may be the best way to ensure that important facts about the defendant come to its attention. In addition, the prosecutor should be particularly alert to the need to volunteer relevant information to the Probation Service in complex cases, since it cannot be expected that probation officers will obtain a full understanding of the facts of such cases simply by questioning the prosecutor or examining his/her files.

The relevant information can be communicated orally, or by making portions of the case file available to the probation officer, or by submitting a sentencing memorandum or other written presentation for inclusion in the presentence report. Whatever method he/she uses, however, the attorney for the government should bear in mind that since the report will be shown to the defendant and defense counsel, care should be taken to prevent disclosures that might be harmful to law enforcement interests.

2. Review of Presentence Report. Before the sentencing hearing, the prosecutor should always review the presentence report, which is prepared pursuant to Rule 32, Federal Rules of Criminal Procedure. Not only must the prosecutor be satisfied that the report is factually accurate, he or she must also pay attention to the initial determination of the base offense level. Further, the prosecutor must also consider all adjustments reflected in the report, as well as any recommendations for departure made by the probation office. These adjustments and potential departures can have a profound effect on the defendant's sentence. As advocates for the United States, prosecutors should be prepared to argue concerning those adjustments (and, if necessary, departures allowed by the guidelines) in order to arrive at a final result which adequately and accurately describes the defendant's conduct of offense, criminal history, and other factors related to sentencing.

3. Factual Presentation to Court. In addition to assisting the Probation Service with its presentence investigation, the attorney for the government may find it necessary in some cases to make a factual presentation directly to the court. Such a presentation is authorized by Rule 32(c), Federal Rules of Criminal Procedure, which requires the court to "afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence."

The need to address the court concerning the facts relevant to sentencing may arise in four situations: (a) when sentence is imposed without a presentence investigation and report; (b) when necessary to correct or supplement the presentence report; (c) when necessary in light of the defense presentation to the court; and (d) when requested by the court.

a. Furnishing Information in Absence of Presentence Report. Rule 32(b), Federal Rules of Criminal Procedure, authorizes the imposition of sentence without a presentence investigation and report, if the court finds that the record contains sufficient information to permit the meaningful exercise of sentencing authority under 18 U.S.C. § 3553. Imposition of sentence pursuant to this provision usually occurs when the defendant has been found guilty by the court after a non-jury trial, when the case is relatively simple and straightforward, when the defendant has taken the stand and has been cross-examined, and when it is the court's intention not to impose a prison sentence. In such cases, and any others in which sentence is to be imposed without benefit of a presentence investigation and report (such as when a report on the defendant has recently been prepared in connection with another case), it may be particularly important that the attorney for the government take advantage of the opportunity afforded by Rule 32(c), Federal Rules of Criminal Procedure, to address the court, since there will be no later opportunity to correct or supplement the record. Moreover, even if government counsel is satisfied that all facts relevant to the sentencing decision are already before the court, he/she may wish to make a factual presentation for the record that makes clear the government's view of the defendant, the offense, or both.

b. Correcting or Supplementing Presentence Report. The attorney for the government should bring any significant inaccuracies or omissions to the Court's attention at the sentencing hearing, together with the correct or complete information.

c. Responding to Defense Assertions. Having read the presentence report before the sentencing hearing the defendant or his/her attorney may dispute specific factual statements made therein. More likely, without directly challenging the accuracy of the report, the defense presentation at the hearing may omit reference to the derogatory information in the report while stressing any favorable information and drawing all inferences beneficial to the defendant. Some degree of selectivity in the defense presentation is probably to be expected, and will be recognized by the court. There may be instances, however, in which the defense presentation, if not challenged, will leave the court with a view of the defendant or of the offense significantly different from that appearing in the presentence report. If this appears to be a possibility, the

attorney for the government may respond by correcting factual errors in the defense presentation, pointing out facts and inferences, ignored by the defense, and generally reinforcing the objective view of the defendant and his/her offense as expressed in the presentence report.

d. Responding to Court's Requests. There may be occasions when the court will request specific information from government counsel at the sentencing hearing (as opposed to asking generally whether the government wishes to be heard). When this occurs, the attorney for the government should, of course, furnish the requested information if it is readily available and no prejudice to law enforcement interests is likely to result from its disclosure.

4. Substantiation of Disputed Facts. In addition to providing the court with relevant factual material at the sentencing hearing when necessary, the attorney for the government should be prepared to substantiate significant factual allegations disputed by the defense. This can be done by making the source of the information available for cross examination or if there is good cause for nondisclosure of his/her identity, by presenting the information as hearsay and providing other guarantees of its reliability, such as corroborating testimony by others. *See United States v. Fatico*, 579 F.2d 707, 713 (2d Cir. 1978).

9-27.730 Conditions for Making Sentencing Recommendations

A. The attorney for the government should make a recommendation with respect to the sentence to be imposed when:

1. The terms of a plea agreement so require it;
2. The public interest warrants an expression of the government's view concerning the appropriate sentence.

B. Comment. USAM 9-27.730 describes two situations in which an attorney for the government should make a recommendation with respect to the sentence to be imposed: when the terms of a plea agreement require it, and when the public interest warrants an expression of the government's view concerning the appropriate sentence. The phrase "make a recommendation with respect to the sentence to be imposed" is intended to cover tacit recommendations (i.e., agreeing to the defendant's request or not opposing the defendant's request) as well as explicit recommendations for a specific type of sentence (e.g., probation or a fine), for a specific condition of probation, a specific fine, or a specific term of imprisonment; and for concurrent or consecutive sentences.

The attorney for the government should be guided by the circumstances of the case and the wishes of the court concerning the manner and form in which sentencing recommendations are made. If the government's position with respect to the sentence to be imposed is related to a plea agreement with the defendant, that position must be made known to the court at the time the plea is entered. In other situations, the government's position might be conveyed to the probation officer, orally or in writing, during the presentence investigation; to the court in the form of a sentencing memorandum filed in advance of the sentencing hearing; or to the court orally at the time of the hearing.

1. Recommendations Required by Plea Agreement. Rule 11(e)(1), Federal Rules of Criminal Procedure, authorizing plea negotiations, implicitly permits the prosecutor, pursuant to a plea agreement, to make a sentence recommendation, agree not to oppose the defendant's request for a specific sentence, or agree that a specific sentence is the appropriate disposition of the case. If the prosecutor has entered into a plea agreement calling for the government to take a certain position with respect to the sentence to be imposed, and the defendant has entered a guilty plea in accordance with the terms of the agreement, the prosecutor must perform his/her part of the bargain or risk having the plea invalidated. *Machibroda v. United States*, 368 U.S. 487, 493 (1962); *Santobello v. United States*, 404 U.S. 257, 262 (1971).

2. Recommendations Reflecting Defendant's Cooperation. Section 5K1.1 of the Sentencing Guidelines provides that, upon motion by the government, a court may depart below the guidelines to reflect a defendant's cooperation. Title 18 U.S.C. § 3553(e) permits the court to impose a sentence below an otherwise applicable statutory minimum sentence upon motion of the government based upon a defendant's cooperation in the investigation or prosecution of another. The Supreme Court held in *Melendez v. United States*, 116 S. Ct. 2057 (1996) that a district court may not reduce a sentence below the statutory mandatory minimum based on a motion pursuant to 5K1.1 unless the government specifically sought a reduction in the mandatory minimum. *See also* Fed. R. Crim. P. Rule 35(b).

3. Recommendations Warranted by the Public Interest. From time to time, unusual cases may arise in which the public interest warrants an expression of the government's view concerning the appropriate sentence, irrespective of the absence of a plea agreement. In some such cases, the court may invite or request a recommendation by the prosecutor, while in others the court may not wish to have a sentencing recommendation from the government. In either event, whether the public interest requires an expression of the government's view concerning the appropriate sentence in a particular case is a matter to be determined with care, preferably after consultation between the prosecutor handling the case and his/her supervisor--the United States Attorney or a Supervisory Assistant United States Attorney, or the responsible Assistant Attorney General or his/her designee.

