# CONSTITUTIONAL LAW AND CIVIL RIGHTS

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**STUDENT READING ASSIGNMENT:** The Constitution of the United States
1. HISTORICAL BACKGROUND

Americans lived under colonial charters for over 100 years, but violations of the "rights of Englishmen" by colonial governors and lesser officials led the colonies to seek severance from England by declaring their independence. The Declaration of Independence by the thirteen colonies did not create any new law. Its purpose and effect was to create thirteen separate and individual sovereigns (states) and to present a united front against the British Crown. The Revolutionary War provided the first real impetus for unity among the states since each was attempting to throw off the English yoke, but the colonies were jealous of their new independence and were not ready to relinquish it to a strong central governing body.

It soon became apparent, however, that a central government was necessary to carry on the day-to-day affairs of the nation. As a result, the Articles of Confederation, providing for a national government, were approved in 1781. Deliberately kept weak by the authors, the national government under the Articles soon became virtually impotent by dint of the lack of such fundamental necessities as a chief executive, the right to regulate commerce, and the power to levy taxes.

2. FRAMING THE CONSTITUTION OF THE UNITED STATES

By the mid 1780's it was clear that the Articles of Confederation had to be replaced by a more viable form of government. In May of 1787, delegates from the states met in Philadelphia "for the sole and express purpose of revising the Articles of Confederation..." The product of this convention was the Constitution of the United States.

Agreement as to representation in Congress came as a result of the Connecticut delegation's proposal of equal representation in the Senate and proportional representation in the House of Representatives, known as the "Great Compromise." This healed the breach between the large states, supporting the Virginia
plan which called for representation in proportion to population, and the small states, supporting the Patterson plan of equal representation by states.

The Constitution created a limited central government by reserving for the people all powers not specifically or impliedly granted to the national government and through the establishment of a dual system of government with co-existing and equal sovereignties.

3. LEGISLATIVE BRANCH

The legislature or Congress consists of the Senate and House of Representatives and exercises all of the lawmaking powers of the United States.

A member of the House of Representatives must be 25 years of age, a citizen of the United States for 7 years, and an inhabitant of the state in which he is chosen.

A member of the Senate must be 30 years of age, a citizen of the United States for 9 years, and an inhabitant of the State in which he is chosen. Originally elected by the state legislatures for a term of 6 years, Senators are now elected directly by the people.

All revenue bills and impeachment proceedings originate in the House of Representatives, and the Senate tries all impeachment proceedings.

Members of Congress are immune from arrest while Congress is in session or while traveling to or from Congress except for treason, a felony, or a breach of the peace, and they may not be questioned or subject to suit for any speeches they make in Congress.

4. EXECUTIVE BRANCH

The Executive Branch of government is headed by the President who, like the Vice-President, must be a natural born citizen, thirty-five years of age and a resident of the United States for fourteen years.
The President is Commander-in-Chief of the Armed Forces. He has the power to grant reprieves and pardons for Federal offenses, and make treaties and appointments with the advice and consent of the Senate.

The President is charged with the execution of the laws of the United States. The executive department most concerned with the litigation involving these laws is the Department of Justice.

The chief executive officer of the Department of Justice is the Attorney General, who has supervisory control over all United States Attorneys and over all Federal criminal cases, unless a specific law to the contrary exists. United States attorneys are, like the Attorney General, appointed by the President, with the advice and consent of the Senate. The United States attorney is the principal officer of the Department of Justice in each judicial district. A United States attorney is appointed for a term of four years and is subject to removal by the President. His duties include prosecuting criminal actions and prosecuting or defending in civil actions in which the United States is concerned. Assistant United States attorneys are appointed by the Attorney General and are subject to removal by him.

5. JUDICIAL BRANCH

The Constitution created one Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish."

No qualifications for judges or the number to be employed are set forth by the Constitution. The President is to appoint judges with the advice and consent of the Senate, and they are to hold office during "good behavior."

The Supreme Court has original jurisdiction in all cases involving ambassadors, ministers, and consuls, and in certain cases where a state is a party. The Constitution grants the Supreme Court appellate jurisdiction in all other cases "with such exceptions, and under such regulations as the Congress shall make." In 1803, the Supreme Court established its power to
declare an act of Congress unconstitutional. The case, Marbury v. Madison, involved an act of Congress which enlarged the original jurisdiction of the Supreme Court. The Court said that a law which is repugnant to the Constitution is void and the Congress lacked the power to enlarge or decrease the Supreme Court's original jurisdiction. In 1869, in Ex Parte McCordle, the Supreme Court recognized the power of Congress to deny the Court appellate jurisdiction in certain cases appealed from the Circuit Courts.

Courts of Appeal in the eleven circuits have appellate jurisdiction only. A case is never taken to a Circuit Court of Appeals initially. The United States District Courts have original jurisdiction in all cases involving offenses against the United States and in certain civil cases where the United States is a party or where jurisdiction is based on the amount in controversy and a diversity of citizenship.

6. A SYSTEM OF CHECKS AND BALANCES

The Constitution provides three separate but equal branches of government, each with powers to check the exercise of powers by the others. The Congress passes laws, but subject to the President's veto, which can be overridden by a two-thirds vote of Congress. The Congress must depend on the President to enforce those laws which are enacted. The President is Commander-in-Chief of the Armed Forces and is in charge of the entire Executive Branch of government, but he must receive appropriations from Congress to carry out his functions and must have the advice and consent of the Senate to make appointments. The Judicial Branch can declare acts of Congress unconstitutional and actions of the Executive Branch unconstitutional, but the courts must look to Congress for appropriations to operate the judicial system, for allocations as to the number of courts and judges, and for jurisdiction in most instances. Furthermore, the courts must look to the Executive Branch to enforce their rulings. Federal judges are appointed by the President with the advice and consent of the Senate but thereafter are shielded against pressure because of their life tenure and the fact that their salaries cannot be reduced.
7. **FEDERAL POWERS GRANTED BY CONSTITUTION**

The Constitution grants Congress the authority to levy and collect taxes; to pay debts and provide for the common defense and general welfare; to borrow money; to regulate commerce; to establish a uniform rule of naturalization; to establish bankruptcy laws; to coin money; to fix the standard of weights and measures; to punish counterfeiters; to establish post offices and post roads; to provide copyright and patent protection; to establish tribunals inferior to the Supreme Court; to define and punish piracies and offenses against international law; to declare war and grant letters of marque and reprisal; to raise and support armies; to provide for calling up the militia to exercise jurisdiction over the District of Columbia and federal reservations; and to make all laws "necessary and proper" to exercise the powers granted.

8. **CONSTITUTIONAL LIMITATIONS ON FEDERAL AUTHORITY**

The Constitution states that the writ of *habeas corpus* shall not be suspended unless in cases of rebellion or invasion the public safety may require it. This writ is a judicial order to determine whether a person is confined illegally. The courts have held that the ordinary administration of justice must be disrupted before the privilege of the writ may be suspended.

The Constitution also forbids the passing of bills of attainder or *ex post facto* laws. A *bill of attainder* is a legislative act by which an individual or class of individuals is declared to be guilty of crime without trial or other judicial proceedings. *Ex post facto* laws relate only to criminal or penal statutes and are those which make criminal that which was not criminal at the time the action was performed, or which increase the punishment or alter the situation of a party to his disadvantage.

Other examples of Constitutional limitations are that there can not be any tax on articles exported from any states, nor any preference given to the ports of one state over those of another, nor any title of nobility.
9. **AMENDMENTS TO THE CONSTITUTION**

The principal argument against ratification of the United States Constitution was that there were no provisions for placing restrictions upon the acts of the government. The proponents of restricting governmental action wanted a Bill of Rights to secure individual liberties against a strong central government.

At the time of its adoption, the Bill of Rights was intended to operate as a restriction only upon the federal government, and originally, the first ten amendments did not apply to the states in any respect. Today, most of the provisions of the Bill of Rights are made applicable to the states through the "Due Process" Clause of the Fourteenth Amendment.

(The following is not a complete discussion of the first ten amendments, but only those that more directly affect the federal law enforcement officer.)

The First Amendment prohibits Congress from making any law concerning the establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or the right of people peaceably to assemble and to petition the government for redress of grievances. When a law enforcement officer is confronted with a situation with First Amendment overtones, i.e., freedom of speech or of assembly, he should be especially sensitive to these rights of the individual.

Because the homes of the people had been invaded and searched indiscriminately by the British prior to the Revolution, the Fourth Amendment was inserted to provide against unreasonable searches and seizures. This amendment has been interpreted extensively by the Supreme Court and is the subject of a separate course, "Search and Seizure."

The Fifth Amendment enumerates safeguards for persons accused of crime. It provides that the government shall not require a person to be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; that no person shall be subject for the same offense to be twice put in jeopardy of life or limb; that no person shall be
compelled in any criminal case to be a witness against himself; that no person shall be deprived of life, liberty, or property without due process of law; and, finally, that no person shall be deprived of his property for public use without just compensation.

The Sixth Amendment assures that, in criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury in the state and district wherein the crime shall have been committed; the right to be informed of the nature and cause of the accusation; the right to have compulsory process for obtaining witnesses in his favor; and the right to have the assistance of counsel for his defense.

The Eighth Amendment guarantees that excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted.

The Fourteenth Amendment guarantees the citizen "due process" of the law in the area of state action just as the Fifth Amendment provides "due process" in the area of Federal action. However, as the Fourteenth Amendment was originally written and ratified, it did not embrace all those specific rights which are enumerated in the Bill of Rights and still does not do so today. Although the Supreme Court has not held that all the specific rights enumerated in the Bill of Rights are applicable to the states by the Fourteenth Amendment, it is apparent from recent decisions that the majority of those rights have now been made applicable to the states. For example, the protections of the Second Amendment and the Third Amendment and the grand jury provisions of the Fifth Amendment have not been brought under the "due process" umbrella, but the other clauses of the Fifth and Sixth Amendments have.
I. NATURE OF CRIMES

1. Definition of Crimes

A crime is an act, or failure to act, prohibited by public law in order to protect the public from social harm, and punishable by the state in an action in its own name. The same act may be punishable by a state and the federal government. This is not double jeopardy, since there are two separate offenses involved against two different sovereigns, even though there is only one act.

2. Crimes Distinguished from Torts

A crime is a public wrong against the community as a whole. A tort is a civil wrong, i.e., a wrong against an individual, actionable generally by a suit for damages. The mere fact that a particular individual is injured by a certain act does not in itself preclude that act from being also a public wrong, i.e., an assault and battery. Thus, a particular act may be both a tort and a crime, and neither the civil nor the criminal action bars the other.

3. Classification of Crimes

At common law, all crimes were divided into three classes: treason, felonies, and misdemeanors.

Treason against the United States is defined in the Constitution as levying war against the United States, or adhering to its enemies by giving them aid and comfort. Treason is the highest category of crime.

The federal government and many states classify felonies as all crimes punishable by imprisonment for more than one year. Misdemeanors are crimes punishable by imprisonment for one year or less. The term "infamous crime" as referred to in the Constitution has been interpreted to mean a felony.

4. Merger of Crimes

Lesser included offenses "merge" into greater offenses, in the sense that one who is placed in jeopardy for the greater offense may not later be retried for that offense or for any lesser included offense. For example, a person convicted of murder cannot
subsequently be convicted of attempted murder based on the same incident. Nor may one be convicted of both the greater offense and a lesser included offense. A lesser included offense is one that consists of some but not all elements of the greater crime.

5. Elements

For a crime to be committed, certain factors or elements must exist. The elements necessary to constitute a crime differ with each crime. The required elements of a crime are normally contained in the definition of the crime or the criminal statute. In a criminal case, the government has the burden of proving each and every element of the crime beyond a reasonable doubt.

II. SOURCES OF CRIMINAL LAW

1. Common Law

Common law is referred to as unwritten law derived from custom and usage. It has its origins in court decisions dating from early English time which created new law (crimes) as the need arose to punish any conduct tending to "outrage decency" or "corrupt public morals." These decisions set a precedent and were then followed by other courts in later decisions under the principle of Stare Decisis, which means to follow the former decisions. Some examples of common law crimes are: murder, suicide, manslaughter, burglary, arson, robbery, larceny, rape, sodomy, mayhem, assault, battery, false imprisonment, libel, perjury, intimidation of jurors, blasphemy, conspiracy, sedition, forgery, attempt, and solicitation.

2. Statutory Law

Statutory law is written law. These laws are enacted by legislative bodies. There are no federal common law crimes. No act can constitute a federal crime unless it is prohibited by and punishable under a federal statute.

III. ESTABLISHING CRIMINAL LIABILITY

1. Criminal Intent

The term mens rea refers to the mental element of a crime and is
perhaps best defined as the deliberate and willful intention to do an act. Generally, in both common law and statutory law mens rea is an indispensable part of a crime. The reason that mens rea is normally required is to distinguish between inadvertent or accidental acts and acts that were performed with a "guilty mind."

Crimes are divided for certain purposes into crimes malum prohibitum, which are crimes not inherently evil but wrong only because prohibited by legislation and crimes malum in se which are those actions which are inherently evil. Courts tend to classify common law crimes as malum in se and statutory crimes as malum prohibitum. However, some statutory crimes have been held to be malum in se.

Most crimes require an element of intent, but motive is not a necessary element of any crime. Intent is the determination to do a certain thing, whereas motive is the underlying reason(s) for so doing.

2. The Criminal Act

The term actus reus refers to the criminal act itself. Where intent is a necessary element of a crime, both the intent and the act must occur at the same time in order for a crime to be committed.

The act must be intentional as distinguished from an unconscious act, such as one performed by a person who is asleep or in an epileptic seizure. For example, one who is pushed by another and consequently bumped into a third person as a result of which the third person is pushed over a cliff, has not "acted" within the meaning of the law.

A failure to perform a duty which the law imposes on the offender and which he is capable of performing constitutes a voluntary act. Note that the failure to act must involve a duty imposed by law, e.g., the duty to feed one's children.
IV. OFFENSES AGAINST THE PERSON

1. Battery

Battery is an unlawful touching or application of force to the person of another.

2. Assault

The common law misdemeanor of assault consisted of either an attempt to commit a battery or the intentional creation of a reasonable fear in the mind of the victim of an imminent battery upon his person.

3. Homicides in General

A homicide is the killing of a human being by another human being.

A justifiable homicide is the killing of a human being in the strict performance of a legal duty.

An excusable homicide is the killing of a human being by a person who acts intentionally, but the circumstances are such that he does not merit punishment, such as, killing in self defense.

A felonious homicide is the killing of a human being without justification or excuse.

4. Murder

A murder is a felonious homicide committed with malice aforethought. Generally the elements for murder require that there must be some conduct which caused the death of another and this conduct must be accompanied by a "malicious" state of mind. This is the intent to kill or do serious bodily injury.

Murder – 1st Degree

To be guilty of this form of murder the defendant must not only intend to kill but in addition he must premeditate the killing and deliberate about it. "Delliberation" is said to require a cool mind that is capable of reflection. "Premeditation" requires that the one with the cool mind did in fact reflect, at least for a short period of time, before his act of killing.
Murder - 2nd Degree

Murder without premeditation and deliberation is second degree murder.

Felony Murder Rule

The common law felony-murder rule requires that the killing occur "in the commission or attempted commission of" the felony. Typical modern statutes make it first degree murder to cause a death, accidentally or intentionally, in the commission or perpetration of certain named felonies. There must be some causal relationship between the felony and the death.

5. Manslaughter

Manslaughter is the felonious killing of a human being without malice aforethought.

Voluntary Manslaughter

Voluntary manslaughter is manslaughter committed voluntarily in the heat of passion without the deliberation or willfulness required for murder but, on the other hand, without justification or excuse.

Involuntary Manslaughter

The unintentional killing of a human being while committing a misdemeanor or when there is criminal negligence.

6. Mayhem

Mayhem at common law is the violent dismembering of a person willfully and maliciously. At common law, the members had to be such as would be useful to the victim in defending himself, but this limitation has generally been abolished by statute, and the crime now generally applies to disfigurement as well.

7. False Imprisonment

False imprisonment is the unlawful detention of a person. It is a misdemeanor at common law. It is necessary to intend the detention, but no malice or bad motive need be shown, so
long as there was full knowledge of the facts.

8. Kidnapping

Kidnapping is a misdemeanor at common law, which involves the forceful stealing away of a person without his consent. Under statutory law kidnapping is now a felony and force is not an element.

9. Rape

Rape consists of having unlawful sexual intercourse with a woman without her consent. It is a felony at common law. Where the girl or woman lacks legal capacity to consent, her "consent" is ineffectual. Such offenses are referred to as statutory rape.

V. OFFENSES AGAINST PROPERTY

1. Larceny

Larceny at the common law is defined as the nonconsensual taking and carrying away of the personal property of another with intent to permanently deprive the owner of the property. By statute, the crime has been divided into the categories of grand larceny and petit larceny, generally depending on the value of the property stolen. Grand larceny is a felony, but petit larceny is generally made a misdemeanor.

2. Robbery

Robbery is defined as larceny from a person or in his presence by violence or by putting him in fear. If the violence or fear element is lacking and the taking was from a person or from his protection, it is not robbery but a felony known as larceny from the person, as in the usual case of a pickpocket.

3. Burglary

At common law, burglary is the breaking and entering of a dwelling house of another at night with the intent to commit a felony therein. Today, statutes cover all types of buildings and have removed the nighttime limitation.
4. Extortion

Extortion is a common law misdemeanor, which was defined as the corrupt collection of an unlawful fee by a public officer under color of his office. While extortion was originally limited to cases of illegal coercion by public officials, it is now extended by statute to other persons as well and is usually a felony.

5. Embezzlement and Related Offenses

Embezzlement is not a common law crime, but is made a felony by statute. In general, it consists of the fraudulent conversion or misappropriation by a person in a position of trust of money or property, the possession or control of which has come to him by virtue of his employment.

The obtaining of legal title to property by false and fraudulent representations of fact, generally known as false pretenses, is a statutory crime, even where no false tokens or writings are used and there is no practice which directly affects the public. There is also another common law crime which resembles the crime of false pretenses, except that possession, instead of title, is obtained by fraud; this is called larceny by trick.

6. Receiving Stolen Property

At common law, one who with fraudulent intent receives stolen property, knowing it to be stolen, is guilty of a misdemeanor. Knowledge is considered to exist if a reasonable man would believe or suspect the goods to be stolen. By statute, it is now generally made a felony. Receiving means taking possession or control with consent of the one in possession, not necessarily buying.

7. Foraery and Uttering

Foraery is the fraudulent making or altering of a writing, which, if genuine, would have had legal effect. In most jurisdictions, it is made a felony by statute.
Uttering a forged instrument consists of negotiating or attempting to negotiate an instrument which the person knows to be false. It need not be passed or used, so long as it is offered as genuine. It is immaterial whether or not the utterer is connected with the forgery, but it is necessary that he know the instrument is a forgery and that he have a fraudulent intent.

9. Arson

Arson is a common law felony, which consists of the willful and malicious burning of the dwelling house of another. Today, all types of structures are covered.

VI. OFFENSES INVOLVING JUDICIAL PROCEDURE

1. Perjury

A misdemeanor at common law, perjury is the willful giving of false testimony, under oath, of a material matter in a judicial proceeding. Today, perjury is normally a felony by statute.

2. Subornation of Perjury

A separate offense at common law, subornation of perjury consists of procuring or inducing another to commit perjury. In some states, this is now part of the perjury statute.

3. Bribery

The common law misdemeanor of bribery constitutes the corrupt payment or receipt of anything of value for official action.

Under modern statutes, it can frequently be a felony, and it may be extended to classes of persons who are not public officials (e.g., athletes). Either the offering of a bribe or the taking of a bribe may constitute the crime.

VII. INCHOATE OFFENSES

An inchoate offense is committed prior to and in preparation for what may be a more serious offense. It is a complete offense in itself, even though the act to be done may not have been completed. The
inchoate offenses are solicitation, conspiracy and attempt. They are quite frequently considered felonies.

Solicitation is a common law misdemeanor, which consists of the solicitation of another to commit a felony. Solicitation consists of inciting, counselling, advising, inducing, urging, or commanding another to commit the felony with the specific intent that the person solicited commit the crime. The offense is complete at the time the solicitation is made. Modern statutes often retain the crime of solicitation of certain serious felonies.

An attempt to commit a crime consists of taking a step towards the commission of a crime with the intent to complete the crime. The defendant must have proceeded beyond mere preparation in the course of conduct intended to end in the crime. He must have taken a substantial step which amounts to commencement of the consummation of the crime, although it need not be the last step believed necessary to complete the crime.

Conspiracy is an agreement between two or more persons to commit an unlawful act or a lawful act in an unlawful manner. This subject will be covered in detail in the conspiracy course.

VIII. PARTIES TO CRIMES

At common law in the case of felonies, the following distinctions are made between principals and accessories.

1. Principal in the first degree: One who actually commits the criminal act.

2. Principal in the second degree: One who is present, actually or constructively, aiding or abetting in the commission of the criminal act.

3. Accessory before the fact: One who procures, counsels, or commands the commission of a felony, but who is absent when the crime is committed by another person.

4. Accessory after the fact: One who gives personal assistance to another person, knowing that he has committed a felony, in an effort to hinder his detection, arrest, trial, or punishment.
In the federal system and many states, the distinction between principals in the first and second degree and accessories before the fact have been abolished by statute. These statutes in general do not effect accessories after the fact.

IX. DEFENSES

1. Consent

For certain crimes, the prior consent of the injured person is a defense if the consent is voluntarily given and the "consenter" is legally competent to give such consent.

2. Condonation

Condonation, or forgiveness by the injured party, is no defense to a criminal action since the action is for the benefit of the state and not the injured person.

3. Entrapment

A person is not guilty of an offense if his conduct is incited or induced by the acts of officers of the government. (This matter is treated in a separate course.)

4. Self-Defense

Self-defense provides justification for the use of reasonable force in repelling an attack. The victim may do only that which is absolutely necessary to save himself from death or serious bodily harm.

5. Justification

An act which would normally be criminal will not be criminal if it is justifiable or privileged such as:

a. Lawful Authority

b. Prevention of a Crime
c. Self-Defense

d. Defense of Another Person

e. Defense of a Dwelling

f. Defense of other Property

a. Compulsion or Duress

6. Lack of Capacity

A person may lack the legal capacity to commit a crime, because he is unable to form the necessary criminal intent or because he is otherwise incapable of committing the criminal act.

a. Infants - An infant under seven years of age, at common law, is conclusively presumed incapable of committing a crime. Between the ages of seven and fourteen he is presumed incapable of committing a crime, but this presumption may be rebutted. Over the age of fourteen, he is presumed to be capable of committing a crime. Today, under federal law, a child's capacity to commit a crime is determined by the facts and circumstances of each case.

b. Insane persons - An insane person may not be legally punished for any crime committed while insane.

c. Intoxication - Generally, intoxication, whether caused by liquor or drugs, is not a defense to a crime.

X. JURISDICTION IN CRIMINAL CASES

1. Jurisdiction

The federal government and the states have the power to punish anyone for a crime committed within their territorial limits.

The states have jurisdiction to punish all crimes committed within their boundaries, unless exclusive jurisdiction over a particular offense has been taken by the federal government. The federal government has only such jurisdiction as is provided by the Constitution, e.g., under the Commerce Clause or the "Necessary and Proper" Clause.
2. Venue

In addition to jurisdictional requirements, there are also venue requirements mandating that the prosecution be in the district (federal) or county (state) in which the crime was committed.
CIVIL RIGHTS

1. INTRODUCTION

The term "civil rights" is virtually synonymous with the term "constitutional rights." It is therefore imperative that all law enforcement officers perform their duties within the framework of the Constitution. When a law enforcement officer discharges his duties unreasonably, recklessly, or indiscriminately, he can be held both civilly and criminally responsible for violating the injured person's constitutional, i.e., civil, rights.

2. FEDERAL CRIMINAL REMEDIES FOR POLICE VIOLATIONS OF CIVIL RIGHTS

After the Civil War, the immediate task of restoring the Union fell upon Congress. The most pressing problem was to assure the rights of the freed slaves. In the winter of 1865-66, a congressional committee was set up to investigate reports of racial violence in the South. The results of the investigation led to the adoption of the first civil rights law to come out of the Reconstruction period. This statute today is found in Title 18, United States Code, Section 242, Deprivation of Rights Under Color of Law:

"Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects any inhabitant of any state, territory, or district to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or the laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1000, or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."
This statute empowers the federal government to prosecute federal, state and local law enforcement officers and other public officials who violate the constitutional rights of prisoners, suspects, or others in the course of performing their duties. The fact that the law enforcement officer's conduct is also a crime under local law does not insulate him from federal prosecution. He can be tried and convicted in both the federal and state courts. Being a criminal statute, proof beyond a reasonable doubt is required to sustain a conviction. Section 242, moreover, by its terms reaches only violations where there is specific intent to deprive a person of a constitutional right.

3. FEDERAL CIVIL REMEDIES FOR POLICE VIOLATIONS OF CIVIL RIGHTS

Another major piece of Reconstruction legislation is the Civil Rights Act which is codified as Title 42, United States Code, Section 1983, which was enacted in 1871, in the wake of the Civil War, to protect citizens from arbitrary exercise of power by state officials.

It provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Violation of this statute by a law enforcement officer affords a civil cause of action against those acting under color of state law who deprive an individual of his constitutional rights. The statutory prerequisites to state a claim under Section 1983 are two-fold: (1) the defendant acted under color of law and (2) the plaintiff was subjected to the deprivation of some right or immunity secured by the Constitution or laws of the United States. Section
1983 applies only to those operating under color of state law, i.e., state, county, and local officers.

Traditionally, the doctrine of sovereign immunity prevailed insofar as it concerned federal law enforcement officers. Sovereign immunity stemmed from the notion that the "King could do no wrong." What this meant was that the federal government (and its agents) could not be sued in any court unless the action was statutorily authorized or unless the government consented to be sued. The government would only permit itself to be sued for claims of damage caused by the negligent acts or omissions of federal employees performed within the scope of employment. The Federal Tort Claims Act (Title 28, United States Code, Sections 2671-80) partially preserved the common law notion of sovereign immunity by protecting the federal government from liability where its agents committed intentional torts such as assault and battery. Thus, under the Federal Tort Claims Act, a federal mail truck driver caused liability by the government if he negligently ran down a citizen on the street, but the federal government was held harmless if a federal agent intentionally assaulted that same citizen in the course of an illegal arrest.

