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FOR CHAPTER 71

9-71.000 COPYRIGHT LAW: INTRODUCTION

The responsibility of the federal government to provide some measure of protection to intellectual property has been recognized since the earliest days of the Republic. Art. I, § 8, cl. 8 of the United States Constitution conferred on Congress the power, ''[t]o Promote the Progress of Science and Useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.'' Beginning with the Act of May 31, 1790, c. 15, 1 Stat. 124, Congress has exercised this power to provide federal copyright protection to an increasingly broad range of intellectual properties. *See Goldstein* v. *California*, 412 U.S. 546, 562-63, n. 17 (1973). These copyright laws are now codified in Title 17 of the United States Code.

The criminal sanctions imposed by Title 17 are an important part of this statutory scheme. In the past several years these criminal sanctions have been revised significantly and the penalties for criminal infringement of certain copyrights have been increased dramatically. *See* 17 U.S.C. § 506; 18 U.S.C. § 2319. Copyright infringement involving sound recordings and audiovisual works may now constitute a felony under federal law, depending on the number of infringing copies made or distributed in a 180-day period. *See* 18 U.S.C. § 2319.

The purpose of this chapter of the Manual is to outline the laws directed against this illegal trade in order to assist U.S. Attorneys in vigorously and effectively enforcing those laws. Criminal copyright infringement, its elements and its proof, is discussed at USAM 9-71.210 to 9-71.214, *infra*. Also discussed are statutes prohibiting false statements on copyright notices, *see* 17 U.S.C. § 506(c) and (d) discussed at USAM 9-71.220, *infra*; false statements on copyright applications, *see* 17 U.S.C. § 506(e) discussed at USAM 9-71.230, *infra*; criminal violations of jukebox licenses, *see* 17 U.S.C. § 116(d) discussed at USAM 9-71.240, *infra*; trafficking in counterfeit labels, *see* 18 U.S.C. § 2318 discussed at USAM 9-71.250, *infra*; and other offenses, *see* USAM 9-71.260 and 9-71.270, *infra*.

9-71.010 Prosecutive Policy

In determining whether to proceed with a criminal copyright prosecution, the U.S. Attorney should bear in mind two important considerations. First, federal law now preempts much of the copyright field. *See* 17 U.S.C. § 301. This federal preemption largely eliminates the state courts as a forum for copyright prosecutions. Thus, a decision by the U.S. Attorney to decline prosecution in a copyright matter generally forecloses all avenues of criminal prosecution. This consideration suggests that all criminal copyright matters should receive careful attention by the U.S. Attorney.

Second, the criminal penalties of 17 U.S.C. § 506(a) for willful infringements undertaken for purposes of commercial advantage or private

financial gain, form an important part of the copyright enforcement scheme. An increased need for deterrence in this area is reflected in the 1982 enactment of *felony* penalties for piracy and counterfeiting of sound recordings and audiovisual works. *See* 18 U.S.C. § 2319. Consequently, all meritorious cases which fall within the parameters of these felony statutes should receive serious consideration.

Once the elements of the offense are technically met, the U.S. Attorney should consider the following factors in determining whether to pursue a criminal copyright prosecution.

A. *The seriousness of the offense*. Felony penalties for first offenses begin at seven copies for audiovisual works, and one hundred copies for sound recordings. In this context, prosecution of felony offenses of comparatively moderate scale may have substantial deterrent impact. It should also be kept in mind that lesser volumes of counterfeiting or pirating activity may suitably lend themselves to the plea bargaining process in particular cases since 18 U.S.C. § 2319(b)(3) provides misdemeanor penalties upon conviction for the first offense. A misdemeanor plea also serves a deterrent function because of the prospect of felony charges for a future offense. Prosecutions focused on the most serious offenders should, of course, be given top priority. Thus, appropriate factors should include the nature and volume of the infringing activity or a prior history of similar conduct by the suspect. Individuals who have continued to infringe for financial gain after civil remedies have been successfully invoked should receive particular attention.

B. *The likelihood of successful prosecution*. An unsuccessful prosecution could be counterproductive not only in terms of allocation of resources, but also with respect to deterrence. The presence of legal or evidentiary problems should be carefully evaluated particularly with regard to criminal intent. A suspect who is making the counterfeit or pirated works himself/herself may be a promising suspect since the possession and use of elaborate duplicating equipment, blank cassettes or labels, in order to manufacture illegal copies for sale, may be good evidence of criminal intent. As to others in the chain of distribution, a greater degree of proof of criminal intent is usually necessary to preclude the successful assertion of defenses, such as lack of scienter.

If assistance or legal advice is needed, or if resource limitations do not permit the handling of a particular case which otherwise merits prosecutive attention, please contact the General Litigation and Legal Advice Section.

9-71.020 Assignment of Responsibilities

Supervisory responsibility for prosecutions brought under 17 U.S.C. §§ 116 and 506 and 18 U.S.C. § 2318 rests with the General Litigation and

Legal Advice Section of the Criminal Division. Investigative responsibility for complaints arising under these sections rests with the Federal Bureau of Investigation. Importation of infringing articles may also be investigated by the United States Customs Service.

Prior authorization of the Criminal Division is not required for instituting prosecutions under Title 17 of the United States Code. However, because such prosecutions frequently involve technical and complex applications of the copyright laws, U.S. Attorneys are encouraged to consult the General Litigation and Legal Advice Section for assistance. Such consultation is particularly important in cases which are likely to go to trial.

9-71.030 Preemption of State Law

Historically, copyright protection in the United States has been provided through a dual system. The federal government, by statute, provided limited monopolies for intellectual property. In addition, state statutory and common laws established roughly equivalent protection for a range of intellectual properties.

The 1976 copyright law accomplished a fundamental and significant change in this system by substituting a single federal statutory copyright for the dual copyrights which previously existed. Thus, federal law now preempts the field of copyrights.

The federal preemption provision can be found at 17 U.S.C. § 301(a). This section, in broad terms, provides that federal statutory copyrights preempt all equivalent statutory and common law protection provided to intellectual property by state law. Moreover, ''[a]s long as a work fits within one of the general subject matter categories [of federal statutory copyrights], the bill prevents the states from protecting it even if it fails to achieve federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain.'' H.R.Rep. No. 1476, 94th Cong., 2d Sess. 1, 131, *reprinted in* (1976) U.S.Code Cong. & Ad.News 5659, 5745.

These preemption provisions have obvious implications for federal prosecutors. With federal preemption of this area, prosecutors must now recognize that individuals harmed by copyright violations do not have recourse to state criminal laws. In most instances, criminal prosecution of copyright offenders is possible only within the federal system. U.S. Attorneys should keep this factor in mind when considering whether to decline prosecution in a copyright case.

9-71.040 Applicability of Civil Copyright Law

Substantively, the criminal law of copyright is often defined by reference to aspects of the civil law of copyright. For criminal copyright

infringement to exist, there must first be civil copyright infringement. *See* 18 U.S.C. § 506(a); 3 *Nimmer on Copyright* § 15.01 *et seq.* (1983). Moreover, the provisions of Title 17 relating to the rights secured by copyright, notice and registration requirements, as well as judicial construction and analysis of infringing conduct, are all directly applicable to criminal cases. Thus, some understanding of the substantive law of copyright is necessary to the effective enforcement of the criminal provisions of Title 17. In this respect, U.S. Attorneys' offices prosecuting copyright cases will find *Nimmer on Copyright*, a four-volume treatise published by Mathew Bender & Co., Inc., a useful guide to the intricacies of copyright law. Prosecutors are also encouraged to contact the General Litigation and Legal Advice Section if they have any substantive questions concerning copyright law.

9-71.200 PROTECTION OF INTELLECTUAL PROPERTY—THE CRIMINAL LAW

As previously noted, in the past decade the criminal law has assumed far greater significance in the protection of intellectual property. This development can be attributed to several factors. In part, it is a consequence of the burgeoning trade in counterfeit records, tapes and films. In addition, this development is a direct result of the increased attention which this problem has received from Congress and federal law enforcement officials.

The criminal law in this area now both complements and supplements the existing civil remedies for copyright infringement. It complements these remedies by providing criminal penalties for certain acts of copyright infringement. *See* 17 U.S.C. § 506(a). In addition, the criminal law supplements private civil remedies by prohibiting conduct which, although not civilly actionable, undermines the integrity of the copyright system. *See* 17 U.S.C. § 506(c) to (e). The following sections outline the major criminal statutes employed to protect intellectual property.

9-71.210 Criminal Copyright Infringement: 17 U.S.C. § 506(a)

Section 506(a) of Title 17 is the principal criminal statute protecting copyrighted works. 17 U.S.C. § 506(a) supplements the panoply of civil remedies provided to copyright owners under federal law, *see* 17 U.S.C. §§ 502 to 505, and imposes criminal sanctions on certain types of infringing conduct.

Section 506(a) of Title 17 also carries the most severe sanctions of any Title 17 offense. Under the sentencing provision of 17 U.S.C. § 506(a), persons convicted of large-scale infringement involving sound recordings or audiovisual works are subject to a maximum penalty of five years imprisonment, a $250,000 fine, or both. *See* 18 U.S.C. § 2319. These penalties make 17 U.S.C. § 506(a) the single most effective criminal deterrent against unlawful appropriation of intellectual property.

Section 506(a) of Title 17 prohibits any person from infringing ''a copyright willfully and for purposes of commercial advantage or private financial gain . . . .'' By tying criminal liability to infringement of a copyright, 17 U.S.C. § 506(a) implicitly incorporates certain aspects of the civil law of copyright infringement into the criminal law. Thus, in order for conduct to violate 17 U.S.C. § 506(a), it must first constitute infringement in the civil sense. Consequently, concepts such as fair use and first sale, which define civil copyright infringement, may be applicable to 17 U.S.C. § 506(a).

Certain civil copyright infringements are excluded, however, from the criminal sanctions of 17 U.S.C. § 506(a). For example, under civil copyright law innocent intent is no defense. In contrast, 17 U.S.C. § 506(a) proscribes only willful infringement. Similarly, under the civil law non-profit public performances may constitute acts of infringement. Yet 17 U.S.C. § 506(a) only prohibits infringement done ''for purposes of commercial advantage or private financial gain.'' Thus it is clear that while 17 U.S.C. § 506(a) is defined in large measure by civil copyright law, the criminal sanctions of that section do not reach all civilly infringing conduct. *See* 3 *Nimmer on Copyright* § 15.01.

Criminal copyright infringement requires proof of the following elements:

A. Infringement of a valid copyright;

B. Done willfully;

C. For purposes of commercial advantage or financial gain.

In addition, several cases suggest that in prosecutions under this section the United States must also prove that the work has not been the subject of a first sale, and that the defendant knew that there has been no first sale of the work. *See United States v. Atherton*, 561 F.2d 747, 749 (9th Cir.1977); *see, e.g., United States v. Drebin*, 557 F.2d 1316, 1326 (9th Cir.), *cert. denied*, 436 U.S. 904 (1978); 3 *Nimmer on Copyright*, § 15.01. However, for the reasons discussed at USAM 9-71.212, *infra*, these cases may err when they require proof of the absence of a first sale in all criminal copyright prosecutions.

The elements of criminal copyright infringement, and their proof, are described below.

9 71.211 Infringement of a Copyright

The threshold requirement for criminal copyright infringement is, of course, infringement of a valid copyright. There are several aspects to this requirement. At the outset, it means that the formal requisites of copyright registration must be satisfied. Such registration is a prereq-

uisite to any infringement action, civil or criminal. *See* 17 U.S.C. § 411. Registration of a copyright can be proven simply by obtaining from the Register of Copyrights a certificate of registration. By statute, such a certificate ''constitute[s] prima facie evidence of the validity of the copyright . . . .'' 17 U.S.C. § 410(c). *See United States v. Taxe*, 540 F.2d 961, 966 (9th Cir.), *cert. denied*, 429 U.S. 1040 (1976) (criminal case, certificate provided prima facie proof of date of fixation).

In addition, the concept of infringement implicates a host of statutory exceptions to the exclusive rights created by copyright. Infringement is not explicitly defined in Title 17. Section 501(a) of Title 17, United States Code, however, provides that: ''[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118, or who imports copies or phonorecords into the United States in violation of [17 U.S.C. § 602] is an infringer of the copyright.'' Thus, the concept of infringement is defined by reference to the exclusive rights established by 17 U.S.C. § 106. It follows that the limitations on these exclusive rights set forth in 17 U.S.C. §§ 107-118 also act as substantive limits on infringement actions, both civil and criminal.

For the most part, these statutory limitations on the exclusive rights conferred by copyright do not create problems of proof in criminal cases. Many of these limitations involve conduct which is already specifically exempted from criminal liability by 17 U.S.C. § 506(a). For example, 17 U.S.C. §§ 110 and 118, which deal with non-profit performances and displays of a copyrighted work, do not affect criminal prosecutions, since such prosecutions are limited to acts of infringement undertaken ''for purposes of commercial advantage or private financial gain.'' *See* 17 U.S.C. § 506(a). Other limitations while theoretically applicable in criminal cases, have little practical impact on the government's burden of proof. For example, the ''fair use'' doctrine, *see* 17 U.S.C. § 107, limits the exclusive rights of a copyright owner. Serious questions of fair use may arise in the context of civil copyright infringement cases. However, as a practical matter, the fair use doctrine should not impose any additional burden on the government in a criminal infringement action. The government is already required by 17 U.S.C. § 506(a) to demonstrate willful infringement conducted for purposes of private gain as part of a criminal prosecution. Proof of these elements would necessarily negate any claim by a defendant that his/her actions were a non-infringing fair use.

In practice, only one of these limitations on statutory copyrights may create problems for criminal law enforcement. That limitation is the first sale doctrine, codified in 17 U.S.C. § 109. That doctrine, and its impact on criminal copyright infringement prosecutions, are discussed below.

9-71.212 First Sale Doctrine in Criminal Cases

The first sale doctrine limits the exclusive rights of a copyright holder. Generally, this doctrine permits the owner of a copy of a copy-

righted work to sell, display or dispose of that copy, notwithstanding the interests of the copyright holder. *See* 17 U.S.C. § 109(a) and (b).

The first sale doctrine has become a part of the criminal law of copyright. Several cases have suggested that proof of the absence of a first sale is part of the government's case-in-chief in criminal copyright prosecutions. *See, e.g., United States v. Moore*, 604 F.2d 1228 (9th Cir.1979); *United States v. Whetzel*, 589 F.2d 707 (D.C.Cir.1978); *United States v. Atherton*, 561 F.2d 747 (9th Cir.1977); *United States v. Drebin*, 557 F.2d 1316 (9th Cir.1977). In fact, at least one case has reversed a conviction in part because of inadequacies in the government's proof on this issue. *See United States v. Atherton, supra*.

We believe that these cases err when they imply that the first sale doctrine is necessarily involved in all criminal copyright prosecutions. It is important to recognize at the outset that 17 U.S.C. § 109 confers limited rights with respect to copyrighted works, and that these rights exist only for a limited class of people.

Only the owner of an authorized copy of a copyrighted work may assert any rights by virtue of the first sale doctrine. Therefore, persons who obtain possession of a copy of a work without receiving title to it are unable to assert this defense. Similarly, the first sale doctrine permits the owner of a copy of a copyrighted work only to sell, display, or dispose of *that copy*. It does not permit him/her to reproduce that copy and dispose of those reproductions. Accordingly, individuals whose infringing conduct consists of reproducing unauthorized copies of a copyrighted work should not be able to assert the first sale doctrine as a defense. Thus, in many instances the concept of first sale is simply inapplicable.

In cases where the first sale doctrine does apply and the burden of proof lies with the government, demonstrating the absence of a first sale can present serious problems of proof. Some defendants have argued that the government must completely account for the distribution of all copies of a work in order to carry its burden on this question. In effect this would require the government to trace the distribution of every copy of a copyrighted work.

This argument has been rejected by the courts which have considered it. *See United States v. Moore, supra*, at 1232; *United States v. Whetzel, supra*, at 711. These cases recognize that the wide distribution of many artistic works makes such a requirement impractical. ''Therefore the Government can prove the absence of a first sale by showing that the [copy] in question was unauthorized, and it can establish this proof not only by evidence tracing the distribution of that [copy] but also by circumstantial evidence from which a jury could conclude beyond a reasonable doubt that the recording was never authorized and therefore never the subject of a first sale.'' *See United States v. Moore, supra*, at 1232.

Several types of circumstantial proof have been relied upon to demonstrate the absence of a first sale. For example, a number of cases have suggested that, when a defendant's actions indicate that copies have been obtained illegitimately, a jury may infer that no valid first sale has occurred. *See United States v. Moore*, *supra*; *United States v. Whetzel*, *supra*. Factors which indicate that copies were obtained illicitly include: sale of copies at a price far below legitimate market value; distribution of copies of inferior quality; presence of false information on the copies, such as a false address for the manufacturer; and the circumstances surrounding the sale of the copies. *See United States v. Whetzel*, *supra*, (sale of copies of tapes at night from the back of a truck in a parking lot).

In other instances the nature of the distribution system employed by the copyright holder may negate the possibility of a first sale. This is particularly true of copyright cases involving the film industry. In a number of cases the absence of a first sale has been established by showing that the works in question were distributed exclusively through loans and leases. Since the first sale defense is premised on a sale and the transfer of title, evidence that the copyright holder sold no copies of the work effectively negates this claim. *Compare*, *United States v. Drebin*, 557 F.2d 1316 (9th Cir.), *cert. denied*, 436 U.S. 904 (1978), *with United States v. Atherton*, *supra*.

9-71.213 Intent

Section 506(a) of Title 17 requires proof of a specific state of mind as part of any criminal infringement prosecution. At the outset the act of infringement must be willful, that is, it must be "an act intentionally done in violation of the law." *See United States v. Wise*, 550 F.2d 1180, 1194 (9th Cir.), *cert. denied*, 434 U.S. 929 (1977). Willful conduct may also include intentional or voluntary acts done with a bad purpose or without justifiable excuse. *See United States v. Murdock*, 290 U.S. 389, 394 (1933).

In addition, as noted earlier, some cases suggest that the government must also demonstrate that the defendant knew the work had not been the subject of a first sale. *See, e.g. United States v. Moore*, 604 F.2d 1228 (9th Cir.1979); *United States v. Atherton*, 561 F.2d 747 (9th Cir.1977); *United States v. Wise*, *supra*. For the reasons discussed in USAM 9-71.212, *supra*, it is questionable whether knowledge regarding absence of a first sale is appropriately part of the government's case-in-chief. Moreover, proof of a willful violation of the copyright laws would necessarily imply that a defendant did not believe that the work had been subject to a first sale. However, to the extent that knowledge regarding first sale is deemed part of the government's proof this knowledge can be proven directly by admissions from the defendant, *see United States v. Wise*, *supra*, at 1194-95, or it can be inferred from circumstantial evidence, *see United*

States v. Moore, *supra*, at 1232; *United States v. Whetzel*, 589 F.2d 707, 711-12 (D.C.Cir.1978) (sale of tapes at night in parking lot; tapes valued at far below market price; tapes falsely labeled).

Finally, the government must show that the defendant engaged in this willful act of infringement ''for purposes of commercial advantage or private financial gain.'' *See* 17 U.S.C. § 506(a). For purposes of 17 U.S.C. § 506(a), it is irrelevant whether any profit was, in fact, realized. *See United States v. Taxe*, 380 F.Supp. 1010, 1018 (C.D.Cal.1974), *aff'd*, 540 F.2d 961 (9th Cir.1976). All that is required is that the defendant engage in the infringing conduct with the hope or expectation of profit. *E.g.*, *United States v. Moore*, *supra*, at 1235; *United States v. Wise*, *supra*, at 1195.

9-71.214 Criminal Copyright Infringement Penalties

A. One important feature of the new federal criminal copyright laws consists of the penalties imposed for criminal infringement. These penalties, which can be found at 18 U.S.C. § 2319, have been increased significantly. Moreover, special graduated penalties are now provided for copyright infringement of motion pictures, audiovisual works, phonorecords and sound recordings. *See* 18 U.S.C. § 2319(b)(1) and (2).

The maximum penalty for criminal copyright infringement is generally set at one year imprisonment, a $25,000 fine, or both. *See* 18 U.S.C. § 2319(b)(3). Congress recognized, however, that this penalty provided an inadequate deterrent to those engaged in the highly lucrative business of record and tape piracy. Accordingly, Congress provided specific enhanced penalties for copyright infringement involving sound recordings, phonorecords, motion pictures and audiovisual works.

These penalties are directly tied to the number of infringing copies produced or distributed by the defendant over a 180-day period. Under this sentencing scheme, as the number of infringing copies increases so too does the maximum sentence. 18 U.S.C. § 2319 also provides enhanced penalties for recidivists, reserving the most severe sanctions for those who have previously been convicted of copyright infringement.

B. Under 18 U.S.C. § 2319, these enhanced penalties are graduated. 18 U.S.C. § 2319 establishes a two-tier sentencing scheme. A maximum sentence of two years imprisonment, a $250,000 fine, or both, may be imposed for criminal infringement of copyrights involving sound recordings or audiovisual works when:

1. The infringement involves the reproduction or distribution of more than 100 but less than 1,000 copies of one or more sound recordings in any 180-day period, *see* 18 U.S.C. § 2319(b)(2)(A); or

2. The infringement involves the reproduction or distribution of more than 7 but less that 65 copies of one or more audiovisual works in a 180-day period, *see* 18 U.S.C. § 2319(b)(2)(B).

C. The most severe penalty, 5 years imprisonment, a $250,000 fine, or both, is reserved for the following three situations:

1. Infringements involving the reproduction or distribution of at least 1,000 copies of one or more sound recordings in any 180-day period, *see* 18 U.S.C. § 2319(b)(1)(A);

2. Infringements involving the reproduction or distribution of at least 65 copies of an audiovisual work in any 180-day period, *see* 18 U.S.C. § 2319(b)(1)(B); or

3. Infringement by a defendant who has previously been convicted of copyright infringement, where the prior conviction related to sound recordings or audiovisual works, *see* 18 U.S.C. § 2319(b)(1)(C).

D. The way in which these sentencing provisions are structured has an impact upon the plea negotiation process. 18 U.S.C. § 2319 affects the plea process in two ways. First, it requires that any infringement plea involving these enhanced penalties specify the number of infringing copies made by the defendant. By specifying the extent of the infringing conduct in the plea colloquy, the prosecutor sets a ceiling on the maximum sentence and establishes a factual record to support that sentence.

E. In addition, by tying these enhanced penalties to prior infringement convictions, 18 U.S.C. § 2319 introduces a new tactical consideration into plea bargaining. In cases involving both corporate and individual defendants, prosecutors will want to insure that guilty pleas are entered by the individual defendants. Such pleas could then be used in subsequent prosecutions to enhance the penalties faced by those individuals.

9-71.220 Protection of Copyright Notices: 17 U.S.C. § 506(c) and (d)

A. One of the formal requisites of a statutory copyright is that all copies of the work bear a prescribed form of notice. *See* 17 U.S.C. §§ 401 and 402. 17 U.S.C. § 506(c) and (d) are criminal statutes which are designed to protect the integrity of these copyright notices. 17 U.S.C. § 506(c) prohibits three distinct acts. These are:

1. Placing a notice of copyright, or words of the same purport, which one knows to be false on an article;

2. Publicly distributing an article which bears such notice or words; and

3. Importing for public distribution an article bearing such notice or words.

Any of these three acts, performed ''with fraudulent intent'', violates the law.

B. Subsection (d) of 17 U.S.C. § 506, in turn, prohibits the removal or alteration of valid copyright notices from an article by any person acting with fraudulent intent.

9-71.230 False Representations: 17 U.S.C. § 506(e)

As part of the copyright process, individuals wishing to obtain statutory protection for a work must file an application for copyright registration with the Register of Copyright. These applications must identify the copyright claimant; explain how the claimant obtained the work; and identify and describe the work. *See* 17 U.S.C. § 409(1)-(11). On the basis of these representations, the Copyright Office determines whether to issue a copyright to the applicant. *See* 17 U.S.C. § 410.

Title 17 U.S.C. § 506(e) is designed to ensure the accuracy of these copyright applications. This section forbids any ''false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application . . . .''

Section 506(e) of Title 17 calls for proof of the following four elements as part of a criminal prosecution:

A. A false representation;

B. Of a material fact;

C. Knowingly make; and

D. In a copyright application or any written statement filed in connection with an application.

9-71.240 Criminal Violations of Licensing Provisions: 17 U.S.C. § 116(d)

A similar set of prohibitions, although of more narrow application, can be found in 17 U.S.C. § 116(d). 17 U.S.C. § 116 provides for compulsory licensing of jukebox operators and the payment of statutorily prescribed royalties for the public performance of phonorecords by jukebox. *See* 17 U.S.C. § 116(b). Operators must apply for a certificate for the jukebox and place that certificate on the jukebox as part of this licensing procedure. 17 U.S.C. § 116(d) makes it a crime for any person to:

A. Knowingly make a false statement on an application for a jukebox license; or

B. Knowingly alter a certificate issued for a jukebox; or

C. Knowingly affix a certificate to a jukebox other than the one it covers.

The penalty for violations of this subsection is a maximum $2,500 fine. There are no recorded cases interpreting this criminal statute.

9-71.250 Trafficking in Counterfeit Labels: 18 U.S.C. § 2318

Section 2318 of Title 18 is closely related to, and complements, the criminal provisions of Title 17. This section prohibits anyone from knowingly trafficking in ''counterfeit label[s] affixed or designed to be affixed to a phonorecord, or a copy of a motion picture or other audiovisual work . . . .'' 18 U.S.C. § 2318(a).

A. However, 18 U.S.C. § 2318 is not, strictly speaking, a copyright statute. The scope of this section is broader than Title 17. It encompasses trafficking in counterfeit labels on both copyrighted and uncopyrighted works. *See United States v. Sam Goody, Inc.*, 506 F.Supp. 380, 386 (E.D.N.Y. 1981). Under 18 U.S.C. § 2318(c), federal jurisdiction exists:

1. When this trafficking occurs within the special maritime and territorial jurisdiction of the United States, or within the special aircraft jurisdiction of the United States;

2. When the mail or a facility of interstate or foreign commerce is used in the commission of the offense; or

3. When the counterfeit label is affixed or designed to be affixed to a copyrighted work.

B. Generally, there are five elements to an 18 U.S.C. § 2318 violation:

1. The defendant must be ''trafficking'' in labels for phonorecords, motion pictures or audiovisual works. Section 2318 defines traffic broadly to include: ''to transport, transfer or otherwise dispose of, to another, as consideration for anything of value, or to make or obtain control of with intent to so transport, transfer or dispose of . . . .'' 18 U.S.C. § 2318(b)(2).

2. The labels must be counterfeit, that is, they must appear to be genuine when, in fact, they are not. *See* 18 U.S.C. § 2318(b)(1). This requirement distinguishes this offense from the ''bootlegging'' or ''pirating'' of recordings or tapes. Counterfeit records or tapes are works which are made to appear legitimate. Bootleg or pirated records and tapes are copies with no pretensions of legitimacy. Under 18 U.S.C. § 2318, only trafficking in counterfeit labels is prohibited. *See United States v. Schultz*, 482 F.2d 1179, 1180 (6th Cir.1973). Tape piracy, of course, may be independently prosecutable under Title 17 or provisions of state law.

3. The counterfeit label must be ''affixed or designed to be affixed to a phonorecord or a copy of a motion picture or other audiovisual work.'' For purposes of 18 U.S.C. § 2318, the terms ''copy,'' ''phonorecord,'' ''motion picture'' and ''audiovisual work'' have the meaning given those terms by 17 U.S.C. § 101. Therefore, these terms are defined by reference to the copyright laws.

In addition, it should be noted that 18 U.S.C. § 2318 prohibits trafficking in counterfeit labels ''affixed or designed to be affixed'' to a record or audiovisual work. Therefore, it is not necessary that the label actually be attached to a work. Simply trafficking in labels will trigger this statutory prohibition.

4. The defendant must know that the labels are counterfeit. By limiting this offense to knowing traffic in counterfeit labels, Congress defines 18 U.S.C. § 2318 as a general intent crime.

5. The jurisdictional bases of 18 U.S.C. § 2318 must be satisfied; *i.e.*, the offense must occur in the special maritime or territorial jurisdiction of the United States, involve a copyrighted work or involve the use of the mails or facilities of interstate or involve the use of the mails or facilities of interstate or foreign commerce. *See* 18 U.S.C. § 2318(c)(1) to (3).

C. The maximum penalty for a violation of 18 U.S.C. § 2318 is five years imprisonment, a $250,000 fine, or both. *See* 18 U.S.C. § 2318(a).

9-71.260 Interstate Transportation of Stolen Property: 18 U.S.C. § 2314

Over the past several years the courts of appeals have divided sharply on the issue of whether the National Stolen Property Act, 18 U.S.C. § 2314, prohibits the interstate transportation of counterfeit copies of copyrighted works. *Compare United States v. Drebin*, 557 F.2d 1316, 1332 (9th Cir.1977) (section 2314 applies to interstate transportation of copyrighted works) *with United States v. Smith*, 686 F.2d 232 (5th Cir.1982). The Supreme Court has now resolved this conflict in favor of the view that interstate transportation of infringing copies of a copyrighted work does not violate 18 U.S.C. § 2314. *Dowling v. United States*, 473 U.S. 207, 105 S.Ct. 3127 (June 28, 1985).

While the court's ruling in *Dowling* largely forecloses 18 U.S.C. § 2314 as a prosecutive option in criminal copyright cases, the court explicitly reserved the issue of whether section 2314 would apply to cases where the infringer ''obtained the source material through illicit means.'' *See Dowling v. United States*, *supra*, 53 U.S.L.W. at 4980, n. 7. Thus, in cases where the underlying copyrighted work is ''stolen, converted or taken by fraud,'' section 2314 may still apply. Prosecutors should be alert to this possibility in reviewing any criminal copyright case.

9-71.270 Other Criminal Statutes

The sale, reproduction and distribution of counterfeit or pirated copies of a copyrighted work may frequently be part of a larger fraudulent scheme. By marketing counterfeit works as genuine, many defendants may be engaging in a scheme to defraud retailers and consumers. Assuming that the jurisdictional means are used, such a scheme may violate the federal mail and wire fraud statutes. *See* 18 U.S.C. §§ 1341 and 1343. Similarly, while copyright laws do not permit copyright protection of works prepared by the United States Government, the government may receive and hold copyrights transferred to it by third parties. *See* 17 U.S.C. § 105. Therefore, infringement or other misappropriation of a copyright held by the United States may constitute a theft of government property, prohibited by 18 U.S.C. § 641. These and other alternate bases of prosecution should also be considered by the U.S. Attorney in all appropriate cases.

9-71.280 Statute of Limitations

In considering whether to indict copyright and Title 18 offenses together, one should note that these offenses are subject to different statutes of limitations. Prosecutions of Title 18 offenses generally must be commenced within five years of the date of the crime itself. *See* 18 U.S.C. § 3282. In contrast, 17 U.S.C. § 507(b) provides that ''[n]o criminal proceedings shall be maintained under the provisions of this title unless it is commenced within three years after the cause of action arose.'' Thus, Title 17 criminal offenses are subject to a shorter statute of limitations than the complementary Title 18 crimes.

This distinction has obvious implications for prosecutors when selecting charges for a proposed indictment. In some cases Title 17 offenses which are clearly beyond the statute of limitations may still be subject to prosecution as a violation of 18 U.S.C. § 2318. Prosecutors should be alert to this possibility when considering which charges to proceed under in a criminal copyright investigation.

9-71.300 FORFEITURE

Finally, federal law protects intellectual property by providing for forfeiture of both infringing copies of copyrighted works and all equipment used in the manufacture of these infringing copies. Under the current law, two types of forfeiture proceedings exist—civil and criminal.

Criminal forfeiture comes into play only after a defendant has been convicted of a substantive criminal offense. Thus, criminal forfeiture is a form of penalty directed against the individual who has broken the law. There are two criminal forfeiture provisions which relate to copyright violations. The most significant of these forfeiture provisions is found at 17 U.S.C. § 506(b). This section provides that:

> When any person is convicted of [criminal copyright infringement], the court in its judgement of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords.

In addition, 18 U.S.C. § 2318 contains a similar provision, requiring the court as part of any judgment of conviction to ''order the forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed.'' *See* 18 U.S.C. § 2318(d).

In considering these criminal forfeiture provisions, it is important to note at the outset that they are mandatory. By their terms these sections require that ''the court in its judgment of conviction *shall* . . . order the forfeiture'' of the goods specified. *See* 17 U.S.C. § 506(b); 18 U.S.C. § 2318(d). Thus, under 18 U.S.C. § 506(b) and 18 U.S.C. § 2318(d), the district court has no discretion to decline to order forfeiture as part of a judgment of conviction. Both provisions do, however, grant to the district court some measure of discretion over the disposition of the forfeited property. Under these criminal forfeiture provisions, the court may order the ''destruction or other disposition'' of this property.

It is also important to note the scope of these forfeiture provisions. 17 U.S.C. § 506(b) provides for the forfeiture of ''all infringing copies or phonorecords and all implements, devices or equipment used in the manufacture of such infringing copies or phonorecords.'' Thus, forfeiture under 17 U.S.C. § 506(b) reaches not only the infringing copies but also the equipment used in the manufacture of those copies. The forfeiture mandated by 18 U.S.C. § 2318(d) is somewhat narrower in scope. It applies only to counterfeit labels, articles to which those labels have been affixed and articles to which those labels were intended to have been affixed. It does not, however, include any of the equipment used in the manufacture of the labels.

These forfeiture provisions are an important part of the penalty scheme established by Congress for criminal copyright offenses. For this reason, prosecutors should in all cases seek forfeiture as part of any prosecution under 17 U.S.C. § 506(a) or 18 U.S.C. § 2318. As a procedural matter, this means that indictments alleging violations of either of these statutes should contain a forfeiture paragraph.

In addition to forfeiture ordered as part of a judgment of conviction, Title 17 provides for civil forfeiture proceedings. *See* 17 U.S.C. § 509. These proceedings are entirely distinct from the criminal forfeiture authorized by 17 U.S.C. § 506(b) and 18 U.S.C. § 2318. A civil forfeiture

under 17 U.S.C. § 509 is an *in rem* proceeding directed against the property which has been manufactured or used in violation of the law. Therefore, unlike the criminal forfeitures, a civil forfeiture is not dependent on a finding that any individual defendant has violated the law. Moreover, civil forfeiture proceedings are governed by a lower burden of proof than criminal prosecutions. These factors combine to make civil forfeiture an attractive alternative to criminal prosecution in some cases.

Title 17 U.S.C. § 509 defines the scope of civil forfeiture under the copyright laws. Three general classes or property are subject to forfeiture under 17 U.S.C. § 509. These are:

A. All criminally infringing copies or phonorecords;

B. All plates, molds, masters and other means by which such copies may be reproduced; and

C. All devices for manufacturing, reproducing or assembling such copies or phonorecords.

Subsection (b) of 17 U.S.C. § 509 describes the procedures for seizure, forfeiture and disposition of property; remission and mitigation of forfeiture; and the compromise of claims. Moreover, the Criminal Division of the Department of Justice has recently organized an Asset Forfeiture Office to deal with the legal issues raised by this, and other, forfeiture provisions. Prosecutors with specific questions regarding practice and procedure under 17 U.S.C. § 509 should consult that office for assistance.

DETAILED
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FOR CHAPTER 73

9-73.000 IMMIGRATION AND NATURALIZATION VIOLATIONS; PASSPORT AND VISA VIOLATIONS

This chapter covers crimes related to immigration matters (Title 8), and nationality, citizenship, passport, and visa matters (Title 18). It incorporates the changes made by the Immigration Reform and Control Act of 1986, Pub.L. No. 99-603, and the Immigration and Marriage Fraud Amendments of 1986, Pub.L. No. 99-639.

9-73.010 Guidelines for INS Undercover Operations

The Attorney General has issued Guidelines for INS Undercover Operations, a copy of which has been sent to each United States Attorney. The Guidelines define an ''undercover operation'' as ''any investigative operation in which an undercover employee or cooperating private individual is used,'' and explain how to apply for approval of one.

9-73.100 8 U.S.C. § 1324(a)—BRINGING, ENCOURAGING, HARBORING, TRANSPORTING ILLEGAL ALIENS

Title 8, U.S.C. § 1324(a), as amended in 1986, sets out several distinct prohibitions. In nontechnical language this subsection prohibits:

1324(a)(1)(A) The knowing bringing of an alien to the U.S. at a place other than a designated port of entry, regardless of whether the alien was otherwise authorized to enter (formerly § 1324(a)(1)).

(a)(1)(B) The transportation within the U.S. of an unauthorized alien (formerly § 1324(a)(2)).

(a)(1)(C) The concealment, harboring, or shielding from detection of an unauthorized alien.

(a)(1)(D) The encouraging of an unauthorized alien to enter or reside in the U.S., whether the entry is surreptitious or unconcealed (formerly § 1324(a)(4)).

(a)(2) The unconcealed or surreptitious bringing to the U.S. of an alien who is not authorized to enter (the unconcealed bringing of an unauthorized alien was formerly not a crime).

The intent required to be proved for a conviction under § 1324(a)(1)(B), (C), and (D) is a knowing or reckless disregard of the alien's illegal status.

Subsection 1324(a) was significantly altered by the 1986 act; one should be aware of these changes when researching cases brought under prior statutory law. The most significant changes are:

A. The unconcealed bringing of unauthorized aliens to the U.S. is now a crime under § 1324(a)(2), and encouraging them to come unconcealed is now a crime under § 1324(a)(1)(D), vacating the effect of prior cases such as *United States v. Anaya*, 509 F.Supp. 289, *en banc*, (S.D.Fla.1980), *aff'd on other grounds, sub nom., United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir.1982), and *United States v. Kavazanjian*, 623 F.2d 730 (1st Cir.1980), which held that only the surreptitious arrival of unauthorized aliens was criminal. Accordingly, under new paragraph 1324(a)(2), the persons who brought the Mariel Cubans to U.S. ports could be prosecuted for such conduct.

B. The proviso in former § 1324(a)(3) that ''for the purpose of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring,'' was repealed, and penalties for the employment of unauthorized aliens were enacted. *See* § 1324a.

C. Proof that the defendant knew that the alien's last entry into the United States occurred less than three years prior to the transportation was eliminated as an element of the crime of transporting an unauthorized alien.

