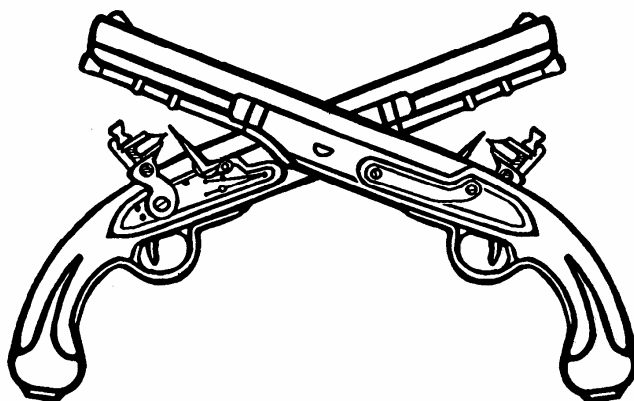


SUBCOURSE
MP1022

EDITION
B

LEGAL ASPECTS OF ECONOMIC CRIMES

MP



SETS THE STANDARD FOR EXCELLENCE

THE ARMY INSTITUTE FOR PROFESSIONAL DEVELOPMENT
ARMY CORRESPONDENCE COURSE PROGRAM

**A
I
P
D**

READINESS /
PROFESSIONALISM



THRU
GROWTH

LEGAL ASPECTS OF ECONOMIC CRIMES

Subcourse Number MP1022

EDITION B

United States Army Military Police School
Fort Leonard Wood, Missouri 65473-8929

4 Credit Hours

Edition Date: July 1993

SUBCOURSE OVERVIEW

We designed this subcourse to provide you with the information necessary to understand the elements of economic crimes in order to plan and carry out a successful investigation; to understand the tools, legal and administrative, which are available to aid in the investigation and finally to understand that teamwork between the attorney and the investigator is essential.

There are no prerequisites for this subcourse.

This subcourse reflects the doctrine which was current at the time it was prepared. In your own work situation, always refer to the latest official publications.

Unless otherwise stated, the masculine gender of singular pronouns is used to refer to both men and women.

TERMINAL LEARNING OBJECTIVE

ACTION: You will learn the elements of economic crimes, investigative tools available and required working relationships.

CONDITION: You will have this subcourse, paper, and pencil.

STANDARD: To demonstrate competency of this task, you must achieve a minimum score of 70 percent on the final subcourse examination.

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LESSON 1

INVESTIGATE ECONOMIC CRIMES

Critical Tasks: 191-390-0154
191-390-0155

OVERVIEW

LESSON DESCRIPTION:

In this lesson you will learn to specify the elements of proof of economic crimes, understand how to investigate them, and coordinate with government attorneys.

TERMINAL LEARNING OBJECTIVE:

ACTION: Investigate, specify elements of proof and coordinate with government attorneys on economic crimes.

CONDITION: You will have this subcourse, paper, and pencil.

STANDARD: To demonstrate competency on this task, you must achieve a minimum of 70 percent on the final subcourse examination.

REFERENCE: None.

INTRODUCTION

Economic crime comes in many forms. It may be a large corporation which overbills the government on a contract and it may be a contractor who bribes a contracting officer; these are examples we normally think of when economic crime is mentioned. But economic crime also includes the soldier who receives outside compensation for doing his official duties, as well as the soldier who puts in phony claims after a permanent change of station move. Whether the amount is a few dollars or thousands of dollars, there is an economic crime in all of these instances.

Economic crime is often thought to be victimless because no one is stabbed or shot. But this is a very narrow view of economic crime. There are victims. When defective materials are used to make the steering gear on a vehicle, accidents and injuries are the result. When fraud results in the purchase of defective aircraft or firehouses aboard ships at sea, the outcome may be disastrous. It certainly is not victimless.

Besides the physical injuries and victims, other damage is caused by economic crime. When the government is charged for goods and services which are not delivered or rendered, there is a monetary loss to the citizens; taxes must be increased. If taxes are not increased, the budget remains the same, and less equipment can be purchased, all because of the economic crime.

Finally, and perhaps most important, the loss of trust must be considered. When public officials are found taking bribes, or otherwise acting dishonorably, the public perceives all government employees as dishonest. So, we are all affected by economic crime-sometimes physically, but always financially and emotionally.

Current DA Policy. The Army's policy toward combating economic crime is contained in AR 690-700. Paragraph 2-1 states: "It is essential that strong and effective measures be applied, consistent with applicable law and regulation, to those individuals who are found to have engaged in the theft, fraud, or other intentionally dishonest conduct against the Army...Service-members who engage in this type of misconduct are already subject to punishment under applicable provisions of the Uniform Code of Military Justice and to adverse personnel actions...it is the policy of the Army that any civilian employee found to have engaged in theft, fraud, or other intentionally dishonest conduct against the Army will be considered for removal from the federal service. Any lesser penalty will require justifiable mitigating circumstances."

PART A - PREPARING YOUR CASE

Use of Title 18. United States Code and Preparation of Proof Analysis Diagrams.

QUESTION: BEFORE SPECIFICALLY GOING INTO THE U.S. CODE, LET'S MAKE SURE WE FULLY UNDERSTAND WHAT THIS IS LEADING UP TO. ASSUME OUR OFFENDER IS A SOLDIER. WHAT WILL HAPPEN TO HIS CASE?

ANSWER: HE FACES POSSIBLE COURT-MARTIAL AND PROSECUTION BY THE CIVIL AUTHORITIES. HE MAY ALSO FACE ADMINISTRATIVE SEPARATION FROM THE SERVICE. IF A PROSECUTION IS BY THE FEDERAL CIVIL AUTHORITIES, IT WILL BE BASED ON SOME VIOLATION(S) OF THE U.S. CODE. UNLESS YOU UNDERSTAND THESE VIOLATIONS AND CAN PUT THE CASE TOGETHER FOR PRESENTATION TO THE U.S. ATTORNEY, YOU MAY HAVE A HARD TIME SELLING IT.

QUESTION: SUPPOSE HE IS A DA CIVILIAN?

ANSWER: HE ALSO FACES PROSECUTION BY THE CIVIL AUTHORITIES. ALSO, HE MAY BE REMOVED FROM HIS JOB. THE U.S. MERIT SYSTEMS PROTECTION BOARD CONSIDERS THESE OFFENSES TO BE SERIOUS AND HAS SUSTAINED REMOVALS FOR A FIRST OFFENSE. THE STANDARD IS WHETHER REMOVAL WOULD FURTHER THE EFFICIENCY OF THE SERVICE.

QUESTION: IN BOTH SITUATIONS, WILL YOU BE A KEY GOVERNMENT WITNESS?

ANSWER: YES. YOU WILL PROBABLY NEED TO EXPLAIN THE ENTIRE INVESTIGATIVE EFFORT AND SET OUT JUST WHAT THE CASE IS ALL ABOUT. THE MORE COMPLEX THE CASE IS, THE GREATER THE NEED IS FOR YOUR EXPERTISE HERE. YOU MAY EVEN BE TESTIFYING AS ONE WHO IS AN EXPERT IN THE FIELD OF INVESTIGATING ECONOMIC CRIMES. TO FULFILL THIS FUNCTION, HOWEVER, YOU NEED A GOOD UNDERSTANDING OF THE U.S. CODE. THIS MUST NOT BE A STRANGE AND FOREIGN DOCUMENT TO YOU.

QUESTION: COULD A CIVILIAN ALSO BE PROSECUTED BY THE STATE AUTHORITIES?

ANSWER: YES, IF HIS CONDUCT VIOLATES STATE LAW, AND THE CRIME OCCURS ON AN AREA OF CONCURRENT OR PROPRIETARY JURISDICTION.

QUESTION: WHAT IF IT'S AN AREA OF EXCLUSIVE FEDERAL JURISDICTION?

ANSWER: HERE, ONLY THE FEDERAL GOVERNMENT CAN PROSECUTE THE CASE.

QUESTION: WHAT IF THE CRIME OCCURS OVERSEAS?

ANSWER: SOME FEDERAL LAWS APPLY NOT MERELY NATIONWIDE, BUT WORLDWIDE, AND A PERSON MAY BE PROSECUTED BY THE U.S. GOVERNMENT WHETHER THE CRIME OCCURS ON AN EXCLUSIVE, CONCURRENT, OR PROPRIETARY JURISDICTION POST, OR OUTSIDE THE UNITED STATES.

QUESTION: WHAT DO YOU CALL A LAW THAT APPLIES OVERSEAS?

ANSWER: EXTRATERRITORIAL.

QUESTION: HOW DO YOU TELL IF A FEDERAL CRIMINAL STATUTE APPLIES ON AN EXTRATERRITORIAL BASIS?

ANSWER: SOMETIMES, THE LANGUAGE OF THE STATUTE WILL SAY WHERE IT APPLIES. IF IT SAYS IT APPLIES IN THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES, THEN IT ONLY APPLIES ON AREAS OF EXCLUSIVE OR CONCURRENT FEDERAL JURISDICTION, AND DOES NOT APPLY OVERSEAS. OTHER TIMES, THE LAW WILL CLEARLY STATE THAT IT APPLIES ON AN EXTRATERRITORIAL BASIS. SOMETIMES, HOWEVER, THE STATUTE ITSELF IS SILENT.

In U.S. v. Gladue, 4 MJ 1 (CMA 1977), the court explained that the "application of a penal statute is not automatically limited to crimes committed within the territorial jurisdiction of the sovereign just because a penal provision lacks express language that it should be applied extraterritorially." Instead, it depends on the purpose of the law. In U.S. v. Bowman, 67 L. Ed. 149 (1922), the Supreme Court explained that it is a question of "statutory construction-"

"Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of

all kinds which affect the peace and good order of the community, must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it (jurisdiction). If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute...But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction or fraud, wherever perpetrated, especially if committed by its own citizens, officers, or agents...to limit their focus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute, and leave open a large immunity for frauds...In such cases, Congress has not thought it necessary to make specific provisions in the law that the laws shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."

Examples of crimes which apply on an extraterritorial basis include bribery (18 USC Section 201), conflict of interest (18 USC Section 208), counterfeiting (18 USC Section 25), and false, fictitious, or fraudulent claims (18 USC Section 287). In U.S. v. Gladue, 4 MJ 1 (CMA 1977), the court explained that Congress clearly has the power to provide for extraterritorial applicability of a federal criminal statute. The issue is not whether it CAN do so, but whether it HAS done so.

A good illustration of this principle is U.S. v. Mosley, 14 MJ 852 (ACMR 1982). There the court was dealing with 18 USC Section 500, which prohibited the forgery and counterfeiting of U.S. Postal Service money orders. The statute did not specifically state whether or not it applied overseas. The court explained that it "must examine the thrust of the statute to determine whether the congressional intent is to protect a governmental rather than (a) private interest." Here the "primary thrust" of the law is the protection of the U.S. Postal Service. The court, therefore, concluded:

"The United States Government has an absolute duty to maintain the integrity of the U.S. Postal System, which includes its postal money orders, both within the borders and in foreign countries...It is reasonable to assume that Congress was aware that the integrity of the postal system and its money orders would be threatened abroad as well as at home, and it is proper to infer that Congress intended to protect the government against forgery of these papers wherever the postal system operated."

The U.S. Government, then, "has a paramount interest in protecting its property, wherever located, by assertions of its penal laws...laws punishing fraud against the government include by implication acts committed in foreign countries." Based on these factors, 18 USC Section 500 was deemed to have extraterritorial effect. Another example is 18 USC Section 2331, which prohibits the commission of terrorist acts (including murder and certain other

forms of physical violence) when committed "abroad against United States nationals."

QUESTION: DOES THIS LAW APPLY OVERSEAS?

ANSWER: YES. THIS IS AN EXAMPLE OF A CRIMINAL LAW WHICH APPLIES ON AN EXTRA-TERRITORIAL BASIS. IT EXPLICITLY PROHIBITS THE COMMISSION OF CERTAIN ACTS WHEN COMMITTED "ABROAD AGAINST UNITED STATES NATIONALS." THIS LANGUAGE OBVIOUSLY SHOWS THAT CONGRESS INTENDED THIS LAW TO APPLY OUTSIDE THE CONTINENTAL UNITED STATES.

Another antiterrorism law is 18 USC Section 1803, which prohibits hostage taking overseas, if the offender or victim is a U.S. national, or if the offenders make demands of the United States government. Again, by its language, this law applies on an extraterritorial basis. You can tell this from the wording of the law itself. Remember, Congress has the power to pass extraterritorial criminal laws--the only issue is whether it HAS done so.

Economic crimes will generally apply overseas, as the offenses (bribery, graft, conflict of interest, etc.) are crimes against the United States itself.

QUESTION: WHAT ABOUT A SOLDIER--DOES HE FALL UNDER THE FEDERAL LAW?

ANSWER: SURE. HE ALSO, OF COURSE, IS SUBJECT TO TRIAL BY COURT-MARTIAL. HE CAN'T BE PROSECUTED BY BOTH THE MILITARY AND THE CIVIL AUTHORITIES, HOWEVER, AS THEY REPRESENT THE SAME SOVEREIGN; SUCH A DUAL PROSECUTION WOULD BE A FORM OF DOUBLE JEOPARDY.

QUESTION: WHAT DO YOU CALL THE FEDERAL LAW?

ANSWER: THE U.S. CODE.

When you begin a study of economic crimes, you need to be familiar with the U.S. Code. The reason for this is that civilians may not be tried by court-martial in peacetime. They must instead be prosecuted for U.S. Code violations. Military members may also be prosecuted under the U.S. Code. Prosecution may rest with the U.S. attorney and the federal courts. So you will be investigating offenses under the U.S. Code. The federal courts will use the federal rules of criminal procedure and the federal rules of evidence. You must understand the offenses and the rules in order to conduct a proper investigation of economic crimes.

To work in this field, you should get a copy of The Fraud, Waste, and Abuse Manual, USACIDC Pam 195-8. This document sets out the various economic crimes, along with an explanation of their various elements, and examples of the various crimes. It also tells you whether or not the crime is extraterritorial and cites the related Uniform Code of Military Justice (UCMJ) offense (if any).

Another important source, of course, is the U.S. Code itself. The Federal Criminal Code and Rules contains the Federal Rules of Evidence (FRE), the Federal Rules of Criminal Procedure, and Title 18 of the U.S. Code. Title 18, of course, is the basic federal criminal code, which contains most of the economic crimes. Use the U.S. Code along with Criminal Investigation Division (CID) Pam 195-8. When you look up the provisions of a statute, coordinate with the Staff Judge Advocate (JAG) in determining whether or not you meet the elements of the offense.

QUESTION: WHY IS IT IMPORTANT TO UNDERSTAND THE ELEMENTS OF THE CRIMES?