The prosecutor should bear in mind the attitude of the court toward sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation. If the prosecutor has good reason to anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs, he/she may conclude that it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation. For example, if the case is one in which the Sentencing Guidelines allow but do not require the imposition of a term of imprisonment, the imposition of a term of imprisonment plainly would be inappropriate, and the court has requested the government's view, the prosecutor should not hesitate to recommend or agree to the imposition of probation. On the other hand, if the responsible government attorney believes that a term of imprisonment is plainly warranted and that, under all the circumstances, the public interest would be served by making a recommendation to that effect, he/she should make such a recommendation even though the court has not invited it. Recognizing, however, that the primary responsibility for sentencing lies with the judiciary, government attorneys should avoid routinely taking positions with respect to sentencing, reserving their recommendations instead for those unusual cases in which the public interest warrants an expression of the government's view.

In connection with sentencing recommendations, the prosecutor should also bear in mind the potential value in some cases of the imposition of innovative conditions of probation if consistent with the Sentencing Guidelines. For example, in a case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the responsible government attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant participate in community service activities, or that he/she desist from engaging in a particular type of business.

9-27.740 Consideration to be Weighed in Determining Sentencing Recommendations

A. Consideration to be Weighed in Determining Sentencing

1. If the prosecutor makes a recommendation as to the sentence to be imposed within the applicable guideline range determined by the court, the prosecutor should consider the various purposes of sentencing, as noted below.

2. If the prosecutor makes a recommendation as to a sentence to be imposed after the court grants a motion for downward departure under Sentencing Guideline 5K1.1, the prosecutor should also consider the timeliness of the cooperation, the results of the cooperation, and the nature and extent of the cooperation when compared to other defendants in the same or similar cases in that district.

B. Comment. The Sentencing Reform Act was enacted to eliminate unwarranted disparity in sentencing. Both judicial discretion and the scope of prosecutorial recommendations have been limited, in those cases in which no departure is made from the applicable guideline range. The prosecutor, however, still has a significant role to play in making appropriate recommendations in cases involving either a sentence within the applicable range or a departure. In making a sentencing recommendation, the prosecutor should bear in mind that, by offering a recommendation, he/she shares with the court the responsibility for avoiding unwarranted sentence disparities among defendants with similar backgrounds who have been found guilty of similar conduct.

Applicable Sentencing Purposes. The attorney for the government should consider the seriousness of the defendant's conduct, and his/her background and personal circumstances, in light of the four purposes or objectives of the imposition of criminal sanctions:

1. To deter the defendant and others from committing crime;
2. To protect the public from further offenses by the defendant;
3. To assure just punishment for the defendant's conduct; and
4. To promote the correction and rehabilitation of the defendant.

The attorney for the government should recognize that not all of these objectives may be relevant in every case and that, for a particular offense committed by a particular offender, one of the purposes, or a combination of purposes, may be of overriding importance. For example, in the case of a young first offender who commits a minor, non-violent offense, the primary or sole purpose of sentencing might be rehabilitation. On the other hand, the primary purpose of sentencing a repeat violent offender might be to protect the public, and the perpetrator of a massive fraud might be sentenced primarily to deter others from engaging in similar conduct.

9-27.745 Unwarranted Sentencing Departures by the Court

A. If the court is considering a departure for a reason not allowed by the guidelines, the prosecutor should resist.

B. Comment. The prosecutor, with Departmental approval, may appeal a sentence which is unlawful or in violation of the Sentencing Guidelines. 18 U.S.C. § 3742(b). If such a sentence is imposed, the Appellate Section of the Criminal Division should be promptly notified so that an appeal can be considered.

9-27.750 Disclosing Factual Material to Defense

A. The attorney for the government should disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he/she intends to bring to the attention of the court.

B. Comment. Due process requires that the sentence in a criminal case be based on accurate information. *See, e.g., Moore v. United States*, 571 F.2d 179, 182-84 (3d Cir. 1978). Accordingly, the defense should have access to all material relied upon by the sentencing judge, including memoranda from the prosecution (to the extent that considerations of informant safety permit), as well as sufficient time to review such material and an opportunity to present any refutation that can be mustered. *See, e.g., United States v. Perri*, 513 F.2d 572, 575 (9th Cir. 1975); *United States v. Rosner*, 485 F.2d 1213, 1229-30 (2d Cir. 1973), *cert. denied*, 417 U.S.

950 (1974); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976). USAM 9-27.750 is intended to facilitate satisfaction of these requirements by providing the defendant with notice of information not contained in the presentence report that the government plans to bring to the attention of the sentencing court.

9-27.760 Limitation on Identifying Uncharged Third-Parties Publicly

In all public filings and proceedings, federal prosecutors should remain sensitive to the privacy and reputation interests of uncharged third-parties. In the context of public plea and sentencing proceedings, this means that, in the absence of some significant justification, it is not appropriate to identify (either by name or unnecessarily-specific description), or cause a defendant to identify, a third-party wrongdoer unless that party has been officially charged with the misconduct at issue. In the unusual instance where identification of an uncharged third-party wrongdoer during a plea or sentencing hearing is justified, the express approval of the United States Attorney or his designee should be obtained prior to the hearing absent exigent circumstances. *See* USAM 9-16.500. In other less predictable contexts, federal prosecutors should strive to avoid unnecessary public references to wrongdoing by uncharged third-parties. With respect to bills of particulars that identify unindicted co-conspirators, prosecutors generally should seek leave to file such documents under seal. Prosecutors shall comply, however, with any court order directing the public filing of a bill of particulars.

As a series of cases make clear, there is ordinarily “no legitimate governmental interest served” by the government’s public acknowledgment of wrongdoing by an uncharged party, and this is true “[r]egardless of what criminal charges may . . . [e]xpected to be contemplated by the Assistant United States Attorney against the [third-party] for the future.” *In re Smith*, 656 F.2d 1101, 1106-07 (5th Cir. 1981). Courts have applied this reasoning to preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings. *See* *Finn v. Schiller*, 72 F.3d 1182 (4th Cir. 1996); *United States v. Briggs*, 513 F.2d 794 (5th Cir. 1975); *United States v. Anderson*, 55 F. Supp. 2d 1163 (D. Kan. 1999); *United States v. Smith*, 992 F. Supp. 743 (D.N.J. 1998); *see also* USAM 9-11.130.

In all but the unusual case, any legitimate governmental interest in referring to uncharged third-party wrongdoers can be advanced through means other than those condemned in this line of cases. For example, in those cases where the offense to which a defendant is pleading guilty requires as an element that a third-party have a particular status (e.g., 18 U.S.C. § 203(a)(2)), the third-party can usually be referred to generically (“a Member of Congress”), rather than identified specifically (“Senator Jones”), at the defendant’s plea hearing. Similarly, when the defendant engaged in joint criminal conduct with others, generic references (“another individual”) to the uncharged third-party wrongdoers can be used when describing the factual basis for the defendant’s guilty plea.

9-28.000
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9-29.000
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9-30.000
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9-31.000
[RESERVED]

9-32.000
[RESERVED]

9-33.000
[RESERVED]

**PREPARATION OF REPORTS
ON CONVICTED PRISONERS
FOR THE PAROLE COMMISSION**

All United States Attorneys, Assistant United States Attorneys, and Criminal Division Attorneys are required to prepare a Form 792 "Report on Convicted Prisoners by United States Attorney" in all cases in which a defendant has been sentenced to a prison term in excess of one year for an offense committed prior to November 1, 1987. Defendants who commit offenses on or after that date are to be sentenced pursuant to the sentencing guidelines promulgated by the United States Sentencing Commission and are not eligible for parole.

As soon as the defendant has been sentenced, the completed Form 792 should be submitted to the Chief Executive Officer of the institution to which the defendant will be committed. The Parole Commission should be fully informed of aggravating and mitigating factors surrounding each offense.

All prosecuting attorneys should take into consideration the Parole Commission's guidelines (contained in 28 C.F.R. § 2.20), both in plea negotiations and in completing the Form 792. *See the Criminal Resource Manual at 729 instructions regarding completion of the form, and 730 for the form itself.*

9-35.000
INTERNATIONAL
PRISONER TRANSFERS

9-35.010

Introduction

9-35.100

**Role of the United States Attorneys' Offices -- Inclusion of Promises
Regarding Transfers in Plea Agreements**

9-35.010 Introduction

The International Prisoner Transfer Program began in 1977 when the Federal Government negotiated the first in a series of treaties to permit the transfer of prisoners from the countries in which they had been convicted to their home countries. Over thirty countries and nationalities are now parties to prisoner transfer treaties with the United States.