D. The minimum kind of intent required to be proved has been lowered to ''reckless disregard,'' except under § 1324(a)(1)(A).

E. Under the previous act, the unit of prosecution under § 1324(a) was each alien. The new act has changed the unit of prosecution only with regard to violations of § 1324(a)(2)—to each transaction, regardless of the number of aliens. Thus, under section 1324(a)(2) in a Mariel boat lift situation with a hypothetical 125,000 aliens, if the defendant presents the aliens immediately to the proper INS officials at a designated port of entry, only one violation occurs; if the defendant takes the aliens to an undesignated port of entry then 125,000 violations result.

F. The new act maintains the maximum penalty for violation of § 1324(a)—of imprisonment for up to five years—except for first-offense, unconcealed, not-for-profit bringing of unauthorized aliens to the U.S., which violation carries a one-year maximum penalty. Violations of § 1324(a) also carry fines pursuant to 18 U.S.C. §§ 3571, 3572.

The elements of a crime charged under 8 U.S.C. § 1324(a) (pre-1986 statute) are set forth in *United States v. Shaddix*, 693 F.2d 1135, 1137-1138 (5th Cir.1982); and *United States v. Gonzales-Hernandez*, 534 F.2d 1353, 1354 (9th Cir.1976).

The unit of prosecution under § 1324(a)(1) is the unauthorized alien. For example, each alien unlawfully brought to the U.S. constitutes a separate crime and should form a separate count of the indictment. *Vega-Murrillo v. United States*, 264 F.2d 240 (9th Cir.), *cert. denied,* 360 U.S.

936 (1959) (coming to the same conclusion as, but amending the reasoning of *Vega-Murrillo v. United States*, 247 F.2d 735 (9th Cir.1957), *cert. denied*, 357 U.S. 910 (1958)); *Jones v. United States*, 260 F.2d 89 (9th Cir.1958); *Sepulveda v. Squier*, 192 F.2d 796 (9th Cir.1951). An indictment referring to four aliens in a single count was ruled duplicitous in *United States v. Martinez-Gonzales*, 89 F.Supp. 62 (S.D.Cal.1950). In practice, indictments are drafted so that a single alien is listed in each count. *See, e.g., United States v. Rubio-Gonzales*, 674 F.2d 1067, 1068 (5th Cir.1982); *United States v. Perez*, 600 F.2d 782, 783-784 (10th Cir.1979); *United States v. Bunker*, 532 F.2d 1262, 1264 (9th Cir.1976).

Illegal entry, 8 U.S.C. § 1325(a), is not a lesser included offense to the alien smuggling section, 8 U.S.C. § 1324(a). *United States v. Loya*, 807 F.2d 1483 (9th Cir.1987); *United States v. Rosales-Lopez*, 617 F.2d 1349 (9th Cir.1980), *aff'd*, 451 U.S. 1982 (1981); *United States v. Wishart*, 582 F.2d 236 (2d Cir.), *cert. denied*, 439 U.S. 987 (1978). *Rosales-Lopez*, *supra*, also approved the imposition of consecutive sentences for violations of each of the paragraphs of 8 U.S.C. § 1324(a). It has also been held that an acquittal on a charge of bringing in illegal aliens, 8 U.S.C. § 1324(a)(1), does not bar retrial for encouraging their entry, 8 U.S.C. § 1324(a)(4), even though both trials are based on the same transaction. *See United States v. Narvaez-Granillo*, 119 F.Supp. 556 (S.D.Cal.1954). And it is not duplicitous for a single conspiracy count of an indictment to allege, as objects of a conspiracy, violations of more than one subsection of 8 U.S.C. § 1324(a). *See United States v. Avila-Dominguez*, 610 F.2d 1266 (5th Cir.1980), *cert. denied*, 449 U.S. 887 (1980).

In the following cases, the court quoted the language of an indictment under 8 U.S.C. § 1324(a) and upheld its validity: *United States v. Wishart*, 582 F.2d 236, 238 (2d Cir.), *cert. denied*, 439 U.S. 987 (1978); *Martinez-Quiroz v. United States*, 210 F.2d 763 (9th Cir.1954).

See Annot., 21 A.L.R.Fed. 254.

9-73.110 Intent

The proof of the intent requirement was eased by the 1986 amendments to subsection 1324(a), except for paragraph 1324(a)(1)(A). For § 1324(a)(1)(B), (C), (D), and (a)(2), the minimum standard of proof has been lowered to a ''reckless disregard'' of the legality of the alien's status. A violation of § 1324(a)(1)(A) still requires proof that the defendant knew that the alien was unauthorized to be in the United States. While the meaning of ''reckless disregard'' for purposes of section 1324(a) has not been interpreted by the courts, the Criminal Division proposes the following court instruction on the meaning of the term:

> A defendant acts in reckless disregard when he or she consciously disregards a substantial and unjustifiable risk that the alien's immigration status was unlawful.

> Of course, recklessness cannot be established by demonstrating mere negligence or even foolishness on the part of the defendant. Before concluding that the defendant acted with reckless disregard, you should be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the alien [was in the country] [was going to enter the country] in violation of the law, and willfully blinded [himself] [herself] to that fact.

Section 1324(a) of Title 8 has often been challenged on the ground that the element of the crime—that the defendant knew that the alien was not lawfully entitled to be in the United States—is unconstitutionally vague. Such challenges have been repulsed. *See United States v. Pruitt*, 719 F.2d 975 (9th Cir.), *cert. denied*, 464 U.S. 1012 (1983); *United States v. Cantu*, 501 F.2d 1019 (7th Cir.1972); *Banderas-Aquirre v. United States*, 474 F.2d 985 (5th Cir.1973), and cases cited therein. Typically, the prosecution establishes defendant's knowledge that the aliens were not lawfully entitled to enter the United States by such evidence as that the aliens paid defendant a substantial fee for transporting them, by evidence of defendant's surreptitious manner of transporting or harboring them, and by defendant's prior conviction for alien smuggling. *See, e.g., United States v. Morales-Quinones*, 812 F.2d 604, 611 (11th Cir.1987); *United States v. Crispin*, 757 F.2d 611, 613-614 (5th Cir.1985); *United States v. Espinoza-Franco*, 668 F.2d 848 (5th Cir.1982); *United States v. Perez-Gomez*, 638 F.2d 215, 218-219 (10th Cir.1981). Also helpful in establishing defendant's guilty knowledge is evidence of defendant's previous arrests for bringing in or transporting illegal aliens. *See United States v. Winn*, 767 F.2d 527, 529-530 (9th Cir.1985); *United States v. Herrera-Medina*, 609 F.2d 376 (9th Cir.1979); *United States v. Holley*, 493 F.2d 581, 584 (9th Cir.), *cert. denied*, 419 U.S. 861 (1974); *United States v. Ruiz-Juarez*, 456 F.2d 1015 (9th Cir.), *cert. denied*, 407 U.S. 914 (1972). For example, in *United States v. McMahon*, 592 F.2d 871 (5th Cir.), *cert. denied*, 442 U.S. 921 (1979), a trial for conspiracy to transport aliens, the court admitted into evidence defendant's prior misdemeanor conviction for aiding and abetting an alien to elude examination, in violation of 8 U.S.C. § 1325. Similarly, defendant's confession that he/she transported illegal aliens can be used in a subsequent trial based on another transportation of illegal aliens, to prove the element of knowledge. *United States v. Madrid*, 510 F.2d 554 (5th Cir.1975), *cert. denied*, 429 U.S. 940 (1976). Proof that the defendant knew that the aliens were not entitled to remain in the United States can consist of evidence that one of the aliens told the defendant so. *See United States v. Bunker*, 532 F.2d 1262 (9th Cir.1976). Proof that defendant's car had certain special equipment in it and that defendant drove in a peculiar manner after spotting the Border Patrol are also relevant. *See United States v. Vasquez-Cazares*, 563 F.2d 1329 (9th Cir.1977), *cert. denied*, 434 U.S. 1021 (1978). But sometimes the central culprits are in a lead car, behind which follows another vehicle containing the illegal aliens. In such a situation, proof that the lead car behaved

suspiciously, without directly linking it to the vehicle behind, may not be enough. *See McMahon, supra.*

Proof that the defendant acted willfully in furtherance of the alien's violation of law, an element in a transporting charge, is a rather elusive concept. In *United States v. Shaddix*, 693 F.2d 1135, 1138-1139 (5th Cir. 1982), where defendant was charged with transporting illegal aliens, the Fifth Circuit Court of Appeals held that the ''in furtherance of'' element of the crime was established by evidence that the defendant offered employment to and transported aliens whom he knew had entered the country illegally. But it has been held that the acts of a farm foreman, which consisted of driving illegal aliens from one work site to another on the farm, were not ''in furtherance of such violation.'' *See United States v. Moreno*, 561 F.2d 1321 (9th Cir.1977).

In *United States v. Merkt*, 764 F.2d 266 (5th Cir.1985), a prosecution of members of the ''Sanctuary'' movement, the court held that the belief of a defendant who transported undocumented aliens that the aliens' genuine qualifications for political asylum entitled them to legal status prior to filing for asylum, could not constitute a defense. Nor could defendants' religious convictions constitute a defense.

9-73.120 8 U.S.C. § 1324(a)(1)(C)—Concealing, Harboring, and Shielding Illegal Aliens From Detection

United States v. Acosta de Evans, 531 F.2d 428 (9th Cir.), *cert. denied*, 429 U.S. 836 (1976), defined ''harboring'' to include both concealment and mere sheltering. It also held that ''from detection'' modifies only ''shield.'' It does not modify ''conceal'' or ''harbor.'' ''Harbor'' was also construed in *United States v. Lopez*, 521 F.2d 437 (2d Cir.1975), *cert. denied*, 423 U.S. 995 (1975), to include merely ''providing shelter to.'' *Lopez* also rejected the argument that the harboring must be part of an alien-smuggling operation. In *United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir.1982), when INS agents appeared on a job site, one of the company employees ran up a hill yelling to a couple of illegal aliens that, ''Immigration is here.'' *Id.*, at 1070. His conviction for ''shielding'' was upheld by the Fifth Circuit Court of Appeals.

In *Susnjar v. United States*, 27 F.2d 223 (6th Cir.1928), the Court of Appeals held that an element of proof in a harboring charge is that the defendant attempted to *conceal* the alien. However, we believe that *Susnjar* is an aberrant decision, for the reasons set forth in *Acosta de Evans*, *supra*, at 430. *Accord*: *United States v. Lopez*, 521 F.2d 437 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975).

9-73.130 8 U.S.C. § 1324a—Unlawful Employment of Aliens

The Immigration Reform and Control Act of 1986, at 8 U.S.C. § 1324a, has for the first time declared it unlawful to:

1) Hire, recruit, or refer for a fee:

a) An unauthorized alien (§ 1324a(a)(1)(A)), or

b) Any individual without complying with the requirements of § 1324a(b) (§ 1324a(a)(1)(B)), or

2) Continue the employment of an alien upon learning that he/she is not authorized to be employed (§ 1324a(a)(2)), or

3) Use a contract, subcontract, or exchange to obtain the labor of an alien knowing that he/she is unauthorized to be employed (§ 1324a(a)(4)).

''Unauthorized alien'' is defined by § 1324a(h)(3), 8 C.F.R. § 274a.1(a). The act explicitly makes good faith a defense to a charge of unlawful employment of an alien (§ 1324a(a)(3)), and declares good faith to include possession of papers from a state employment agency certifying that the agency has complied with the employment verification requirements of 8 U.S.C. § 1324a(b).

For the purpose of § 1324a, an unauthorized alien is defined as one who is not a permanent resident or authorized to be employed.

The penalties of § 1324a preempt state and local laws providing penalties for the employment of unauthorized aliens. 8 U.S.C. § 1324a(h)(2).

A scheme for civil enforcement of the requirements of § 1324a through injunctions and monetary penalties is set forth in § 1324a(e) and § 1324a(f)(2).

Paragraph 1324a(f)(1) provides for imprisonment of up to six months for a person who knowingly engages ''in a pattern or practice'' of hiring unauthorized aliens. The legislative history indicates that ''a pattern or practice'' of violations is to be given a commonsense rather than overly technical meaning, and must evidence regular, repeated and intentional activities, but does not include isolated, sporadic or accidental acts. H.R.Rep. No. 99-682, Part 3, 99th Cong., 2d Sess. (1986), p. 59. *See* 8 C.F.R. § 274a.1(k).

The act also adds new subsections (b) and (c) to 18 U.S.C. § 1546. Subsection (b) provides a penalty of two years imprisonment, plus a fine, for anyone who uses a false identification document, or misuses a real one, for the purpose of satisfying the new employment verification provisions of the act (8 U.S.C. § 1324a(b)). New subsection 1546(c) provides that section 1546 does not prohibit any state or federal law enforcement or intelligence activity.

9-73.140 Material Witnesses in Alien Smuggling Cases

Frequently, when an alien smuggling case is developed, a few of the undocumented aliens are held as material witnesses. The other aliens are

deported or granted voluntary departure in lieu of deportation, except those who possess evidence favorable to the defendant. The United States Supreme Court held, in *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982), that the Executive Branch's responsibility to faithfully execute Congress' immigration policy of prompt deportation of illegal aliens justifies deportation of undocumented alien witnesses upon the Executive's good-faith determination that the aliens possess no evidence favorable to the defendant. And in order for the defendant to demonstrate a violation of the Sixth Amendment right of confrontation, he/she would have to show not merely that deportation of the aliens deprived him/her of their testimony, but must at least make some plausible showing of how their testimony would have been both material and favorable to the defense. Of course, if the alien material witnesses are released when the defendant becomes a fugitive, the defendant cannot later be heard to complain that he/she had no opportunity to interview the witnesses. *See United States v. Vega-Limon*, 548 F.2d 1390 (9th Cir.1977); *United States v. Saintil*, 753 F.2d 984 (11th Cir.1985), *cert. denied*, 472 U.S. 1012 (1986).

One court of appeals has held that permitting voluntary departure of the alien witness is the equivalent of deporting him, for the purpose of this kind of analysis. *See United States v. Morales-Quinones*, 812 F.2d 604 (9th Cir.1987).

Unfortunately, absent the concurrence of the defendant, there is no assurance that the transcripts of depositions of undocumented alien material witnesses who are deported or who voluntarily depart will be admissible at trial. The Court of Appeals for the Ninth Circuit has ruled them inadmissible absent the express waiver of defendant's Sixth Amendment right of confrontation. *See United States v. Vasquez-Ramirez*, 629 F.2d 1295 (9th Cir.1980). In a Fifth Circuit case, where a local district court policy forces the taking of depositions of alien witnesses and their release after 60 days, the court of appeals reversed the conviction upon the urging of both the prosecution and defense, on the ground that defendant had been denied his Sixth Amendment right of confrontation. *See United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir.1987). *But see*, *United States v. Seijo*, 595 F.2d 116 (2d Cir.1979). Until this issue is resolved, depositions and deportation of our alien witnesses over the objection of the defendant should be opposed in the 5th and 9th Circuits under our administrative INS powers. *See* 8 U.S.C. 1252(c). Prosecutors with questions concerning these matters should contact the General Litigation and Legal Advice Section for advice.

The *Guadian-Salazar* opinion discusses the relationship between 18 U.S.C. § 3144, which authorizes the arrest of material witnesses; 18 U.S.C. § 3142, which provides conditions for release of persons detained; Federal Rules of Criminal Procedure 15, which authorizes the use of depositions in criminal cases; and 8 C.F.R. §§ 215.2(a) and 215.3(g), which concern aliens

who are needed in the United States as trial witnesses. Federal Rules of Evidence 804(a) provides that a witness whose absence was procured by the ''proponent of his statement for the purpose of preventing the witness from attending or testifying'' is not considered unavailable.

9-73.200 8 U.S.C. §§ 1325, 1326, 1327, AND 1328

9-73.210 8 U.S.C. §§ 1325 and 1326

Sections 1325 and 1326 of Title 8 are the penal provisions usually used against aliens who enter the United States unlawfully, and against those who aid and abet them. The Immigration Marriage Fraud Amendments Act of 1986 added subsection 1325(b) aimed at fraudulent marriages between aliens and U.S. citizens. Fraudulent marriage cases have been prosecuted, *inter alia*, under 8 U.S.C. § 1325(a) and 18 U.S.C. § 1546(a). *See* USAM 9-73.700 for a discussion of marriage fraud cases.

Section 1325(a) of Title 8 makes it unlawful for an alien to enter the United States at any time or place other than as designated by immigration officers, to elude examination or inspection by immigration officers, or to obtain entry to the United States by a false or misleading representation or the willful concealment of a material fact. 8 U.S.C. § 1326 generally penalizes an alien who has already been deported, but reenters or attempts to reenter. The first offense under 8 U.S.C. § 1325(a) is a misdemeanor; subsequent offenses are felonies. 8 U.S.C. § 1326 is a felony statute.

Recently, the Supreme Court has held that a defendant, charged with illegal reentry after deportation, may under certain circumstances, not fully specified in the opinion, collaterally attack the basis for the underlying deportation. *United States v. Mendoza-Lopez*, 107 S.Ct. 2148 (1987). *See United States v. Campos-Asencio*, 822 F.2d 506 (5th Cir.1987). But he can probably not attack the prior deportation on the ground that it was based on evidence illegally obtained, because the exclusionary rule does not apply in civil deportation proceedings. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

Some indictments under 8 U.S.C. § 1325(a) contain a felony count for a second offender, and an alternative misdemeanor count. But it has been held that an alien should not be charged with both illegal entry, 8 U.S.C. § 1325(a), and illegal re-entry after deportation, 8 U.S.C. § 1326, for the same act of entry. *United States v. Rosales-Lopez*, 617 F.2d 1349 (9th Cir.1980), *aff'd*, 451 U.S. 182 (1981); *United States v. Ortiz-Martinez*, 557 F.2d 214 (9th Cir.1977). The Ninth Circuit Court of Appeals has held that in an 8 U.S.C. § 1325(a) prosecution the prior commission of an offense must be established by a prior conviction, not merely by proof of the prior commission of a prohibited act. *See United States v. Arambula-Alvarado*, 677 F.2d 51 (9th Cir.1982). And aiding and abetting a violation of

§ 1325(a) is not a lesser included offense to aiding and abetting the transportation of illegal aliens. *See United States v. Loya*, 807 F.2d 1483 (9th Cir.1987).

The Court of Appeals for the Ninth Circuit has held that the confession of an alien that he entered the United States unlawfully must be corroborated at trial by independent evidence which ''need not independently establish any element beyond a reasonable doubt, but must 'merely fortify the truth of the confession.''' *See United States v. Lopez-Garcia*, 693 F.2d 1226, 1228 (9th Cir.1982), *cert. denied*, 459 U.S. 1174 (1983). Proof of a prior deportation can consist of a warrant of deportation containing the deported alien's thumbprint and indicating the date and location of his deportation. *See United States v. Quezada*, 754 F.2d 1190 (5th Cir.1985).

United States v. Pulido-Santoyo, 580 F.2d 352 (9th Cir.1978), discusses the kind of evidence needed to prove that the defendant knew that the man he aided in entering the country was an undocumented alien.

Where a defendant brought two aliens to the border and instructed them to claim United States citizenship, the court held that he could not be convicted of aiding and abetting an illegal entry under 8 U.S.C. § 1325(a) because the ruse did not work, and so the aliens did not enter, or obtain entry to the United States, or elude examination or inspection by immigration officers. *See United States v. Oscar*, 496 F.2d 492 (9th Cir.1974). But a conviction for aiding and abetting an illegal entry was upheld where the defendant picked the alien up in his car after the alien's entry, and drove him elsewhere. *See United States v. Mallides*, 339 F.Supp. 1 (S.D. Cal.1972), *rev'd on other grounds*, 473 F.2d 859 (9th Cir.1973).

Two courts of appeals have held that specific intent need not be proved in a prosecution under 8 U.S.C. § 1326, that is, that the defendant knew he was not entitled to reenter the United States without the permission of the Attorney General. *United States v. Hussein*, 675 F.2d 114 (6th Cir.), *cert. denied*, 459 U.S. 869 (1982); *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir.1978).

It has been held that deportation proceedings begun after defendant's reentry, followed by his/her prosecution for illegal reentry, does not constitute double jeopardy. *United States v. Ramiriz-Aguilar*, 455 F.2d 486 (9th Cir.1972). *See also United States v. Martinez*, 785 F.2d 663 (9th Cir.1986). For other cases and minor points, *see* Annot., 59 A.L.R.Fed. 190.

9-73.220 8 U.S.C. §§ 1327 and 1328

Section 1327 of Title 8 is a rarely-used provision prohibiting persons from aiding subversive aliens in entering the United States.

Section 1328 of Title 8 prohibits three kinds of sexual activities with respect to aliens: (1) importing aliens for prostitution, (2) holding aliens for prostitution, and (3) keeping, maintaining, controlling, supporting, employing, or harboring aliens for prostitution. Each of the three is a separate crime. *See Dalton v. Hunter,* 174 F.2d 633 (10th Cir.), *cert. denied,* 338 U.S. 906 (1949).

The phrase, ''in pursuance of such illegal importation,'' was added to § 1328 in 1910 to establish an interstate commerce nexus because the Supreme Court had held that the statute infringed on state police powers. *See Keller v. United States,* 213 U.S. 138 (1909). Also, ''alien'' was substituted for ''woman or girl'' to make it clear that the statute applied to both sexes. The phrase, ''or for any other immoral purpose,'' probably includes only immoral purposes relating to sex, and not, for example, the selling of babies. *See United States v. Baker,* 136 F. Supp. 546, 549-550 (S.D.N.Y.1955).

For a definition of ''hold'' *see United States v. Giuliani,* 147 F. 594, 596, 600 (D.Del.1906). *See also* 18 U.S.C. § 2424, which provides penalties for failure to register a female brought to the United States from certain countries for immoral purposes.

9-73.300 ARREST, SEARCH, AND SEIZURE BY IMMIGRATION OFFICERS

The general rules concerning arrest, search and seizure applicable to other federal officers are, of course, applicable to immigration officers. The Immigration and Naturalization Act, 8 U.S.C. § 1101 *et seq.,* authorizes immigration officers to make arrests either for the purpose of holding an alien for civil administrative proceedings or for a crime, or both. 8 U.S.C. § 1225 provides that all aliens arriving at United States ports must be examined by immigration officers who are authorized, without a warrant, to board and search any conveyances believed to carry aliens, and to detain for further inquiry anyone ''who may not appear . . . at the port of arrival to be clearly and beyond a doubt entitled to land.'' 8 U.S.C. § 1252(a) authorizes the arrest upon warrant of the Attorney General of any alien, pending a determination of his/her deportability. 8 U.S.C. § 1252(c) authorizes arrest of an alien at any time within six months after a final order of deportation has been entered. 8 U.S.C. § 1324(b) authorizes immigration officers to seize, without a warrant, conveyances used to transport illegal aliens. 8 U.S.C. § 1357 sets out their authority to interrogate, arrest, search, and seize aliens without a warrant.

Section 1357(a)(1) of Title 8, authorizing immigration officers ''to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States,'' has a deceiving simplicity. It is deceiving because in practice the courts have strained to give the section a reasonable and meaningful interpretation in light of the Fourth Amendment. The appellate courts have evinced a reluctance to believe that such

interrogations occur without a detention, however brief. Since there is usually some kind of stop or detention, the question arises as to whether immigration officers may stop persons reasonably believed to be aliens when there is no reason to believe they are illegally in the country. The Supreme Court has declined to give that question a general answer. *See United States v. Brignoni-Ponce,* 422 U.S. 873, 884 n. 9 (1975). However, it has answered the question with respect to ''factory surveys,'' that is, worksite inspections to discover illegal aliens. *See Immigration and Naturalization Service v. Delgado,* 466 U.S. 210 (1984).

The ''open fields'' doctrine, which defines the rights of law enforcement officers to enter or observe open fields and certain non-residential structures without a search warrant is often relevant to INS enforcement efforts. The doctrine is explicated in: *United States v. Dunn,* 480 U.S. 294, 107 S.Ct. 1134 (1987); *Dow Chemical Co. v. United States,* 476 U.S. 227 (1986); and *California v. Ciraolo,* 476 U.S. 207, (1986). However, the 1986 amendments added new subsection 8 U.S.C. § 1357(d) which prohibits INS officers from entering a farm without a search warrant.

The INS Office of General Counsel has available for distribution its memorandum entitled, *The Law of Arrest, Search and Seizure for Immigration Officers,* Publication No. M-69.

9-73.310 Arrest of Illegal Aliens by State and Local Officers

Section 1324(c) of Title 8 specifically authorizes state and local officers to enforce the criminal provisions of 8 U.S.C. § 1324. There is also a general federal statute which authorizes local officials to make arrests for violations of federal statutes. 18 U.S.C. § 3041. The Fifth Circuit Court of Appeals has held that 18 U.S.C. § 3041 authorizes those local officials to issue process for the arrest, to be executed by law enforcement officers. *See United States v. Bowdach,* 561 F.2d 1160, 1168 (5th Cir.1977).

Rule 4(a)(1) of the Federal Rules of Criminal Procedure provides that an arrest warrant ''shall be executed by a marshal or by some other officer authorized by law.'' The phrase, ''some other officer,'' includes state and local officers. *Bowdach, supra.*

In the absence of a specific federal statute, the validity of an arrest without a warrant for violation of federal law by local peace officers is to be determined by reference to local law. *See Miller v. United States,* 357 U.S. 301, 305 (1958); *United States v. Di Re,* 332 U.S. 581, 589 (1948).

In approving a state trooper's arrest of persons who appeared to be illegal aliens, the United States Court of Appeals for the Tenth Circuit held, simply, as follows: ''A state trooper has general investigative authority to inquire into possible immigration violations.'' *See United States v. Salinas-Calderon,* 728 F.2d 1298, 1301, n. 3 (10th Cir.1984).

The United States Court of Appeals for the Ninth Circuit held, in *Gonzales v. City of Peoria,* 722 F.2d 468 (9th Cir.1983), that the structure of the Immigration and Nationality Act does not evidence an intent to preclude local enforcement of the act's criminal provisions. *Id.* at 474. Based on the pertinent legislative history, the court of appeals rejected the argument that since 8 U.S.C. § 1324(c) specifically authorizes local officers to make arrests for violations of 8 U.S.C. § 1324(a), and 8 U.S.C. §§ 1325(a) and 1326 contain no comparable provision, Congress must have intended that local officers be precluded from making arrests for violations of 8 U.S.C. §§ 1325(a) and 1326. *Id.* at 475. The decision warns, however, that the first violation of 8 U.S.C. § 1325(a) is a misdemeanor, and that if applicable state law authorizes law enforcement officers to arrest for misdemeanors only if committed in their presence, they would not be authorized to arrest aliens for illegal entry (unless the officers should happen to know that the alien had previously been convicted of illegal entry) unless they saw him/her cross the border.

The disappointing aspect of *Gonzales* is the statement that an alien's ''inability to produce documentation does not in itself provide probable cause [to arrest].'' *See Gonzales v. City of Peoria, supra,* at 16. Pursuant to 8 U.S.C. § 1304(e), aliens are issued registration cards and must carry such cards with them at all times. Aliens who gain entry without the requisite inspection, and who therefore are not issued such cards, violate 8 U.S.C. § 1325. Consequently, a law enforcement officer confronting an alien who is unable to produce documentation arguably has probable cause to believe that a violation of 8 U.S.C. § 1304(e) (failure to possess documents *or* 8 U.S.C. § 1325(a) (entry without inspection) has occurred. (If the alien is undocumented and has been in the United States for longer than 30 days, he or she has also violated 8 U.S.C. § 1306(a)).

9-73.400 REPORTING OF DECISIONS

The outcome of all important prosecutions arising under the immigration and nationality laws should be reported to the General Litigation and Legal Advice Section. In all cases in which the decision is adverse to the government, except criminal cases in which no appeal is allowed by law, copies of the pleadings and other documents, except insofar as previously supplied to the Section, should be promptly submitted along with an appeals recommendation. *See* USAM Title 2, Appeals.

9-73.500 DEPORTATION

9-73.510 Promise of Non-Deportation

In a criminal case, the United States Attorney should not as part of a plea agreement or an agreement to testify, or for any other reason, promise an alien that he/she will not be deported, without prior authorization from the Criminal Division.

9-73.600 18 U.S.C. §§ 1541 TO 1546: PASSPORTS AND OTHER ENTRY DOCUMENTS

Title 18, §§ 1541 to 1546, provide criminal penalties for offenses related to passports, visas, and related documents. §§ 1541 to 1544 exclusively concern passports. § 1545 deals with safe conducts as well as passports. 18 U.S.C. § 1546 deals with visas, permits, and related documents. *See* Annot., 3 A.L.R.Fed. 623.

A passport is defined at 8 U.S.C. § 1101(a)(3) as ''any travel document issued by competent authority showing the bearer's origin, identity, and nationality, if any, which is valid for the entry of the bearer into a foreign country.'' The Supreme Court has stated: '''[A passport] is a document, which, from its nature and object, is addressed to foreign powers; purporting only to be a request, that the bearer of it may pass safely and freely; and is to be considered rather in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact.''' *See Haig v. Agee*, 453 U.S. 280, 292 (1981). 8 U.S.C. § 1104 entrusts control of passport and visa matters to the Bureau of Consular Affairs of the Department of State, and establishes in the Bureau a Passport Office and a Visa Office. 8 U.S.C. § 1185(b) makes it unlawful for a United States citizen to attempt to depart from or enter the United States without a valid passport except as authorized by the President.

Section 211a of Title 22 authorizes the Secretary of State to issue United States passports in foreign countries. 22 U.S.C. § 212 limits issuance of United States passports to United States nationals only. Section 213 prescribes the method of applying for a passport, 22 U.S.C. §§ 213, 214a, and 215 control the fees for passports, 22 U.S.C. § 217 limits the temporal validity of passports to no more than 10 years. State Department regulations governing passports appear at 22 C.F.R. Part 51. *See* 60 Am. Jur.2d ''Passports'' for a general discussion of the law of passports.

The statute of limitations for violations of 18 U.S.C. §§ 1541 to 1544 is 10 years. *See* 18 U.S.C. § 3291.

9-73.610 18 U.S.C. § 1541: Issuance of Passports, Etc., Without Authority

Section 1541 of Title 18 makes it a crime to issue or verify a passport, or other instrument in the nature of a passport, without authority to do so. For example, state and local governments may not issue documents designed to facilitate overseas travel of their residents. 17 Op.Att.Gen. 674 (1884). Similarly, forgery of a document purporting to be such a travel document issued by a state or local government would also violate 18 U.S.C. § 1541. 9 Op.Att.Gen. 350 (1859). 18 U.S.C. § 1541 also makes it a crime for consular officers to verify passports for persons not owing allegiance to the United States, even if they are citizens.

9-73.620 18 U.S.C. § 1542: False Statement in Application for Passport and Use of a Passport Fraudulently Obtained

Section 1542 of Title 18 proscribes both false statements made to obtain a passport, and use of any passport so obtained.

The false statement against which this section is most commonly used is the use of a false name in obtaining a passport. United States citizens attempt to obtain passports using false names in order to conceal criminal activity. A problem of proof can arise when the passport applicant has routinely used aliases and now seeks to obtain a passport in one of those aliases. *See, e.g., United States v. O'Bryant,* 775 F.2d 1528 (11th Cir. 1985); *United States v. Cox,* 593 F.2d 46 (6th Cir.1979); *United States v. Wasman,* 641 F.2d 326 (5th Cir.1981), *aff'd,* 464 U.S. 932 (1984).

Browder v. United States, 312 U.S. 335 (1941), is the leading case on *use* of a passport, the application for which contained a false statement. Browder obtained a passport in his real name, but in the portion of the application asking when his last passport was obtained, he falsely stated, ''none.'' This statement was false because he had previously obtained a passport in a false name. He then used the new passport to enter the United States. The Supreme Court upheld Browder's conviction under 18 U.S.C. § 1542 for innocent use of a passport secured by a false statement.

See Annot., 53 A.L.R.Fed. 507.

9-73.630 18 U.S.C. § 1543: Making or Using a Forged Passport

Section 1543 of Title 18 proscribes the forgery, alteration, etc., of passports or the use of or furnishing to another of a forged, altered, void, etc., passport or purported passport. It applies to instruments issued or purportedly issued by foreign governments as well as by the United States. *See United States v. Dabdee,* 616 F.2d 1118 (9th Cir.1980).

9-73.640 18 U.S.C. § 1544: Misuse of a Passport

Section 1544 of Title 18 proscribes the use or attempted use of someone else's passport, or its use in violation of any applicable regulation or law. It also proscribes giving one's passport to another for the other's use.

9-73.650 18 U.S.C. § 1546: Fraud and Misuse of Visas, Permits, and Related Documents, and False Personation

Title 18, U.S.C. § 1546 was significantly amended in 1986. For a legislative history of former 18 U.S.C. § 1546, *see United States v. Varga,* 380 F.Supp. 1162 (E.D.N.Y.1974). The 1986 amendments added new subsections (b) and (c) to § 1546. Subsection (b) provides a penalty of two years imprisonment, plus a fine, for anyone who uses a false identification

document, or misuses a real one, for the purpose of satisfying the new employment verification provisions of the act (8 U.S.C. § 1324(b)). New subsection 1546(c) provides that section 1546 does not prohibit any state or federal law enforcement or intelligence activity.

Generally, the first paragraph of 18 U.S.C. § 1546(a) proscribes the forging, etc. of certain immigration documents or their use, possession, etc. The second paragraph proscribes the possession, etc., of plates or distinctive papers used for the printing of entry documents. The third paragraph makes it a crime, when applying for an entry document or admission into the United States, to personate another or appear under a false name. The fourth paragraph makes it a crime to give a false statement under oath in any document required by the immigration laws or regulations.

The first paragraph of section 1546(a) was judicially construed to apply only to documents *required* for entry into the United States. *United States v. Campos-Serrano,* 404 U.S. 293 (1971). However, it was amended in 1986 by adding to the list of specified documents which it is a crime to falsify, the border crossing card, alien registration receipt card, and any other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States.

However, 18 U.S.C. § 1546(a) has always been applicable in certain situations where no entry document is applied for, but the person seeking admission to the United States falsely personates another. *See United States v. Carrillo-Colmenero,* 523 F.2d 127 (5th Cir.1975); *United States v. Knight,* 514 F.2d 1286 (5th Cir.1975); *United States v. Mouyas,* 42 F.2d 743 (S.D.N.Y.1930); *Contra, McFarland v. United States,* 19 F.2d 807 (6th Cir.1927). It also constitutes false personation when an alien applies in his/her own name for entry documents, but falsely states that he/she previously used another name, the other being the name of a real person who was an alien lawfully entitled to enter the United States. *See Shimi Miho v. United States,* 57 F.2d 491 (9th Cir.1932). And 18 U.S.C. § 1546(a) is equally applicable to United States citizens and foreigners. *Id.* The statutory scheme indicates that 18 U.S.C. § 1546(a) was also designed to apply to anyone who makes false statements in a visa application to a United States consular official overseas. *See United States v. Pizzarusso,* 388 F.2d 8 (2d Cir.1968), *cert. denied,* 392 U.S. 936 (1968). In fact, the Ninth Circuit Court of Appeals has commented: ''It is difficult to see how many of the offenses described in Section 1546 could be committed by an alien were he not in a foreign country,'' *Rocha v. United States,* 288 F.2d 545 (9th Cir.), *cert. denied,* 366 U.S. 948 (1961). Section 1546(a) can be violated without actually signing the underlying false document. *Brown v. I.N.S.,* 775 F.2d 383 (D.C.Cir.1985).

An indictment charging an offense under the first paragraph of 18 U.S.C. § 1546(a) was quoted approvingly in *United States v. Santelises,* 476 F.2d 787 (2d Cir.1973). An indictment charging false personation under the

third paragraph of 18 U.S.C. § 1546(a) is set forth in *United States v. Knight,* 514 F.2d 1286, n. 1 (5th Cir.1975). An indictment charging receipt of an immigrant visa knowing it was procured by fraud (in violation of the first paragraph under 18 U.S.C. § 1546(a)) and false statements under oath in an application for a non-quota visa (in violation of the fourth paragraph of 18 U.S.C. § 1546(a)) is quoted in *United States v. Rodriquez,* 182 F.Supp. 487 (S.D.Cal.1960), *rev'd in part and aff'd in pertinent part, sub nom., Rocha v. United States,* 288 F.2d 545 (9th Cir.), *cert. denied,* 366 U.S. 948 (1961). The test for materiality of false statements under 18 U.S.C. § 1546(a) is probably the same as under 18 U.S.C. § 1001. *See United States v. One Lear Jet,* 808 F.2d 765 (11th Cir.1987).

The use of section 1546(a) to prosecute marriage fraud cases is discussed at USAM 9-73.700.

9-73.700 MARRIAGE FRAUD CASES: 8 U.S.C. § 1325(b) AND 18 U.S.C. § 1546

Marriage fraud has been prosecuted, *inter alia,* under 8 U.S.C. § 1325 and 18 U.S.C. § 1546(a). The Immigration Marriage Fraud Amendments Act of 1986 amended § 1325 by adding § 1325(b), which provides a penalty of five years imprisonment and a $250,000 fine for any ''individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws.'' Under 8 U.S.C. § 1151(b), ''immediate relatives'' of U.S. citizens, including spouses, who are otherwise qualified for admission as immigrants, must be admitted as such without regard to other, ordinary numerical limitations. The typical fact pattern in indicted marriage fraud cases is that a U.S. citizen and an alien get married. They fulfill all state law requirements such as medical tests, licensing, and a ceremony. But the U.S. citizen is paid to marry the alien in order to entitle the alien to obtain status as a permanent resident of the United States; the parties do not intend to live together as man and wife.

A legal issue arises where the parties tell the INS they are married, and they subjectively believe they are telling the truth because they have complied with state marriage requirements. The Supreme Court has ruled that the validity of their marriage under state law is immaterial to the issue of whether they defrauded INS. *See Lutwak v. United States,* 344 U.S. 604 (1953). *Lutwak* was followed in *United States v. Yum,* 776 F.2d 490 (4th Cir.1985); *Johl v. United States,* 370 F.2d 174 (9th Cir.1966), and *Chin Bick Wah v. United States,* 245 F.2d 274 (9th Cir.), *cert. denied,* 355 U.S. 870 (1957). *But see, United States v. Lozano,* 511 F.2d 1 (7th Cir.), *cert. denied,* 423 U.S. 850 (1975); *United States v. Diogo,* 320 F.2d 898 (2d Cir.1963). *But cf, United States v. Sarantos,* 455 F.2d 877 (2d Cir.1972).