In 1971, the Supreme Court decided, in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, that there is a right of action against federal agents for an illegal search conducted in bad faith and without probable cause. A federal agent had previously enjoyed derivative sovereign immunity, and, like his employer, the government, could not be held civilly liable for intentional torts such as assault and battery, false arrest, abuse of process, or malicious prosecution. The court, in deciding Bivens, reasoned that a federal law enforcement officer, like his fellow state and local law enforcement officers, had great capacity to commit harm. The result is that now federal law enforcement officers can be sued civilly under Bivens for intentional violations of a person's civil rights. Such suits are analogous to suits against state officers arising under Title 42, United States Code, Section 1983.
In 1974, as a result of alleged illegal "raids" by federal agents in Collinsville, Illinois, Congress amended the Federal Tort Claims Act to subject the government to liability whenever its agents act under color of law so as to injure the public through such intentional torts as those arising from arrests and searches and seizures that are conducted in bad faith and without probable cause. The effect of this amendment is to deprive the federal government of the defense of sovereign immunity when its employees, acting within the scope of their employment or under color of law, commit intentional torts. Thus today, the federal government will be liable for both negligent and intentional wrongdoing of its employees as would any civilian employer, and the claimant (plaintiff) who alleges a violation of his civil rights by federal officers now has the option of (1) proceeding solely against the United States under the amended Federal Tort Claims Act, (2) proceeding solely against the officer under Bivens, or (3) proceeding jointly against the officer and the United States.

4. DEFENSES TO CIVIL RIGHTS ACTIONS

The Courts hold that a law enforcement officer named as a defendant in a civil suit alleging that the plaintiff's civil rights were violated, e.g., by an illegal arrest, may successfully defend himself by a showing of a reasonable and good faith belief that probable cause existed. The civil liability of a law enforcement officer does not turn on whether the arrest or search was in fact legal, but rather on whether the officer reasonably believed that he had probable cause to make the arrest or search. Where there is an arrest or search on less than probable cause and an improper motive is found, the court may hold that the requisite good faith has not been established and hold the officer civilly liable.

The good faith defense will, in most cases, ultimately be resolved by a jury. The good faith defense, if successful, must convince the jury that: (a) the officer subjectively, i.e., in his own mind, believed he had probable cause to arrest or search, and (b) that objectively, i.e., as the jury views the evidence, the officer's personal (subjective) belief that he had probable cause was reasonable.
5. **CONCLUSION**

It is imperative that federal agents be aware of their obligation to avoid violations of the civil rights of any person. Such violations may not only subject the officer to criminal and civil liability but also may result in disciplinary action by the officer's agency, inasmuch as civil rights violations are proscribed by executive department directives and agency policy. Law enforcement officers also have the responsibility to be alert to civil rights violations by other persons, and, if they do learn of such violations, to report them through proper channels for appropriate legal action.
LAW OF ARREST

STUDENT ASSIGNMENTS

SUGGESTED READING: Law of Arrest, Search & Seizure by J. Shane Creamer

WRITTEN ASSIGNMENT: Write from memory the full custodial advice of rights according to Miranda v. Arizona and the Consent to Search in class.

(Use the warnings in this guide. If your agency has a different warning and you have it with you, it may be used. Note due date on student assignment handout.)

I. INTRODUCTION

Many federal law enforcement officers are vested with statutory authority to make arrests. This authority carries with it responsibilities and requirements which must be observed if one is to make a legal arrest. The authority of arrest is one that must be exercised judiciously, being ever mindful of the rights of individuals under our Constitution.

An arrest may be defined as the taking into official custody of a person to answer a criminal charge. The accused person is presumed innocent and the arrest is not proof of guilt. An arrest is not to be used as punishment but only to insure the presence of the arrestee to answer the charges before a court of law.
2. CHARACTERISTICS OF A LEGAL ARREST

The characteristics of a legal arrest consist of authority, intent, knowledge, and submission.

(1) Authority - All arrest authority is statutory. There is no all-encompassing authority statute for all federal officers. Unless an officer has specific statutory authority, he has no authority to arrest. (Exhibits 1-6 are examples of statutory authorities for federal agencies.)

In the absence of a controlling federal statute, the law of the state in which the arrest takes place is controlling. Since most states do not confer peace officer status on federal law enforcement officers, any arrest made outside of the officer's statutory authority will generally be treated as a citizen's arrest.

A private citizen, who has no statutory authority under state law, may make what is called a "citizen's arrest." For there to be a valid citizen's arrest, most states require that a felony actually be committed and that there be probable cause to believe the person arrested committed the crime. Most states allow a citizen's arrest for minor offenses only if they are committed in the presence of the citizen making the arrest. The requirements for a valid citizen's arrest vary greatly from state to state and do not afford the same protection from liability that a law enforcement officer has when he makes an arrest within his statutory authority, based on probable cause that a crime has been committed and that the person arrested committed it. For example, a federal officer is returning home at 2:00 a.m., and while driving down an alley near his residence, he observes a man wearing a ski mask and carrying a radio leaving a neighboring residence through a bedroom window. He arrests the man for burglary. After the arrest, the facts disclose that the man is not a burglar, but rather the resident who is merely leaving to go to work. In this case a state or local officer or a federal officer with peace officer status would have protection from liability because he did have a reasonable good faith belief that probable cause existed. A federal officer without peace officer status, however, would have only that protection afforded any citizen of the state and could not rely on probable cause for protection from liability. In other words, the private citizen (in most states) must be right. If he is wrong, he is subject to liability for a false arrest.

It should be noted that a federal officer whose authority statute does not embrace all federal crimes makes a citizen's arrest for a federal offense not within his area of authority. Thus both a Deputy United States Marshal making an arrest for a liquor store robbery (not on federal property) and a
Special Agent of the Internal Revenue Service making an arrest for narcotic smuggling are both making citizen's arrests (unless in states wherein federal officers have been given peace officer status).

(2) Intent - The officer's intent must be to take the person into custody. Intent is objective (how would officer's actions be viewed by a reasonable person) in nature and is determined by all the facts surrounding the arrest. A distinction must be made as to whether the intent was to restrain the person or was merely an "invitation to accompany."

(3) Knowledge - The arrestee must have knowledge that an arrest is intended. In order to convey this knowledge, the officer should use clear and unequivocal language.

(4) Submission - The person who is to be arrested must submit to the authority of the officer. The best evidence of submission is, of course, complying with the directions of the arresting officer.

The characteristics appear simple and easy to understand. However, the court may see the facts differently than the officer did and may find an arrest took place when no arrest was intended by the officer, i.e., calling an arrest a "detention" will not necessarily make it so.
3. **USE OF FORCE**

A law enforcement officer may use whatever force is reasonably necessary to effect an arrest. The indiscriminate use of force against citizens is prohibited, and the use of unreasonable force alone may amount to an illegal arrest so as to warrant suppression of any evidence obtained thereby. Force by law enforcement officers in the performance of their duties has been traditionally limited to the following 4 major categories:

1. Protection of the law enforcement officer or other persons.
2. Overcoming resistance to lawful actions.
3. Arrest and detention of offenders.

Officers should exercise prudent judgement to insure that their use of force in every arrest situation is only that minimum amount of force necessary and reasonable in order to overcome resistance and effect the lawful arrest. A firearm may be discharged only as a last resort when, in the considered opinion of the officer, there is a danger of loss of life or serious bodily injury to either himself or other persons. (Students are referred to their course of instruction on Firearms Policy for additional guidance on the use of firearms and deadly force.

Although Title 18, US Code, Section 3109 uses specific language applying the knock and announce requirements to search warrants, the Supreme Court has extended the statute to apply to the execution of arrest warrants and arrest situations without warrant. Therefore, before entering premises, the agent must announce his identity and purpose in a loud and clear voice and wait a reasonable amount of time before forcing entry.
4. PROBABLE CAUSE TO ARREST

Before an agent can make a valid arrest he must have prior justifi-
cation to make the arrest. This justification is supplied by
probable cause and consists of information known to the agent who either
prepared the complaint for an arrest warrant or makes an arrest without
a warrant. An arrest made without probable cause is illegal and will
result in the suppression of evidence found as a result of that arrest.
No amount of probable cause developed after an arrest can be used to
support that arrest.

Probable cause to arrest is defined as "facts or apparent facts
which would lead a man of reasonable caution to believe that a crime
is being or has been committed and that the person to be arrested is
the person who has committed or is committing such crime."

Probable cause deals with probabilities which are incapable of
being determined with mathematical precision. An agent gathers facts
or apparent facts connecting the person to be arrested to the suspected
crime which has been or is being committed until the amount or weight
of the information is such as to make it probable (i.e., more likely
than not) that the person to be arrested is guilty of the crime. Thus,
probable cause does not amount to proof beyond a reasonable doubt (but
it must be more than mere suspicion).

Probable cause may consist of apparent facts. Such facts may be
hearsay or information thought to be true by the agent. Whether the
facts and apparent facts later prove to be right or wrong, the arrest
will be judged on the facts as the agent thought them to be at the time
of the arrest, the only limitation being that the information establish-
ing probable cause must be believed to be true and must be used in
good faith by the officer. If the agent does not act in good faith,
but uses information he knows to be false or does not believe to be
true, he subjects himself to possible disciplinary action as well as
civil and criminal sanctions.

The courts will consider the issue of probable cause through the
eyes of the experienced agent or investigator rather than of an ordinary
citizen. The facts establishing probable cause may not be readily
apparent to the layman; therefore the courts will consider all the
facts in light of the training and experience of the officer making
the observations.
5. **ARREST Warrants**

A warrant of arrest is far less important than is a search warrant. The United States Supreme Court has ruled that the test of the validity of an arrest is probable cause to make that arrest. In general, if an officer has probable cause, he may make an arrest even though (1) he had ample time to obtain a warrant and failed to do so, or (2) the warrant turns out to be defective. In other words, the propriety of an arrest is judged by whether or not there is probable cause and not by the existence or nonexistence of a warrant or the validity or invalidity of the warrant (as long as probable cause exists). Naturally, the arresting officer should be mindful of whether such arrest is within the scope of his statutory authority.

Although it is good practice to obtain a warrant whenever practical, an officer must bear in mind that the issuance of the warrant "commands" the arrest by any officer who comes across the individual. Thus, it would be unwise to secure a warrant if further investigation, especially undercover work, is involved. The individual, from whom one more "buy" is planned, may be stopped for speeding and the case thus aborted.

One cautionary note is in order. The Supreme Court has never decided whether an arrest warrant is necessary to effect an arrest in a private place. As stated above, the test is probable cause, but the court decisions involved treated arrests in public places, e.g., a restaurant. The Court has even held that a person (for whom there is probable cause to arrest) who stands in his own doorway and flees into the interior of his home may lawfully be pursued and arrested inside. The Supreme Court has never ruled on the validity of a warrantless arrest wholly inside private areas. The various circuits have dealt with the problem of arrests that take place wholly inside private areas in different ways so that, if it appears that an arrest will occur wholly inside a private place, a warrant should be obtained if there is time.

An arrest warrant may be executed anywhere in the United States, its possessions, or its territories at any time that the opportunity to arrest presents itself regardless of how long a period of time elapsed since its issuance.
6. INVESTIGATIVE STOPS

Federal law enforcement officers may "...In appropriate circumstances and in appropriate manner approach a person for the purpose of investigating possible criminal behavior, even though there is no probable cause to make an arrest." The Supreme Court has not defined what is meant by appropriate circumstances and in an appropriate manner, but it is clear that a stop cannot be justified if it is arbitrary, random, capricious, or for harassment.

The basic requirement is a reasonable suspicion that criminal activity might be afoot. The reasonableness required is measured by the standard of a law enforcement officer and is determined by the circumstances of each case. The suspicion necessary is less than probable cause, but must be more than a hunch or mere speculation.

After a stop has been made, the officer should, as a practical matter, identify himself as soon as possible. The duration of an investigative stop is measured by a standard of reasonableness in light of the circumstances of each case and no fixed time applies. When conducting investigative stops, it should always be remembered that an unreasonable detention will be construed as an illegal arrest.
7. **STOP AND FRISK**

A law enforcement officer incident to his duty to investigate suspicious activities is justified in stopping and frisking a person whenever he can articulate a reasonable belief that the person is armed and dangerous to him or to others. Testimony by a law enforcement officer that he is "always" in fear that someone is armed will not support a stop and frisk of any and all citizens the officer encounters.

The law enforcement officer must be able to point to particular facts from which he can reasonably infer that the individual is armed and dangerous. The "search" therefore is generally limited to a "patdown" of the outer clothing or other limited intrusion necessary to determine if the person is carrying a weapon. If during the "pat down" the officer feels something but is unable to articulate a reasonable belief that it is a weapon, he does not have the right to reach into the suspect's pocket and retrieve the object. If the "pat down" reveals a hard object which the officer reasonably believes to be a weapon, he may retrieve it for his own safety. If what he retrieves does not turn out to be a weapon, e.g., burglar tools, this evidence is still legally seizable and can be admitted into evidence against the accused.
8. INITIAL APPEARANCE OF ARRESTED PERSON

Rule 5(a) of the Federal Rules of Criminal Procedure requires that an agent bring an arrested person before a U.S. Magistrate "without unnecessary delay" for the purpose of conducting an initial appearance. The purpose of the initial appearance is to insure that arrested persons are quickly brought into the criminal justice system in order to protect their rights and to eliminate secret police interrogation of detained persons without placing specific charges against such persons. (The specific procedures for the conduct of the initial appearance are set forth in the text on Federal Court Procedures.)

There is no penalty provision provided by statute when officers fail to take an arrested person before the U.S. Magistrate without "unnecessary" delay. Therefore, since the courts are charged with judicial supervision over the administration of justice, the Supreme Court has applied the suppression doctrine to confessions or admissions obtained from an arrested person during a period of unlawful detention in violation of Rule 5(a). The important issue in determining the admissibility of any confession or admission obtained during a period of delay between the arrest of the individual and the initial appearance is whether such confession or admission was a direct product of any "unnecessary delay." It is not the amount of delay but the manner in which the time is utilized by the officers which is controlling. Arresting officers may proceed with routine processing of arrested persons prior to taking them before the U.S. Magistrate. Officers should not, however, delay taking an arrestee before the magistrate for the purpose of questioning and obtaining statements from the arrestee. (In order to help clarify the amount of time that can constitute "unnecessary" delay and its effect on statements obtained from a defendant prior to his being taken to a magistrate, Congress enacted Title 18, United States Code, Section 3501. See page 24.)
1. A juvenile is a person who has not attained his eighteenth birthday. A person may be proceeded against under the Juvenile Delinquency Act if the crime was committed while the defendant was a juvenile (under 18) and the trial takes place before his twenty-first birthday.

2. A juvenile may be detained only in a juvenile facility or such other suitable place as the Attorney General may designate. Whenever possible, detention shall be in a foster home or community based facility located in or near his home community.

3. The Attorney General shall not cause any juvenile to be detained or confined in any institution in which the juvenile has regular contact with adult prisoners or with adjudicated delinquents.

4. Unless a juvenile taken into custody is prosecuted as an adult:
   (a) neither the fingerprints nor photographs shall be taken without written consent of the judge.
   (b) neither the name nor picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding.

5. When a juvenile is arrested, the arresting officer shall:
   (a) immediately advise the juvenile of his legal rights, in language comprehensive to a juvenile.
   (b) immediately notify the Attorney General and the juvenile's parents or guardian of such custody.
   (c) advise the parents or guardian of the rights of the juvenile and of the nature of the alleged offense.

6. After arrest, the juvenile must be taken before a magistrate forthwith. The magistrate shall insure that the juvenile is represented by counsel and Miranda and Gideon apply. If the juvenile has not been discharged before the initial appearance, the magistrate shall release the juvenile to his parents, guardian or other responsible party, such as the director of a shelter-care facility or any other responsible party.
7. In order for a person to be tried as a juvenile in Federal Courts, the Attorney General must, after investigation, certify to the appropriate U.S. District Court:

   (a) That the court of the State does not have jurisdiction, or

   (b) The State refuses to assume jurisdiction with respect to such act of juvenile delinquency, or

   (c) The State does not have available programs and services adequate for the needs of juveniles.

If the Attorney General does not make the above certification, the juvenile shall be surrendered to the appropriate legal authorities of the State.

8. Any proceedings under federal law will be in the appropriate district court of the United States and may be held at any place within the district, in chambers or otherwise.

9. The Attorney General shall proceed by information for the alleged act of Juvenile delinquency. A juvenile will be proceeded against under the Juvenile delinquency act unless:

   (a) The juvenile requests in writing, upon advice of counsel, to be proceeded against as an adult, or

   (b) If the juvenile is sixteen years or older alleged to have committed an act after his sixteenth birthday which if committed by an adult would be a felony punishable by a maximum penalty to ten years imprisonment or more, life imprisonment, or death, criminal prosecution may be begun by motion of the Attorney General to proceed against the juvenile as an adult and the court finds such action would be in the best interest of justice.

10. In order to proceed against the juvenile as an adult upon motion of the Attorney General, a hearing must be held by the U.S. District Court Judge and reasonable notice must be given to the juvenile, his parents or guardian and to his counsel. Statements made by the juvenile prior to or during the hearing shall not be admissible at subsequent criminal prosecutions.
STATEMENT OF RIGHTS

Before we ask you any questions, it is my duty to advise you of your rights.

You have the right to remain silent.

Anything you say can be used against you in court, or other proceedings.

You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning.

You may have an attorney appointed by the U.S. Magistrate or the committing magistrate or the court to represent you if you cannot afford or otherwise obtain one.

If you decide to answer questions now with or without a lawyer, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting a lawyer.

HOWEVER --

You may waive the right to advice of counsel and your right to remain silent, and you may answer questions or make a statement without consulting a lawyer if you so desire.

CONSENT TO SEARCH

Before we search your premises (or person) it is my duty to advise you of your rights.

You have the right to refuse to permit us to enter your premises (or search your person). If you voluntarily permit us to enter and search your premises (or your person) any incriminating evidence that we find may be used against you in court, or other proceedings.

Prior to permitting us to search you have the right to require us to secure a search warrant.
Material for Customs on Boarding vessels is quoted directly from United States Code Annotated, Title 19.

(a) Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under Sections 1701 and 1703-1711 of this title, or at any other authorized place, without as well as within his district, and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and every part thereof and any person, truck, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

(b) Officers of the Department of the Treasury and other persons authorized by such department may go on board of any vessel at any place in the United States or within the customs waters and hail, stop, and board such vessel in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

(c) Any master of a vessel being examined as herein provided, who presents any forged, altered, or false document or paper to the examining officer, knowing the same to be forged, altered, or false and without revealing the fact shall, in addition to any forfeiture to which in consequence the vessel may be subject, be liable to a fine of not more than $5,000 nor less than $500.

(d) Any vessel or vehicle which, at any authorized place, is directed to come to a stop by any officer of the customs, or is directed to come to a stop by signal made by any vessel employed in the service of the customs and displaying proper insignia, shall come to a stop, and upon failure to comply a vessel or vehicle so directed to come to a stop shall become subject to pursuit and and the master, owner, operator, or person in charge thereof shall be liable to a penalty of not more than $5,000 nor less than $1,000.
(e) If upon the examination of any vessel or vehicle it shall appear that a breach of the laws of the United States is being or has been committed so as to render such vessel or vehicle, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel or vehicle, liable to forfeiture or to secure any fine or penalty, the same shall be seized and any person who had engaged in such breach shall be arrested.

(f) It shall be the duty of the several officers of the customs to seize and secure any vessel, vehicle, or merchandise which shall become liable to seizure, and to arrest any person who shall become liable to arrest, by virtue of any law respecting the revenue, as well without as within their respective districts, and to use all necessary force to seize or arrest the same.

(g) Any vessel, within or without the customs waters, from which any merchandise is being, or has been unlawfully introduced into the United States by means of any boat belonging to, or owned, controlled, or managed in common with, said vessel, shall be deemed to be employed within the United States and as such, subject to the provisions of this section.

(h) The provisions of this section shall not be construed to authorize or require any officer of the United States to enforce any law of the United States upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States except as such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government.

Further authority for Bureau of Customs is quoted from United States Code Annotated, Title 26 Additional authority for Bureau of Customs.

Officers of the Customs (as defined in Section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., Sec. 1401(1), may --

(1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under the authority of the United States, and

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in Section 102 (16) of the Controlled Substances Act) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.
SECRET SERVICE

18 U.S.C. 3056

The powers of the Secret Service are quoted directly from United States Code Annotated, Title 18

Subject to the direction of the Secretary of the Treasury, the United States Secret Service, Treasury Department, is authorized to protect the person of the President of the United States, the members of his immediate family, the President-elect, the Vice-President or other officers next in the order of succession to the Office of President, and the Vice-President-elect; protect the person of a former President and his wife during his lifetime and the person of a widow and minor children of a former President for a period of four years after he leaves or dies in office, unless such protection is declined; detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments; detect and arrest any person violating any of the provisions of Sections 508, 509, and 871 of this title and, insofar as the Federal Deposit Insurance Corporation, Federal land banks, jointstock land banks and Federal land bank associations are concerned, of Sections 218, 221, 433, 493, 657, 709, 1006, 1007, 1011, 1013, 1014, 1907 and 1909 of this title; execute warrants issued under the authority of the United States; carry firearms; offer and pay rewards for services of information looking toward the apprehension of criminals; and perform such other functions and duties as are authorized by law. In the performance of their duties under this section, the Chief, Deputy Chief, Assistant Chief, inspectors, and agents of the Secret Service are authorized to make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. Moneys expended from Secret Service appropriations for the purchase of counterfeits and subsequently recovered shall be reimbursed to the appropriation current at the time of deposit. As amended July 16, 1951.
Intelligence Division and Inspection Service

26 U.S.C. 7608(b)

Material quoted directly from United States Code Annotated, Title 26, regarding enforcement of laws relating to Intelligence Division and Inspection Service

(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary or his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are:

(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

(B) to make arrests without warrant for any offense against the United States relating to the Internal Revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony; and

(C) to make seizures of property subject to forfeiture under the internal revenue laws.
United States Marshals and Deputies


The following material on powers of marshals and deputies is quoted directly from United States Code Annotated, Title 18, Section 3053

United States marshals and their deputies may carry firearms and may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

The following material on marshals and deputies authority to exercise the powers of the sheriff is quoted directly from United States Code annotated, Title 28, Sections 569 and 570.

28 U.S.C. 569 Powers and Duties Generally

United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, including those of the courts and Government of the Canal Zone, and command all necessary assistance to execute their duties.

28 U.S.C. 570 Power as Sheriff

A United States marshal and his deputies, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof.
The following material on Authority of Special Agents, Bureau of Alcohol, Tobacco and Firearms is quoted directly from United States Code Annotated, Title 26.

(a) Enforcement of subtitle E and other laws pertaining to tobacco, and firearms. Any investigator, agent, or other internal revenue officer by whatever term designated, whom the Secretary or his delegate charges with the duty of enforcing any of the criminal seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle for the enforcement of which the Secretary or his delegate is responsible, may;

(1) carry firearms;

(2) execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

(3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony; and

(4) in respect to the performance of such duty, make seizures of property subject to forfeiture to the United States.
43. Transportation of wildlife taken in violation of state, national, or foreign laws; receipt; making false records

3054 Officer's powers involving animals and birds

Any employee authorized by the Secretary of the interior to enforce sections 42, 43, and 44 of this title, and any officer of the customs, may arrest any person who violates section 42 or 44, or who such employee or officer of the customs has probable cause to believe is knowingly and willfully violating section 43, in his presence or view, and may execute any warrant or other process issued by an officer or court of competent jurisdiction to enforce the provisions of said sections.
18 U.S.C. 3109

The officer may break open an outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance Before the Magistrate.

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. section 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.
Sec. 701 (a) Chapter 223, Title 18, United States Code (relating to witnesses and evidence), is amended by adding at the end thereof 71 Stat. 595 the following new sections:

3501. Admissibility of Confessions

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (3) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

"(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: PROVIDED, that the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer.

"(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."
Recommended Cases

S.Ct. means Supreme Court Reporter
F.2d means Federal Reporter, 2nd Series

Authority

U.S. v. DiRe 68 S.Ct. 222 (1948)

Rule 5(a)

Mallory v. U.S. 71 S.Ct. 1356 (1957)
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U.S. v. Sorce 325 F.2d 84 (CA 7, 1963)
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Castillon v. U.S. 298 F.2d 256 (CA 9, 1962)
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Arrest Warrants

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CHAPTER 1 - INTRODUCTION

This course deals with the operation of the federal court system, with particular emphasis on the role of the agent within the system. The first part of this course will be devoted principally to the duties and functions of the U.S. Magistrate, but to understand the functions of the U.S. Magistrate, one must first understand the make-up of the Federal Judicial System. (See Appendix 1)

The Supreme Court is the only court specifically provided for in our Constitution. Its decisions apply to the entire judicial system as it is the final arbiter of all cases on appeal. The other courts are those established by Congressional action under the authority of the Constitution. Federal criminal cases originate in U.S. District Courts. The Circuit Courts of Appeals have no original criminal jurisdiction, but only appellate powers. This appellate jurisdiction sets precedent within its own circuit and these decisions are binding therein, unless overturned by the U.S. Supreme Court. If there is disagreement among the Circuits, the matter may eventually be resolved by the Supreme Court. Though appellate decisions are binding only within their own circuits, they normally are weighed heavily by other circuits when confronted with the same issue. Thus, investigators need to be aware generally of the major appellate decisions of all circuits, inasmuch as they may become the basis for future decisions of other circuits or of the Supreme Court itself.

There are 10 Federal Appellate Circuits plus the District of Columbia Circuit Court of Appeals. Within these Circuits, the Federal law enforcement officer will appear and testify at the U.S. District Court level. There are 94 Federal Judicial Districts, including the District of Columbia, Puerto Rico, the Virgin Islands, the Canal Zone, and Guam. District Courts in the Virgin Islands, the Canal Zone, Guam, and the District of Columbia hear local as well as Federal cases. (See Appendix 2).

There may be more than one district in a state, but no district will ever cross state lines. Some districts are divided into "divisions," but these divisions have no legal significance and exist for convenience only. Federal judges who sit on these District Courts are appointed for life or during good behavior. (This applies to Judges of the Circuit Courts and the U.S. Supreme Court as well.)
The Supreme Court promulgates the rules of criminal procedure for the courts pursuant to two sections of Title 18, U.S. Code. The first of these, Section 3771, authorizes the Supreme Court to prescribe rules for all criminal proceedings prior to and including verdict. Section 3772 empowers the Supreme Court to prescribe rules for all proceedings after the verdict. From time to time the Supreme Court has amended these rules.

As stated in Rule 1 of the Federal Rules of Criminal Procedure, these rules apply to all criminal procedures in the U.S. District Courts, U.S. Courts of Appeal, and the Supreme Court of the United States. These also apply to proceedings before the U.S. Magistrate and proceedings before state and local judicial officers when acting on Federal cases in place of U. S. Magistrates.

The reason for the existence of these rules is to secure simplicity in procedures, fairness in administration, and the elimination of unjustifiable expenses and delay. (Rule 2)
CHAPTER 2 - PRELIMINARY PROCEEDINGS

United States Magistrates are appointed by United States District Judges. If there is more than one judge in a district, appointment will be made by the concurrence of the majority of the judges. The full-time Magistrate is appointed for a term of eight years. His salary may not exceed 75 percent of the salary of a judge of a District Court of the United States.