The International Prisoner Transfer Unit (IPTU) of the Office of Enforcement Operations, Criminal Division, is responsible for approving and administering the transfer of prisoners to and from the United States pursuant to the prisoner transfer treaties. Much of the practice and procedure for transfer is governed by 18 U.S.C. § 4100 *et seq.*, with applicable regulations set out at 28 C.F.R. § 527.40 *et seq.*.

The United States Attorneys' Offices are responsible for furnishing facts and recommendations to the IPTU that can be considered in deciding whether to approve or deny an offender's request to be transferred to another country. Generally, any relevant facts and recommendations that are requested by IPTU must be supplied promptly (which, absent compelling factors, is within ten days of the request).

The Criminal Resource Manual has a more complete description of the International Prisoner Transfer Program, and the procedures that must be followed

Purpose of the Prisoner Transfer Program	Criminal Resource Manual at 731
Eligibility for Transfer	Criminal Resource Manual at 732
Effect of Transfer	Criminal Resource Manual at 733
Review of Prisoner Transfer Requests	Criminal Resource Manual at 734
Reconsideration of Transfer Requests	Criminal Resource Manual at 735
Role of the United States Attorneys' Offices and Law Enforcement Agencies -- Providing Assistance to the International Prisoner Transfer Unit	Criminal Resource Manual at 736
Sample Form Used by the IPTU to Obtain the Views of the United States United States Attorney's Office	Criminal Resource Manual at 737
Alerting Defense Counsel to Issues Concerning Defendant's Immigration Status	Criminal Resource Manual at 738
Verification Hearings	Criminal Resource Manual at 739
Countries with Which Prisoner Transfer Treaties Are in Effect	Criminal Resource Manual at 740

**9-35.100 Role of the United States Attorneys' Offices -- Inclusion of Promises
Regarding Transfers in Plea Agreements**

A prosecutor may promise, as part of a plea agreement, to recommend that a particular defendant/prisoner be transferred pursuant to a treaty to his or her home country to serve his/her sentence.

In the alternative, the prosecutor may agree not to oppose the prisoner's request for transfer. The United States Attorney's Office may *not*, however, promise that a transfer will in fact be granted.

The decision to approve or deny a transfer request is based on the legality and overall appropriateness of the requested transfer, and making that decision has been delegated by the Attorney General to the Director and Senior Associate Director of the Office of Enforcement Operations. A myriad of factors enter into the final decision, including in some instances factors of which the United States Attorney's Office has no knowledge. Accordingly, the United States Attorney's Office is not in a position to guarantee that a transfer will be approved in any particular case.

If the United States Attorney's Office agrees (either in writing as part of the plea agreement or orally at the sentencing hearing) to recommend transfer or not to oppose a transfer, this position is binding in subsequent communications, both formal and informal, with the Office of Enforcement Operations.

Attention should be given to the wording of an agreement not to oppose transfer. The prosecution may appropriately promise that the "United States Attorney's Office" will not oppose transfer. However, the prosecution is not in a position to state that "the government" will not oppose transfer, since this language would necessarily include the investigative or law enforcement agency (and possibly other entities), the views of which may in fact differ from those of the United States Attorney's Office. It should also be noted that it is not appropriate to promise non-opposition by the United States Attorney's Office in the hope that the transfer request will ultimately be rejected based upon the contrary views of the investigative or law enforcement agency or upon other factors.

9-36.000
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FEDERAL HABEAS CORPUS
(28 U.S.C. § 2241-53, 2255)

Federal prisoners may file two different kinds of motions for post-conviction relief: "Section 2255 motions" and "Section 2241 habeas corpus petitions."

Prisoners may file motions under 28 U.S.C. § 2255 challenging their convictions and sentences. A Section 2255 motion must be filed in the district where the prisoner was convicted and sentenced. The motion usually seeks to have the sentence or conviction vacated and may also request resentencing. As a general matter, Section 2255 is the proper vehicle for almost all federal prisoner collateral attacks.

Prisoners may file post-conviction habeas corpus petitions under 28 U.S.C. § 2241 in two circumstances: 1) where the prisoner does not challenge the validity of his conviction and sentence, but rather its execution (for example, claims that the BOP miscalculated a sentence or failed to properly award good time credits, or complaints about conditions of confinement are properly raised in habeas corpus petitions), and 2) in exceptional cases where the prisoner can show that his remedy under Section 2255 is "inadequate or ineffective" under 28 U.S.C. § 2255 ¶ 5. Section 2241 habeas corpus petitions must be filed in the district where the prisoner is confined, and are litigated by the U.S. Attorneys' Offices in the districts where the petitions are filed.

AUSAs who have questions about handling a Section 2255 motion or Section 2241 habeas corpus petition should consult their office liaison in the Criminal Appellate Section. See also Criminal Resource Manual 741 ("Protocol for the Effective Handling of Collateral Attacks on Convictions Brought Pursuant to 28 U.S.C. 2241").

9-38.000
[RESERVED]

9-39.000
CONTEMPT OF COURT

Contempt of court is an act of disobedience or disrespect towards the judicial branch of the government, or an interference with its orderly process. It is an offense against a court of justice or a person to whom the judicial functions of the sovereignty have been delegated.

For a discussion of the law relating to civil and criminal contempt of court, see the Criminal Resource Manual

General Definition of Contempt	Criminal Resource Manual at 752
Elements of the Offense of Contempt	Criminal Resource Manual at 753
Criminal Versus Civil Contempt	Criminal Resource Manual at 754

Tests for Distinguishing Between Civil and Criminal Contempt

Nature of Relief Sought	Criminal Resource Manual at 755
Mechanical Distinction	Criminal Resource Manual at 756
Purging	Criminal Resource Manual at 757
Criminal and Civil Contempts Elements are Present	Criminal Resource Manual at 758

Indirect Criminal Contempt

Indirect Versus Direct Contempt	Criminal Resource Manual at 759
Institution of the Action	Criminal Resource Manual at 760
Federal Jurisdiction and Venue	Criminal Resource Manual at 761
Notice Under Rule 42(b) of the Rules of Criminal Procedure	Criminal Resource Manual at 762
Probable Cause of a Willful Violation	Criminal Resource Manual at 763
Necessity of a Demand for Compliance With the Decree	Criminal Resource Manual at 764
Use of a Single Petition to Institute Both a Civil and Criminal Contempt Action	Criminal Resource Manual at 765
Role of the Grand Jury	Criminal Resource Manual at 766
Persons Against Whom the Action May Be Commenced	Criminal Resource Manual at 767
Role of the Prosecutor	Criminal Resource Manual at 768

Defenses

Negation of Essential Elements	Criminal Resource Manual at 769
Statute of Limitations	Criminal Resource Manual at 770
Good Faith Reliance Upon the Advice of Counsel	Criminal Resource Manual at 771
Purging	Criminal Resource Manual at 772
Failure to Attempt to Obtain Compliance Prior to Filing	Criminal Resource Manual at 773

Violation of an Invalid Decree	Criminal Resource Manual at 774
Inability Versus Refusal to Comply	Criminal Resource Manual at 775
Consolidation for Trial of Issues in Civil and Criminal Contempt Proceedings	Criminal Resource Manual at 776
Right to Counsel	Criminal Resource Manual at 777
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Burden of Proof in a Criminal Contempt Action	Criminal Resource Manual at 779
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Witness's Refusal to Obey Court Order to Testify at Trial Versus	Criminal Resource Manual at 780
Witness's Refusal to Obey Court Order to Testify Before	
a Grand Jury	
Necessity of Warning of Contemptuous Conduct	Criminal Resource Manual at 781
Summary Punishment at the End of Trial -- Judicial Bias	Criminal Resource Manual at 782
Certification of Judge Under Rule 42(a) of the Federal Rules	Criminal Resource Manual at 783
of Criminal Procedure	
Least Possible Power Rule	Criminal Resource Manual at 784
Jury Trial	Criminal Resource Manual at 785
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Double Jeopardy	Criminal Resource Manual at 787
Sentencing -- Effect of 18 U.S.C. § 401 on the Appropriate	Criminal Resource Manual at 788
Fine or Imprisonment	
Sentencing -- Discretion with Respect to the Appropriate	Criminal Resource Manual at 789
Fine or Imprisonment	
Appeal	Criminal Resource Manual at 790

9-40.000
BANK FRAUDS AND
RELATED OFFENSES -- POLICY

The Criminal Division's Fraud Section has supervisory authority over the bank fraud statutes. Prior approval from the Fraud Section for an indictment under the bank fraud statutes is not required. The Fraud Section has published a manual on the prosecution of financial institution fraud entitled *Financial Institution Fraud Federal Prosecution Manual* (1994) (FIF Manual), which has been distributed to all United States Attorneys' offices.