There have been situations where a bona fide marriage turns sour but the alien induces the U.S. citizen spouse to maintain the marriage as a ruse only as long as necessary for the alien to obtain status as a permanent resident alien. There is a line of cases holding that the viability of the

marriage, *if initially valid,* is not a proper concern of the INS. *United States v. Qaisi,* 779 F.2d 346 (6th Cir.1985); *Dabaghian v. Civilleti,* 607 F.2d 868 (9th Cir.1979), and cases cited therein. However, the Immigration Marriage Fraud Amendments of 1986, 8 U.S.C. § 1186a, were designed, *inter alia,* to eliminate the *Qaisi* type loophole by establishing a two-year conditional status for alien spouses seeking permanent resident status, and requiring that an actual family unit still remain in existence at the end of the two year period.

9-73.800 OTHER RELATED STATUTES

8 U.S.C. § 1185(b)	(Except as authorized by the President) U.S. citizen's entry into or departure from the U.S. without a passport.
8 U.S.C. § 1252(d)	Alien's failure to comply with supervisory regulations pertaining to his deportation.
8 U.S.C. § 1252(e)	Alien's willful failure to comply with deportation order.
8 U.S.C. § 1282	Alien crewman remaining in U.S. in excess of number of days allowed.
8 U.S.C. § 1306(a)	Alien's failure to apply for registration or fingerprinting.
8 U.S.C. § 1306(b)	Alien's failure to give notice of change of address.
8 U.S.C. § 1306(c)	Alien making false statements in registering.
8 U.S.C. § 1306(d)	Counterfeiting alien registration cards and forms.
8 U.S.C. § 911	False personation as United States citizen.
18 U.S.C. § 1001	The general false statements statute.
18 U.S.C. § 1015	False statements relating to naturalization, citizenship, or registry of aliens; false denial of citizenship to avoid duty or liability imposed by law; use of fraudulently obtained certificate of arrival, declaration of intention, certificate of naturalization or citizenship, etc.; false certificate of appearance or oath taking relating to immigration, citizenship, etc.
18 U.S.C. §§ 1421 to 1429	Nationality and citizenship—crimes committed in connection with naturalization and citizenship proceedings.
18 U.S.C. § 1621	Perjury generally in connection with any matter in which a law of the United States authorizes an oath to be administered.
18 U.S.C. § 4221	Perjury before United States consular official overseas.

DETAILED
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FOR CHAPTER 74

9-74.000 SEXUAL ABUSE

The primary federal statutes concerning sexual abuse and exploitation are the Child Protection Act of 1984, 18 U.S.C. §§ 2251 to 2253, and the Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241 to 2245.

9-74.100 CHILD PROTECTION ACT OF 1984, 18 U.S.C. §§ 2251 TO 2253

The Child Protection Act of 1984, 18 U.S.C. §§ 2251 to 2253, addresses the problem of sexual exploitation of children for the production of child pornography. Supervision of criminal prosecutions under the Child Protection Act of 1984 is assigned to the National Obscenity Enforcement Unit. *See* USAM 9-75.001.

9-74.200 SEXUAL ABUSE ACT OF 1986, 18 U.S.C. §§ 2241 TO 2245

The Sexual Abuse Act of 1986 reforms and modernizes the federal law governing rape and other sexual offenses by: (1) defining the offenses in gender neutral terms; (2) defining the offenses so that the focus is on the conduct of the defendant, instead of upon the conduct or state of mind of the victim; (3) expanding the offenses to reach all forms of sexual abuse of another; (4) abandoning the doctrines of resistance and spousal immunity; and (5) expanding federal jurisdiction to include all federal prisons. H.R.Rep. No. 99-594, 99th Cong.2d Sess. 10-11 (1986). In addition, the bill carries forward the current federal rule that corroboration of a victim's testimony is not required. *Id.* at 12.

9-74.201 Investigative Jurisdiction

Criminal violations of the Sexual Abuse Act of 1986 are within the investigative jurisdiction of the Federal Bureau of Investigation.

9-74.202 Supervising Section

Supervision of criminal prosecutions under the Sexual Abuse Act of 1986 is assigned to the General Litigation and Legal Advice Section.

9-74.210 Jurisdiction

The Sexual Abuse Act of 1986 applies by its terms in the special maritime and territorial jurisdiction of the United States, *see* 18 U.S.C. § 7, and in federal prisons.

The Act also applies in Indian country to offenses committed by non-Indians against Indians, 18 U.S.C. § 1152, and to felonious offenses committed by Indians, 18 U.S.C. § 1153, as amended. Section 87 of the Criminal Law and Procedure Technical Amendments Act of 1986, Pub.L. No. 99-646, 100 Stat. 3623, Nov. 10, 1986, entitled the ''Sexual Abuse Act of 1986,'' replaced Title 18, Chapter 99 (Rape) with Chapter 109A (Sexual Abuse).

This necessitated conforming amendments to the Indian Major Crimes Act, 18 U.S.C. § 1153, which was undertaken in subsection (c)(5) of section 87. Subsection (c)(5) calls for the striking out of ''rape, involuntary sodomy, carnal knowledge of any female, not his wife, who had not attained the age of sixteen years, assault with intent to commit rape,'' and inserting in lieu thereof ''a felony under chapter 109A.'' The draftsman overlooked the fact that section 1153 had been amended earlier that year by the insertion of the offense ''felonious molestation of a minor'' between the offenses of ''sodomy'' and ''carnal knowledge'' by Pub.L. No. 99-203, 100 Stat. 438, May 15, 1986. The failure to direct deletion of ''felonious molestation of a minor'' (which also became superfluous by enactment of Chapter 109A) presents a problem for the codifier. Rather than inserting a reference to chapter 109A on either side of a ''felonious molestation of a minor,'' the editors of West's 1987 paperback edition of Federal Criminal Code and Rules and 1987 supplement to the United States Code Annotated elected to reprint section 1153 without change, followed by an ambiguous explanatory note. Do not be misled. Section 1153 has been amended. Sexual offenses committed by Indians in Indian country are prosecutable only under 18 U.S.C. § 1153, and only if they are felonies under chapter 109A. A technical amendment will be proposed to delete the now superfluous offense of ''felonious molestation of a minor.''

9-74.220 Aggravated Sexual Abuse

Section 2241 sets forth three offenses. All three offenses involve a ''sexual act'' as defined in section 2245(2). *See* USAM 9-74.260, *infra.* Subsection (a) makes it an offense for someone, in the special maritime and territorial jurisdiction of the United States or in a federal prison, (1) to use force against another person and thereby cause that person to engage in a sexual act, or (2) to cause another person to engage in a sexual act by means of threats express or implied or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping. Thus, it would be an offense, for example, for A to cause B to engage in a sexual act (with A or with someone else) by threatening to kill B's child. The maximum penalty for an offense under subsection (a) is life imprisonment and a fine under Title 18.

Subsection (b) makes it an offense (1) knowingly to render another person unconscious and thereby engage in a sexual act with that person, or (2) knowingly to administer a drug, intoxicant or other similar substance to another person, thereby (A) substantially impairing that other person's ability to appraise or control conduct and (B) engaging in a sexual act with that other person. The subsection requires that the drug, intoxicant, or other similar substance be administered by force or threat of force, or without the knowledge or permission of the person to whom the drug, intoxicant, or other similar substance is administered. The maximum penalty for

a violation of subsection (b) is life imprisonment and a fine under Title 18.

Subsection (c) makes it an offense knowingly to engage in a sexual act with a person less than 12 years old, or to attempt to do so. The maximum penalty is life imprisonment and a fine under Title 18. This offense does not require the use of force or threats, or the administering of a drug, intoxicant, or other similar substance. It proscribes noncoercive conduct in which older, more mature persons take advantage of others whose capability to make judgments about sexual activity has not matured. Subsection (d) provides that, in a prosecution under subsection (c), the government need not prove that the defendant knew that the victim was less than 12 years old. Thus, there is strict liability as to the age of a victim.

For all of the offenses set forth in section 2241, there is no spousal immunity, and corroboration of the victim's testimony is not required. Lack of consent by the victim is not an element of the offense, and the prosecution need not introduce evidence of lack of consent. *See* H.R.Rep. No. 99-594, 99th Cong.2d Sess. 14, 15 (1986).

9-74.230 Sexual Abuse

Section 2242 sets forth two offenses involving a ''sexual act'' as defined in section 2254(2). *See* USAM 9-74.260, *infra.* The maximum punishment for each is 20 years imprisonment and a fine under Title 18. Paragraph (1) of the section makes it an offense, in the special maritime and territorial jurisdiction of the United States or a federal prison, for someone to cause another person to engage in a sexual act by means of express or implied threats or placing another in fear (other than by threats of, or placing in fear of, harm described in section 2241(a)(2)). The requirement of force may be satisfied by a showing that the threat or intimidation created in the victim's mind an apprehension or fear of harm to self or others. *See* H.R.Rep. No. 99-549, 99th Cong.2d Sess. 16 (1986).

Paragraph (2) of section 2242 makes it an offense to engage in a sexual act with another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation, or communicating unwillingness to engage in, the sexual act. There is no spousal immunity, and corroboration of the victim's testimony is not required. Lack of consent by the victim is not an element of the offense, and the prosecution need not introduce evidence of lack of consent or of victim resistance. *Id.*

9-74.240 Sexual Abuse of a Minor or a Ward

Section 2243 defines two offenses involving a ''sexual act'' as defined in section 2245(2). *See* USAM 9-74.260, *infra.* Subsection (a) makes it an offense, in the special maritime and territorial jurisdiction of the Unit-

ed States or a federal prison, for a person to engage in a sexual act with someone who is (1) at least 12 but less than 16 years old and (2) at least four years younger than that person. The maximum punishment is five years imprisonment and a fine under Title 18.

This offense, like that described in section 2241(c), does not require the use of force or threats, or the administering of a drug, intoxicant, or other similar substance. It applies to behavior that the participants voluntarily and willingly engage in. The offense is intended to reach older, mature persons who take advantage of younger, immature persons, but not to reach sexual activity between persons of comparable age. Corroboration of the victim's testimony is not required. Since subsection (a) reaches noncoercive conduct, and since some states permit marriage by persons of less than 16 years of age, subsection (c)(2) sets forth a defense that the parties were married at the time of the sexual act. The defendant has the burden of establishing this defense by a preponderance of the evidence. *See* H.R.Rep. No. 99-954, 99th Cong., 2d Sess. 16 (1986).

Subsection (b) of section 2243 makes it an offense for a person to engage in a sexual act with someone (1) who is in official detention, and (2) who is under the custodial, supervisory, or disciplinary authority of the defendant. The maximum punishment is one year imprisonment and a fine under Title 18. Corroboration of the victim's testimony is not required. *Id.* at 17.

9-74.250 Abusive Sexual Contact

Section 2244 describes offenses involving sexual contact as defined in section 2245(3), *see* 9-74.260, *infra*, rather than a sexual act. Subsection (a)(1) makes it an offense, in the special maritime and territorial jurisdiction of the United States or a federal prison, for someone to engage in, or cause, sexual contact with or by another person if to do so would violate section 2241 had the sexual contact been a sexual act. The maximum punishment is five years imprisonment and a fine under Title 18.

Subsection (a)(2) makes it an offense, for someone to engage in, or cause, sexual contact with or by another person if to do so would violate section 2242 had the sexual contact been a sexual act. The maximum punishment is three years imprisonment and a fine under Title 18.

For offenses under both subsections (a)(1) and (a)(2) of section 2244, there is no spousal immunity, and corroboration of the victim's testimony is not required. Lack of consent by the victim is not an element of the offense, and the prosecution need not introduce evidence of lack of consent. *See* H.R.Rep. No. 99-594, 99th Cong., 2d Sess. 18 (1986).

Subsection (a)(3) makes it an offense for someone to engage in, or cause, sexual contact with or by another person if to do so would violate section 2243(a) had the sexual contact been a sexual act. The maximum punishment is imprisonment for one year and a fine under Title 18.

Section (a)(4) makes it an offense for someone to engage in, or cause, sexual contact with or by another person if to do so would violate section 2243(b) had the sexual contact been a sexual act. The maximum punishment is imprisonment for 6 months and a $5,000 fine.

Subsection (b) makes it an offense for someone, in the special maritime and territorial jurisdiction or in a federal prison, knowingly to engage in sexual contact with another person without that other person's permission. The maximum punishment is imprisonment for six months and a $5,000 fine.

For offenses under subsections (a)(3), (a)(4) and (b) of section 2244, corroboration of the victim's testimony is not required. *See* H.R. Rep. No. 99-594, 99th Cong., 2d Sess. 18, 19 (1986).

9-74.260 Definitions

Section 2245 defines the terms used in the new chapter. Paragraph (1) defines the term ''prison'' to mean a correctional, detention, or penal facility. Paragraph (2) defines the term ''sexual act'' to mean (1) contact between the penis and the vulva, or the penis and the anus, that involves penetration, however slight, (2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Penetration may be proved by indirect or circumstantial evidence. It is not necessary that the penetration of the genital and anal openings be complete, and emission is not required.

Paragraph (3) defines the term ''sexual contact'' to mean an intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Paragraph (4) defines the term ''serious bodily injury'' to mean an injury to the body that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Paragraph (5) defines the term ''official detention'' to mean (1) detention by a federal officer or employee (or under the direction of such person) following arrest for an offense, following surrender in lieu of arrest for an offense, following a charge or conviction of an offense (or an allegation of finding of juvenile delinquency), following commitment as a material witness, following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or (2) custody by a federal officer or employee (or under the direction of such person)

for purposes incident to any detention just described, including transportation, medical diagnosis or treatment, court appearance, work and recreation. The term ''official detention'' does not include supervision or other control (other than custody during specified hours or days) after release on bail, on probation, on parole, or following a finding of juvenile delinquency.

9-74.280 Relationship to Other Sexual Abuse Laws

9-74.281 Sexual Assault

The offense of assault with intent to commit rape has been eliminated from the federal assault statute, 18 U.S.C. § 113. Section 113 now specifically excludes assault with intent to commit a felony under the sexual abuse statutes from its coverage. Such conduct may now be charged as an attempt under the appropriate sexual abuse statute.

9-74.282 Felony Murder

The federal murder statute, 18 U.S.C. § 1111, now includes in its felony murder provisions murder committed in the perpetration of or attempt to perpetrate any aggravated sexual abuse or sexual abuse.

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FOR CHAPTER 75

9-75.000 OBSCENITY AND SEXUAL EXPLOITATION

Obscenity prosecutions are initiated under 18 U.S.C. §§ 1461 through 1465. *See* USAM 9-75.010-.050, *infra*. Related provisions are found in 18 U.S.C. §§ 2251, 2252, which makes it criminal offenses to cause a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, to advertise child pornography and to traffick in child pornography. *See* USAM 9-75.081-.088, *infra*. This provision is directed at the actual abuse of children in producing photographs, films and the like.

Sections 2421 to 2422 of Title 18 prohibit the transportation and coercion of any individual with the intent that the person engage in any criminal sexual activity. Section 2423 increases the penalty to 10 years imprisonment when the individual is a minor.

Section 2241 *et seq.* of Title 18 establishes different categories of sex abuse offenses depending upon the age of the victim and whether force was used.

Section 223 of Title 47 prohibits, *inter alia*, obscene or indecent telephone calls. *See* USAM 9-75.090, 9-75.091, *infra*. Civil forfeiture proceedings for imported obscene material are initiated under 19 U.S.C. § 1305. *See* USAM 9-75.060, *infra*.

9-75.001 Authorization and General Prosecutive Policies and Priorities

The Attorney General has launched a concerted effort to combat the production and distribution of obscenity and child pornography. On October 22, 1986, the Attorney General created the National Obscenity Enforcement Unit (NOEU) within the Criminal Division to coordinate the activities of all Federal enforcement agencies engaged in obscenity investigations and prosecutions and to assist other federal prosecutors in obscenity prosecutions. In April 1987, the Attorney General elevated obscenity and child pornography prosecutions as two of the seven top prosecutive priorities.

The National Obscenity Enforcement Unit of the Criminal Division, Department of Justice, has the supervisory responsibility for all the above statutes. Unit special attorneys are authorized to conduct grand jury investigations and prosecute cases in any federal district, with or without the consent of the U.S. Attorney whenever necessary. However, it is the strategy and policy of the Department to cooperate with the U.S. Attorney and designated Assistant U.S. Attorneys in prosecuting child pornography and obscenity cases. Consultation with that Unit is required before any criminal prosecution may be instituted under 18 U.S.C. § 1461 *et seq.*; § 2251 *et seq.*; § 2421 *et seq.*; § 2241 *et seq.*; § 1961 *et seq.*; and 47 U.S.C. § 223. A civil action under 19 U.S.C. § 1305 may be instituted without prior authorization. *See* USAM 9-75.400, *infra*.

Consultation with NOEU is required prior to instituting a case against a large-scale interstate distributor who may be a target of multiple prosecutions.

Sections 1461 to 1465 are also predicate offenses for violation of the RICO statute, 18 U.S.C. §§ 1961 to 1968. *See* 18 U.S.C. § 1961(1). Questions concerning RICO authorization and the application of the RICO guidelines (*see* USAM 9-110.100 to 9-110.143) should be addressed to the Organized Crime and Racketeering Section; however, questions concerning obscenity issues involved in RICO should be addressed to the National Obscenity Enforcement Unit. NOEU and Organized Crime and Racketeering will jointly authorize RICO prosecutions that include obscenity violations as predicate offenses.

The NOEU should be advised in writing prior to initiation of the forfeiture action as to the nature and value of any property or interest forfeited under 18 U.S.C. §§ 2253 or 2254 for violations of 18 U.S.C. §§ 2251 or 2252 or forfeited in connection with an obscenity-based RICO prosecution.

The Department must report annually to Congress with regard to prosecutions, convictions and forfeitures under these statutes. Therefore, it is imperative that U.S. Attorneys maintain close contact with NOEU during the investigative and prosecutive stages of these cases. Copies of indictments, their disposition, sentencing information, and plea agreements must be furnished to the Unit. In addition, if an agency refers a case to an office or section that is part of a nationwide operation, consultation with the NOEU is required.

Prosecutive priority should be given to cases involving large-scale distributors who realize substantial income from multi-state operations and cases in which there is evidence of involvement by known organized crime figures. However, prosecution of cases involving relatively small distributors can have a deterrent effect and would dispel any notion that obscenity distributors are insulated from prosecution if their operations fail to exceed a predetermined size or if they fragment their business into small-scale operations. Therefore, prosecution of such distributors also may be appropriate on a case-by-case basis.

Priority should also be given to cases involving the use of minors engaging in sexually explicit conduct for the purpose of producing any visual or print medium depicting such conduct or cases involving the mailing of interstate or foreign shipment of material depicting minors engaging in sexually explicit conduct (18 U.S.C. §§ 2251, 2252).

Investigation has shown that many individuals who import or consensually exchange child pornography for their own collections do so repeatedly and with full knowledge that it is illegal to do so. In addition, many of these individuals regularly engage in sexual child abuse. Many of these

people are also involved in occupations which bring them into frequent contact with children.

9-75.010 Mailing Obscene Matter

Section 1461 of Title 18 declares every obscene article to be nonmailable matter, and imposes upon anyone who knowingly uses the mails to carry or deliver such material or knowingly takes such material from the mails for the purpose of circulating it, a maximum five years' imprisonment and $5,000 fine for the first offense and a maximum ten years' imprisonment and $10,000 fine for each offense thereafter.

9-75.011 Comment

See Obscenity Prosecution Manual, Chapters 5 to 11.

9-75.020 Importation or Transportation of Obscene Matters

Section 1462 of Title 18 prohibits anyone from: importing obscene material using an express company or other common carrier; carrying obscene material in interstate or foreign commerce and taking obscene material from an express company or common carrier. It imposes a maximum five years' imprisonment and a $5,000 fine for the first offense and a maximum ten years' imprisonment and a $10,000 fine for each offense thereafter.

9-75.030 Mailing Indecent Matter on Wrappers or Envelopes

Section 1463 of Title 18 imposes a maximum five years' imprisonment and a $5,000 fine upon anyone who deposits for mailing or takes from the mails for the purpose of circulating any material that carries obscene or indecent language or delineations upon the envelope or outside cover and upon all post cards.

9-75.040 Broadcasting Obscene Language

Section 1464 of Title 18 imposes a maximum two year and $10,000 penalty upon anyone who utters any obscene language by means of radio communication.

9-75.050 Transportation of Obscene Matters for Sale or Distribution

Section 1465 of Title 18 prohibits anyone from knowingly transporting in interstate or foreign commerce any obscene book, pamphlet, picture, film, or phonograph recording, for the purpose of sale or distribution. It also includes the rebuttable presumption that such publications and articles are intended for sale or distribution if the transportation included two or more copies of an obscene publication or article described above or a combined total of five such publications and articles. It imposes a maxi-

mum five years' imprisonment and $5,000 fine and permits the court to order the confiscation and disposal of such items described above that were found in the possession of or under the immediate control of the defendant at the time of his arrest.

9-75.060 Immoral Articles; Prohibition of Importation

Section 1305 of Title 19 prohibits, *inter alia,* the importation of any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, figure, or other article which is obscene. The entire contents of the package in which such articles are contained are subject to seizure and forfeiture. Upon the seizure of such book or matter, the Customs officer shall transmit information thereof to the district attorney of the district in which the seizure occurred, who shall institute proceedings in the district court for the forfeiture, confiscation and destruction of the book or matter seized. Upon adjudication by the district court that the seized matter is obscene, it shall be ordered destroyed. Any party in interest may have the facts at issue determined by a jury and may have an appeal.

9-75.070 Sexually Oriented Advertisements

9-75.071 Prohibition of Pandering Advertisements

Section 3008 of Title 39 allows an individual who has received a sexually oriented advertisement to request that the Postal Service issue an order directing the sender to: refrain from further mailings to the named addressees; delete the names of the designated addressees from all mailing lists controlled by the sender, and cease selling or renting the mailing lists bearing the names of the designated addressees. If the Postal Service believes that such an order has been violated, it shall serve a complaint on the sender and request a response. After a hearing, if requested by the sender, the Postal Service can request the Attorney General to apply to a district court for an order directing compliance. Failure to comply with such an order may be punishable by the court as contempt.

9-75.072 Mailing of Sexually Oriented Advertisements

Section 3010 of Title 39 requires a sender of sexually oriented advertisements to place on the envelope his name, address and notice of the sexually explicit nature of its contents. Any person may file a form with the Postal Service stating that he and/or his children do not desire to receive sexually oriented advertisements. The Postal Service shall maintain a list of the names and addresses of such persons and shall make it available to any sender. No person shall mail a sexually oriented advertisement to any person whose name has been on the list for more than 30 days.

9-75.073 Sexually Oriented Advertisements—Criminal Sanctions

Section 1735 of Title 18 prohibits anyone from willfully mailing a sexually oriented advertisement in violation of 39 U.S.C. § 3010. It imposes a maximum five years' imprisonment and $5,000 fine for the first offense and a maximum ten year and $10,000 fine for any offense thereafter.

9-75.074 Manufacture of Sexually Related Mail Matter

Section 1737 of Title 18 prohibits anyone from manufacturing any sexually related mail matter, intending or knowing that such matter will be deposited for mailing in violation of 39 U.S.C. § 3008 or § 3010. It imposes a maximum five years' imprisonment and a $5,000 fine for the first offense and a maximum ten years' imprisonment and a $10,000 fine for any offense thereafter.

9-75.075 Comment

Prohibitory orders, as described in 39 U.S.C. § 3008, are the preferred method of obtaining compliance. The order can be enforced either by contempt or by prosecution under 18 U.S.C. § 1737. Knowledge is also easier to prove.

9-75.080 Sexual Exploitation of Children; Child Pornography

The Child Protection Act of 1984, 18 U.S.C. §§ 2251 to 2256, addresses the problem of sexual exploitation of children for the production of child pornography.

9-75.081 Sexual Exploitation of Children

Section 2251 sets forth three offenses. Subsection (a) proscribes the employment or enticement of a minor to engage in sexually explicit activity for the purpose of producing any visual depiction of such conduct. Either the visual depiction must be actually transported in interstate or foreign commerce, or mailed, or the person must know or have reason to know that it will be so transported.

Subsection (b) prohibits any parent, legal guardian, or person having custody or control over a minor to permit such minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

Subsection (c) penalizes anyone who makes, prints or publishes any notice or advertisement seeking or offering: (1) to receive, exchange, buy, produce, display, distribute or reproduce a visual depiction of a minor engaging in sexually explicit conduct; or (2) to participate in any act of sexually explicit conduct by or with a minor.

Section 2251 imposes, for all three offenses, a maximum ten years' imprisonment and a $100,000 fine for the first offense and a minimum five years' to a maximum fifteen years' imprisonment together with a maximum $200,000 fine for every offense thereafter.

9-75.082 Comment

See Child Sexual Exploitation and Pornography Prosecution Manual at pp. 17-30.

9-75.083 Certain Activities Relating to Material Involving the Sexual Exploitation of Minors

Section 2252 of Title 18 sets forth four offenses. Subsection (a)(1) prohibits anyone from knowingly transporting in interstate or foreign commerce or mailing any visual depiction involving the use of a minor engaging in sexually explicit conduct.

Subsection (a)(2) prohibits anyone from knowingly receiving or distributing any visual depiction of a minor engaging in sexually explicit conduct that has been mailed or transported in interstate or foreign commerce or from knowingly reproducing any such visual depiction for distribution in interstate or foreign commerce or through the mails. Section 2252 imposes, for all four offenses, a maximum ten years' imprisonment and $100,000 fine for the first offense and a minimum five years' imprisonment to a maximum fifteen years' imprisonment and a $200,000 fine for every conviction thereafter.

9-75.084 Prosecutive Policy—Prospective Policy Generally and in Multiple District Investigations

Because of the international and national network of child pornography and child molesters which traffick in sexually explicit material featuring children depicted engaged in sexual conduct, projects involving multiple districts and multiple targets have become more commonplace. Individuals who receive child pornography are often child molesters and frequently are producers or distributors themselves.

Because of the underground and secretive nature of child pornography and the inextricable link between the receiving distributors and producer, new innovative law enforcement techniques involving multiple district prosecution of multiple targets have become necessary and commonplace. Regional and national reverse sting projects, undercover writing techniques, pedophile informant stings, and use of child pornography distributors and seizure lists are essential to successfully combat child pornography.

However, because of the new and complex nature of such investigations and the need for coordination of multiple district prosecutions which utilize the same concept or technique, it is imperative that the National

Obscenity Enforcement Unit of the Criminal Division (NOEU) be consulted prior to initiating a case against a defendant who may be a target which is the subject of multiple district investigation of child pornography. It is also important that U.S. Attorneys be advised through NOEU of actions by Postal, Customs or FBI in regional or national projects involving multiple federal districts.

NOEU will coordinate the various federal investigations to ensure effective cooperation and communication among districts and between U.S. Attorneys and the federal agencies in any such multiple district investigation. A law enforcement agency that is investigating multiple targets residing in multiple federal districts, such as in reverse stings, undercover, or test writing operations, must obtain approval from NOEU prior to referral to the appropriate U.S. Attorneys.

U.S. Attorneys must consult with NOEU at least 10 days prior to obtaining or filing any indictment or information. In such cases, the U.S. Attorney shall also consult with NOEU prior to entering into any plea agreement to ensure that it does not affect other districts or other cases.

Pre-trial diversion for child pornography offenses is not favored and consultation is required.

9-75.085 Criminal Forfeiture

Section 2253 of Title 18 requires the court to order the forfeiture of any property: (1) constituting or derived from proceeds obtained from a Section 2251 or Section 2252 offense and/or (2) used, or intended to be used, to commit such an offense, if the trier of fact determines, beyond a reasonable doubt, that the property is subject to forfeiture under the statute. It also permits the court to issue restraining orders and accept performance bonds to preserve the property subject to forfeiture.

9-75.086 Civil Forfeiture

Section 2254 of Title 18 permits seizure and civil forfeiture, according to the pertinent customs laws pertaining to civil forfeiture (*see* 19 U.S.C. §§ 1600 *et seq.*), of: (1) equipment used, or intended to be used, in producing, reproducing, transporting, shipping or receiving child pornography or any property used to facilitate such a violation; (2) any child pornography or material containing child pornography; and (3) any property constituting or derived from profits or proceeds obtained from a violation of Section 2251 or Section 2252.

9-75.087 Civil Remedy for Personal Injuries

Section 2255 of Title 18 permits a minor victim of a Section 2251 or Section 2252 violation to sue for actual damages in any appropriate United

States District Court. Sustained damages are deemed to be no less than $50,000.

9-75.088 Definitions for Chapter

Section 2256 of Title 18 sets forth definitions for Sections 2251 and 2252. For example, ''minor'' refers to any person under the age of eighteen years. ''Sexually explicit conduct'' means actual or simulated: sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or lascivious exhibition of the genitals or pubic area.

9-75.090 Obscene or Harassing Telephone Calls in the District of Columbia or in Interstate or Foreign Communications

Section 223(b) of Title 47 prohibits anyone from making an obscene or indecent communication for commercial purposes by telephone to any person. It imposes a maximum fine of $50,000 and imprisonment of not more than six months. In addition, subsection (b)(2) imposes an additional criminal fine of $50,000 for each day of the violation and subsection (b)(3) imposes a civil fine of $50,000 for each day of the violation, to be assessed by the Federal Communications Commission or the court, pursuant to F.C.C. civil action. The Attorney General may also obtain injunctive relief in the appropriate district court.

9-75.091 Comment

Because dial-a-porn is a rapidly changing area, consultation with the NOEU is suggested.

9-75.100 SEXUAL ABUSE ACT OF 1986

The Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241 to 2245, reforms and modernizes the federal law governing rape and other sexual offenses by: (1) defining the offenses in gender neutral terms; (2) defining the offenses so that the focus is on the conduct of the defendant, instead of upon the conduct or state of mind of the victim; (3) expanding the offenses to reach all forms of sexual abuse of another; (4) abandoning the doctrines of resistance and spousal immunity; and (5) expanding federal jurisdiction to include all federal prisons. H.R.Rep. No. 594, 99th Cong.2d Sess. 10-11 (1986). In addition, the bill carries forward the current federal rule that corroboration of a victim's testimony is not required. *Id.* at 12.

9-75.110 Aggravated Sexual Abuse

Section 2241 of Title 18 sets forth three offenses. All three offenses involve a ''sexual act'' as defined in 18 U.S.C. § 2245(2). Subsection (a) makes it an offense for someone, in the special maritime and territorial jurisdiction of the United States or in a federal prison: (1) to use force

against another person and thereby cause that person to engage in a sexual act; or (2) to cause another person to engage in a sexual act by means of threats, express or implied, or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping.

Subsection (b) makes it an offense: (1) knowingly to render another person unconscious and thereby engage in a sexual act with that person; or (2) knowingly to administer a drug, intoxicant or other similar substance to another person, thereby: (A) substantially impairing that other person's ability to appraise or control conduct; and (B) engaging in a sexual act with that other person. The subsection requires that the drug, intoxicant, or other similar substance be administered by force or threat of force, or without the knowledge or permission of the person to whom the drug, intoxicant, or other similar substance is administered.

Subsection (c) makes it an offense knowingly to engage in a sexual act with a person less than 12 years old, or to attempt to do so. Subsection (d) provides that, in a subsection (c) prosecution the government need not prove that the defendant knew that the victim was less than 12 years old. The maximum penalty for subsections (a), (b) and (c) is life imprisonment and a fine under Title 18.

For all of the offenses set forth in Section 2241, there is no spousal immunity, and corroboration of the victim's testimony is not required. Lack of consent by the victim is not an element of the offense, and the prosecution need not introduce evidence of the lack of consent. H.R.Rep. No. 594, 99th Cong.2d Sess. 14, 15 (1986).

9-75.120 Sexual Abuse

Section 2242 of Title 18 sets forth two offenses involving a ''sexual act'' as defined in Section 2254(2). The maximum punishment for each is 20 years' imprisonment and a fine under Title 18. Paragraph (1) of the section makes it an offense, in the special maritime and territorial jurisdiction of the United States or a federal prison, for someone to cause another person to engage in a sexual act by means of express or implied threats or placing another in fear (other than by threats of, or placing in fear of, harm described in Section 2241(a)(2)). The requirement of force may be satisfied by a showing that the threat or intimidation created in the victim's mind an apprehension or fear of harm to self or others. H.R.Rep. No. 549, 99th Cong.2d Sess. 16 (1986).

Paragraph (2) of Section 2242 makes it an offense to engage in a sexual act with another person who is incapable of appraising the nature of the conduct or physically incapable of declining participation, or communicating unwillingness to engage in, the sexual act. There is no spousal immunity, and corroboration of the victim's testimony is not required. Lack of consent by the victim is not an element of the offense, and the

prosecution need not introduce evidence of lack of consent or of victim resistance. *Id.*

9-75.130 Sexual Abuse of a Minor or Ward

Section 2243 of Title 18 defines two offenses involving a ''sexual act'' as defined in Section 2245(2). Subsection (a) makes it an offense, in the special maritime and territorial jurisdiction of the United States or a federal prison, for a person to engage in a sexual act with someone who is: (1) at least 12; but less than 16 years old; and (2) at least four years younger than that person. The maximum punishment is five years imprisonment and a fine under Title 18.

Subsection (c)(1) and (2) sets forth two available defenses which the defendant must prove by a preponderance of the evidence: that he/she reasonably believed that the other person had attained the age of 16 years and/or that the parties were married at the time of the sexual act. Subsection (d) makes clear, however, that, in a subsection (a) prosecution, the government need not prove that the defendant knew the age of the other person engaging in the sexual act, or that the requisite age difference existed between the persons.

Subsection (b) of Section 2243 makes it an offense for a person to engage in a sexual act with someone: (1) who is in official detention; and (2) who is under the custodial, supervisory, or disciplinary authority of the defendant. The maximum punishment is one year imprisonment and a fine under Title 18. Corroboration of the victim's testimony is not required.

9-75.140 Abusive Sexual Contact

Section 2244 of Title 18 describes offenses involving sexual contact as defined in Section 2245(3), rather than a sexual act. Subsection (a)(1) makes it an offense, in the special maritime and territorial jurisdiction of the United States or a federal prison, for someone to engage in, or cause, sexual contact with or by another person if to do so would violate Section 2241 had the sexual contact been a sexual act. The maximum punishment is five years' imprisonment and a fine under Title 18.

Subsection (a)(2) makes it an offense, for someone to engage in, or cause, sexual contact with or by another person if to do so would violate Section 2242 had the sexual contact been a sexual act. The maximum punishment is three years' imprisonment and a fine under Title 18.

For offenses under both subsections (a)(1) and (a)(2) of Section 2244, there is no spousal immunity, and corroboration of the victim's testimony is not required. Lack of consent by the victim is not an element of the offense, and the prosecution need not introduce evidence of lack of consent. H.R.Rep. No. 594, 99th Cong., 2d Sess. 18 (1986).

Subsection (a)(3) makes it an offense for someone to engage in, or cause, sexual contact with or by another person if to do so would violate Section 2243(a) had the sexual contact been a sexual act. The maximum punishment is imprisonment for one year and a fine under Title 18.

Section (a)(4) makes it an offense for someone to engage in, or cause, sexual contact with or by another person if to do so would violate Section 2243(b) had the sexual contact been a sexual act. The maximum punishment is imprisonment for 6 months and a $5,000 fine.

Subsection (b) makes it an offense for someone, in the special maritime and territorial jurisdiction or in a federal prison, knowingly to engage in sexual contact with another person without that other person's permission. The maximum punishment is imprisonment for six months and a $5,000 fine.

9-75.150 Definitions for Chapter

Section 2245 of Title 18 defines the terms used in the new chapter. Paragraph (1) defines the term ''prison'' to mean a correctional, detention, or penal facility. Paragraph (2) defines the term ''sexual act'' to mean: (1) contact between the penis and the vulva, or the penis and the anus, that involves penetration, however slight; (2) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (3) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Penetration may be proved by indirect or circumstantial evidence. It is not necessary that the penetration of the genital and anal openings be complete, and emission is not required.

Paragraph (3) defines the term ''sexual contact'' to mean an intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Paragraph (4) defines the term ''serious bodily injury'' to mean an injury to the body that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental facility.

Paragraph (5) defines the term ''official detention'' to mean: (1) detention by a federal officer or employee (or under the direction of such person) following arrest for an offense, following surrender in lieu of arrest for an offense, following a charge or conviction of an offense (or an allegation of finding of juvenile delinquency), following commitment as a material witness, following civil commitment in lieu of criminal proceedings or pending resumption of criminal proceedings that are being held in abeyance, or pending extradition, deportation, or exclusion; or (2) custo-

dy by a federal officer or employee (or under the direction of such person) for purposes incident to any detention just described, including transportation, medical diagnosis or treatment, court appearance, work and recreation. The term ''official detention'' does not include supervision or other control (other than custody during specified hours or days) after release on bail, on probation, on parole, or following a finding of juvenile delinquency.

9-75.151 Comment

See Child Pornography Prosecution Manual at p. 78.

9-75.200 TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES

9-75.210 Transportation Generally

Section 2421 of Title 18 prohibits anyone from knowingly transporting an individual in interstate or foreign commerce with the intent that the individual engage in prostitution or any criminal sexual activity and imposes a maximum punishment of five years' imprisonment and a fine under Title 18.

9-75.220 Coercion and Enticement

Section 2422 of Title 18 prohibits anyone from knowingly persuading, inducing, enticing or coercing an individual to travel in interstate or foreign commerce with the purpose of engaging in prostitution or any criminal sexual activity and imposes a maximum punishment of five years' imprisonment and a fine under Title 18.

9-75.230 Transportation of Minors

Section 2423 of Title 18 prohibits anyone from transporting any individual under the age of 18 years in interstate or foreign commerce with the intent that the minor engage in prostitution or any criminal sexual activity. It imposes a maximum ten years' imprisonment and a fine under Title 18.

9-75.231 Comment

See Child Pornography Prosecution Manual at p. 77.