ANSWER: THERE ARE MANY DIFFERENT STATUTES HERE, SOME OF WHICH ARE FAIRLY SIMILAR. CHARGING THE WRONG ONE CAN PROVE DISASTROUS AT TRIAL, AS IT MAY PRODUCE A COMPLETE DISMISSAL OF THE GOVERNMENT'S CASE, AND EMBARRASSMENT TO ALL PARTIES CONCERNED. AS STATED, USE THE U.S. CODE ALONG WITH USACIDC PAM 195-8. THE LATTER EXPLAINS THE ELEMENTS OF THE VARIOUS CRIMES AND PROVIDES EXAMPLES OF EACH. ALWAYS REMEMBER THAT WE ARE DEALING WITH COMPLICATED STATUTES AND, VERY FREQUENTLY, SOME VERY SOPHISTICATED OFFENDERS. A SLOPPY INVESTIGATION AIMED AT SUCH OFFENDERS IS DOOMED FROM THE OUTSET. THESE CASES DEMAND PATIENCE AND A METICULOUS ATTENTION TO DETAIL.

A third important source is DOD IG Miscellaneous Publication 20-1, Indicators of Fraud in Department of Defense Procurement (June 1987). It identifies the crimes most frequently involved in this area.

QUESTION: WHAT CRIMES ARE THESE?

ANSWER: FALSE STATEMENTS (18 USC SECTION 1001), FALSE CLAIMS (SECTION 287), MAIL FRAUD (SECTION 1341), WIRE FRAUD (SECTION 1343), BRIBERY AND GRATUITIES (SECTION 201 AND SECTION 209), AND CONFLICTS OF INTEREST (SECTION 208). WE'LL LOOK AT THESE SHORTLY.

This publication breaks the contracting process into its various stages, and shows "indicators of fraud" at each level, explaining that their existence "should cause DOD employees to be alert to the possibility of impropriety and take appropriate actions to ensure the integrity of the process" (paragraph 1-1).

QUESTION: THE FIRST PHASE IS THE "IDENTIFICATION OF THE GOVERNMENT'S NEED FOR GOODS OR SERVICES." WHAT ARE INDICATORS OF FRAUD HERE?

ANSWER: FRAUD MAY RESULT "FROM DECISIONS TO BUY GOODS AND SERVICES IN EXCESS OF THOSE ACTUALLY NEEDED OR POSSIBLY NOT NEEDED AT ALL." ANOTHER EXAMPLE IS IMPROPERLY DEFINING THE NEEDS "IN WAYS THAT CAN BE MET ONLY BY CERTAIN CONTRACTORS" (PARAGRAPH 1-2(d)4). ANOTHER PROBLEM AREA IS IMPROPERLY IDENTIFYING SOLE SOURCE PROCUREMENTS (PARAGRAPH 1-2(d)5).

QUESTION: THE NEXT PHASE IS THE DEVELOPMENT OF STATEMENTS OF WORK AND SPECIFICATIONS. WHAT ARE INDICATORS OF FRAUD HERE?

ANSWER: THERE MAY BE, FOR INSTANCE, DELIBERATE COLLUSION BETWEEN THE GOVERNMENT PERSONNEL AND THE CONTRACTOR PERSONNEL, RESULTING IN SPECIFICATIONS THAT ARE DELIBERATELY WRITTEN IN AN AMBIGUOUS MANNER, THEREBY ENABLING THE CONTRACTOR TO CLAIM MORE MONEY FOR DOING LESS. OTHER FRAUD INDICATORS ARE DEFINING STATEMENTS OF WORK AND SPECIFICATIONS "TO FIT THE PRODUCTS OR CAPABILITIES OF SINGLE CONTRACTOR," ADVANCE OR SELECTIVE RELEASE BY GOVERNMENT PERSONNEL "OF INFORMATION CONCERNING REQUIREMENTS AND PENDING PURCHASES." HERE, THE RELEASE IS MADE "ONLY TO PREFERRED CONTRACTORS," DEPRIVING THE SYSTEM OF THE REQUISITE DEGREE OF FAIR AND OPEN COMPETITION. ANOTHER FRAUD INDICATOR IS THE DEVELOPMENT OF SOLE SOURCE JUSTIFICATIONS, AND DESIGNING SPECIFICATION "TO EXCLUDE OTHERWISE QUALIFIED CONTRACTORS OR THEIR PRODUCTS" (PARAGRAPH 1-3(b)).

QUESTION: WHAT ARE FRAUD INDICATORS IN THE PRESOLICITATION PHASE?

ANSWER: UNNECESSARY SOLE SOURCE JUSTIFICATION, FALSIFIED STATEMENTS TO JUSTIFY SOLE SOURCE PROCUREMENTS, RESTRICTIONS ON COMPETITION, AND THE PROVISION OF ADVANCE INFORMATION "TO CONTRACTORS OR THEIR REPRESENTATIVES ON A PREFERENTIAL BASIS" (PARAGRAPH 1-4).

QUESTION: WHAT ARE THE INDICATORS IN THE SOLICITATION PHASE?

ANSWER: "LIMITING TIME FOR SUBMISSION OF BIDS SO ONLY THOSE WITH ADVANCE- INFORMATION HAVE AN ADEQUATE TIME TO PREPARE BIDS OR PROPOSALS" AND RESTRICTIONS ON THE PROCUREMENT "TO EXCLUDE OR HAMPER ANY QUALIFIED CONTRACTOR." ANOTHER IS REVEALING ANY INFORMATION ABOUT THE PROCUREMENT "TO ONE CONTRACTOR WHICH IS NOT REVEALED TO ALL" (PARAGRAPH 1-5).

QUESTION: WHAT ARE THE INDICATORS IN THE SUBMISSION OF BIDS STAGE?

ANSWER: FRAUD MAY BE INDICATED BY SUCH THINGS AS COLLUSION AND BID RIGGING, AND VARIOUS TYPES OF FALSE DOCUMENTATION WHICH IS FURNISHED BY THE CONTRACTOR; I.E., FALSE SMALL BUSINESS ADMINISTRATION CERTIFICATION, FALSE BUY-AMERICAN ACT CERTIFICATION, ETC. (PARAGRAPH 1-6). IN THIS, AS IN THE OTHER AREAS INVOLVED IN CONTRACTING, COORDINATION WITH THE CONTRACTING OFFICE AND JAG IS VERY IMPORTANT.

QUESTION: WHAT ARE INDICATORS OF FRAUD IN THE EVALUATION OF BIDS AND PROPOSALS STAGE?

ANSWER: THE EXERCISE OF FAVORITISM TOWARD ANY CONTRACTOR, BIASED EVALUATION CRITERIA, UNAUTHORIZED RELEASES OF INFORMATION, IMPROPER DISQUALIFICATIONS OF CONTRACTORS, AND ACCEPTING NONRESPONSIBLE, NONRESPONSIVE BIDS (PARAGRAPH 1-7).

QUESTION: WHAT ARE INDICATORS AT THE AWARD STAGE?

ANSWER: THE AWARD STAGE MAY REVEAL FRAUD IN SUCH FORMS AS THE DISQUALIFICATION OF AN APPARENTLY QUALIFIED BIDDER, AND THE AWARD TO

ONE WHO IS NOT THE LOWEST, RESPONSIBLE, RESPONSIVE BIDDER (PARAGRAPH 1-8). FINALLY, CONTRACTS AWARDED THROUGH NEGOTIATION (RATHER THAN COMPETITIVE BIDDING) MAY REVEAL FRAUD IN SUCH FORMS AS INFORMATION GIVEN TO ONE CONTRACTOR WHICH IS NOT GIVEN TO OTHERS, AND WHICH GIVES IT A COMPETITIVE ADVANTAGE (PARAGRAPH 1-9).

In the area of economic crime (or any crime for that matter), you should also keep apprised of current developments through such things as the CID Information Digest Report. Volume 1, No. 2 (Feb 86), for example, discusses economic crime and "10 major crime conducive conditions." It involves things like "contractors being paid for services that had not been accomplished." Such a condition, obviously, can be a breeding ground for further frauds against the government.

Unfortunately, the U.S. Code does not have the elements of the various crimes set out like the Manual for Courts-Martial. Your first task is to read the statute involved and to figure out what its elements are. An example of this process is set out below, using 18 USC 711a. The statute looks like this in the U.S. Code.

Whoever, except as authorized under rules and regulations issued by the Secretary, knowingly and for profit manufactures, reproduces, or uses the character "Woodsy Owl," the name "Woodsy Owl," or the associated slogan, "Give a Hoot, Don't Pollute" shall be fined not more than \$250 or imprisoned not more than six months, or both.

The first step is to break this statute down, to list the elements.

Why do this? Because the government must prove each element beyond a reasonable doubt in order to get a conviction for the crime. This means you must investigate each element of the crime. So, what are the elements of 18 USC 711a? Broken down, they look like this:

ELEMENTS

1. Manufactures; reproduces; or uses,
2. the character "Woodsy Owl," the name "Woodsy Owl," or the slogan "Give a Hoot, Don't Pollute,"
3. knowingly or for profit,
4. except as authorized.

Now the statute is easier to understand, and it is easier to plan an effective investigation because you have a clear picture of what the crime is and what avenues must be pursued. This breakdown also helps organize your thoughts when you are consulting with the attorneys on the case. The example above is quick and easy. But look at a portion of the bribery statute, 18 USC 201:

18 USC 201b:

Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

(1) to influence any official act, or

(2) to influence such public official person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States: or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty...

This statute is confusing until it is broken down into its elements:

ELEMENTS

(1) the suspect gave, offered, or promised (directly or indirectly) to give something of value to any other person or entity,

(2) the offer was to a public official or a person selected to be a public official,

(3) the suspect acted corruptly,

(4) the suspect has the intent to:

(a) influence an official act of the official; or,

(b) induce a breach of official duty; or,

(c) induce the official to commit or allow a fraud on the United States.

You can see how breaking down the elements makes the statutes easier to understand. Once this is done, you can formulate the questions which your investigation must answer. You have also identified areas within which the attorneys can help you; e.g., what is "something of value," what is an "entity," what constitutes "corruption"? Once these questions are answered, you know what to do, and what questions to ask.

As you investigate the case and develop facts, make a proof diagram to organize your thoughts for your next meeting with the attorney. The following is an example of 18 USC 711a with the analysis of the proof:

Elements

1. manufactures.
2. "Woodsy Owl"
3. knowingly and for profit
4. except as authorized

Proof

- 1a. 200 tee shirts
- b. silk-screening equipment
2. silk-screen master of "Woodsy Owl"
3. mailing list with prices
4. letter from the Secretary stating no authorization was given to the suspect

You can see from the analysis above that you have physical evidence on every element of the offense. It is time to consult with the attorneys again. If the attorney feels you have proof beyond a reasonable doubt on each element, your investigation is complete. If not, you know exactly what area to pursue and what questions to ask.

Appendix J, CIDR 195-1 is a guide for packaging and presenting your case. Its requirements are:

1. Introductory summary. This should be a brief narrative explaining the type of offense, how it came to your office's attention, the period of time the offense covers, names of individuals and companies (even fictitious names), evidence of prior criminal activity, type and amount of loss to the government, statutes that may have been violated (civil, criminal, and administrative), whether you interviewed anyone, and if you did, whether or not you gave a rights warning.

2. Description of proposed defendants, to include at least names (aliases, if any), home and business addresses, physical description, date and place of birth, occupation/employers, associates/accomplices, prior record, and identification of persons who have cooperated with the government or who might cooperate with the government.

3. Description of the offense including how the offense was conceived; who executed the offense and what part each person played; where it was done; how long the operation lasted; the nature of the fraud, merchandise, service, or trickery involved; anything else which will aid the attorney in understanding the magnitude of the offense as well as its nature and characteristics. (Note: Use a proof analysis worksheet to help clarify the case.)

4. Results of investigation including:

(a) Any occurrences which might lead to a conclusion of criminal intent. Include any diagrammatic outlines of the fraud or offense.

(b) Each major misrepresentation, false statement, pretense, promise, or conspiracy which the defendant entered into or used in obtaining money or property from the U.S. government.

5. Possible evidence:

(a) A list of witnesses, (including subjects who are cooperating), their addresses, and telephone numbers.

(b) Oral, documentary, and physical evidence associated with each witness.

(c) How the evidence was obtained (e.g., interview).

6. A brief description of the involvement of other government, law enforcement, or private agencies.

NOTE: Figure 38, CIDR 195-1 is a suggested package for presenting your case to the attorney.

Why place so much emphasis on planning and coordination? Why not dive right in and start interviewing people? You can't afford to do this in the economic crime area. The cases can be complex and confusing. You will amass large quantities of information and evidence. If you aren't organized or aren't sure of your direction, you will be overwhelmed. You may have to spend many hours sorting the irrelevant from the relevant. You may spend many hours chasing false leads. Save yourself the trouble, consult with the attorneys, keep your goals clear, and analyze your results as the case progresses.

Another reason for coordination with JAG is the Procurement Fraud Division (PFD). The PFD is established as the single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement (paragraph 8-2c, AR 27-40). Significant procurement fraud cases involve an alleged loss of \$50,000 or more, and all corruption cases related to procurement that involve bribery, gratuities, conflicts of interest, or any procurement fraud case that is expected to receive significant media coverage. The PFD is part of the U.S. Army Legal Services Agency at Headquarters, Department of the Army. Reporting to it and managing the Procurement Fraud Irregularities (PFI) program is the local Procurement Fraud Advisor (PFA). The PFA is an attorney at the MACOM level or at commands having procurement advisors responsibilities which includes almost all installations. Coordinate with the PFA! Through this coordination comes a unified, cohesive effort to pursue all available remedies: civil and criminal, administrative and contractual. The PFA will notify PFD, who will coordinate with the Department of Justice. So, in a given case, the government might prosecute violations, recover damages, and bar further defense work by the offender--all because of coordination with the PFA.

Preparing Your Case.

1. Avoid Assumptions--Prove It. When putting together the proof, do not assume the elements--prove them. Avoid saying "I know that is true," or "of course that is true, everyone knows that," or "we can assume that." This may not be true. The judge may not share your outlook, or your assumptions.

Do not rely on conclusions, rely on evidence and proof. Do not say "I know it's true because witness X told me so the other day." If that is what happened, get a statement from witness X. Make your own statement, as to what witness X told you. In cases where you interview people over the telephone, write up Memorandums for Record (MFRs) or reports reflecting the substance of the conversation. The prosecuting attorney will want statements and evidence on all of the elements. Six months to a year later, at trial, the witness may "forget" ever having talked to you, or may contradict what you say he said earlier. You may be the government's only evidence to substantiate what really happened. Do not rely just on memory.

Where you have a case involving illegal possession of a firearm, the prosecutor does not necessarily want to carry around two World War II submachine guns. Take pictures of them and write a statement describing them and their condition. Are they operable? Find out and say so. Do not assume they are. Are they even real? Find out, and avoid some real embarrassment at trial. Check them out and write a brief MFR stating they are in good mechanical working order. The key is documenting what you do. Similarly, if your case involves a museum curator who has allegedly stolen some 100-year-old dresses, photograph them. Also, determine their value. Don't assume they're valuable just because they're old. Remember, don't assume--prove your case.