The Criminal Resource Manual is another source of information on the laws used to prosecute bank fraud

Embezzlement, Abstraction, Purloining or Willful Misapplication -- 18 U.S.C. §§ 656 and 657	Criminal Resource Manual at 801
Applicability of 18 U.S.C. §§ 656 and 657	Criminal Resource Manual at 802
Actions Proscribed	Criminal Resource Manual at 803

Examples of Misapplications

Loans to Uncreditworthy Borrowers and/or Insufficiently Collateralized	Criminal Resource Manual at 805
Nominee Loans	Criminal Resource Manual at 806
Check Kiting	Criminal Resource Manual at 807
Compensating Balances	Criminal Resource Manual at 808

Elements of Misapplication

Loss to the Bank	Criminal Resource Manual at 809
Bank Funds	Criminal Resource Manual at 810
Duplicity and Multiplicity Issues	Criminal Resource Manual at 811
Aiding and Abetting	Criminal Resource Manual at 812
	Criminal Resource Manual at 813

False Statements (18 U.S.C. § 1014)

Elements of Offense of False Statements	Criminal Resource Manual at 814
Check-Kite Cases	Criminal Resource Manual at 815
	Criminal Resource Manual at 816

False Entries (18 U.S.C. §§ 1005 and 1006)

Applicability	Criminal Resource Manual at 817
Bank Holding Companies	Criminal Resource Manual at 818
Actions Proscribed	Criminal Resource Manual at 819
False Entries	Criminal Resource Manual at 820
Book, Report, or Statement	Criminal Resource Manual at 821
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Bank Fraud (18 U.S.C. § 1344)	Criminal Resource Manual at 825
Applicability of 18 U.S.C. § 1344	Criminal Resource Manual at 826
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Elements of Offense of Bank Fraud	Criminal Resource Manual at 828
Bank Bribery (18 U.S.C. §215) Generally	Criminal Resource Manual at 829
Bribe Offerer or Payer, 18 U.S.C. § 215(a)(1)	Criminal Resource Manual at 830
Corrupt Bank Officer, 18 U.S.C. § 215(a)(2)	Criminal Resource Manual at 831
Definitions, 18 U.S.C. § 215(b)	Criminal Resource Manual at 832
Elements of Bank Bribery (18 U.S.C. § 215)	Criminal Resource Manual at 833
Intent of the Parties	Criminal Resource Manual at 834
Penalties for Bank Bribery	Criminal Resource Manual at 835
Prosecutive Considerations in Bank Bribery Cases	Criminal Resource Manual at 836
Mail/Wire Fraud Affecting Financial Institution	Criminal Resource Manual at 837

9-41.000
BANKRUPTCY FRAUD

9-41.001 Resource Materials

9-41.010 Report of Violations of Bankruptcy Fraud

9-41.001 Resource Materials

Bankruptcy Fraud	Criminal Resource Manual at 838
Report of Violations	Criminal Resource Manual at 839
Overview of 18 U.S.C. § 152 Violations	Criminal Resource Manual at 840
Concealment of Property -- 18 U.S.C. § 152(1)	Criminal Resource Manual at 841
Sample Indictment -- Concealing Assets, 18 U.S.C. § 152(1) -- Chapter 7	Criminal Resource Manual at 842
Sample Indictment -- Concealing Assets, 18 U.S.C. § 152(1) -- Chapter 11	Criminal Resource Manual at 843
Sample Indictment -- Money Laundering, 18 U.S.C. § 1956(a)(1)(B)(i)	Criminal Resource Manual at 844
False Oath or Account -- 18 U.S.C. § 152(2)	Criminal Resource Manual at 845
Sample Indictment -- False Statement Under Oath -- 18 U.S.C. § 152(2)	Criminal Resource Manual at 846
Sample Indictment -- False Social Security Number -- 42 U.S.C. § 408(a)(7)(B)	Criminal Resource Manual at 847
False Declarations -- 18 U.S.C. § 152(3)	Criminal Resource Manual at 848
Sample Indictment -- False Statement Under Penalty of Perjury -- 18 U.S.C. § 152(3) -- Omission of Assets on Bankruptcy Petition and Schedules	Criminal Resource Manual at 849
Sample Indictment -- Omission of an Answer as a False Statement Under Penalty of Perjury -- 18 U.S.C. § 152(3)	Criminal Resource Manual at 850
False Claims -- 18 U.S.C. § 152(4)	Criminal Resource Manual at 851
Sample Indictment -- False Claim -- 18 U.S.C. § 152(4)	Criminal Resource Manual at 852
Fraudulent Receipt of Property -- 18 U.S.C. § 152(5)	Criminal Resource Manual at 853
Sample Indictment -- Knowingly Receiving Property of Debtor -- 18 U.S.C. § 152(5)	Criminal Resource Manual at 854
Extortion and Bribery -- 18 U.S.C. § 152(6)	Criminal Resource Manual at 855
Sample Indictment -- Forbearance -- 18 U.S.C. § 152(6)	Criminal Resource Manual at 856
Sample Indictment -- Attorney's Fee--Bankruptcy Fraud --	Criminal Resource Manual at 857

18 U.S.C. § 152(6)	
Fraudulent Transfer or Concealment -- 18 U.S.C. § 152(7)	Criminal Resource Manual at 858
Sample Indictment -- Bust Out -- 18 U.S.C. § 152(7)	Criminal Resource Manual at 859
Sample Indictment -- Fraudulent Transfer in Contemplation of Bankruptcy -- 18 U.S.C. § 152(7)	Criminal Resource Manual at 860
Sample Indictment -- Fraudulent Transfer of Property -- 18 U.S.C. § 152(7)	Criminal Resource Manual at 861
Sample Indictment -- Fraudulent Transfer of Property in Contemplation of Bankruptcy -- 18 U.S.C. § 152(7)	Criminal Resource Manual at 862
Destruction or Alteration of Recorded Information -- 18 U.S.C. § 152(8)	Criminal Resource Manual at 863
Sample Indictment -- Destroying or Mutilating Records of Debtor -- 18 U.S.C. § 152(8)	Criminal Resource Manual at 864
Sample Indictment -- Concealing Records of Debtor -- 18 U.S.C. § 152(8)	Criminal Resource Manual at 865
Sample Indictment -- Falsifying Records of the Debtor -- 18 U.S.C. § 152(8)	Criminal Resource Manual at 866
Withholding of Recorded Information -- 18 U.S.C. § 152(9)	Criminal Resource Manual at 867
Sample Indictment -- Withholding Records of the Debtor -- 18 U.S.C. § 152(9)	Criminal Resource Manual at 868
Statute of Limitations -- 18 U.S.C. § 3284	Criminal Resource Manual at 869
Embezzlement against Estate -- 18 U.S.C. § 153	Criminal Resource Manual at 870
Sample Indictment -- Embezzlement by Trustee or Employee -- 18 U.S.C. §§ 153 and 645	Criminal Resource Manual at 871
Sample Indictment -- Embezzlement by Trustee or Employee -- 18 U.S.C. §§ 153 and 645	Criminal Resource Manual at 872
Adverse Interest and Conduct -- 18 U.S.C. § 154	Criminal Resource Manual at 872
Sample Indictment -- Adverse Interest -- 18 U.S.C. § 155	Criminal Resource Manual at 876
Knowing Disregard of Bankruptcy Laws -- 18 U.S.C. § 156	Criminal Resource Manual at 877
Sample Indictment -- Knowing Violation of Bankruptcy Law or Rule -- 18 U.S.C. § 156	Criminal Resource Manual at 878
Bankruptcy Fraud -- 18 U.S.C. § 157	Criminal Resource Manual at 879
Sample Indictment -- Bankruptcy Fraud -- 18 U.S.C. § 157 -- False Claim to be in Bankruptcy -- 18 U.S.C. § 157	Criminal Resource Manual at 880
Sample Indictment -- Concealing a Scheme or Artifice to Defraud -- 18 U.S.C. § 157	Criminal Resource Manual at 881
Sample Indictment -- Equity Skimming -- 18 U.S.C. § 157	Criminal Resource Manual at 882

9-41.010 Report of Violations of Bankruptcy Fraud

Section 3057(a) of Title 18, United States Code, requires a judge, receiver or trustee having reasonable grounds for believing that any violation of laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, to report all the facts and circumstances to the appropriate United States Attorney. Upon receipt of this report, the United States Attorney determines whether an investigation should be commenced; and upon completion of this investigation, the United States Attorney decides whether criminal action is warranted. A report by a judge, receiver or trustee of possible violations is not a condition precedent to the initiation of an investigation.