9-75.300 VENUE

Cases under the obscenity statutes may be prosecuted in the district where the material is mailed or deposited with a facility of interstate commerce, the district of receipt, or any intermediate district through which the material passes. *See* 18 U.S.C. § 3237. In cases where there are complaints by postal patrons about the unsolicited receipt of obscene material, the district of receipt would appear to be the appropriate choice

of venue. On the other hand, in cases involving numerous mailings by a distributor into various districts, the district of origin may be the appropriate venue for the case. Furthermore, if a case is to be based solely upon test purchases by postal inspectors, it may be venued in the district of receipt where the government has some information showing that there were prior mailings into the recipient districts by the individual involved. Prosecutions will not be brought in jurisdictions through which obscene material passes in transit except in unusual circumstances and only with the express concurrence of the National Obscenity Enforcement Unit. Consultation with NOEU is required if the case is part of a multi-district effort.

9-75.310 Multiple Prosecutions of Obscenity Offenses

Because of the nationwide scope of operations of the large-scale obscene material distributors, cases involving multiple violations of the obscenity laws are frequently referred by investigative agencies to one or more U.S. Attorneys contemporaneously. Although multiple prosecutions are generally not favored with respect to other crimes (*see USAM 9-2.142*), large-scale obscenity distributors will not be insulated and multiple prosecutions for violations of the obscenity statutes may be authorized. However, because of the need for coordination of multiple prosecutions, it is imperative that the National Obscenity Enforcement Unit of the Criminal Division (NOEU) be consulted prior to initiating a case against a defendant who is a large-scale interstate producer or distributor and thus may be a target of multiple prosecutions. It is also important that U.S. Attorneys be advised of actions of the NOEU involving multiple district cases. Therefore, upon a determination by the NOEU that a target warrants a multiple district approach, the NOEU shall notify the U.S. Attorneys in those districts where investigations are contemplated.

NOEU will coordinate the various federal investigations to ensure effective cooperation and communication among districts. A law enforcement agency that is targeting or investigating a major multiple district distributor must consult with the NOEU for approval prior to referral to the appropriate U.S. Attorney. In any case which is included in a multiple district prosecution project, *i.e.* where the same target or targets are to be subjects of prosecution in two or more districts, each U.S. Attorney in those districts must consult with NOEU and obtain approval prior to filing any indictment or information. It shall constitute sufficient prior approval if the proposed indictment or information is submitted to NOEU at least ten days before the date of indictment and no objection is made by NOEU by the date of indictment.

Whether or not more than one prosecution will take place will depend largely upon: (1) whether the transmission of material occurred prior to or subsequent to the first indictment; (2) the number of districts in-

volved; (3) the size of the operation; (4) the nature of the material transported or mailed; (5) number of districts into which material was mailed or transported; and (6) charging considerations.

In short, multiple prosecutions will be encouraged where the producer or distributor is a large-scale, organized entity who routinely commits obscenity and related crimes in numerous federal districts and where the size of the organizational structure suggests that a multiple district prosecution approach, in either districts of receipt and/or distribution, will be most effective.

9-75.320 Federal-State Relations

The federal role in prosecuting obscenity cases is to focus upon the major producers and interstate distributors of pornography while leaving to local jurisdictions the responsibility of dealing with local exhibitions and sales. Local authorities dealing with obscene material being distributed within their area may develop evidence of interstate distribution useful to a federal prosecution. Under some circumstances, the United States may provide assistance to local and state authorities in cases not within the above guidelines. Hence, cooperation between federal and local prosecutors can be highly productive in both federal and local efforts. *See*, Fed.R.Cr.P. 6(e).

The Attorney General has asked for training and creation of LECC subcommittees on pornography. The federal prosecutor's participation in these events can foster improved federal-state cooperation in obscenity prosecutions.

9-75.330 Private Remedies

Section 3008 of Title 39 allows an individual who has received a sexually oriented advertisement to initiate a complaint with the Postal Service so that administrative corrective action may be taken. 39 U.S.C. § 3010 permits a person to place his/her name on a list maintained by the Postal Service of those who do not wish to receive such advertisements and imposes certain requirements on distributors of such material with regard to the names listed. 18 U.S.C. § 2255 provides for a civil remedy for victims of child pornography. The use of the Federal Tort Claims Act and the Civil RICO statute may also be appropriate in certain cases.

9-75.400 FORFEITURE PROCEDURES

Forfeiture actions initiated under the customs laws (19 U.S.C. § 1305) should receive the prompt and thorough consideration of those U.S. Attorneys having ports of entry within their jurisdictions since undue delay in commencing such action or in proceeding to trial may create First Amendment problems. *See United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971), which requires that a complaint for forfeiture must be filed within

14 days following seizure and that trial must be completed within 60 days. *But see, United States v. Hale*, 784 F.2d 1465 (9th Cir.1986). While it is not necessary to secure Department authorization before filing a complaint in a matter referred by Customs Service for forfeiture action under 19 U.S.C. § 1305, the National Obscenity Enforcement Unit should be notified immediately after forfeiture.

9-75.410 Request to Re-export

Importers of articles placed under seizure by Customs as obscene, and therefore subject to condemnation under 19 U.S.C. § 1305, may make a request to the Customs Service, or to the U.S. Attorney after referral of the matter to him/her for forfeiture action, to be permitted to re-export the articles. To permit re-exportation of an article once a complaint for forfeiture has been filed is inadvisable. The filing of the complaint should represent a final decision by the government that the article is obscene and will sustain forfeiture. To allow re-exportation without an adjudication would fail to carry out the statutory purpose of effecting the destruction of obscene material or to achieve the deterrent effect of forfeiture.

However, prior to filing of a complaint, greater latitude may be exercised with respect to the re-exportation of articles of questionable prosecutive merit. Re-exportation should be permitted only in those cases whether the U.S. Attorney entertains grave doubts as to the possibility of a successful action under 19 U.S.C. § 1305.

In the event that an importer approaches the U.S. Attorney with a request to re-export an article prior to the time such article has been formally referred to the U.S. Attorney by the Customs Service for his/her evaluation, the importer should be instructed to contact the Customs Service. If Customs officials thereafter informally request the U.S. Attorney's views concerning the merits of such a request, the U.S. Attorney should review the article in question and render his/her advice accordingly.

If after formal referral to the U.S. Attorney but before a complaint has been filed, an importer seeks permission from the U.S. Attorney to re-export an article and the U.S. Attorney is of the opinion that re-exportation would comport with the interests of the government, he/she should return the article to the Customs Service stating that a request for re-exportation has been made and that the U.S. Attorney has no objection to the re-exportation of the article in question.

The National Obscenity Enforcement Unit will arbitrate any disputes between Customs and the U.S. Attorney on re-exportation. Because of strict judicial time limitations imposed upon the government in the prosecution of these cases, however, it is imperative that the U.S. Attorney immediately contact NOEU in the event of such a disagreement.

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9-76.000 TRANSPORTATION

9-76.100 AVIATION

The Federal Aviation Administration of the Department of Transportation, including the regional attorneys thereof, refer directly to the appropriate U.S. Attorneys cases involving violations of the civil penalty provisions of the Federal Aviation Act of 1958 (49 U.S.C. § 1471).

9-76.110 Policy

U.S. Attorneys are authorized to effect settlement of the civil penalties provided in 49 U.S.C. § 1471 without the prior approval of the Criminal Division in those instances where the amount of the compromise is acceptable to the Federal Aviation Administration unless the difference between the total amount of the penalties and the amount of the proposed settlement exceeds $750,000 or 10 percent, whichever is greater. In the latter situation, the U.S. Attorney should forward to the General Litigation and Legal Advice Section an appropriate memorandum with supporting reasons for the recommended settlement, since prior approval of the Deputy Attorney General must be secured (*see* § 28 C.F.R. §§ 0.160, 0.161). If the U.S. Attorney believes that a compromise settlement should be effected in an amount less than is acceptable to the Administration, the matter should be submitted to the General Litigation and Legal Advice Section for decision. Such compromise settlements may be made without filing suit or at any other time before a judgment is obtained, in which event the settlement need not be reduced to a judgment unless the U.S. Attorney deems that advisable. In addition to the principal amount, the settlement should include any costs to which the government is entitled.

The relatively small amount of money involved in many FAA civil penalty cases must not be a consideration in evaluating the merits of such cases. A civil penalty action is not one to collect a trivial amount owed to the government, rather it is an important part of the federal enforcement effort to ensure aviation safety.

9-76.200 MOTOR CARRIER SAFETY

The Federal Highway Administration of the Department of Transportation investigates and refers directly to the U.S. Attorneys criminal cases involving violations of the Motor Carrier Safety Regulations (*see* 49 C.F.R., pts. 390 to 397) promulgated pursuant to Part II of the Interstate Commerce Act (49 U.S.C. § 304) and violations of the Hazardous Materials Transportation Act (49 U.S.C. §§ 1801 to 1811) involving motor carriers.

9-76.210 Policy

The U.S. Attorney should advise the Federal Highway Administration of all significant developments in the case. Supervision of criminal prose-

cutions under these acts is assigned to the General Litigation and Legal Advice Section.

A vigorous enforcement program is followed in regard to offenses which endanger the public on the highways.

9-76.300 RAILROAD SAFETY

The Federal Railroad Administration (FRA) of the Department of Transportation administers the following railroad safety statutes:

A. The Safety Appliance Act (45 U.S.C. §§ 1 to 16);

B. The Locomotive Inspection Act (45 U.S.C. §§ 22 to 34);

C. The Accident Reports Act (45 U.S.C. §§ 38 to 43);

D. The Hours of Service Act (45 U.S.C. §§ 61 to 64);

E. The Signal Inspection Law (49 U.S.C. § 26); and

F. The Hazardous Materials Transportation Act (49 U.S.C.App. §§ 1801 to 1811).

The Accident Reports Act contains criminal penalties. The Hazardous Materials Transportation Act has both civil and criminal sanctions. The other referenced acts are civil in nature (*see* USAM 9-76.340).

9-76.310 Policy

Supervision of criminal prosecutions and civil penalty actions under these acts is assigned to the General Litigation and Legal Advice Section. The FRA will refer all cases directly to the appropriate U.S. Attorney, except cases involving novel questions of law.

The U.S. Attorney should advise the Chief Counsel, FRA of all significant developments in a case, including the filing of an information or complaint, the docket number, the arraignment, the trial date, the position taken by the railroad and, the proposed settlement of the case, etc. Copies of such correspondence should be furnished to the General Litigation and Legal Advice Section when significant or unusual developments or matters are involved. The Criminal Division should, of course, be promptly notified of adverse decisions and of cases where an appeal is taken by defendant.

9-76.320 Investigation and Referral of Cases

Investigations of all cases arising under the railroad safety statutes are conducted by the FRA.

9-76.330 Criminal Penalty Provisions

The Hazardous Materials Transportation Act provides that any person who is determined by the Secretary of Transportation to have knowingly violated any provision of the act or any regulation issued thereunder, may be subject to a civil penalty of not more than $10,000 for each violation. *See* 49 U.S.C. § 1809. A willful violation of a provision of the act or a regulation issued thereunder is a criminal offense punishable by a fine of not more than $25,000 and imprisonment for a term not to exceed five years. The substitution of the word ''willfully'' in 49 U.S.C. § 1809(b), dealing with criminal penalty, implies that Congress intended that the mens rea required before a criminal penalty can be imposed be greater than that for the civil penalty. *See United States v. Allied Chemical Corp.*, 431 F.Supp. 361 (W.D.N.Y.1977).

The Accident Reports Act makes it a misdemeanor for a railroad to fail to submit the required report of an accident within the time provided.

9-76.340 Civil Penalty Provisions

Under the Federal Claims Collection Act (31 U.S.C. § 3711) and regulations promulgated thereunder (*see* 4 C.F.R. §§ 101-105), the FRA is authorized to collect and compromise administratively civil penalties and forfeitures arising from violations of railroad safety statutes. Occasionally, it will be necessary to refer claims arising under the Safety Appliance Act, the Locomotive Inspection Act, the Hours of Service Act, and the Signal Inspection Law to the appropriate U.S. Attorney when such claims cannot be disposed of under the applicable standards of the Federal Claims Collection Act. Since three written demands, at 30-day intervals, must normally be made upon a debtor pursuant to a requirement contained in 4 C.F.R. § 102.2, Hours of Service Act cases in which the violation will expire due to the short statute of limitations of 2 years (*see* 45 U.S.C. § 64a), will necessarily be referred to the U.S. Attorney.

Due to the mandatory nature of these acts and the absolute duties which they impose upon carriers, the Department regards the penalties, although recoverable in civil proceedings, as not being merely civil obligations but penal sanctions, and accordingly does not accept compromise settlements of less than the full statutory penalty on each count with costs, to which the government is entitled as a matter of right. *See* 28 U.S.C. § 1918(a).

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9-78.000 WORKER PROTECTION STATUTES

The primary federal worker protection statutes are the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, and the Federal Mine Safety and Health Act of 1977, *as amended,* 30 U.S.C. § 801 *et seq.* Supervision of criminal prosecutions under these Acts is assigned to the General Litigation and Legal Advice Section. Questions arising under these statutes should be directed to the General Litigation and Legal Advice Section.

9-78.010 Railroad Safety Acts

See USAM 9-76.300.

9-78.100 OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act (''OSHA''), 29 U.S.C. § 651 *et seq.*, provides for enforcement of its provisions by means of civil and criminal penalties, 29 U.S.C. § 666, and by injunction proceedings, 29 U.S.C. § 662. Investigations are conducted by the Occupational Safety and Health Administration of the Department of Labor.

9-78.110 Criminal Violations

Criminal cases are referred by the Department of Labor to the Criminal Division. If the Criminal Division determines that prosecution is warranted, the case will be referred to the appropriate U.S. Attorney. Complaints of violations should be referred by the U.S. Attorneys to the regional office of the Department of Labor and to the General Litigation and Legal Advice Section. Questions regarding OSHA criminal matters should be directed to the General Litigation and Legal Advice Section.

9-78.111 Willful Violation of a Safety Standard which Causes Death to an Employee

Title 29 U.S.C. § 666(e) provides criminal penalties for any employer who willfully violates a safety standard prescribed pursuant to the Occupational Safety and Health Act, where that violation causes death to any employee. Four elements must be proved in order to establish a criminal violation of 29 U.S.C. § 666(e). The government must prove (1) that the defendant is an employer engaged in a business affecting commerce, (2) that the employer violated a ''standard, rule, or order'' promulgated pursuant to 29 U.S.C. § 655, or any regulation prescribed under the Act, (3) that the violation was willful, and (4) that the violation caused the death of an employee.

A. *Employer*

The term ''employer'' is defined in 29 U.S.C. § 652(5) as ''a person engaged in a business affecting commerce who has employees.'' The term

''employer'' has been interpreted for civil OSHA purposes as being limited to the employing business entity, thereby covering individuals only if they are sole proprietors of a business. *See, e.g., Skidmore v. Travelers Insurance Co.*, 356 F.Supp. 670, 672 (E.D.La.), *aff'd*, 483 F.2d 67 (5th Cir.1973). Criminal enforcement, however, is not limited to the business entity, whether a corporation, partnership, or sole proprietorship. Culpable supervisors and corporate officers, as well as other persons who have a responsible share in the prohibited conduct, may be punishable as principals under 18 U.S.C. § 2 for aiding and abetting or for willfully causing the employer's violation. *See United States v. Lester*, 363 F.2d 68, 72 (6th Cir.1960), *cert. denied*, 385 U.S. 1002, *reh. denied*, 386 U.S. 938 (1967).

The employer must be ''engaged in business affecting commerce.'' 29 U.S.C. § 652. The use of this phrase shows Congressional intent to exercise fully its constitutional authority under the commerce clause. *Brennan v. OSHRC*, 492 F.2d 1027, 1030 (2d Cir.1974); *Godwin v. OSHRC*, 540 F.2d 1013, 1015 (9th Cir.1976); *United States v. Dye Construction Co.*, 510 F.2d 78, 83 (10th Cir.1975). The use of supplies and equipment from out of state sources is generally sufficient to show the business ''affects commerce.'' *See United States v. Dye Construction Co.*, 510 F.2d at 83, *citing Katzenback v. McClung*, 379 U.S. 294 (1964).

B. *Willfulness*

In *United States v. Dye Construction*, 510 F.2d 78 (10th Cir.1975), the only case to address the issue of what constitutes ''willfulness'' for the purpose of finding a criminal violation, the court concluded that 29 U.S.C. § 666(e) does not require that the government prove that the employer entertained a specific intent to harm the employee or that the employer's action involve moral turpitude. *See United States v. Dye Construction Co.*, 510 F.2d 78, 82 (10th Cir.1975). Instead, the court approved the following jury instruction:

> The failure to comply with a safety standard under the Occupational Safety and Health Act is willful if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally.

510 F.2d at 81. *See also Consolidation Coal v. United States*, 504 F.2d 1330, 1335 (10th Cir.1974). This definition of ''willfulness'' has been widely adopted by the circuits in the context of OSHA civil enforcement. *See Ensign-Beckford Co. v. OSHRC*, 717 F.2d 1419, 1422 (D.C.Cir.1983), *cert. denied*, 104 S.Ct. 1909 (1984), and cases cited therein.

Ignorance of the applicable standard is not a defense, where intentional disregard or plain indifference to the requirements of the law can be shown. For example, a company may not fail to make its supervisors on the

job site aware of OSHA regulations, then plead ignorance when caught in a violation. *Georgia Electric Co. v. Marshall*, 595 F.2d at 320. Such conduct itself shows plain indifference to the requirements of the law. However, a defendant who pleads ignorance would be entitled to the bracketed portion of *Devitt and Blackmar* instruction #14.10 allowing professed ignorance to be considered on the question of intent. *See United States v. McIntrye*, 582 F.2d 1221, 1224-25 (9th Cir.1978).

Indifference to general safety or to a specific hazard can also be evidence of intentional disregard of or plain indifference to the requirements of the law. *See Georgia Electric Co. v. Marshall*, 595 F.2d 309, 320 (indifference to employee safety); *United States v. Dye Constr. Co.*, 510 F.2d at 82 (gross indifference to the hazard). On the other hand, belief that a practice in violation of OSHA standards is safe is not a defense. *F.X. Messina Constr. Co. v. OSHRC*, 505 F.2d at 702; *Intercounty Constr. Co. v. OSHRC*, 522 F.2d at 780; *Western Waterproofing Co. v. Marshall*, 576 F.2d at 143. On the contrary, a defendant's substitution of his own judgment for the requirements of the standard may itself show intentional disregard of or plain indifference to the standard. *See Western Waterproofing Co. v. Marshall*, 576 F.2d at 143.

9-78.112 Unauthorized Advance Notice of Inspection

Title 29 U.S.C. § 666(f) provides criminal penalties for any person who gives advance notice of an inspection to be conducted under the Occupational Safety and Health Act, without authority from the Secretary of Labor or his designees.

9-78.113 False Statement, Representation, or Certification

Title 29 U.S.C. § 666(g) provides criminal penalties for any person who knowingly makes a false statement, representation, or certification in any application, record, report, plan, or other document filed, required to be filed, or required to be maintained pursuant to the Occupational Safety and Health Act.

9-78.120 Civil Penalties and Enforcement

Civil penalty and enforcement proceedings are handled by the Solicitor's Office of the Department of Labor. Civil penalties are assessed by the Occupational Safety and Health Review Commission, an independent, quasi-judicial body. *See* 29 U.S.C. §§ 661, 659, 666(c). Review of the Commission's orders lies with the United States court of appeals. *See* 29 U.S.C. § 660. Injunction proceedings may be brought in the United States district courts, 29 U.S.C. § 662, as may civil actions to recover civil penalties owed, 29 U.S.C. § 666(k). Questions regarding OSHA civil matters should be addressed to the Civil Division.

9-78.200 FEDERAL MINE SAFETY AND HEALTH ACT

The Federal Mine Safety and Health Act of 1977, *as amended* (''MSHA''), 30 U.S.C. § 801 *et seq.*, provides for enforcement of its provisions by means of civil and criminal penalties, 30 U.S.C. § 820, and by other civil and administrative enforcement methods. *See, e.g.*, 30 U.S.C. § 817(a) (withdrawal orders); 30 U.S.C. § 818 (injunctions). Investigations are carried out by the Mine Safety and Health Administration of the Department of Labor. Complaints of violations should be referred by the U.S. Attorneys to the Assistant Secretary for Mine Safety and Health, United States Department of Labor, 4051 Wilson Boulevard, Arlington, VA 22203 and also to the General Litigation and Legal Advice Section.

9-78.210 Criminal Violations

Criminal cases are referred by the Department of Labor to the Criminal Division, or, in some cases, directly to the U.S. Attorneys. If the Criminal Division determines that a case referred to it warrants prosecution, the case will be referred to the appropriate U.S. Attorney. Questions regarding MSHA criminal matters should be directed to the General Litigation and Legal Advice Section.

9-78.211 Willful Violation of a Mandatory Health or Safety Standard or Withdrawal Order

Title 30 U.S.C. § 820(d) provides criminal penalties for any operator who willfully fails to comply with a mandatory health or safety standard, or who knowingly violates or refuses to comply with an order under 30 U.S.C. § 814 or § 817. Three elements must be proved in order to establish an offense under 30 U.S.C. § 820(d). The government must prove (1) that the defendant is an operator of a coal or other mine which is subject to the Act, (2) that the defendant violated a mandatory health or safety standard or an order of withdrawal at that mine, and (3) that the violation was willful.

A. *The defendant is an operator of a mine subject to the Act.*

Title 30 U.S.C. § 820(d) applies to ''operators'' of mines subject to the Mine Safety and Health Act. Mines subject to coverage include coal or other mines, the products of which enter commerce, or the operations or products of which affect commerce. *See* 30 U.S.C. § 803. Note that the Act now covers mines other than coal mines. *See* 30 U.S.C. § 802(h)(i). ''Operator'' is defined to include any owner, leasee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine. 30 U.S.C. § 802(d).

Title 30 U.S.C. § 820(c) provides that whenever a corporate operator violates Section 820(d), any director, officer, or agent of the corporate violator who knowingly authorized, ordered, or carried out the act constituting the violation shall be subject to the same penalties as can be

imposed under 30 U.S.C. § 820(d). Similarly culpable agents of operators which are partnerships or sole proprietorships, rather than corporations, are punishable as principles under 18 U.S.C. § 2 as aiders and abettors of the operator's violation.

B. *The operator violated a mandatory health or safety standard or withdrawal order.*

The operator must have violated a mandatory health or safety standard under the Act or an order pursuant to 30 U.S.C. § 814 or § 817. Sections 814 and 817 set forth provisions for orders requiring operators to cause all persons, other than certain specified persons, to be withdrawn from and prohibited from entering certain areas of a mine.

Mandatory health and safety standards are established either by statute or by regulation. The statute itself sets forth interim mandatory health standards for underground coal mines at 30 U.S.C. §§ 841-846, and interim mandatory safety standards for underground coal mines at 30 U.S.C. §§ 861-878. Regulations setting forth mandatory health and safety standards for various types of mines are found in Title 30 of the Code of Federal Regulations.

Regulations establishing or modifying mandatory health or safety standards can form the basis of a criminal prosecution only when they have been promulgated under the formal rulemaking procedures of 30 U.S.C. § 811. *United States v. Finley Coal Company*, 493 F.2d 285 (6th Cir.1974); *United States v. Consolidation Coal Co.*, 417 F.Supp. 283, 286 (S.D.Ohio 1979). Care should be exercised to insure that criminal charges are based only on mandatory health or safety standards set forth in the statute or properly promulgated under 30 U.S.C. § 811.

C. *The violation was willful.*

The violation of the mandatory health or safety standard or withdrawal order must be willful. The leading case on the intent requirement of this statute approves a jury instruction that a failure to comply with a mandatory health or safety standard is willful.

> if done knowingly and purposefully by a ... mine operator who, having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements.

United States v. Consolidation Coal Co., 504 F.2d 1330, 1335 (6th Cir. 1974).

9-78.212 Unauthorized Advance Notice of Inspection

Title 30 U.S.C. § 820(e) provides criminal penalties for any person, unless otherwise authorized by the Act, who gives advance notice of any inspection to be conducted under the Act.

9-78.213 False Statement, Representation, or Certification

Title 30 U.S.C. § 820(f) provides criminal penalties for any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to the Act.

9-78.214 Equipment Falsely Represented as Complying with Requirements

Title 30 U.S.C. § 820(h) provides criminal penalties for any person who knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal or other mine which is represented as complying with the Act or any applicable specification or regulation, which does not so comply.

9-78.220 Civil Penalties and Enforcement

Civil penalty and enforcement proceedings are handled by the Solicitor's Office of the Department of Labor. Civil penalties are assessed by the Federal Mine Safety and Health Review Commission. *See* 30 U.S.C. §§ 802(*o*), 820(i), 823. Review of the Commission's orders lies in the United States courts of appeals, 30 U.S.C. § 816(b). Injunction proceedings may be brought in the United States district courts, 30 U.S.C. § 818, as may civil actions to recover civil penalties owned, 30 U.S.C. § 820(j). Questions regarding MSHA civil matters should be addressed to the Civil Division.

9-78.300 MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT

The Migrant and Seasonal Agricultural Worker Protection Act, Pub.L. 97-470, January 14, 1983, 96 Stat. 2584, codified at 29 U.S.C. § 1801 *et seq.*, became effective on April 14, 1983. It repealed and replaced the former Farm Labor Contractor Registration Act of 1963 as amended in 1974, codified at 7 U.S.C. § 2041 *et seq.*

The purpose of the Act is to remove restraints on commerce caused by activities detrimental to migrant and seasonal agricultural workers, to require farm labor contractors to register, and assure necessary protections for migrant and seasonal agricultural workers, agricultural associations, and agricultural employees.

9-78.310 Prosecutive Policy

The Department of Labor has advised that it will forward for possible criminal prosecution only cases involving habitual violators, such as those who have been previously warned, civilly fined, enjoined, or criminally prosecuted, and cases involving undocumented workers. U.S. Attorneys should carefully review such referrals on a timely basis and prosecute meritorious cases. It is requested that you advise the appropriate regional office of the Department of Labor of your decision in each referred case.

9-78.320 Provisions of the Act

The Act, *inter alia*, requires any person engaging in farm labor contracting activities to obtain a certificate of registration from the Secretary of Labor specifying the farm labor contracting activities he is authorized to perform, to carry said certificate while engaging in farm labor contracting activities, and to exhibit it, upon request, to all persons with whom he intends to deal in that capacity. The Act also prohibits the knowing employment of illegal aliens.

The Act requires the disclosure to migrant and seasonal agricultural workers of certain information on wages and working conditions by recruiters, employers, and housing providers, and imposes certain record keeping requirements on employers. Knowingly providing false or misleading information under the disclosure requirements is a violation of the Act. The Act requires payment of wages when due, prohibits employers from requiring workers to purchase goods and services from them, and prohibits the unjustified violation by employers of the terms of working arrangements made with workers. The Act also provides for safety and health of housing, and for motor vehicle safety and insurance. An antidiscrimination clause protects workers who institute enforcement proceedings or testify in such proceedings.

9-78.330 Enforcement

Criminal penalties for willful and knowing violations of the Act or any regulation under the Act, are available under 29 U.S.C. § 1851. The penalty for a first offense is a fine of not more than $1,000, imprisonment for up to one year, or both. A conviction for a subsequent violation carries a penalty of a fine of not more than $10,000, imprisonment for up to three years, or both. The penalty for knowing recruitment or employment of illegal aliens by a farm labor contractor who has been refused issuance or renewal of a certificate of registration, or has failed to obtain one, is a fine of not more than $10,000, imprisonment for not more than three years, or both.

The Act also provides for enforcement by means of actions for injunctive relief brought by the Solicitor of Labor, 29 U.S.C. § 1852, administrative civil money penalties, 29 U.S.C. § 1853, and private civil actions by persons aggrieved by a violation, 29 U.S.C. § 1854. Most violations are handled by the Department of Labor by imposing monetary penalties or seeking injunctive relief. According to the Department of Labor, the regional offices of the Department of Labor investigate alleged or apparent criminal violations of the Act. After review by the Regional Solicitors' offices the cases are forwarded directly to the office of the appropriate U.S. Attorney. The Department of Labor has advised that it forwards only cases involving habitual violators, such as those who have been previously warned, civilly fined, enjoined, or criminally prosecuted, and cases involving undocumented workers.

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9-79.000 OTHER CRIMINAL DIVISION STATUTES

9-79.100 WHITE SLAVE TRAFFIC

A. *Investigative and Supervisory Responsibility*:

Cases under the White Slave Traffic Act, also known as the Mann Act, 18 U.S.C. § 2421 *et seq.*, are investigated by the Federal Bureau of Investigation and are referred directly to the U.S. Attorneys. The General Litigation and Legal Advice Section, Criminal Division, is responsible for supervision of the Act.

B. *Overview and Prosecutive Policy*:

Sections 2421 to 2423 of the Act spell out several offenses including the offense of knowingly transporting any individual, male or female, in interstate or foreign commerce or in any territory or possession of the United States for the purpose of prostitution or sexual activity which is a criminal offense under any federal or state statute or local ordinance. Section 2423 is concerned solely with the transportation of minors under the age of 18 years and has an enhanced penalty. This section should generally be used when minors are victims, although the other two sections also cover minors (''any individual'').

Unless minors are victims, prosecutions under 18 U.S.C. §§ 2421 and 2422 should generally be limited to persons engaged in commercial prostitution activities, even though commerciality is not an element of the offense. *See Cleveland v. United States*, 329 U.S. 14 (1946), and *Caminetti v. United States*, 242 U.S. 470 (1917). Prosecution of persons other than those engaged in commercial prostitution enterprises as panderers, operators of houses of prostitution, or call-girl operations, and of those acting for or in association with such persons, should not be instituted without consultation with the General Litigation and Legal Advice Section unless minors are victims.

Section 2423 was amended on February 6, 1978, by Pub.L. No. 95-225 and again on November 7, 1986, by Pub.L. No. 99-628. The legislative history of these amendments demonstrates Congress' special concern with the sexual exploitation of minors. Cases falling under these statutes involving minors as victims should be given special priority.

C. *Victims as Defendants*:

In *United States v. Holte*, 236 U.S. 140 (1915), the Supreme Court held that under certain circumstances a woman could be indictable as a conspirator in her own transportation. However, in *Gebardi v. United States*, 287 U.S. 112 (1932), the Court, while not disavowing *Holte*, held that a woman who merely assents to her transportation without taking a more active role in promoting it is not guilty of a substantive offense under these statutes. The Court also held that such a woman cannot be charged with conspir-

acy, and that where the only coconspirator is the man who transported her or caused her transportation, a conspiracy charge against him must fall also. *Gebardi* has been cited and followed in more recent lower court decisions. This strongly suggests that it may be difficult to sustain a prosecution against a transportee ''victim'' for the substantive offense or for conspiracy, or a conspiracy case against a sole coconspirator who was the transporter, unless the ''victim'' was active in promoting the transportation and not merely acquiescent.

9-79.200 BANK RECORDS AND FOREIGN TRANSACTIONS ACT

9-79.210 Summary

For a further discussion of the provisions of the Bank Records and Foreign Transactions Act—which is frequently referred to in the following discussion as the Bank Secrecy Act—U.S. Attorneys and their Assistants should refer to a monograph entitled *Investigation and Prosecution of Illegal Money Laundering—A Guide to the Bank Secrecy Act* (1983), which can be obtained from the Narcotic and Dangerous Drug Section of the Criminal Division.

The Bank Records and Foreign Transactions Act consists of two sections. Title I, codified at 12 U.S.C. § 1829(b) and §§ 1951 to 1959 (with effectuating regulations contained at 31 C.F.R. §§ 103.31 to 103.37), requires banks and other financial institutions to retain certain financial records for periods of up to five years. Title II—which was entitled the Currency and Foreign Transactions Reporting Act—was originally codified at 31 U.S.C. §§ 1051-1122. In 1982, these sections were re-enacted without substantive change as 31 U.S.C. §§ 5311 to 5322 and are now entitled Records and Reports on Monetary Instruments Transactions, with applicable regulations at 31 C.F.R. § 103.11 *et seq.* Provisions contained in these sections require private individuals, banks, and other financial institutions to file reports with the federal government regarding certain of their foreign and domestic financial transactions. Failure to comply with the reporting requirements of the Bank Secrecy Act may lead to civil penalties, civil forfeiture, or criminal misdemeanor and felony sanctions. Sections 5323 and 5324 were added in 1984 and 1986.

A. In order to aid law enforcement officials in the detection and investigation of criminal, tax, and regulatory violations, the Bank Secrecy Act requires reports which identify:

1. The source, volume, and movement of United States currency transported into or out of the country (''Report of International Transportation of Currency or Monetary Instruments'');

2. Certain deposits made into domestic financial institutions (''Currency Transaction Report''); and

3. United States persons who engage in transactions or maintain a relationship with a foreign financial agency (''Foreign Bank Account Report'').

B. The Bank Secrecy Act's reporting requirements have been held constitutional in a number of contexts: 31 U.S.C. § 5316 has been held not to be violative of the First Amendment, *United States v. Fitzgibbon*, 576 F.2d 279 (10th Cir.1978), *cert. denied*, 439 U.S. 910 (1978); the reporting requirements of Title 31 were upheld by the Supreme Court against Fourth Amendment attack, *California Bankers Association v. Schultz*, 416 U.S. 21 (1974); and, applicable Fifth Amendment rights have been held to be sufficiently protected under the Act's reporting requirements, *United States v. Dichne*, 612 F.2d 632 (2d Cir.1979), *cert. denied*, 445 U.S. 928 (1980), and *United States v. Fitzgibbon, supra*.

C. The Act consists of eight main parts:

1. Definitions;

2. Reporting provisions;

3. Recordkeeping provisions (in addition to those required by Title I);

4. Criminal penalties;

5. Civil penalty and injunction provisions;

6. Exemption provisions;

7. Provisions regarding the dissemination of financial information; and

8. Search and forfeiture provisions.

9-79.220 Policy Considerations

9-79.221 Prosecutions based on 31 U.S.C. § 5324

This provision, enacted on October 27, 1986, is aimed at ''money laundering.'' It is discussed at USAM 9-79.272.

Due to potential proof and other legal problems, consultation with the Narcotic Section is required prior to use of this provision in an indictment or complaint.

Also note that the possible civil penalties in a money laundering prosecution may not be compromised without contacting the Director, Office of Financial Enforcement, United States Department of the Treasury, 15th and Pennsylvania Avenue, N.W., Washington, D.C. 20220, FTS 566-8022. That office should also be contacted in criminal cases which seem appropriate for civil remedies.

In determining the appropriate prohibitions to utilize in a prosecution for ''money laundering,'' serious consideration should be given to utilizing this section as well as the appropriate subsection in Title 18, Sections 1956 and 1957 whenever any of these are applicable.

9-79.222 Advising the Department of Justice

The U.S. Attorney should keep the Department of Justice advised respecting the developments in important Bank Secrecy Act cases as they arise. Telephone advice and assistance as to criminal sanctions and civil penalties may be obtained by calling the General Litigation and Legal Advice Section (FTS 786-4805), the Fraud Section (FTS 786-4381), or the Narcotic and Dangerous Drug Section (FTS 786-4637), depending on the underlying nature of the investigation or prosecution. Telephone advice and assistance as to the seizure and forfeiture of monetary instruments may be obtained by calling the Asset Forfeiture Office (FTS 786-4950).

9-79.223 Access

The Currency and Foreign Transactions Reporting Act authorizes the Secretary of the Treasury to make information filed pursuant to its provisions available to any Department or Agency, but only ''upon such conditions and pursuant to such procedures as he may by regulation prescribe.'' *See* 31 U.S.C. § 5319. Consistent with this view, the Secretary of the Treasury has notified law enforcement agencies that access to information contained in the reports must be based upon an agency's ''need in connection with an authorized criminal or regulatory investigation or proceeding.''

The Department of Justice has obtained an agreement from the Secretary of the Treasury to honor requests signed on behalf of the Attorney General by an Assistant Attorney General. U.S. Attorneys wishing to obtain information filed pursuant to the Bank Secrecy Act should submit requests to the Office of Enforcement Operations (FTS 633-3684). Requests should identify the particular information desired and describe the investigation in connection with which it is being requested. The Office of Enforcement Operations will forward such requests, in proper form, to the Treasury Department.

9-79.230 Report on Domestic Financial Transactions

Section 5313 of Title 31 (with applicable regulations at 31 C.F.R. § 103.22), requires domestic financial institutions to report currency transactions which involve the payment, receipt, or transfer of United States coins or currency (or other monetary instruments as the Secretary of the Treasury may prescribe) in the amount of $10,000 or more. The report must be made on IRS Form 4789, commonly called a Currency Transaction Report (CTR), which is to be filed with the Internal Revenue Service within

fifteen days following the day a reportable currency transaction occurs. Multiple cash transactions of under $10,000 apiece which occur in one day at one financial institution and aggregate over $10,000 must likewise be reported. *See United States v. Thompson*, 603 F.2d 1200 (5th Cir.1979).

In order to convict a defendant for violating 31 U.S.C. § 5313, the government must show that the defendant willfully violated the requirements. *See United States v. Warren*, 612 F.2d 887 (5th Cir.1980), *cert. denied*, 446 U.S. 956 (1980); *United States v. Granda*, 565 F.2d 922 (5th Cir.1978). To show a willful violation, the government must prove that the defendant actually knew of the currency reporting requirements and voluntarily and intentionally failed to comply with the requirements. *Id.* Corporate liability can be premised on an agency relationship, *United States v. Beusch*, 596 F.2d 871 (9th Cir.1979), and the knowledge of a corporation can be inferred from the aggregate knowledge of individual employees. *See United States v. Sawyer Transport, Inc.*, 337 F.Supp. 29, 30-31 (D.Minn.1971), *aff'd*, 463 F.2d 175 (8th Cir.1972).

9-79.240 Reports on Foreign Financial Transactions

9-79.241 Reports on the Export and Import of Monetary Instruments

Section 5316 of Title 31 (through the provisions of 31 C.F.R. § 104.23), requires any person who transports or has someone else transport United States currency or other monetary instruments in excess of $5,000 into or out of the United States, or who receives such monetary instruments in the United States from abroad, to report the transaction. This report is made on Form 4790 (''Report of International Transportation of Currency or Monetary Instruments,'' commonly known as a CMIR), which must be filed with the United States Customs Service at the time of entry into the United States or at the time of departure, mailing, or shipping from the United States.