In the event the District Judge cannot find a qualified person for a full-time Magistrate, he may appoint a part-time Magistrate whose term is four years. Magistrates usually work only in the district in which they are appointed. However, temporary assignment to other judicial districts may be made with the concurrence of the chief judge of each district. To be appointed as a U. S. Magistrate, a person must be a member in good standing of the bar of the highest court of the state in which he is to serve. Non-lawyers may serve as part-time Magistrates if the appointing court is unable to find a qualified member of the bar at a specific location.

The U.S. Magistrate in all likelihood will be the first judicial officer with whom an investigator will come in contact. In the investigative process, the investigator's first contact with a U.S. Magistrate generally will be to obtain either a search warrant or an arrest warrant. (Search warrants will be covered in detail in the course on Search and Seizure.) To obtain an arrest warrant from the Magistrate, the investigator must file a complaint which is defined in Rule 3. (A copy of the complaint form will be found as Appendix 3 of this text.) It will be the duty of the investigator to prepare the complaint prior to appearing before the Magistrate to obtain an arrest warrant or, should an arrest be made without warrant, (but, of course, upon probable cause), to present the complaint at the time the prisoner is brought in for initial appearance. In most areas the complaint is prepared with the cooperation of, or with review by, the U.S. Attorney's office before it is presented to the Magistrate.

It is the function of the Magistrate to acknowledge any complaint sworn before him, and to determine if probable cause exists to issue an arrest warrant or a summons.
Upon finding probable cause that the offense has been committed and that the person named in the complaint has committed it, the Magistrate may issue an arrest warrant or summons. Generally speaking, the Magistrate will issue an arrest warrant unless the U.S. Attorney requests a summons instead of an arrest warrant. (Rule 4)

The arrested person must be taken before a committing officer for the initial appearance "without unnecessary delay." This is in compliance with Rule 5(a) of the Rules of Criminal Procedure. Generally, the committing officer is the U.S. Magistrate; however, it may be a U.S. District Judge or a state or local judicial officer authorized by 18 USC 3041.

As noted above, if the person has been arrested without a warrant, Rule 5(a) provides that a complaint shall be filed when the prisoner is brought in for his initial appearance. The procedure for filing a complaint under these circumstances are the same as previously stated (Rule 4).

18 USC 1 defines a felony as a crime punishable by imprisonment in excess of 1 year and a misdemeanor as a crime punishable by imprisonment for 1 year or less regardless of the amount of fine. Minor offenses are defined as those misdemeanors punishable by up to 1 year's imprisonment and a maximum of $1,000 fine. Petty offenses are defined as those misdemeanors punishable by up to 6 months imprisonment and a maximum of $500 fine. Petty offenses are, therefore, minor offenses as well as misdemeanors.

A U.S. Magistrate may try a misdemeanor providing the maximum penalty for the offense does not exceed 1 year's imprisonment or a fine of $1,000, i.e., is a minor offense. If the offense is triable by a magistrate, the magistrate may proceed with the trial according to rules especially designed for such procedures as per Rule 5(b). (The various types of offenses are defined in the Glossary, Appendix 4.)

If the offense with which the prisoner is charged is a minor offense triable by a U.S. Magistrate, the Magistrate may proceed with the trial according to Rules especially designed for such procedures. (Rule 5(b)) (The various types of offenses are defined in the Glossary, Appendix 4)

For an offense not triable by the U.S. Magistrate, at the initial appearance, the Magistrate shall inform the defendant of the complaint against him and any affidavit filed therewith; of his right to retain counsel or request assignment of counsel if unable to obtain counsel; the
general circumstances under which he may secure pretrial release; of his right not to make a statement and that any statements made may be used against him; and of his right to a preliminary examination. The Magistrate shall not call upon the defendant to enter a plea. The Magistrate may admit the defendant to bail as provided by the Bail Reform Act and the Rules of Criminal Procedure. The purpose of the Bail Reform Act of 1966 is to assure that all persons, regardless of financial status, shall not needlessly be detained pending appeal when detention serves neither the ends of justice nor the public interest. 18 USC 3146(b), as amended by the Act, provides that, "In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings."

Bail Reform Act Form No. 1, entitled Record of Responses to Questions at Bail Reform Act Hearings, was devised by the Department of Justice and the Administrative Office of the United States Courts as an aid to assist judicial officers in obtaining information required by the Act. U.S. Attorneys have been directed to cooperate with the courts in gathering and furnishing the necessary information in time for the accused's initial appearance. The Assistant Attorney General, Criminal Division, has requested all federal investigative agencies to assist the U.S. Attorneys in providing them with as much information as is possible. (A copy of Bail Reform Act Form No. 1 is included as Appendix No. 5)

If the defendant fails to make bail, the Magistrate will commit him to the custody of the U.S. Marshal. If there is no deputy marshal present, then it is incumbent upon the investigator to take the defendant and place him in jail.

If the defendant does not waive preliminary examination, the Magistrate will hear evidence in accordance with Rule 5.1 to determine if there is probable cause to believe the offense was committed and the defendant has committed it. This preliminary examination must be held within ten days.
following the initial appearance if the defendant is in custody and cannot make bail. If the defendant is not in custody, the hearing must be held no later than twenty days following the initial appearance. However, with the consent of the defendant and upon showing good cause, time limits may be extended by the U.S. Magistrate.

If a determination is made at the preliminary examination that there is probable cause to believe that the crime has been committed and that the defendant committed it, the Magistrate will hold the defendant to answer in the District Court. If it appears from the evidence that there is no probable cause to believe that the offense has been committed or that the defendant has not committed it, the Magistrate will dismiss the complaint and discharge the defendant. This, however, does not preclude the government from instituting a subsequent prosecution for the same offense.

Probable cause may be based upon hearsay evidence in whole or in part. At the preliminary examination, the defendant, or his attorney, may cross-examine witnesses against him and may introduce evidence on his own behalf. The defense counsel may be given an opportunity to have a recording of the hearing made available for his information in connection with further hearings or preparation for trial. Objections to evidence on grounds that it was acquired by unlawful means will not be heard at the preliminary examination.

Upon motion to the District Court either by the government or defense, the court may order that a copy of the transcript be made available to either party.

All proceedings before the U.S. Magistrate are subject to review by the District Courts.

NOTE: Appendix No. 6 in the back of this text is a copy of the order of the U.S. Supreme Court prescribing rules of procedure for trial of minor offenses before U.S. Magistrates.
GRAND JURIES (GENERAL)

A United States District Court is empowered to summon one or more grand juries at such time as the public interest requires. (Rule 6) This rule is based on the clause of the Fifth Amendment to the Constitution, which states, "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

The purpose for creating grand juries is to safeguard the rights of innocent citizens against hasty, malicious, and oppressive prosecution by the government. The government cannot bring a person to trial for a felony unless he is first indicted by a grand jury, or indictment is waived.

A grand jury will hear testimony to determine whether or not there is probable cause to believe that the person to be indicted committed the crime in question. This is known as the "accusatory function" of the grand jury. If the grand jury determines that there is sufficient probable cause to indict, the foreman of the grand jury will write "True Bill" on the indictment. The indictment will then be signed by the foreman and by an attorney for the government. An indictment is invalid without both of these signatures.

The grand jury also has broad investigative power to determine whether a crime has been committed and who committed it. This investigative function is directed by the U.S. Attorney, under the supervision of the court. The scope of a grand jury investigation is virtually unlimited.

In fulfilling both functions, the grand jury is generally unrestricted by technical, procedural, or evidentiary rules. To assist the grand jury in carrying out its public duty, it is the obligation of every person to appear and give testimony when subpoenaed.

A. GRAND JURIES (RULE 6)

Grand juries consist of 16 to 23 members. A grand jury may stay in session for a period of not more than 18 months.

A member of a grand jury must be a citizen of the United States who is at least 18 years of age and who has resided in the judicial district for a period of one year or more. A person may not serve on a grand jury if:
1. He has a felony charge pending against him or has been convicted of a felony, and his civil rights have not been restored by pardon or amnesty.

2. He cannot understand, read, or write the English language.

3. He is incapable of serving due to mental or physical infirmities.

(Petit jurors, who determine the guilt or innocence of the defendant at the trial itself, are selected in the same manner. Petit jurors and grand jurors must have the same qualifications.)

B. CHALLENGES TO THE GRAND JURY

Challenges to prospective members of a grand jury must be made prior to the time they are sworn in. The challenge, which will be heard by the court, may be made either by the government or by a defendant who has been held to answer in the U.S. District Court. The challenge may be based on the array of the jurors, i.e., that the grand jury was not selected, drawn, or summoned in accordance with the law. Individual jurors may be challenged on the ground that they do not meet the legal qualifications.

If not challenged prior to the swearing in of the grand jury, a defendant's recourse is a motion to dismiss the indictment based on the array or the qualifications of individual jurors. If, however, 12 of the 16 to 23 members of a grand jury still concur in the indictment after a successful objection on the above grounds, the motion to dismiss will fail.

C. HOW A CASE COMES BEFORE THE GRAND JURY

Generally, an officer brings a report of his investigation to the U.S. Attorney who in turn presents the case to the grand jury. If the defendant in the case is not in custody when indicted, the court will issue an arrest warrant for the defendant's arrest or a summons for his appearance in court.

In addition, a grand jury may institute an inquiry on its own. In this instance, the grand jury, under the direction of the court, conducts its own investigation, or orders the investigation to be done. Upon completion of the grand jury's investigation, an indictment may result.
(A presentment, which requires no signature by a govern-
ment attorney (see A, above), is now obsolete; an indictment
is the sole legally acceptable procedure (except, as noted
below, when an information may be used).

D. SECRECY OF THE PROCEEDINGS

Attorneys for the government, interpreters, stenographers
or operators of recording devices may be present when the
grand jury is listening to testimony. When the grand jury is
deliberating or voting, however, no one may be present except
the grand jurors themselves. (Rule 6(d))

No obligation of secrecy may be imposed upon any person
not specifically listed in Rule 6(e) of the Federal Rules of
Criminal Procedure with respect to grand jury proceedings.
Jurors may disclose matters (other than the grand jury's
deliberations or the vote of any juror) to the attorneys for
the government for use in the performance of their duties.
These same matters may also be disclosed to those personnel
deemed necessary by an attorney for the government to assist
the attorney in the performance of his duty to enforce the
federal criminal law. Otherwise jurors, officers and employees
of the court may not disclose matters except on order of the
court. The rule does not impose secrecy requirements on
witnesses.

E. INDICTMENT

An indictment may be found only upon the concurrence of
12 or more jurors, regardless of the number of persons
comprising the grand jury (16 to 23). If the grand jury fails
to indict, they shall report this to the court forthwith
(Rule 6(f)) by writing NO BILL on the indictment. This does
not necessarily mean that this is the end of the case. The
U.S. Attorney may present the same case to another grand jury
or, with additional information, go before the same grand jury
again.

The grand jury foreman keeps a record of the number of
grand jurors concurring in the finding of every indictment and
files this record with the clerk of the court.

F. SPECIAL GRAND JURY

Title I of the Organized Crime Control Act of 1970
established proceedings for summoning a "special grand jury"
to inquire into organized criminal activity. (Excerpts from
this statute will be found in Appendix 7 of this text.) A
special grand jury is empaneled for 18 months, but may be
granted up to three extensions of six months each. By law it cannot sit for more than 36 months.

G. **INDICTMENT AND INFORMATION (RULE 7)**

An indictment is a formal accusation by a grand jury. This accusation must be concise as to the charges against the defendant and as to when the crime allegedly occurred. The court may direct that the indictment be kept secret until the defendant is in custody or has been admitted to bail. In this instance, the clerk of the court seals the indictment, and no person may disclose its findings. This is commonly known as a sealed indictment.

An information is a formal accusation by a U.S. attorney, i.e., the US attorney determines probable cause. This is similar to an indictment except that the case is not presented to a grand jury. It must have the same information in it as does an indictment. An indictment or an information may have two or more related offenses charged in it. (Rule 8). These are called separate counts of the indictment. Two or more defendants also may be charged in the same indictment as long as the charge evolves from the same action or is connected by a common scheme or plan. This is called joinder of offenses or defendants.

In the event that there is property subject to forfeiture, the indictment or information must allege the extent of the interest subject to forfeiture.

H. **USE OF INDICTMENT AND INFORMATION**

For a capital crime, a person can be prosecuted only by indictment. In all other felony cases, a person must be prosecuted by an indictment unless he waives the right to an indictment, in which case he may be prosecuted by information. (Rule 7(a)). In misdemeanor cases, the government has the option of charging the defendant either by indictment or by information.

The role of a law enforcement officer in appearing before a grand jury is to give testimony to establish probable cause that the crime has been committed and that the defendant committed the crime. When the officer goes into the grand jury room, he will generally be accompanied by an assistant U.S. attorney, who will introduce him to the grand jurors. The officer will be sworn by the foreman and then will testify. His testimony does not have to be based on personal knowledge, but may consist of hearsay. Any and all members of the grand jury may question the officer regarding the case.
All grand jury proceedings are "ex parte" proceedings, which means that the grand jury only hears one side of the case, that of the government.

The defendant may appear before the grand jury if he so desires. The reason why most defendants do not do this is because by appearing on their own petition, they waive their Fifth Amendment rights. A potential defendant may be summoned to appear before a grand jury in the same manner as any other witness, in which case he retains all his privilege against self-incrimination.

I. ISSUING OF WARRANTS AND SUMMONSES BASED ON INDICTMENT OR INFORMATION (RULE 9)

The court shall issue a warrant for each defendant named in the information or indictment upon request of the attorney for the government. The clerk shall issue a summons instead of a warrant upon request of the government or by direction of the court. If a defendant fails to appear in response to a summons, a warrant for his arrest will be issued. These warrants or summonses are returnable to a federal magistrate, i.e., to the U.S. Magistrate or to any other judge as defined in Rule 54.

If the information or indictment charges a minor offense, the warrant or summons shall command that the defendant be brought before the U.S. Magistrate.
CHAPTER IV - PRE-TRIAL PROCEDURES AND MOTIONS

A. ARRAIGNMENT (RULE 10)

The arraignment is founded on the Sixth Amendment's provision that the accused shall enjoy the right "to be informed of the nature and cause of the accusation" in all criminal proceedings. An arraignment is conducted in open court before a U.S. District Court judge after an indictment has been returned or an information has been filed against the defendant. The magistrate, however, may arraign a defendant for offenses triable by him. (One should be careful not to use the word arraignment when referring to a preliminary examination or an initial appearance.)

The arraignment is conducted after probable cause has already been established by an indictment or information and consists of:

- Calling the defendant to the bar,
- Reading the indictment or information to him,
- Apprising him of his various rights, e.g., jury trial, right to be confronted by his accusers,
- Demanding of him whether he is guilty or not guilty, and
- Taking the plea.

The arraignment, therefore, is an indispensable prerequisite to the trial itself. The Federal Rules do not specify any specific time within which the arraignment must be held. However, the Speedy Trial Act of 1974 provides that the arraignment will be held within 10 days after the return of the indictment or the filing of the information.

Before a judge will take a plea, he must be satisfied that the defendant has had the opportunity to consult with counsel; he has been properly apprised of the charges against him, and he is competent to plead. Under Rule 11 a defendant may plead Not Guilty, Guilty, or, with the consent of the court, Nolo Contendere. If the defendant refuses to plead or fails to appear at the arraignment, the judge will enter a plea of Not Guilty.

Guilty; This is a judicial confession. If the court determines that there is a factual basis for the plea and is satisfied that the plea was made voluntarily with a full understanding of the charge, the court will accept a plea of guilty.
Not Guilty: This is a denial of guilt by the defendant. A plea of Not Guilty maintains all rights and denies the guilt of the defendant.

Nolo Contendere: This plea, in effect, is the same as a plea of guilty. It an admission of guilt without trial determination. (A Nolo Contendere plea in a criminal case cannot later be raised in a related civil action.)

B. BILL OF PARTICULARS (RULE 7(f))

A request for a Bill of Particulars is an effort by the defense to obtain more information concerning the crime with which the defendant is charged. For example, in an indictment, it is generally stated "That on or about" a certain date a crime was committed. A Bill of Particulars would demand specificity as to the date as well as the crime.

C. OTHER MOTIONS AND PLEADINGS (RULE 12)

All other motions, pleas, etc., have been abolished and defenses and objections may be raised only by motion to dismiss or to grant appropriate relief.

a. Any defense or objection which is capable of determination without trial of the general issue may be raised before the trial.

b. Defenses and objections based on defects in the prosecution or in the indictment or information must be raised before the trial. This does not include defenses of lack of jurisdiction of the court or failure to charge an offense. Generally, failure to raise defenses or objections constitutes a waiver thereof.

c. Hearing on motions is held before trial unless the court orders that it be deferred for determination at the trial.

d. A motion to suppress is the legal process to exclude the use of evidence and will be made at a time specified by the judge. This motion, a motion for the return of property, and other motions are heard by the judge (and to the extent possible) out of the hearing of the jury.

D. PRE-TRIAL CONFERENCE (RULE 17.1)

At any time after the filing of the indictment or information, the court, upon motion of any party or its own motion, may order one or more conferences to consider such matters as will promote a fair and expeditious trial. No
admissions made by the defendant or his attorney at the
conference can be used against the defendant unless the
admissions are reduced to writing and signed by the
defendant and his attorney. If the defendant is not
represented by counsel, the rule does not apply.

E. DEPOSITION (RULE 15)

A deposition is a means of preserving testimony for use
at a trial. On motion of the party planning to call
a witness and after notice is given to all parties, a
deposition of the party's prospective witness may be taken
at any time after the filing of an indictment or information.
This may be done if it appears that: (a) the witness
may be unable to attend or may be prevented from attending
a trial or hearing, and (b) the testimony he is to give
is material. (A deposition taken under this rule may be
read into the court record if the witness is unavailable
within the meaning of Rule 804(a) of the Federal Rules of
Evidence.) The witness whose deposition is to be taken
may be required by subpoena to attend at any place designated
by the trial court, taking into account the convenience
of the witness and the parties. (See also Rule 17 (f)). At
a deposition, opposing counsel has the right to cross-
examine the witness.
CHAPTER 5 - DISCOVERY AND INSPECTION

I. DISCOVERY AND INSPECTION (RULE 16)

Rule 16 of the Federal Rules of Criminal Procedure, Discovery and Inspection, is one of the more important rules for Federal investigators. This deals with what the defense may request and see of the government's case prior to trial. It also has provisions for discovery and inspection of defense material by the government.

A. Discovery by the Defense (Rule 16a)

Upon motion by the defense for discovery, the court shall order the government to permit the defendant to inspect, copy or photograph any of the following documents providing they are relevant and within possession, custody, or control of the government, the essence of which is known or by the exercise of due diligence will become known to the attorney for the government:

1. Statements of Defendant
   a. Written or recorded confessions and statements made by the defendant or copies thereof;
   b. The substance of any oral statement, which the government intends to offer in evidence at the trial, made by the defendant before or after arrest in response to interrogation by any person known at the time of interrogation by the defendant to be a government agent, e.g., results of interview memorandum prepared by an agent after interview of the defendant (but not an oral statement made to an undercover agent);
   c. Any recorded testimony of the defendant before the Grand Jury which relates to the offense charged.

2. Defendant's Prior Record

A copy of the defendant's prior criminal record.
3. Documents, Tangible Objects and Reports of Examinations

a. Books, papers, documents, tangible objects, buildings or places. Before releasing these items, there must be a showing of necessity to the preparation of the defense or that the material is intended for use by the government as evidence in its case in chief, or that it was obtained from or belonged to the defendant.

b. The results of physical or mental examinations or scientific tests or experiments made in connection with the particular case.

4. Information Not Subject to Disclose

This rule does not authorize the discovery or inspection of reports, memoranda or other internal government documents made by the attorneys for the government or by the government agents in connection with the investigation or prosecution of the case or of statements made by government witnesses or prospective witnesses (other than the defendant) to agents of the government except as provided in 18 USC 3500, the "Jencks Act."

B. Discovery by the Government (Rule 16(b))

If the defendant requests disclosure of documents, tangible objects and or reports of examination, (as noted above) the government upon compliance with such request has the reciprocal right to request similar material from the defense. Upon such request, the defense shall be required to permit the government to review that material, i.e., documents and tangible objects and reports of examinations and tests, within their possession, custody, or control which it intends to introduce as evidence at the trial.

Rule 16(b) does not authorize the government to discover or inspect reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or
statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses to the defendant, his agents or attorneys.

a. **Protective Orders**

Upon a sufficient showing, the court may at any time order that the discovery and inspection be denied, restricted, or deferred, or make such other order as is appropriate. Failure to comply with a request for discovery and inspection under Rule 16 may result in an order for such by the court and a continuance to allow the requesting party to review the material, or the court may prohibit the offering party from introducing evidence not disclosed.

b. **Continuing Duty to Disclose**

Unless otherwise provided by local rules, the court may, at the time of arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests. However, if, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery and inspection under Rule 16, it must promptly notify the other party or his attorney or the court of the existence of the additional evidence and material.

II. THE BRADY DOCTRINE (Brady v. Maryland)

The defense is entitled to the production of exculpatory evidence, i.e., evidence which tends to show that the defendant is not guilty, in the possession of the government. The suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material either to guilt or punishment. Therefore, the prosecutor must make timely disclosure to counsel for the defendant (or to the defendant if he has no lawyer) of the evidence known to him which tends to negate the guilt of the accused. Such disclosure must be made to the defense at a reasonable time before trial.

If the government has in its possession substantial exculpatory information, elementary fairness requires that it be disclosed to the defense even without a specific request.
In situations where no specific request is made, non-disclosure by the government of information in its possession which might create a reasonable doubt as to the defendant's guilt does not automatically mean that the defendant's due process rights have been violated. The trial judge will review the court record to determine if non-disclosure violated the defendant's due process rights.

III. JENCKS ACT (18 USC 3500)

While Rule 16 of the Federal Rules of Criminal Procedure deals with what the defendant may discover before trial, the Jencks Act is concerned with material the defense may obtain from the government during the trial. The Jencks Act provides for the production of statements and reports of witnesses under the following conditions: (See also Appendix 8.)

A. In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness, is subject to subpoena, discovery, or inspection until the witness has testified on direct examination in the trial of the case.

B. After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

C. If the United States claims that the statements ordered to be produced do not relate to the direct testimony of the witness, the court shall order the United States to deliver such statement for inspection by the court in camera. The court will review the statement and shall excise the portions of such statement which do not relate to the testimony of the witness. Whenever any statement is delivered to the defendant under the Jencks Act, the court, upon motion of the defendant, may recess the trial. This gives the defense the opportunity to review the statement before proceeding with his cross-examination.

D. If the United States elects not to comply with an order of the court to deliver such statements to the defendant, the court shall strike from the
record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

E. The term "statement" under the Jencks Act means:

1. A written statement made by said witness and signed or otherwise adopted or approved by him; or

2. A stenographic, mechanical, electrical, or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement; or

3. A statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

IV. INHERENT POWER TO ORDER DISCOVERY

Although the defendant is entitled only to "Brady" material and those categories of items and information specified in Rule 16 prior to trial and to Jencks Act material at trial, the trial judge has the inherent power to order such discovery as he feels is necessary in a particular case to ensure the fair administration of justice. Thus, for example, the defendant may request and obtain a list of the government witnesses' names and addresses before trial although such a list ordinarily falls under neither the Brady Doctrine or Rule 16. Such orders by the trial judge are, however, the exception rather than the rule.

V. INVESTIGATORY NOTES

Traditionally, most Federal investigators destroyed their handwritten notes of investigation after they had prepared their reports of investigation. In recent years, however, defense attorneys have successfully argued that investigative notes contain potentially discoverable material. Several Circuit Courts of Appeal have held that the decision as to whether the notes are discoverable should be left up to the courts and not to the investigator. Many agencies require that rough notes of agents should be kept. In that way, they can be produced upon challenge, i.e., the trial court can determine whether or not the notes should be made available to the defendant.
VI. SUBPOENAS (Rule 17)

A subpoena is a court order commanding the appearance of a witness before a court or magistrate at time and place designated.

A. Issuance by Clerk of the Court

The Clerk of the Court shall issue a subpoena, signed and sealed but otherwise blank, to the party requesting it, who shall fill in the blanks before serving it. Indigent defendants may have witnesses subpoenaed at government cost if the defendant swears that the testimony of the witness to be subpoenaed is relevant to his defense and he is unable to pay the fees of the witness.

B. Issuance by U.S. Magistrate

A subpoena may be issued by a U.S. Magistrate in a proceeding before him, but it need not be under the seal of the court. (Rule 17 (a)).

C. Subpoena Duces Tecum

A subpoena may command the person to whom it is directed to produce specific tangible objects designated in the subpoena. (Rule 17 (c)). This is known as a "subpoena duces tecum." The subpoena duces tecum may be quashed or modified upon motion of the party served if there is a showing that compliance would be unreasonable or oppressive. The court may order that the items listed be produced before the court prior to trial or time of introduction into evidence and permit their examination by both parties and their attorneys.

D. Service

A subpoena may be served any place within the United States, and may be by a U.S. Marshal, his deputy or any other non-party 18 years of age or older. It is accomplished by delivering a copy to the person named.
E. Failure to Comply

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it is issued if it was issued by a United States Magistrate.
CHAPTER 6 - JURISDICTION AND VENUE

I. VENUE

The Constitution requires that the trial of all crimes shall be held in the state and district where the crime was committed, or, if not committed in any state, where Congress shall direct. The place where the offense may be tried is known as "venue." Rule 18 of the Federal Rules of Criminal Procedure states that prosecution will generally be in the district in which the offense was committed.

In determining where the offense was committed, consideration is given to whether a single act was involved, or whether the offense was a continuing one or one which involved more than one act. In the later cases, venue would lie at any point where a criminal act occurred. In cases involving offenses against the United States committed on the high seas, in a foreign country, or when more than one person is involved, venue is determined by where the offender(s) are first arrested or transported.

A. Venue as Distinguished from Jurisdiction

"Jurisdiction" is the inherent power of the court to decide a case. All U.S. District Courts have jurisdiction over offenses committed against the United States. Venue refers to the particular place (judicial district) where a court that has jurisdiction may hear and decide a case. A District Court may have jurisdiction to decide a case but may lack the venue to hear it.

B. Change of Venue (Rule 21)

Under Rule 21, the court may, upon motion of the defendant, transfer the proceedings to another district if:

(1) There exists in the district where the prosecution is pending so great a prejudice that the defendant cannot obtain a fair or impartial trial; or

(2) It appears that the transfer of proceedings against the defendant or any one or more of the counts against him would be more convenient for the parties and witnesses, and in the interest of justice.
C. Transfer from the District for Plea and Sentence (Rule 20)

If a defendant is arrested or held pursuant to indictment or information in a district other than the one in which the indictment or information is pending, he may state in writing that he wishes to plead "guilty" or "nolo contendere," to waive trial in the district of indictment or information, and to consent to disposition of the case in the district where he was arrested or is held. If the United States Attorneys for both districts agree to this procedure, the relevant papers will be transferred to the Clerk of the Court where disposition is to occur and the prosecution will continue in that district.