When a matter referred to the United States Attorney pursuant to 18 U.S.C. § 3057(a) by a judge, receiver or trustee is declined, 18 U.S.C. § 3057(b) requires that the United States Attorney "report the facts of the case to the Attorney General for his direction." This statutory directive is satisfied by providing the Fraud Section, Criminal Division, with a concise summary of the facts of the case and the reasons for declining it. Concurrence with the decision to decline may be presumed if no disagreement is expressed by the Fraud Section.

The personal opinion of the judge or trustee as to whether a criminal offense has occurred or as to whether criminal proceedings should or should not be commenced is in no way binding on the United States Attorney or determinative of the issues involved. Similarly, the decision of an officer of the Bankruptcy Court not to refer a matter to the United States Attorney should not be determinative in any prosecutive analysis.

9-42.000

FRAUD AGAINST THE GOVERNMENT

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9-42.010 Coordination of Criminal and Civil Fraud Against the Government Cases

9-42.160 False Statements to a Federal Criminal Investigator

9-42.191 Application of Appropriate Statute

9-42.420 Federal Procurement Fraud Unit

9-42.430 Department of Defense Voluntary Disclosure Program

9-42.440 Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act

9-42.451 Plea Bargaining in Medicare-Medicaid Frauds

9-42.500 Referral Procedures -- Relationship and Coordination With the Statutory Inspectors General

9-42.510 Social Security Fraud

9-42.530 Department of Defense Memorandum of Understanding

9-42.100 Introduction

This chapter contains a discussion of the federal statutes that can be used to investigate and prosecute various frauds against the government, including 18 U.S.C. § 1001 (false statements), 18 U.S.C. § 287 (false claims), and 18 U.S.C. § 371 (conspiracy to defraud the government), as well as the Department's working relationship with the agencies that investigate fraud against the government.

Related and supporting material can also be found in the Criminal Resource Manual

Scope of the General Statutes Prohibiting Fraud Against the Government	<u>Criminal Resource Manual at 901</u>
1996 Amendments to 18 U.S.C. § 1001	<u>Criminal Resource Manual at 902</u>
False Statements, Concealment -- 18 U.S.C. § 1001	<u>Criminal Resource Manual at 903</u>
Purpose of Statute	<u>Criminal Resource Manual at 904</u>
Items Not Required to Be Proved	<u>Criminal Resource Manual at 905</u>
Jurisdictional Requirements Satisfied	<u>Criminal Resource Manual at 906</u>

Statements Warranting Prosecution	<u>Criminal Resource Manual at 907</u>
Elements of 18 U.S.C. § 1001	<u>Criminal Resource Manual at 908</u>
False Statement	<u>Criminal Resource Manual at 909</u>
Knowingly and Willfully	<u>Criminal Resource Manual at 910</u>
Materiality	<u>Criminal Resource Manual at 911</u>
Falsity	<u>Criminal Resource Manual at 912</u>
Department or Agency	<u>Criminal Resource Manual at 913</u>
Concealment--Failure to Disclose	<u>Criminal Resource Manual at 914</u>
False Statements as to Future Actions	<u>Criminal Resource Manual at 915</u>
False Statements to a Federal Investigator	<u>Criminal Resource Manual at 916</u>
Corporate Crimes	<u>Criminal Resource Manual at 917</u>
False Statements and Venue	<u>Criminal Resource Manual at 918</u>
Multiplicity, Duplicity, Single Document Policy	<u>Criminal Resource Manual at 919</u>
General Versus Specific Statutes	<u>Criminal Resource Manual at 920</u>
False Claims	<u>Criminal Resource Manual at 921</u>
Elements of 18 U.S.C. § 287	<u>Criminal Resource Manual at 922</u>
18 U.S.C. § 371: Conspiracy to Defraud the United States	<u>Criminal Resource Manual at 923</u>

Defrauding the Government of Money or Property	<u>Criminal Resource Manual at 924</u>
Obstructing or Impairing Legitimate Government Activity	<u>Criminal Resource Manual at 925</u>
Government Instrumentality	<u>Criminal Resource Manual at 926</u>
Anti-Kickback Act of 1986	<u>Criminal Resource Manual at 927</u>
Procurement Integrity Act	<u>Criminal Resource Manual at 928</u>
Obstruction of Federal Audit	<u>Criminal Resource Manual at 929</u>
Major Fraud Against the United States	<u>Criminal Resource Manual at 930</u>
Department of Defense Voluntary Disclosure Program	<u>Criminal Resource Manual at 931</u>
Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act	<u>Criminal Resource Manual at 932</u>
Medicare-Medicaid Frauds	<u>Criminal Resource Manual at 933</u>
Policy Statement of the Department of Justice on Its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States	<u>Criminal Resource Manual at 934</u>
Implementation of the Policy Statement	<u>Criminal Resource Manual at 935</u>
Social Security Violations	<u>Criminal Resource Manual at 936</u>
Department of Agriculture-Food Stamp Violations	<u>Criminal Resource Manual at 937</u>
Department of Defense Memorandum of Understanding	<u>Criminal Resource Manual at 938</u>

9-42.010 Coordination of Criminal and Civil Fraud Against the Government Cases

- A. The United States has both statutory (e.g., the False Claims Act, 31 U.S.C. §§ 3729-3733) and common law rights of action arising from fraud against the government and from the corruption of its officials. Every report of fraud or official corruption should be analyzed for its civil potential before the file is closed. In the first instance, this review should be conducted by an Assistant United States Attorney or Departmental Trial Attorney assigned to the initial referral. Claims of fraud against the government involving more than \$1,000,000 in single damages plus civil penalties also should be referred to the Civil Division's Commercial Litigation Branch.
- B. The Federal Bureau of Investigation has been directed to furnish both the Fraud Section of the Criminal Division and the Commercial Litigation Branch of the Civil Division with copies of all reports in all matters involving fraud against the government, or bribery or conflict of interest involving a public employee. Other federal investigative agencies are required to forward similar reports of investigation to the Branch Director or appropriate United States Attorney.
- C. Cases pursued criminally must also be analyzed for civil potential. This analysis should be conducted at the earliest possible stage. Criminal dispositions by plea bargain should not waive or release the government's civil interests, except in return for adequate consideration, as measured by the Department's standards for civil settlements generally. Proposed civil dispositions involving over \$1,000,000 in single damages plus civil penalties must be referred to the Commercial Litigation Branch for approval. *See* 28 C.F.R. § 0.160, § 0.164, and Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (April 6, 1995), *reprinted in* 28 C.F.R. Pt. 0, Subpart Y, Appendix.
- D. As to cases referred to it, the Commercial Litigation Branch notifies the appropriate United States Attorney and other interested offices within the Department of Justice of potential civil actions that come to the Branch's attention. The Branch coordinates its cases with the appropriate United States Attorney to ensure the pursuit of both civil and criminal redress. Cases are similarly coordinated within the United States Attorneys' offices. This coordination may include the simultaneous initiation of civil and criminal proceedings in cases in which the monetary recovery to the government and the deterrent effect will be enhanced, giving due consideration to the risks to the criminal case and the availability of protective orders and stays.
- E. The attorney from the Commercial Litigation Branch or Assistant United States Attorney assigned to the matter follows the investigation as it develops and, where necessary, requests, in coordination with other interested offices of the Department of Justice, that an investigation be conducted relating to areas such as damages, which are particularly pertinent to civil actions. It is the policy of the Department to coordinate jointly the investigation of criminal and civil actions. Pursuant to this policy, an Attorney General memorandum to the United States Attorneys dated July 16, 1986 states that "where possible, documents should be obtained by methods other than grand jury subpoenas." This Attorney General memorandum encourages the use of Inspector General subpoenas as an alternative to grand jury subpoenas in those cases where an Inspector General has determined that such usage is appropriate.