Enforcement of the export/import reporting requirements is strengthened by two additional provisions: (1) 31 U.S.C. § 5317(a) which authorizes the Customs Service to apply for a search warrant to search for and seize monetary instruments which are not reported, and (2) 31 U.S.C. § 5317(b) permits the United States to seek the forfeiture of monetary instruments for which a CMIR has not been filed, or for which the CMIR contains a material omission or misstatement.

In order to convict a defendant of violating the reporting requirements of 31 U.S.C. § 5316 (formerly § 1101), the government must show that the defendant had knowledge of the reporting requirements and willfully violated the law. *See United States v. Warren*, 612 F.2d 887 (5th Cir.1980), *cert. denied*, 446 U.S. 956 (1980); *United States v. Chen*, 605 F.2d 433 (9th Cir.1979); *United States v. Dichne*, 612 F.2d 632 (2d Cir.1979), *cert. denied*, 445 U.S. 928 (1980); *United States v. San Juan*, 545 F.2d 314 (2d

Cir.1976). *See also United States v. $6,250 in United States Currency*, 706 F.2d 1195 (11th Cir.1983), in which it was held that the defendant's ''physical presentation of the currency'' by throwing a purse containing $6,250 at Customs officers did not constitute sufficient compliance with the reporting laws. The court held that the reporting laws do not require a traveler to surrender currency or the monetary instruments but, rather, require a traveler who is carrying more than $5,000 to provide certain information to the government by filing a CMIR with the U.S. Customs Service. The defendant had been advised of the reporting requirements both before and after he threw the purse and he had not filed the report. *See United States v. Rojas*, 671 F.2d 159 (5th Cir.1982); *see also United States v. Rodriquez*, 592 F.2d 553 (9th Cir.1979); *United States v. Granda*, 565 F.2d 922 (5th Cir.1978).

The regulations contained at 31 C.F.R. § 104.23, which implement the import/export reporting requirements of the Bank Secrecy Act, provide that the report is to be filed ''at the time of ... departure, mailing, or shipping from the United States.'' There can be no violation of the export reporting requirements prior to that time. It is important to note that there is not an attempt provision included under the Bank Secrecy Act, so a person must actually complete the violation prior to being charged with an offense for violation of the import/export reporting requirements. Several courts have defined what constitutes the ''time of departure.'' ''Time of departure'' does not necessarily mean the moment the plane is airborne. Most courts have held that ''the time of departure does not mean the moment the aircraft leaves the runway.'' *See United States v. Rojas*, *supra*; *United States v. Cutaia*, 511 F.Supp. 619 (E.D.N.Y.1981).

In *Cutaia*, *supra*, the district court held that the ''time of departure'' is ''that time reasonably close to the moment of the carrier's actual departure when the passenger has manifested a definite commitment to leave the country.'' *Id.* ''Time of departure'' was reached in that case where the defendant had checked his bags, gotten a boarding pass, and sat in the boarding area, even though the plane would not be departing for approximately thirty minutes. It should be noted that in *United States v. Gomez-Londono*, 422 F.Supp. 519, 525 (E.D.N.Y.1976), *rev'd on other grounds*, 553 F.2d 805 (2d Cir.1977), *aff'd* 580 F.2d 1046 (2d Cir.1978), the court suggested that the time of departure is not reached until the defendant has received a boarding pass and is ready to board, or has already boarded the aircraft.

9-79.242 Reporting on Foreign Financial Agency Transactions

Under 31 U.S.C. § 5314 (31 C.F.R. § 103.24), a United States resident or citizen who engages in a transaction with a foreign financial agency, or who has a financial interest in, or signature or other authority over, bank securities or other financial accounts in a foreign country must report

certain information about the transaction or the financial interest in the account. This information is reported on Treasury Form 90-22.1, called a ''Report on Foreign Bank and Financial Accounts,'' or FBA. In addition, a person who is required to file an FBA must also check the appropriate box on their tax return and file IRS Form 4683 with the return. *See generally*, *United States v. Hajecate*, 683 F.2d 894 (5th Cir.1982) (the applicability of the ''exculpatory no'' defense).

9-79.250 The Recordkeeping Provisions

Two provisions of the Bank Secrecy Act are important with regard to recordkeeping. First, 31 U.S.C. § 5314 requires United States citizens and residents and domestic financial institutions to keep records of their transactions and relations with foreign financial institutions. The regulations which implement this section spell out what records are required to be made and retained by financial institutions, banks, and securities and exchange brokers.

Second, 31 U.S.C. § 5318(2) authorizes the Secretary of the Treasury to promulgate regulations which require domestic financial institutions to maintain appropriate procedures to ensure compliance with the reporting requirements of the Act. For example, domestic financial institutions are required to keep records of all the exemptions from the currency transaction reporting requirements that they have granted to customers.

9-79.260 Venue

Venue for a violation of 31 U.S.C. § 5316(a)(1)(A) or (a)(1)(B), both of which concern the transportation or other sending of currency or other monetary instruments into or out of the United States, may be established in either the situs of the port of entry, the port of departure, or the place of mailing or shipping. 31 C.F.R. § 103.25(b) provides that ''[r]eports required to be filed by § 103.23(a) shall be filed at the time of entry into the United States or at the time of departure, mailing, or shipping from the United States.'' *Id.* The above language indicates quite clearly that the failure to file, which constitutes a 31 U.S.C. § 5316 offense, may occur at any one of these three places.

If a person enters or departs the United States without the currency or monetary instruments on his/her person, venue is, nevertheless, determined by the port of entry or departure, or place of mailing or shipping. Venue is the same because 31 C.F.R. § 103.25(b) provides that, in such instances, the reports must be filed by mail *on* or *before* the date of entry, departure, mailing, or shipping. Therefore, if a person should fail to file prior to the mailing or shipping, or, if the mailing or shipping has occurred, prior to or contemporaneously with the entry or departure, venue not only exists at the place of entry or departure but also at the place of mailing or shipping. It should be noted that because entry or departure of

a person without currency or monetary instruments on their person requires that such person file directly with the Commissioner of Customs in Washington, D.C., venue will also exist in Washington, D.C. *See* 31 C.F.R. § 103.25(b).

Venue for a violation of 31 U.S.C. § 5316(a)(2), which concerns the receiving of currency or monetary instruments, may be established at any port of entry or departure, or Washington, D.C. 31 C.F.R. § 103.25(c) provides in pertinent part:

> Reports required to be filed by § 103.23(b) [the receiving of currency or other monetary instruments] shall be filed with the Commissioner of Customs within 30 days after receipt of the currency or other monetary instruments. They may be filed with the Customs officer in charge at *any* port of entry or departure or by mail addressed to the Commissioner of Customs . . . . (emphasis added)

Although this language indicates that any port of entry or port of departure is sufficient for venue purposes, it is suggested that prosecutors look to the port of entry or departure where the currency or other monetary instruments were received. Also, the 30-day filing deadline, as set forth above, applies only to persons who receive currency or other monetary instruments.

Questions pertaining to the issue of venue with respect to violations involving the Foreign Bank Account Report may be addressed to the offices identified at USAM 9-79.222, *infra*

9-79.270 Criminal Penalties

Under the Bank Secrecy Act, certain violations of the reporting or recordkeeping requirements may be criminal offenses. The Act provides for both misdemeanor and felony offenses.

9-79.271 Misdemeanor Offenses

Section 5322(a) of Title 31 provides that a person who willfully violates the Act or the regulations prescribed under it shall be fined not more than $1,000 and/or imprisoned up to one year. To show a willful violation, the government must prove that the defendant actually knew of the currency reporting requirements and voluntarily and intentionally failed to comply with the requirements. *See* USAM 9-79.300 and USAM 9-79.400, *infra*.

9-79.272 Felony Offenses

The felony penalties of 31 U.S.C. § 5322(b) apply to all violations of the Bank Secrecy Act, unless specifically excluded, where certain conditions are present. Under 31 U.S.C. § 5322(b), a felony violation occurs

when the defendant violates the Act (or the regulations promulgated thereunder) ''while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period.'' The penalty for a felony violation is a fine of up to $500,000 and/or imprisonment for not more than five years.

Section 5324 of Title 31 (a result of the Anti-Drug Abuse Act of 1986) forbids an individual from evading the reporting requirements of Section 5313(a) of Title 31 by:

1. Causing or attempting to cause a domestic financial institution to fail to file a report under Section 5313(a);

2. Causing or attempting to cause a domestic financial institution to file a report required under Section 5313(a) that contains a material omission or misstatement of fact; or

3. Structuring or assisting in structuring, or attempting to structure or assist in structuring, transactions with one or more domestic financial institutions.

The language of 31 U.S.C. § 5324 is aimed at addressing the problems created by *United States v. Anzalone*, 766 F.2d 676 (1st. Cir.1985), and subsequent decisions, which limit the degree to which an individual may be criminally liable for conduct which causes a financial institution to fail to file, or to inaccurately file, CTRs.

The prohibition on ''structuring'' is the key language meant to prevent the ''smurfing'' of cash to fail reporting requirements. There is no specific statutory definition of ''structuring.'' However, the new provisions make prosecutions possible in those circuits where they were previously precluded in whole or in part.

9-79.273 Use of Other Criminal Statutes

Section 1001 of Title 18 can be used both in cases involving the filing of a false CTR, CMIR, or FBA and in situations involving a scheme to avoid the filing of the forms, such as a pattern of cash transactions at a financial institution in amounts under $10,000 where the aggregate sum of the transactions over a short period of time may exceed that amount. Other possible Title 18 charges for currency offenses include 18 U.S.C. § 371 (for a conspiracy to avoid filing the currency transaction reports), 18 U.S.C. § 1341 (mail fraud), and 18 U.S.C. § 1343 (wire fraud). A false response on an income tax return or on IRS Form 4683 may involve perjury under 26 U.S.C. § 7206. A further discussion of the use of these and other additional criminal provisions may be found in the monograph mentioned at USAM 9-79.210, *supra*.

9-79.280 Civil Remedies

9-79.281 Injunctions

Section 5320 of Title 31 allows the Secretary of the Treasury to bring a civil action to enjoin a violation or to enforce compliance with the Bank Secrecy Act, regulations prescribed thereunder, or orders.

9-79.282 Civil Penalties

Section 5321(a) of Title 31 provides that domestic financial institutions and any partner, director, officer, or employee of a domestic financial institution can be fined up to $1,000 for each violation of the Bank Secrecy Act. If a domestic financial institution fails to follow the compliance procedures required by the Act or the regulations, a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs.

Section 5321(a) of Title 31 also provides that the Secretary of the Treasury may impose additional civil penalties on a person who does not file a CMIR, or who files a CMIR containing a material omission or misstatement. The civil penalty can be levied for not more than the value of the monetary instrument for which the report was required, although such penalty must be reduced by any amount forfeited under 31 U.S.C. § 5317(b). This portion of the civil penalty provision can be very helpful when a large volume of currency is involved and criminal prosecution is not available.

Section 5321(b) of Title 31 authorizes the Secretary of the Treasury to bring civil actions to collect civil penalties. 31 U.S.C. § 5321(c) provides authority for the Secretary of the Treasury to remit any part of a civil forfeiture or civil penalty imposed under 31 U.S.C. § 5317(b) or § 5321(a)(2). This statute thereby provides a procedure to protect innocent third parties.

9-79.290 Exemptions

Section 5318 of Title 31 of the U.S.Code, 31 C.F.R. § 103.45, and 31 C.F.R. Part 103 ''Appendix—Interpretations and Exemptions'' provide for certain exemptions from compliance with the reporting requirements. All transactions between domestic financial institutions are exempt. Domestic financial institutions can also request exemptions from the CTR requirements for large-volume customers. The Department of the Treasury has the power to grant or deny exemptions, and it maintains a list of all bank customers who have been granted exemptions.

9-79.300 BANK RECORDS AND FOREIGN TRANSACTIONS ACT (CONT.)

9-79.310 Dissemination of Financial Information

Section 5319 of Title 31 provides that the Secretary of the Treasury may disseminate information from domestic financial transaction reports

(CTRs), export/import reports (CMIRs), and foreign financial agency transaction reports (FBAs) to other agencies for use in criminal, tax, or regulatory investigations or proceedings. Any information disseminated, however, must be received in confidence and can only be disclosed to persons utilizing the information for official purposes relating to the criminal, tax, or regulatory investigation or proceeding for which the information was sought.

9-79.320 Treasury Financial Law Enforcement Center (TFLEC)

The Treasury Financial Law Enforcement Center (TFLEC) serves as a centralized national clearinghouse and repository for criminal/financial intelligence and expertise. TFLEC is responsible for receiving, storing, analyzing, and disseminating all information collected pursuant to the Bank Secrecy Act.

Upon the written request of a recognized domestic or foreign law enforcement agency, the Secretary of the Treasury can authorize TFLEC to provide information requested about a named subject or organization. Access to this information is predicated, however, on the requirement that the subject or subjects are *bona fide* targets of an ongoing criminal investigation. TFLEC information will not be provided to agencies outside the federal government for purposes of initiating investigations or providing leads in response to nonspecific requests.

To obtain financial information from TFLEC, the head or designated representative of the requesting law enforcement agency, except the Department of Justice (*see* USAM 9-79.223, *infra*), should make a written request indicating the type of information desired. The request should state that the information is to be used in an ongoing criminal investigation or other proceeding. The request should be directed to: Commissioner of Customs, Treasury Financial Law Enforcement Center, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

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9-85.000 PROTECTION OF GOVERNMENT INTEGRITY

9-85.100 BRIBERY (18 U.S.C. § 201)

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For an overview of 18 U.S.C. § 201 *see Prosecution of Public Corruption Cases*, a February 1988 publication of the Department of Justice. Inquiries about the statute may be addressed to the Public Integrity Section (FTS 786-5056 or (202) 786-5056).

9-85.200 CONFLICTS OF INTEREST CRIMES (18 U.S.C. § 202 *ET SEQ.*)

9-85.201 Introduction

The effectiveness of the Federal Government's operations largely depends on the public's confidence in the integrity and objectivity of both federal officials and the decision-making process of the government. The federal conflicts of interest statutes are designed to foster such confidence, as well as to further a number of other important policy objectives; namely, assuring that decisions of public importance will not be unduly influenced by private considerations, fairness and equal treatment for those who deal with government, efficiency and economy in carrying on the business of the government, and preventing the unfair use of public office and inside information for private gain. *See, e.g.*, S.Rep. No. 170, 95th Cong., 1st Sess. 31-32 (1977) *reprinted in* [1978] U.S.CODE CONG. & ADMIN. NEWS 4247-48; H.R.Rep. No. 748, 87th Cong., 1st Sess. 5-6 (1961); Perkins, ''The New Federal Conflict of Interest Law,'' 76 *Harv.L.Rev.* 1113, 1118; Association of the Bar of the City of New York's Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service*, 6-7 (1960).

It is also vitally important to the effectiveness of democratic government that highly qualified individuals serve in the government. The federal conflicts of interest statutes, therefore, strike a balance seeking to ensure that the law is adequate to deal with serious conflicts of interest but is not so strict that it deprives the government of the services of its best qualified citizens.

The federal conflicts of interest crimes most likely to be brought to the attention of a federal prosecutor are specifically defined by the following statutes contained in Chapter 11 of Title 18 of the United States Code: *See* 18 U.S.C. §§ 201(c)(1); 203; 205; 207; 208; and 209. For overviews of these statutes *see Prosecution of Public Corruption Cases, supra*.

The Public Integrity Section of the Criminal Division has attorneys who have substantial experience investigating and prosecuting conflicts of interest cases. The Section furthermore has a significant collection of

materials interpreting a number of federal conflicts of interest statutes. Requests for assistance from the Section may be made by calling the Director of its Conflicts of Interest Crimes Branch (FTS 786-5077 or (202) 786-5077) or by letter addressed to the Section (Post Office Box 27321, Central Station, Washington, D.C. 20038).

9-85.202 Prosecutorial Policy

The ''Principles of Federal Prosecution,'' available on JURIS, contain guidelines for the federal prosecutor describing various factors that should be considered when making a prosecutorial decision. The guidelines should be taken into consideration when deciding whether to undertake prosecution of a conflict of interest matter. In addition, allegations of violations of the federal conflict of interest laws should be thoroughly investigated. Sufficient investigation should be conducted to establish proof or the absence of proof of a complaint or an allegation or to clearly show that the issue cannot be resolved. If investigation results in proof of an offense, the offender should be prosecuted unless there are strong reasons not to prosecute. The offender's failure to profit from his/her crime, and the fact that the offense did not involve fraud against the government are not, without more, appropriate reasons for declining to prosecute conflicts of interest crimes. But, for example, when it is unquestionably clear that a petit jury would acquit the offender or if administrative disposition would be clearly more appropriate than prosecution, a decision against prosecution would be justifiable.

9-85.203 Office of Government Ethics

Conflicts of interest matters are subject not only to the scrutiny of federal prosecutors but also to regulation by the Office of Government Ethics (OGE). Title IV of the Ethics in Government Act of 1978 (Pub.L. No. 95-521, October 26, 1978) established the Office of Government Ethics within the Office of Personnel Management. The Director of the OGE was vested with the responsibility of providing overall direction of Executive Branch policies related to preventing conflicts of interest on the part of officers and employees of executive agencies. Pub.L. No. 95-521, Title IV, § 402(a). Such responsibility includes the development, recommendation and interpretation of regulations governing conflicts of interest and ethical problems, as well as the authority to render formal advisory opinions on matters of general applicability and on important matters of first impression that involve the interpretation of application of 18 U.S.C. §§ 202 to 209. The Office of Personnel Management, upon recommendation of the Director of the OGE, has promulgated comprehensive regulations that explain and amplify the provisions of the post-employment restrictions of 18 U.S.C. § 207. *See* 5 C.F.R. § 737.1 *et seq.*

In addition, OGE entered into an agreement with the Department of Justice, effective May 19, 1980, relating to the responsibility for rendering formal advisory opinions. Under the terms of that agreement, the OGE will consult with the Criminal Division before rendering any advisory opinion on an actual or apparent violation of any conflict of interest law. If a decision to undertake a criminal investigation is made, the OGE will refrain from issuing any opinion until a prosecutorial decision has been made. Similarly, when an advisory opinion is sought in a matter not involving an actual or apparent violation of the law, the OGE has agreed to consult the Department of Justice's Office of Legal Counsel before issuing any opinion. The importance of the agreement to federal prosecutors is that once an advisory opinion has been issued, a person who is involved in the transaction or activity in question, or in a materially identical transaction or activity, and who relies upon the advisory opinion in good faith, shall not be subject to prosecution under the conflicts of interest statutes. Another important function of the OGE is to consult, when requested, with agency ethics counselors and other responsible officials regarding the resolution of conflicts of interest problems in individual cases. Pursuant to the regulations of the Office of Personnel Management, each agency must establish a counseling service to provide authoritative advice and guidance to employees who seek advice and guidance on questions of conflicts of interest and ethical standards of conduct. *See* 5 C.F.R. § 735.105. Any counselor in an agency counseling service may request assistance from the OGE in resolving conflicts of interest questions.

The OGE has issued numerous informal opinions. Copies of such opinions are available on request directly from the OGE.

Finally, 5 C.F.R. § 737.1(c),(d), requires the heads of federal departments and agencies to report substantiated allegations of violations of 18 U.S.C. § 207 to the OGE as well as to the Department of Justice. Criminal enforcement of the provisions of 18 U.S.C. § 207 remains the exclusive responsibility of the Attorney General. *See* 5 C.F.R. § 737.1(a).

9-85.204 Designated Agency Ethics Official for the Department of Justice

The regulations of the Office of Personnel Management require each agency to have a designated agency ethics official (DAEO) appointed by the head of the agency to coordinate and manage the agency's ethics program. *See* 5 C.F.R. § 738.201 *et seq.* The Assistant Attorney General for Administration has been designated the agency ethics official for the Department of Justice. *See* 28 C.F.R. § 45.735-26. The duties of the Assistant Attorney General for Administration as DAEO are set forth in 5 C.F.R. § 738.203 and 28 C.F.R. § 45.735-26(b). These consist primarily of the responsibility for carrying out the Department's ethics program, to include reviewing financial disclosure reports submitted by the Department's employees, as well as developing and conducting an education program and a counseling

program for Department employees concerning all standards of conduct matters including post-employment matters. Any present of former employee of the Department of Justice who wishes to obtain general advice concerning his or her own present or proposed activities or financial transactions should contact the Office of the Assistant Attorney General for Administration. If the Assistant Attorney General for Administration believes that a particular request should be answered by the Office of Government Ethics, there is a procedure available for referring the question to that office. *See* 5 C.F.R. § 738.301(b).

Finally, there is a procedure whereby an individual may request a formal advisory opinion from the Director of the Office of Government Ethics on a proposed activity or transaction. Such formal opinions are only issued with regard to non-hypothetical situations which involve matters of general applicability or important matters of first impression concerning the applicability of the conflicts of interest and standards of conduct laws and regulations. The procedure for requesting a formal advisory opinion is found at 5 C.F.R. § 738.301 *et seq.*

9-85.205 Standards of Conduct Regulations Relating to Conflicts of Interest

By Executive Order 11222 of May 9, 1965, the President required Agency heads to issue regulations establishing standards of conduct for their respective agencies. This requirement is also found in the regulations of the Office of Personnel Management, 5 C.F.R. § 735.104. Such regulations incorporate, as standards of conduct regulations, the prohibitions of the conflicts of interest statutes in Chapter 11 of Title 18, U.S.C., and can, in some instances, prohibit a broader range of activity than the criminal statutes. A violation of a criminal conflict of interest statute, therefore, will ordinarily subject a federal employee to the risk of disciplinary action by his/her department or agency in addition to the criminal penalty imposed by the statute. This dual nature of a conflict of interest violation underscores the need for prompt investigative and prosecutive action by the Department of Justice, because in most instances of conflicts of interest crimes the employee's agency will need to protect its own operations and funds by taking appropriate disciplinary action against its employee. Coordination between the prosecutor and the concerned agency may be necessary to ensure that disciplinary action which might jeopardize the criminal investigation is not initiated.

9-85.300 BETRAYAL OF OFFICE

9-85.310 Census Violations

9-85.311 Background

The Bureau of the Census of the Department of Commerce conducts censuses and surveys of population, agriculture, manufacturing, business, and oth-

er subjects at various intervals. The censuses are taken pursuant to the Act of August 31, 1954, 68 Stat. 1012, as amended, which codified Title 13, United States Code. The annual surveys are authorized by Section 181 of Title 13. The geographic scope of the census is explained in 13 U.S.C. § 191. Criminal provisions are found in 13 U.S.C. §§ 211 to 214 and 221 to 225.

The authority of Congress to enact legislation providing for the collection of data of the types mentioned and of other types called for by the Bureau's schedules of inquiries has been upheld by the courts in *United States v. Moriarity,* 106 Fed. 886, 891-92 (S.D.N.Y.1901) and in *United States v. Sarle,* 45 Fed. 191 (D.R.I.1891). U.S. Const., Art. I, Section 2.

9-85.312 Policy Matters

(a) Referrals to U.S. Attorney

Whenever the Department of Commerce feels that the facts surrounding a refusal to furnish desired census information justify prosecution, the file in each case will be forwarded by the Department to the appropriate U.S. Attorney. In all instances of refusal to answer census questionnaires, the U.S. Attorney should make certain that efforts have been made to persuade the delinquent to comply with the Census Bureau's request. Prosecution of the citizen or business involved may be instituted under 13 U.S.C. § 221 or § 224, respectively, if the delinquent persists in refusal to supply the required census data.

(b) Injunctive Actions Against Bureau of Census

If injunctions are sought to prevent the Bureau of Census from requiring answers to one or more of the questions on the schedules of inquiries, the Civil Division should be advised so that the necessary information can be obtained from the Department of Commerce.

(c) Offenses by Census Employees

Complaints or allegations involving possible violations of 13 U.S.C. §§ 211 to 214 by employees of the Bureau of the Census should be immediately submitted to the nearest local FBI office in the district where the alleged misconduct occurred.

9-85.313 Investigative Jurisdiction

Federal Bureau of Investigation

9-85.314 Supervisory Jurisdiction

The General Litigation and Legal Advice Section of the Criminal Division supervises the citizen violations in regard to census taking. The Public Integrity Section of the Criminal Division supervises employee violations.

9-85.315 Offenses by Census Employees

Offenses by employees of the Department of Commerce in regard to census taking are covered by 13 U.S.C. §§ 211 to 214, *i.e.*, receiving compensation for appointment of employees, refusal or neglect to perform duties, false statements, and wrongful disclosure of information. The basic elements of the offenses denounced by 13 U.S.C. §§ 211 to 214 directly involve misconduct by government employees.

9-85.316 Offenses by Others

Violations may arise from the refusal of individuals or businesses to respond to questionnaires or to furnish census enumerators with information pertaining to the censuses and surveys. The penalty provisions for violations by respondents are contained in Sections 221 through 225 of Title 13. The constitutionality of the census in general, and of these penalty provisions in particular, was sustained against constitutional challenge in two cases following the 1960 census. *See United States v. Rickenbacker,* 309 F.2d 462 (2d Cir.1962), *cert. denied,* 371 U.S. 962 (1963); *United States v. Sharrow,* 309 F.2d 77 (2d Cir.1962), *cert. denied,* 372 U.S. 949 (1963).

Five individuals were prosecuted following the 1970 census for refusal to answer. Three were convicted in two unreported cases and one reported case, *United States v. Little,* 321 F.Supp. 388 (D.Del.1971). In the remaining two cases, *United States v. Steele,* 461 F.2d 1148 (9th Cir.1972), and *United States v. Danks,* 357 F.Supp. 193 (D.Hawaii 1973), convictions were overturned when the courts concluded the defendants had been selectively prosecuted based on their vocal opposition to census taking. The reasoning of these decisions may be questioned in light of the decision in *Wayte v. United States,* 470 U.S. 598 (1985), in which the Supreme Court affirmed the conviction of a Selective Service nonregistrant, rejecting his claim that he had been selectively prosecuted based on his vocal opposition to registration. Cf. *United States v. Catlett,* 584 F.2d 864 (8th Cir.1978) (vocal tax protester).

9-85.317 Venue

Venue for prosecution of offenses under 13 U.S.C. §§ 221 to 225, inclusive, would lie in the district where the prohibited conduct occurs. The neglect or failure to furnish information when official request is made by

''registered or certified mail or telegram'' is penalized by 13 U.S.C. § 224, and for the purpose of prosecution, prima facie evidence of an official request is defined in 18 U.S.C. § 241. Venue for such prosecution under 13 U.S.C. § 224 would lie in the district where the requested information was required to be filed. *See United States v. Lombardo,* 241 U.S. 73 (1916).

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

July 21, 1995

TO: Holders of United States Attorneys' Manual Title 9

FROM: Jamie S. Gorelick
Deputy Attorney General

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

RE: National Security

NOTE: 1. This is issued pursuant to USAM 1-1.510.
2. Distribute to holders of Title 9.
3. Insert in front of affected section.

AFFECTS: USAM 9-90.000

PURPOSE: This bluesheet sets forth policy and procedures to clarify the Department of Justice's handling of national security matters.

The following text replaces sections 9-90.000, 9-90.100, and 9-90.200-220 of Chapter 90 in your United States Attorneys' Manual.

The remaining sections of Chapter 90 are unchanged.

9-90.000 NATIONAL SECURITY

National security encompasses the national defense, foreign intelligence and counterintelligence, and foreign relations. When national security issues arise during a criminal prosecution, they must be resolved through careful coordination by the Department of Justice with high level officials from the intelligence, military, and foreign affairs communities. In addition, the Attorney General, or the Attorney General's designee, has certain statutory authority and obligations related to national security prosecutions. That authority and those obligations may be properly exercised and met only with appropriate coordination with the Department of Justice by the respective U. S. Attorney's Offices.

9-90.100 GENERAL POLICIES CONCERNING PROSECUTIONS FOR CRIMES DIRECTED AT NATIONAL SECURITY AND FOR OTHER CRIMES IN WHICH NATIONAL SECURITY ISSUES MAY ARISE

The Attorney General has determined that all criminal cases relating to activities directed against the national security (see 9-90.300 et seq.), as well as collateral offenses such as perjury that arise out of such activities are to be supervised by the Assistant Attorney General, Criminal Division. Although the Assistant Attorney General may assign those cases within the Criminal Division, prosecution of national security cases will ordinarily be handled by the U. S. Attorney's Office in the district where venue lies. When a national security investigation is initially referred to the Criminal Division, the Assistant Attorney General, or his/her designee, will notify the U. S. Attorney in that district as soon as possible following that referral. In either event, the Assistant Attorney General shall retain general supervisory authority over the conduct of the case from its inception until its conclusion, including appeal.

When national security issues arise in U. S. Attorney's Office prosecutions of offenses not related to the national security,[1] that district's National Security Coordinator must notify the Chief of the Internal Security Section (ISS).[2] That Section Chief shall

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[1]An example would be a defendant indicted for laundering the proceeds of smuggling cocaine into the United States, whose defense is that he was authorized to do so by a U.S. intelligence officer as part of a covert intelligence operation.

[2]Presently pending approval of Congress is a proposed reorganization of the Criminal Division. Under that plan, the Internal Security Section will be replaced by the National Security

be responsible for insuring that the Assistant U. S. Attorney assigned to the case is aware of and complies with Departmental policies related to national security prosecutions.

9-90.200 POLICIES AND PROCEDURES FOR CRIMINAL CASES THAT INVOLVE CLASSIFIED INFORMATION

With the concurrence of the appropriate Deputy Assistant Attorney General (DAAG), Criminal Division, or of the DAAG's designated Criminal Division Section Chief, the Department attorney or the assigned Assistant U. S. Attorney may seek access to classified information in the custody and control of one or more of the U. S. intelligence agencies.[3] The Criminal Division's ISS has primary responsibility to assist all Departmental officials and U.S. Attorney's Offices on all matters related to national security, including approval of requests for production of pre-existing classified information in connection with an anticipated or ongoing criminal prosecution. Other sections of the Criminal Division may also assist according to the subject matter of the criminal activity involved in a particular prosecution.

The Classified Information Procedures Act (CIPA), Title 18, United States Code, App. III, is the mechanism by which the disclosure of classified information must be controlled during the course of a criminal prosecution. ISS is responsible to ensure proper adherence to CIPA, both at the pre-trial and trial stages of a prosecution. ISS personnel will assist the prosecuting attorney in properly drafting a request to an intelligence agency for production of its information and/or materials for review by the AUSA and will provide advice and consultation regarding review and use of those materials.

There are certain unique requirements that apply to cases involving classified information. First, only the Attorney General, the Deputy Attorney General, the Associate Attorney General or the Assistant Attorney General, Criminal Division, can authorize the declination of a prosecution for national security

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Section. Once the effective date of that change is published, all references herein to the Internal Security Section should thereafter be construed as referring to the new National Security Section.

[3]Occasionally, a law enforcement agency may also possess documents that are classified for national security purposes and which should be reviewed in connection with a criminal case. The procedures discussed herein also apply to those documents.

reasons. CIPA §§ 12, 14. Such declinations must be included in a report submitted to Congress pursuant to the requirements of CIPA § 13. This report is initially prepared by the ISS.

Further, classified information that is or may be relevant to a criminal prosecution cannot be utilized, even for discovery purposes, without coordinating with the agency that is responsible for classifying or declassifying that information. This rule applies to oral disclosures of classified information, such as certain statements by present or former government employees, or contract employees who hold or held security clearances and were given access to classified information.

Because of regulatory limitations on dissemination of classified information, special considerations apply to investigations that involve classified information. First, when interviewing witnesses, classified information may be discussed only if the witnesses have appropriate security clearances and the agency that classified the information has approved such disclosure. Second, although grand jurors are precluded under Fed.R.Crim.P. 6(e)(2) from disclosing matters occurring before the grand jury, a prosecutor nevertheless may not disclose classified information to the grand jury except by agreement of the agency responsible for that classification. Third, witnesses, subjects, or targets of an investigation who have lawfully acquired classified information cannot lawfully disclose such information to their uncleared attorneys. Those attorneys should therefore either seek to have the information declassified or obtain a security clearance that would allow access to the classified information. If the defense attorney chooses the latter alternative, the prosecutor must petition the court for a protective order that controls the use of that classified information. For guidance on how to handle classified information during investigations or before the grand jury, see section 9-90.230, infra, or contact the ISS.

9-90.210 Contacts With The Intelligence Community Regarding Criminal Investigations Or Prosecutions

A. Generally

Although both are arms of the Executive Branch, the federal law enforcement and intelligence communities[4] have very

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[4]For the purpose of this chapter, the law enforcement community includes all federal investigative and prosecutive agencies. The intelligence community includes the Central Intelligence Agency, the National Security Agency, the Defense

distinct identities, mandates, and methods. The mission of the former is to identify, target, investigate, arrest, prosecute, and convict those persons who commit crimes in violation of federal laws. The mission of the latter is to perform intelligence activities necessary for the conduct of foreign relations and the protection of the national security, including the collection of information and the production and dissemination of intelligence; and the collection of information concerning espionage, international terrorist activities, and international narcotics activities.

The federal law enforcement community (LEC) must carry out its mission in accordance with the provisions of the United States Constitution, case law, statutes, and rules of procedure and evidence. Its compliance with those constraints is continually monitored by the judicial branch. Through its internal affairs and professional responsibility offices, the components of the LEC also perform self-monitoring of the legality of its investigative activities.

The intelligence community (hereafter intelligence community or IC) carries out its mission in accordance with the Constitution, the National Security Act of 1947 and other statutes, case law, and with select Executive Orders issued by the President, primarily E.O. 12333 (issued by then-President Ronald Reagan on December 4, 1981). The IC's compliance with legislative constraints is monitored by the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee On Intelligence (HPSCI). The IC also polices itself through its various inspectors general offices.

The two communities occasionally find themselves mutually affected by a criminal case, such as when a defendant seeks access to classified information to assist in his defense. When that occurs, an issue of major concern to both communities is the adequate protection of sensitive intelligence methods and sources. This protection is accomplished by the IC either by placing restrictions on access to the information, or by including special warnings and caveats that restrict the use of the information, and by the prosecutor through invocation of CIPA.

Although coordination on matters of common concern is critical to the proper functioning of the two communities, prosecutors must

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Intelligence Agency, and the National Reconnaissance Office. It also includes the intelligence components of the Department of State, Federal Bureau of Investigation, Department of Treasury, Department of Energy, and the respective military services.

be aware of the concomitant need of both communities to maintain a well-delineated separation between criminal prosecutions and foreign intelligence activities, in which less-stringent restraints apply to the government. Not to do so may invite the perception of an attempt to avoid criminal law protections by disguising a criminal investigation as an intelligence operation. The judicial response to that may be the suppression of evidence in the criminal case, e.g., United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).

B. Approval To Request A File Search.

Initial contacts with the intelligence community by the Department of Justice, or by any of the U. S. Attorney's Offices, for the purpose of requesting a search of IC files in connection with a criminal investigation or prosecution must be approved by the Criminal Division's ISS. A request to the ISS by a U.S. Attorney's Office for a search of IC files for preexisting intelligence information relevant to a criminal investigation or indictment must be in writing and must have been approved by the U. S. Attorney or a senior designee, e.g., the First Assistant, or the National Security Coordinator.

Such requests shall be undertaken only when there exist objective articulable facts justifying the conclusion that

(1) within specific files, or category of files, there will likely be information of which the prudent prosecutor should be aware in deciding whether, or against whom, or for what offenses to seek an indictment from the grand jury;

(2) there are intelligence-related issues likely to arise post-indictment that the prosecutor should address preemptively, and that searching IC files is likely to produce information helpful to resolving those issues;

or

(3) there are documents or information within the intelligence community that fall reasonably within the scope of the prosecutor's affirmative discovery obligations to the defendant, as that scope has been defined by the federal courts.

That the information within the possession of the intelligence community is classified shall have no effect either on the prosecutor's obligation to undertake the review of intelligence community files or on the legally-mandated scope of that review.

Similarly, except as modified by CIPA, the prosecutor's obligation to produce to the defendant information found during that review is unaffected by the classified nature of that information.

C. Definitions.[5]

Discovery Material: Material and information, including evidence to be offered at trial, that each party in a criminal case is obligated to provide to the opposing party in advance of trial pursuant to Fed.R.Crim.P. 16[6] and the case law, including Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1974).

Alignment: A theory by which to determine what agency's files are subject to a prosecutor's affirmative duty to search for discovery materials. For the purpose of this memorandum, an aligned agency is one which actively participates in that case in the investigation leading to an indictment or the trial on that indictment. An agency does not become aligned merely by responding to a prosecutor's request to provide from its records or archives preexisting intelligence information collected for reasons other than to support the criminal case but which also may be relevant to that case.

Prudential Search: A search of IC files, usually prior to indictment, for pre-existing intelligence information undertaken because the prosecutor and the Department of Justice have objective

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[5]The discussion that follows in this chapter covers some very basic legal principles, with which most prosecutors will already be very familiar, as well as certain complex and developing areas of the law. It should be read in the context of how those well-known issues should be viewed when classified information, and therefore national security issues, are at stake in a criminal case. The Criminal Division's Internal Security Section is available to all AUSAs for consultation on these important matters.

[6]In pertinent part, Rule 16(a)(1) requires the government "(A)...[to] disclose to the defendant...any relevant written or recorded statement made by the defendant...within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government;" and "(C)...[to] permit the defendant to inspect and copy...papers, documents, photographs, tangible objects...which are within the custody or control of the government, which are material to the preparation of the defendant's defense or which are intended for use by the government as evidence in chief...."

articulable facts justifying the conclusion that the files in question contain classified information that may have an impact upon the government's decision whether to seek an indictment and, if so, what crimes and defendants should be charged in that indictment. A prudential search should include a search for Brady material and other information that would be subject to the government's post-indictment discovery obligations. Upon an appropriate threshold showing of necessity by the prosecutor, a prudential search may include a narrowly drawn request for specific investigative leads to assist the prosecutor to reduce or eliminate the relevance of classified information to his case.