2. Document Everything.

QUESTION: WHAT IF YOU INTERVIEW A WITNESS WHO SWEARS HE KNOWS NOTHING?

ANSWER: THIS CAN BE JUST AS IMPORTANT AS ONE WHO DOES KNOW SOMETHING. GET HIS STATEMENT SAYING HE KNOWS NOTHING. TWO MONTHS LATER, HE MAY SHOW UP IN COURT AS A WITNESS FOR THE OTHER SIDE CLAIMING TO KNOW A GREAT DEAL ABOUT THE CASE. IF THIS HAPPENS, YOU WILL HAVE TO BE ABLE TO IMPEACH HIM. AGAIN, DO NOT RELY ON MEMORY.

QUESTION: WHY ELSE IS IT IMPORTANT FOR YOU TO DOCUMENT EVERYTHING?

ANSWER: ANOTHER REASON FOR CAREFULLY DOCUMENTING EVERYTHING IS THAT THE INVESTIGATION MAY GO ON OVER SEVERAL MONTHS. YOU MAY HAVE TO TURN IT OVER TO ANOTHER INVESTIGATOR. THE NEW AGENT WILL NEED TO KNOW WHAT YOU DID AND WHY. WHAT WERE YOU GOING AFTER? WHERE WERE YOU HEADING? WHAT WAS YOUR PLAN OF ATTACK? WHAT DID YOU DO? WHAT REMAINS TO BE DONE? DO NOT JUST TURN OVER BOXES OF DOCUMENTS TO HIM. THERE IS NO NEED FOR HIM/HER TO REDO WHAT YOU ALREADY HAVE DONE. LET HIM KNOW JUST WHERE YOU WERE GOING, WHERE YOU HAVE BEEN, AND WHY YOU WENT THERE. OTHERWISE, ALL OF YOUR EFFORTS MAY BE WASTED.

3. Don't Underestimate the Case. A CID command letter dated 3 Dec 85, included a copy of an FBI report pertaining to procurement fraud. On page 2, it notes that these cases are "complex and massive." The investigator "must have a working knowledge of the basic technology or industrial process involved." Also, you may be dealing with "an incredible bulk of evidence and a large number of potential witnesses (who are almost all bright, technically proficient, advised by corporate counsel, and capable of easily deflecting the inquiry of an unprepared investigator)." If we are dealing with a false claim, you need to understand the claims process. Approaching a case of contract fraud without an understanding of the procurement system is not likely to produce any success. If the suspect has a PhD in history, you need to know a lot more about that field than you otherwise would. In such a case, you might need to find out what the suspect's specialty is, and whether he has written in the area. Remember the case of the museum curator and the 100 year old dresses. To tackle a case like that, you need a basic understanding of clothing value.

4. Don't Underestimate the Suspect. The Federal Bureau of Investigation (FBI) report notes on page 9: "Remember the nature of the case and the level of intelligence and sophistication of the witness. Interviews can easily produce misleading information and clever interviewees can create exculpatory information." The suspect may have a PhD and may be an expert in computer science, American history, etc. The FBI report states on page 6: "Do not hesitate to bring agency personnel into the investigation." They can, of course, "pinpoint suspect areas."

5. Develop an Investigative Plan. In other words, where are you going? The FBI report explains on page 6 that "too many of these investigations have begun by the shotgun approach-go do 400 interviews and take 50 people through the grand jury, creating an additional mound of unfocused testimony and interview notes." Don't just generate reams of paperwork; focus your investigation. What are you trying to prove? Unless you know that, how are you ever going to prove it? Develop a theory of what the crime was; i.e., how did the system break down? What did the suspect do? Now, it will be much easier to go about developing evidence in order to prove the crime. The alternative is to develop a large volume of "evidence" that doesn't really show anything.

6. Work with the Department of Justice (DOJ). There is a Memorandum of Understanding (MOU) between the Department of Defense (DOD) and DOJ regarding the prosecution of economic crimes. An 18 April 1985 letter from CID command states that CID units "should establish close working relationships with the U.S. Attorneys or their assistants responsible for prosecuting federal crimes in conjunction with the supporting staff judge advocate." This is consistent with DOD Directive 5525.7 (January 22, 1985) which states: "It is DOD policy to maintain effective working relationships with the DOJ in the investigation and prosecution of crimes involving the programs, operations, or personnel of the Department of Defense." Where DOJ has assumed investigative responsibilities, "DOD investigative agencies should seek to participate jointly with DOJ investigative agencies whenever the

inquiries relate to the programs, operations, or personnel of the Department of Defense."

The Memorandum of Understanding (MOU) between DOD and DOJ is contained within the DOD directive. It may also be found at AR 27-10, paragraph 2-7. This sets forth policy for both agencies "with regard to the investigation and prosecution of criminal matters over which the two departments have jurisdiction." Again, joint investigative efforts are encouraged.

DOD "will refer to the FBI on receipt of all significant allegations of bribery and conflict of interest involving military or civilian personnel of the Department of Defense." DOD will obtain the concurrence of DOJ or the FBI before initiating an independent investigation. If the case is not considered to be "significant," we will still coordinate the case with DOJ. This will also be done when the suspects are neither military nor DOD civilians, but are DOD contractors or subcontractors.

In cases involving fraud against DOD and theft/embezzlement of government property, DOD will "confer with the United States Attorney." This conference will serve "to define the respective roles of DOD criminal investigative organizations and the FBI on a case-by-case basis." The mere receipt of an allegation, however, does not require the conference. Sufficient evidence should first be developed by DOD "to allow the prosecutor to make an informed judgment as to the merits of the case." Such cases, CID will initially investigate the case, in coordination with the PFA, to determine whether there is credible evidence to support the allegations of fraud. If so, the matter will be coordinated with DOJ. Remember, joint investigative efforts are encouraged.

QUESTION: IS THIS A POSSE COMITATUS PROBLEM?

ANSWER: NO, DUE TO THE MILITARY INTEREST THAT IS INVOLVED.

QUESTION: WHAT HAPPENS IF WE REFER A CASE TO THE U.S. ATTORNEY AND PROSECUTION IS DECLINED? DOES THIS MEAN THE FBI FEELS THE SUSPECT IS NOT GUILTY?

ANSWER: NO. IT SIMPLY MEANS THE U.S. ATTORNEY HAS DECLINED PROSECUTION. WE CAN THEN GO AHEAD AND TAKE OUR ACTION, POSSIBLY FIRING THE EMPLOYEE OR COURT-MARTIALING HIM.

QUESTION: WHY MIGHT THE U.S. ATTORNEY DECLINE PROSECUTION?

ANSWER: THEIR RESOURCES MAY NOT ALLOW THE PROSECUTION OF EVERY CASE. THUS, CERTAIN OFFENSES MAY NOT MEET THEIR MONETARY LIMITS. ALSO, THE OFFENDER MAY NOT BE A GOOD ONE TO PROSECUTE. IF A WIFE HAS BEEN DESERTED BY THE HUSBAND AND IS LEFT TO RAISE A HANDICAPPED DAUGHTER, AND THE WIFE IS HERSELF HANDICAPPED, SHE DOES NOT MAKE A VERY GOOD DEFENDANT. IN SUCH CASES, THE U.S. ATTORNEY MAY DECLINE PROSECUTION, FEELING THAT IMPRISONMENT IS NOT A LIKELY OUTCOME, AND PREFERRING TO

ALLOW THE MILITARY TO TAKE SOME ADMINISTRATIVE ACTION IF ITS OWN. THE MILITARY CAN TAKE SUBSTANTIAL ADMINISTRATIVE ACTION INCLUDING FIRING A DEFENDANT WHO IS A U.S. CIVILIAN EMPLOYEE OR SUSPENDING OR DEBARRING A GOVERNMENT CONTRACTOR.

QUESTION: IN CASES WHERE THE U.S. ATTORNEY DECLINES PROSECUTION, WHAT SHOULD YOU DO?

ANSWER: GET IT IN WRITING FROM THE U.S. ATTORNEY'S OFFICE. CID REGULATION 195-1 STATES AT PARAGRAPH 6-54, THAT THIS DECLINATION SHOULD STATE: "THE FACTS EVIDENCE A DEGREE OF CRIMINAL MISCONDUCT ON THE PART OF _____. HOWEVER, THE CASE DOES NOT MEET THE UNITED STATES ATTORNEY'S STANDARDS REQUIRED FOR FEDERAL PROSECUTION. THIS DECLINATION SHOULD NOT BE CONSTRUED BY YOUR AGENCY OR COMMAND IN SUCH A WAY AS TO PRECLUDE CONSIDERATION OF OTHER AVAILABLE CRIMINAL, CIVIL, CONTRACTUAL. AND ADMINISTRATIVE REMEDIES...

QUESTION: WHAT HAPPENS IF YOU DO NOT DO THIS?

ANSWER: THE DEFENDANT MAY TRY TO ARGUE THAT THE DECLINATION MEANS THAT THE U.S. ATTORNEY, WORKING WITH THE FBI, THOROUGHLY INVESTIGATED THE CASE AND CONCLUDED THAT IT WAS WITHOUT ANY MERIT. IN THE FACE OF A SILENT RECORD, THIS ARGUMENT MAY MEET A RECEPTIVE LISTENER. IF THE DEFENDANT CAN CONVINCE THE JUDGE THAT DOJ HAS FOUND HIM NOT GUILTY AND HAS THROWN OUT THE CASE, THE GOVERNMENT'S CASE WILL CERTAINLY NOT BE OFF TO A VERY GOOD START. IT IS IMPORTANT, THEREFORE, TO DOCUMENT WHY THE U.S. ATTORNEY IS NOT TAKING THE CASE ANY FARTHER AND WHAT THE FAILURE OF THE U.S. ATTORNEY'S OFFICE TO PROSECUTE REALLY MEANS. THIS WILL PREVENT A TOTALLY FALSE IMPRESSION FROM BEING GIVEN BY THE DEFENSE.

Earlier, we looked at the Procurement Fraud Division. Remember, within that division is the Remedies Branch. There are various remedies that can be taken, apart from criminal prosecution. These include contract remedies (termination, withholding payments, etc.) and administrative remedies (suspension, debarment). Coordination with the Procurement Fraud Advisor will ensure that all available remedies are considered.

7. Coordinate with PFA. Understand that you have to sell the case to PFA. You may have lived with the case for quite some time and may be very familiar with all of its intricacies. The PFA prosecutor, however, may know nothing of it until you walk into his office. The procurement fraud advisor will not know the background of what led to the investigation or what your efforts have been able to unearth. You, therefore, need to package the case to him also. You need to put the investigative effort into a format that makes sense. Remember that YOU are the expert investigator. A sloppy product will most probably result in equally inferior results.

QUESTION: SHOULD YOU COORDINATE THE CASE WITH PFA AT A VERY EARLY STAGE?

ANSWER: YES. IN A COMPLEX INVESTIGATION, YOU SHOULD SCHEDULE PERIODIC BRIEFINGS. YOU BOTH SHOULD BE THINKING ALONG THE SAME LINES. DO NOT WAIT UNTIL THE INVESTIGATION IS OVER BEFORE YOU CONTACT PFA FOR THE FIRST TIME. ONCE YOU HAVE A BASIC OUTLINE OR THEORY OF THE CASE, DISCUSS IT WITH PFA. GET THE THOUGHTS OF THE PROCUREMENT FRAUD ADVISOR. HE MAY SEE SOMETHING YOU TOTALLY OVERLOOKED. TOGETHER, YOU STAND A FAR GREATER CHANCE OF SUCCESS. AT THE LEAST, YOU NEED TO BRIEF HIM ON THE ALLEGATIONS INVOLVED, THE APPARENT OFFENSES THAT YOU SEE, AND HOW YOU INTEND TO PROCEED WITH THE INVESTIGATION. THIS CAN SAVE YOU A LOT OF TIME AND WASTED EFFORT. THE PROCUREMENT FRAUD ADVISOR MAY SEE POSSIBLE INCONSISTENCIES IN THE EVIDENCE, OR POTENTIAL AFFIRMATIVE DEFENSES THAT THE SUSPECT MAY RAISE. IF SO, ADDITIONAL AREAS MAY NEED TO BE INVESTIGATED. HE CAN HELP TO ANTICIPATE THE SUSPECT'S DEFENSES, SO YOU CAN CLOSE ANY POTENTIAL LOOPHOLES IN THE CASE. THIS IS IMPORTANT BEFORE YOU PROCEED TO INTERROGATE THE SUSPECT. THE PROCUREMENT FRAUD ADVISOR MAY HELP PREDICT HOW THE SUSPECT WILL ATTEMPT TO WIGGLE OFF THE HOOK. HE MAY WANT OTHER AVENUES EXPLORED AND MAY SEE THE NEED FOR ADDITIONAL EVIDENCE.

IT IS ABSOLUTELY ESSENTIAL FOR YOU TO WORK WITH THE PROSECUTOR. HE IS GOING TO HAVE TO TAKE THE CASE INTO COURT AND WIN WITH IT. IF HE WANTS MORE WITNESS INTERVIEWS, DO THEM. DO NOT DELAY AND IGNORE HIM. A POOR RELATIONSHIP BETWEEN THE TWO OF YOU WILL PROVE DISASTROUS FOR EVERYONE BUT THE DEFENDANT.

Coordination with PFA does not simply mean that you walk into his office one afternoon and drop 15 volumes of documents on his desk, asking him to determine if any crimes were committed. He does not have two weeks to try to reinvent the wheel by redoing all that you already have done. You need to sit down and discuss the case with him. It may take all day, or all week, but take the time that is needed. In some cases, you and the prosecutor may spend entire weeks, even months, working together on a case. Simply dropping the volumes on his desk is likely to accomplish little. It will probably produce a negative reaction against you. He may feel that if you are too busy to bother discussing the case with him, then HE is too busy to waste time reading the documents. The result may be that nothing is accomplished. He may give the case a superficial examination but, without the background and analysis that you could provide, he may not see what you see. The suspect may be drastically undercharged and may escape with an incredibly favorable pretrial agreement. He may not even be prosecuted at all.

Suppose the investigator has a case involving a government employee who has been using government time and equipment to write articles for publication, for which he is being paid by private commercial sources. This may be a standards of conduct violation and a possible violation of 18 USC Section 209. What would the subject's defense be? Get a copy of the suspect's job description. It may show that part of his job is to write articles for publication. Thus, the suspect could argue in court that he was simply doing what his job required. He was, thus, using the government equipment/supplies in order to do what he was required to do by his job. The

suspect then, might have a good defense. Work with PFA. Otherwise, you could spend months investigating an allegation that would not result in a successful prosecution.

The Procurement Fraud Advisor (PFA) must be in on the case at a very early stage. It is essential that you work with the PFA prior to any meetings you have with the U.S. Attorney. The PFA is your point of contact (POC) for coordinating with DOJ. This coordination is essential whether the offender is military or civilian. Remember, the Defense Procurement Fraud Division is the "single centralized organization within the Army to coordinate and monitor criminal, civil, contractual, and administrative remedies in significant cases of fraud or corruption relating to Army procurement." (AR 27-40, paragraph 8-2c.) Even if the case doesn't involve procurement, coordination with PFA is still essential.