F. The Branch attorney or AUSA assigned to the matter, should give consideration at the earliest possible date to the initiation of civil action and advise other interested offices in the Department or United States Attorneys' offices of any contemplated civil action. Absent a specific, detailed statement that there is a strong likelihood that institution of a civil action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to institute civil action is governed solely by the standards specified in 38 Op. Att'y Gen. 98 (1934). That is, the suit is instituted unless there is

1. doubt as to collectibility

or

2. doubt as to the facts or law.

G. Provisional relief may be sought in cases in which the investigation warrants the conclusion that dissipation of any substantial amounts of assets is likely, notwithstanding the degree to which the criminal aspects of the matter have been concluded. The Commercial Litigation Branch and/or assigned Assistant United States Attorney should advise other interested offices of the Department or United States Attorneys' offices of any provisional action. Such provisional relief is sought unless there is a clear likelihood that efforts to prevent dissipation of assets would materially prejudice criminal prosecution of specific subjects. Where there is a possible criminal component to the case, the criterion for determining "substantial assets" is set at \$50,000, which is the minimum debt that must exist for the United States to obtain discovery in connection with a request for provisional relief under the Federal Debt Collection Procedures Act, 28 U.S.C. § 3015(b). In cases in which assets of \$50,000 or more may be dissipated, efforts at provisional relief to secure recovery on behalf of a client agency should, if a conflict exists, be resolved within the Department at the appropriate level.

H. The Commercial Litigation Branch and the United States Attorneys' offices are accorded significant latitude in urging client agencies to withhold payment of claims presented by any subject known to have engaged in fraudulent conduct. The Branch will advise the appropriate United States Attorney's Office and other interested offices of the Department when taking such actions. Absent a specific, detailed statement that withholding action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to withhold is governed by the usual Department standards. The government's common law right to withhold payment by setoff has been upheld by the United States Supreme Court. *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947). Withholding is an important tool for effecting civil redress, and in recent years the government has successfully defended a number of cases in which client agencies have employed this self-help remedy. See, e.g., *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975); *Brown v. United States*, 524 F.2d 693 (Cl. Ct. 1975), *as amended*, (1976); *Continental Management, Inc. v. United States*, 527 F.2d 613 (Cl. Ct. 1975). The negotiation of favorable settlements in unliquidated matters also may be enhanced by the bargaining leverage which withholding affords. Client agencies also should be urged to withhold pay and retirement benefits to Federal employees separated because of evidence of wrongdoing. The current regulations regarding the withholding or setoff of backpay are found at 4 C.F.R. § 102.3, 5 C.F.R. §§ 550.805(e)(2), 845.206(b). The current regulations regarding the withholding or

setoff of retirement benefits are found at 4 C.F.R. § 102.4 and 5 C.F.R. §§ 179.213(a)(4), 831.1306, 831.1801, 845.206(a).

- I. The existing delegations of authority to file suit, settle or close civil fraud claims are set forth in 28 C.F.R. § 0.160, § 0.164, and Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (April 6, 1995), *reprinted in* 28 C.F.R. Pt. 0, Subpart Y, Appendix. They provide for redelegation of the authority of the Civil Division's Assistant Attorney General over fraud claims (set out in 28 C.F.R. § 0.45(d)) to the Division's Branch Directors and United States Attorneys in certain circumstances. Under Directive 14-95, the United States Attorneys are authorized to file suit, close a case, or "take any other action necessary to protect the interests of the United States," wherever "the gross amount of the original claim does not exceed" \$1,000,000. Directive No. 14-95, § 1(c). Agencies are also authorized to refer matters directly to United States Attorneys involving "[m]oney claims by the United States, except claims involving penalties and forfeitures, where the gross amount of the original claim does not exceed \$1,000,000." *Id.* § 4(a)(1).

In the following instances, cases within the monetary range normally within the authority of the United States Attorneys shall not be delegated and shall be submitted to the Assistant Attorney General:

1. where a proposed action "will control or adversely influence the disposition of other claims totaling more than" the amount within the United States Attorney's authority, *id.* § 1(e)(1);
2. where "a novel question of law or a question of policy is presented," *id.* § 1(e)(2);
3. where the "agencies involved are opposed to the proposed action," *id.* § 1(e)(3); and
4. where, "for any other reason, the proposed action should * * * receive the personal attention of the Assistant Attorney General, Civil Division," *id.* § 1(e)(2).

The Directive also provides that "[a]ny case involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract, or exploitation of public office" will "normally" not be delegated to United States Attorneys for handling. *Id.* § 4(c)(4).

Similarly, "[a]ny fraud or False Claims Act case where the amount of single damages, plus civil penalties, if any, exceeds \$1,000,000" will "normally" not be delegated to United States Attorneys. *Id.* § 4(c)(5). Nevertheless, upon the recommendation of the Director, Commercial Litigation Branch, "the Assistant Attorney General, Civil Division may delegate to United States Attorneys suit authority involving any claims or suits where the gross amount of the original claim does not exceed \$5,000,000 where the circumstances warrant such delegations." *Id.* § 4(b). Any authority exercised by the United States Attorneys under Directive No. 14-95 may be redelegated to Assistant United States Attorneys who supervise other Assistant United States Attorneys handling civil litigation. *Id.* § 1(d).

Where the matter was originally within their authority, United States Attorneys may accept any offer in compromise where either the gross amount of the original claim or the principal amount of the proposed settlement does not exceed \$1,000,000, *id.* §§ 1(b)(2)(a) & (b). In cases where the gross amount of the original claim is more than \$1 million but less than \$5 million, the United States Attorney may accept any settlement in which "the

difference between the gross amount of the original claim and the proposed settlement does not exceed \$1,000,000." *Id.* § 1(b)(2)(a)(ii).

Inquiries should be directed to: Director, Commercial Litigation Branch, Civil Division, and Chief, Fraud Section, Criminal Division.

J. Each United States Attorney's Office has an Affirmative Civil Enforcement (ACE) coordinator, who should be consulted on issues arising from parallel criminal and civil cases.

9-42.160 False Statements to a Federal Criminal Investigator

It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government. This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to Federal criminal investigators would not fall within the policy. Further, certain false responses to questions propounded for administrative purposes (e.g., statements to border or United States Immigration and Naturalization Service agents during routine inquiries) are also prosecutable, as are untruthful "no's" when the defendant initiated contact with the government in order to obtain a benefit. See the Criminal Resource Manual at 916 for a brief discussion of the case law.

Prior consultation with the Criminal Division is not required before initiating prosecutions for false statements to Federal investigators; however, the Fraud Section is available for consultation on cases involving these principles.

9-42.191 Application of Appropriate Statute

It is the policy of the Department that in those instances in which the United States Attorney (USA) has a choice of statutes, charges normally should be brought pursuant to the more specific statute. In those cases in which special aggravating circumstances exist, the USA retains the discretion to charge a violation of the more serious general statute. *See also* the Criminal Resource Manual at 920 (General versus Specific Statutes).

9-42.420 Federal Procurement Fraud Unit

In August 1982, the Attorney General and the Secretary of Defense established the Defense Procurement Fraud Unit in the Criminal Division's Fraud Section to help concentrate and coordinate the law enforcement resources of the Department in prosecuting significant procurement fraud cases involving the Department of Defense's ("DOD") multi-billion dollar procurement of equipment and services. That unit is now called the Federal Procurement Fraud Unit (Unit), and handles a variety of fraud cases affecting both civilian and defense agency procurements, including product substitution, false testing, cost mischarging, defective pricing, and kickback cases. In addition to conducting major procurement investigations, the Unit provides expertise and guidance on procurement fraud issues to investigative agencies and United States Attorneys' Offices that request their assistance.

9-42.430 Department of Defense Voluntary Disclosure Program

In July 1986, the Department of Defense initiated its Voluntary Disclosure Program which is designed to encourage self-policing and voluntary disclosure by Defense contractors of procurement-related problems. The Fraud Section's Federal Procurement Fraud Unit (Unit) is the contact point in the Department of Justice to oversee voluntary disclosure matters. See the Criminal Resource Manual at 931 for a listing of the Unit's responsibilities and procedures.

9-42.440 Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act

In 1986, Congress amended the False Claims Act, 31 U.S.C. § 3729 *et seq.*, *see generally* False Claims Act Amendments of 1986, Pub.L. 99-562, 100 Stat. 3153 (October 27, 1986), *reprinted in*, 10A USCCAN (December 1986). One of the Congress's objectives in modifying the Act was to encourage the use of qui tam actions in which citizens are authorized to bring, as "private Attorneys General," lawsuits on behalf of the United States alleging frauds upon the government.