D. When is the prosecutor compelled to search for discovery material within IC files?

Whether the IC files must be combed for discovery material in a particular criminal case is a function of several queries. The first is:

1. Whether the intelligence community has been an active participant in the investigation or prosecution of the case.

It is well-settled that a prosecutor must search at least the files within the prosecutor's own office for Brady material. Giglio, 405 U.S. at 154. That affirmative obligation also applies to the files of the investigative and other prosecutorial agencies that comprise the "prosecution team" in a given case. United States v. Antone, 603 F.2d 566 (5th Cir. 1979).[7]

Some courts have advanced, as a theory for defining the membership of the "prosecution team," the principle of "alignment." E.g., United States v. Brooks, 966 F.2d 1500, 1503 (D.C.Cir. 1992); United States ex rel. Smith v. Fairman, 769 F.2d 386, 391 (7th Cir. 1985). Under that theory, an investigative or prosecutive agency becomes aligned with the government prosecutor when it becomes actively involved in the investigation or the prosecution of a

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[7] Prosecutors must be aware that the scope of their duty to search is not measured by that of the prosecutor's personal knowledge. Knowledge of discoverable information unknown to the prosecutor but known to a law enforcement agent on the prosecution team may be imputed to the prosecutor. United States ex rel. Smith v. Fairman, 769 F.2d 386, 391-92 (7th Cir. 1985)(knowledge of police ballistic report reflecting inoperability of gun defendant charged with shooting at police officers imputed to prosecutor); Cary v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984)(knowledge of cooperation agreement between informant/witness and DEA agents imputed to prosecutor).

particular case. When that occurs, the agency's files are subject to the same requirement of search and disclosure as the files of the prosecuting attorney or lead agency. E.g., United States v. Antone, 603 F.2d at 570 (in joint federal-state prosecution, knowledge of state agents assigned to case will be imputed to the federal agents and prosecutor); United States v. Burnside, 824 F.Supp. 1215, 1257-58 (N.D.Ill. 1993)(federal prison personnel's knowledge of government witness' drug use while in witness protection program imputed to prosecutor).

On the other hand, the mere fact that an agency has been solicited to produce documents generated independently of the criminal case does not necessarily result in the alignment of that agency with the prosecutor. United States v. Polizzi, 801 F.2d 1543, 1553 (9th Cir. 1986)(federal prosecutor not attributed knowledge of two documents that state agency failed to produce in response to request from federal prosecutor).[8] Moreover, a government agency does not necessarily fall into alignment with the prosecutor's office, thus requiring a search of its files, simply because it is an agency of the same government and arguably could have exculpatory evidence regarding the defendant. See United States v. Trevino, 556 F.2d 1265 (5th Cir. 1977)(prosecutor had no duty to produce PSI report prepared by probation office).

When an IC component has actively participated in a criminal investigation or prosecution -- that is, has served in a capacity that exceeds the role of providing mere tips or leads based on information generated independently of the criminal case -- it likely has aligned itself with the prosecution and its files are subject to the same search as would those of an investigative law enforcement agency assigned to the case. For example, alignment likely exists where an intelligence agency has provided information to a law enforcement agency or to the prosecution, which information serves independently as a factual element in support of a search warrant, arrest warrant, indictment, etc. On the other hand, where an IC agency has provided only lead information which does not form part of the factual basis for such action against a defendant, that IC agency's files do not thereby necessarily fall

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[8] For practical purposes, the alignment principle is merely another articulation of the "prosecution team" argument and offers little additional guidance to prosecutors and agencies seeking to define their discovery obligations to a defendant prior to trial. Like the "prosecution team" theory, alignment has been used less to determine in advance the necessary scope of a prosecutor's search and more to establish an arbitrary point at which a prosecutor will be held responsible after the fact for discoverable information unknown to him before or during trial.

within the scope of a required search for discovery.

2. Assuming that the IC had no active involvement in the criminal investigation, when must the IC's files nevertheless be included in a prosecutor's discovery search?

The question, stated more broadly, is, in addition to the agencies immediately involved in a criminal case, what is the required scope of a prosecutor's search for discoverable material. Some courts have answered this query, in general, by holding that the government's search must extend to sources that are readily available to the government and that, because of the known facts and nature of the case, should be searched as a function of fairness to the defendant. E.g., United States v. Perdomo, 929 F.2d 967, 970-71 (3d Cir. 1991); United States v. Auten, 632 F.2d 478, 481 (5th Cir. 1980); United States v. Burnside, 824 F.Supp. 1215 (N.D.Ill. 1993).

In the context of a defense demand for discovery, one court has held that the breadth of such a duty is to be measured against a sliding scale. United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992). Under Brooks, the government is required to conduct a search if the defendant has made an explicit request that certain files be searched, and there is a non-trivial prospect that the examination of those files will yield material exculpatory information. Id. at 1504. As the connection between the case and the files that the defendant wants searched becomes less clear, the court must increasingly weigh the burden that the requested search will impose upon the government, and the violence that may be done to the government's interest in limiting access to files containing relevant information, against the prospect that the search will reveal exculpatory information. Id.; United States v. Robinson, 585 F.2d 274, 280-81 (7th Cir. 1978)(en banc), cert. denied, 441 U.S. 947 (1979).

It follows that the broader the request and the greater the difficulty to perform the requested search, the greater the requestor's burden is to demonstrate that the search will be fruitful. Mere speculation that a government file may contain Brady material is never sufficient to meet that burden. United States v. Navarro, 737 F.2d 625, 631 (7th Cir. 1984).

a. Brady

Assuming no demand for specific discovery, there remains the question of when the prosecutor is nevertheless required to engage a search of IC files. The relevant factors for answering that query are:

(1) whether the prosecutor has direct knowledge of potential Brady and/or other discovery material in the possession of the intelligence community; or

(2) assuming no such knowledge by the prosecutor, whether there nevertheless exists any objective indication suggesting that the intelligence community possesses evidence that meets the Brady case law standard of materiality.

A positive answer to either of these questions means that the prosecutor "needs to know" and must conduct a suitable search of the IC files. If both queries can be answered in the negative, there is no justification for a search of IC files.

In Brady, the Supreme Court held that a prosecutor's suppression "...of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In United States v. Agurs, 427 U.S. 97 (1976), the Supreme Court extended the rule announced in Brady to situations in which the defense had made no specific request, but at most a general request for exculpatory material.

Under Agurs, materiality of particular information turned on whether it pertained to perjured testimony at trial, would have been responsive to a specific or general request from the defense, or, in the absence of a request, should have been disclosed to avoid violating the defendant's right of due process. Id. at 108. The Supreme Court revisited and modified the Agurs materiality thresholds in United States v. Bagley, 473 U.S. 667 (1985). In Bagley, the Court, after agreeing that one standard of materiality should govern both the "specific request" and the "no request" situations discussed in Agurs, held that "...a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." Id. at 678. Thus, regardless of the specificity of the defendant's request, after Bagley, the defendant seeking post-trial relief for violation of Brady bears the burden of showing that the suppressed evidence would have raised a reasonable doubt as to guilt.[9]

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[9]The Bagley court also re-emphasized that Brady did not create a constitutionally required right of discovery in favor of the defendant or any obligation of the prosecutor to allow defense counsel to review his files. Rather, the prosecutor need only disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. Id. at 675. That

In summary, the government prosecutor's affirmative obligation to search the IC files for Brady material is not triggered merely by the defendant's (or the prosecutor's) speculation that such files contain discoverable information. Nor is the government required to search the files of every intelligence agency that conceivably may have exculpatory information. See e.g., United States v. Trevino, 556 F.2d at 1270-72. On the other hand, where there is an explicit request for discovery that has been approved by the court, the scope of the search may have to be broadened. It may not reasonably be confined to merely the prosecution team if there are known facts that support the possible existence elsewhere of the requested information. See, e.g., United States v. Brooks, 966 F.2d at 1504 (scope of government's search must include anywhere there is non-trivial prospect of finding exculpatory information in response to specific defense request); United States v. Perdomo, 929 F.2d at 970 (prosecutor may not be excused from providing discoverable information that is readily available to it); United States v. Deutsch, 475 F.2d 55, 57 (5th Cir. 1973)(prosecutor cannot avoid disclosing personnel file of a government employee/witness merely by avoiding actual possession of the file), rev'd on other grounds, United States v. Henry, 749 F.2d 203 (5th Cir. 1984). But cf., United States v. Sanchez, 917 F.2d 607 (1st Cir. 1990)(finding of harmless error where AUSA was unaware of local police department's payments to FBI informant/government witness and therefore did not provide them in discovery).

b. Other discovery material.

Whether other discovery material (e.g., Rule 16, Jencks, or Section 3504 materials) is present in IC files is yet another issue. In the absence of actual or implied foreknowledge, however, the prosecutor would have no obligation to search for such materials in IC files over that which would exist in other criminal cases not involving IC agencies and/or classified information.

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necessarily does not include inculpatory evidence, no matter how helpful such evidence might be to the defendant in preparing his defense. See United States v. Polowichak, 783 F.2d 410, 414 (4th Cir. 1986). Nor is the government required to search for or disclose to the defendant exculpatory evidence of which the defendant is aware, or should be aware. See United States v. Ramirez, 810 F.2d 1338, 1343 (5th Cir.), cert. denied, 481 U.S. 1072 (1987); Gov't Of The Virgin Islands v. Martinez, 831 F.2d 46, 49-50 (3d Cir. 1987). However, the government should produce as Brady material the transcript of its witness' prior testimony as a defendant if that testimony is inconsistent with that witness' anticipated testimony as a government witness. See United States v. Isgro, 974 F.2d 1091, 1093-95 (9th Cir. 1992).

3. When a search of IC files is not constitutionally compelled or merely prudent, are there other circumstances when a prosecutor must initiate contact with the intelligence community?

An event which requires that contact with the intelligence community be initiated is when the prosecutor, whether pre- or post-indictment, acquires information that suggests the defendant may have had, or as part of his defense at trial will assert that he has had, contacts with the intelligence community or with an intelligence component of the law enforcement community. The experience of recent prosecutions suggest that the defense will likely be some derivative of the public authority defense as recognized by Fed.R.Crim.P. 12.3.[10] In these circumstances, the prosecutor should assume that national security issues will be implicated and ask his office's National Security Coordinator to notify the ISS in accordance with 9-90.210, the September 21, 1994, memorandum by the Deputy Attorney General regarding National Security, and the April, 1995, memorandum by the Deputy Attorney General identifying focal points for contacts with the intelligence community.

4. Other than to meet Brady/discovery obligations, in what other circumstances should a prosecutor consider initiating a search of IC files?

As a general rule, a prosecutor should not seek access to IC files except when, because of the facts of the case, there is an affirmative obligation to do so. There are, however, certain types of cases that may fall outside of that rule in which issues relating to national security and/or classified information are likely to be present, e.g., those targeting corrupt or fraudulent practices by middle or upper officials of a foreign government; those involving alleged violations of the Arms Export Control Act or the International Emergency Economic Powers Act; those involving trading with the enemy, international terrorism, or significant international narcotics trafficking, especially that involving foreign government or military personnel; and those in which one or more targets are, or have previously been, associated with an intelligence agency. The National Security Coordinators in each office should carefully educate the prosecutors in their respective offices regarding cases that should be proactively reviewed for a possible nexus to the intelligence community.

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[10]See 9-90.260.

In these and similar cases, a careful consideration of the facts of the case may lead a prosecutor to conclude that he should seek contact with one or more of the components of the intelligence community to initiate a "prudential search," i.e., one based not upon a known duty to the defendant or to a known nexus to national security matters but rather on the fact that the case meets a certain profile of cases likely to implicate such issues. Properly used, the prudential search will assist the prosecutor in identifying and managing potential classified information problems before indictment and trial. It may also permit the prosecutor to tailor the indictment in a way that will reduce or eliminate the relevance of any classified information, and thereby reduce or eliminate the likelihood of having to face a "disclose-or-dismiss" dilemma after the indictment.

The prosecutor must recognize that, with rare exceptions, information gathered by the IC is not intended to support a criminal prosecution, but rather to satisfy other needs of the intelligence community's clientele, needs that are likely to be significantly divergent from those of the prosecutor. Accordingly, law enforcement techniques to ensure admissibility of evidence at trial will likely not have been used by the intelligence officer. It follows that requesting the IC to search its files will ordinarily not be done for the purpose of obtaining evidence-in-chief. Rather, it will be done (1) to assist the prosecutor in drafting his case to avoid implicating classified sources and methods, (2) when legally necessary to ensure that the prosecution team has met its legal obligations to an indicted defendant, or (3) under certain circumstances, to provide investigative leads to law enforcement for use in obtaining other admissible evidence.

E. The Search Request.

Immediately upon the prosecutor's conclusion, based on the principles outlined above, that a search of IC files is appropriate, the prosecutor should consult with the district National Security Coordinator[11] and initiate telephonic contact with the Criminal Division's Internal Security Section (ISS). The ISS, in consultation with the Office of Intelligence Policy and Review, will determine whether a search of IC files is appropriate. If that determination is that a search of IC files is appropriate under the circumstances described by the prosecutor, the prosecutor will be required to prepare a written search request to be submitted to the IC agencies.

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[11]The U. S. Attorney or his designee must approve the AUSA's request before it is submitted to the Internal Security Section. See 9-90.210.B, supra.

In line with the Department's general policy, search requests must be focused, narrowly drawn, and based upon carefully reasoned and case-specific grounds. Each request should be accompanied by a prosecution memorandum that sufficiently identifies the individual and corporate targets of the investigation (e.g., full name, known aliases, date of birth, place of birth, citizenship, etc.); that summarizes the evidence already known about those targets (specifically that which the prosecutor's believes justifies a search of IC files); that sets forth a time frame;[12] and that specifies the type of information that is sought (e.g., what if any witting relationship the person has had or currently has with an IC agency, payments made to the person, criminal activity known by the IC agency to have been committed by the person in question, etc.) If the prosecutor's search request pertains to witnesses who will testify for the government, the same information should be provided as to them.

The prosecutor should avoid asking an IC agency any conceptual questions or to draw any conclusions about the entities named, especially conclusions of a legal nature. Rather, the search request should present questions that require answers consisting of discrete facts that will enable the prosecutor to draw conclusions concerning the broader conceptual issues extant in his case.

F. Submitting the search request to the intelligence community.

The Criminal Division, ISS, acting on behalf of the prosecutor, will formally transmit the search request to the appropriate element(s) of the intelligence community. In some cases, that request may be followed by a planning and strategy meeting between the assigned prosecutors, the ISS, and representatives of the appropriate IC agencies.

To expedite the pace of the search, the prosecutor should request that each IC agency obtain limited third agency waivers from other IC agencies for purposes of the initial review of documents in response to the search request. Except with certain very sensitive types of classified information, this will normally allow an agency that possesses a responsive classified document originated by another agency to produce that document to the prosecutors without having first to obtain the permission of the

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[12]Ordinarily, the prosecutor should confine the search request to a period of time that conforms with that of the underlying criminal activity that necessitates the search.

originating agency.[13]

G. Review of documents identified by the IC as responsive to the search request.

Members of the prosecution team (including the attorneys and investigators) must have all necessary security clearances before they will be permitted access to classified information. This may be accomplished by contacting the Department of Justice Security and Emergency Planning Office at 202-514-2094.[14] During the review of classified information, it is crucial that all regulations pertaining to the handling of classified information be observed. The Justice Security and Emergency Planning Staff will assist the prosecutor in taking the necessary measures in the U.S. Attorney's Office to protect any classified information that is determined to be relevant to a particular case.

The prosecutor must also be prepared to undertake appropriate measures for keeping track of the IC documents that are produced in response to a search request. Depending on the volume of documents produced, the administrative burden of that process may be enormous. A critical part of that burden will be the establishment of procedures for identifying what documents are produced by the IC agencies, and, thereafter, for indexing those documents that the prosecutor has reviewed and determined to be relevant to the case. In all events, classified documents obtained from the IC must be segregated from investigative documents produced by law enforcement agencies. The Justice Security Office and Emergency Planning Staff and ISS are available to advise the prosecutor on such matters.

9-90.220 Disclosure Of Grand Jury Information To An Intelligence Agency

Exceptions to the general rule of secrecy as to grand jury proceedings include disclosure to

...such government personnel...as are deemed necessary by

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[13]Any subsequent disclosure or dissemination beyond the prosecutor's initial review of the documents must first be approved by the originating agency.

[14]In some instances when delay should be avoided, an uncleared AUSA may have the National Security Coordinator or an attorney from the ISS review selected documents.

an attorney for the government[15] to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

Fed.R.Crim.P. 6(e)(3)(A)(ii).

If disclosure of grand jury material to intelligence community personnel is required to properly frame a file search request to the IC, that disclosure is permitted under Rule 6(e)(3)(A)(ii). See United States v. Lartey, 716 F.2d 955, 963-64 (2d Cir. 1983); In re Perlin, 589 F.2d 260, 268-69 (7th Cir. 1978). As with disclosure to federal law enforcement agencies, Rule 6(e)(3)(B) requires that the attorney for the government notify the court of the names of the particular IC personnel to whom disclosure is made, and certify that those persons have been advised of the restrictions placed on the use and dissemination of grand jury materials.

9-90.230 Disclosure Of Classified Information To The Grand Jury

Grand jurors do not have the security clearances required for access to classified information. Accordingly, disclosure of such information to a grand jury may only be done with the approval of the agency responsible for classifying the information sought to be disclosed.

There are measures that a prosecutor can take that will increase the likelihood that the appropriate intelligence agency will approve the use of its information before the grand jury. First and foremost is the use of an unclassified summary of the information prepared by the prosecutor in concert with the intelligence agency. In other instances, the agency may simply be able to declassify the particular document(s) involved, in whole or in part, by excising certain portions that make the document particularly sensitive but that are not relevant to the use desired by the prosecutor.

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[15] An "attorney for the government" is defined in the Notes of Advisory Committee for Fed.R.Crim.P. 54(c) as including the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, and an authorized Assistant United States Attorney. That term does not include an attorney for a county or state government, e.g., In re Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896 (7th Cir. 1973); nor does it include an attorney for a federal administrative agency. In re Grand Jury Proceedings, 309 F.2d 440, 443 (3d Cir. 1962).

Of greater difficulty would be the request of a prosecutor that an intelligence agency officer or asset testify as a witness before the grand jury.[16] As a rule, because hearsay testimony is permissible before the grand jury, the prosecutor will likely have alternatives, such as the testimony of a summary witness, that would obviate the need for the agency officer's testimony before the grand jury. If a summary witness is not a viable option, however, the prosecutor must obtain the approval of the ISS before making any effort to secure the presence before the grand jury of an intelligence agency officer or asset. The ISS will assist the prosecutor as much as possible in arranging for that testimony or in structuring an alternative thereto that will provide essentially the same information to the grand jury.

9-90.240 Synopsis of Classified Information Procedures Act (CIPA)

I. DEFINITIONS, PRETRIAL CONFERENCE, PROTECTIVE ORDERS AND DISCOVERY

After a criminal indictment becomes public, the prosecutor remains responsible for taking reasonable precautions against the unauthorized disclosure of classified information during the case. This responsibility applies both when the government intends to use classified information in its case-in-chief as well as when the defendant seeks to use classified information in his defense. The tool with which the proper protection of classified information may be ensured in indicted cases is the Classified Information Procedures Act (CIPA).

CIPA is a procedural statute; it neither adds to nor detracts from the substantive rights of the defendant or the discovery obligations of the government. Rather, the procedure for making these determinations is different in that it balances the right of a criminal defendant with the right of the sovereign to know in advance of a potential threat from a criminal prosecution to its national security. See, e.g., United States v. Anderson, 872 F.2d 1508, 1514 (11th Cir.), cert. denied, 493 U.S. 1004 (1989); United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983); United

[16] If a target of the grand jury investigation was, or is, an intelligence officer, asset, or other employee of the intelligence community, in addition to the usual concerns related to the appearance of a target before the grand jury, the prosecutor must take care to protect against "retaliatory" testimony by that individual in the form of unauthorized disclosure of classified information. Accordingly, prior to any grand jury appearance by such target, the AUSA, in coordination with the ISS, must consult with any intelligence agency whose information may be disclosed by the target's testimony.

States v. Lopez-Lima, 738 F.Supp. 1404, 1407 (S.D.Fla. 1990). Each of CIPA's provisions is designed to achieve those dual goals: preventing unnecessary or inadvertent disclosures of classified information and advising the government of the national security "cost" of going forward.

A. Definitions of Terms

Section 1 of CIPA defines "classified information" and "national security," both of which are terms used throughout the statute. Subsection (a), in pertinent part, defines "classified information" as:

> [A]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.

Subsection (b) defines "national security" to mean the "national defense and foreign relations of the United States."

B. Pretrial Conference

Section 2 provides that "[a]t any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution." Following such a motion, the district court "shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by Section 5 of this Act, and the initiation of the procedure established by Section 6 [to determine the use, relevance, or admissibility of classified information] of this Act."

C. Protective Orders

Of critical importance in any criminal case, once there exists any likelihood that classified information may be at issue, is the entering of a protective order by the district court. CIPA Section 3 requires the court, upon the request of the government,[17] to

[17]The government's motion for a protective order is an excellent opportunity to begin educating the Court, including the judge's staff, about CIPA and related issues. It is essential that the motion include a memorandum of law that provides the court with an overview on national security matters and sets forth the authority by which the government may protect matters of national

issue an order "to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case." The protective order must be sufficiently comprehensive to ensure that access to classified information is restricted to cleared persons[18] and to provide for adequate procedures and facilities for proper handling and protection of classified information during the pre-trial litigation and trial of the case.

An essential provision of a protective order is the appointment by the court of a Court Security Officer (CSO). The CSO is an employee of the Department's Justice Management Division; however, the court's appointment of a CSO makes that person an officer of the court. In that capacity, the CSO is responsible for assisting both parties and the court staff in obtaining security clearances (not required for the judge), in the proper handling and storage of classified information, and in operating the special communication equipment that must be used in dealing with classified information.

D. Discovery of Classified Information by Defendant

Section 4 provides in pertinent part that "[t]he court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting the relevant facts that classified information would tend to prove." Like Rule 16(d)(1) of the Federal Rules of

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security, including the general authority of the Intelligence Community pursuant to the National Security Act of 1947, the Central Intelligence Act of 1949, and various Executive Orders issued by the President. For sample motions and protective orders or to discuss any problems you may have with the court on CIPA issues, please contact the Internal Security Section.

[18]The requirement of security clearances does not extend to the judge or to the defendant (who would likely be ineligible, anyway). Some defense counsel may wish to resist this requirement by seeking an exemption by order of the court. The prosecutor should advise defense counsel that, because of the stringent restrictions imposed by federal regulations, statutes, and Executive Orders upon the disclosure of classified information, such tack may prevent, and will certainly delay access to classified information. In any case in which this issue arises, the prosecutor should notify the Internal Security Section immediately.

Criminal Procedure, Section 4 provides that the Government may demonstrate that the use of such alternatives is warranted in an in camera, ex parte submission to the court.

By the time of the Section 4 proceeding, the prosecutor should have completed the government's review of any classified material and have identified any such material that is arguably subject to the government's discovery obligation. Where supported by law, the prosecutor, during the proceeding, should first strive to have the court exclude as much classified information as possible from the government's discovery obligation. Second, to the extent that the court rules that certain classified material is discoverable, the prosecutor should seek the court's approval to utilize the alternative measures described in Section 4, i.e., unclassified summaries and/or stipulations.[19]

II. SECTIONS 5 AND 6: NOTICE AND PRETRIAL EVIDENTIARY RULINGS

Following the discovery process under Section 4, there are three critical pretrial steps in the handling of classified information under Sections 5 and 6 of CIPA. First, the defendant must specify in detail the precise classified information he reasonably expects to disclose. Second, the Court, upon a motion of the Government, shall hold a hearing pursuant to Section 6(a) to determine the use, relevance and admissibility of the proposed evidence. Third, following the 6(a) hearing and formal findings of admissibility by the Court, the Government may move to substitute redacted versions of classified documents from the originals or to prepare an admission of certain relevant facts or summaries for classified information that the Court has ruled admissible.

A. The Section 5(a) Notice Requirement

The linchpin of CIPA is Section 5(a), which requires a defendant who intends to disclose (or cause the disclosure of) classified information to provide timely pretrial written notice of his intention to the Court and the Government. Section 5(a) expressly requires that such notice "include a brief description of the classified information," and the leading case under Section 5(a) holds that such notice

> must be particularized, setting forth specifically the classified information which

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[19]The court's denial of such a request is subject to interlocutory appeal. See Section III.A., infra.

> the defendant reasonably believes to be necessary to his defense.

United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983) (emphasis added). See also United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (en banc). This requirement applies both to documentary exhibits and to oral testimony, whether it is anticipated to be brought out on direct or on cross-examination. See e.g., United States v. Collins, supra, (testimony); United States v. Wilson, 750 F.2d 7 (2d Cir. 1984) (same).

If a defendant fails to provide a sufficiently detailed notice far enough in advance of trial to permit the implementation of CIPA procedures, Section 5(b) provides for preclusion. See United States v. Badia, 827 F.2d 1458, 1465 (11th Cir. 1987). Similarly, if the defendant attempts to disclose at trial classified information which is not described in his Section 5(a) notice, preclusion is the appropriate remedy prescribed by Section 5(b) of the statute. See United States v. Smith, supra, 780 F.2d at 1105 ("A defendant is forbidden from disclosing any such information absent the giving of notice").

B. The Section 6(a) Hearing

The purpose of the hearing pursuant to Section 6(a) of CIPA is for the court "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial . . . ." 18 U.S.C. App. III § 6(a). The statute expressly provides that, after a pretrial Section 6(a) hearing on the admissibility of evidence, the court shall enter its rulings prior to the commencement of trial.[20]

At the Section 6(a) hearing, the court is to hear the defense's proffer and the arguments of counsel, and then rule whether the classified information identified by the defense is relevant under the standards of Fed. R. Evid. 401. United States v. Smith, supra, 780 F.2d at 1106. The court's inquiry does not end there, for under Fed. R. Evid. 402, "[n]ot all relevant evidence is admissible at trial." Id.[21] The Court therefore must also

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[20] CIPA does not change the "generally applicable evidentiary rules of admissibility," United States v. Wilson, supra, 750 F.2d at 9, but rather alters the timing of rulings as to admissibility to require them to be made before the trial. Accord, United States v. Smith, supra, 780 F.2d at 1106.

[21] In Smith, the Fourth Circuit noted that, in deciding whether arguably relevant classified evidence is also admissible as part of the defense case, the trial court should also consider whether such

determine whether the evidence is cumulative, "prejudicial, confusing, or misleading," United States v. Wilson, supra, 750 F.2d at 9, so that it should be excluded under Fed. R. Evid. 403.

At the conclusion of the Section 6(a) hearing, the court must state in writing the reasons for its determination as to each item of classified information. 18 U.S.C. App. III § 6(a).

C. Substitution Pursuant to Section 6(c)

In the event that the Court rules any classified information to be admissible, Section 6(c) of CIPA permits the Government to propose unclassified "substitutes" for that information. Specifically, the Government may move to substitute either (1) a statement admitting relevant facts that the classified information would tend to prove or (2) a summary of the classified information instead of the classified information itself. 18 U.S.C. App. III § 6(c)(1). See United States v. Smith, supra, 780 F.2d at 1105. In many cases, the government will propose a redacted version of a classified document as a substitution for the original, having deleted only non-relevant classified information. A motion for substitution shall be granted if the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information." 18 U.S.C. App. III § 6(c).

In the event that the district court will not accept a substitution proposed by the government, an interlocutory appeal may lie to the Circuit Court under CIPA § 7. If the issue is resolved against the government, and classified information is thereby subject to a disclosure order of the Court, the AUSA must immediately notify the ISS. Thereafter, the Attorney General may file an affidavit effectively prohibiting the use of the contested classified information. If that is done, the Court may impose sanctions against the government, which may include striking all or part of a witness' testimony, resolving an issue of fact against the United States, or dismissing part or all of the indictment. See CIPA § 6(e). The purpose of the relevance hearings under 6(a) and

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evidence is protected from disclosure at a public trial by the government's state secrets privilege. 780 F.2d at 1106-10. The risk of using the Smith privilege argument at a Section 6(a) proceeding, which proceedings are not ex parte, is that, in order to justify the application of the privilege, the government may have to disclose classified information in the presence of the defendant that is otherwise irrelevant to the proceedings. For additional guidance on this and related legal issues, please contact the Internal Security Section.

the substitution practice under 6(c), however, is to avoid the necessity for these sanctions.

III. OTHER RELEVANT CIPA PROCEDURES

A. Interlocutory Appeal

Section 7(a) of the Act provides for an interlocutory appeal by the government from any decision or order of the trial judge "authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information."[22] The term "disclosure" within the meaning of Section 7 includes both information which the court orders the government to divulge to the defendant or to others as well as information already possessed by the defendant which he or she intends to disclose to unapproved people. Section 7(b) provides that the court of appeals shall give expedited treatment to any interlocutory appeal filed under subsection (a).

Section 7 is silent on the issues of whether the defense must be given notice of the appeal and whether appeals pursuant to Section 7 are to be ex parte. As a matter of fairness, the policy of the Department shall be that the defense be given notice of the government's appeal under Section 7; however, the appeal itself shall be litigated ex parte. The CIPA provisions read together make it clear that to divulge the substance of the appeal or to allow the defense to participate in a Section 7 interlocutory appeal would render meaningless the issue driving the appeal, i.e., the government's effort both to protect classified information from unnecessary disclosure while meeting its obligations to the defendant by way of unclassified alternatives.

B. Introduction of Classified Information

Section 8(a) provides that "[w]ritings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status." This provision simply recognizes that classification is an executive, not a judicial, function. Thus, Section 8(a) implicitly allows the classifying agency, upon completion of the trial, to decide whether the information has been so compromised during trial that it could no longer be regarded as classified.

In order to prevent "unnecessary disclosure" of classified information, Section 8(b) permits the court to order admission into

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[22]Section 7 appeals must be approved by the Solicitor General.

evidence of only a part of a writing, recording, or photograph. Alternatively, the court may order into evidence the whole writing, recordings, or photograph with excision of all or part of the classified information contained therein. However, the provision does not provide grounds for excluding or excising part of a writing or recorded statement which ought in fairness to be considered contemporaneously with it. Thus, the court may admit into evidence part of a writing, recording, or photograph only when fairness does not require the whole document to be considered.

Section 8(c) provides a procedure to address the problem presented during a pretrial or trial proceeding when the defendant's counsel asks a question or embarks on a line of inquiry that would require the witness to disclose classified information not previously found by the Court to be admissible. If the defendant knew that a question or line of inquiry would result in disclosure of classified information, he presumably would have given the Government notice under Section 5 and the provisions of Section 6(a) would have been used. Section 8(c) serves, in effect, as a supplement to the hearing provisions of Section 6(a) to cope with situations which cannot be handled effectively under that section, e.g., where the defendant does not realize that the answer to a given question will reveal classified information. Upon the Government's objection to such a question, the Court is required to take suitable action to avoid the improper disclosure of classified information.

C. Security Procedures

Section 9 required the Chief Justice of the United States to prescribe security procedures for the protection of classified information in the custody of Federal courts. On February 12, 1981, Chief Justice Burger promulgated these procedures. For further information regarding those procedures, please contact the Justice Management Division Office of Security (202-514-2094).

D. Public Testimony By Intelligence Officers

Although the intelligence community is committed to assisting law enforcement where it is legally proper to do so, it must also remain vigilant in protecting classified national security information from unauthorized disclosure. Just as with law enforcement agencies, the successful functioning of the IC turns in significant part upon the ability of its intelligence officers covertly to obtain information from human sources. In carrying out that task, the intelligence officers must, when necessary, be able to operate anonymously, that is, without their connection to an intelligence agency of the United States being known to the persons with whom they come in contact. For that reason, an intelligence

agency is authorized under Executive Order 12356 to classify the true name of an intelligence officer.

During the pre-trial progression of an indicted case, as the court enters its CIPA rulings under Sections 4 and 6, it may become apparent to the prosecutor that testimony may be required from an intelligence officer or other agency representative engaged in covert activity, either because the Court has ruled under CIPA that certain evidence is relevant and admissible in the defense case, or because such testimony is necessary in the government's rebuttal. Just as the substance of that testimony, to the extent it is classified and is being offered by the defense, must be the subject of CIPA determinations by the court, the prosecutor must also ensure that the same considerations are afforded to the true names of covert intelligence community personnel, if those true names are classified information. That is, the prosecutor must seek the Court's approval, under either CIPA section 4 or section 6, of an alternative method to the witness' testimony in true name that will provide the defendant with the same ability that he would have otherwise had to impeach, or bolster, the credibility of that witness.

In any criminal case in which it becomes likely that an intelligence agency employee will testify, the AUSA assigned to the case shall immediately notify the ISS. That office, in consultation with the general counsel at the appropriate intelligence agency, will assist the AUSA during pretrial motion practice and litigation on the issue of whether the witness should testify in true name and other issues related to the testimony of intelligence agency personnel.

9-90.250 Implementation of CIPA

The Internal Security Section (ISS) is responsible for the development and implementation of policies and procedures related to CIPA. ISS is also responsible for the preparation of reports to Congress concerning cases in which prosecution is declined for national security reasons and reports concerning the operation and effectiveness of the act.

9-90.260 Public Authority Defense

There has been considerable confusion in the law regarding what truly constitutes a defense of governmental authority. In point of fact, there are at least three different defenses that in theory a defendant might assert when he insists that he committed the crimes charged in response to a request from an agency of the government. In gauging the appropriate response to rebut the

defense, the government should determine which of the defenses actually applies and, if necessary, file the necessary pleadings to have the defendant elect which defense is at issue.[23]

First, the defendant may offer evidence that he honestly, albeit mistakenly, believed he was performing the crimes charged in the indictment in cooperation with the government. More than an affirmative defense, this is a defense strategy relying on a "mistake of fact" to undermine the government's proof of criminal intent, the mens rea element of the crime. United States v. Baptista-Rodriguez, 17 F.3d 1354, 1363-68 (11th Cir. 1994); United States v. Anderson, 872 F.2d 1508, 1517-18 & n.4 (11th Cir.), cert. denied, 493 U.S. 1004 (1989); United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985). The defendant must be allowed to offer evidence that negates his criminal intent, id., and, if that evidence is admitted, he is entitled to a jury instruction on the issue of his intent. United States v. Abcasis, 45 F.3d 39, 44 (2d Cir. 1995); United States v. Anderson, 872 F.2d at 1517-1518 & n. 14.[24]

In Juan, the defendant admitted the criminal acts charged against him, but sought to defend by demonstrating a lack of criminal intent, i.e., that he thought he was doing those things in cooperation with the U.S. government. Specifically, he moved, pursuant to the dictates of CIPA, to use classified information to prove a prior relationship with a government agency in order to prove that his belief of cooperation was reasonable. The court held that

> ...the mere fact that appellant had, in the past, engaged in the activity he seeks to prove does not insulate him from criminal responsibility for unlawful acts thereafter... Yet, the past events tend to make more plausible that which, absent proof of those events, would be implausible. Appellant should be allowed...to establish the premise for his claim.

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[23]The legal discussion that follows is not intended as an exhaustive discourse on the public authority defense but rather is to assist the prosecutor in identifying the issues that may arise when that defense is asserted.

[24]In Anderson, the Eleventh Circuit approved the district court's instruction to the jury that the defendants should be found not guilty if the jury had a reasonable doubt whether the defendants acted in good faith under the sincere belief that their activities were exempt from the law.

776 F.2d at 258.

The second type of government authority defense is the affirmative defense of public authority, i.e., that the defendant knowingly committed a criminal act but did so in reasonable reliance upon a grant of authority from a government official to engage in illegal activity. This defense may lie, however, only when the government official in question had actual authority, as opposed to merely apparent authority, to empower the defendant to commit the criminal acts with which he is charged. United States v. Anderson, 872 F.2d at 1513-15; United States v. Rosenthal, 793 F.2d 1214, 1236, modified on other grounds, 801 F.2d 378 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987).[25] If the government official lacked actual or real authority, however, the defendant will be deemed to have made a mistake of law, which generally does not excuse criminal conduct.[26] United States v. Anderson, 872 F.2d at 1515; United States v. Rosenthal, 793 F.2d at 1236; United States v. Duggan, 743 F.2d at 83-84.

The last of the possible government authority defenses is "entrapment by estoppel," which is somewhat similar to public authority. In the defense of public authority, it is the defendant whose mistake leads to the commission of the crime; with "entrapment by estoppel," a government official commits an error and, in reliance thereon, the defendant thereby violates the law. United States v. Burrows, 36 F.3d 875, 882 (9th Cir. 1994); United States v. Hedges, 912 F.2d 1397, 1405 (11th Cir. 1990); United States v. Clegg, 846 F.2d 1221, 1222 (9th Cir. 1988); United States v. Tallmadge, 829 F.2d 767, 773-75 (9th Cir. 1987). Such a defense

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[25]The genesis of the "apparent authority" defense was the decision in United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976). Barker involved defendants who had been recruited to participate in a national security operation led by Howard Hunt, whom the defendants had known before as a CIA agent but who was then working in the White House. In reversing the defendants' convictions, the appellate court tried to carve out an exception to the mistake of law rule that would allow exoneration of a defendant who relied on authority that was merely apparent, not real. Due perhaps to the unique intent requirement involved in the charges at issue in the Barker case, the courts have generally not followed its "apparent authority" defense. E.g., United States v. Duggan, 743 F.2d 59, 83-84 (2d Cir. 1984); United States v. Rosenthal, 793 F.2d at 1235-36.

[26]But see discussion on "entrapment by estoppel," infra.

has been recognized as an exception to the mistake of law rule.[27] See United States v. Duggan, 743 F.2d at 83 (citations omitted); but, to assert such a defense, the defendant bears the burden of proving that he was reasonable in believing that his conduct was sanctioned by the government. United States v. Lansing, 424 F.2d 225, 226-27 (9th Cir. 1970). See United States v. Burrows, 36 F.3d at 882 (citing United States v. Lansing, 424 F.2d at 225-27).

Federal Rule of Criminal Procedure 12.3

Regardless of which form of the government authority defense the defendant chooses to pursue, the federal rules require notice of the defense well in advance of trial. As the following discussion demonstrates, it also offers the government the opportunity to challenge the defense to justify in advance any proposed foray into law enforcement or IC files.