8. Packaging the Case. You have to sell your product. You must convince the U.S. Attorney that the case is one that is worth his time and effort. It is important for you to put the investigative product into a format that will lead to the result you want: prosecution and conviction. If the U.S. Attorney does nothing with the case, and if this is simply the result of the way you presented the matter to him, then the interests of justice have not been served.

Guidelines for putting the package together are at CID Regulation 195-26. Paragraph 2-8 explains that "the investigator must be able to present his product in written form and organized in a way that permits efficient access to all information and evidence important to the case. Even the best case is likely to be declined if it is poorly organized and presented (whether in writing or orally). It is the investigator's responsibility to organize the material to enable the prosecutor to make his decision; it is not the prosecutor's responsibility to exhaustively examine papers and question the investigator to determine what should have been clearly presented to him in the first place. Also, the investigator "should be sure that he has gathered as much evidence as possible...The investigator must be able to demonstrate clear awareness of the legal elements of the case and have admissible, competent, and persuasive evidence on each such point." Also, the investigator must "carefully and explicitly distinguish between his suppositions and the facts he has established by investigation." Paragraph 2-2 also notes the need for an investigative plan and the need for SJA coordination, points which have already been discussed.

In these cases, you need to explain just what the offenses are, and what you have to prove them. How does it prove them? What is obvious to you may not be so obvious to someone who has not been living with the case for the past 11 months. You may have hundreds of witness interviews, thousands of documentary exhibits, and various other forms of evidence such as photographs. If you and the prosecutor have been working on the case together, putting the package together will not be that onerous a task.

Do not assume the trial counsel or prosecutor will understand the intricacies of your case. He may know nothing about computer technology,

which may be the essence of the crime. You need to, in effect, draw a picture and tell a story. What did the defendant do? How did he do it? How does the evidence prove this? The prosecutor cannot simply walk into court with a box of documents and expect to prove anything. If he throws them on the judge's desk, the judge may just throw them back. The judge may know nothing about the military at all. Spell the case out in a form that the prosecutor will be able to explain in court. The cases are complex, but it is our job to translate a maze of documents into something we can go into court with...and win. Remember that you are the main government witness, since you have put the investigative effort together. It is YOUR case. Do not throw it away at the end. Remember, a good example of packaging a case is at Appendix C of the regulation. It separates the "crime package" as follows:

1. Introductory summary (narrative regarding the type of offenses involved, statutes violated, loss to the government, etc.).
2. Description of the defendants.
3. Description of offenses. This is a detailed analysis of the crimes, from inception to completion. This is the who, what, when, where, how, and why of the crimes.
4. Results of investigation. A description of the evidence which may be used for proof of the elements of the statutes violated.

In terms of analyzing the evidence to prove the elements of the statute, one way to do this is to initially simply set forth each element of the crime and then list, alongside it, each item of proof that goes to substantiate the existence of that element. That is, of course, the same as the diagrams we previously did with sections of the U.S. Code. When it comes time to selling the case and putting together a comprehensible package for someone who has no prior familiarity with the case, this can be an extremely valuable means of making sense out of a maze of documents and exhibits.

PART B - CRIMES UNDER THE UNITED STATES CODE.

A. 18 USC 2 - Principals.

1. Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
2. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

This section is almost identical to the definition of principals under Article 77, Uniform Code of Military Justice (UCMJ). Note, however, that the U.S. Code requires the offense to be against the United States, while the military version requires only an offense under the UCMJ.

B. 18 USC 3 - Accessory After the Fact:

Whoever knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. (Note: The punishment is the same as it is under Article 78, UCMJ; i.e., one-half the maximum confinement authorized for a principal, up to a maximum of 10 years.)

C. 18 USC 201 - Bribery of Public Officials and Witnesses.

1. 18 USC 201b:

Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent--

a. to influence any official act; or

b. to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude, in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

c. to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty...

The gist of this offense is the intent to influence an official act. Note that the statute says whoever gives or offers anything of value. This means that the crime is complete once the offer is made. There does not have to be an actual delivery of anything. The statute also states "anything of value," so money is not the only form of payment. A new car, a fur coat, a vacuum cleaner, or anything else could be promised or given. Examine what the payment, or offer, was for. If the offer or payment was made with the corrupt intent to influence an official act, the offense is bribery.

U.S. v. Graalum, 19 CMR 667 (AFBR 1954), is a good illustration of the way courts approach this area. Graalum was a clerk in a squadron orderly room. Part of Graalum's duty concerned making calls to higher headquarters (group) to indicate that an airman had requested or would request a hardship discharge. When the group headquarters got the call, the next higher headquarters (wing) would be called. When the wing got the call, the airman's name would be taken off orders for overseas assignment. Graalum started dealing in a "calls for cash" scheme. For a price, he would call the group headquarters and tell them that a hardship discharge request had been submitted. The Air Force Court of Military Review discussed bribery at length, defining it to include the offer or the request for something of value with the corrupt intent to influence the official action or decision of a

person occupying an official position or having official duties. The court pointed out the recipient of the offer does not need to be in a position to accomplish the end purpose of the bribe. The recipient need only be in a position to carry out routine duties with respect to the end purpose of the bribe. So, in this case, Graalum did not have to be in a position to take a name off of an overseas assignment; he only had to be in a position to perform a routine duty related to the end desired. Graalum could not remove anyone from an overseas assignment, only wing headquarters could. Graalum was, however, in a position to make telephone calls to start the process, and this was sufficient to put him in an official position. The court further noted that even if the end result would be impossible to carry out, the offer plus the corrupt intent is sufficient for bribery.

The Army Court of Military Review again stated that the person who is bribed must occupy an official position in U.S. v. Kulp, 5 MJ 678 (ACMR 1978). This court agreed that the offeree must occupy an official position relating to the object of the bribe. This court also agreed that the offeree does not have to be able to perform the object of the bribe, he only needs to be in a position related to it. The requirement is that he be in a position to take official action on the matter in question.

You can find an official position for the purposes of 18 USC 201 at all levels, high or low. In U.S. v. Eslow, 1 MJ 620 (ACMR 1975), the official position was the temporary guard of an Army truck. The unit was preparing to move out, and the soldiers had all put their duffle bags on a truck. The company commander got a tip that someone had marijuana in their duffle bag. The CO put a guard on the truck and instructed him not to let anyone take their duffle bag off the truck. Eslow offered the guard \$400 if the guard would let him get something out of his duffle bag. Was the guard in an official position? The court held that he was. In U.S. v. Eckert, 8 MJ 835 (ACMR 1980), the court found that a battalion legal clerk's position was an official position for these purposes when the object of the bribe was the destruction of an Article 15.

2. 18 USC 201c.

Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

- a. being influenced in his performance of any official act; or
- b. being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; or
- c. being induced to do or omit to do any act in violation of his official duty...is guilty of bribery.

This portion of the statute deals with the official who is bribed, i.e., the offeree. It covers the request for something of value just as much as the receipt of something of value. The offense is complete when the official asks for the thing of value. You don't have to wait until there is an actual exchange. The mere solicitation of the bribe establishes the offense. U.S. v. McCarron, 4 CMR 546 (AFBR 1951).

D. 1. 18 USC 201f - Gratuities.

Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official for or because of any official act performed or to be performed by such public official, former official, or person selected to be a public official

2. 18 USC 201g - Gratuities.

Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him...

Notice how these two subsections are different from 201b and c. These subsections do not require an intent to influence the public official. The intent of these two subsections is to avoid even the appearance of evil. If a contracting officer receives a new TV set from a company which just received an award of a contract, suspicions are raised about the legitimacy of the entire contracting process. The company which got the contract may have been by far the best choice, but there will always be doubts about the award.

These subsections are also lesser included offenses of 18 USC 201b and c. You may feel that there was an intent to influence a public official, but your investigation does NOT turn up evidence which would prove intent beyond a reasonable doubt. In such a case, either 201f or 201g may be the answer.

E. 18 USC 209a - Salary of Government Employees Payable Only by the United States.

1. "Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any state, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any

way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection--

Shall be fined not more than \$5,000, or imprisoned not more than one year or both."

At first, this may look like the gratuities subsections (201f and 201g), but it is broader in intent than the gratuities prohibitions. The intent of this statute is to avoid divided loyalties. The rationale is that the government employee will be paid only by the government and will have allegiance only to the government. Section 201 is a felony. Section 209 is punishable by one year, and is a lesser included offense. Persons charged with 201 violations frequently offer to plead guilty to a 209 violation, which is not a felony.

F. 18 USC 203 - Compensation to Members of Congress, officers, and others in matters affecting the Government.

1. Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another--

a. at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect; or

(1) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, or

(2) Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Delegate, commissioner, officer, or employee--

"Shall be fined not more than \$10,000 or imprisoned for not more than a year, unless the act was willful in which event the imprisonment is not more than five years, or a fine and imprisonment; and shall be incapable of holding any office of honor, trust, or profit under the United States."

These two subsections are also aimed at avoiding divided loyalties. Note that there is no mention that the government employee's duties would be a violation if a government attorney (whose duties dealt solely with tax questions) agreed to represent someone in a contract dispute with the government. These subsections do require that the matter be one in which the government is a party, or one in which the government has a direct and substantial interest. Notice that these subsections include the offer, promise to give, solicitation, and receipt of compensation. So, like section 201b, the offenses can be complete without an exchange actually taking place.

G. 18 USC 205 - Activities of Officers and Employees in Claims Against and Other Matters Affecting the Government:

Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties--

1. acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or share of, or interest in any such claim in consideration of assistance in the prosecution of such claims, or
2. acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest--

"Shall be fined not more than \$10,000 or imprisoned for not more than one year, unless the act was willful in which event the imprisonment is not more than five years, or a fine and imprisonment."

This section strives for undivided loyalty on the part of government employees. In this sense it is like Section 209. It is, however, aimed at government employees who act in a representational capacity.

Another reason for enforcing this section is that the public's confidence will be undermined if officials are seen switching sides whenever they want. Eventually, the perception becomes one of getting the result you want by hiring a member of the agency (an indirect bribe) or by getting in with a member of the agency and letting an "old boy network" take its course.

The word "claim" is important. This is a broad term which includes any interest which is being pursued against the government. In Bachman v. Pertachuk, 437 F.Supp 973 (D.D.C. 1977), the plaintiffs brought a class action suit against the Federal Trade Commission (FTC) for racial discrimination in awarding promotions. The court held that such a suit did involve a claim against the United States and that an employee of the FTC could not accept any compensation for his legal services on behalf of the plaintiffs.

You should be aware of two exceptions to Section 205. First, an employee can act, without compensation, as counsel for any person who is the subject of personnel, disciplinary, or loyalty hearings. "Hearings" is the key word, the exception only covers administrative actions, not court cases. The other exception is that an employee may represent himself or his immediate family in a claim against the government as long as the employee did not substantially act in the matter as a government employee.

H. 18 USC 208 - Acts Affecting a Personal Financial Interest.

1. Except as permitted by subsection (b) hereof, whoever being an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve Bank director, officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling in other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

"Shall be fined not more than \$10,000, or imprisoned not more than one year, unless the act was willful in which event imprisoned for not more than five years, or a fine and imprisonment."

2. Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

The purpose of the statute is to make sure that there is honesty in government, by preventing anyone whose interests are adverse to the government from promoting their interests over those of the government. The law is aimed not only at dishonor but also at the temptation to be dishonorable. There does not have to be actual corruption, or a loss to the government. The crime is complete when there is a conflict, whether there is a loss or not. This

law attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation. Congress intended the statute to be both broad and rigid, not a case by case exercise.

Remember, the violation of the statute does not depend upon harm to the government; the violation occurs when the government's agent enters into a relationship which makes it difficult for him or her to represent only the government's interest. U.S. v. Mississippi Valley Generation Co, 5 Fed 2d 268 (1961).

If you investigate a possible 208 violation, remember to check for a possible waiver under 208b. If the employee made a full disclosure and a waiver was granted, there is no liability. This waiver involves disclosure to the installation Ethics Counselor and approval by the chain of command.

I. The Standards of Ethical Conduct for Employees of the Executive Branch

1. General Principles

a. The "Standards of Ethical Conduct for Employees of the Executive Branch" are based on the following fourteen general principles, contained in Executive Order 12674.

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) Employees shall put forth honest effort in the performance of their duties.

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) Employees shall act impartially and not give preferential treatment to any private organization or individual.

(9) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.

(10) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.

(11) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.

(12) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those imposed by law, such as Federal, State, or local taxes.

(13) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.

(14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.

Because they are intended to answer questions about the ethical conduct of more than a million individuals employed by more than 100 different Federal agencies, the new "Standards of Ethical Conduct" are detailed. Where a situation is not covered by a specific rule in the "Standards of Ethical Conduct," personnel should apply the general principles stated above in determining whether their conduct is proper.

The following synopsis of the "Standards of Ethical Conduct" will provide you with enough information to recognize ethical issues when they arise, and of the need to seek guidance from an ethics counselor.

2. General Provisions (Synopsis of Subpart A)

A violation of these regulatory standards may be cause for corrective action or for disciplinary action against an employee. There are criminal penalties for violations of criminal statutes referred to in the regulations.

Employees are encouraged to seek the advice of agency ethics officials. Disciplinary action for violation of regulatory standards will not be taken against an employee who relies on such advice.

There are special rules for determining which standards apply to employees detailed to other agencies, to other branches of the Federal government, to State or local governments or to international organizations.

Agencies may, with the approval of the Office of Government Ethics, establish supplemental rules to cover matters unique to the agency.

3. Gifts from Outside Sources (Synopsis of Subpart B)

BASIC PROHIBITION. An employee shall not solicit or accept a gift given because of his official position or from a prohibited source. A prohibited source is defined as any person, including any organization more than half of whose members are persons:

Seeking official action by his agency;

Doing or seeking to do business with his agency;

Regulated by his agency; or

Substantially affected by the performance of his duties.

DEFINITION OF A GIFT. The term "gift" includes almost anything of monetary value. However, some of the things it does not include are:

Coffee, donuts and similar modest items of food and refreshments when offered other than as part of a meal;

Greeting cards and most plaques, certificates and trophies;

Prizes in contests open to the public;

Commercial discounts available to the general public or to all Government or military personnel;

Commercial loans, and pensions and similar benefits;

EXCEPTIONS. Subject to the limitations noted below, there are exceptions which will permit an employee to accept an otherwise prohibited gift. Some of these cover:

Unsolicited gifts with a market value of \$20 or less per occasion, aggregating no more than \$50 in a calendar year from any one source (this exception does not permit gifts of cash or investment interest);

Gifts when clearly motivated by a family relationship or personal friendship;

Commercial discounts and similar benefits offered to groups in which membership is not related to Government employment or, if membership is related to Government employment, where the same offer is broadly available to the public through similar groups, and certain benefits offered by professional associations or by persons who are not prohibited sources.