II. REMOVAL PROCEEDINGS (RULE 40)

If the defendant is arrested on a warrant based on complaint, information or indictment, or is arrested without warrant based on probable cause in a district other than the one where the offense occurred or the proceedings are pending, and he wishes to plead "not guilty" to the charges against him, it will be necessary to return him to the original district. The process of return to another judicial district is known as "removal." Depending upon the circumstances of whether the arrest occurred in a nearby district or in a distant district, a "removal hearing" may be necessary.

A. Arrest in a Nearby District (Rule 40(a))

A nearby district is defined as one within the same state where a warrant was issued or where the offense took place, or a district in another state but less than 100 miles from the place where the warrant was issued or the offense took place.

If arrest is made in a nearby district based on a warrant issued upon a complaint, or without a warrant, the person should be taken without unnecessary delay before the nearest available federal magistrate in accordance with Rules 5 (Initial Appearance) and 5.1 (Preliminary Examination). The defendant will be held to answer in the district court where the prosecution is pending or, if arrested without warrant, in the district in which the offense was committed.
If the arrest is based on a warrant issued on an indictment or information in a nearby district, the arrested person shall be taken before the district court in which the prosecution is pending. For bail purposes only, the arrested person may be taken before a federal magistrate in the district of arrest in accordance with Rule 9(c)(1).

B. Arrest in a District (Rule 40(b))

An arrest takes place in a distant district when made in another state and 100 miles or more from the place where the offense was committed or the warrant, if any, was issued.

If a person is arrested in a distant district, with or without a warrant, he must be taken before the nearest available magistrate in the district in which the arrest was made. (Note the difference between this and the provision of Rule 5(a).) This magistrate will inform the arrested person of his rights specified in Rule 5(c), of his right to a removal hearing, of the provisions of Rule 20, and set bail. At no time during this process is the defendant called upon to plead.

C. Removal Hearings

If the defendant waives a removal hearing, a judge of the United States will issue a warrant of removal to the district where prosecution is pending.

If the defendant does not waive the hearing, the federal magistrate will hear evidence at a removal hearing to determine if there are sufficient grounds for ordering the removal. At the hearing, the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. Upon a showing of sufficient grounds, the judge will issue the warrant of removal. There are "sufficient grounds" for ordering removal under the following circumstances:

<table>
<thead>
<tr>
<th>If Arrest was by;</th>
<th>Grounds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indictment</td>
<td>Certified copy of the indictment and proof that the defendant is the person named.</td>
</tr>
</tbody>
</table>
I. ARREST

If Arrest was by:  

Information or Complaint  

Certified copy of the information or complaint and proof that there is probable cause to believe the defendant is guilty of the offense charged.

Without Warrant  

Upon a showing of probable cause to believe the defendant is guilty, the hearing may be continued for a reasonable time; but there will be no removal until a warrant is obtained from the district where the alleged offense occurred.

Once a warrant of removal has been issued, the defendant will be admitted to bail for appearance in the district in which the prosecution is pending. The same considerations for bail apply as in any initial appearance.

III. TRIAL

If the defendant has previously entered a plea of not guilty, the question of guilt will be determined at a trial of the defendant. At the trial, the government will attempt to offer evidence to support a finding of guilt beyond a reasonable doubt. The defendant may offer a defense to disprove the allegation of guilt but is not obliged to do anything at all inasmuch as the burden of proof is on the government.

A. Functions of the Judge and Jury

In general, the judge decides questions of law, and the jury decides questions of fact. The defendant may waive jury trial if he requests in writing and the request is approved by the court and the government. In such cases, the judge will decide questions of both law and fact.
B. The Trial Process

The ordinary trial process in the Federal courts consists of:

(a) Opening statements (optional).
(b) Presentation of government's case.
(c) Motion by defense for judgment of acquittal (optional).
(d) Presentation of defendant's case (optional).
(e) Rebuttal (optional).
(f) Closing arguments (optional).
(g) Instructions to the jury.
(h) Verdict.

C. Trial By Jury (Rule 23)

In a trial by jury, the jury will consist of 12 jurors, except in those cases where both the prosecution and the defense stipulate in writing, with the approval of the court, that the jury may consist of a number of jurors less than 12. This allows a verdict to be reached in the event a juror becomes incapacitated after retiring to consider the verdict. This trial jury is known as a petit jury, as opposed to a grand jury, but is selected and impanelled in the same manner as a grand jury.

D. Alternate Jurors (Rule 24(c))

The court may direct that up to six alternate jurors be impanelled in addition to the regular jurors. The alternates, in the order in which they are called, will replace regular jurors who become ill or are otherwise disqualified during the trial. These alternate jurors will sit through the entire case, and those remaining alternates who have not replaced a regular juror will be discharged after the jury has retired to consider the verdict.
E. **Challenges**

In selecting members of a petit jury, both the defense and the government can challenge prospective members and keep them from serving on the jury. There are two kinds of challenges, peremptory challenges and challenges for cause.

Peremptory challenges are those for which no cause need be shown. A prospective juror challenged on this basis is automatically stricken from the list. Depending on the type of offense being tried, there are specific limitations on the number of peremptory challenges allowed:

- **Misdemeanor**: 3 challenges for each side.
- **Non-capital felony**: 6 challenges for the government; 10 challenges for the defense
- **Capital Offense**: 20 challenges for each side.

Rule 24 allows additional peremptory challenges which may be used only against alternate jurors, the number depending on the number of alternates to be impanelled.

There is no limit to the number of challenges that each side may make for cause. However, with respect to a challenge for cause, the judge must be satisfied that the juror is unqualified to sit on the jury due to bias, prejudice, or the like.

F. **Sequestration of Jurors**

When the jury is "sequestered," they are segregated and protected from outside influences for the duration of the trial. This is done at the discretion of the court. When sequestered, both regular and alternate jurors are included.

G. **Verdict (Rule 31)**

The verdict must be unanamious in a Federal criminal trial. All 12 of the jurors must concur in the verdict. The jury may find a defendant guilty of a lesser included offense, but never of an offense more serious than the offense charged.
For instance, if the defendant is charged with robbery, the jury may instead find him guilty of larceny, attempted robbery, or attempted larceny. However, if the charge is only attempted larceny, there can be no finding of guilt for the more serious charges.

When the verdict is returned, but before it is recorded, the jury may be polled at the request of either party or upon the court's own motion to determine if all jurors concur in the verdict. If the poll reveals there is no unanimous concurrence, the jury may be directed to retire for further considerations or may be discharged and a mistrial declared.

H. Presence of the Defendant at Trial (Rule 43)

The defendant's presence is required at the arraignment, at the time of plea, at every stage of trial including the impanelling of the jury and the return of the verdict, and at the imposition of sentence. However, the defendant's continued presence is not required after the trial has commenced if he was initially present and subsequently absents himself voluntarily; or if after having been warned by the court, the defendant persists in disruptive conduct which justifies his exclusion from the courtroom. In such cases, the defendant is deemed to have waived his right to be present. The defendant's right to be present during trial on a capital offense, however, has been said to be so fundamental that it may not be waived.

IV. JUDGEMENT

The judgement is the final determination or action of the court. A judgement of conviction consists of the plea, the verdict or finding of the court, and the adjudication and sentence. A finding of not guilty or any other reason for discharge of the defendant will be entered as judgement accordingly.

A. Sentence (Rule 32)

Sentence is to be imposed without unreasonable delay. Before sentence is imposed, the defendant and his attorney both have the opportunity to speak in behalf of the defendant and to present any information in mitigation of punishment. The government's attorney also has an opportunity to address the court.
B. **Pre-Sentence Investigation**

A pre-sentence report is prepared by the U.S. Probation Service and is given to the judge as an aid in deciding on the proper sentence. It will include such information as prior criminal record, financial condition, personal characteristics and any other circumstances that affect the defendant's behavior. A law enforcement officer who has information relevant to the determination of the sentence (which may have been inadmissible at the trial) should convey such information to the U.S. Probation Officer either directly or through the office of the U.S. Attorney.

C. **Right of Appeal**

After the sentence has been imposed in a trial in which the defendant pled "not guilty," the court will advise the defendant of his right to appeal. There is no duty of the court to give such advice after sentence when the defendant has pled "guilty" or "nolo contendere."
CHAPTER 7 - THE SPEEDY TRIAL ACT AND THE STATUTE OF LIMITATIONS

I. THE SPEEDY TRIAL ACT (18 U.S.C. 3161)

Since it became effective in 1975, the Speedy Trial Act has gradually reduced the amount of time which may elapse between the various stages of the judicial process (arrest, indictment, arraignment, trial, etc.). By July 1, 1979, no more than 100 days may elapse between arrest and the beginning of the trial of the defendant. Failure to meet this deadline or any of the intermediate deadlines imposed by the Act may result in dismissal of the charges against the defendant.

The Speedy Trial Act is significant to the Federal criminal investigator because an arrest starts the clock running, and if the arrest is made prematurely (i.e., before the investigation is completed), the government may lose the case through an inability to meet the Act's time requirements. (See Appendix 9).

II. STATUTE OF LIMITATIONS

A statute of limitations means that after a specified time following a criminal act an amnesty becomes effective for the crime. Once this amnesty date is reached, no prosecution may take place. The reasoning in favor of such limitations is that, after a certain period of time, if the accused has lived an exemplary life, he should not be punished for something that occurred many years before.

While many Acts of Congress may contain their own specified limitations on the length of time in which prosecution may be instituted following the commission of a crime, the majority do not. When such limitations are not specified within the specific statutes, the General Statute (18 USC 3282) will apply.

A. General Statute (18 U.S.C. 3282)

18 U.S.C. 3282, the General Statute of Limitations, which covers offenses that are not capital offenses, states in substance that, except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense unless the indictment is found or information instituted within five years after the offense has been committed.
B. Running of the Statute

The expression "running of the statute" means the period of time provided by a statute during which the government can institute prosecution. At the end of the period, when the statute is said to have run, prosecution is barred.

The time begins to run on the day the offense is committed. The day following is the first day of the period. For the general statute (18 U.S.C. 3282) the period of limitation ends five years after the offense is committed, and prosecution is barred on the day following that.

Example:

Crime committed 12/31/76
First day of running of statute 1/1/77
Statute ends (last day to secure indictment or information 12/31/81
Prosecution barred 1/1/82

In this example, the government may institute proceedings against the suspect at any time from 12/31/76 through 12/31/81, a period of five years. However, if no indictment or information is obtained by the day the statute ends, 12/31/81, the government is prohibited from prosecuting the individual on 1/1/82 or at any time thereafter for that crime. On a crime that is a continuing offense, the statute of limitation does not begin to run until the criminal conduct ceases. In a conspiracy, the statute of limitations begins to run with the last overt act. (This will be covered in greater detail in the course on conspiracy.)

C. Tolling the Statute

To "toll" the statute is to suspend or interrupt the running of the statute over a period of time. This will extend the date on which the statute ends and prosecution is subsequently barred. A statute may be tolled when it can be shown that an individual is "fleeing from justice." 18 U.S.C. 3290 provides: "No statute of limitations shall extend to any person fleeing from justice."
The essential characteristics of fleeing from justice have been defined as "leaving one's residence, usual place of abode or resort, or concealing one's self with intent to avoid punishment." The key word in the definition is "intent." One of the most common ways of fleeing from justice is to leave the country to avoid prosecution, but it is not the only one. Using a false name in a location other than one's usual habitat is generally sufficient. Once a person has fled from justice, the reasons for his continued absence have no effect on tolling the statute, so that an excuse that the individual was in jail in Mexico is irrelevant if the original intent in going to Mexico was to avoid prosecution in the United States. The burden of proving the intent to flee is on the government. If proven, the statute will be tolled for the duration of the time the individual was "fleeing from justice."

III. EXTRADITION

When an individual has fled the jurisdiction of the United States to a foreign country, the process for bringing him back to this country is known as extradition. It is important to remember that in the Federal system, the term extradition applies only to transfers of defendants and potential defendants on the international level. Transfers within the jurisdiction of the United States are covered by Rule 40 (Removal Hearings) as discussed above.

Extradition is effected through a request from the U.S. Attorney to the Attorney General to conduct extradition proceedings. These proceedings are accomplished through the U.S. State Department which will deal with the foreign government concerned. In order to extradite an individual from a foreign country, there must exist an extradition treaty between the United States and the foreign country involved. The United States does not have such treaties with all countries. In addition to the existence of an extradition treaty between the two countries, there must be enough evidence to make a strong case and the offense charged must be one that is recognized by both countries. If the offense charged is not a crime in the host country, there can be no extradition.
FEDERAL JUDICIAL SYSTEM

Supreme Court of the United States

U. S. Courts of Appeal (11 Circuits)

U. S. District Courts with federal and local jurisdiction
(District of Columbia, Virgin Islands, Canal Zone, Guam)

Administrative Quasi-Judicial Agencies
(Tax Court, Federal Trade Commission, National Labor Relations Board, etc.)

U. S. District Courts with federal jurisdiction only
(90 districts in 50 States and Puerto Rico)

Court of Customs and Patent Appeals

Court of Claims

Direct Appeals from State Courts in 50 States

Customs Court
United States District Court
FOR THE

UNITED STATES OF AMERICA

v

The undersigned complainant being duly sworn states:

That on or about , 19 , at

in the

District of

And the complainant states that this complaint is based on

And the complainant further states that he believes that

are material witnesses in relation to this charge.

Sworn to before me, and subscribed in my presence, , 19 .

(Official Title)

[Signature of Complainant]

[Name of Magistrate]

[Address of Magistrate]

(1) Insert name of accused
(2) Insert statement of the essential facts constituting the offense charged.
GLOSSARY OF LEGAL TERMS

Abet - To encourage, incite, facilitate or help in the commission of a crime. Similar to "aid", but with the implication of guilty knowledge.

Abide - To accept the consequences of; to rest satisfied with; to wait for.

Abode - One's home; habitation; place of dwelling; or residence.

Abolish - To do away with wholly; to annul.

About - Near in time, quantity, number, quality or degree.

Accept - To receive with approval or satisfaction; to receive with intent to retain.

Accessory - One who contributes to or aids in the commission of an offense, but is not the chief actor, either before or after the fact or commission, while not actually present during the offense.

Accomplice - A person who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of a crime.

Accusation - A formal charge against a person, to the effect that he is guilty of a punishable offense.

Accused - The generic name for the defendant in a criminal case.

Acknowledge - To own, allow, or admit; to confess; to recognize one's acts, and assume the responsibility therefore.

Acquit - To legally certify the innocence of one charged with a crime.

Act - A written law formally passed by a legislative body.

Adjudicate - To settle in the exercise of judicial authority. To determine finally.
Admission - The avowal of a fact or of circumstances from which guilt may be inferred. A statement or act of the defendant used against his position at trial.

Admonish - To caution or advise.

Adopt - To accept, appropriate, choose, or select; to consent to, or make one's own.

Adversary proceeding - One having opposing parties.

Advice - View; opinion; the counsel given by lawyers to their clients.

Affiant - The person who makes and subscribes to an affidavit.

Affidavit - A statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation.

Affirmation - A solemn and formal declaration that the witness will tell the truth.

Aid - To support, help, assist or strengthen.

Alias - Known by another name. Also "a.k.a.", or "also known as."

Allege - To claim or charge.

Amnesty - A general pardon.

At issue - Whenever the parties to a suit come to a point in the pleadings which is affirmed on one side and denied on the other, they are said to be "at issue."

Bail - A guaranty that a person arrested on a criminal charge will appear for trial or examination when required if he is temporarily released. The guaranty may take the form of a bond, a deposit of money or a deed to property, which is forfeited if the accused does not appear when required.

Calendar - A list of cases which are to be heard by a court during the court term.
Case - A suit in law or equity. In appellate procedure, the trial record made in the lower court, including the papers and testimony.

Certiorari - A writ issued by a higher court requiring the record of a case in the court below to be sent up to itself for redetermination.

Change of venue - the removal of a suit begun in one district, to another for trial, or from one court to another in the same district.

Circuit - A division or territory for judicial business.

Civil action - An action which seeks the establishment, recovery, or redress of private and/or civil rights. Civil suits relate to and affect only individual rights whereas criminal prosecutions involve public wrongs.

Common-law pleading - A system of pleading and procedure in force in England until 1852, and until 1848 in most of the United States. Opposition to its extreme rigidity and technicality led to the adoption of code pleading in most American jurisdictions.

Concurrent jurisdiction - When two courts have the power to determine the same issues.

Court of appeal - A court in which appeals from a lower court are heard.

Court of first instance - A court in which a case must originally be brought. Usually a trial court. Sometimes referred to as court of original jurisdiction.

Court of last resort - A court from which no appeal lies to a higher court in the same jurisdiction. This may sometimes not be the highest court in the jurisdiction.

Court of record - A court whose proceedings are permanently recorded, and which has the power to fine or imprison for contempt. Courts not of record are those of lesser authority whose proceedings are not permanently recorded.

Court session - The time during which a court sits and may exercise its judicial power.
Court term - A division of the year during which the court holds its sessions.

Defendant - A person who is being sued in a civil action or is prosecuted in a criminal action.

Direct appeal - An appeal as of right from a lower court to an appellate court.

Discovery - A proceeding whereby one party to an action may be informed as to facts known by other parties or witnesses.

Dismissal without prejudice - Permits the complainant to sue again on the same cause of action, while dismissal "with prejudice" bars the right to bring or maintain an action on the same claim or cause.

Dissenting opinion - An opinion by a judge, usually of an appellate court, indicating his reason for disagreeing with the result reached by the majority.

Double jeopardy - Charging an accused with a crime for which he has already been tried.

Ex parte - On one side only; by or for one party.

Ex post facto - After the fact.

Exclude - To keep out.

Exculpatory - Clearing or tending to clear from alleged fault or guilt.

Exigent - Something arising suddenly out of circumstances calling for immediate action or remedy.

Extrajudicial - Outside of the court.

Federal Magistrate - A United States magistrate as defined in 28 USC 631-639, a judge of the United States or another judge or judicial officer specifically empowered by statute in force in any territory or possession, the Commonwealth of Puerto Rico, or the District of Columbia, to perform a function to which a particular rule of the Rules of Criminal Procedure relate.

Felony - A crime punishable by more than one year imprisonment.
Forfeit - To lose, or lose the right to, by some error, fault, offense, or crime.

Germane - In close relationship, appropriate, relative, pertinent.

Habeas Corpus - As in an application for a "writ of habeas corpus"; to bring before a court to determine if a person is restrained of his liberty by due process.

Hold - To adjudge or decide, spoken of a court, particularly to declare the conclusion of law reached by the court as to the legal effect of the facts disclosed.

Impeach - To call in question the veracity of a witness as it pertains to Laws of Evidence; also, to proceed criminally against a public officer.

In camera - In chambers, in private before the judge with all spectators excluded.

Inculpatory - Going or tending to establish guilt; incriminating.

Indictment - A formal accusation made by a grand jury charging a person with having committed a crime.

Information - A formal accusation by the U.S. Attorney charging a person with having committed a crime.

Instruction - A direction given by the judge to the jury concerning the law of the case. Sometimes referred to as charging the jury.

Joinder - Joining or coupling together; uniting two or more elements in one.

Judgment - Determination by a court of competent jurisdiction of a controversy between two or more persons, which is brought before the court by proper procedure.

Jurisdiction - The authority of a court to exercise its judicial power in a specific case.

Jury wheel - A machine containing the names of persons qualified to serve as grand and petit jurors, from which, in an order determined by the hazard of its revolutions, are drawn a sufficient number of names to make up the panels for a given term of court.
Leading question - One which instructs the witness how to answer or puts into his mouth words to be echoed back; one which suggests to the witness the desired answer.

Majority decision - A decision usually by an appellate court, by more than one-half of those judges hearing a case.

Minor Offense - A special category of misdemeanor having a penalty of six months to one year and/or a maximum fine of $1000.

Misdemeanor - Under modern statutes the distinction between felonies and misdemeanors is whether it is punishable by imprisonment in the penitentiary (sentences over one year) or capitally, in which case it is a felony. All others are misdemeanors.

Mistrial - An erroneous or invalid trial; a trial which cannot stand in law because of lack of jurisdiction, wrong drawing of jurors, or disregard of some other fundamental requisite.

Nolle prosequi - A formal entry upon the record by the plaintiff in a civil suit, or the prosecuting officer in a criminal case, by which he declares that he "will not further prosecute" the case.

Nolo contendere - A pleading usually used by defendants in criminal cases, which literally means "I will not contest it." Referred to in some state courts as "non vult."

Official report - A report of a decided case, generally, in courts of appellate jurisdiction, containing statements of the facts, judgments and opinions published by a government body. Several states publish such reports officially for selected trial courts.

Overrule - To refuse to sustain a motion or verdict.

Parties - The persons who are actively concerned in the prosecution and defense of any legal proceeding.

Per curiam - An opinion rendered by the court as a whole, rather than by one judge with whom others concur. These opinions are often very short.

Petit jury - A body, usually of twelve men or less, selected from a larger panel to hear and find the facts in a trial at law, so called to distinguish it from the grand jury.
Petty Offense - A special category of misdemeanor with a maximum penalty of up to six months imprisonment and/or a maximum fine of $500.

Plaintiff - A person who brings a law suit in law or equity. Sometimes the party appealing from a lower court to a higher court, the appellant, whether he was the plaintiff or defendant in the court below, is called the "plaintiff in error."

Pleadings - Successive statements by which litigants set forth the allegations upon which they base their own claims or challenge the claims of their opponents.

Stare decisis - The doctrine that, when a court has once laid down a principle of law as applicable to a certain set of facts, it will adhere to that principle and apply it to future cases where the facts are substantially the same.

Voir dire - To speak the truth. The phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, as to his qualifications. Also used to refer to inquiry during a trial, outside the presence of the jury, to determine the admissibility of testimony or an item offered as documentary or physical evidence.

Writ - An order issued by a court or judge directing a public officer or private person to do or refrain from doing a specific act.
The Bail Reform Act of 1966 requires that each judicial officer, in determining which conditions of release will reasonably assure appearance, shall take into account available information concerning the following:

- the nature and circumstances of the offense charged
- the weight of the evidence against the accused
- the accused's family ties
- employment and financial resources
- character and mental condition
- length of residence in the community
- record of convictions
- record of appearance at court proceedings
- record of flight to avoid prosecution
- record of failure to appear at court proceedings.

This information is necessary to enable the officer to issue the Order Specifying Methods and Conditions of Release (Bail Reform Act Form No. 2).

The questions listed in Part I are designed to assist the judicial officer in obtaining information, principally from the representative of the United States, concerning the nature and circumstances of the offense charged, the weight of the evidence against the accused, and the circumstances of the arrest. The questions set forth in Part II are designed to assist in obtaining information, principally from the defendant, concerning the other factors specified in the statute. In each part, the information or its verification may be sought from any source.

Questions need not be limited to the ones suggested here, nor need all questions be asked in all cases. Neither the defendant nor the representative of the United States may be compelled to answer any question. Responses to questions should be recorded on this form in order to facilitate their use in further proceedings under the Act.

This Form No. 1 need not be used if the United States Attorney and counsel for the defendant agree on the terms of an order (Form No. 2) which specifies methods and conditions of release acceptable to the judicial officer.

**PART I. QUESTIONS FOR THE REPRESENTATIVE OF THE UNITED STATES**

A. General information

1. WHAT ARE THE CHARGES AGAINST THE DEFENDANT? 

2. WHAT ARE THE MAXIMUM PENALTIES APPLICABLE TO THESE CHARGES? 

3. WHEN AND WHERE DID THE OFFENSE TAKE PLACE? 

4. WHEN AND WHERE WAS THE DEFENDANT TAKEN INTO CUSTODY?
5. IS THE DEFENDANT HERE PURSUANT TO AN ARREST OR A SUMMONS?    
6. ARE ANY DETAINERS OUTSTANDING?  

B. Circumstances of the offense  
7. WAS THE DEFENDANT ARMED AT THE TIME OF THE OFFENSE?    
   WAS A WEAPON USED?   IF SO, WHAT KIND?    
8. WAS ANY VICTIM'S PROPERTY TAKEN OR DESTROYED?   IF SO, WHAT IS THE ESTIMATED VALUE OF THE PROPERTY AND HAS IT BEEN RECOVERED?    

C. Circumstances of the arrest  
10. DID THE DEFENDANT ATTEMPT TO AVOID OR RESIST ARREST?    
   IF SO, HOW?    
11. WAS THE DEFENDANT ARMED AT THE TIME OF ARREST?   WHAT KIND OF WEAPON?    
12. WAS EVIDENCE OF THE OFFENSE FOUND IN THE DEFENDANT'S POSSESSION?    
13. HAS THE DEFENDANT ADMITTED INVOLVEMENT IN THE OFFENSE?    

D. Other relevant information  
14. HAS THE DEFENDANT MADE ANY THREATS AGAINST POTENTIAL WITNESSES?    
   WHAT KINDS?    
15. IS THERE ANY INDICATION THAT THE DEFENDANT IS AN ALCOHOLIC?   AN ADDICT?   MENTALLY DISTURBED?    
16. IS THERE ANY OTHER INFORMATION WHICH INDICATES THAT THE DEFENDANT MAY ATTEMPT TO FLEE IF RELEASED?   IF SO, WHAT INFORMATION?    
17. NAME AND ADDRESS OF THE GOVERNMENT REPRESENTATIVE AND ANY OTHER PERSON WHO FURNISHED INFORMATION IN RESPONSE TO THE FOREGOING QUESTIONS.    