Fed.R.Crim.P. 12.3 is the newest of three rules pertaining to specific defenses and requiring advance notice to the government before being asserted by a defendant. The rule provides as follows, in pertinent part:

> **Notice Of Defense Based Upon Public Authority**
>
> (a)(1) A defendant intending to claim a defense of actual or believed exercise of public authority on behalf of a law enforcement or Federal intelligence agency at the time of the alleged offense shall...serve upon the attorney for the government a written notice of such intention.... Such notice shall identify the law enforcement or Federal intelligence agency and any member of such agency on behalf of which and the period of time in which the defendant claims the actual or believed exercise of public authority occurred....

When the prosecutor has reason to believe that a Rule 12.3 defense is likely to be asserted to a pending indictment, he should

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[27]In Tallmadge, for example, a federally licensed gun dealer sold a gun to the defendant after informing him that his circumstances fit into an exception to the prohibition against felons owning firearms. After finding that licensed firearms dealers were federal agents for gathering and dispensing information on the purchase of firearms, the Court held that a buyer has the right to rely on the representations made by them. 829 F.2d at 774.

consider immediate action to force the issue, such as filing a demand for notice pursuant to Rule 12.3(a)(1). The responsive notice, if it is as comprehensive as this section stresses below it should be, will provide the prosecutor with abundant information that can guide that prosecutor's strategy and tactics in preparing for trial.

Moreover, if the responsive notice alleges public authority by an agency of the intelligence community, it most certainly signals that the prosecutor must consider invoking CIPA. With such an invocation will come enormous administrative burdens, both for the prosecutor and for the court, as security clearances must be obtained, proper facilities established for storing classified documents, and potentially innumerable hearings held under Sections 4 and 6 of CIPA to determine the admissibility of classified evidence.

When a prosecutor receives a 12.3 notice, he should not hesitate, but should respond quickly and aggressively to determine whether there is a true public authority defense at hand, or just a diversionary tactic. If the prosecutor is able successfully to handle the Rule 12.3 issue, he may avoid the immense impact on the preparation of the case that is inevitably involved when classified information becomes at risk. The information that follows is offered to assist in that regard.

LEGAL DISCUSSION

Rule 12.3 has been held not to improperly infringe upon a defendant's guarantee against self-incrimination, United States v. Abcasis, 785 F.Supp. 1113, 1116-17 (ED/NY 1992), rev'd on other grounds, 45 F.3d 39 (2d Cir. 1995); or upon the defendant's due process rights to reciprocal discovery, 785 F.Supp at 1118; and not to abridge a defendant's right of compulsory process. United States v. Seeright, 978 F.2d 842, 848-49 (4th Cir. 1992). In reaching these conclusions, the respective courts have analogized Rule 12.3 to its sister rules, 12.1 and 12.2.

Rule 12.1 provides for pretrial notice to the government of the defendant's intention to offer a defense of alibi. The government carries the burden of triggering the notice requirement through a written demand served upon the defendant specifying the time, date, and place of the charged offense. If the defendant intends to offer an alibi defense, he must then respond by specifying his whereabouts at the time of the offense and by identifying the witnesses whom he intends to call to prove his alibi. The prosecution must then serve the defendant with notice of those witnesses who will place him at the crime scene.

Florida's notice of alibi provision, which is virtually

identical to Rule 12.3, was considered and its constitutionality upheld in Williams v. Florida, 399 U.S. 78 (1970). Specifically, the Court noted that there is no abridgement of the Fifth Amendment's protection against self-incrimination by requiring a defendant to give notice of intent to assert a defense, as opposed to requiring a defendant to testify in support of that defense. Moreover, the court recognized a strong government interest in avoiding the unfair prejudicial surprise that would occur if the defendant were allowed to assert an alibi defense without warning.[28] Id. at 1116-17.

Similarly, Rule 12.2 requires a defendant to give notice to the government of his intent to rely on an insanity defense. The Notes of Advisory Committee on Rules reflects that

> [t]he objective [of Rule 12.2] is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony. Failure to give advance notice commonly results in the necessity for a continuance in the middle of a trial, thus unnecessarily delaying the administration of justice.

United States Code Annotated, Title 18, Federal Rules of Criminal Procedure, Rules 12 to 12.1, at page 82.

Like its companion rules, Rule 12.3 is designed to provide the government with reasonable notice that the defendant intends to defend the charges against him in a very unique way, that is, by admitting the crimes but denying criminal intent by claiming that he was authorized to do so by a representative of the government. The purpose of requiring a particularized list of witnesses under any of these unique defense notice rules, is to ensure that the defense is a real defense, to avoid prejudicial surprise, and to obviate the need for continuances. In the context of an alibi defense, the courts have held, for example, that, to avoid rendering Rule 12.1 useless, the Rule necessarily requires a reasonable threshold of completeness and specificity. See United

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[28]The legislative history behind Rule 12.1 reflects that Congress was also concerned that the prosecution not be unfairly surprised at trial by only then learning of the defendant's claim of an alibi. Thus, to avoid unnecessary interruption and delay in the trial while the government conducts an investigation into the alibi, it included advance notice and exchange of witness names as a condition to assert the defense. H.R.Rep.No. 247, 94th Cong., 1st Sess. 8, reprinted in 1975 U.S.Code Cong. & Ad.News 674 et seq.; Notes of Committee on the Judiciary House Report No. 94-247. See 8 J. Moore, Moore's Federal Practice 12.1.02 (2d ed. 1981).

States v. Vela, 673 F.2d 86, 88-89 (5th Cir. 1982); United States v. Myers, 550 F.2d 1036, 1041-43 (5th Cir. 1977). Similar specificity and forthrightness have been held to be required as to notice under Rule 12.2. United States v. Buchbinder, 796 F.2d 910, 915 (7th Cir. 1986).

The same argument must reasonably apply to Rule 12.3. If the intent of the rule is to be accomplished, the defendant who asserts a public authority defense should be required to answer the following questions in his Rule 12.3 Notice: Who does the defendant say authorized him to perform the criminal acts with which he is charged? When and where did that authorization occur?

In short, the defendant must be required, as part of his notice, to make a prima facie showing of a colorable public authority defense. Mere speculation that the government knew of the defendant's activity is insufficient. Likewise, the claim that the government was fully aware of the defendant's criminal acts, and for whatever reason did not interfere, is simply not public authority. The court in United States v. Rosenthal, 793 F.2d 1214 (11th cir. 1986), held that the defense of public authority must depend upon a grant of authority that is real, and not merely apparent. See also, United States v. Lopez-Lima, 738 F. Supp. 1404 (S.D.Fla. 1990). Moreover, the authority must actually be given, not simply presumed, by the defendant. The imagined specter of some lurking, invisible government presence, coupled with the fact that the government never interfered with the defendant's criminal activity, is not public authorization. If it were a defense, it would be a haven for the paranoid felon.

In light of the foregoing, the government should urge the Court to require the defendant to provide the following information in support of his public authority defense:

(1) the name and address of any person who will testify at trial that either he/she or a person or persons known to him/her gave the defendant authority to commit the criminal acts set forth in indictment;

(2) the federal agency or agencies which employed each person named in paragraph (1) and that person's official title at the time the alleged authorization was given to the defendant; and

(3) the approximate date or dates when the grant of public authority was allegedly given to the defendant and a brief description of the circumstances of how that was done.

The defense may argue that the foregoing information exceeds a narrow reading of Rule 12.3. The prosecutor should respond that, given the concerns expressed in the legislative history and in some court opinions that the government receive meaningful notice and opportunity to prepare its rebuttal and that mid-trial continuances be avoided, these are reasonable measures by the court to ensure that the defense is a real defense, with at least colorable merit.[29] It further follows that the evidence that the defendant offers to support his defense must meet at least the basic threshold of materiality for any other exculpatory evidence, i.e., it is admissible under the Rules of Evidence. See United States v. Oxman, 740 F.2d 1298, 1311 (3d Cir. 1984), vacated on other grounds, 473 U.S. 922 (1985); United States v. Kanney, 719 F.2d 1182, 1190 (1st Cir. 1983); United States v. Kennedy, 890 F.2d 1056, 1059 (9th Cir. 1989).

It cannot be seriously disputed that a defendant should have the opportunity to assert a fact-based defense that someone in the government asked him to commit the crimes alleged in the indictment for political, diplomatic, or any other reason he cares to offer. But the quid pro quo must be that the defendant identifies specifically the person or persons who directly, or even by a "wink and a nod," told him he had authority to act in behalf of the government; and he must be required to link any alleged grant of authority to act for the government specifically to one or more of the crimes in the indictment.

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[29]To the extent that any of the listed threshold information exceeds a narrow reading of the scope of the notice required by Rule 12.3, the court may wish to allow the defense to submit the information ex parte and in camera.

DETAILED
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FOR CHAPTER 90

9-90.000 NATIONAL SECURITY

National security encompasses the national defense, foreign intelligence or foreign counterintelligence, internal security, and foreign relations. Prosecutions that may affect the national security involve sensitive and complex issues. They require coordination with high level officials from military and intelligence agencies, and sometimes the Department of State, and the cooperation of these agencies in making available the sensitive evidence that is required to prosecute such cases successfully. In addition, Congress has conferred direct responsibility for certain aspects of national security prosecutions on the Attorney General, or on high ranking Department of Justice officials.

9-90.100 POLICIES CONCERNING PROSECUTIONS THAT MAY AFFECT THE NATIONAL SECURITY

The Department of Justice has assigned the enforcement of all criminal laws relating to activities directed against the national security of the United States, including criminal prosecutions for offenses, such as perjury and false statements, arising out of offenses related to the national security, to the Assistant Attorney General, Criminal Division, or higher authority. All prosecutions for such offenses shall be conducted, handled, or supervised by the Assistant Attorney General, Criminal Division, or by higher authority within the Department of Justice. The Internal Security Section of the Criminal Division assists Departmental officials in carrying out their responsibilities for national security cases. John L. Martin, Chief of the Internal Security Section, can be contacted at FTS 786-4909.

When national security issues arise in prosecutions for offenses not related to the national security, the Criminal Division is to be consulted, to ensure that Departmental policies are followed. For example, if a defendant in a criminal prosecution makes a discovery request for classified information (information that, pursuant to Executive Order, the United States government has determined should be protected against unauthorized disclosure because such disclosure would adversely affect the national defense or foreign relations), the Criminal Division's Internal Security Section should be consulted. Similarly, if a criminal defendant indicates that his/her defense will require the disclosure of classified information, or contends that his/her otherwise unlawful activities were authorized by a U.S. intelligence agency, the Internal Security Section should be consulted. Further, if a foreign government, or representatives of a foreign government, are implicated in criminal activity, the Criminal Division should be consulted.

9-90.200 POLICIES AND PROCEDURES FOR CRIMINAL CASES THAT INVOLVE CLASSIFIED INFORMATION

The Internal Security Section of the Criminal Division assists the Attorney General in implementing the Classified Information Procedures Act of 1980 (hereafter CIPA) (18 U.S.C.App. IV), and coordinates other aspects of prosecutions that involve the potential disclosure of classified information. U.S. Attorneys' offices should consult with the Internal Security Section's Graymail Unit in any case in which there is a possibility that classified information will be disclosed during a prosecution, or play a role in prosecutive decision making. A synopsis of CIPA and the role of the Internal Security Section in administering CIPA appears at USAM 9-90.210-220. Compliance with CIPA is mandatory.

Several essential requirements apply to cases involving classified information. First, only the Assistant Attorney General, Criminal Division, the Deputy Attorney General, or the Attorney General can authorize the declination of a prosecution for national security reasons. (CIPA §§ 12 and 14.) Such declinations must be included in a report submitted to Congress pursuant to the requirements of Section 13 of CIPA. This report is prepared by the Internal Security Section.

Further, classified information that is or may be relevant to a criminal prosecution cannot be utilized, even for discovery purposes, without coordinating with the agency that is responsible for classifying or declassifying that information. This rule applies to oral disclosures of classified or classifiable information, such as certain statements by present or former government employees, or contract employees who hold or held security clearances and were given access to classified information.

Special considerations apply to investigations that involve classified information. First, when interviewing witnesses, classified information can only be discussed if the witnesses have appropriate security clearances. In some instances, the approval of the agency that classified the information is also required. Second, classified information usually may not be disclosed to the grand jury, despite the secrecy provisions of Rule 6 of the Federal Rules of Criminal Procedure. Third, witnesses, subjects, or targets of an investigation who have lawfully acquired classified information cannot lawfully disclose such information to their uncleared attorneys. The attorneys should seek to have the information declassified, secure a security clearance, or obtain the information pursuant to an appropriate protective order. For guidance on how to handle classified information during investigations or before the grand jury, contact the Internal Security Section.

9-90.210 Synopsis of Classified Information Procedures Act (CIPA)

The key elements of CIPA include: (1) a provision for a pretrial conference to consider matters relating to classified information that may arise

in connection with a prosecution; (2) a requirement that the defense notify the government of any classified information it will seek to introduce; (3) a provision for a pretrial hearing to determine the admissibility of classified information; (4) a provision authorizing the court to issue an order to protect against the disclosure of classified information made available by the United States to any defendant; (5) a provision permitting the use of summaries or admissions of relevant facts, as alternatives to the disclosure of specific classified information; (6) a provision for appeals by the government of adverse rulings concerning the admissibility of classified information, the use of substitutes for the disclosure of specific classified information, or the sanctions imposed by the court for the government's refusal to permit disclosure of classified information which has been found to be admissible; and (7) various reporting requirements. The Attorney General, pursuant to the act, issued guidelines for determining the propriety of initiating or declining prosecution in cases which may require the disclosure of classified information.

The Classified Information Procedures Act also permits *in camera* hearings to determine the use of classified information, or alternatives to the disclosure of specific classified information, when the Attorney General certifies to the court that a public proceeding may result in the disclosure of classified information.

In addition, CIPA required the Chief Justice to issue security procedures to protect against the unauthorized disclosure of classified information in the custody of federal courts. These procedures were issued in 1981, and are published in U.S.C.A. following the text of CIPA in the Appendix to Title 18. They are also available through JURIS. The procedures require, among other things, that all classified information that is submitted to, or generated by, the court in connection with CIPA proceedings, be placed in the custody of a court security officer and safeguarded against unauthorized disclosure.

9-90.220 Implementation of the Classified Information Procedures Act (CIPA)

The Internal Security Section coordinates the implementation of CIPA, and prepares reports to Congress concerning cases in which prosecution is declined for national security reasons and reports concerning the operation and effectiveness of the act. Edward J. Walsh, Chief of the Graymail Unit, can be contacted at FTS 786-4938.

9-90.300 ESPIONAGE AND RELATED OFFENSES

Chapter 37 of 18 U.S.C. proscribes espionage and related activities. All prosecutions under Chapter 37 shall be initiated and conducted in accordance with USAM 9-2.132. Various statutes supplement the provisions of Chapter 37 to criminalize activities that jeopardize the national de-

fense or national security. Key national defense and national security provisions are synopsized *infra* at 9-90.310. Prosecutions pursuant to these provisions must also be instituted and conducted in accordance with USAM 9-2.132. John J. Dion, Chief of the Espionage Unit of the Internal Security Section, supervises prosecutions of espionage and espionage related offenses, and can be reached at FTS 786-4943.

9-90.310 Espionage: 18 U.S.C. § 791 et seq.

The espionage provisions of Chapter 37, Title 18, United States Code, deal with documents, material, or information, related to the national defense. Key provisions of Chapter 37 include the following sections:

Section 794 applies to: (1) persons who deliver, or attempt to deliver, information pertaining to the national defense of the United States to agents or subjects of foreign countries, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation; (2) wartime espionage; and (3) conspiracy to commit espionage.

Section 793 applies to activities such as gathering, transmitting to an unauthorized person, or losing, information pertaining to the national defense, and to conspiracies to commit such offenses.

Section 798 applies to the willful communication of classified information concerning codes or communications intelligence, or related materials, to an unauthorized person.

9-90.320 Espionage Related Offenses

9-90.321 Treason: 18 U.S.C. §§ 2381 and 2382

The crime of treason is covered in 18 U.S.C. § 2381. It proscribes levying war against the United States and giving comfort to the enemy. Misprison of treason is also unlawful. 18 U.S.C. § 2382.

9-90.322 Computer Espionage: 18 U.S.C. § 1030(a)(1)

Section 1030(a)(1) of Title 18, U.S.C., makes it unlawful to knowingly access a computer without authorization, or beyond the scope of one's authorization, and thereby obtain information that has been classified for national defense or foreign relations reasons, with intent or reason to believe that such information is to be used to the injury of the United States or to the advantage of a foreign nation.

9-90.323 Communication or Receipt of Classified Information: 50 U.S.C. § 783

Section 783 of Title 50, U.S.C., makes it unlawful for any officer or employee of the United States, or of any federal department or agency, to

communicate to any person whom he or she knows or has reason to believe to be an agent of a foreign government, any information classified by the President or by the head of such department or agency as affecting the security of the United States, knowing or having reason to know that such information has been so classified. *See* 50 U.S.C. § 783(b). Conversely, it is unlawful for a foreign agent knowingly to receive classified information from a U.S. government employee, unless special authorization has been obtained. *See* 50 U.S.C. § 783(c).

9-90.324 Disclosing Intelligence Identities: 50 U.S.C. § 421

The Intelligence Identities Protection Act prohibits the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants or sources. It is codified at 50 U.S.C. § 421.

9-90.325 Foreign Agents: 18 U.S.C. § 951

Section 951 of Title 18, United States Code, makes it unlawful for foreign agents to act as such without notifying the Attorney General, unless the agent is entitled to a statutory exemption from the registration requirement.

9-90.326 Neutrality Laws: 18 U.S.C. § 952 *et seq.*

Chapter 45 of Title 18, United States Code, entitled ''Foreign Relations,'' covers unauthorized activities respecting foreign governments.

9-90.327 Passport Matters: 8 U.S.C. § 1185(b); 18 U.S.C. § 1542 *et seq.*

The Internal Security Section has jurisdiction over prosecutions under 8 U.S.C. § 1185(b) and 18 U.S.C. §§ 1542 to 1544 when the defendants have subversive connections, or when travel to a restricted country is involved.

9-90.400 ATOMIC ENERGY ACT

Prosecutions under the Atomic Energy Act, 42 U.S.C. *et seq.*, are subject to the requirements of USAM 9-2.132 when they involve the national security. The Atomic Energy Act provides that prosecutions pursuant to it shall be commenced by the Attorney General, after he or she has notified the Nuclear Regulatory Commission. *See* 42 U.S.C. § 2271(c). Prosecutions brought pursuant to certain sections of the act (42 U.S.C. §§ 2272 to 2276) must be expressly authorized by the Attorney General.

The Internal Security Section of the Criminal Division has jurisdiction over Atomic Energy Act violations that have national security implications, including all violations of 42 U.S.C. §§ 2274 to 2278. The General Litigation and Legal Advice Section has jurisdiction over regulatory vio-

lations of the act. Supervision of prosecutions brought pursuant to 42 U.S.C. §§ 2011 to 2273 and 2280 to 2283 depends on whether the offense has national security implications. The Internal Security Section contact for Atomic Energy Act and related criminal violations that have national security implications is Joseph J. Tafe, FTS 786-4922.

9-90.410 Criminal Use of Restricted Data: 42 U.S.C. §§ 2274 to 2277

The Atomic Energy Act makes it unlawful to transmit, receive, or tamper with Restricted Data, with intent to injure the United States or secure an advantage to a foreign nation. *See* 42 U.S.C. §§ 2274 to 2277. Restricted Data is information so classified because it concerns the design, manufacture, or utilization of atomic weapons, the production of special nuclear material, or the use of special nuclear material in the production of energy. The act also makes it unlawful to photograph, draw, or map certain nuclear facilities without authorization. *See* 42 U.S.C. § 2278b.

9-90.420 Nuclear Sabotage: 42 U.S.C. § 2284

Section 2284 of Title 42, U.S.C., makes the willful destruction of or willful damage to a nuclear facility or nuclear fuel, or attempts to cause such damage, unlawful. The act also makes it unlawful to interrupt a nuclear facility, willfully, by tampering with the machinery, components or controls, or to attempt to do so. *See* 42 U.S.C. § 2284(b).

9-90.430 National Security Violations of Other Atomic Energy Act Provisions

Examples of other Atomic Energy Act violations that may affect the national security include: the unauthorized production, transfer, receipt, or possession of special nuclear material (42 U.S.C. § 2077(a)); the unauthorized manufacture, possession, import, or export of an atomic weapon (42 U.S.C. § 2122); and the unauthorized manufacture, possession, importation, or exportation of a nuclear facility (42 U.S.C. § 2131). Enhanced penalty provisions are triggered when these offenses are committed with an intent to injure the United States or secure an advantage to a foreign nation (42 U.S.C. § 2272). An enhanced penalty provision is also provided for violations of those sections of the act for which no criminal penalty is specifically provided when the offense is committed with intent to injure the United States or secure an advantage to a foreign nation. 42 U.S.C. § 2273.

9-90.440 Other Prohibited Transactions Involving Nuclear Materials: 18 U.S.C. § 831

The Convention on the Physical Protection of Nuclear Materials Implementation Act of 1982, Pub.L. No. 97-351, makes it a criminal offense: (1) to possess unlawfully or use nuclear material when it will cause substan-

tial injury; (2) to take or use nuclear material without authorization, or to obtain nuclear material fraudulently; or (3) to threaten or attempt to use nuclear material for illegal purposes. *See* 18 U.S.C. § 831.

9-90.500 INTERNAL SECURITY

Numerous offenses pertaining to the internal security of the United States can be prosecuted only with the approval of, and under the supervision of, the Assistant Attorney General of the Criminal Division, or higher authority. Brief synopses of key internal security provisions are provided below. Authorization and supervision requirements are found at USAM 9-2.132. The Internal Security Section of the Criminal Division supervises prosecutions involving internal security, and can be contacted at FTS 786-4909.

9-90.510 Sabotage: 18 U.S.C. § 2151 et seq.

Federal sabotage laws are found in Title 18, U.S.C., §§ 2151 to 2157. They proscribe the willful destruction of certain military equipment or military property, and related activities committed with an intent to injure the U.S. national defense.

9-90.520 Rebellion or Insurrection: 18 U.S.C. § 2383

Section 2383 of Title 18, U.S.C., makes it unlawful to incite, assist or engage in any rebellion against the authority or laws of the United States.

9-90.530 Sedition and Seditious Conspiracy: 18 U.S.C. §§ 2384, 2387 et seq.

Sedition and related offenses are covered in 18 U.S.C. §§ 2387 to 2391. Seditious conspiracy is covered in 18 U.S.C. § 2384.

9-90.540 Advocating the Overthrow of the Government: 18 U.S.C. § 2385

The Smith Act proscribes teaching or advocating the duty or necessity of overthrowing or destroying the Government of the United States by force or violence, publishing or circulating literature which so teaches or advocates, joining or organizing any group which so teaches or advocates, knowing the purposes thereof, or conspiring to do any of the foregoing. *See* 18 U.S.C. § 2385.

9-90.550 Contempt of Congress: 2 U.S.C. § 192

The Internal Security Section has jurisdiction over prosecutions under 2 U.S.C. § 192 in which witnesses have Communist Party or other subversive connections. Under the provisions of 2 U.S.C. § 194, contempt of Congress cases are referred directly by the Congress to the U.S. Attorney, by

certification. If such a case is referred to a U.S. Attorney, he or she should immediately notify the Criminal Division, and no prosecution shall be initiated without prior authorization by the Criminal Division.

9-90.560 False Statements Affecting the National Security

The Internal Security Section has jurisdiction over cases which involve false statements concerning relationships with foreign governments or membership in organizations advocating the violent overthrow of the government, made to agencies and departments of the United States in violation of 18 U.S.C. § 1001 and similar statutes. Such cases may arise in connection with the filing of applications for government employment, loyalty certificates for personnel of the Armed Forces, and personnel security questionnaires submitted to government agencies in connection with applications for security clearances.

9-90.600 EXPORT CONTROL AND UNLAWFUL TRANSACTIONS WITH FOREIGN COUNTRIES

The prosecution of any violation of export control statutes shall be authorized only in accordance with USAM 9-2.132 unless otherwise noted. Joseph J. Tafe, Chief of the Export Control Unit of the Internal Security Section, supervises prosecutions of export control offenses and can be reached at FTS 786-4922.

9-90.610 Export Administration Act, 50 U.S.C.App. §§ 2401 to 2420

The Export Administration Act, 50 U.S.C.App. §§ 2401 to 2420, and the rules and regulations promulgated thereunder, 15 C.F.R. §§ 368 to 399, prohibit the exportation of strategic goods and technologies without a license from the Department of Commerce. Violations are investigated by the Customs Service and the Department of Commerce.

The prosecution of Export Administration Act violations frequently involves foreign policy, national security, and intelligence issues that require close coordination with the Department of Commerce, Department of State and other agencies. Therefore, prosecution of Export Administration Act violations shall not be undertaken without the prior approval of the Criminal Division. *See* USAM 9-2.132. However, the U.S. Attorney is authorized to take whatever action is necessary to prevent the commission of an offense where time does not permit seeking prior authorization. Often an illegal exportation can be prevented by seizing the items that are about to be exported. Seizure of strategic goods and technologies that are about to be exported in violation of the Export Administration Act is authorized by 50 U.S.C.App. § 2411(a)(2)(B) and 3(A), and 22 U.S.C. § 401. *See United States v. Marti,* 321 F.Supp. 59, 63 (E.D.N.Y.1970); *United States v. Various Pieces of Semiconductor Manufacturing Equipment,* 649 F.2d 606 (8th Cir.1981).

9-90.620 Arms Export Control Act: 22 U.S.C. § 2778

The Arms Export Control Act, 22 U.S.C. § 2778, and the rules and regulations promulgated thereunder, 22 C.F.R. §§ 121-130, prohibit the importation and exportation of arms, ammunition and implements of war without a license from the Department of State. Violations are investigated by the Customs Service.

Unless the unlicensed shipment has no relevance to the foreign relations of the United States (*e.g.*, smuggling small quantities of weapons), prosecution of violations of the Arms Export Control Act should not be undertaken without prior approval of the Criminal Division. *See* USAM 9-2.132. However, the U.S. Attorney is authorized to take whatever action is necessary to prevent the commission of an offense where time does not permit seeking prior authorization. Often an illegal exportation can be circumvented by seizure of the munitions pursuant to the provisions of 22 U.S.C. § 401.

9-90.630 Trading With the Enemy Act: 50 U.S.C.App. § 5(b)/Foreign Assets Control

Pursuant to the authority granted in the Trading With the Enemy Act (50 U.S.C.App. § 5(b)), the Secretary of the Treasury has promulgated regulations prohibiting unlicensed transactions between U.S. nationals and certain designated foreign countries and their nationals. *See* 31 C.F.R. § 500.101. Investigations of violations of the Foreign Assets Control regulations are conducted by the Treasury Department, and cases are referred by that Department to the Internal Security Section.

9-90.640 International Emergency Economic Powers Act: 50 U.S.C. § 1701 et seq.

Pursuant to the International Emergency Economic Powers Act (50 U.S.C. §§ 1701 to 1706), the President is granted authority to declare a national emergency with respect to any unusual and extraordinary threat, which has its source outside the United States, and to take action to meet that threat including the imposition of controls over property in which any foreign country or a national thereof has an interest. Criminal violations are investigated by the Treasury Department. Prosecution of violations which involve the exportation of property in which a foreign national or foreign country has an interest shall not be undertaken without prior approval of the Criminal Division. *See* USAM 9-2.132.

9-90.700 REGISTRATION AND LOBBYING PROVISIONS

The Internal Security Section administers and enforces four registration statutes: (1) the Foreign Agents Registration Act of 1938, as amended (22 U.S.C. § 611 *et seq.*); (2) the Voorhis Act (18 U.S.C. § 2386); (3) the

Act of August 1, 1956 (50 U.S.C. §§ 851 to 857); and (4) the Federal Regulation of Lobbying Act (2 U.S.C. § 261 *et seq.*); and a related statute, 18 U.S.C. § 219, which is a conflict of interest provision. The *express prior approval* of the Criminal Division or higher authority must be obtained before prosecution may be initiated under any of these provisions. *See* USAM 9-2.132. In addition, the Internal Security Section is responsible for the supervision of prosecutions under 46 U.S.C. § 1225, which requires the registration of persons lobbying on behalf of shipbuilders or ship operators, and 2 U.S.C. § 441e, the foreign campaign contribution prohibition. The Internal Security Section should be consulted before initiating grand jury proceedings, or seeking an indictment or filing an information under these provisions. Joseph E. Clarkson, Chief of the Registration Unit, supervises civil injunctive actions and criminal prosecutions of registration related offenses, and can be reached at FTS 786-4930.

9-90.710 Foreign Agents Registration Act: 22 U.S.C. § 611 et seq.

The Foreign Agents Registration Act requires that agents of foreign principals engaged in political or quasi-political activities register with the Attorney General unless exempt. Inquiries regarding administration and enforcement of the act should be directed to the Registration Unit, Criminal Division, Department of Justice, Washington, D.C. 20530. No prosecution under the act may be instituted without the *express prior approval* of the Criminal Division or higher authority. *See* USAM 9-2.132.

9-90.720 Public Officials Acting as Agents of Foreign Principals: 18 U.S.C. § 219

It is illegal for a public official to act as an agent of a foreign principal in such a manner as to require his/her registration under the Foreign Agents Registration Act. *See* 18 U.S.C. § 219. This prohibition does not apply to the employment of a foreign agent as a special U.S. Government employee in any case where the head of the employing agency certifies that such employment is required in the national interest. No prosecution under this section should be instituted without the *express authorization* of the Criminal Division or higher authority. *See* USAM 9-2.132.

Note that Members of Congress are now expressly covered by 18 U.S.C. § 219.

9-90.730 Federal Regulation of Lobbying Act: 2 U.S.C. § 261 et seq.

The Lobbying Act requires registration with the Clerk of the House of Representatives and the Secretary of the Senate of any person engaged for pay in attempting to influence the passage or defeat of legislation by Congress and the filing of reports on a calendar quarter basis.

9-90.740 Voorhis Act: 18 U.S.C. § 2386

The Voorhis Act requires registration with the Attorney General of certain organizations, the purpose of which is to overthrow the government or a political subdivision thereof by the use of force and violence. The rules and regulations promulgated thereunder are set forth in 28 C.F.R. § 10.1 *et seq.*

9-90.750 Registration of Persons With Knowledge of Espionage: 50 U.S.C. §§ 851 to 857

This statute requires registration with the Attorney General of certain persons who have knowledge of or have received instruction or assignment in the espionage, counter-espionage or sabotage services or tactics of a foreign government. Rules and regulations promulgated pursuant to this act are set forth in 28 C.F.R. § 12.1 *et seq.*

9-90.760 Political Contributions by Foreign Nationals: 2 U.S.C. § 441e

The making of a political contribution by a foreign national, directly or through any other person, in connection with any election, convention or caucus, for any political office, is illegal under 2 U.S.C. § 441e.

9-90.770 Employment of Persons to Appear Before Congress or a Government Agency: 46 U.S.C. § 1225

It is illegal for any person employed or retained by a shipbuilder or ship operator, or a subsidiary, affiliate, associate or holding company of such shipbuilder or ship operator holding or applying for a contract under Chapter 27 of the Merchant Marine Act, 1936, to present, advocate or oppose any matter within the scope of the Shipping Act of 1916, as amended; the Merchant Marine Act, of 1970, as amended; the Merchant Marine Act, of 1928, as amended; the Intercoastal Shipping Act, of 1933, or Chapter 27, before Congress or any committee thereof, or before certain federal agencies, unless the shipbuilder or ship operator has filed with the Secretary of Transportation a statement of the subject matter in respect of which such person is retained or employed, and the nature and character of compensation received or to be received by such person directly or indirectly.

9-90.800 MISCELLANEOUS

Prosecutions pursuant to criminal statutes not primarily concerned with national security may affect national security. In such situations, prosecutions shall be instituted and conducted under the supervision of the Assistant Attorney General, Criminal Division, or higher authority.

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FOR CHAPTER 100

9-100.000 THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970—I

The Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub.L. No. 91-513, 84 Stat. 1236 (1970), became law on October 27, 1970. The act constituted a complete revision, consolidation, and reconstruction of federal statutes dealing with narcotics and dangerous drugs. The act has been amended several times since 1970, although the principal revisions were made under the Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, §§ 501 to 525, 98 Stat. 2068-77 (1984), and the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207 (1986). Titles II and III of the 1970 Act—respectively titled the Controlled Substances Act and the Controlled Substances Import and Export Act—contain the control and enforcement provisions directly of interest to federal prosecutors.

Two monographs published by the Department of Justice contain detailed discussions of the pertinent provisions of the Comprehensive Crime Control Act of 1984 and the Anti-Drug Abuse Act of 1986: (i) *Handbook on the Comprehensive Crime Control Act of 1984 and Other Criminal Statutes Enacted by the 98th Congress* (Dec. 1984) (the *1984 Act Handbook*) and (ii) *Handbook on the Anti-Drug Abuse Act of 1986* (Mar. 1987) (the *1986 Act Handbook*). The latter monograph is available through the JURIS research system and copies of both monographs have previously been distributed to all United States Attorney's offices.

The following is a cursory outline of some of the more pertinent provisions of Titles II and III of the 1970 Act, as amended in 1984 and 1986. More detailed discussion of any particular provision(s) may be obtained by consulting the two monographs mentioned above. Answers to specific questions or additional information may also be obtained by writing to the Narcotic and Dangerous Drug Section, Criminal Division, U.S. Department of Justice, Bond Building—Room 4100, 1400 New York Avenue, N.W., Washington, D.C. 20530, or calling FTS 786-4701.

9-100.100 TITLE II—THE CONTROLLED SUBSTANCES ACT

9-100.110 Part A—Short Title, Findings and Declarations, Definitions

9-100.111 Short Title (Section 100) 21 U.S.C. § 801 note

This section provides that Title II of the Comprehensive Drug Abuse Prevention and Control Act is to be cited as the ''Controlled Substances Act.''

9-100.112 Findings and Declarations (Section 101) 21 U.S.C. § 801

This section contains findings and declarations by Congress regarding the need for federal regulation of controlled substance activities. The section spells out Congress' intent to regulate controlled substances

under the commerce power and indicates that such regulation applies to all controlled substances, regardless of whether they move in interstate commerce.

Challenges to the constitutionality of the Controlled Substances Act have been uniformly rejected.

9-100.113 Definitions (Section 102) 21 U.S.C. § 802

This section, as amended, contains 32 definitions. Discussion of some of the more pertinent definitions may be found in the *1984 Act Handbook* at 71 (definition of ''isomer'' and ''narcotic drug''); *1986 Act Handbook* at 54 (definition of ''controlled substance analogue'').

9-100.120 Part B—Authority to Control; Standards and Schedules

9-100.121 Scheduling of Controlled Substances

There are five schedules of controlled substances under the 1970 Act, as amended. *See* 21 U.S.C. § 812. The schedule into which a substance is placed determines the controls and penalties applicable to that substance. Counsel should note that the Administrator of the Drug Enforcement Administration was given authority to place substances in Schedule I on a temporary basis (*see* 21 U.S.C. § 811(h)) and has utilized this authority a number of times. However, convictions based upon the temporary scheduling of MDMA have been reversed because of utilization of improper procedures. *See United States v. Caudle,* 828 F.2d 1111 (5th Cir.1987) (failure to issue formal order 30 days after publication of notice); *United States v. Spain,* 825 F.2d 1426 (10th Cir.1987) (failure of Attorney General to formally delegate temporary scheduling authority to DEA). Moreover, one court has held that the Administrator has applied an improper legal standard in determining whether a substance has no currently accepted medical use in treatment in the United States and no accepted safety for use under medical supervision and, therefore, meets two of three criteria necessary for placement of the substance in Schedule I. *See Grinspoon v. DEA,* 828 F.2d 881 (1st Cir.1987). The Drug Enforcement Administration is taking steps to correct the improper procedures and standards cited in these cases.

Counsel should also note that the Controlled Substance Analogue Enforcement Act (codified at 21 U.S.C. §§ 802(32) and 813), which became law on October 27, 1986, as Subtitle E of Title I of the Anti-Drug Abuse Act of 1986, provides that *unscheduled* analogues of controlled substances in Schedules I or II will be treated as controlled substances in Schedule I for purposes of control and prosecution.

9-100.122 Schedules of Controlled Substances (Section 202) 21 U.S.C. § 812—General

It is *extremely important* for counsel to note that the *statutory schedules* of controlled substances set forth in 21 U.S.C. § 812 *ARE NOT THE*

SCHEDULES CURRENTLY IN FORCE; they are the original schedules established by Congress in 1970 and are quite outdated. Indeed, the statute provides that the schedules are to be updated and republished on an annual basis. *See* 21 U.S.C. § 812(a). The schedules *CURRENTLY IN FORCE* are published at *21 C.F.R. § 1308.11 et seq.* Any administrative order adding, deleting or rescheduling a substance after publication of the most recent revision of the *Code of Federal Regulations* is published in the *Federal Register*. Thus, counsel in drafting indictments, determining penalties applicable to offenses involving a particular controlled substance, or otherwise having a need to know what schedule a substance is currently placed in, should consult both Title 21 of the most recent revision of the *Code of Federal Regulations* and issues of the *Federal Register* published thereafter.

9-100.130 Part C—Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances

Part C of Title II of the 1970 Act as amended (21 U.S.C. §§ 821 to 829) sets forth the registration requirements and controls applicable to persons and businesses engaged in the legal manufacture, distribution, and/or dispensing of controlled substances. Essentially, all such persons are required to register with the Drug Enforcement Administration and periodically renew their certificates of registration. *See* 21 U.S.C. §§ 822-823; 21 C.F.R. § 1301.01 *et seq.* The Drug Enforcement Administration is vested with authority to deny, revoke, or suspend any such registration and to seize, forfeit, and dispose of any controlled substances in the hands of a registrant whose certificate has expired or been suspended or revoked. 21 U.S.C. § 824. The act and its implementing regulations also establish labeling and packaging requirements relevant to controlled substances (21 U.S.C. § 825; 21 C.F.R. § 1302.01 *et seq.*); production quotas for controlled substances (21 U.S.C. § 826; 21 C.F.R. § 1303.01 *et seq.*); record-keeping and reporting requirements for registrants (21 U.S.C. § 827; 21 C.F.R. § 1304.01 *et seq.*); requirements concerning use of order forms to obtain controlled substances (21 U.S.C. § 828; 21 C.F.R. § 1305.01 *et seq.*); and prescription requirements for dispensing a controlled substance (21 U.S.C. § 829; 21 C.F.R. § 1306.01 *et seq.*). Violations of the foregoing statutory provisions and implementing regulations, and the penalties applicable to such violations, are set forth in 21 U.S.C. §§ 842 and 843.