Gifts resulting from the outside business activities of employees and their spouses;

Free attendance provided by the sponsor of a widely-attended gathering of mutual interest to a number of parties where the necessary determination of agency interest has been made;

Certain gifts of food and entertainment in foreign areas;

LIMITATIONS ON USE OF EXCEPTIONS. An employee may not use any of the exceptions noted above to solicit or coerce the offering of a gift or to accept gifts:

For being influenced in the performance of official duties;

In violation of any statute;

So frequently as to appear to be using public office for private gain; or

In violation of applicable procurement policies regarding participation in vendor promotional training.

DISPOSITION OF GIFTS. When an employee cannot accept a gift, the employee should pay the donor its market value. If the gift is a tangible item, the employee may instead return the gift. Subject to approval, however, perishable items may be donated to a charity, destroyed or shared within the office.

4. Gifts between Employees (Synopsis of Subpart C)

BASIC PROHIBITION. An employee shall not:

Give or solicit for a gift to an "official superior;" or

Accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

DEFINITION OF AN OFFICIAL SUPERIOR. The term "official superior" includes anyone whose official responsibilities involve directing or evaluating the performance of the employee's official duties or those of any other official superior of the employee. The term is not limited to immediate supervisors but applies to officials up the supervisory chain.

EXCEPTIONS. Subject to a limitation on using any exception to coerce a gift from a subordinate, there are exceptions that:

a. On an occasional basis, including birthdays and other occasions when gifts are traditionally exchanged, permit giving and accepting:

(1) Items other than cash aggregating \$10 or less per occasion;

- (2) Food and refreshments shared in the office;
- (3) Personal hospitality at a residence; or
- (4) Appropriate hostess gifts; and

b. On infrequent occasions of personal significance, such as marriage, and on occasions that terminate the superior-subordinate relationship, such as retirement, permit giving and accepting gifts appropriate to the occasion. In these cases, employee contributions must be of a nominal value. The aggregated value of the gifts may not exceed \$300 per occasion, nor may one person contribute more than \$10 to this gift. Therefore, the aggregated value of the gift will not exceed either \$300 or \$10 times the number of truly voluntary contributors, whichever is less.

5. Conflicting Financial Interests (Synopsis of Subpart D)

DISQUALIFYING FINANCIAL INTERESTS. Under Federal criminal law, an employee is prohibited from participating in an official capacity in any particular matter in which to his knowledge, he or certain other persons have a financial interest, if the particular matter will have a direct and predictable effect on his own or that person's financial interests.

APPLICABILITY. In addition to matters that affect his own financial interests, this prohibition applies to particular matters that affect the financial interests of:

The employee's spouse, minor child or general partner; or

Any person the employee serves as officer, director, trustee, general partner or employee;

The prohibition also applies to particular matters that affect the financial interest of a person with whom the employee is negotiating for or has an arrangement concerning future employment. However, this aspect of the statute is addressed more specifically in subpart F.

DISQUALIFICATION. Disqualification can be accomplished simply by not participating in the matter. An employee should notify the person responsible for his assignment (his superior) of the need to disqualify.

SOLUTIONS OTHER THAN DISQUALIFICATION. Disqualification is not required if the financial interest is the subject of one of the statutory waivers described in subpart D or if the employee has sold or otherwise divested the conflicting interest. An employee required to divest a financial interest may be eligible for special tax treatment of the transaction.

6. Impartiality in Performing Duties (Synopsis of Subpart E)

CONSIDERATION OF CERTAIN PERSONAL AND BUSINESS RELATIONSHIPS. Even though a disqualification may not be required under subpart D, an employee should not

participate in an official capacity in certain matters without first obtaining specific authorization if, in his judgment, persons with knowledge of the relevant facts would question his impartiality in those matters. This is commonly referred to as the "appearance of impropriety principle."

MATTERS COVERED. These include a particular matter involving specific parties if the employee knows either (1) that it is likely to affect the financial interest of a member of his household or (2) that one of the following persons is a party or represents a party in the matter:

- A person with whom the employee has or seeks a business or other financial relationship;

- A member of the employee's household or relative with whom the employee has a close relationship;

- A person the employee's spouse, parent or child serves or seeks to serve in an official or business capacity;

- A person the employee has, in the past year, served in an official of business capacity; or

- An organization, other than a political party, in which the employee is an active participant.

DISQUALIFICATION. Disqualification can be accomplished in the same manner as when required under subpart D for disqualifying financial interests.

AUTHORIZATION TO PARTICIPATE. Notwithstanding the employee's determination that his impartiality would be questioned, the agency designee can authorize the employee to participate in the matter based on a determination that the Government's interest in the employee's participation outweighs the concern that a reasonable person would question the integrity of agency programs and operations.

7. Seeking other Employment (Synopsis of Subpart F)

DISQUALIFICATION WHILE SEEKING EMPLOYMENT. An employee is prohibited from participating in an official capacity in any particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of a person with whom he is seeking employment.

DEFINITION OF SEEKING EMPLOYMENT. The term "seeking employment" includes bilateral negotiations with another, mutually conducted with a view to reaching an agreement regarding possible employment. It also includes conduct short of negotiations, such as sending an unsolicited resume or other employment proposal. It can include employment contacts by or through an agent or intermediary. However, it does not include simply:

- Rejecting an unsolicited employment overture;

Requesting a job application; or

Sending an unsolicited resume or other employment proposal to members of an industry or other discrete class.

Having once begun, an employee generally continues to be seeking employment until he or the prospective employer rejects the possibility of employment and all discussions end. However, an employee is no longer seeking employment with the recipient of his unsolicited resume or other employment proposal after two months have passed with no indication of interest.

DISQUALIFICATION. Disqualification can be accomplished in the same manner as when required under subpart D for disqualifying financial interests.

SOLUTIONS OTHER THAN DISQUALIFICATION. The employee can participate in the matter affecting his prospective employer if granted an individual waiver described in subpart D, or if authorized to participate using the procedures set forth in subpart E.

DISQUALIFICATION BASED ON AN EMPLOYMENT ARRANGEMENT. An employee may not participate in a particular matter that, to his knowledge, has a direct and predictable effect on the financial interests of anyone with whom he has an arrangement concerning future employment. In this case, an employee may be able to participate in a particular matter affecting a prospective employer only if he has received an individual waiver described in subpart D.

8. Misuse of Position (Synopsis of Subpart G)

USE OF PUBLIC OFFICE FOR PRIVATE GAIN. An employee shall not use his public office for his own private gain or for the private gain of friends, relatives or persons with whom he is affiliated in a non-government capacity, or for the endorsement of any product, service or enterprise.

USE OF NONPUBLIC INFORMATION. An employee shall not engage in a financial transaction using nonpublic information, or allow the improper use of nonpublic information to further his own private interest or those of another. Information that is "nonpublic" includes information the employee knows or reasonably should know is routinely exempt from disclosure under the Freedom of Information Act, is protected from disclosure by statute, or is classified.

USE OF GOVERNMENT PROPERTY. An employee has a duty to protect and conserve Government property and to use Government property only for authorized purposes. Authorized purposes are those for which Government property is made available to the public or those purposes authorized in accordance with law or regulation.

USE OF OFFICIAL TIME. Unless authorized in accordance with law or regulation to use such time for other purposes, an employee shall use official time in an honest effort to perform official duties. And, an employee shall not encourage, direct, coerce or request a subordinate to use official time to

perform activities other than those required in the performance of official duties or those authorized in accordance with law or regulation.

9. Outside Activities (Synopsis of Subpart H)

GENERALLY. In addition to the standards set forth in subpart H, an employee's outside employment and other activities must comply with all ethical requirements set forth in the subparts A through G of the regulation. For example, the prohibition against use of Government property for unauthorized purposes would prohibit an employee from using the agency photocopier to reproduce documents for his outside organization.

RESTRICTIONS IMPOSED BY OTHER LAWS. An employee's outside employment and other activities must comply with the criminal statutes restricting an employee's engaging in representational activities before the United States, the constitutional prohibition against accepting any office, title or compensation from a foreign government, and the "Hatch Act," which prohibits most employees' participation in certain partisan political activities.

PRIOR APPROVAL FOR OUTSIDE ACTIVITIES. When required by supplemental agency regulation, an employee shall obtain approval before engaging in outside employment or activities.

SERVICE AS AN EXPERT WITNESS. In the absence of specific authorization, an employee shall not represent anyone other than the United States as an expert witness in any proceeding before a court or agency of the United States if the United States is a party or has a direct and substantial interest.

TEACHING, SPEAKING AND WRITING. An employee shall not receive compensation for teaching, speaking or writing that is related to his official duties.

DEFINITION OF RELATED TO DUTIES. Teaching, speaking or writing is "related to an employee's official duties" if:

The activity is undertaken as part of his official duties;

The invitation to engage in the activity was extended primarily because of his official position;

The invitation or the offer of compensation was extended by a person whose interests may be affected by the employees official duties;

The information draws substantially on nonpublic information; or

The subject deals in significant part with any matter to which the employee is now or has been assigned in the previous one-year period, or to any ongoing or announced policy, program or operation of his agency.

EXCEPTION FOR TEACHING. An employee may receive compensation for teaching certain courses, notwithstanding that the subject matter is related to his

official duties and notwithstanding that he may have been offered the opportunity because of his official position.

FUNDRAISING. Provided that he does not otherwise violate the "Standards of Ethical Conduct," an employee may engage in charitable fundraising activities in a personal capacity if he does not use his official title, position or authority to further that effort or personally solicit funds or other support from subordinates or from anyone known to him to be a prohibited source for purposes of the gift restrictions in subpart B.

JUST FINANCIAL OBLIGATION. Employees shall satisfy in good faith all just financial obligations.

10. Procurement Integrity

The Standards of Ethical Conduct apply to all procurement officials who are members of the Executive Branch. However, because of the procurement scandals of the 1980's, Congress passed legislation setting up stricter standards of conduct for procurement officials, 41 USC 423. Since these standards are punitive, you should be aware of them when the economic crime involves procurement fraud allegations.

A procurement official is any military person, US Government employee or other who, during the conduct of a procurement, participates personally and substantially in:

- (1) drafting, reviewing, or approving of a contract specification or statement of work,
- (2) preparing or developing requests for bid proposals,
- (3) preparing and issuing solicitations,
- (4) evaluating bids or proposals,
- (5) selection of sources,
- (6) negotiations, or
- (7) reviewing and approving a contract award.

The conduct of the procurement begins when a decision is made to contract for an item or service for the government. The conduct of the procurement ends with the award of the contract. It also includes the period from the decision to modify an existing contract through all the procedures to the actual approval of the modification.

In addition to the Standards of Ethical Conduct which apply to all employees; there are special standards which apply to those procurement officials and the prospective contractors during the conduct of the

procurement. A competing contractor will not discuss or offer employment to a procurement official. Nor will that contractor offer any gift of any monetary value to a procurement official. Finally, the competing contractor will not solicit protected information from any government employee concerning the source selection process or any proprietary information. During the conduct of the procurement, the procurement official may not discuss or accept employment with a competing contractor, ask for or accept gifts from these contractors, or disclose protected information to these contractors. You should note that a gift is a gratuity or any other thing of value. This does not include anything for which the procurement official paid fair market value to a competing contractor, any plaque or certificates with no intrinsic value received from a competing contractor, or any unsolicited item, valued at \$10 or less, received from a competing contractor. A competing contractor is any entity that is or is reasonably likely to become a competitor for a contract or subcontract under the procurement and includes any other person acting on behalf of such an entity.

There are additional postemployment restrictions placed on procurement officials in their relationship with defense contractors and subcontractors. An employee who was a procurement official with respect to a specific procurement may not:

- a. participate in any manner on behalf of a competing contractor in any negotiations leading to the award or modification of a contract for such procurement; or
- b. participate personally and substantially on behalf of the competing contractor in the performance of such contract.

These restrictions apply for a period of two years from the date of the employee's last personal and substantial participation in the procurement on behalf of the Government. These restrictions apply to postemployment activities on behalf of a subcontractor. They generally do not apply if the subcontract amount is less than \$100,000 or if participation is on behalf of a subcontractor below the second tier. However, the restrictions apply regardless of the dollar value and at any tier if the subcontractor significantly assisted the prime contractor in negotiation of the prime contract or if the employee recommended the particular subcontractor to the prime contractor as a source.

You should understand that all procurement officials must certify that they are familiar with the provisions of the Procurement Integrity Act and have complied with those provisions. This certification may serve as a basis for a false statement allegation if the employee has violated any of these provisions.

J. 18 USC 1001

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies; conceals or covers up by any trick, scheme, or device a material fact, or makes any

false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000, or imprisoned not more than five years or both."

This is a broad statute and the courts have given it extremely broad scope. The accused must knowingly make a false representation of a material fact. Mere negligence or carelessness is not enough to commit this offense. Any statement is covered, whether made because of duty, or volunteered. In U.S. v. Rogers, 80 L.Ed 2d 492 (1984), the false statements were one phony report of a kidnapping to the FBI, and a phony report of an assassination plot to the Secret Service. The Supreme Court held that §1001 covered these acts; the false reports were still within their jurisdiction because they were the agencies with investigative jurisdiction.

The false statement can be very simple and short. In United States v. Woodward, 83 L.Ed 2d 518 (1985), the Supreme Court held that a check mark in the "NO" blocks on a customs form was a false statement under 18 USC 1001. It also held that a 1001 violation may be prosecuted along with and in addition to other offenses to which the false statement was connected. In this case, Woodward brought over \$20,000 of currency into the United States without reporting it. He was convicted for violating currency reporting requirements under Title 31 and for the false statement, even though the check mark was the act used for both violations.

The Supreme Court has showed its interest in this provision by denying constitutional challenges to it. The Court held nearly 20 years ago that a citizen may go to court to prevent answering a question; but may not answer falsely and then claim that the government could not constitutionally ask the question. So, even though a law requires answers to questions ("are you affiliated with the communist party") and the law might be unconstitutional, if a false answer is given, Section 1001 still applies (Bryson v. U.S., 24 L.Ed 2d 264, 1969).

You should note the difference between 18 USC 1001 and two military offenses: false official statements (Article 107) and false swearing (Article 134). Article 107 requires an official statement; that is, a statement made in the line of duty. So, unless a suspect has a duty to speak, his answers during an interrogation are not official. Article 134 (False Swearing) requires the statement to be made under oath. The statement does not have to be official; therefore, there is no requirement of a duty to make the statement.

One problem that comes up with all three offenses is that of a person who simply says "no" to a question, knowing that the answer is false. If a simple "no" is given, with nothing else said, the courts call this an "exculpatory no."

The Court of Military Appeals has held that the exculpatory no is not a defense to false swearing under Article 134. In U.S. v. Gay, 24 MJ 304 (CMA 1987), the court held that denials under oath are not covered by this defense.