PART II. QUESTIONS FOR THE DEFENDANT OR OTHER PERSONS HAVING INFORMATION  

A. Background and Residence  
1. FULL NAME OF DEFENDANT    
2. AGE    SEX    3. ALIAS OR NICKNAMES    
4. a. PLACE OF BIRTH    b. PRESENT CITIZENSHIP    
5. PRESENT ADDRESS    
6. TELEPHONE NO.    7. HOW LONG AT THIS ADDRESS    
8. WHAT OTHER ADDRESSES DURING PAST YEAR, AND HOW LONG AT EACH    
9. AT WHAT PLACE HAVE YOU LIVED THE LONGEST IN THE PAST FIVE YEARS, AND FOR HOW LONG?    
10. WHERE WILL YOU GO IF RELEASED TODAY?    
11. ARE YOU PRESENTLY IN MILITARY SERVICE?   BRANCH AND RANK    

B. Family  
12. ARE YOU MARRIED?    
13. LIVING WITH YOUR WIFE?   14. HOW MANY CHILDREN ARE LIVING WITH YOU?    
15. IF YOU HAVE REGULAR CONTACT WITH ANY PARENT, CHILD, RELATIVE OR OTHER PERSON, FURNISH THE FOLLOWING INFORMATION:    

<table>
<thead>
<tr>
<th>NAME</th>
<th>RELATIONSHIP</th>
<th>ADDRESS</th>
<th>MONTHLY SUPPORT</th>
</tr>
</thead>
<tbody>
<tr>
<td>a.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>b.</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>c.</td>
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<td></td>
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<tr>
<td>d.</td>
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<td></td>
</tr>
</tbody>
</table>
C. Employment during past twelve months

<table>
<thead>
<tr>
<th>PERIOD</th>
<th>NAME OF COMPANY OR EMPLOYER</th>
<th>ADDRESS</th>
<th>KIND OF WORK</th>
<th>WAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>FROM</td>
<td>TO</td>
<td>CITY</td>
<td>STATE</td>
<td>AMT.</td>
</tr>
<tr>
<td>a.</td>
<td></td>
<td></td>
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<tr>
<td>b.</td>
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<tr>
<td>d.</td>
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</tbody>
</table>

17. WHAT IS THE NAME OF YOUR PRESENT SUPERVISOR? ____________________________ HIS TEL. NO. ____________________________

D. Financial resources

18. HOW MUCH CASH DO YOU HAVE ON HAND? $ ____________________________
19. HOW MUCH CASH IN THE BANK? $ ____________________________
20. WHAT OTHER PROPERTY DO YOU OWN (HOUSE, CAR, ETC.)? ____________________________
21. WHAT SOURCES OF SUPPORT DO YOU HAVE OTHER THAN THE EMPLOYMENT LISTED IN ITEM 16? ____________________________

E. Health

22. WHEN WERE YOU LAST IN A HOSPITAL? __________ OR UNDER A DOCTOR'S CARE? __________
23. WITHIN THE PAST FIVE YEARS HAVE YOU BEEN TREATED FOR
   a. ANY MENTAL CONDITION? ____________________________
   b. DRUG ADDICTION? ____________________________
   c. ALCOHOLISM? ____________________________

F. Criminal record

24. HAVE YOU EVER BEEN CONVICTED OF A CRIME OR FORFEITED COLLATERAL (YOU MAY OMIT MENTION OF TRAFFIC VIOLATIONS FOR WHICH A FINE OF $30 OR LESS WAS IMPOSED)? ____________________________
25. WHILE IN MILITARY SERVICE, WERE YOU EVER CONVICTED BY A GENERAL COURT MARTIAL? ____________________________
26. ARE YOU NOW UNDER CHARGES IN ANY OTHER ADULT OR JUVENILE COURT? ____________________________
27. WITHIN THE PAST FIVE YEARS, HAVE YOU BEEN ARRESTED FOR ANY OFFENSE OTHER THAN THOSE MENTIONED IN ITEMS 24, 25 OR 26? ____________________________
28. FOR EACH YES ANSWER TO QUESTIONS 24-27, FURNISH THE FOLLOWING INFORMATION:

<table>
<thead>
<tr>
<th>QUESTION NO.</th>
<th>CHARGE</th>
<th>DISPOSITION</th>
<th>MONTH &amp; YEAR</th>
<th>LOCATION OF COURT</th>
</tr>
</thead>
<tbody>
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</table>

29. ARE YOU NOW ON PAROLE OR PROBATION? ____________________________
   WHAT IS THE NAME AND ADDRESS OF YOUR SUPERVISING OFFICER? ____________________________
30. HAVE YOU EVER HAD PAROLE OR PROBATION REVOKED? ____________________________
   WHEN AND WHERE? ____________________________

G. Record of appearance

31. IF YOU HAVE EVER BEEN RELEASED ON BAIL OR OTHER CONDITIONS PENDING TRIAL OR APPEAL, FURNISH THE FOLLOWING INFORMATION:

<table>
<thead>
<tr>
<th>DATE</th>
<th>COURT WHICH RELEASED YOU</th>
<th>CHARGE</th>
<th>DID YOU EVER FAIL TO APPEAR AS REQUIRED?</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

H. Identifying documents

32. SOCIAL SECURITY NO ____________________________
33. MOTOR VEHICLE REG. NO ____________________________
34. DRIVER'S LICENSE NO ____________________________
35. SELECTIVE SERVICE NO ____________________________
36. OTHER ____________________________
I. Supervision

37. IS THERE ANY ORGANIZATION (CHURCH, UNION, CLUB, ETC.) OR PERSON WHO MIGHT AGREE TO SUPERVISE YOU, AND BE RESPONSIBLE FOR YOUR RETURN TO COURT? IF SO, FURNISH THE FOLLOWING INFORMATION:

<table>
<thead>
<tr>
<th>ORGANIZATION</th>
<th>PERSON TO CONTACT</th>
<th>ADDRESS</th>
<th>TELEPHONE NO.</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

J. Verification

38. DO YOU OBJECT TO CONTACT BEING MADE WITH ANY PERSON NAMED ABOVE?

K. Additional relevant information

39. NAME AND ADDRESS OF EACH PERSON OTHER THAN THE DEFENDANT WHO FURNISHED INFORMATION IN RESPONSE TO QUESTIONS IN PART II:

<table>
<thead>
<tr>
<th>Name and Address</th>
<th></th>
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</thead>
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<td></td>
</tr>
</tbody>
</table>

40. CONTINUATION SPACE IF NEEDED (INDICATE ITEM NUMBER)
ORDERED that the following Rules, to be known as the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, be and they are prescribed pursuant to §302 (b) of the Federal Magistrates Act, which amends §3402 of Title 18, United States Code. These Rules shall take effect as of the date of this order and supersede the rules heretofore promulgated by this Court on May 19, 1969.

RULES OF PROCEDURE FOR THE TRIAL OF MINOR OFFENSES BEFORE UNITED STATES MAGISTRATES

Rule 1. Scope

These rules govern the procedure and practice for the trial of minor offenses (including petty offenses) before United States magistrates under Title 18, U.S.C. §3401, and for appeals in such cases to judges of the district courts. To the extent that pretrial and trial procedure and practice are not specifically covered by these rules, the Federal Rules of Criminal Procedure apply as to minor offenses other than petty offenses. All other proceedings in criminal matters, other than petty offenses, before United States magistrates are governed by the Federal Rules of Criminal Procedure.
Rule 2. Minor Offenses Other than Petty Offenses

(a) Complaint or Information. The trial of a minor offense, other than a petty offense, may proceed on a complaint filed with the magistrate or on an information filed with the clerk of the district court. The district court, by order or local rule, may make provision for the reference of such information to a magistrate.

(b) Appearance. Upon the defendant's appearance, the magistrate shall inform him of the complaint or information against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and the general circumstances under which he may secure pretrial release. The magistrate shall also explain to the defendant that he has a right to trial before a judge of the district court and a jury and, if the prosecution is on a complaint, that he has a right to have a preliminary examination before the magistrate unless he consents to be tried before the magistrate.

(c) Consent; Arraignment. If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court and a jury, the magistrate shall take the defendant's plea to the charge set forth in the complaint or information. The defendant may plead not guilty, guilty or, with the consent of the magistrate, nolo contendere. If the defendant indicates a desire to plead guilty or nolo contendere, the magistrate shall proceed in accordance with the requirements of Rule II of the Federal Rules of Criminal Procedure. If the defendant pleads not guilty, the magistrate shall either conduct the trial immediately or fix a time for the trial.

(d) Trial

(1) Date of trial. The date of trial shall be fixed at such time as will afford the defendant a reasonable opportunity for preparation and for representation by counsel if desired.

(2) Procedure. The trial shall be conducted as are trials of criminal cases in the district court by a district judge without a jury.

(3) Record. Proceedings under this rule shall be taken down by a reporter or recorded by suitable sound recording equipment.
Rule 3. Petty Offenses

(a) Complaint or Citation. The trial of a petty offense may proceed on an information filed with the clerk of the district court or on a complaint, citation, or violation notice filed with the magistrate.

(b) Consent; Arraignment. The magistrate shall state to the defendant the charge against him and shall inform the defendant of his right to counsel and to a trial in the district court. If the defendant signs a written consent to be tried before the magistrate which specifically waives trial before a judge of the district court, the magistrate shall take the defendant's plea to the charge. The defendant may plead not guilty, guilty or, with the consent of the magistrate, nolo contendere. If the defendant pleads not guilty, the magistrate shall either conduct the trial immediately or fix a time for the trial, giving due regard to the needs of the parties to consult with counsel and to prepare for the trial.

(c) Trial

(1) Procedure. The trial shall be conducted as are trials of petty offenses in the district court by a district judge without a jury.

(2) Record. Unless the defendant waives in writing the keeping of a verbatim record, proceedings under this rule shall be taken down by a reporter or recorded by suitable sound recording equipment.

Rule 4. Warrant or Summons

(a) Citation or Violation Notice. If a defendant fails to appear in response to a citation or violation notice, a summons or a warrant for his arrest may be issued by the magistrate. No warrant may issue unless the essential facts of the offense charged in the citation or violation notice establish probable cause and are supported by oath.

(b) Failure to Appear. If a defendant fails to appear before the magistrate when summoned or otherwise ordered by the magistrate to appear, the magistrate may summarily issue a warrant for his immediate arrest and appearance before the magistrate.

Rule 5. Orders Subject to Rehearing by District Judges

A decision or order by a magistrate which, if made by a judge of the district court, could be appealed by the government under any provision of
law, shall be subject to rehearing de novo by a judge of the district court upon motion for such rehearing filed with the magistrate by the attorney for the government within 10 days after the entry of the order. Upon the filing of such a motion, the magistrate shall promptly transmit the motion and all records in the case to the clerk of the district court. The magistrate shall not proceed further with the case until the matter to be reheard, including any available appeal, has been determined.

Rule 6. Transfer of Cases

(a) Minor Offenses other than Petty Offenses. Cases of minor offenses, other than petty offenses, may, upon transfer under Rule 20 of the Federal Rules of Criminal Procedure, be referred to a magistrate for plea and sentence, if authorized by rule or order of the district court.

(b) Petty Offenses. A defendant charged with a petty offense who is arrested, held, or present in a district other than that in which an information, complaint, citation or violation notice is pending against him may state in writing before a magistrate that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the proceeding against him is pending, and to consent to disposition of the case in the district in which he was arrested, is held, or is present. The magistrate shall thereupon transmit the statement to the magistrate before whom the proceeding is pending. Upon receipt of the defendant's statement, the magistrate before whom the proceeding is pending shall transmit papers, or certified copies thereof, to the clerk of the district court for the district in which the defendant was arrested, is held, or is present for reference to a magistrate and the proceeding shall continue in that district.

(c) Not Guilty Plea after Transfer. If, after the proceeding has been transferred pursuant to this rule, the defendant pleads not guilty, the magistrate shall send the papers to the clerk of the district court for return to the magistrate in the district where the proceeding was originally commenced for restoration to the docket. The defendant's statement that he wishes to plead guilty or nolo contendere shall not be used against him.

Rule 7. New Trial

The magistrate, on motion of a defendant, may grant a new trial if required in the interest of justice. The magistrate may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within 180 days after final judgment, but if an appeal is pending the magistrate may grant the motion only on remand of
the case. A motion for a new trial based on any other grounds shall be made within 7 days after a finding of guilty or within such further time as the magistrate may fix during the 7-day period.

Rule 8. Appeal

(a) Notice of Appeal. An appeal from a judgment of conviction by a magistrate to a judge of the district court shall be taken within 10 days after entry of the judgment. An appeal shall be taken by filing with the magistrate a notice stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney, personally or by mail.

(b) Record. The magistrate shall forward to the clerk of the district court the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings, and a certified copy of the docket entries. These shall constitute the record on appeal. Any expense in connection therewith shall be borne by the government.

(c) Stay of Execution; Release Pending Appeal. The provisions of Rule 38(a) of the Federal Rules of Criminal Procedure relating to stay of execution shall be applicable to a judgment of conviction entered by a magistrate. The defendant may be released pending appeal by the magistrate or a district judge in accordance with the provisions of law relating to release pending appeal from a judgment of conviction of a district court.

(d) Scope of Appeal. The defendant shall not be entitled to a trial de novo by the judge of the district court. The scope of appeal shall be the same as on an appeal from a judgment of a district court to a court of appeals.

Rule 9. Payment of Fixed Sum in Lieu of Appearance

When authorized by local rules of the district courts in cases of petty offenses as defined in Title 18, U.S.C., §1(3), payment of a fixed sum may be accepted in lieu of appearance and as authorizing the termination of the proceeding.


The magistrate shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe.
Rule II. Rules of Court

(a) Local Rules by District Courts. Rules adopted by a district court for the conduct of trials before magistrates shall not be inconsistent with these rules. Copies of all rules made by a district court shall, upon their promulgation, be filed with the clerk of the district court and furnished to the Administrative Office of the United States Courts.

(b) Procedure Not Otherwise Specified. If no procedure is especially proscribed by rule, the magistrate may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.
APPENDIX 7

TITLE I - SPECIAL GRAND JURY

Sec. 101. (a) Title 18, United States Code, is amended by adding immediately after chapter 215 the following new chapter:

"Chapter 216. -- SPECIAL GRAND JURY

"Sec.
"3331. Summoning and term.
"3332. Powers and duties.
"3333. Reports.
"3334. General provisions.

"§ 3331. Summoning and term

"(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

"(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.
"§ 3332. Powers and duties

"(a) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

"(b) Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

"§ 3333. Reports

"(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report--

"(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or

"(2) regarding organized crime conditions in the district.

"(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise provided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that--

"(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (a) of section 3332 and is supported by the preponderance of the evidence; and

"(2) when the report is submitted pursuant to paragraph (1) of subsection (a) of this section, each person named therein and any reasonable number of witnesses in his behalf as designated by him to the foreman of the grand jury were afforded an opportunity to testify before the grand jury
prior to the filing of such report, and when the report is submitted pursuant to paragraph (2) of subsection (a) of this section, it is not critical of an identified person.

"(c) (1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be filed as a public record or be subject to subpoena or otherwise made public (i) until at least thirty-one days after a copy of the order and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or (ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3) of subsection (c) of this section. The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publication may be punished as contempt of the court.

"(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudicially, or unnecessarily, such answer shall become an appendix to the report.

"(3) Upon the expiration of the time set forth in paragraph (1) of subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility or authority over each public officer or employee named in the report.

"(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpoena or public inspection during the pendency of such criminal matter, except upon order of the court.
"(e) Whenever the court to which a report is submitted pursuant to paragraph (I) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpoena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may be extended by the district court beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

"(f) As used in this section, 'public officer or employee' means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.

"§ 3334. General provisions

"The provisions of chapter 215, title 18, United States Code, and the Federal Rules of Criminal Procedure applicable to regular grand juries shall apply to special grand juries to the extent not inconsistent with sections 3331, 3332, or 3333 of this chapter."

(b) The part analysis of part II, title 18, United States Code, is amended by adding immediately after

"215. Grand Jury-----------------------------------3321"

the following new item:

"216. Special Grand Jury--------------------------3331."

Sec. 102. (a) Subsection (a), section 3500, chapter 223, title 18, United States Code, is amended by striking "to an agent of the Government" following "the defendant".

(b) Subsection (d), section 3500 chapter 223, title 18, United States Code, is amended by striking "paragraph" following "the court under" and inserting in lieu thereof "subsection".

(c) Paragraph (1), subsection (e), section 3500, chapter 223, title 18, United States Code, is amended by striking the "or" following the semicolon.

(d) Paragraph (2), subsection (e), section 3500, chapter 223, title
18, United States Code, is amended by striking "to an agent of the Government" after "said witness" and by striking the period at the end thereof and inserting in lieu thereof: "; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."
§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as herinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.
(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means --

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.
§ 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c) The arraignment of a defendant charged in an information or indictment with the commission of an offense shall be held within ten days from the filing date (and making public) of the information or indictment, or from the date a defendant has been ordered held to answer and has appeared before a judicial officer of the court in which such charge is pending whichever date last occurs. Thereafter, where a plea of not guilty is entered, the trial of the defendant shall commence within sixty days from arraignment on the information or indictment at such place, within the district, as fixed by the appropriate judicial officer.

(d) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.
(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within sixty days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within sixty days impractical.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(I) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(a) delay resulting from an examination of the defendant, and hearing on his mental competency, or physical incapacity;

(b) delay resulting from an examination of the defendant pursuant to section 2902 of title 28, United States Code;
(c) delay resulting from trials with respect to other charges against the defendant;

(d) delay resulting from interlocutory appeals;

(e) delay resulting from hearings on pretrial motions;

(f) delay resulting from proceedings relating to transfer from other districts under the Federal Rules of Criminal Procedure; and

(g) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3) (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) Any period of delay resulting from the treatment of the defendant pursuant to section 2902 of title 28, United States Code.
(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(8) (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the periods of time established by this section.
(iii) Whether delay after the grand jury proceedings have commenced, in a case where arrest precedes indictment, is caused by the unusual complexity of the factual determination to be made by the grand jury or by events beyond the control of the court or the Government.

(C) No continuance under paragraph (8) (A) of this subsection shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j) (I) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial, or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.
(4) When the person having custody of the prisoner receives from
the attorney for the Government a properly supported request for temporary
custody of such prisoner for trial, the prisoner shall be made available
to that attorney for the Government (subject, in cases of interjurisdictional
transfer, to any right of the prisoner to contest the legality of his
delivery).

§ 3162. Sanctions

(a) (1) If, in the case of any individual against whom a complaint
is filed charging such individual with an offense, no indictment or
information is filed within the time limit required by section 3161(b)
as extended by section 3161(h) of this chapter, such charge against
that individual contained in such complaint shall be dismissed or otherwise
dropped. In determining whether to dismiss the case with or without
prejudice, the court shall consider, among others, each of the following
factors: the seriousness of the offense; the facts and circumstances of
the case which led to the dismissal; and the impact of a reprosecution
on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit
required by section 3161(c) as extended by section 3161(h), the informa­
tion or indictment shall be dismissed on motion of the defendant. The
defendant shall have the burden of proof of supporting such motion but
the Government shall have the burden of going forward with the evidence
in connection with any exclusion of time under subparagraph 3161 (h) (3).
In determining whether to dismiss the case with or without prejudice, the
court shall consider, among others, each of the following factors: the
seriousness of the offense; the facts and circumstances of the case which
led to the dismissal; and the impact of a reprosecution on the adminis­
tration of this chapter and on the administration of justice. Failure of the
defendant to move for dismissal prior to trial or entry of a plea of guilty
or nolo contendere shall constitute a waiver of the right to dismissal
under this section.

(b) In any case in which counsel for the defendant or the attorney
for the Government (1) knowingly allows the case to be set for trial
without disclosing the fact that a necessary witness would be unavailable
for trial; (2) files a motion solely for the purpose of delay which he knows
is totally frivolous and without merit; (3) makes a statement for the purpose
of obtaining a continuance which he knows to be false and which is material
to the granting of a continuance; or (4) otherwise willfully fails to proceed
to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

§ 3172. Definitions

As used in this chapter--

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a petty offense as defined in section 1(3) of this title, or an offense triable by court-martial, military commission, provost court, or other military tribunal).
§ 3173. Sixth amendment rights

No provision of this chapter shall be interpreted as a bar to any claim of denial of speedy trial as required by amendment VI of the Constitution.
SEARCH AND SEIZURE

This course is taught entirely by the case method, and few hard and fast rules can be enunciated.

The cases are to be treated as guideposts to assist you in the field in making such decisions as whether or not to secure a search warrant, or to what extent an area can be searched incident to an arrest.

Naturally, no situation which you will face will be exactly like any case discussed, but familiarity with the leading cases on the point should enable you to make an intelligent decision which will likely lead to the admission into evidence of the items seized.

It is important to remember that search and seizure is a fast-moving field and what is valid today may not be valid tomorrow, and what is true in one judicial circuit may not be true in another.

After you return to the field, you should attempt to keep abreast of developments in this area. (One good source is the newsletter put out by many agencies' chief counsel.)

In any event, you should not approach this subject looking for concrete or easy answers, or for rules which can withstand the test of time as, unfortunately, few exist.

REQUIRED READING:
U.S. Constitution: Fourth Amendment; Fed. Rules of Criminal Procedure: Rule 41; Student Text

RECOMMENDED READING:
Creamer, Law of Arrest, Search, and Seizure; Waltz, Criminal Evidence, Chapter 10.

ASSIGNMENT:
OUT OF CLASS EXERCISE:
Prepare a legally sufficient affidavit for a search warrant from a given set of facts.
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INTRODUCTION

Search and Seizure is undoubtedly one of the most difficult subjects for a law enforcement officer in the field. Statutes and rules cover only a minute portion of the field and court decisions are frequently vague, misleading, or even contradictory. Often, important points have never been passed upon by the U.S. Supreme Court, and officers must look to the law of the various circuits or even the districts for guidance. An additional problem that officers face in the area of the Fourth Amendment (arrest, search and seizure) is that decisions must often be made on the spur of the moment, without benefit of books, manuals, advice of government attorneys, or even assistance from more seasoned officers. Substantial changes in the area of search and seizure occur regularly, and it is extremely difficult for a student of the law, let alone an officer in the field, to keep up with new developments. Nonetheless, an officer with knowledge of the basic principles of search and seizure can be effective and hold the number of errors that he makes down to a minimum. It is the purpose of this course to prepare the officer for the Fourth Amendment decisions which he will face in the field so that he can help insure that his actions will be lawful and that the evidence thereby seized will be admissible in a court of law.
I. THE FOURTH AMENDMENT; THE PREFERENCE FOR WARRANTS

The Fourth Amendment to the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment could really be divided into two parts for the purposes of analysis. The first clause, although negatively stated, holds simply that all searches shall be reasonable. The second clause states that all warrants shall be based upon probable cause. Thus, the Fourth Amendment does not hold that all arrests and searches need be based on probable cause. Some types of searches, as shall be seen, do not require probable cause but must merely be "reasonable" as determined by the courts of the United States. (Examples are searches by consent and searches incident to lawful arrests.) On the other hand, if a warrant is to be issued, it must be based on probable cause and supported by oath or affirmation. Underlying the entire study of the law of search and seizure is the basic tenet that if the officer has time and if he has probable cause, a warrant should be secured. The courts have frequently stressed their preference for warrants and in fact, the very issuance of a warrant may be dispositive in a close case because the courts will give the benefit of the doubt to the magistrate's approval of the warrant. Of course, urgent circumstances or the absence of probable cause may dictate that a warrantless search be conducted; and, in such a case, the search, in order to be found to be reasonable, and therefore lawful, must fall within one of the "few specially established and well-delineated exceptions" to the warrant requirement. In other words, when a warrantless search is made, the burden is on the government to show an acceptable excuse for failure to secure a warrant. Therefore, it can not be overemphasized that, in doubtful situations, where time permits, the officer should make every effort to obtain a warrant.

A. THE EXCLUSIONARY RULE

Prior to 1914, the admissibility of evidence in United States courts was not affected by the illegality of the means by which it was obtained. Evidence which was relevant and otherwise competent, regardless of how it was obtained, could be used in a prosecution in both Federal and state courts. The court would make no inquiry into the means by which the evidence was obtained.

In 1914, the Supreme Court of the United States handed down its decision in the case of Weeks v. United States, in which it was held
that evidence obtained through an unreasonable search and seizure by Federal officers was inadmissible in a prosecution in Federal court against the person whose constitutional rights had been violated.

This "exclusionary rule," also known as the "suppressive doctrine," is applied nowhere else in the world. Whether the illegal search was willful or negligent; whether the officer acted in good faith or in bad faith; whether the error was technical or egregious, the evidence in United States Courts is inadmissible. Although the rule has been consistently rejected by other countries and has been forcefully attacked by leading scholars and jurists, most recently by Chief Justice Warren Burger, the rule remains in force.

The purpose of the exclusionary rule is to deter police officers from violating constitutional rights by removing the incentive, i.e., the use of evidence obtained, to do so. The rule's supporters claim that it is the only effective way to deter law enforcement officers from conducting illegal searches or making illegal arrests. Its opponents, on the other hand, point out that its immediate result is to free the guilty, and its ultimate effect is the punishment of and injury to society by turning a criminal trial away from its proper goal of determining innocence or guilt and rendering it instead a "sporting contest" between lawyers to unearth procedural errors made by law enforcement officers after the crime has occurred.

B. DEVELOPMENT OF THE RULE SINCE 1914

Even after 1914, the federal courts continued to receive illegally seized evidence in federal trials so long as federal officers were not involved in any way with the illegal search and seizure. This was known as the "silver platter doctrine," supposedly because state and local officers would turn over the fruits of their illegal searches and seizures to Federal authorities for prosecution. Over the years, the silver platter doctrine underwent substantial modification and was finally abolished in 1960. Since that time, illegally seized evidence has been inadmissible in federal court regardless of the type of law enforcement officer who made the seizure.

In 1961, in the case of Mapp v. Ohio, the U.S. Supreme Court, by means of the Due Process Clause of the Fourteenth Amendment, imposed the exclusionary rule of the Fourth Amendment on the states. Thus, to be admissible today in any court in the United States, evidence must meet minimum federal standards for lawful searches and seizures.

C. FRUIT OF THE POISONOUS TREE

Often encountered in cases involving Fourth Amendment problems is the so-called "fruit of the poisonous tree" doctrine. Simply stated, this doctrine holds that illegally seized evidence cannot be used as
the means of obtaining still more evidence. Stated another way, an
officer cannot use what he gains from illegally-obtained evidence.
(This doctrine has many subtle ramifications, and the test of legality
is emphatically not a "but for" test. For example, it has been held
that if the evidence would inevitably have been discovered, or if the
"primary taint" has dissipated, or if the evidence at the end of the
chain had an independent, i.e., unpoisoned, source, such evidence will be
admitted.) A classic example of the fruit of the poisonous tree is
where agents illegally seize documents from Richard Roe and make photo-
copies. An attempt to introduce the photocopies against Roe would be
unsuccessful because the photocopies had been acquired by exploiting
the illegal seizure of the originals.
II. SCOPE OF THE EXCLUSIONARY RULE

Not all searches and seizures will trigger the application of the exclusionary rule. Such factors as the status of the searching party, the ultimate use of the evidence, and the relationship of the defendant to the evidence play a role in determining whether the rule will apply. Nonetheless, officers must realize that most searches and seizures are covered by the rule, and an officer should not attempt to evade the effect of the rule by seeking, in advance of the search, to fit it into one of the "exceptions."

A. PRIVATE SEARCHES

Searches by private persons with such varied private motives as theft or fear for personal safety are not within the ambit of the exclusionary rule. Though a search by a private party would have been clearly illegal if conducted by a law enforcement officer, the evidence will not be excluded if it was not the result of governmental action. As noted above, the purpose of the rule is to deter law enforcement officers from conducting illegal searches. Thus it is wholly irrelevant to the actions of private persons. A caveat, however, is in order in this area. The courts closely scrutinize private searches, and if it is found that law enforcement officers have attempted to avoid the application of the exclusionary rule by encouraging private persons to conduct the search or played too great a role in the action, exclusion will result.