9-100.140 Piperidine Reporting (Section 310) 21 U.S.C. § 830

Piperidine is a chemical used in making the Schedule II controlled substance phencyclidine (PCP). Section 310 of the Controlled Substances Act, enacted into law effective November 10, 1978, as Section 202 of the Psychotropic Substances Act of 1978, Pub.L. No. 95-633, 92 Stat. 3768, makes it unlawful for any person to distribute, sell, or import piperidine

without filing a report with the Attorney General (now the DEA) within 7 days. The person reporting is required to preserve a copy of each report for 2 years. Section 310(a)(2) provides that no person may distribute or sell piperidine unless the recipient or purchaser presents to the distributor or seller the identification required by the statute and implementing regulations. The regulations implementing the reporting and identification requirements are published at 21 C.F.R. Part 1310. Civil and criminal penalties for violation of these requirements may be found in 21 U.S.C. §§ 841(d), 842(a)(9), 842(c)(1), 843(a)(4), and 843(c).

9-100.150 Controlled Substances Analogue Enforcement Act—21 U.S.C. §§ 802(32) and 813

A. Treatment of Controlled Substance Analogues

The Controlled Substance Analogue Enforcement Act was enacted into law as Subtitle E of Title I of the Anti-Drug Abuse Act of 1986, effective October 27, 1986. Its provisions are codified at 21 U.S.C. §§ 802(32) and 813. Simply stated, the act provides that *unscheduled* ''analogues'' of controlled substances in Schedule I or II shall be treated, to the extent that they are intended for human consumption, the same as a controlled substance in Schedule I for purposes of control and prosecution. The act constitutes a legislative response to the problems posed by chemists who manufacture ''designer drugs'' or ''analogues'' (substances which are nearly identical to a controlled substance in terms of structure and effect but which previously were legal because a slight variation in their molecular structure rendered them ''different'' from the controlled substances they imitate).

Under the act, the unlawful manufacture, distribution, or possession (with intent to distribute) of a controlled substance analogue may be prosecuted under 21 U.S.C. § 841(a)(1) and punished in accordance with the corresponding penalties in 21 U.S.C. § 841(b)(1)(C) (except for offenses involving certain quantities of fentanyl analogues which are punishable under 21 U.S.C. § 841(b)(1)(A) or (B)). Importation offenses involving analogues may be prosecuted under the provisions in the Controlled Substances Import and Export Act (*e.g.*, 21 U.S.C. §§ 952, 963), and punished in accordance with the penalties set forth in 21 U.S.C. § 960(b)(3) (except for offenses involving certain quantities of fentanyl analogues which are punishable under 21 U.S.C. § 960(b)(1) or (2)). Many of the enhancements applicable to the foregoing offenses (*e.g.*, use or employment of minors, sales within 1,000 feet of a school, recidivists, etc.) automatically extend to offenses involving analogues. However, the lifetime sentence to be imposed on the ''principal administrator'' of a continuing criminal enterprise under 21 U.S.C. § 848(b) is not applicable to analogue offenses, except for offenses involving large quantities of fentanyl analogues.

B. Approval Requirement

To ensure uniformity in analogue prosecutions and to avoid potential evidentiary issues, consultation with the Narcotic and Dangerous Drug Section, Criminal Division, at (202) 514-0917, is required prior to the presentation of an indictment to a Grand Jury.

Further information concerning this statute may be found in the Criminal Division's *Handbook on the Anti-Drug Abuse Act of 1986* at 52-56.

C. *Handbook Reference*

Counsel should consult the *1986 Act Handbook* at 52 regarding the Analogue Act.

9-100.200 TITLE II—OFFENSES AND PENALTIES

9-100.210 Manufacturing, Distributing, Possessing (Section 401) 21 U.S.C. § 841

Section 401(a)(1) of the Controlled Substances Act, 21 U.S.C. § 841(a)(1), sets forth the criminal offenses most commonly charged under the act. It prohibits the knowing, intentional, and unauthorized manufacture, distribution, or dispensing of any controlled substance or possession of any controlled substance with the intent to manufacture, distribute, or dispense.

Section 401(a)(2) of the act, 21 U.S.C. § 841(a)(2), prohibits the knowing, intentional, and unauthorized creation, distribution, dispensing, or possession with intent to distribute or dispense of a ''counterfeit substance'' as defined in 21 U.S.C. § 802(7). No prosecution should be initiated under this subsection without prior consultation with the Narcotic and Dangerous Drug Section.

9-100.211 Penalties

The penalties applicable to violations of 21 U.S.C. § 841(a) completed on or after October 27, 1986, are discussed in the *1986 Act Handbook* at 1-28. Penalties applicable to violations of 21 U.S.C. § 841(a) occurring between October 12, 1984, and October 26, 1986, are discussed in the *1984 Act Handbook* at 67-70.

Prosecutors occasionally have need to determine the penalties applicable to offenses under 21 U.S.C. § 841(a) that occurred some time ago. To assist them in this process an abbreviated history of the legislative amendments to Section 841's penalty provisions is set forth below.

The original penalties—which became effective May 1, 1971—were those under the Comprehensive Drug Abuse Prevention and Control Act, Pub.L. No. 91-513, § 401(b), 84 Stat. 1236, 1260-62 (1970). These penalties remained essentially unchanged from May 1, 1971, to October 12, 1984, with two major exceptions: (i) special penalties were added for offenses involving phen-

cyclidine (PCP) and piperidine (a chemical used in making PCP) by the Psychotropic Substances Act of 1978, Pub.L. No. 95-633, §§ 201 to 203, 92 Stat. 3768, 3774 to 3777 (1978), which became effective on November 10, 1978; and (ii) special penalties were added for offenses involving quantities of marijuana in excess of 1,000 pounds by the Infant Formula Act of 1980, Pub.L. No. 96-359, § 8, 94 Stat. 1190, 1194, 1195 (1980), which became effective on September 26, 1980. Each of the foregoing enactments may be found in the appropriate volumes of the *U.S. Code Congressional and Administrative News*.

The first wholesale revision of penalties under 21 U.S.C. § 841 came with the enactment of the Comprehensive Crime Control Act of 1984, Pub.L. No. 98-474, §§ 502 and 503(b)(1), (2), 98 Stat. 1976, 2068-70 (1984). The 1984 Act singled out cocaine, PCP, and LSD for special treatment in 21 U.S.C. § 841(b)(1)(A) and raised penalties across-the-board for all other controlled substances. A copy of Section 841, as amended by the 1984 Act, may be found in the 1985 edition of the U.S.Code. It also may be found in the 1986 ''gray'' edition of West Publishing Company's *Federal Criminal Code and Rules*. These penalties apply to offenses committed between October 12, 1984, and October 27, 1986.

The second and most recent revision of the penalty provisions under Section 841 came with the enactment of the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, §§ 1002, 1003(a), 1103, 15005, 100 Stat. 3207. Most of the amendments became effective on October 27, 1986, and apply to offenses completed thereafter. However, the effective dates of a few of the amendments were delayed until November 1, 1987, to coincide with the effective dates of the Sentencing Guidelines. As noted earlier, a comprehensive discussion of these amendments appears in the *1986 Act Handbook* at 1-28.

Any questions concerning the penalty provisions of 21 U.S.C. § 841 should be addressed to the Narcotic and Dangerous Drug Section of the Criminal Division (FTS: 786-4701).

9-100.212 Prosecution of Juveniles

Counsel should note that, under the Juvenile Justice and Delinquency Protection Act of 1974 as amended (18 U.S.C. § 5032 *et seq.*), ''juveniles'' arrested for offenses under 21 U.S.C. § 841 may be prosecuted as adults. A discussion of the act is set forth in the *1984 Act Handbook* at 145-147.

9-100.220 Violations Relating to Prescriptions, Labeling, Recordkeeping, Etc. (Section 402) 21 U.S.C. § 842

Section 402 of the Controlled Substances Act, 21 U.S.C. § 842, sets forth the violations and penalties applicable to the registration, labeling and packaging, recordkeeping and reporting, order form and prescription requirements under 21 U.S.C. §§ 822 to 830 as implemented by regulations published in Title 21 of the Code of Federal Regulations.

9-100.230 Order Forms, Fraud, Counterfeiting, Etc. (Section 403) 21 U.S.C. § 843

Section 403 of the Controlled Substances Act, 21 U.S.C. § 843, prohibits: (1) the distribution of a controlled substance in Schedule I or II by a Drug Enforcement Administration registrant, in the course of the registrant's legitimate business, except pursuant to a proper order or order form; (2) the use of a Drug Enforcement Administration registration number that is fictitious, revoked, suspended, expired, or issued to another person; (3) acquisition of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge; (4) false or fraudulent information or omissions of material information in required reports and records and the presentation of false or fraudulent identification in obtaining piperidine (a chemical used in making PCP); and (5) manufacture, distribution or possession of devices used in making ''counterfeit substances'' as defined in 21 U.S.C. § 802(7).

The 1970 Act prohibited the use of a Drug Enforcement Administration registration number that is fictitious, revoked, suspended, or issued to another person in the course of manufacturing or distributing a controlled substance. It did not include use of ''expired'' registrations. *See* Pub.L. No. 91-513, § 403(a)(2), 84 Stat. 1263 (1970). The use of all such registrations, including expired registrations, in the course of dispensing, or for the purpose of acquiring or obtaining, a controlled substance, was added by the 1984 Act, effective October 12, 1984, Pub.L. No. 98-473, § 516, 98 Stat. 2074 (1984). The provisions regarding use of false or fraudulent identification in obtaining piperidine were added by the 1978 amendments to the 1970 Act, effective November 10, 1978. *See* Pub.L. No. 95-633, § 202(b)(3), 2 Stat. 3776 (1978).

The section also prohibits the use of a ''communication facility'' in committing, causing, or facilitating the commission of any felony under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) and the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*). *See* 21 U.S.C. § 843(b). The term ''communication facility'' is defined in this Section. *Id.*

The penalties set out in 21 U.S.C. § 843(c) have remained unchanged since 1970.

This section is discussed in the *1984 Act Handbook* at 75.

9-100.240 Simple Possession (Section 404) 21 U.S.C. § 844

Section 404 of the Controlled Substances Act, 21 U.S.C. § 844, prohibits the simple possession of any controlled substance. It also formerly provided for dismissal of criminal proceedings and expungement of criminal records for first offenders upon completion of a period of probation not to

exceed 1 year, but these provisions were repealed effective November 1, 1987. *See* Pub.L. No. 98-473, §§ 219, 235, 98 Stat. 2027, 2031 (1988), as amended by Pub.L. No. 99-217, § 4, 99 Stat. 1728 (1985). Section 404 has been amended once, effective October 27, 1986, to increase substantially the applicable penalties, including, for the first time, mandatory minimum fines for all offenders and mandatory minimum terms of imprisonment for repeat drug offenders, and to provide for recovery of costs of investigation and prosecution.

The 1986 amendments are discussed in the *1986 Act Handbook* at 29-31. See DOJ Order No. 2710 regarding expungement of criminal records.

9-100.250 Distribution to Persons Under 21 Years of Age (Section 405) 21 U.S.C. § 845

Section 405 of the Controlled Substances Act, 21 U.S.C. § 845, as enacted in 1970, provided enhanced penalties for any person at least 18 years of age who distributes a controlled substance to any person under 21 years of age. The section was amended in 1984 (Pub.L. No. 98-473, § 503(b)(3), 98 Stat. 2070 (1984)), and again in 1986 (Pub.L. No. 99-570, § 1105(a), (b), 100 Stat. 3207-11 (1986)). These amendments are discussed in the *1984 Act Handbook* at 70-71 and the *1986 Act Handbook* at 26-37.

9-100.251 Distribution or Manufacturing Near Schools and Colleges (Section 405A) 21 U.S.C. § 845

Section 405A of the Controlled Substances Act, 21 U.S.C. § 845(a), as originally enacted effective October 12, 1984, provided enhanced penalties for any person committing a violation of 21 U.S.C. § 841(a)(1) by distributing a controlled substance in, on, or within 1,000 feet of, the real property comprising a public or private elementary or secondary school. *See* Pub.L. No. 98-473, § 503(a), 98 Stat. 2069 (1984). This section is discussed in the *1984 Act Handbook* at 70, 71.

The section was substantially amended effective October 27, 1986, to include manufacturing offenses under 21 U.S.C. § 856 in addition to the distribution offenses previously proscribed and to include vocational schools as well as public or private colleges, junior colleges, and universities within the scope of the section. The penalty provisions were also amended. Pub.L. No. 99-570, §§ 1103, 1105, 1841(b), 1866(b), (c), 100 Stat. 3207 (1986).

The 1986 amendments to this section are discussed in the *1986 Act Handbook* at 36, 37.

9-100.252 Employment of Juveniles Under 18 Years of Age; Distributions to Pregnant Women (Section 405B) 21 U.S.C. § 845(b)

The Juvenile Drug Trafficking Act of 1986 (codified at 21 U.S.C. § 845(b)) was enacted into law effective October 27, 1986, as Subtitle C of

Title I of the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, § 1102, 100 Stat. 3207 (1986). The act prohibits and provides enhanced penalties for any person at least 18 years of age who employs or uses a person under 18: (i) to commit any violation of the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) or the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*), or (ii) to avoid detection or apprehension for such offenses by federal, state, or local law enforcement officials. 21 U.S.C. § 845b(a). It provides supplemental penalties, in addition to the enhanced penalties, for persons who (i) provide or distribute a controlled substance to a person under 18 in the course of committing either of the specified offenses, or (ii) use or employ a person *14 years of age or younger* to commit either of the specified offenses. 21 U.S.C. § 845b(f).

This section is discussed in the *1986 Act Handbook* at 32 to 38.

9-100.260 Attempt and Conspiracy (Section 406) 21 U.S.C. § 846

Section 406 of the Controlled Substances Act, 21 U.S.C. § 846, prohibits conspiracies and attempts to violate any provision of the act (21 U.S.C. § 801 *et seq.*). It became law in 1970 and has not been amended since.

Counsel should note that special parole terms applicable to substantive offenses under the Controlled Substances Act prior to October 27, 1986, and November 1, 1987, may not be imposed for violation of this section. *See Bifulco v. United States*, 447 U.S. 381 (1980). The same is probably true of ''terms of supervised release'' which replaced ''special parole terms'' under the act in some instances effective October 27, 1986, and in all other instances effective November 1, 1987. For the Department of Justice's position regarding the applicability of mandatory minimum terms of imprisonment to offenses to this section, *see* the *1986 Act Handbook* at 17-20.

Caveat: The conspiracy provisions of this section are intended to embrace all such offenses involving controlled substances. Accordingly, 18 U.S.C. § 371, the general conspiracy statute, should *not* be used to charge a conspiracy involving controlled substances.

9-100.270 Additional Penalties (Section 407) 21 U.S.C. § 847

Section 407 provides that any penalty imposed under the Controlled Substances Act is to be in addition to any civil or administrative penalty otherwise authorized by law.

9-100.280 Continuing Criminal Enterprise (Section 408) 21 U.S.C. § 848

Section 408 of the Controlled Substances Act (21 U.S.C. § 848), as enacted in 1970, created a new kind of dangerous drug offense for engaging

in a ''continuing criminal enterprise.'' Under Section 408(b) (recodified in 1986 as 21 U.S.C. § 848(d)), a defendant engages in a ''continuing criminal enterprise'' whenever he/she commits a felonious controlled substance violation which (i) is part of a continuing series of such violations from which he/she obtains substantial income or resources and (ii) involves five or more other persons with respect to whom the defendant occupies a supervisory or managerial position. Section 408(a)(1), 21 U.S.C. § 848(a)(1), provided that any one who engages in a continuing criminal enterprise shall be imprisoned not less than 10 years and fined up to $100,000 for a first offense. Effective October 27, 1986, the fines applicable to first offenders were raised to $2,000,000 if the defendant is an individual and $4,000,000 if the defendant is other than an individual, unless a greater amount is authorized under the alternative fine provisions of Title 18. These penalties (terms of imprisonment and fines) are doubled for subsequent offenders. A major amendment to this provision came with the enactment into law, effective October 27, 1986, of Section 1253 of the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207 (1986), which requires mandatory terms of life imprisonment for the ''principal administrator(s), principal(s), or leader(s)'' of particularly large scale criminal enterprises. *See* 21 U.S.C. § 848(b). Counsel should note that there is a ''consultation requirement'' prior to the filing of any information or indictment or the initiation of any grand jury proceedings relating to the ''mandatory life term'' provisions of 21 U.S.C. § 848(b). *See 1986 Handbook* at 58. Section 408(c) (recodified in 1986 as 21 U.S.C. § 848(e)) provides that a sentence imposed for a continuing criminal enterprise violation may not be suspended and that probation or parole may not be granted.

Section 408(a)(2) of the 1970 Act provided that anyone found to have engaged in a continuing criminal enterprise must forfeit to the government any profits he/she obtained from the enterprise and any legal interest, property right, etc., he/she may have had in such enterprise. Section 408(d) provided that Section 408 forfeiture actions are to be brought in United States district or territorial courts. The statute was amended in 1984 primarily to replace these forfeiture sections with references to the forfeiture provisions of 21 U.S.C. § 853. *See* Pub.L. No. 98-473, § 305, 98 Stat. 2050 (1984).

A discussion of the 1986 amendments to this section appears in the *1986 Act Handbook* at 57, 58.

9-100.290 Dangerous Special Drug Offender Sentencing (Former Section 409) Former 21 U.S.C. § 849

Section 409 of the Controlled Substances Act, 21 U.S.C. § 849, contained special sentencing provisions authorizing the imposition of sentences in excess of the usual maximum for defendants who are found to be ''dangerous special drug offenders.'' It was repealed effective November 1, 1987, by

Sections 219 and 235 of the Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, § 503(b)(3), 98 Stat. 2027, 2031 (1984), as amended by Pub.L. No. 99-217, 99 Stat. 1728 (1985).

9-100.300 TITLE II—OFFENSES AND PENALTIES (CONT'D)

9-100.310 Information for Sentencing (Section 410) 21 U.S.C. § 850

Section 410 of the Controlled Substances Act, 21 U.S.C. § 410, allows a court, in imposing sentence upon a controlled substance offender, to consider any information (other than confidential or privileged information) concerning the defendant's background, character, or conduct. It has not been amended since enactment in 1970.

9-100.320 Proceedings to Establish Prior Convictions (Section 411) 21 U.S.C. § 851

Section 411 of the Controlled Substances Act, 21 U.S.C. § 851, sets forth the procedure for establishing defendant's previous conviction record when the U.S. Attorney seeks to have ''subsequent offender'' penalties imposed. To bring such penalties into play, the U.S. Attorney should, before trial or entry of a guilty plea, file an information setting forth the previous convictions relied upon. This section has not been amended since 1970. A discussion of its provisions may be found in the *1986 Act Handbook* at 20, 21.

9-100.330 Forfeitures (Section 413) 21 U.S.C. § 853

Section 413 of the Controlled Substances Act, 21 U.S.C. § 853, was enacted into law effective October 12, 1984, and provides for the forfeiture of property, profits, and other rights obtained through or used in the commission of felony offenses under the Controlled Substances Act (21 U.S.C. § 801 *et seq.*) and the Controlled Substances Import and Export Act (21 U.S.C. § 951 *et seq.*). It is extensively discussed in *Asset Forfeiture: Law, Practice, and Policy*, a publication of the Criminal Division's Office of Asset Forfeiture and in the *1984 Act Handbook* at 47 to 50.

It was amended effective October 27, 1986, to provide for forfeiture of ''substitute assets'' in certain circumstances. *See* 21 U.S.C. § 853(p) (added under Pub.L. No. 99-570, § 1153(b), 100 Stat. 3207 (1986)). The 1986 amendment is discussed in the *1986 Act Handbook* at 39, 40.

9-100.340 Investment of Illicit Drug Profits (Section 414) 21 U.S.C. § 854

Section 414 of the Controlled Substances Act, 21 U.S.C. § 854, became law effective October 12, 1984, under Pub.L. No. 98-473, § 303, 98 Stat. 2049 (1984). It prohibits the investment of illicit drug proceeds, broadly defined, in enterprises engaged in or affecting interstate or foreign

commerce and provides criminal penalties applicable thereto. It has not been amended since enactment. It is briefly discussed in the *1984 Act Handbook* at 50.

9-100.350 ''Manufacturing'' Operations (Section 416) 21 U.S.C. § 856

Section 416 of the Controlled Substances Act, 21 U.S.C. § 856, was enacted as Section 1841(a) of the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207 (1986), and became effective on October 27, 1986. It prohibits (1) the opening or maintenance of any place for the manufacture, distribution, or use of a controlled substance and/or (2) the knowing acquiescence in the use of a building, room, or enclosure for the purpose of manufacturing, storing, distributing, or using a controlled substance. It is discussed in the *1986 Act Handbook* at 106, 107.

9-100.360 Sale of Drug Paraphernalia in Interstate or Foreign Commerce—21 U.S.C. § 857

Subtitle O of the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207 (1986), codified at 21 U.S.C. § 857, prohibits the selling of ''drug paraphernalia,'' broadly defined, through the United States mails or in interstate or foreign commerce. It became effective 90 days after its enactment on October 27, 1986 (January 25, 1987). Through an apparent oversight, it was not formally enacted as part of the Controlled Substances Act. This section is discussed in the *1986 Act Handbook* at 103 to 105.

9-100.400 TITLE II—PART E: ADMINISTRATIVE AND ENFORCEMENT PROVISIONS

The provisions of Part E of the Controlled Substances Act, 21 U.S.C. §§ 871 to 886, concern administrative and enforcement practices under the act. The provisions are discussed *in toto* in former USAM 9-100.410 through 9-100.570 and the provisions have not been substantially amended since. Many of the provisions relating to administrative powers and functions should not be of direct interest to U.S. Attorneys except as background information. However, several provisions having more direct relevance to criminal and civil enforcement are listed below.

Section 506 (21 U.S.C. § 876)	Subpoena Power
Section 508 (21 U.S.C. § 878)	Powers of Enforcement Personnel (including state and local law enforcement officers designated by the Attorney General)
Section 509 (21 U.S.C. § 879)	Search Warrants (service day or night)
Section 510 (21 U.S.C. § 880)	Administrative Inspections and Warrants
Section 511 (21 U.S.C. § 881)	Forfeiture (civil) *See Asset Forfeiture: Law, Practice, and Policy* (Asset Forfeiture Office, Criminal Division, USDOJ); *1986 Act Handbook* at 39.

Section 512 (21 U.S.C. § 882)	Injunctions
Section 514 (21 U.S.C. § 884)	Immunity and Privilege (re: refusal to testify in judicial or grand jury proceeding)
Section 515 (21 U.S.C. § 885)	Burden of Proof; Civil and Criminal Liability of Enforcement Personnel
Section 516	Payments and Advances (*e.g.*, 21 U.S.C. § 886) (informant payments, disposition of recovered ''buy'' moneys)

9-100.500 TITLE III—IMPORTATION AND EXPORTATION AMENDMENTS; REPEAL OF REVENUE LAWS

9-100.501 Definitions (Section 1001) 21 U.S.C. § 951

Section 1001(a)(1) of the Controlled Substances Import and Export Act, 21 U.S.C. § 951, defines the terms ''import'' and ''customs territory of the United States'' and incorporates all definitions contained in 21 U.S.C. § 802.

9-100.510 Importation of Controlled Substances (Section 1002) 21 U.S.C. § 952

Section 1002 of the Controlled Substances Import and Export Act, 21 U.S.C. § 952, was enacted in 1970, and prescribes:

(i) the importation into the customs territory of the United States (the states, the District of Columbia and Puerto Rico) from anywhere outside thereof but within the United States and (ii) the importation into the United States from any place outside the United States, of any controlled substances, subject to such exceptions as the Attorney General may prescribe by regulation. The relevant regulations appear at 21 C.F.R. §§ 1312.11-1312.19. Minor amendments were made to this section in 1978 (Pub.L. No. 95-633, § 105, 92 Stat. 3772) and in 1984 (Pub.L. No. 98-473, §§ 519 to 521, 98 Stat. 2075). The 1984 amendments are discussed in the *1984 Act Handbook* at 74, 75.

9-100.520 Exportation of Controlled Substances (Section 1003) 21 U.S.C. § 953

Section 1003 of the Controlled Substances Import and Export Act, 21 U.S.C. § 953, prohibits the export of controlled substances from the United States except under certain restrictive conditions and procedures established under the statute or its implementing regulations. The relevant regulations are codified at 21 C.F.R. §§ 1312.21-1312.29. Minor amendments were made to the statute in 1978 (Pub.L. No. 95-633, § 106, 92 Stat. 3772) and in 1984 (Pub.L. No. 98-473, § 522, 98 Stat. 2076). The 1984 amendments are discussed in the *1984 Act Handbook* at 76.

9-100.530 Transshipment and In-Transit Shipment of Controlled Substances (Section 1004) 21 U.S.C. § 954

Section 1004 of the Controlled Substances Import and Export Act, 21 U.S.C. § 954, establishes the terms under which controlled substances may be imported into the United States for transshipment to another country. Implementing regulations are published at 21 C.F.R. §§ 1312.31 and 1312.32. The statute has not been amended.

9-100.540 Possession on Board Vessels, Etc., Arriving in or Departing From United States (Section 1005) 21 U.S.C. § 955

Section 1005 of the Controlled Substances Import and Export Act, 21 U.S.C. § 955, makes it unlawful for any person to bring or possess on board any vessel, aircraft, or any vehicle of a carrier, arriving in or departing from the United States or the customs territory of the United States, a Schedule I or II controlled substance or a Schedule III or IV narcotic controlled substance unless the substance is entered in the cargo manifest or is part of official supplies. It has not been amended.

Caveat: In *United States* v. *Valot*, 481 F.2d 22 (2d Cir.1973), a Section 1005 violation, to wit, possessing hashish on board an airplane arriving in the United States, was held to be a lesser included offense with regard to illegal importation. The court states: ''We find that the offense of possession on board an aircraft merges with the offense of illegal importation once the latter offense has been committed.'' *Id.* at 27. *See also United States* v. *Tonarelli*, 55 F.R.D. 423 (D.P.R.1972). Thus, care should be used in charging Section 1005 offenses so that a ''lesser included offense'' situation will not arise.

9-100.541 Former 21 U.S.C. §§ 955a to 955d, Now Codified as 46 U.S.C. §§ 1901 to 1904

Public Law 96-350, 94 Stat. 1159 (1980), became law effective September 15, 1980, and the provisions thereof were originally codified as 21 U.S.C. §§ 955a to 955d. Prior to the act, drug smugglers seized by the Coast Guard on the ''high seas'' (beyond the territorial seas of the United States or any foreign nation) could only be prosecuted either for attempted importation or conspiracy to import which posed several rather obvious problems of proof. The act sought to alleviate this problem by proscribing the manufacture or distribution, or the possession with intent to manufacture or distribute, of any controlled substance by any person on board a vessel of the United States, a vessel subject to the jurisdiction of the United States on the high seas, or any vessel within the customs waters of the United States. It proscribed the same offenses if committed by a United States citizen on board any vessel. (*See* former 21 U.S.C. § 955a(a) to (c).) It also prohibited the possession, manufacture, or distribution of a controlled substance with either intent or knowledge that it will be

imported into the United States (*see* former 21 U.S.C. § 955a(d) as well as attempts and conspiracies to commit the foregoing offenses (*see* former 21 U.S.C. § 955c).) The act contained a definitional section (*see* former 21 U.S.C. § 955b) and a forfeiture provision (former 21 U.S.C. § 955d).

Subtitle C of Title III of the Anti-Drug Abuse Act of 1986-the ''Maritime Drug Law Enforcement Prosecution Act of 1986'' (Pub.L. No. 99-570, §§ 3201, 3202, 100 Stat. 3207) (now codified at 46 U.S.C. §§ 1901 to 1904)—completely rewrote and superseded the foregoing provisions. The new act, which became effective October 26, 1986, proscribes the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance on board a vessel of the United States or a vessel subject to the jurisdiction of the United States (46 U.S.C. § 1903(a)), and attempts and conspiracies to commit such offenses (46 U.S.C. § 1903(j)). (An identical act was passed as part of the Coast Guard Authorization Act of 1986, Pub.L. No. 99-640, § 17, 100 Stat. 3552-3554 (1986), which became effective on November 10, 1986. Because this act (like its earlier counterpart under the Anti-Drug Abuse Act) amends only the 1980 provisions and does not purport to amend the Anti-Drug Abuse Act, it appears that the effective date of 46 U.S.C. §§ 1901 to 1904, remains October 26, 1986.) The new act also substantially broadens the kinds of vessels subject to its provisions and eliminates two problems which had commonly arisen in prosecutions under the former act. *See 1986 Act Handbook* at 125 to 127.

9-100.550 Exemption Authority (Section 1006) 21 U.S.C. § 956

Section 1006 of the Controlled Substances Import and Export Act, 21 U.S.C. § 956, authorizes the granting of exemptions, in certain circumstances, from 21 U.S.C. §§ 952(a), (b), 953, 954, and 955. *See, e.g.*, 21 C.F.R. § 1311.27 (exemption for personal medical use).

9-100.560 Persons Required to Register (Section 1007) 21 U.S.C. § 957

Section 1007 of the Controlled Substances Import and Export Act, 21 U.S.C. § 957, prohibits any person from importing or exporting any controlled substances unless he/she is registered with the Drug Enforcement Administration or is exempt from registration. Implementing regulations may be found in 21 C.F.R. Part 1311.

9-100.570 Registration Requirements (Section 1008) 21 U.S.C. § 958

Section 1008(a) of the Controlled Substances Import and Export Act, 21 U.S.C. § 958, sets forth the registration requirements for importers and exporters of controlled substances and the grounds under which the Drug Enforcement Administration may deny, revoke, or suspend a registration. Implementing regulations may be found at 21 C.F.R. Part 1311.

9-100.580 Manufacture or Distribution for Purposes of Unlawful Importation; Manufacture, Distribution or Possession With Intent to Distribute on Board Aircraft (Section 1009) 21 U.S.C. § 959

Section 1009 of the Controlled Substances Import and Export Act, 21 U.S.C. § 959, as originally enacted effective May 1, 1971, prohibited the manufacture or distribution of controlled substances in Schedule I or II with intent or knowledge that such substance(s) are to be unlawfully imported into the United States. *See* Pub.L. No. 91-513, § 1009, 84 Stat. 1289 (1970). The section remained unchanged until the enactment of Section 3161(a) of the Anti-Drug Abuse Act of 1986, Pub.L. No. 99-570, 100 Stat. 3207 (1986), which became effective October 27, 1986. The amendments: (1) expanded the scope of the requisite ''intent or knowledge'' provision for the foregoing offense by adding that the importation could be either to the United States or within a distance of 12 miles of the coast of the United States. It also prohibited the manufacture, distribution, or possession with intent to distribute of *any* controlled substances by any United States citizen on board any aircraft or by any person aboard an aircraft owned by a United States citizen or registered in the United States. Counsel should also refer to 19 U.S.C. § 1590, another anti-smuggling statute. The two statutes, 21 U.S.C. § 959, as amended, and 19 U.S.C. § 1590, are discussed in the *1986 Act Handbook* at 123, 124.

9-100.590 Penalties

9-100.591 Prohibited Acts A—Penalties (Section 1010) 21 U.S.C. § 960

Section 1010 of the Controlled Substances Import and Export Act, 21 U.S.C. § 960, as originally enacted in 1970, set forth the penalties (terms of imprisonment, fines and special parole terms) applicable to *first offenders* (repeat drug offenders were subject to doubled penalties under 21 U.S.C. § 962) for violations of 21 U.S.C. §§ 952, 953, 955, 957 and 959. *See* Pub.L. No. 91-513, § 1010, 84 Stat. 1290 (1970). These penalties also applied to offenses under 21 U.S.C. §§ 955a to 955d after those provisions were enacted effective September 15, 1980. The original penalties remained unchanged until 1984 and apply to offenses completed from May 1, 1971, to October 12, 1984.

The penalties were increased across the board in 1984. *See* Pub.L. No. 98-473, § 504, 98 Stat. 2070 (1984). The 1984 amendments became effective on October 12, 1984, and the amended penalties apply to offenses completed from that date through October 27, 1986.

In 1986, the penalty scheme was again substantially revised, penalties were further increased, and mandatory minimum terms of imprisonment were required for the first time. *See* Pub.L. No. 99-570, §§ 1302, 1866(e), 100 Stat. 3207 (1986). The amended penalties became effective October 27, 1986, and apply to offenses completed thereafter. In addition, ''special parole terms'' were replaced by ''terms of supervised release''—in some

instances immediately upon enactment (October 27, 1986) and in all other instances effective November 1, 1987. The penalties, as amended in 1986, are also applicable to offenses under 46 U.S.C. §§ 1901 to 1904.

Counsel should consult the U.S. Code Congressional & Administrative News for copies of the 1970 Act and the 1984 and 1986 amendments. The section, as amended in 1984, last appeared in the 1986 ''gray'' edition of West Publishing Company's *Federal Criminal Code and Rules*.

The 1984 amendments are discussed in the *1984 Act Handbook* at 69. The 1986 amendments are discussed in the *1986 Act Handbook* at 1 to 28.

9-100.592 Prohibited Acts B—Penalties (Section 1011) 21 U.S.C. § 961

Section 1011 of the Controlled Substances Import and Export Act, 21 U.S.C. § 961, sets forth the penalties applicable to offenses under the transshipment and in-transit shipment provisions of 21 U.S.C. § 964. The penalties have not been amended since enactment in 1970.

Comment

Section 1011's civil penalty provisions should be used when a transshipment or in-transit violation is due to mistake, negligence, or inadvertence or is minor in nature. When an offense is committed ''knowingly or intentionally,'' Section 1011's misdemeanor provisions should be invoked.

9-100.593 Second or Subsequent Offenses (Section 1012) 21 U.S.C. § 962

Section 1012 of the Controlled Substances Import and Export Act, 21 U.S.C. § 962, doubles the penalties available under 21 U.S.C. § 960 for cases involving ''repeat drug offenders.'' The section, as originally enacted effective May 1, 1971, was applicable only to persons with one or more final felony drug-related convictions under *federal law. See* Pub.L. No. 91-513, § 1012(b), 84 Stat. 1291 (1970). The statute was amended effective October 12, 1984, to include prior felony drug-related convictions under federal, state, or foreign law. *See* Pub.L. No. 98-473, § 505, 98 Stat. 2070 (1984).

9-100.594 Attempts and Conspiracies (Section 1013) 21 U.S.C. § 963

Section 1013 of the Controlled Substances Import and Export Act, 21 U.S.C. § 963, prohibits conspiracies and attempts to commit any offense under the act. It became law in 1970 and has not been amended since.

Counsel should note that special parole terms applicable to substantive offenses under the act do not apply to attempt and conspiracy offenses under this section. *See Bifulco v. United States*, 447 U.S. 381 (1980) (construing 21 U.S.C. § 846); *United States v. Monaco*, 702 F.2d 860, 883 (11th Cir.1983); *United States v. Cordero*, 668 F.2d 32, 45-46 (1st Cir.

1981) (construing 21 U.S.C. § 963). The same should be true of the ''terms of supervised release'' which replaced special parole terms in some sections of the act effective October 27, 1986, and in all other sections effective November 1, 1987. For the Department of Justice's position on the applicability of mandatory minimum terms of imprisonment to offenses under this section, *see* the *1986 Act Handbook* at 17 to 20.

9-100.595 Additional Offenses or Penalties Applicable to Importation/Exportation Under the Controlled Substances Act

Counsel should note that additional offenses and/or penalties applicable to importation and exportation of controlled substances are available under the following provisions of the Controlled Substances Act: 21 U.S.C. § 813 (analogue enforcement); § 843(b) (use of communications facility); § 844 (simple possession); § 845b (employment of juveniles, distributions to pregnant women); § 848 (continuing criminal enterprises); § 849 (dangerous special drug offender—repealed effective November 1, 1987); § 853 (criminal forfeitures); § 854 (investment of illegal drug profits); § 857(a)(3) (import/export of drug paraphernalia).

9-100.596 Prosecution of Juveniles

Counsel should note that under the Juvenile Justice and Delinquency Protection Act of 1974 as amended (18 U.S.C. § 5032 *et seq.*), ''juveniles'' arrested for offenses under 21 U.S.C. §§ 952(a), 955, or 959 may be prosecuted as adults. A discussion of the act is set out in the *1984 Act Handbook* at 145-47.

9-100.597 Additional Penalties (Section 1014) 21 U.S.C. § 964

Section 1014 of the Controlled Substances Import and Export Act, 21 U.S.C. § 964, provides that any penalty imposed for a violation of the Controlled Substances Import and Export Act shall be in addition to, and not in place of, any other authorized civil or administrative penalty.

9-100.598 Applicability of Part E of the Controlled Substances Act (Section 1015) 21 U.S.C. § 965

Section 1015 of the Controlled Substances Import and Export Act, 21 U.S.C. § 965, provides that Part E of the Controlled Substances Act (*i.e.*, the administrative and enforcement provisions) shall apply to the act.

9-100.599 Authority of Secretary of Treasury—21 U.S.C. §§ 966 to 969

Section 966, 21 U.S.C., provides that nothing in the Controlled Substances Import and Export Act shall affect the Treasury Secretary's authority under customs and related laws. 21 U.S.C. §§ 967 to 969 vest the

Secretary with various investigative powers, including subpoena power, to investigate smuggling of any controlled substances.

9-100.600 PART B--AMENDMENTS AND REPEALS, TRANSITIONAL, AND EFFECTIVE DATE PROVISIONS

9-100.601 Repeals (Section 1011)

Section 1101 of the 1970 Act repealed prior federal laws relating to importation of narcotics, depressant, and stimulant drugs, marijuana, and federal revenue laws dealing with narcotics and marijuana.

9-100.602 Pending Proceedings (Section 1103) 21 U.S.C. § 171 note

Section 1103 of the 1970 Act provided that prosecutions for offenses occurring before May 1, 1971, and civil seizures, forfeitures and injunction proceedings commenced before May 1, 1971, are not affected by repeals and amendments contained in the new law.