(The court did note in passing that the defense might apply to Article 107). In U.S. v. Harrison, 20 MJ 710 (ACMR 1985), the Army Court of Military Review upheld a false swearing conviction when the accused said "no" and nothing else to four questions. All four denials were false and under oath. The court followed Harrison in upholding the conviction for false swearing under Article 134.

To sum up, the exculpatory no may apply to a violation of 18 USC 1001. The Federal Courts are split on this issue. If a military member does nothing more than say "no" falsely, liability will depend upon whether an oath was given. If the statement was under oath, the soldier is liable for false swearing under Article 134.

K. 18 USC 287 – False, Fictitious, or Fraudulent Claims.

"Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

The accused must present a claim against the United States or any U.S. agency or department. It also covers one who causes the false claim to be submitted to the government. U.S. v. Catena, 500 F2d 1319 (3d Cir. 1974), cert. den. 42 L.Ed 2d 2641 (1974).

The claim must be put into government channels at some point; in other words, there must be a demand or request made on the government. The section does not require that the claim be paid. The government must prove that the accused knew the claim was false.

18 USC 287 is similar to the false claim provisions of Article 132, UCMJ. Article 132 is broken down into eight different offenses: (1) making a false or fraudulent claim, (2) presenting a false or fraudulent claim, (3) making a false writing in connection with claims, (4) false oath in connection with claims, (5) forgery of signature in connection with claims, (6) using a forged signature in connection with claims, (7) delivering less than called for by receipt, and (8) making or delivering a receipt without having full knowledge that it is true.

Under Article 132, making a false claim requires an act placing the claim into official channels. This does not require that the claim be paid, nor that it reach a person who has the authority to pay it. The government must prove the accused knew the claim was false. An honest belief is a defense to a false claim. Also, a negligently made claim is not a false claim. The government must show that the accused knew the claim was fictitious or dishonest. "You should understand that if a suspect made a good faith effort to correct an erroneous pay situation, then there may be no larceny or false claim because the suspect did not have criminal intent. For example, a soldier informs the F&AO that he has moved into government quarters to

terminate receipt of BAQ. After he receives several more months of BAQ, he again notifies F&AO of this problem. He still receives BAQ for several more months. At no time during this period did the soldier commit any fraud or larceny, even though he received BAQ to which he was not entitled based on his occupying government quarters. The criminal intent is not present."

Presenting a false claim requires that the accused took a false claim, knowing that it was false, and presented it to a person who had the authority to pay it.

ELEMENTS

1. Making:

(a) the accused made a certain claim against the United States or an officer thereof;

(b) the claims were false or fraudulent in certain particulars; and

(c) the accused then knew the claim was false or fraudulent in these particulars.

2. Presenting:

(a) the accused presented for approval or payment to a certain person in the civil or military services of the United States having the authority to approve or pay it a certain claim against the United States or an officer thereof;

(b) the claim was false or fraudulent in certain particulars; and

(c) the accused then knew that the claim was false or fraudulent in these particulars.

The underlined portion in 2(a) above is the difference between making and presenting. In presenting, the claim must reach a person who has the authority to make payment. In making, the claim only has to get into official channels.

One last point should be made regarding presenting a false claim. You can present a false claim by receiving money from the government when you know you are not entitled to it. So, if your paycheck includes an allowance which you know you are not entitled to, you present a false claim when you cash the paycheck.

Under Article 132. making a false writing or using a false writing in connection with a claim requires a material and false statement to be made in writing. The offense is complete upon the making of the false paper or writing. The accused does not have to present the claim, make the claim, or make any attempt to use the false writing. The elements are:

1. The accused made or used a certain writing or other paper;

a. That certain material statements in the writing or other paper were false or fraudulent;

b. That the accused then knew the statements were false or fraudulent; and

c. That the act of the accused was for the purpose of obtaining the approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

The elements of the other claims offenses under Article 132 are:

2. False oath in connection with claims.

a. the accused made an oath to a certain factor to a certain writing or other paper;

b. That the oath was false in certain particulars;

c. That the accused then knew it was false; and

d. That the act was for the purpose of obtaining approval, allowance, or payment of a certain claim or claims against the United States or an officer thereof.

3. Forgery of signature in connection with claims.

a. That the accused forged or counterfeited the signature of a certain person on a certain writing or other paper; and

b. That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

4. Using forged signature in connection with claims.

a. That the accused used the forged or counterfeited signature of a certain person.

b. That the accused then knew that the signature was forged and counterfeited; and

c. That the act was for the purpose of obtaining the approval, allowance, or payment of a certain claim against the United States or an officer thereof.

5. Delivering less than amount called for by receipt.

a. That the accused had charge, possession, custody, or control of certain money or property of the United States furnished or intended for the armed forces thereof;

b. That the accused obtained a certificate or receipt for a certain amount or quantity of that money or property.

c. That for the certificate or receipt the accused knowingly delivered to a certain person having authority to receive it an amount or

quantity of money or property less than the amount or quantity thereof specified in the certificate or receipt; and

d. That the undelivered money or property was of a certain value.

6. Making or delivering receipt without having full knowledge that it is true.

a. That the accused was authorized to make or deliver a paper certifying the receipt from a certain person of certain property of the United States furnished or intended for the armed forces thereof;

b. That the accused made or delivered to that person a certificate or receipt;

c. That the accused made or delivered the certificate without having full knowledge of the truth of a certain material statement or statements therein;

d. That the act was done with intent to defraud the United States; and

e. That the property certified as being received was of a certain value.

L. 18 USC 1341 - Mail Fraud.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, load, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon. or at the place to which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both."

This section covers a wide range of activities under "scheme or artifice" and "by means of false or fraudulent pretenses." It does not require that the scheme be successful. It covers schemes for money, economic benefits, and intangibles which the courts have held to be property interests. The prosecution only has to show a scheme; it does not have to prove that the scheme worked. So, the prosecution does not have to prove that anyone lost money or other property because of the scheme.

The prosecution must show a specific intent to defraud, but circumstantial evidence may be used to prove the intent, using a totality of the

circumstances standard of proof. The courts have held that representations made with a reckless disregard for truth or falsity are sufficient to prove intent. The standard for "fraudulent" is whether a scheme was "reasonably calculated to deceive persons of ordinary prudence and comprehension." U.S. v. Bohonus, 628 F2d 1167 (9th Cir. 1964), cert. den. 65 L.Ed 2d 1122 (1965)).

Obviously, this section is aimed at offenders who seek to get money or other property through fraud. What constitutes property may not be obvious at first glance. The courts have held that intangibles can be property for the purposes of this section. One thing is clear with regard to intangibles: the intangible must be a property interest. The Supreme Court recently stated: "The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government" McNally v. U.S., 97 L.Ed 2d 292, 300 (1987). In McNally, the Court noted that there was no showing of loss to the government or the taxpayer and that "good government" or the loss of "good government" was not covered by Section 1341. The Court will accept an intangible as property, but it appears to be reluctant to expand its definition unless there is a showing of loss of some identifiable interest in property.

This section is titled "Mail Fraud". The use of the mails is an element of the crime, so it must be proved. The standard is that the use of the mails could be reasonably foreseen in the ordinary course of business. The use of the mails does not have to be by the accused, so long as the accused causes the use of the mails. The accused in U.S. v. Kenofaky, 243 US 440 (1917) filled out a phony death certificate which his supervisor mailed. Even though the supervisor was unaware of the scheme, the Court held that Kenofaky had used the mails. Anyone can use the mails, even the victim of the fraud or scheme.

A more difficult question is whether the use of the mails is for the purpose of executing the scheme. The most difficult question on this point is whether use of the mails after the receipt of money or anything of value is still for the purpose of executing the scheme. There is a temptation to say that once money is received, the scheme is complete and any use of the mails thereafter is incidental and not for the purpose of executing the scheme. This temptation should be avoided. You must look at factors in addition to the timing of the use of the mails.

In U.S. v. Maze, 38 L.Ed 2d 603 (1974), the accused stole his roommate's credit card and drove from Kentucky to California paying for motel rooms and meals with the stolen credit card. Maze was charged with mail fraud on the theory that the motels would mail the sales invoices (for the rooms) to the bank for payment. The government argued that even though Maze had already received rooms and meals, the fraud would not be discovered until the bank received the invoices. The time that the invoices were in the mail would delay discovery and aid Maze in further illegal use of the card. The Court disagreed. The Court found that things had been received and that the mailing did not affect the fraud. In fact, the Court pointed out that Maze would have preferred that the invoices never be mailed at all; if the invoices were never mailed, the fraudulent use of the card would never be discovered. As it was,

the mailing just settled things between the bank and the hotels, not between Maze and the bank, or Maze and the motels. Therefore, the Court said that the use of the mails was not in furtherance of the scheme.

U.S. v. Sampson, 9 L.Ed. 2d 136 (1962), illustrates how the use of the mails after receipt of money may still constitute "use of the mails" for the purpose of executing a scheme. The scheme in Sampson consisted of a phony company which was supposed to arrange loans for businesses or to help businessmen sell their businesses. The company's salesmen would con businessmen into paying an advance fee for the company's work. The salesmen would convert the fees into cashier's checks and then mail them to the home office. The home office would cash the checks and the money went into the personal accounts of Sampson and others in the scheme. The home office would send letters to the businessmen stating that the application had been accepted. The mailing also included a form letter which stated that financial data had been forwarded to various lending institutions (this was true; "rudimentary" data was sent to lending institutions). The letter also stated that there would be no refund of any fees. The Court found that the cover letters were sent out to lull the victims by making them think that services were being performed on their behalf. The Court noted that the indictments alleged that the cover letters had been part and parcel of the original scheme. The Court said Section 1341 would cover such a scheme. The mails were used throughout the scheme and the scheme was still ongoing even after the money was received.

M. 18 USC 1343 - Wire Fraud.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice shall be fined not more than \$1,000 or imprisoned not more than five years, or both." Wire fraud and mail fraud are very similar. The main difference is the requirement of interstate commerce under wire fraud. In other words, wire fraud must cross state lines, mail fraud does not have to cross state lines.

With the exception of interstate or foreign commerce, the wire fraud statute is interpreted by the courts in the same way as the mail fraud statute. It is given a broad interpretation as far as the scheme, the intent to defraud, the use of wire transmissions, and the execution of the scheme.

N. 18 USC 1029 - Fraud and Related Activity in Connection with Access Devices.

One of the things that this section does is to cover the opening left by U.S. v. Maze and cases like it. There is now no argument over use of the mails with credit cards. It is the use of the card itself that is penalized, and the courts do not need to consider the aftermath to determine if there was a violation.

O. 18 USC 641 - Public Money, Property, or Records.

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with the intent to convert it to his use or gain knowing it to have been embezzled, stolen, purloined or converted--

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of \$100, he shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater."

This offense also has a broad interpretation. The thing of value can be anything; examples include contraband liquor which the government had seized, military property that had been designated surplus and set aside for disposal, unmachined duralumin (an aluminum and copper alloy), undelivered government checks, tip money for employees of a noncommissioned officer's club, a government check payable to the Rocky Mountain Arsenal, and scrap metal ammunition which had been left in an open area accessible to the public. The courts do not require the government to prove that the accused knew the property belonged to the government. The courts have used a broad definition of "embezzles", requiring only control over the property, not the traditional position of trust that embezzlement requires.

P. 18 USC 371 - Conspiracy to Commit Offense or to Defraud United States.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The gist of this offense is the agreement to commit a crime. The offense is not complete until some overt act is done in furtherance of the crime. The rationale for this offense is that the agreement between people to commit an offense is a danger in and of itself. Even though an overt act is needed, the substantive crime does not have to be carried out.

A conspiracy may be formed by any number of people, and any number may subsequently join or leave the conspiracy. The conspirators do not need to know the precise part which the others will play or even the identity of all of the others. The parties are liable for all acts done by co-conspirators in furtherance of the conspiracy. A conspirator may withdraw and not be liable for acts done after the withdrawal as long as he can show affirmative evidence of his withdrawal. The burden is on the accused to show the withdrawal. For example, clear evidence of withdrawal from a conspiracy is when one of the co-conspirators reports the conspiracy to law enforcement officials. Merely making oneself scarce or for unexplained reasons having limited or no contact with fellow conspirators after the conspiracy has been formed probably will not be found to be a withdrawal from the conspiracy.

The overt act does not have to be criminal, nor does it have to be the intended crime itself. The conspiracy and the crime itself are separate offenses and may be separately punished.

PART C - INVESTIGATIVE TOOLS

A. Military Search Authorization.

Military Rule of Evidence 315 defines an authorization to search as an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence or person. Military personnel may be searched wherever found; anyone or anything within military control may be searched pursuant to an authorization. The Manual requires a probable cause determination by the authorizing official. The determination may be made based upon oral, written, or telephonic communications. The authorization may be given by a commander, with authority over the area or person to be searched, a military judge, or (in the Army) a military magistrate (paragraph 9-7, AR 27-10).

B. Search Warrants Under the Federal Rules of Criminal Procedure.

Rule 41 of the Federal Rules of Criminal Procedures sets out the rules for searches in the federal system. The warrant may be issued by a federal magistrate/judge or a judge of a state court of record within the district where the person or property to be searched is located. The warrant may be requested by an attorney for the government or by a federal law enforcement officer. Military agents of the department of defense who are authorized to enforce the UCMJ are included in the definition of "federal law enforcement officer" (28 CFR Part 60).

The federal rule normally requires a sworn affidavit setting out the grounds for the requested warrant. The magistrate can require the affiant to appear personally and to be examined under oath to help in determining whether probable cause exists.

Once the warrant is issued, it must be executed in the daytime unless the warrant states that it may be executed at other times ("daytime" is between 0600 and 2200 local time per Rule 41(h)). The warrant must be executed within 10 days and a civilian law enforcement officer must go with you if the search is off post (CIDR 195-1, paragraph 5-33b(3)). A copy of the warrant and a receipt for any property seized will be given to the person whose premises were searched. If no one was present when the search was conducted, a copy of the warrant and the receipt will be left at the premises. The warrant and the inventory must be returned to the official who issued the warrant.

If you are working a case and feel that a federal search warrant may be needed, the Assistant United States Attorney must be contacted and briefed prior to requesting the warrant (paragraph 5-33c, CID Regulation (CIDR) 195-1). Examples of affidavits, warrants, and returns are contained in Appendix N, Figures 47 and 48, CIDR 195-1.

C. Inspector General Act of 1978: 5 USC App 3 8 6(a)(4).

This section was enacted to give several agencies of the government the power to conduct audits and investigations of their programs and operations. The Department of Defense is one of the listed agencies. The Act provides for an inspector general for each of the departments. Each inspector general has the duty to report criminal violations to the Attorney General. The inspectors general (IGs) also have the responsibility of recommending actions to cure abuses or deficiencies in the operations of their respective departments.