B. FOREIGN SEARCHES

Similarly, the courts have recognized their inability to deter foreign officers by means of the exclusionary rule. The rule does not apply to searches by foreign officers, whether the search conducted was legal or illegal by American standards or even by the standards in the country of the search. As long as American officers did not instigate or participate in the illegal search, the evidence will be admissible. It has been held that furnishing the foreign officers with leads by the American officers in the case will not trigger the application of the rule even if a search by foreign officers, which was illegal by American standards, results.

C. IMPEACHMENT PURPOSES

Evidence which is inadmissible in the government's case-in-chief may nonetheless be admitted for the limited purpose of impeaching the defendant's credibility as a witness. Thus, a defendant who voluntarily elects to take the stand and states that he has never possessed an illegal weapon may be impeached on rebuttal by an agent's testifying that he had once seized an illegal weapon from the defendant, even
though that seizure had previously been determined to have been illegal.

D. STANDING TO OBJECT

Even if an illegal search has occurred, not everyone has the right to object to the introduction of the evidence seized. Constitutional rights being personal rights, one person cannot claim that evidence should not be admitted against him by reason of its having been seized in violation of another person's rights. In other words, to have standing, i.e., the right to object, one must himself be the victim of the illegal search as distinguished from one who claims prejudice merely through the use of evidence gathered as a result of a search directed at someone else.

Standing will be granted to one who:

1. Has an attendant requisite expectation of privacy in relation to the place searched, or

2. Has a proprietary or possessory interest in the premises searched, or

3. Is charged with a crime that includes, as an essential element, possession of the seized evidence at the time of the search and seizure.

As an example of the "standing" issue, assume Able is alone at his home when agents enter and conduct an illegal search and seizure and find Baker's fingerprints on bait money obtained in a bank robbery. Baker has no standing to object to the search and seizure because (1) he was not on Able's premises at the time of the search, (2) he is not the owner or the tenant of the searched premises, and (3) he is not charged with a crime (bank robbery) that includes, as an essential element, possession of the seized evidence (the money) at the time of the search. In short, Able and not Baker was the victim of the search, and, although Able has standing to object to it, Baker does not and the illegally seized evidence may be used against Baker.

E. MISCELLANEOUS LIMITATIONS

In recent years, the Supreme Court has somewhat restricted the use of the exclusionary rule. In 1974, the court declined to allow a defendant to refuse to testify before the grand jury on the grounds that the subpoena was based on an investigation which had its origins in an illegal search and seizure. The court held that the necessity for ensuring the efficacy of the grand jury's investigative powers outweighed any possible deterrent effect.
In 1976, the court held that where agents of one sovereign, e.g., state police officers, conduct an illegal search, the evidence gained thereby may be used in a civil prosecution by a different sovereign, e.g., the United States government.

Also in 1976, the Supreme Court virtually eliminated the use of the federal writ of habeas corpus in state cases where the issue was the use of illegally seized evidence. Thus federal district and circuit courts can no longer overturn state convictions on Fourth Amendment grounds where the state courts have ruled on the legality of a search and seizure applying federal standards.

Nevertheless, as stated above, the exclusionary rule, as promulgated in Weeks, is still virtually intact, and officers must be cognizant of the fact that the vast majority of their errors in the area of search and seizure will result in the suppression of the evidence obtained.
III. REASONABLE EXPECTATION OF PRIVACY

The Fourth Amendment provides that the people shall be "...secure in their persons, houses, papers and effects, against unreasonable searches and seizures..." Just what areas are protected and to what extent has always been a problem for the investigative agent in the field and the courts as well.

In 1967, a new standard for determining the extent of Fourth Amendment protections was established by the Supreme Court in Katz v. United States. The court stated that the Constitution protects people, not places. Therefore, the degree of protection provided by the Constitution to an individual in his person, or an area, or possessions depends on the reasonable expectation of privacy manifested by the individual. Thus, what one seeks to preserve as private even though in an area accessible to the public is protected. For example, a person who uses a public telephone booth and closes the door manifests an expectation of privacy in his conversation against seizure by law enforcement officers using a concealed microphone on that public telephone booth. On the other hand, what one knowingly exposes to the public, even though in the privacy of his own home or office is not protected. Therefore, a person who commits a criminal violation and boasts loudly of his deeds to his friends in his home with the windows open cannot complain of law enforcement officers overhearing his words on the street outside.

The expectation of privacy does not depend on the concepts of property law but instead is measured by the objective reasonableness of the individual's expectation of privacy considering all the facts and circumstances of the particular case. Therefore, in light of the expectation of privacy standard, we will now examine the scope of the protection of the Fourth Amendment.

A. PERSONS

The Constitution protects "persons" rather than places and no differentiation is made between citizens of the United States and other persons nor between innocent or guilty persons. Therefore, all persons, even those who may be in this country illegally, are protected against violations of the Fourth Amendment. Even a foreign spy illegally in this country for the avowed purpose of overthrowing our government is afforded the protections of the Constitution.

Persons in the military service of the United States also have the protections of the Fourth Amendment but under some circumstances their reasonable expectation of privacy may be lessened due to the specialized mission and needs of the armed forces in fighting wars and maintaining the national defense.
A corporation, although not a living person, has been held to be a "person" for the purposes of the protections of the Fourth Amendment. A corporation, as a legal entity, may own property, sue and be sued, and be prosecuted for criminal violations. Therefore, a corporation is protected from unreasonable searches and seizures to the same extent as any living person.

B. PAPERS AND EFFECTS

The protection of the Fourth Amendment extends to all personal property. The specific mention of "papers" in the Constitution is a recognition of the great expectation of privacy that individuals have in their personal papers. Although a person may not be compelled to produce his personal papers to be used against him because of the Fifth Amendment, there is no special sanctity in papers as distinguished from other kinds of property for the purposes of search and seizure. Therefore, officers may obtain a search warrant for and seize personal papers, diaries, bank and financial records, etc., and use these items as evidence in court.

Another form of "papers" that has presented problems to law enforcement officers is mail. The expectation of privacy in first class mail is such that it may not be opened except under the authority of a search warrant. With lower classes of mail, the expectation of privacy is less and such mail may be opened by postal officials pursuant to their regulations. Since the expectation of privacy in mail only extends to the contents of the letter or parcel, the weight, description, external markings and writings are exposed to the public and may be noted or recorded by officers without obtaining a search warrant. The courts have also permitted a reasonable delay in the transmission of an item of mail for the purpose of obtaining a search warrant based on probable cause.

Some forms of evidence have been classified as "nontestimonial" and therefore not subject to the protections of the Fifth Amendment. Thus, evidence in the form of fingerprints, handwriting exemplars, blood samples, etc., may be taken from a person, even by force, without causing a person to be a witness against himself. But since a person manifests an expectation of privacy in his person, e.g., bodily fluids, these nontestimonial items of evidence are protected by the provisions of the Fourth Amendment. If the courts find that an unreasonable search or seizure took place in the obtaining of these items, then they will be suppressed. For example, fingerprints are nontestimonial evidence and the taking of them from a suspect, even over his objection, does not compel that individual to be a witness against himself. However, if that suspect is illegally arrested for the purpose of obtaining his fingerprints, the seizure of the fingerprints violates the individual's expectation of privacy and thus those fingerprints will be suppressed as evidence.
As can be seen in the foregoing, all property and evidence is protected from unreasonable searches and seizures by law enforcement officers. This is so regardless of the nature of the item seized. Even contraband and other property illegally possessed by an individual, such as stolen property, is protected under the Fourth Amendment and will be suppressed if illegally seized. The only difference is that contraband and other illegally possessed items taken from a defendant will not be returned to that individual.

C. HOUSES (PREMISES)

The term "houses" in the Constitution has been interpreted very broadly by the courts and has been extended so as to bring the protections of the Fourth Amendment to cover practically all buildings and structures, whether used as a residence, office, or storage facility. The concepts of traditional property law are no longer controlling since the measure of the Fourth Amendment's protection is established by the individual's reasonable expectation of privacy concerning a particular area. (This will be discussed more fully below in the section on "curtilage."

A dwelling house, be it a home, apartment, etc., is looked at by the courts in a more protective way than any other structure. This is due to the traditional expectation of privacy manifested in the home. The fact that a dwelling or structure is temporarily unoccupied does not change its status. For example, a vacation cottage which is only occupied for a few weeks each year nonetheless has the protection of the Fourth Amendment from unreasonable searches all year long.

Multiple-unit dwellings such as apartments, hotel rooms, etc., are also protected from unreasonable searches during the period that the resident has the right to occupancy and use of the premises. Each dwelling unit in a multiple-unit structure is treated as separate independent premises entitled to Fourth Amendment protection. Thus, if agents desire to search an entire apartment building containing four units, there must be independent probable cause to justify the search of each separate unit in order to comply with the requirements of the Fourth Amendment.

The occupancy of some types of dwelling units may be accompanied by a lessened expectation of privacy. For example, the occupancy of college dormitories may be subject to regulations authorizing college officials to enter rooms to inspect mechanical equipment such as plumbing or heating or providing maid service. The resident, however, still retains an expectation of privacy in his personal belongings and his room, subject to the limited specific purposes for which others may have authority to enter. Thus, college officials could not abuse their limited inspection authority to enter a student's room, nor authorize law enforcement officers to enter the room, for the purpose of conducting a search for criminal evidence.
Some dwelling houses may be used for the purpose of conducting illegal activities such as gambling or prostitution. Even though the activities offend the law, the individual's right to expect privacy is protected. The illegal activities involved do not place the premises beyond the protection of the Fourth Amendment.

As stated above, all structures are protected from unreasonable searches based on the degree of expectation of privacy manifested by the individual. Thus, storage buildings, barns, lockers, stores, and offices even though not "houses" in the literal sense share the protections against unreasonable governmental invasion.

The amount of expectation of privacy that is reasonable in reference to offices and other business premises depends on the character of the premises itself and the degree of public access. Wherever the general public is allowed access, so too may law enforcement officers enter. However, permission to enter a public office or premises does not create a right to search. Officers may make observations of things in plain view to them but have no authority to search desks, filing cabinets, closets or other closed or limited-access spaces. Remember that what an individual seeks to preserve as private, even though in an area accessible to the public, is protected from unreasonable search and seizure.

The only area that is void of any expectation of privacy is a jail or prison. The need for security and discipline outweighs the privacy protection normally afforded a person by the Fourth Amendment. In prison, surveillance and monitoring are the order of the day. The only exception to this is in those rooms specifically provided for prisoners to confer with their attorneys.

D. SURVEILLANCE V. PRIVACY

One of the functions of the law enforcement officer is to make observations and obtain evidence. Thus, the use of surveillance by officers is an accepted and effective tool for obtaining evidence. However, there are limitations. The courts have held generally that the use of an electronic listening device is an invasion of privacy without first obtaining a search warrant for the use of the device. On the other hand, if officers can position themselves lawfully in an area where they may eavesdrop on a private conversation with the "naked ear" such conversations overheard may constitute admissible evidence. For example, the courts have held that defendants had no reasonable expectation of privacy in their motel room conversations which were overheard by a law enforcement officer listening through the door to the adjoining motel room.

There have been very few restrictions placed on the use of devices that aid visual observations. The courts have held that the use of common visual aids such as flashlights, binoculars and telescopes do not constitute an unreasonable invasion of privacy.
An area of concern that has caused problems for agents conducting surveillance has been the use of electronic tracking devices, or "beepers," in order surreptitiously to monitor the movements of automobiles, aircraft, vessels or other moveable items. The courts have not been uniform in their decisions on the legality of the use of these devices.

The courts have generally held that there is a lesser expectation of privacy in an automobile or other conveyance that travels about in public open to view. Therefore, there is no expectation of privacy in a license plate number or motor vehicle identification number while the vehicle is exposed to public view. Some courts hold that a tracking device may be attached to a vehicle or other conveyance in order to monitor its movements without first obtaining a warrant so long as no other invasion of privacy occurred in order to attach the device, e.g., entering a private garage or entering the inside of the vehicle. The court's reasoning is that an individual has no expectation of privacy that his travels on the public highways will not be followed. Other courts, however, have held that law enforcement officers may not use a tracking device on a vehicle or other conveyance without first obtaining the approval of a judicial officer and a warrant (absent exigent circumstances).

In regard to other uses of tracking devices, the courts have generally held that a person has no reasonable expectation of privacy to believe that the government will not place a "beeper" in contraband, e.g., narcotics, things illegally possessed, e.g., stolen property, or items exchanged for contraband, e.g., a television set exchanged by undercover agents for narcotics.

Due to the divergence of opinions by the various courts it is recommended that prior to using any tracking device, agents first contact either the United States Attorney's office or their agency's legal advisor to determine the position of the courts in their area on the legality of the use of these devices.

E. CURTILAGE AND OPEN FIELDS

"Curtilage" is an old common law property concept that defined the area of the home and separated it from the surrounding "open fields." "Curtilage" has been defined as that area, including outbuildings, around and immediately adjacent to a dwelling house that is necessary, convenient and used for family purposes and the daily domestic pursuits of the family. The effect of curtilage on the law of search and seizure has been that the courts have extended the protections of the Fourth Amendment to include not just the dwelling house but also that curtilage area around the house. Therefore, just as law enforcement officers may not enter the house to search without a warrant or other legal justification, neither may they enter that curtilage area around the outside of the house.

A major problem with curtilage is that it is a fluid concept. The
courts have never given a fixed definition of what constitutes curtilage in all cases. In a regular suburban neighborhood the curtilage of a home could extend to the entire front, side and back yards. In an urban area, the curtilage may be only a small private courtyard at the rear of the house. In a rural area, the curtilage of the farmhouse may extend to adjacent outbuildings such as barns, storage sheds and include private garden areas near the house. Every case is different depending on its own special facts and circumstances. To determine if an area is within the curtilage, the courts have considered: (1) the nearness or connection to the dwelling; (2) its inclusion within the general enclosure surrounding the dwelling; and (3) its use by the occupants. Note that in order for a structure to have the added protection of the curtilage, the structure must be actually used as a dwelling house. This does not mean that an individual loses any expectation of privacy in the interior or contents of other structures but that the expectation of privacy does not extend to any area beyond the walls of the structure itself. For example, if an agent, without a warrant, enters the backyard of a private home in order to look into the window of a small workshop attached to the home and observes evidence of a crime, that observation and any use of it will be suppressed because the officer violated the curtilage. On the other hand, if the defendant maintained a workshop on property not connected with his residence, the agent could lawfully, without a warrant, approach the workshop and look through the window. Of course, the agent could still not break into or otherwise enter the workshop without complying with the Fourth Amendment.

The importance of curtilage as a property concept has been lessened as a result of the Katz case. The courts still occasionally use the terms "curtilage" and "open fields" but they use them to define the areas of expectation of privacy around the dwelling house. Thus, the traditional curtilage area is now considered to be the area where an individual has a reasonable expectation of privacy. On the other hand, the "open fields" are areas where the landowner normally does not have an expectation of privacy.

Officers may enter upon the open fields to make searches or observations without a warrant or any other legal justification so long as they are on official business. If the agents obtain evidence from the open fields areas, its use does not violate the Fourth Amendment. The law enforcement officers may be technically trespassers on private property, but this fact will not prevent the lawful use of evidence obtained in the performance of their law enforcement duties. As long as the officers are physically located off the curtilage, they may make observations even into the curtilage area. Agents are advised, however, that if there is any doubt whether a vantage point or a place to be searched is within the curtilage, a warrant should be obtained.

F. PLAIN VIEW

The plain view doctrine is an acknowledgement by the courts that a law
enforcement officer lawfully engaged in the ordinary course of his duties is not required to wear blinders or close his eyes to that which he observes. Accordingly, when an officer who already has a legal right to be where he is inadvertently observes items which are immediately of an apparently incriminating nature, the courts will allow a seizure of those items without a warrant. The three necessary elements for a lawful plain view seizure are: (1) the officer must be lawfully present; (2) the discovery must be inadvertent; and (3) the item must be immediately of an apparent incriminating nature.

(1) Lawfully Present. The officer must be justified in being where he is at the time he makes his plain view observation. If the officer is not in a place where he has a right to be, then his observations or any evidence seized will be suppressed. An officer may gain lawful presence by execution of a lawful arrest, service of a lawful search warrant for some other items of evidence, consent, etc. Plain view would not apply if the officer's presence is found to be unlawful such as resulting from a defective search warrant, illegal arrest or curtilage violation.

It should be noted that there is a difference between a seizure justified by plain view and an observation based on plain or open view. A plain view seizure of evidence is justified only when the officer is lawfully present such that no further invasion of an individual's privacy is necessary. For example, where officers are already lawfully in a suspect's home for the purpose of executing a search warrant for counterfeit currency and they discover a moonshine still, they are justified in seizing the still under the plain view doctrine. No further expectation of privacy has been violated. But, if officers make a lawful observation from a neighbor's property into the open window of a suspect's house and observe growing marijuana plants, they may not enter the suspect's house and seize the plants. The plain or open view observation provides probable cause for an arrest of the suspect or the issuance of a search warrant but no amount of probable cause alone will justify a warrantless entry of premises to search without a warrant.

(2) Inadvertent Discovery. The theory supporting the plain view doctrine is that there is no separate search in the Fourth Amendment context when evidence is observed in plain view. Thus, the second requirement for a valid plain view seizure is that the officer must discover the evidentiary items accidentally or "inadvertently." If an officer has probable cause to believe that an item is located on certain premises and goes on those premises with the intention of searching for and seizing that item, such a seizure is not inadvertent and thus cannot be supported by the plain view doctrine even though the officer was lawfully on the premises. The officer was conducting a search and thus should have obtained a search warrant.

(3) Apparent Incriminating Nature. The officer making a seizure under the plain view doctrine must have reasonable grounds to believe
immediately, without further investigation, that the item in plain view is evidence. For example, if officers go to the home of a known convicted felon to interview him, are admitted to the premises, and see a pistol lying on a table in plain view, they may seize the pistol because its value as evidence of the crime of possession of a weapon by a convicted felon is immediately apparent to them. On the other hand, if officers enter the home of a suspect, not a convicted felon, on a warrant to search for gambling devices, and observe several sporting rifles, they may not seize the weapons or even read the serial numbers from the weapons because there is no incriminating nature immediately apparent concerning these rifles.

As long as the three-prong test for plain view is met, the courts have allowed the use of artificial light and/or visual aids. Therefore, the use of flashlights, binoculars, etc., is acceptable as a means of observing what is in plain view.

G. ENTRANCES (NONFORCIBLE)

In order for law enforcement officers to make legal observations or plain view seizures, they must first lawfully be in the position to make the observation or seizure. Not every entry into the curtilage or privacy area is forbidden. Often, there are legitimate reasons for officers to enter private areas.

Officers may legally walk up to an individual's front door to obtain directions, seek the whereabouts of an individual, conduct an interview, or use the bathroom. In determining whether officers are legally on the premises, the courts place a heavy burden on the government to show that the entry was not a subterfuge to avoid the warrant requirement of the Fourth Amendment. If the courts find that the officer's action was actually designed to allow them to search without obtaining a warrant, then any observations or seizures made will be suppressed.

Sometimes, the line between proper undercover operations and an illegal search is a thin one. Where an officer gains entry to premises by assuming a false identity and seeking to purchase contraband or seeking to become involved in illegal activities, the entry (and thus any subsequent observations made) has been held to be legal. The individual, by allowing the undercover officer to enter with full knowledge that he desires to see or discuss contraband or other illegal activities, has relinquished his expectation of privacy as to these matters.

On the other hand, where an officer not only conceals his identity but goes further and also conceals his purpose for entry, in order to make observations, the courts have held the entry to be unlawful and have suppressed the observations made. The Supreme Court and lower federal courts have uniformly condemned searches that are conducted after entrance has been obtained by fraud, stealth, or in the guise of a false business
or social call. By using fraud to induce an individual to admit officers so they can conduct a surreptitious search, the officers have violated the individual's expectation of privacy. Thus, where an officer, seeking to gain evidence to support an affidavit for a search warrant, goes to the suspect's home and falsely identifies himself as a vacuum cleaner salesman and is admitted to the premises for the purpose of demonstrating the vacuum cleaner, observations made by him will be suppressed and cannot be the basis for a subsequent search warrant. The use of fraud by the officer in misrepresenting his true purpose violated the suspect's expectation of privacy.

The courts have also held that officers desiring to make observations in private areas may not assume the identity of a person who has a right to enter that area. Thus, for example, officers may not pretend to be gas company employees in order to gain entry to a private basement where the gas meters are located in order to make observations without a warrant.

H. INSPECTIONS.

An officer may rightfully enter or be on private premises where his entry is justified by a legitimate right to conduct an inspection. An "inspection" is a limited form of search but consists of an examination of items or an area in order to insure compliance with laws or regulations concerning the conduct of certain regulated industries, operation of vessels, maintenance of licensed premises, public health or safety, etc. A "search," on the other hand, contemplates an attempt to uncover or find items constituting criminal evidence that may be hidden or concealed.

The authority to conduct a lawful inspection is based on the power to regulate and not the authority to seek out evidence of criminal activities. Therefore, in order for officers to justify their presence in a private area to "inspect," there must be specific statutory or regulatory authority for an inspection, and the scope of the inspection may not exceed that authority. As long as the court finds that the initial purpose of the entry was for a legitimate inspection, any criminal evidence subsequently discovered can lawfully be seized or used as evidence in a criminal prosecution. However, officers may not attempt to use their inspection authority as a pretext to conduct a warrantless search for evidence.

The courts have ruled that the government has broad authority to regulate certain types of industries, e.g., liquor, firearms, and drug manufacturers and dealers. This authority includes the authority to provide for warrantless entry for inspection even by force and over the objection of the individual to be inspected. Congress, however, has refused to authorize forceful, warrantless inspections. Therefore, officers seeking to conduct a lawful inspection must do so, with the consent of the person to be inspected or they must obtain a warrant. For example, if an agent who is authorized to conduct an inspection of the
premises of a license holder is refused admission, then his only recourse is to follow the procedures provided for by law or regulation. Thus, he may advise the individual of the penalties for his refusal in order to seek consent to enter; or, he may leave the premises and seek administrative sanctions such as revocation of the license concerned or imposition of a civil penalty; or he may seek issuance of a warrant to conduct his inspection.

The Fourth Amendment does not require that the government establish traditional "probable cause" or obtain a traditional search warrant to conduct a regulatory inspection, but the officers must obtain a court authorized inspection warrant similar in format to a search warrant. The only elements that must be shown are: (1) that there is authority to conduct the specific inspection and that the official to perform the inspection has that authority; and (2) that the subject's premises or facilities are subject to inspection pursuant to the agency's general regulatory scheme. It is not necessary that officials be refused entry by a subject prior to obtaining an inspection warrant.

An inspection warrant does not confer any additional search authority on officers. Therefore, once they enter the premises, the scope of their inspection is limited to only those activities that they could have performed under their inspection authority if entry had been obtained by consent. If officers have probable cause and desire to actually conduct a search for criminal evidence, then they are required to obtain a traditional Fourth Amendment search warrant.

I. ABANDONMENT

If a person abandons his ownership, right to usage, possession or interest in his real or personal property, then that property may be searched or seized without a warrant.

Unlike some areas of search and seizure, the courts are not concerned with the existence of any probable cause at the time of a search or seizure based on abandonment. Abandoned property has no Fourth Amendment protection because either: (1) the defendant has given up his reasonable expectation of privacy in that property; or (2) the defendant no longer has standing to object to use of the evidence in court; or (3) both. The search of the property is justified solely on the fact that the property, or the individual's privacy interest in that property, is deemed abandoned. As long as the court finds that the property was abandoned prior to the search or seizure by an officer, then the actions of the officer will be legal whether or not the officer knew that the property was in fact abandoned.

Abandonment for the purposes of the law of search and seizure is defined as the voluntarily casting away or relinquishing of possession of property with no present intention of reclaiming it. Since direct proof of an individual's intent is rarely possible, the resolution of the question
of whether or not abandonment of property has resulted is determined from all of the facts and circumstances surrounding the alleged abandonment, e.g., statements, location, conditions, actions.

The location of allegedly abandoned property is critically important. If an individual discards property in an area where one normally has a lesser expectation of privacy, i.e., a public place, then that property may be deemed to be abandoned without proving that the defendant intended to rid himself of it permanently. Generally, the act of discarding the property alone is sufficient to determine abandonment. For example, if an individual walking through a public park noticed that a police officer had been following him, he may decide to discard some narcotics, which he had been carrying in a paper bag, behind a park bench. The officer may then seize the bag and search it. The narcotics found may be used against the defendant because they were abandoned, even though the individual may claim that his true intent was to hide the bag and return for it after the police officer had left.

On the other hand, if property is discarded in a traditionally private area, e.g., an individual's home, it is not considered to be abandoned per se. Some other actions or conduct will be required to show not only the act of discarding or abandoning, but the actual intent to relinquish the expectation of privacy. An example of this is where an individual discards items in his trash can in his dwelling or on his curtilage. The item would normally not be considered to be abandoned until it is removed from the curtilage for garbage pickup or until the garbage collectors have taken possession of the property. In this connection, an individual may abandon his house, automobile, or any other property so long as the court finds that there was the intent to abandon plus the act itself.

The limitation that the courts have placed on searching or seizing abandoned property is that the police may not take advantage of an abandonment of property caused or induced by the unlawful acts of the law enforcement officers. For example, if officers illegally stop an automobile and notice an occupant throw a paper bag out onto the side of the road, a subsequent seizure and search would be illegal. The bag would not be deemed abandoned because the act was caused by the illegal acts of the officers and thus was not voluntary. In this situation, the owner still has standing to object to the violation of his constitutional rights and the attendant seizure of his property.
IV. OBTAINING SEARCH WARRANTS

Agents should not attempt to rely on the exceptions to the warrant requirement to make searches. Whenever possible, a valid, judicially approved search warrant should be obtained before officers intrude on an individual's expectation of privacy to obtain evidence. The prerequisites for a legal search warrant are governed by the Fourth Amendment to the Constitution and the procedures for obtaining the warrant are set forth in Rule 41 of the Federal Rules of Criminal Procedure.

A. AUTHORITY TO ISSUE

Rule 41(a) states that a search warrant "may be issued by a federal magistrate or a judge of a state court of record within the district wherein the property sought is located, upon the request of a federal law enforcement officer or an attorney for the government."

A state court of record is a court in which a record of judicial proceedings is made and one which has the power to fine or imprison for contempt. This can vary from state to state depending on local laws. Although it is legal, a federal officer should seek a warrant from a state judge only as a last resort.

The term "Federal Magistrate" as used in the rule includes United States magistrates and federal judges, but the judicial officer who will ordinarily issue search warrants will be the United States Magistrate.

The judicial officer must be neutral and detached and can issue a valid warrant only within his jurisdiction or district. Thus, a justice of the United States Supreme Court would have the authority to issue a warrant for property anywhere in the United States, but a district court judge could issue a valid warrant only within his district.

B. PROPERTY SEIZABLE WITH A WARRANT

Rule 41(b) provides for the issuance of a warrant to seize:
(1) property which is evidence of the commission of a criminal offense;
(2) property which is contraband, the fruits of a crime, or otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means or instruments of committing a criminal offense. Therefore, any property can be the subject of a valid search warrant as long as it falls into at least one of these broad categories.