When United States Attorneys receive information about a qui tam action, they should promptly forward a copy of the complaint and statement of evidence to the Commercial Litigation Branch of the Civil Division, particularly because relators frequently fail to serve the Attorney General or delay in doing so. The Commercial Litigation Branch will contact the agency involved, the Criminal Division, and, frequently, the Inspector General of the agency, to determine if the allegations are known to them and to obtain an assessment of the material evidence furnished by the relator. The Criminal Division will, in turn, check with appropriate United States Attorneys' offices USAOs and investigative agencies to determine if the allegations relate to a pending criminal investigation. Because of the 60-day deadline, it must be emphasized that a prompt response is required to these inquiries.

See the Criminal Resource Manual at 932 for an additional discussion of this issue.

9-42.451 Plea Bargaining in Medicare-Medicaid Frauds

A potential problem area has been identified regarding the practice of plea bargaining as it relates to administrative sanctions available to the Health Care Financing Administration, United States Department of Health and Human Services (HHS), in Medicare-Medicaid fraud cases.

Specifically, provision 229 of Pub.L. No. 92-603, enacted on October 30, 1972, amended Sections 1862 and 1866(b) of the Social Security Act to enable the Secretary of HHS to deny payment under Title XVIII of the act upon determining that a provider or person has committed fraud or abuse against the Medicare program. Subsequent to such determinations, Section 1903 (i)(2) of the act also prohibits Federal financial participation (FFP) for payments to these providers or persons in the Medicaid program. In addition, the legislation (Pub.L. No. 95-142, Medicare-Medicaid Anti-Fraud and Abuse Amendments) enacted on October 25, 1977, contains a provision (Section 7) that requires the Secretary of HHS to suspend program participation for a physician or individual practitioner convicted of a criminal offense involving the Medicare or Medicaid programs. Suspension from program participation is immediate and applicable to both programs. The Section 7 provision is incorporated in the Code of Federal Regulations at 42 C.F.R. § 405.315-2 for Title XVIII and at 42 C.F.R. § 450.85 for Title XIX.

Since the administrative sanction would generally be effectuated after any criminal

proceedings, plea bargains that include commitments to forego or restrict administrative remedies, which the HHS may elect to pursue under the aforementioned provisions, should be rare and made only after obtaining prior explicit approval from the Criminal Division.

See USAM 9-16.000 et seq. and 9-27.000 et seq. for additional guidance regarding plea agreements.

See the Criminal Resource Manual at 933 for further discussion of the Medicaid/Medicare Programs and statutes that can be used to prosecute fraud against these programs. *See also USAM 9-44.000 et seq.* (Health Care Fraud).

9-42.500 Referral Procedures -- Relationship and Coordination With the Statutory Inspectors General

- A. Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States:** The investigation and prosecution of fraud and corruption in federal programs is a major priority of the Department of Justice. On June 3, 1981, the Deputy Attorney General issued a "Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States." This statement is summarized in the Criminal Resource Manual at 934. The statement was first announced at a meeting of the President's Council on Integrity and Efficiency (Inspectors General group) and was the result of a combined effort of the Criminal Division, the Federal Bureau of Investigation (FBI) and the Executive Office for United States Attorneys.

The policy statement has two principal purposes: an early alert system for prosecutors relative to ongoing investigations and increased emphasis on coordination and cooperation between the FBI and the Inspectors General. Several particular provisions deserve special emphasis. Consistent with an Inspector General's obligation to "report to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of law," the Inspector General is to report to "the United States Attorney in the District where the crime occurred." Simultaneously, the Inspector General is expected to notify the appropriate FBI field office. The FBI is committed to investigating every criminal violation which the prosecutor determines will be prosecuted, if proved.

The timing of the report to the prosecutor is discussed in the policy statement. In an ordinary investigation involving completed events, the policy statement simply tracks the Inspector General legislation and requires a report whenever there are reasonable grounds, i.e., some evidence to believe that a Federal crime has occurred. Immediate reporting is required for crimes of an ongoing nature and organized crime allegations. Such urgent and sensitive matters often require use of sophisticated investigative techniques, and the Inspector General is to make an immediate report upon receipt of the information. The policy statement requires the FBI to advise the appropriate Inspector General when it initiates an investigation and to keep the Inspector General regularly informed of its progress.

B. Implementation of the Policy Statement: Since the Department of Justice issued the June 3, 1981 policy statement, there have been discussions over its meaning, with requests from various Inspectors General and the FBI for further clarification of their respective investigative responsibilities.

The Department is concerned about the allocation of limited investigative resources and the possibility of competitive and, at times, redundant and unproductive relationships among law enforcement agencies. The policy statement addresses these issues and establishes a structure for early reporting of instances of criminality to the prosecutor. As a further refinement, to set out more clearly the Department's expectations regarding the use of the limited investigative resources in both the FBI and the Offices of individual Inspectors General, the policy statement has been supplemented by a February 19, 1982 statement on the implementation of the policy statement (see the Criminal Resource Manual at 935), which allocates investigative responsibility between the Inspectors General and the FBI with respect to four types of crime in which both have an investigative interest:

1. bribery
2. significant allegations of fraud involving federal employees
3. organized crime matters and
4. fraud against the government.

Implementation of the policy statement requires the cooperation and support of the USAs, the FBI, and the Inspectors General. The Fraud Section of the Criminal Division is charged with overseeing the operations of the policy and resolving any uncertainties or differing interpretations which arise in its implementation. Any questions or information should be directed to the Fraud Section.

9-42.510 Social Security Fraud

Pursuant to an agreement reached between the Department of Justice and the Social Security Administration (SSA) in April 1977, the SSA will not refer matters in which one or more of the factors below is present unless additional aggravating circumstances are present:

- A. The suspect is 75 or more years old;
- B. The suspected violation did not result in improper payment. This exception does not apply in criminal misuse cases such as conversion by a representative payee, SSN misuse or improper disclosure;
- C. There is evidence that the suspect has an illness expected to result in his/her death in the near future; or
- D. The suspected violation is solely a failure to disclose an increase in a pension amount.

The SSA has discontinued its procedure of summarizing each case involving one or more of the aforementioned factors and recommending against further action. The SSA will, however, continue to take administrative action directed toward recovering any overpayments in those

cases not warranting criminal prosecution. Matters in which the factors cited above are either not present or not compelling will be referred with an appropriate recommendation.

Each referral with a recommendation for prosecution contains the name and telephone number of the SSA Regional Integrity Specialist familiar with the facts of the case. You are invited to contact that individual for discussion or additional investigation.

For additional discussion of Social Security Numbers and criminal violations involving misuse of Social Security Numbers, see the Criminal Resource Manual at 936.

9-42.530 Department of Defense Memorandum of Understanding

In August 1984, the United States Attorney General and the Secretary of Defense signed a Memorandum of Understanding ("MOU") between the Departments of Justice and Defense relating to the investigation and prosecution of certain crimes. Special attention is directed to the treatment of investigative jurisdiction of corruption, fraud and theft cases. The prosecutor has the responsibility to

1. concur before Department of Defense can initiate any corruption investigation;
2. confer to determine investigative jurisdiction in all fraud and theft matters; and
3. concur before the Department of Defense initiates any administrative investigation or actions during the pendency of any criminal investigation.

The MOU was developed with the expectation that the more complex cases require the joint efforts of the Departments of Defense and Justice. In this regard a repeated theme of the MOU is the prosecutor's responsibility for coordinating and effectuating the various interests of the United States. The Federal Procurement Fraud Unit, Fraud Section, Criminal Division, of the Department of Justice has developed substantial expertise in these investigations and can assist in structuring and conducting the investigations requiring expertise from the FBI and Department of Defense. Questions concerning the MOU should be directed to the Justice Department's Fraud Section, Criminal Division.

See the Criminal Resource Manual at 938 for the text of the MOU.

9-43.000
MAIL FRAUD AND
WIRE FRAUD

9-43.100 Prosecution Policy Relating to Mail Fraud and Wire Fraud
9-43.300 Statement of Policy concerning Venue in Mail Fraud Prosecutions

9-43.100 Prosecution Policy Relating to Mail Fraud and Wire Fraud

Prosecutions of fraud ordinarily should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts. Serious consideration, however, should be given to the prosecution of any scheme which in its nature is directed to defrauding a class of persons, or the general public, with a substantial pattern of conduct.