The tool which the Act gives to each IG is the subpoena. The subpoena may be enforced by the Federal District Courts (Section 6(a)(4)). The subpoena may be for any information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by the Act. Note that this does not empower the IG to subpoena people for oral testimony. The subpoena only covers records, papers, etc. Since the IG's responsibilities under the Act are very broad, the areas which may be investigated are similarly broad. For instance, the IG can subpoena records when investigating with a view toward increasing efficiency. Obviously, the subpoena in such an instance would be very broad. It would have to be broad to carry out the stated functions. The IG would have to have enough information to evaluate the present program. The Department of Defense IG has stated that one of the IG functions is to provide leadership in promoting efficiency, economy, and prevention and detection of fraud and abuse (DOD Directive 5106.1, dated 14 March 1983). The DOD IG cited the directive in a 19 September 1983 memorandum to the Secretaries of the Army, Navy, and Air Force. The memorandum implements the authority of the DOD IG to issue subpoenas in support of DOD IG investigations. The memorandum sets out procedures for issuance of DOD IG subpoenas. When a DOD audit or investigative agency wants a subpoena, the agency is to request it through the Assistant IG for Criminal Investigations and Policy Oversight. If the IG feels the subpoena is appropriate and within the IG function, the subpoena will be issued.

When you desire a subpoena from the DOD IG, prepare a request covering the five following areas:

1. Background of the investigation.
2. The reasons justifying the request.
3. Description of the documents.
4. The date and time for turning over the documents.
5. Evidence (if any) that the subpoena will be challenged.

When you describe the documents (number 3 above) be as specific as you can. Although the courts will allow considerable leeway, a challenge can be made based upon unreasonableness. Also, this may save you from examining irrelevant documents. Include in the justification (number 2 above) both your reasons why the documents are needed and why a subpoena (rather than some other means of access, e.g., consent) is necessary. Examples of a request for a subpoena, the subpoena itself, a privacy act statement, and the cover letter for the subpoena may be found in Figures 57-60, Appendix N, CIDR 195-1, dated 1 Nov 86.

Do not be concerned over possible Posse Comitatus violations here; the Act itself (section 8(g)) states that Posse Comitatus does not apply to audits and investigations by the DOD IG.

As stated above, the courts will interpret the statute broadly. As long as four criteria are met, the courts will enforce an administrative subpoena. The four criteria are:

- a. Is the investigation for a legitimate purpose?
- b. Is the inquiry relevant to the legitimate purpose?
- c. Is the information sought in the possession of others than the agency?
- d. Were the required administrative steps followed?

If all of the above are met, the courts will enforce the subpoena. U.S. v. Powell, 13 L.Ed 2d 112. (1964). The courts will step in only when the subpoena is so unrelated to the inquiry that it amounts to exceeding the investigatory power. U.S. v. Morton Salt Co. 94 L.Ed 401 (1950). This means that the standard for issuing the subpoena is not as high as probable cause; it is a standard of reasonableness and relevance.

D. Grand Jury Subpoena: Federal Rule of Criminal Procedure 41.

The grand jury is an investigative body or tool of the U.S. Attorney. The grand jury has broad investigative authority, so it (like the IG) has broad

subpoena power. The grand jury does not have to establish probable cause to issue a subpoena. The standard is one of reasonableness. U.S. v. Dionisio, 315 L.Ed 2d 67. (1973).

The grand jury is allowed this broad leeway because it is an investigative body.

Its proceedings require secrecy; it must be free to conduct its ongoing investigations without information becoming public. Disclosure of its proceedings would allow crimes to be covered up and would lead to obstructions of proper law enforcement. The secrecy rule protects the identity of witnesses and the substance of their testimony. The identity of witnesses must be protected; this can be a life or death question. Their testimony must be protected because it could reveal the direction of an investigation which is still ongoing. Advance knowledge of the steps of an investigation would allow a wrongdoer to destroy evidence, intimidate witnesses, or engage in other actions which would hamper the investigation.

The rule (6)(e)(2) itself states:

General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph 3(a)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Rule 6(e)(2) sets out the secrecy requirement and the penalty for a violation of it. The courts enforce its requirements strictly. The Supreme Court has enforced the secrecy requirement even after the grand jury has been discharged, Douglas Oil Co. v. Petrol Stops Northwest, 60 L.Ed 2d 156 (1979). The courts will only allow disclosure when there is a demonstrated need which outweighs the general need for secrecy. The Court (in Douglas) set out the following test for release of grand jury transcripts:

The party seeking transcripts must:

1. show that the material they seek is needed to avoid a possible injustice in another proceeding;
2. show that the need for disclosure is greater than the need for continued secrecy; and
3. show that their request is narrowed to cover only material that is needed to prevent the injustice.

The district court which supervises the grand jury should rule on requests for disclosure. The supervising court will make a written evaluation of the need for secrecy weighed against the need for disclosure; (2) the court which is

trying the case then considers this evaluation and balances it against the need for the evidence in the case before it. So, before the information is released, two judges have made an evaluation of the need for secrecy. This two-step process underscores how closely the courts guard against violating the rule of secrecy.

Note that the Douglas case dealt with releasing information for use in a lawsuit. This is one of the exceptions to the rule of secrecy. Rule 6(e)(3)(c)(i) allows disclosure "when so directed by a court preliminarily to or in connection with a judicial proceeding." The court defined "judicial proceeding" narrowly in U.S. v. Baggett, 77 L.Ed 2d 785 (1983). Baggett had been under a grand jury investigation for phoney commodities transactions. Eight months after Baggett pled guilty to two misdemeanors (without an indictment ever being issued), the Internal Revenue Service requested disclosure under Rule 6(e)(3)(c)(i) for use in an IRS audit. The Court found that a taxpayer has four options when faced with an audit: (1) pay the tax, (2) petition the tax court for a reduction, (3) pay the tax, go through the administrative process and then sue in the court of claims for a refund, or (4) do nothing and wait for the IRS or the government to take steps to collect the tax. The Court found that an IRS audit was not a judicial proceeding. The Court then said that numbers 2 and 3 (above) were judicial proceedings. The question then, was whether the IRS audit was "preliminary to" either of the two judicial proceedings; if it is, there may be a disclosure; if not, then no disclosure. The IRS argued that litigation was likely and it is wise to prepare an administrative action well enough to be able to defend it in court; therefore, the audit was "preliminary to" a judicial proceeding. The Court disagreed and said that the question was one of the actual use to which the material would be put. The primary purpose of the disclosure must be to assist in preparing for or conducting a judicial proceeding. The fact that a judicial proceeding might or is likely to occur is not enough. The IRS is not required to resort to litigation after an audit; any of the four options might be used by the taxpayer. So, once again, the Court has rule against disclosure of grand jury information unless a definite need can be established.

As an investigator, you may feel that grand jury information should be made available to you under Rule 6(e)(3)(a)(i) or (ii), which allow disclosure to a U.S. attorney. The Court keeps this exception narrow also. In U.S. v. Sells Engineering, 77 L.Ed 2d 743 (1983), the Court ruled that 6(e)(3)(a) does not include government attorneys who are litigating civil cases. The Court ruled that civil division attorneys must apply for a court order to obtain grand jury information, they may not rely on the exception for government attorneys. The Court then stated that the procedure to be used for release is the same as was stated in Douglas Oil; the supervising court evaluates secrecy versus the need for disclosure, makes a recommendation to the second court which balances the need for secrecy recommendation against the need for disclosure in the case at hand.

With such strict controls placed on disclosure, the U.S. attorneys must be very careful about disclosure of grand jury information; so, do not be surprised if a request for information is denied.

Note that the reason for the secrecy is partly to protect the grand jury's ongoing investigation. Therefore, the secrecy rule does not cover information that the government obtains by investigation independent of the grand jury. This independently gathered information may be presented to the grand jury, but this presentation does not automatically make the information subject to Rule 6e. However, because the rule of secrecy is broad and is enforced by the court's contempt powers, U.S. attorneys will be very reluctant to release information once it has been subpoenaed by a grand jury. The safest procedure is to coordinate with the U.S. attorney and try to get the documents before they are subpoenaed by a grand jury. When in doubt, the attorney must decide in favor of not releasing the information. "Finally, an IG subpoena is not subject to these secrecy rules. This subpoena is a viable alternative to a Grand Jury subpoena when the intention is to pursue other than criminal remedies."

E. Income Tax Records: 26 USC 6103a.

Section 6103(a) is the general rule, which states: Returns and return information shall be confidential, and except as authorized by this title--

1. no officer or employee of the United States
2. no officer or employee of any state or of any local child support enforcement agency, or any local agency administering a program listed in subsection (e)(7)(D), who has or had access to returns or return information under this section, and
3. no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), subsection (m)(4)(B), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

The "return" is defined as any tax return, a declaration of estimated tax, or claim for refund which is filed by or on behalf of the taxpayer. This includes any amendments to a return, any supporting schedules, attachments, or lists which are supplemental to, or attached to the form.

"Return information" means a taxpayer's identity, the nature, source, or amount of his income, payments, receipts deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments. It also means information on whether the taxpayer's return was, is, or will be examined or subject to investigation or processing or any other data received, recorded, or prepared by, or furnished to or collected by the secretary with respect to a return or with respect to the determination of the existence, or possible existence of liability (or the amount of liability of any person for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and any part of a written determination or background file document relating to the determination which

is not open to public inspection under Section 6110 (Public Inspection of Written Determinations). Return information does not include data in a form which cannot be associated with, or otherwise identify, even indirectly, a particular taxpayer.

The purpose of this section is to assure taxpayers that their returns and information will not become public knowledge. However, persons who have a legitimate need for the information have to have a means of access to the information. The first means is Section 6103(c) which allows release upon consent of the taxpayer. Release may be denied, however, if it would seriously impair tax administration.

The next way to obtain the information is under 6103(i), (disclosure to federal officers or employees for administration of federal laws not relating to tax administration). Subsection (1), Nontax Criminal Investigation, provides for disclosure pursuant to an order by a federal district court judge or magistrate. The disclosure will be limited to information necessary for preparation for or use in any administrative or judicial proceeding (or an investigation which may result in such a proceeding) pertaining to enforcement of a federal criminal statute which does not involve tax administration. The proceeding must be one to which the United States may be a party. This provision includes federal grand jury proceedings. The judge or magistrate will issue the order if there is reasonable cause to believe a specific criminal act has been committed; that the information sought is or may be relevant to matters concerning the commission of the criminal act; and the information is sought solely for a federal proceeding regarding the criminal act and the information cannot be reasonably obtained from another source.

The statute also provides for release of return information by the Secretary of the Treasury when he/she feels there is evidence of a violation of federal criminal law. The Secretary may release the information to the head of the federal agency which is charged with enforcing the law in question.

F. Fair Credit Reporting Act: 15 USC 1681.

This statute was passed to ensure that consumer reporting agencies adopt reasonable procedures for providing consumer credit information fairly, accurately, and that the information will be properly used. "Consumer report agency" means any person who, either for profit or nonprofit, regularly engages in assembling or evaluating consumer credit information on consumers for the purpose of furnishing consumer reports to third parties and uses any means of interstate commerce to prepare or furnish the reports. Subsection 1681b sets out the circumstances which allow disclosure of a consumer report. Of these circumstances, the easiest is 1681b(2), in accordance with the written instructions of the consumer to whom the consumer report relates.

Even if consent is not given, certain information may be given to a government agency: (1) name, (2) address, (3) former address, (4) place of employment, and (5) former places of employment (Section 1681f).

Finally, Section 1681(1) provides for release in response to a court order. So, the act does intend that consumer credit information remain confidential, but the Act does give two ways to get the information (consent and court order) and it does provide for release of information that may be a valuable investigative tool.

G. Right to Financial Privacy Act: 12 USC 3401.

This act strictly limits the government's access to financial records. The term "financial record" includes not only copies of records but also any information known to have been derived from a record held by the financial institution.

If you need financial records, the easiest option is to get consent from the customer. Sections 3402(1) and 3404 provide for release to the government upon written consent of the customer. The consent under 3404 is limited to a period of three months or less, must state that the customer may revoke the consent at any time before the records are disclosed, must state to which government authority and for which purposes the records may be used, and states the customer's rights under Section 3404 (the fact that a financial institution cannot require such a consent as a condition of doing business and that the customer can obtain a copy of the record of all releases made to the government under Section 3404). CIDR 195-1 has samples of the customer consent form (Figure 62) and a notification of the customer's rights (Figure 63).

The next possible option is a formal written request under Section 3408. Section 3408 sets out basic requirements for the formal written request. First: no administrative or judicial subpoena authority appears available to the government authority seeking the records. Second: the request is authorized by regulations promulgated by the head of the agency or department. Third: there is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry; and a copy of the proper notice is either served upon the customer or mailed to his last known address on or before the date of the request to the financial institution. The notice must state the nature of the law enforcement inquiry with reasonable specificity. The notice, as set out in Section 3408, is:

"Record or information concerning your transactions held by the financial institution named in the attached request are being sought by this (agency or department) in accordance with the Right to Financial Privacy Act of 1978 for the following purpose:

"If you desire that such records or information not be made available, you must:

"1. Fill out the accompanying motion paper and sworn statement or write one of your own, stating that you are the customer whose records are being requested by the Government and either giving the reasons you believe the records are not relevant to the legitimate law

enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

"2. File the motion and statement by mailing or delivering them to the clerk of any one of the following United States District Courts:

"3. Serve the Government authority requesting the records by mailing or delivering a copy of your motion and statement to

"4. Be prepared to come to court and present your position in further detail.

"5. You do not need to have a lawyer, although you may wish to employ one to represent you and protect your rights.

If you do not follow the above procedures, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of this notice, the records or information requested therein may be made available. These records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event you will be notified after the transfer"

If the customer is served personally, he has 10 days to challenge the request in court; if the notice was mailed, the customer has 14 days from the date of the mailing of the notice to challenge in court. If the applicable time period passes without the challenge, the financial institution will disclose the information.

If the customer wants to challenge the request, he must file a motion in the appropriate federal district court with an affidavit stating that he is a customer of the institution and stating his reasons for believing that the financial records sought are not relevant to a legitimate law enforcement inquiry and/or there has not been substantial compliance with the Right to Financial Privacy Act. The court then orders the government to make a sworn response. The court can decide the matter based on the initial allegations of both sides. If the court needs more than the allegations, it can conduct such proceedings as it deems appropriate. The court then either denies disclosure, or orders disclosure, as appropriate.

The notice requirement of 3408 may be delayed by the appropriate court if there is reason to believe that the notice will result in:

1. endangering the life or physical safety of anyone;
2. flight from prosecution;
3. destruction or tampering with evidence;
4. intimidation of potential witnesses; or

5. seriously jeopardizing an investigation, official proceeding, unduly delaying a trial or official proceeding to the same extent as 1 through 4 above.

The court will grant a delay of up to ninety days and may grant further delays upon application of the government. The court will also prohibit the financial institution from disclosing that records have been obtained. When the delay ends, the customer must be notified that records were disclosed, the reason for the delay, and the purpose of the investigation or official proceeding.