C. AFFIDAVITS FOR A SEARCH WARRANT

The Fourth Amendment requires that "no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly
describing the place to be searched, and the persons or things to be seized." The sworn affidavit is the vehicle for meeting this constitutional requirement. In order to obtain a search warrant, the officer must file, in accordance with Rule 41(c), an affidavit before the magistrate. A form is available for this purpose and a sample is provided in this text. Although helpful, it is not necessary to use this particular form as long as all of the required elements are met. In fact, effective on October 1, 1977, Rule 41(c)(2) provides that a federal search warrant may issue upon oral testimony. In any event, the officer seeking the search warrant should fill out the affidavit and make sure that it satisfies the constitutional requirements of probable cause, that the affidavit is sworn, and that the place to be searched and the person or things to be seized are particularly described. A failure to meet these requirements will result in a refusal by the magistrate to issue the warrant or in an invalid warrant being issued.

D. DESCRIPTIONS

The purpose of the Fourth Amendment in requiring a particular description of the place (be it a house, building, automobile, suitcase, or person) to be searched and the persons or things to be seized is to limit the scope of a search and thus insure that no greater invasion of an individual's privacy than necessary is created. If a warrant described the wrong place or things or is vague or overly broad then the courts will suppress any evidence seized even though the officers acted in good faith and searched the place actually intended.

(1) Place. The precise location and area to be searched must be described in sufficient detail so that any officer executing the warrant can with reasonable effort, ascertain and identify the place intended without mistaking it for another. Minor errors in a description will not affect the validity of the warrant, so long as the description, as a whole, enables the officers to identify the place intended.

Normally, if a search is to be conducted in a rural area, directions showing how to locate the place to be searched should be included along with a physical description of the premises. In addition, a map or photograph could aid identification and may be attached. Directions must begin with some fixed and definable point and end with the specific place to be searched.

In an urban area, directions may not be necessary but particular attention should be paid to obtaining correct house or apartment numbers, the owner's name, and the street address. In any area, a detailed physical description should be given which clearly distinguishes the place to be searched from any surrounding area. For example, in a situation where one unit in a multiple unit apartment building is to be searched, care must be exercised to describe the particular unit to be searched so as to preclude any mistake by officers executing the warrant.
In describing a dwelling house to be searched, officers should not overly restrict their search by describing just the "house." Officers should use the term "premises" and thus extend their coverage to include the curtilage area of the home. Officers can also insure coverage of the entire premises by specifying the premises and "any outbuildings and appurtenances thereto."

(2) Persons or Things. The persons or things to be seized under the warrant must also be specifically described so that the searching officers will be able to exercise as little discretion as possible as to what can be seized.

Persons should be described by name, including any aliases, and by physical description. The detail in which the things to be seized must be described will depend on the nature of the items themselves. If the items to be seized are traditional contraband, such as heroin, counterfeit currency, moonshine whiskey, etc., then a general description of the illegal items will suffice. But in the case of noncontraband property, the more ordinary an item is and the more it is capable of being described so as to differentiate it from other similar items, then the more detailed the warrant description must be of that item. For example, a firearm which is stolen property may be described by make, model, serial number, barrel length, type of finish, etc. Also, such items as books and records need to be specifically described as much as possible by such things as account, type, manner of keeping, relationship to the particular criminal activity, etc. If the court finds that the description is overly broad and gives too much discretion to the searching officers, then it will declare the warrant invalid.

Officers will not always know exactly what evidence may be found during a search. After the officer has described in as much detail as possible all those items for which he has probable cause to believe are located where he intends to search, the courts have authorized the inclusion of a general description: "together with the means and instruments and all other property constituting evidence of the crime." This general description is intended to cover under the warrant those items not specifically listed which relate only to the crime for which the particular warrant is issued.

The section of the affidavit form that follows the description of the property to be seized is where the officer will establish the grounds for the issuance of the search warrant under Rule 41(b). In other words, the officer must cite the category that the property to be seized falls under and cite a specific federal criminal violation to which the seized items will relate. For example, in an affidavit for a warrant for counterfeit currency and related evidence the officer would cite as grounds: "Fit and intended to be used or possessed in violation of Title 18, United States Code, Sections 472 and 474."
E. PROBABLE CAUSE

The constitution requires that no warrants shall issue except those based on probable cause. Therefore, probable cause is a theory of prior justification to search that must exist before a search warrant can be valid. A warrant cannot create probable cause.

For the purposes of the law of search and seizure, probable cause can be defined as a set of facts or apparent facts which are sufficiently strong in themselves to lead a reasonable, prudent man to believe that a crime has been or is being committed and that evidence of that crime is located at the place to be searched.

The test of probable cause is not a philosophical concept existing in a vacuum; it is a nontechnical standard to be applied with common sense. But, there is no set formula for probable cause, and therefore it must be decided on the specific facts and circumstances of each individual case.

The existence of probable cause is initially determined by the magistrate to whom the law enforcement officer presents his affidavit. The officer must present enough facts so that the magistrate can make an independent determination that probable cause exists for the issuance of a warrant. Only those facts actually communicated to the magistrate under oath can be used to support a warrant. Thus, if a warrant is issued but subsequently ruled to be invalid for a lack of probable cause, an agent may not save the warrant, or a search under its authority, by later bringing forward facts that he had known previously but had failed to communicate to the magistrate. Likewise, if the magistrate does not read the affidavit nor actually make the independent finding of probable cause, then the warrant will be invalid.

(1) Personal Knowledge - Reasonable Agent Standard. The ideal situation for the establishment of probable cause is where the officer or agent presents facts within his own personal knowledge gained from investigation and observations. The magistrate and the courts will judge the facts or apparent facts in light of how these facts appear, not just to the ordinary reasonable man, but to the reasonable law enforcement officer, based on his specialized knowledge and experience. Thus, the magistrate may find probable cause to exist from recited facts which might not seem suspicious to a chemical engineer but which would amount to probable cause when considered by a reasonable, experienced criminal investigator.

The agent must be careful to recite only facts in his affidavit. Mere suspicions, hunches, or conclusions by the officer are not sufficient for the magistrate to determine the existence of probable cause. It is the magistrate's position to make the conclusions and reasonable inferences from the facts presented to him. Without the facts upon which the magistrate can make an independent determination of probable cause, no valid warrant can be issued.
(2) Hearsay and the Aguilar Test. Often law enforcement officers have no personal knowledge of criminal activities and must rely on information passed to them from informants, citizens, victims, etc. Rule 1101(d)(3) of the Federal Rules of Evidence and Rule 41(c) of the Federal Rules of Criminal Procedure provide that probable cause for the issuance of a search warrant may be based on hearsay information either wholly or in part.

When the officer uses hearsay information passed to him by others as the basis of his probable cause, the courts must assure themselves that sufficient facts are present to establish the trustworthiness of this information originated by one who is not present and sworn before the magistrate. In 1964, the Supreme Court, in the case of Aguilar v. Texas set forth what has become known as the two-pronged "Aguilar Test" for determining the trustworthiness of hearsay information. It is based on the theory that the magistrate must have specific facts upon which to make his independent finding of probable cause and not the bare conclusions of an officer or informant. First, the magistrate must be informed of some of the underlying facts and circumstances that led the informant to believe that items subject to seizure are where he claims they are. This is referred to as the "Basis of Knowledge" prong. Secondly, there must be presented sufficient facts which will show the magistrate that the particular informant, whose identity need not be disclosed, is credible or that the particular information presented is reliable. This second part of the Aguilar Test is the "veracity" prong. Both prongs of the test must be satisfied by the affidavit in order to support a valid search warrant.

(a) Basis of Knowledge Prong. It is not sufficient for an informant to make a bare assertion or conclusion that evidence of a crime may be found in a certain location. The affidavit must set forth the facts upon which that conclusion is based. Did the informant see the contraband or other evidence? What exactly did he see, hear, smell, or touch?

If the informant's information is deficient in stating specifically how the informant got his information, the courts have allowed one alternative. If the informant's information is presented in such minute detail that the magistrate can conclude that the informant could only have obtained his information first-hand, then this "self-verifying" detail will establish the basis of knowledge prong. The detailed information must be of such a nature, however, that the magistrate can be satisfied that the information was obtained first-hand and is not based on idle rumor or irresponsible conjecture.

(b) Veracity Prong. The second part of the Aguilar Test establishes the basis for truthfulness or believability of the hearsay information in the affidavit. This veracity prong may be met in one of two ways. The affidavit can establish the credibility of the informant or the reliability of his information.
(1) Credibility of Informant. It is not sufficient for an officer merely to state that his source or informant is reliable, credible, or trustworthy. Once again, the magistrate must have facts, not conclusions, upon which he may independently find that the informant is reliable or believable. The affidavit must set forth the informant's character, reputation or history as a truthful person. This is particularly important when the source of the hearsay information is a paid government informant. The principal example of establishing reliability is the informant with a proven track record. The affidavit should establish: How long the officer has known the informant; number of times this informant has provided information to law enforcement officers and the number of times his information proved to be correct; the number or arrests and/or convictions that have resulted from this informant's previous information, the types of criminal activities involved, etc.

Some classes of persons are deemed to be credible by the very nature of their status. For example, other law enforcement officers, innocent bystanders, victims or eyewitnesses to a crime, etc., are reliable for the purposes of the veracity prong of the Aguilar Test.

(2) Reliability of Information. An officer cannot always establish a track record for all informants and, of course, there has to be a first time for every informant. If the reliability of the person is not established, the affiant must set forth the circumstances surrounding the information which will assure the magistrate of its trustworthiness on this particular occasion. For example, the information can be found reliable if it comes from a person who admits to being a participant in a crime or otherwise makes a statement against his penal interest. In any event, when it is desirable to maintain the confidentiality of an informant, the affiant should use as much detail as possible about the informant's past record without disclosing his identity. If the informant cannot be established as reliable without disclosing his identity, then the affiant officer must establish for the magistrate the reliability of the information by showing independent verification or corroboration of as much of the informant's information as possible.

Independent observations by law enforcement officers contribute directly to the overall totality of probable cause and can qualify otherwise questionable hearsay to show that the informant has spoken the truth, thus establishing the veracity prong. As the courts have stated, "a direct showing that some of the story has been verified as true lends credence to the remaining unverified portions of the story and so may raise it above Aguilar's threshold."
Corroboration and Other Facts. The importance of corroboration by law enforcement officers cannot be over-emphasized. Defective information that does not meet the Aguilar test can still be considered in the overall test for probable cause if there is sufficient corroboration by officers. The more defective the hearsay information, the more independent corroboration is needed to establish probable cause. Thus, the officer should include in his affidavit any information in his possession that will help the magistrate find probable cause. For example, if the alleged subject of the proposed search has a criminal record or a bad reputation, this information should be passed on to the magistrate. It must be remembered that probable cause does not have to be based on evidence that would be admissible to prove guilt in a criminal trial because the rules of evidence do not apply to applications for warrants. Probable cause is the result of a consideration of the "totality of the circumstances." Thus, probable cause can be created by a number of facts that may seem innocent when considered separately but become guilt-laden and suspicious when considered all together. Chief Justice Warren Burger has stated: "Probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observe as trained officers."

The only limitation placed on probable cause is that evidence, information, or observations obtained by law enforcement officers as a result of a violation of an individual's constitutional rights may not be used to establish probable cause for a warrant against that person.

F. TIMELINESS

Probable cause must exist at the time the warrant is issued and at the time of the search. A warrant cannot be based on stale information. Therefore, in addition to the other requirements for probable cause, there must be sufficient facts presented in the affidavit so that the magistrate can conclude that the items to be searched for are presently located in the place to be searched.

The questions to be answered, in regard to establishing timeliness, have nothing to do with when the officer received his information but rather when the items to be searched for were last seen or known to be in the place to be searched; and will they be in the place to be searched at the time of the proposed search.

How fresh in time the information must be depends on the circumstances of each case considering the nature of the evidence sought, the volume and turnover rate, plans of the violators as established by the probable cause, etc. As with the other areas of probable cause, corroboration and surveillance work by officers can aid in establishing timeliness and thus keep the probable cause alive.

G. AFFIDAVITS - MISCELLANEOUS

There is no special language or form that is necessary to insure a good affidavit for a search warrant. The courts have held that the
affidavits should be read for their substance and not graded as an English thesis or a common law legal pleading. However, agents should strive to present their information in a logical and complete order. Affidavits should be written clearly, avoiding vagueness, unclear references, misused pronouns, and the passive voice. Attachments and additional affidavits or statements from others should be clearly referenced. More than one affidavit may be submitted to support a request for a single search warrant, but no more than one signature should be on any one affidavit.

The affidavit submitted to the magistrate must be sworn to and signed in the presence of the magistrate. In addition, the person signing the affidavit supporting the search warrant may not use a fictitious name. An unsworn affidavit or one with a false signature will result in suppression.

Sometimes, informants who provide the information forming the basis of the probable cause give false information to the officers. In such a case, the officer-affiant is swearing to what was told him, i.e., hearsay. As long as the officer himself does not lie or act in reckless disregard for the truth, i.e., commit perjury, and he is acting in good faith, then no adverse action will lie against him. If the officer affiant falsely swears to an affidavit or acts in reckless disregard for the truth, a search warrant issued as a result will be suppressed unless enough independent (untainted) information remains so that the magistrate can still find probable cause.

If the nongovernmental informant, however, provides the false information which is the basis of the probable cause, the court reviewing the sufficiency of the probable cause will not sustain an attack on the validity of the warrant issued.
V. EXECUTION OF THE SEARCH WARRANT

A. AUTHORITY TO EXECUTE FEDERAL SEARCH WARRANTS

Rule 41(c)(1) provides: "The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States."

Section 3105 of Title 18 further provides: "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

The courts hold that an authorized officer, named (individually or in a class) in the warrant may be accompanied by other law enforcement officers even if they are not designated in the warrant. Thus, a warrant specifying service by "any special agent of the U.S. Fish and Wildlife Service" must be executed by at least one special agent of Fish and Wildlife, but he may be accompanied by, e.g., Customs agents and/or local police officers, and anyone participating in the warrant execution may lawfully seize evidence.

Such phraseology as "to any special agent of the Bureau of Alcohol, Tobacco, and Firearms," "to Special Agent John Jones of the U.S. Secret Service or any other special agent of the U.S. Secret Service," or "to any U.S. Marshal, any of his deputies, or any other authorized person" has been held to be proper. Limiting the warrant to one officer, e.g., "to Special Agent John Jones, U.S. Secret Service," should be avoided inasmuch as that officer alone will be able to execute it, and his absence will render the warrant execution invalid.

B. TIME LIMITS

A search warrant will normally be served in the daytime, which is defined by Rule 41(h) as 6:00 a.m. to 10:00 p.m. according to local time. A search which begins during the daytime may extend past 10:00 p.m. if such extension is reasonably necessary to complete the search. Rule 41(c)(1) provides that, if the issuing magistrate finds reasonable cause from facts presented to him in the affidavit, he can, by appropriate provision in the warrant, authorize execution during the nighttime.

Rule 41(c)(1) also states that the search shall be conducted within a specified period of time not to exceed 10 days. If, for some reason, the warrant is not executed within the specified period, it is no longer valid and the officer must resubmit his factual basis for probable cause to the magistrate. The magistrate has no authority simply to "extend" the specified period of time.
C. FORCING ENTRY

Deeply rooted in Anglo-American law is the requirement that, before forcing entry, law enforcement officers must announce their identity and purpose and afford the occupant the opportunity to open his door voluntarily. Section 3109 of Title 18 provides: "The officer may break open an outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." This section has been held to apply to all entries under color of law, either to search or to arrest, and either with or without warrant. The officer must announce both his authority and his purpose. Merely saying "federal agents" will not suffice; the officer must also state that he has, e.g., a search warrant.

The courts have given a broad construction to the terminology in the statute. The word "break" in the statute is particularly broadly construed. Opening an unlocked door or using a passkey constitute "breaking" and thus will trigger the application of 3109.

The term "refused admittance" means that an officer must wait a reasonable length of time before forcing entry. There is no set minimum time. As stated above, the occupant must be given ample time to open the door voluntarily. What constitutes a reasonable length of time will depend on the facts of the case, taking into account such factors as the size of the dwelling, the (destructible) nature of the evidence, the time of day, and the physical condition of the occupant. Thus an athlete in his motel room at noon will ordinarily be entitled to less time to respond than would an invalid living alone in a sixteen-room mansion at night.

Occasionally, special circumstances will arise upon execution that will reduce the waiting time before forcing entry or even obviate the necessity for the announcement of authority and purpose. Of these "exceptions," the most frequently encountered is the so-called "fleeing footsteps" exception. Refusal to admit will rarely be expressed. Hearing footsteps receding from the door is a clear indication that entrance has been refused by implication, and the officer need wait no longer.

Also occurring frequently in some cases is the situation where the officer sees or hears indications of the destruction of evidence, e.g., paper crackling in flames or a toilet being repeatedly flushed. An officer need not wait until evidence is destroyed but can thereupon enter. On the other hand, the mere fact that the evidence sought is easily destructible, e.g., narcotics, will not suffice. Rather, the officer must be able to point to articulable facts showing that the evidence in this particular instance was actually being or was about to be destroyed.
On rare occasions, "palpable peril" may excuse compliance. If, for example, a murderer, who has threatened never to be taken alive, is within, announcing identity and purpose would create obvious peril to the officers by giving the occupant time to arm himself, and no announcement is required.

The words in the statute "or when necessary to liberate himself or a person aiding him in the execution of the warrant" does not mean that compliance with 3109 is excused whenever an agent or informant is inside. Some special circumstances, such as an earlier threat or an overheard plan to injure the inside man must be present.

If compliance with 3109 would be manifestly a "useless gesture," e.g., when officers pursue a suspect from the scene of a crime to a house, there will be no need to announce authority and purpose. This type of situation, however, is most unusual and should not be relied upon except under the clearest of circumstances.

Entry by ruse or deception, e.g., where an agent with a search warrant announces that he is from the county assessor's office, gains entry, and, once inside, reveals his true identity and purpose, has been approved in most circuits. Such entries, however, must be effected without any force whatsoever. The danger of discovery before or during entry (and the resultant necessity of using force and thus violating the statute) should preclude resort to this type of entry except when absolutely necessary, e.g., when confronted by a fortified door in a case involving easily destructible evidence.

The word "house" appears in the statute. Some circuits have accordingly limited the application of 3109 to dwellings. Other circuits, however, have extended the meaning of "house" to cover such structures as offices, smokehouses, and barns. Officers should therefore be familiar with the rule in their areas of operation when contemplating the entry of such buildings.

D. SEARCHES, SEIZURES AND SCOPE OF THE WARRANT

Once the officers executing the warrant have gained entry to the premises and secured the area to be searched, then the search for the items specifically described in the warrant will commence. When officers exceed the limits of their warrant by searching areas not covered by the warrant, searching for items not specified in the warrant, or remaining on the premises after the search is complete, they violate the defendant's expectation of privacy and any evidence obtained as a result of these actions will be suppressed.

(1) Areas not Covered by the Warrant. The search warrant restricts the authority of the searching officers to a search of only those places wherein the items described in the warrant could be concealed and the search may not exceed that scope. Thus if officers are searching for a
stolen console color television set, they could not search in dresser drawers or the kitchen breadbox, bathroom medicine cabinet, etc.

If the warrant for a premises is properly drawn, it will authorize a search of all containers and personal property, including automobiles found on the curtilage that could conceal the items sought. However, if the suspect's automobile is parked on the street, off the curtilage, then a search of that automobile could not be justified under the authority of the search warrant for the premises.

(2) Seizure of Items not Specifically Described in the Warrant. Generally, officers may seize only those items particularly described in the warrant. There are some limited exceptions, however. Where the description section of the warrant contains language such as "and all property that constitutes evidence of the offense," those items found during the course of the search which constitute means and instruments, fruits, or evidence of the offense for which the warrant issued may be seized although not specifically described in the warrant. The items searched or seized must appear to have some logical relationship or "nexus" to the purpose of the search. For example, in conducting a search for marijuana in a suspected drug dealer's apartment, if officers find residue of marijuana, a quantity of plastic bags, a set of scales, and a personal diary all on the kitchen counter, all the items may be examined and seized. The residue is seizable because it is specifically listed in the warrant. The plastic bags and scales are seizable because they are the means and instruments of the offense of dealing in marijuana. The officers have a right to search the personal diary although it is not an item particularly described in the warrant. There is a logical nexus between the diary and the offense due to its proximity to other evidence and the fact that it is reasonable to believe that a dealer in marijuana will record his transactions. If the search of the diary confirms the record of transactions, then it may be seized under the authority of the search warrant.

Another justification for seizing evidence that is not particularly described in the warrant is the plain view doctrine. The search warrant places the officers lawfully on the premises. Therefore, whatever they inadvertently come across during their search that immediately appears to be evidence of some offense may be seized. For example, if officers are conducting a search for stolen food stamps and they open a desk drawer and find a fully automatic submachine gun, they may seize it. The seizure is not made under the search warrant but is justified by the plain view doctrine.

(3) Remaining on the Premises. When the last item specified in the warrant is found or all reasonable efforts to uncover the items to be seized have been exhausted, then the officers must leave the premises. The authority of the warrant to intrude on an individual's expectation of privacy extends only as long as is reasonably necessary to search.
Officers who remain on the premises for an unreasonable period become trespassers and any subsequent evidence obtained will be suppressed.

E. SEARCH, DETENTION, AND ARREST OF PERSONS ON THE PREMISES

The issuance of a search warrant for premises does not automatically give agents the authority to search or arrest all persons found on the premises. To search persons under the authority of a search warrant for premises, a particular showing must be made in each case, taking into account such factors as the concealable nature of the object of the search, the identity and background of the persons, suspicious or furtive actions of the persons, and the scope of the original probable cause.

Probable cause to search a particular person may arise during the search of the premises such as where a person opens a desk drawer and quickly stuffs some items into his pocket. As in other aspects of search and seizure, the issues of practicability of obtaining a prior search warrant for the person, plain view, etc., are present. Therefore, since the degree of invasion by the government into an individual's expectation of privacy may not exceed the scope of the warrant (other than the recognized exceptions), a warrant to search the persons covered by the officer's probable cause and reasonably expected to be on the premises at the time of the search should be obtained in advance.

Personal articles carried by persons on the premises may or may not be considered part of the premises for the purpose of being covered by the warrant. Of paramount importance is the question of why one's personal possessions are on the premises. The courts will inquire into the degree of reasonable expectation of privacy that a certain person retains on the searched premises. One does not give up his entire expectation of privacy in his person or possessions just because he happens to find himself on premises subject to a search warrant. The courts will also consider whether the person has a special relationship to the premises and whether the original probable cause for the issuance of the search warrant reasonably comprehended within its scope the personal property to be searched. For example, if officers arrive at a premises to search for illegal firearms and find the Avon lady on the premises with her sample case and purse, a search of her possessions may not be justified. On the other hand, if the person found on the premises with a briefcase is identified as the business partner of the defendant and is himself a suspect in illegal firearms transactions, then a search of his briefcase may be justified under the search warrant. Generally, if personal property such as suitcases, purses, briefcases, etc., are found unattended on a premises being searched, then the officer may search these items without first attempting to identify the ownership of the item.

Officers conducting a lawful search under a warrant have authority to insure that their search will be conducted without interference. Thus, officers may take any steps reasonable and necessary in order to protect
the safety of themselves and persons and property under their control during their search. If an officer can articulate a reasonable basis for believing that a particular person may be armed and presents a threat to himself or others, then that officer may conduct a limited Terry-type pat-down of the individual. The pat-down is not a full search and is not authorized by the warrant for premises but is a limited frisk of the person's clothing or possessions to discover weapons.

The courts have held that a limited detention of a person for a legitimate reason during the execution of a search warrant is acceptable. The rationale for a detention at the scene of a search is the preservation of the premises for the search, reduction of the risk of interference, and prevention of the destruction of evidence which the search was intended to reach. The detention must be reasonable under the circumstances or it will blossom into an arrest without probable cause.

F. SERVICE OF THE COPY OF THE WARRANT

Rule 41(d) requires that the person executing a search warrant give the person whose premises have been searched a copy of the search warrant before leaving the premises. No requirement exists that the copy be given to the person immediately upon entry into the premises. However, this may be a practical consideration if it will make the search easier for the officers. If no one is present during the search, Rule 41(d) requires that a copy of the search warrant be left in a conspicuous place so that the owner of the premises may find it.

G. INVENTORY AND SEPARATE RECEIPT AND RETURN OF THE WARRANT

All property which is taken from the premises during the execution of a search warrant must be accounted for. Property which is taken pursuant to the authority of the search warrant must be listed on the inventory found on the reverse side of the search warrant. Items which are taken outside the scope of the search warrant, such as items not related to the search, but seized under plain view, will be accounted for on a separate receipt. No specific form or format exists for this separate receipt. The agent will simply put such identification information as required by the nature of the item on a plain sheet of paper and attach a copy of it to the copy of the search warrant and leave it either with the person whose premises has been searched or on the premises itself. For example, during the execution of a search warrant for drugs, scales, and illegal weapons are also found. The drugs and scales would be listed on the search warrant inventory and the illegal weapons on a separate receipt.

The inventory of the property seized pursuant to the warrant shall be made in the presence of the applicant for the warrant and the person from whose premises the property was taken if he is present and available. If the person from whose premises the property was taken is not present, the inventory will be made in the presence of a least one credible
witness other than the applicant and occupant and verified by the officer.

The search warrant will designate a federal magistrate to whom it shall be returned promptly. The federal magistrate shall, upon request, deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant. Although a prompt return is required by the rule, a failure to make a prompt return will not invalidate the search warrant or the items seized since this is held to be only an administrative procedure after the search.

H. STATUTORY PENALTIES

The execution of the search warrant and subsequent seizure of property may be declared illegal and may subject the agent to criminal or civil actions if he caused the search warrant to be issued without probable cause or exceeded his authority in the warrant's execution. The criminal statutes which have application to search warrants are as follows:

18 USC 242. Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

18 USC 1621. Perjury generally

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true,
is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 USC 1622. Subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 USC 2234. Authority exceeded in executing warrant

Whoever, in executing a search warrant, willfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000 or imprisoned not more than one year.

18 USC 2235. Search warrant procured maliciously

Whoever maliciously and without probable cause procures a search warrant to be issued and executed, shall be fined not more than $1,000 or imprisoned not more than one year.

18 USC 2236. Searches without warrant

Whoever, being an officer, agent, or employee of the United States or any department or agency thereof, engaged in the enforcement of any law of the United States, searches any private dwelling used and occupied as such dwelling without a warrant directing such search, or maliciously and without reasonable cause searches any other building or property without a search warrant,
shall be fined for a first offense not more than $1,000; and, for a subsequent offense, shall be fined not more than $1,000; or imprisoned not more than one year, or both.