See also USAM 9-85.210 (requires prior consultation with the Public Integrity Section to use the mail or wire fraud statutes in the prosecution of election fraud cases).

Further guidance and legal analysis of issues surrounding the investigation and prosecution of frauds involving use of the mail or wire, in violation of Title 18, United States Code, Sections 1341 and 1343 can be found in the Criminal Resource Manual

Investigative Authority	Criminal Resource Manual at 939
18 U.S.C. Section 1341 -- Elements of Mail Fraud	Criminal Resource Manual at 940
18 U.S.C. 1343 -- Elements of Wire Fraud	Criminal Resource Manual at 941
The Scheme and Artifice to Defraud	Criminal Resource Manual at 942
No Loss or Gullible Victims	Criminal Resource Manual at 943
Proof of Scheme and Artifice to Defraud	Criminal Resource Manual at 944
McNally and Intangible Rights	Criminal Resource Manual at 945
Tangible Versus Intangible Property Rights	Criminal Resource Manual at 946
Fiduciary Duty	Criminal Resource Manual at 947
Intent to Defraud	Criminal Resource Manual at 948
Proof of Fraudulent Intent	Criminal Resource Manual at 949
Use of Mailings and Wires in Furtherance of the Execution of the Scheme	Criminal Resource Manual at 950
Proof of Mailings and Transmissions	Criminal Resource Manual at 951
Use of Private or Commercial Interstate Carriers	Criminal Resource Manual at 952
Use of a Wire Communication in Interstate or Foreign Commerce	Criminal Resource Manual at 953
Lulling Letters, Telegrams and Telephone Calls	Criminal Resource Manual at 954
Expanding Uses of the Mail and Wire	Criminal Resource Manual at 955
Fraud Statutes in Prosecutions	
RICO Prosecutions -- 18 U.S.C. §§ 1961-68	Criminal Resource Manual at 956
Money Laundering -- 18 U.S.C. §§ 1956 & 1957	Criminal Resource Manual at 957
Fraud Affecting a Financial Institution	Criminal Resource Manual at 958

Ten-year Statute of Limitations	Criminal Resource Manual at 959
More Severe Sanctions, Including Forfeiture	Criminal Resource Manual at 960
Civil Actions for Mail and Wire Frauds and Use of Grand Jury Information	Criminal Resource Manual at 961
Criminal Penalties for Disclosure of Grand Jury Subpoenas	Criminal Resource Manual at 962
Telemarketing Fraud	Criminal Resource Manual at 963
Credit Card Frauds	Criminal Resource Manual at 964
Conspiracy to Violate the Mail Fraud or Wire Fraud Statutes	Criminal Resource Manual at 965
Venue in Mail Fraud	Criminal Resource Manual at 966
Venue in Wire Fraud	Criminal Resource Manual at 967
Defenses -- Statute of Limitations	Criminal Resource Manual at 968
Defenses -- Good Faith	Criminal Resource Manual at 969
Drafting a Mail Fraud and/or Wire Fraud Indictment	Criminal Resource Manual at 970
Sufficiency of Indictment -- Generally	Criminal Resource Manual at 971
Sufficiency of Indictment -- Victims and Loss	Criminal Resource Manual at 972
Sufficiency of Indictment -- Mailings or Transmissions in Furtherance of Scheme	Criminal Resource Manual at 973
Sufficiency of Indictment -- Separate Offenses	Criminal Resource Manual at 974
Sufficiency of the Indictment -- Special Considerations	Criminal Resource Manual at 975

9-43.300 Statement of Policy concerning Venue in Mail Fraud Prosecutions

Department of Justice policy opposes mail fraud venue based solely on the mail matter passing through a jurisdiction. *See* the Criminal Resource Manual at 966 (mail fraud venue) and 967 (wire fraud venue).

9-44.000
HEALTH CARE FRAUD

9-44.100 Health Care Fraud -- Generally

9-44.150 Fraud and Abuse Control Program and Joint Guidelines Mandated by the Health Insurance Portability and Accountability Act of 1996

9-44.160 Guidelines for Multidistrict Health Care Fraud Initiatives

9-44.200 Overview of Authorized Investigative Demands -- Authority

9-44.201 Overview of Authorized Investigative Demands -- Delegation

9-44.202 Overview of Authorized Investigative Demands -- Limitations

9-44.203 Factors to Consider Prior to Issuance of Authorized Investigative Demands

9-44.204 Authorized Investigative Demands: Record Keeping Procedures

9-44.100 Health Care Fraud -- Generally

Health care fraud is a growing problem across the United States. In response to this growing problem, in 1993, the Attorney General made health care fraud one of the Department's top priorities. Through increased resources, focused investigative strategies and better coordination among law enforcement, the Department continues to upgrade its efforts in combatting the full array of fraud perpetrated by health care providers.

Health care fraud can be prosecuted both civilly and criminally under a variety of statutes and regulations that are discussed in several different chapters of the United States Attorneys' Manual including 9-42.000 (Fraud Against the Government), 9-43.000 (Mail and Wire Fraud), and 9-46.000 (Program Fraud and Bribery).

See the Criminal Resource Manual at 976 for additional background on the problem of health care fraud.

9-44.150 Fraud and Abuse Control Program and Joint Guidelines Mandated by the Health Insurance Portability and Accountability Act of 1996

The Health Insurance Portability and Accountability Act, signed by the President on August 21, 1996, established and funds a Health Care Fraud and Abuse Program to combat fraud and abuse committed against all health plans, both public and private. See the Criminal Resource Manual at 978 for the text of the Program.

In addition, joint Guidelines issued by the Attorney General and the Secretary of the Department of Health and Human Services to carry out the Fraud and Abuse Program stress the importance of communication and shared information between private and public plans and the federal, state and local governments. The Guidelines also note the importance of parallel or joint proceedings to help maximize the government's recovery while minimizing duplication of effort. See the Criminal Resource Manual at 978 for the text of the guidelines.

9-44.160 Guidelines for Multidistrict Health Care Fraud Initiatives

The following guidelines for multidistrict health care fraud initiatives were issued by the Attorney General on April 2, 1997:

I. COORDINATION OF ACTIVITIES.

The United States Attorneys' Offices, the Criminal Division and the Civil Division should work as partners to ensure a vigorous national health care fraud enforcement program. As the Health Care Fraud and Abuse Guidelines promulgated by the Attorney General and the Secretary of the Department of Health and Human Services recognized, consistent with the Department's regulations, the United States Attorneys' Offices remain the focal point for the coordination of criminal and civil health care fraud sanctions within a district. See the Criminal Resource Manual at 978 (Health Care Fraud and Abuse Guidelines).

The purpose of this memorandum is to provide guidance to the United States Attorneys, the Criminal Division, and the Civil Division, in carrying out their responsibilities in the investigation and prosecution of multidistrict health care fraud matters in a manner that

1. encourages initiative on the part of individual United States Attorneys and draws upon their litigation expertise and knowledge of the local community; and
2. utilizes the expertise and institutional and program knowledge of the Criminal and Civil Divisions, in particular the Fraud Section and Asset Forfeiture and Money Laundering Section of the Criminal Division, and the Commercial Litigation Branch of the Civil Division.

Cooperation and communication among components will enhance health care fraud enforcement. Before the Civil Division or Criminal Division acts on any health care fraud matter within a particular district, or a United States Attorney's Office acts on a health care fraud matter in a district other than its own, it shall advise in advance the health care fraud coordinator in the United States Attorney's Office of that district. Similarly, United States Attorneys' Offices shall advise the Criminal Division's Fraud Section and the Civil Division's Commercial Litigation Branch of matters which appear likely to result in inquiries to the Criminal or Civil Divisions.

II. IDENTIFYING MULTIPLE INVESTIGATIONS.

Each investigative agency will be responsible for ascertaining whether a subject of an investigation is already under investigation by any other agency and/or in multiple jurisdictions. Investigative and prosecutive agencies must be alert to and appropriately communicate fraud schemes and health care enforcement policy issues that potentially require a nationwide strategy.

III. INVESTIGATIONS IN MULTIPLE DISTRICTS.

When a federal or state investigative agency, a United States Attorney's Office or