Finally, Sections 3406 and 3407 provide for disclosure pursuant to a search warrant or a judicial subpoena. The search warrant must be in compliance with the Federal Rules of Criminal Procedure. The judicial subpoena requires notice to the customer on or before the date it is served on the financial institution. The notice includes why the information is being sought, how to file a motion challenging release, and that the motion must be filed within 10 days of personal service or 14 days of service by mail, or the records will be disclosed.

H. Interception of Wire and Oral Communications: AR 190-53.

The requirements of AR 190-53 must be followed strictly. This is an area which breeds lawsuits. Paragraph 1-4c of AR 190-53 underlines this concern:

Interception of wire and oral communications is a special technique which shall not be considered as a substitute for normal investigative procedures and shall be authorized only in those circumstances where it is demonstrated that the information is necessary for a criminal investigation and cannot be obtained in some other less intrusive manner.

The regulation permits nonconsensual intercepts in the United States only if an offense listed in 18 USC 2516(1) is suspected. 18 USC 2516 covers (among others) treason, espionage, sabotage, and riots. It also covers murder, kidnapping, robbery, extortion, bribery of public officials, bribery in sporting contests, transmission of wagering information, influencing jurors or witnesses, obstruction of criminal investigations, manufacture, sale, importation, buying of marihuana, or other dangerous drugs, and conspiracy to commit any of the above. Overseas, the regulation permits a military judge to approve a nonconsensual intercept if the offense is murder, kidnapping, gambling, robbery, bribery, extortion, espionage, sabotage, treason, fraud against the United States, or dealing in marihuana, narcotic, or other dangerous drugs. It also includes any other offense dangerous to life, limb, or property, and punishable by confinement for one year or more; the offenses listed in 18 USC 2516(1); any offense punishable under Title 18 USC by death or confinement for one year or more if a fraud against the United States or if dangerous to life or limb, or property; and conspiracy to commit any of the above offenses.

Consensual intercepts may be made for the investigation of offenses punishable under the USC or the UCMJ by death or confinement for one year or more, and telephone calls involving obscenity, harassment, extortion, bribery, bomb threats, or threats of bodily harm. The calls must have been made to a person authorized to use the telephone of a subscriber-user on an installation, building, or part thereof under DOD jurisdiction. The subscriber-user must have consented to the intercept and a party to the conversation must consent. (Note: any person authorized to use a government telephone is a "subscriber-user," so many times a party to the call is also the "subscriber-user".) Note that the use of a telephone extension to monitor a call with the consent of a party is not an intercept for the purpose of this regulation, if done solely for a valid law enforcement purpose (paragraph 1-4h).

What is an interception? It is the oral acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device. "Electronic, mechanical, or other device" means anything which can be used to intercept a wire or oral communication other than telephone equipment (including extensions) furnished commercially or by the Army in the ordinary course of business and used by the subscriber or user in the ordinary course of duty. A pen register does not intercept the content of a conversation and, therefore, normally does not require the same approval as does an intercept; but, if a pen register is to be used in conjunction with an intercept, the intercept procedures apply to both the intercept and the pen register. Telephone tracing ("locking-out" and "trapping") is not considered an intercept, but its use is governed by AR 190-53 and CIDR 195-1.

Approval authority for consensual intercepts is the Secretary of the Army, the Under Secretary of the Army, the Army General Counsel or, in their absence, the DOD General Counsel. The request should be forwarded through USACIDC command channels to Hq, USACIDC, for approval. The Commanding General, HQ, USACIDC, must approve the request. If not, the request will be returned to the field." The request should include the facts and circumstances requiring the interception, how, where, and for how long it will be conducted, whose conversation will be intercepted, and what part they have in the offense, and a statement that in your judgement the intercept is in the interest of effective law enforcement. If approval is given, it will be for 30 days in the U.S. and may be for up to 60 days outside the U.S. If more time is needed a request for renewal must be made. This request is made the same way, with the same justifications, as the original request. All consensual intercepts must be ended when the evidence sought is obtained or when it is determined that the intercept is nonproductive (paragraph 2-5, AR 190-53).

Nonconsensual intercepts in the United States will be done under court order. The approval authority is the DOD General Counsel. The case is then coordinated with the Justice Department. If the Attorney General approves the request, a Justice Department attorney will apply for a court order. If you need an intercept, you must send the request through your region commander to the CDR, USACID. The request must include the following information: (1) who is making the request; (2) the facts behind the request, to include the offense, the type of communication you want to intercept, and why it is

relevant; (3) the place and nature of the facilities where the interception will be made; (4) identity of the person committing the offense and whose communications will be intercepted; (5) what other procedures have been tried and why they failed or would fail or be dangerous; (6) the type of equipment to be used to make the intercept; (7) the time period for the intercept; (8) the safeguards to minimize acquiring, retaining, and disseminating communications which are irrelevant to the case; (9) a statement concerning the facts of any previous applications regarding the same persons, facilities, or places, and the result of such and, if you apply for an extension, you must set forth the results so far, or an explanation of why no results were obtained yet. Remember, if you use a pen register as part of an intercept, you must follow these procedures for the pen register too.

If the intercept is abroad, follow the procedures outlined above if you want to target a person subject to the UCMJ. The approval authority is the DOD General Counsel. If approved, the request will be submitted to a military judge. The military judge will authorize the intercept if, using a probable cause standard, it appears that a person subject to the UCMJ is involved in committing one of the offenses listed previously. The military judge then must decide that normal measures will not succeed or are too dangerous; and finally, that no violations of the relevant treaties or host country law will occur. The order will narrowly state whose communications will be intercepted, where it will be done, the type of communication sought and to what offense it relates, what agency may perform the intercept, how long it may run, and that it shall be done in a way to minimize intercepting irrelevant communications. You should understand that this intercept should be coordinated with the Host Nation prosecutor before seeking approval from the DOD General Counsel. This will ensure that such intercepts do not violate Host Nation laws or agreements the United States has with the Host Nation.

If you need a nonconsensual intercept of a person not subject to the UCMJ, use the procedures for nonconsensual intercept within the United States. The approval procedures are the same as those for nonconsensual intercept within the United States. This intercept should be coordinated with the Host Nation prosecutor for the same reasons discussed in the paragraph next above. Further, you should understand that there is an unresolved issue as to which Federal District Court would have jurisdiction and willingness to issue an order to conduct an overseas intercept.

Telephone tracing is governed by paragraphs 4-1 and 4-2 of AR 190-53 and paragraph 5-27d, CIDR 195-1. Approval of consensual tracing may be given by the installation commander; the commander, USACIDC; or the region commander.

There is a provision for emergency intercepts, but the approval levels are still the DOD General Counsel and the Attorney General.

In all instances when you need an intercept, coordinate with JAG. This is a complex area, it can be an emotional area, and it can be a breeding ground for lawsuits.

I. Consent to Search.

You have studied some of the investigative tools available to you; some are complex, some are simple. Do not overlook the most obvious tool: the consent search. It is easy to forget this or to assume that a sophisticated criminal will turn you down. The sophisticated criminal may give consent out of arrogance, or he may not be as sophisticated as was thought.

Consent searches are easy because they do not require the foundation that other searches require. You do not have to have probable cause to ask for consent to search. All the courts require is that you show that the consent was freely and voluntarily given by a person who is lawfully in control of the property. One of the things that makes the consent search so easy and so effective is that even though a person has the right to refuse, to limit the search, and to stop at any point; the courts do not require you to advise the subject of these rights. Schneckloth v. Bustamunte, 25 L.Ed 2d 854 (1978). Giving consent to search is not self-incrimination, so Article 31 is not required when you ask for consent. U.S. v. George, 9 MJ 607 (ACMR 1980). The courts will look at all of the surrounding circumstances to decide if consent was freely given. Was the accused sober? Was he under apprehension? Who asked for the consent? Were there any threatening poses or gestures? In U.S. v. Chase, 1 MJ 275 (CMA 1976), a gate guard said: "Good morning, sir. I am making a search of vehicles. Would you mind opening your van?" The court held this to be a show of authority and that the accused backed down rather than consented. Perhaps this would have been a valid consent if the act had occurred anywhere but the gate, where people expect to be checked or even searched. The point is that the courts will look at all of the circumstances to see if the consent was freely given.

The suspect can turn you down. He can limit you, or he can stop the search at any time. What if he inquires, "What happens if I don't consent?" Tell him that you will try to get a search authorization. This leaves him feeling that he still has his rights intact. It avoids unnecessary litigation over voluntariness. Although the courts have allowed consent searches when the officer said he would get a search authorization (U.S. v. Nicholson, 1 MJ 616 (ACMR 1975)), this approach just creates needless litigation. Tell him you will try to get the authorization and avoid the unnecessary fight. You do not have to tell him what you are looking for, unless he asks you. If he asks, tell him, but there is no requirement to volunteer the information. When you tell him what you are looking for, you limit your search to the areas large enough to hold the object of your search. U.S. v. Stroecker, 17 MJ 158 (CMA 1984). If you do not put in this limitation and he does not either, you may look anywhere you want. He may stop your search at any time, but you are entitled to clear notice that the search is to stop. If a suspect tries to hide something during your search he has not given you clear notice to stop and you may seize any item (Stroecker, supra).

Remember, anyone lawfully in control of property may give consent. So, a person who borrows a car may give consent to search the car. If two people share control of property, both can consent. If you are not sure who has control, get a search authorization. The courts do not have a "good faith rule" regarding consent searches; we have to get consent from someone who is lawfully in control of the property.

CONCLUSION.

You now have the knowledge of economic crimes-the offenses, the investigative tools available to you, and practical advice on how to use the tools. You have the foundation to investigate economic crimes and to thereby aid in their elimination and in the conviction of the offenders.

LESSON 1

PRACTICE EXERCISE

1. The installation commander gave his 13-year-old son 100 shares of Phaully Phrames stock that he (the commander) owned. The commander made the gift partly because Phaully Phrames sells equipment to the installation under a basic ordering agreement and he did not want to violate The Joint Ethics Regulation. Which of the following is true?

- A. He is no longer violating The Joint Ethics Regulation.
- B. He was never violating The Joint Ethics Regulation.
- C. He is not violating The Joint Ethic Regulation if the son is still a minor.
- D. He is still violating The Joint Ethics Regulation.

2. Colonel Malarchuk has worked for the last year negotiating with civilian firms regarding specifications for the Le Page antiaircraft gun. He is one year from retirement and has made several calls to the same defense contractors, who are working on the Le Page, regarding future employment. Which of the following is true?

- A. He has violated The Joint Ethics Regulation because he participated personally and substantially for the government in the Le Page project.
- B. He has violated 18 USC 371 by conspiring with a defense contractor.
- C. He has violated 18 USC 1343 by making illegal job hunting calls.
- D. He has committed no violation of the U.S. Code or Army regulations.

3. Mr. Ruth is the president of Tidal Landscapes, a company which sells submerged real estate to the unwary. He conducts all of his sales pitches by telephone to buyers within the state but far enough away that they won't drive down to inspect the land. He tells them that the land sits high on a bluff far from any water. Which of the following is true?

- A. He is guilty of mail fraud, 18 USC 1341.
- B. He is guilty of wire fraud, 18 USC 1343.
- C. He is guilty of conspiracy, 18 USC 371.
- D. None of the above.

4. Mr. Mantle of McClaymores, a fast food chain, offers the post contracting officer a year's supply of hamburger meat if he will award the on-post restaurant franchise to McClaymores. The officer turns him down. Which is the correct statement about Mantle's actions?
- A. He violated 18 USC 201b when he made the bribe offer.
 - B. He has not violated 18 USC 201b yet because no money changed hands.
 - C. He has not violated 18 USC 201b because the contracting officer turned him down.
 - D. None of the above.
5. The contracting officer awarded the on-post restaurant franchise to Burger Serf. The president of Burger Serf was overcome with joy and presented the contracting officer with a \$300 gas barbecue grill. Can the officer keep the grill?
- A. Yes, because the gift came after the franchise was awarded.
 - B. Yes, because the gift did not influence the decision.
 - C. No. The gift is an illegal gratuity; it doesn't matter when it was given.
 - D. None of the above.
6. A nonconsensual telephone intercept in the United States may be approved by:
- A. The installation commander.
 - B. The region commander.
 - C. The Staff Judge Advocate.
 - D. The DOD General Counsel.
7. Lieutenant Thorpe filled out a fraudulent claim for damages which occurred during his recent PCS move. He left the fraudulent forms at his quarters, never putting them in official channels.
- A. Lieutenant Thorpe has made a false claim under Article 132.
 - B. Lieutenant Thorpe has presented a false claim under Article 132.
 - C. Lieutenant Thorpe has made a false writing in connection with a claim under Article 132.
 - D. None of the above.

8. Mr. Johnson sells nuts and bolts to the Army. The Army requires that he fill out a form which covers several areas regarding his product. One question on the form asks whether his product contains any lead alloys. He puts a check mark in the "NO" column even though he knows the bolts have a lead alloy in them. What, if any, offense has he committed?

- A. False statement: 18 USC 1001.
- B. Wire fraud: 18 USC 1343.
- C. Conspiracy: 18 USC 371.
- D. None of the above.

9. Your partner just returned to the office in a state of confusion. He had asked a soldier (suspect) for consent to search without reading the soldier an Article 31 warning. Your partner cannot remember if he acted properly. Did he?

- A. No. He must give an Article 31 warning whenever he speaks to a suspect.
- B. Yes. Soldiers have no Article 31 protection.
- C. Yes. Consent to a search is not covered by Article 31.
- D. No. Searches always require an Article 31 warning.

10. You want to apply to a federal judge for a search warrant. Your partner says you cannot do so. Who can apply for a federal search warrant?

- A. Only members of the FBI.
- B. Only Treasury agents.
- C. All federal law enforcement officers, except military agents of DOD.
- D. All federal law enforcement officers, including military agents of DOD.

LESSON 1

PRACTICE EXERCISE

ANSWER KEY AND FEEDBACK

<u>ITEM</u>		<u>CORRECT ANSWER AND FEEDBACK</u>
1.	D.	He is still violating The Joint Ethics Resolution. Except as permitted by... (page 1-24, para H).
2.	A.	He has violated The Joint Ethics Regulation... Except as permitted by...(page 1-24, para H).
3.	D.	None of the above. Whoever, having devised...(page 1-39, para L). Whoever, having devised...(page 1-41, para M). If two or more persons...(page 1-42, para P).
4.	A.	He violated 18 USC 201 b when he made the... Whoever, directly or indirectly...(page 1-19, para C1).
5.	C.	No. The gift is an illegal gratuity, it doesn't... If a contracting officer...(page 1-21, para D2).
6.	D.	The DOD General Counsel. The approval authority is...(page 1-53, para 4).
7.	C.	Lieutenant Thorpe has made a false writing. Under Article 132, making...(page 1-37, para 2).
8.	A.	False statement: 18 USC 1001. Whoever, in any matter...(page 1-34, para J).
9.	C.	Yes: Consent to a search is not covered by Article 31. Giving consent to search is...(page 1-55, para 2).
10.	D.	All Federal law enforcement officers including... Rule 41 of the Federal Rules...(page 1-43, para B).

APPENDIX A

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