This section shall not apply to any person--

(a) serving a warrant of arrest; or

(b) arresting or attempting to arrest a person committing or attempting to commit an offense in his presence, or who has committed or is suspected on reasonable grounds of having committed a felony; or

(c) making a search at the request or invitation or with the consent of the occupant of the premises.

An agent may also be subject to civil action as a result of his improper actions. There is no specific statute under which an agent may be sued. However, case law established in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics gives the aggrieved party a cause of action.
VI. SEARCHES INCIDENT TO ARREST

One of the most well known and often used exceptions to the probable cause and warrant requirements of the Constitution is the right of a law enforcement officer to make a search incident to a lawful arrest. The right to search under this exception is based solely on the legality of the arrest itself. Thus, if the arrest is subsequently held to be illegal, then any search incident to that arrest will also be invalid.

The general rule established by the Supreme Court is that incident to any lawful arrest a federal officer may contemporaneously search both the arrestee's person and the immediate area into which he might reach in order to obtain weapons, means of escape, and any evidence that might be concealed or destroyed.

The Supreme Court has drawn a sharp distinction between searches of the arrestee's person and searches of the area, including possessions, within his immediate control. In a search incident to arrest involving either area, the determinative factor triggering the protections of the Fourth Amendment and thus determining the legal scope of the particular search is that degree of privacy that a person, even a person under arrest, can expect in his person and in his possessions.

A. SEARCHES OF THE PERSON ARRESTED

A federal officer can make a complete and thorough search of the arrestee's person regardless of the type of offense for which he is arrested or the circumstances in the particular case. The officer making the search does not have to establish a belief that the arrested person is armed nor does he have to articulate any expectation of finding evidence of any particular offense. Thus, if an individual is arrested on a warrant for failure to appear on a traffic citation, arresting officers may search his entire person and if counterfeit currency is found in his shoe, it will be admissible as evidence.

A complete search may be made of the arrestee's person because the lawful arrest is itself the governmental invasion of the arrestee's privacy, and he therefore no longer retains a legitimate expectation of privacy in his person. The Supreme Court has held that the lawful search of the "person" includes a search of those items "immediately associated with the person of the arrestee." Therefore, clothing and small unlocked containers carried on the person are also subject to examination under the aegis of the search incident to arrest, e.g., a man's wallet, a woman's purse, an eyeglass case, a cigarette package, a pill box. The larger the size of the item to be searched and the more expectation of privacy that can be shown to exist concerning such item, however, the more likely it will be that the courts will consider the item, such as luggage or other possessions, separate from the "person."
B. SEARCHES OF THE ARRESTEE'S AREA AND POSSESSIONS

The Supreme Court has emphasized that when a search goes beyond the arrestee's person and things "immediately associated with the person," then the person arrested maintains his expectations of privacy in his personal belongings even after he is taken into custody. For example, a person arrested may be carrying a locked suitcase. By locking his suitcase, the defendant has manifested an expectation that the contents will remain private. The arrest of the defendant does not reduce his expectation of privacy. The officers may seize the suitcase, maintain it for safekeeping or hold it until they can obtain a search warrant based on probable cause. They may not, however, search it without a warrant unless they can articulate some exigent circumstance requiring immediate action such as a belief that the suitcase contains explosives.

The above example illustrates one of the limitations on a search incident to arrest. The area to be searched must be an area "from within which the arrestee might gain possession of a weapon or destructible evidence." Thus, where an item is locked or accessibility similarly restricted, then that item or area is not an area subject to a search incident to arrest.

The exact area around an arrestee that officers may search for weapons and evidence incident to an arrest depends on the facts and circumstances of each case, but generally has been limited to the "arms length," or "lunging distance" area into which the individual could reasonably reach. Thus, the arrest of an individual in his living room would not justify a search incident to arrest of other rooms of the house. Also, if a person is arrested while seated at his desk, officers may search, contemporaneous with the arrest, the top of the desk and those unlocked drawers of the desk and similar areas within reach of where the arrestee is seated. But the Supreme Court has held that the search incident to arrest could not justify searching through "all the desk drawers or other closed or concealed areas in that room."

The courts have recognized that there are potential dangers lurking in all custodial arrests. Therefore, it is logical and reasonable for officers to conduct a limited search of surrounding areas and unlocked containers for weapons and evidence during that brief and often hectic first few moments of the arrest. But, on the other hand, once the arrestee is completely subdued and/or is removed from the scene of the arrest, officers may not go back to the place where the arrest took place to search because the arrest and thus the exigency of the moment has passed and the search would not be "contemporaneous." Likewise, if the officers remove personal belongings from the arrestee, such as a briefcase, bag or other container without searching it immediately, they have cut off the accessibility by the arrestee and a subsequent search could no longer be justified as a search incident to arrest.
C. CONTEMPORANEITY REQUIREMENT

A search incident to arrest must be made at the same time and place as the arrest. To be contemporaneous, the search must occur at the same time as the arrest or be so connected with the arrest as to form a part of the continuous, uninterrupted, lawful act.

Therefore, searches incident to arrest involving areas or unlocked objects seized at the time of arrest must be conducted in that short period of time "contemporaneous" with the arrest before police control of the area or possessions becomes "exclusive." If not, then the objects or possessions seized must be held intact (without searching them) until a warrant or some other recognized exception justifies their search. Even a short delay can be fatal to a search. For example, agents arrested a defendant and seized an unlocked briefcase from him. The defendant was handcuffed and removed some twenty feet away and placed in the officer's car. After radioing other agents and advising them of the arrest, the arresting officer opened the briefcase and searched it. The time lapse between the arrest and the search was approximately eight minutes. The court held that the search could not be justified as incident to the arrest because it was not contemporaneous with the arrest, and therefore, a warrant was required to search the item.

The Supreme Court has held that in situations where officers have the right to search the "person" incident to arrest, they may search the person immediately at the time and place of the arrest or they may remove the person to a more secure or private area and conduct the search there. Likewise, officers may delay a search of the person or those items "immediately associated" with the person, such as clothing, for a short reasonable time. For example, it has been held permissible to delay a search of a defendant's clothing for a reasonable period until replacement clothing could be obtained for him. This type of search incident to arrest is justified, not only because there is initially a reduced expectation of privacy in the defendant's person and clothing created by the intrusion of the lawful arrest, but also because the defendant has a continuing ability to gain access to a weapon or to destroy evidence in his clothing during his continued custody. Note, that this authorized delay for searches of the "person" will not apply to a search incident to arrest of the area around the arrestee or to the other possessions seized from him such as luggage, packages, etc.

Officers may make a lawful search incident to arrest even though the search precedes the actual words of arrest. However, in this situation, the officers must have pre-existing legitimate probable cause to arrest and the actual intent to make the arrest.

Other situations may arise that will authorize a valid search incident to arrest although slightly removed from the exact time and exact place of the arrest. It is permissible and reasonable to search any item that must necessarily be placed on the arrestee's person, e.g.,
warm clothing on a cold day, or within his immediate control, e.g., a diabetic's insulin kit, to effect his removal from the place of arrest. This type of search is permissible as incident to the arrest because it is reasonable and still deemed to be contemporaneous with, i.e., a part of, the arrest. Officers may not, however, allow an arrestee to roam around or lead him around for the purpose of trying to justify a search of every area into which he moves as incident to his arrest.

D. BODY CAVITY SEARCHES

Body cavity searches involve intrusions beyond the body surfaces and into the vagina, rectum, stomach, etc. Although people lose a degree of expectation of privacy in their persons upon being arrested, they still retain their expectation of privacy in their body cavities. Thus, a warrantless search of a body cavity of an arrestee cannot be justified as incident to his or her arrest.

Generally, the courts take a very restrictive approach in determining the validity of body cavity searches. First, there must be probable cause to believe that an item subject to seizure is concealed within the body cavity. Secondly, the item must be removed by a physician under proper medical conditions or the defendant must voluntarily remove the item himself. Thirdly, there must be no other means of obtaining the item.

Although the courts have sanctioned the warrantless removal of evidence from a subject's body by a doctor under exigent circumstances, e.g., obtaining a blood sample for a blood alcohol content test for intoxication, the preferable procedure is for officers to obtain a search warrant.

The defendant may be detained and observed so that there will be no opportunity for him to destroy the evidence while the officers obtain a search warrant. The courts will weigh the degree of intrusion into the defendant's body against the dangers that may exist to the defendant in deciding whether to authorize a search. Thus, while it may be fairly easy to obtain a warrant to have a doctor search a vagina or rectum of a suspect for a concealed narcotics package, a court will be unlikely to grant a warrant authorizing major surgery on a defendant for an item of evidence, such as a bullet lodged near his spine.

Officers may take reasonable steps and use reasonable force to prevent a defendant from concealing an item in his body such as stopping a defendant from swallowing a balloon filled with heroin. Such conduct as pressing the neck or adam's apple or bending the head to prevent swallowing are acceptable. But, however, agents should be careful not to choke or prevent the breathing of a defendant.
E. TIMED AND PRETEXT SEARCHES

Officers may not use an arrest and its attendant search as a substitute for obtaining a search warrant for premises. If officers intend or desire to search particular premises, they should obtain a valid search warrant in advance. If the court finds that officers have made an arrest that they would otherwise not have made just so they could conduct a search incident to that arrest, then the arrest will be considered a technical pretext and any evidence seized will be suppressed.

Likewise, if it can be shown that officers making a valid arrest timed or delayed their arrest until a defendant entered particular premises that they desired to search, the court will suppress any evidence seized as a result of that search incident to arrest. The court will look at all of the facts and circumstances to determine whether the officers made the arrest in good faith, such as whether they can show a valid investigative purpose for the timing of the arrest, or whether the officers rejected a convenient opportunity to make the arrest so that the arrest could be made in the place searched.

F. PROTECTIVE SWEEPS AND SECURITY MEASURES

Although not a true search incident to arrest, the courts have often considered whether protective measures taken by arresting officers which take them beyond the immediate area of the arrest, such as into other rooms of a home, are a reasonable intrusion into an individual's expectation of privacy and thus legitimate to authorize a plain view seizure of evidence.

When officers enter premises to effect a lawful arrest, they have the necessary right to take reasonable steps to protect themselves and insure that they will not be interfered with in the performance of their duties. Therefore, where officers can articulate some reasonable facts to support their belief that other persons may be on the premises who are dangerous, armed, or otherwise pose a threat to the safety of the officers, they may make a limited search or sweep of the entire premises to look for people only. The sweep may not be an extended search and must not be used as an exploratory quest for evidence. The officers conducting the protective sweep may look only in those areas or places where a person could be hidden. If the protective sweep is legitimate, however, any evidence that comes into plain view may be lawfully seized.
VII. SEARCHES UNDER EXIGENT CIRCUMSTANCES

Sometimes officers are confronted with a situation where an immediate search is necessary in order to prevent the loss or destruction of evidence but where there is insufficient time to obtain a search warrant. The courts have often approved these searches as an exception to the warrant requirement where the officers can establish that the circumstances were exigent, i.e., so urgent that immediate action was required justifying a failure to obtain a warrant.

To justify a search of premises, automobiles or personal possessions under this exception, the law enforcement officer must first have probable cause to search. The exigent circumstances and the probable cause must occur at the same time. Exigent circumstances by themselves, just as probable cause standing alone, will not justify a warrantless search. Therefore, other than in those situations which are recognized exceptions to the probable cause and warrant requirements to the Constitution, all searches must be based on either probable cause plus a warrant or probable cause plus exigent circumstances.

A. SEARCHES OF VEHICLES, VESSELS, AND AIRCRAFT

The most common form of exigent circumstances is where a conveyance that officers have probable cause to believe is carrying items subject to seizure (contraband, means and instruments of a crime, etc.) is found moving about on the highways, waterways, etc. In such a situation, it is impractical for officers to seek a search warrant prior to stopping and searching the conveyance. By the time a warrant could be obtained, the conveyance and its suspected evidentiary cargo could be hidden, destroyed or removed from the court's jurisdiction.

This exception to the search warrant requirement is called the "mobility" doctrine or the "Carroll Doctrine" after the case of Carroll v. United States in which the Supreme Court first recognized the exception. The Court stated that a vehicle, for which probable cause exists to believe contains items subject to seizure, may be stopped and searched without a warrant if it is actually or potentially mobile or in an exposed condition. In such a case there is a "fleeting opportunity on the open highway" to obtain the evidence and it is impractical to obtain a warrant. For example, in the Carroll case, federal officers had probable cause to believe that the suspect's automobile contained illegal alcohol. Officers observed the suspect's automobile, weighted down heavily in the rear, on the main road used by bootleggers between Detroit and Grand Rapids, Michigan. The defendant was a known violator and, when he saw the officers, he increased his speed in an attempt to elude them. The Court approved of the officers stop of the automobile and their warrantless search of its interior which revealed a large quantity of alcohol.

The probable cause standard required to search with exigent circumstances such things as motor vehicles is the same as for a search of a
home or office or other personal possessions, but the courts have been more liberal in finding exigent circumstances and allowing searches to be considered "reasonable" when the search is made of a vehicle. The Supreme Court has stated that searches of vehicles have often been allowed, where a search of a house or a person's suitcase would not be, because there is a reduced expectation of privacy in a motor vehicle.

Using this rationale, the Supreme Court has extended the permissible time frame in which a search of a vehicle must be made under exigent circumstances. If there is probable cause to search a vehicle at the moment that the exigency exists, for example, at the scene of the stop, seizure of the vehicle, or arrest of the driver, the officers can conduct a search at that place or remove the vehicle to a better, more convenient, or safer location and search it there. This is true even though the officer could, after taking possession of the vehicle, hold it and obtain a valid search warrant. The probable cause to believe that the vehicle contains items subject to seizure is not lessened by its being moved by the officers and the courts have merely allowed the "exigency" to continue for a reasonable time in order to provide officers an opportunity to conduct or complete the search that would have been legitimate at the scene of the seizure or stop. For example, where officers have stopped a vehicle with probable cause to believe that its driver was involved in an armed robbery and that fruits of that crime and other evidence are in the vehicle, they may arrest the driver. After securing the driver, officers may search the vehicle there on the street or delay the search and take it to a well-lighted parking lot or the police garage and conduct their search there.

It is important to remember that if the probable cause arises at a time when the vehicle is not actually or potentially mobile or in an exposed condition, then exigency does not exist, and the regular search warrant requirements must be met. Mobility generally exists where the vehicle is moving or parked in a public place or an area where access to the vehicle by others, such as accomplices, vandals, or even the public, is not meaningfully restricted. For example, a vehicle suspected of being used as a getaway car in an armed robbery that same day could be considered "potentially mobile" where is is found parked on a downtown street and the violator and/or any accomplices have not been apprehended.

The courts will view all the circumstances surrounding a warrantless search of a vehicle to determine whether there were exigent circumstances. Where a vehicle is immobile, for example in a garage and set on concrete blocks without its wheels, then a search may not be based on the mobility theory. Also, if officers desiring to search a vehicle know in advance the specific location where that vehicle may be found, and they have probable cause sufficiently in advance of their planned search to obtain a search warrant then the courts may invalidate a warrantless search of that vehicle even though the officers could establish that at the time of the search the vehicle was "potentially mobile." For example, officers
have probable cause to believe that various evidentiary items are in the trunk of a particular automobile owned and operated by the suspect in a robbery. The officers also know that the automobile is normally kept at the defendant's residence because they have observed it at that location off and on for over a week since they obtained their probable cause. If the officers go to the suspect's home to arrest him but he is not home and see the vehicle parked on the street in front of the house, they may not search that vehicle without a warrant even though it may be "potentially mobile." They could have and should have obtained a search warrant.

Likewise, if a vehicle is actually mobile but is operated on a regular local route so that officers, with probable cause to search, could easily establish and predict the location of that vehicle, a failure to obtain a warrant prior to stopping and searching the vehicle may result in a suppression of any evidence seized. For example, if officers have probable cause to believe that a milk delivery truck is also picking up daily betting slips from several locations on his regular route, the officers should obtain a search warrant for the truck. In this situation the mobility of the vehicle alone does not establish exigency. The courts will weigh heavily the practicability of and opportunity for obtaining a search warrant.

As a general rule, if officers have an opportunity to obtain a search warrant, one should be obtained. But, exigency, such as flight by a suspect, change in expected route of a vehicle, etc., may occur at any time, and the fact that the police might have obtained a search warrant earlier does not negate the possibility of an unforeseen emergency situation arising which will necessitate prompt police action.

As with any intrusion into an individual's expectation or privacy, a search under exigent circumstances must be reasonable as to force and scope. Using unreasonable force, like firing a shotgun into the rear window, trunk, and tires of a suspected vehicle in order to effect the stop can result in a suppression of any evidence seized. Once a vehicle is lawfully stopped, however, the search may extend to all areas of the vehicle including the locked trunk and any containers or luggage in which the items covered by the probable cause could be concealed.

B. INVESTIGATIVE VEHICLE STOPS

It is a well-established fact that law enforcement officers have the right to stop vehicles for a legitimate investigative purpose. A stop is not a search and thus no probable cause is needed. However, officers may not arbitrarily stop motorists or others without a reasonable, legitimate justification. Officers may stop a particular automobile as long as there is a reasonable or "founded" suspicion for stopping an individual for questioning. This "founded suspicion" must be based on facts, not hunches or gut-feelings, that the officer can specifically articulate to justify his stopping an individual and investigating the circumstances that provoked the suspicion. Thus, officers may not single out a vehicle
and stop it merely because they wanted to "check out" a couple of "hippy-types" to see what they were doing. On the other hand an officer could justify stopping at 2:00 a.m. a vehicle driving slowly in the parking lot behind a shopping center in which several stores have recently been burglarized.

Officers may not use a random stop for the alleged purpose of making a license or other regulatory check when their true purpose is to search for evidence of another violation. If the court finds that a stop was not justified in its inception, any observations or any evidence that results from that illegal stop will be suppressed.

Once a vehicle is lawfully stopped, however, full probable cause to make a warrantless search and seizure may arise. For example, officers may smell burning marijuana, see contraband or stolen property in plain view, or obtain a valid consent to search from the driver or owner of the vehicle.

C. VEHICLE SEARCHES INCIDENT TO ARREST

Sometimes the courts and law enforcement officers confuse a search of a vehicle incident to arrest with a search of the vehicle based on probable cause and exigent circumstances. There are, however, some very important differences. As stated in Chapter VII, no probable cause (to search) is needed for a search incident to arrest. The authority to search is derived from the lawful arrest and the right of the officer to protect himself and preserve evidence. The "mobility" or exigent circumstances search, on the other hand, requires specific probable cause to believe particular evidence is in a particular place.

The most important difference is in the permissible scope of the two types of searches. The search based on probable cause and exigent circumstances can extend into all areas, locked and unlocked, of the automobile which might conceal the object of the search. A search incident to arrest is much more limited. The area searched may only extend to the arrestee's person and that area into which he might reach to obtain a weapon or evidence. For example, an individual arrested while seated behind the wheel of his automobile may be searched and also officers may search those areas within his "reach" in the passenger compartment of the vehicle. However, officers could not search those areas such as the trunk of the vehicle or a locked glove compartment or container within the vehicle. Likewise, where an individual is stopped but then arrested some distance from his vehicle, secured, and placed in the officer's car, the officers will not be able to search any area of his car as incident to the arrest.

Sometimes officers will be justified in searching a vehicle because both probable cause, exigent circumstances and a lawful arrest of the driver or occupant are involved. But officers should know the limits of each justification so that they will be able to articulate the correct
basis to support their search at a suppression hearing. For example, there may be a situation where officers have probable cause to believe that a suspect has just robbed a drug store and that fruits of the crime and evidence are in his vehicle. When officers stop the suspect, they arrest him while he is seated in his automobile. They remove him from the vehicle and immediately search his person and passenger compartment and find a weapon and other evidence of the robbery on his person and under the front seat of the vehicle. The officers then open the locked trunk of the vehicle and find the remaining stolen property from the robbery. The search of the trunk could not be justified as a search incident to arrest but could be justified as an exigency search based on probable cause.

D. SEARCH OF VEHICLES PURSUANT TO FORFEITURE STATUTES

There are various federal statutes which authorize federal law enforcement officers to seize a vehicle, vessel or aircraft which is presently being or has in the past been used to transport or facilitate the transportation of contraband. The general forfeiture statutes are found at Title 49, United States Code, Sections 781 through 789. These statutes cover controlled substances, firearms (illegally possessed) and forged and counterfeit obligations of the United States. Other items are covered by various specific statutes enforced by different agencies.

Such seizures are permitted because the vehicle's title has been forfeited in law to the United States since the vehicle itself, by its use, is considered to have offended the sovereign. Therefore, once there is probable cause to forfeit a vehicle, i.e., believe that the vehicle has been or is being used to transport contraband, the government has a superior right to take possession of it and a warrantless search becomes "reasonable."

There will be a subsequent formal legal proceeding against the vehicle to determine whether title should be permanently retained by the United States Government. The results of this proceeding will have no bearing on the legality of a previous seizure and search of the vehicle as long as at the time of the seizure there existed the required probable cause.

Under the general rule, the seizure of the vehicle does not have to be incident to any arrest and may be made at any place and any time that officers find the vehicle. This may even be after a considerable time has elapsed since the probable cause arose, unlike a seizure under Rule 41.

There has been a minority view among the courts on the conditions under which a valid forfeiture seizure and thus a search may be made. The Ninth Circuit has ruled that a search warrant is required to seize a vehicle even under the forfeiture statutes unless there are exigent circumstances or some other recognized exceptions to the warrant requirement to justify the seizure.
In any event, officers must follow the provisions of the forfeiture statutes. Forfeitures are not authorized because a vehicle has been merely used in a crime, transported evidence, etc. The vehicle must be used in connection with a specific class of contraband as established in the particular forfeiture statute.

E. INVENTORY "SEARCHES"

Once law enforcement officials have lawfully obtained custody and control of an automobile or other personal property, an inspection of the automobile or personal property may be made in order to record an inventory. Such an inventory should be made in accordance with agency or departmental regulations and in good faith and not as a pretext or excuse for conducting a warrantless search for evidence. The purpose of a legitimate inventory is: (1) to protect the owner's property; (2) to protect the seizing officers from false claims; or (3) to protect the officers or general public from potential danger.

In order to inventory for the purpose of public safety, the officers must justify the intrusion, such as where an individual has been arrested on charges of violating explosive laws and some of his personal property (for example a locked suitcase) seized at his arrest could contain some explosive or otherwise dangerous material. In other routine situations, as long as the governmental custody of the property is lawful, officers may inventory the property without probable cause and without a warrant.

In light of the emphasis placed on the expectation of privacy as the governing factor in determining reasonableness of law enforcement intrusions under the Fourth Amendment, the scope of the inventory exception to the warrant requirement has been limited. Thus, the scope of the inventory search may not extend any further than is reasonably necessary to discover valuables or other items for safe keeping. Generally, an inventory search may extend into areas of an automobile and containers and luggage that are unlocked. By locking or similarly securing his personal possessions, a person manifests an expectation of privacy in the contents of those possessions.

For example, where officers have the right to take custody of a locked automobile, they may enter that automobile in order to move it and/or to secure any valuables or personal property in the passenger compartment of the vehicle. The courts are divided, however, on whether the inventory search can extend to the locked glove box or trunk of the automobile. The Supreme Court has not decided whether officers may inventory locked trunks or glove boxes but has stated that an individual has a lesser expectation of privacy in an automobile than in other items, such as luggage, that might be found or held by officers.

Consider the situation where officers arrest an individual for driving under the influence of alcohol. They may lawfully impound the automobile and hold it for safekeeping. The officers observe valuables
lying exposed on the front seat of the automobile and also observe two
briefcases, one locked, the other unlocked. The officers may take custody
of all the personal property for safekeeping under the inventory exception.
The officers may even open the unlocked briefcase to determine the presence
of other possible valuables or to place the exposed valuables inside the
case. If evidence of a crime is discovered by the officers during this
inventory, it will be admissible as evidence. The general trend of the
courts is, however, that the officers would not be justified in opening
the locked briefcase under the authority of the inventory. The officers
should inventory that item as "one locked briefcase" in order to preserve
the individual's privacy rights.

F. EXIGENT CIRCUMSTANCES OTHER THAN VEHICLES

In cases where no vehicles are involved, the search warrant require­
ment is very stringently enforced by the courts and relatively few
searches can be justified on the basis of exigent circumstances. There are
two major justifications for these exigent circumstances which are:
(1) dangerous and "hot pursuit" situations; and (2) where there is
imminent destruction of evidence.

No type of search is harder to justify than a warrantless search of
premises. It is important to remember that no amount of probable cause,
absent exigent circumstances, will justify searching premises without a
search warrant.

The "hot pursuit" situations arise where officers pursue a suspect
from the scene of a crime to a house. The officers do not have to
obtain a search warrant prior to entering the house and searching for the
suspect, or other persons, or weapons which may constitute a danger to
the officers. Any items of evidence, contraband, fruits of the crime, etc.,
which are uncovered during this "hot pursuit" can be lawfully seized.

"Hot pursuit" also applies when officers do not actually see the
suspect enter the dwelling but are advised and have probable cause to
believe that the suspect entered the house moments before. In all of these
cases, speed is essential and only a thorough search for persons and
weapons can insure that the suspect is the only person present and that
any weapons which could be used for attack or escape are secured.

The permissible scope of the search may only be as broad as is
reasonably necessary to prevent the suspect at large in the house from
resisting or escaping. The officer is not entitled to continue his
search, however, once it becomes apparent that the house is in fact
vacant or that there is no longer a danger to the officers or others.
Thus, where officers entered a hotel room into which they had been
advised that an armed and dangerous person had fled, the court found that
a search of a suitcase in the room was not reasonable after it was
established that the room was vacant. The proper procedure would have
been to hold the property and obtain a search warrant.

Almost any type of situation that presents a clear need for officers to take immediate action will be considered exigent circumstances. Thus, where officers hear screams coming from a particular residence followed by gunshots, they are justified in entering the residence without a warrant. Of course, once the emergency ceases, the right to search also ceases. In any case where a search is permissible without a warrant, its scope is limited to that degree of intrusion reasonably necessary to accomplish the purpose of the original entry. Any intrusion beyond that is unreasonable and any evidence thereby discovered will be suppressed. Thus the Supreme Court has refused to allow a complete warrantless search of a house owned by the violator in which a homicide occurred once the officers had secured the premises, removed and tended to dead or wounded persons and apprehended the violator on the premises. The Court stated that a full search for evidence, once the exigency which authorized the officers' original entry had passed, could not be justified without a warrant.

The second category of emergency circumstances which justify a warrantless search deals with those cases where officers reasonably believe that a removal or destruction of evidence is imminent and there is no time to secure a search warrant. This exception has been applied where officers on surveillance overheard a conversation in the next room which led them to believe that heroin had been cut and packaged there and was about to be removed. The subsequent emergency entry and seizure of the heroin was found reasonable. There must be a strong indication that evidence is actually about to be removed or destroyed. The courts have held that merely because there would be a delay or an inconvenience to the officers if they were required to obtain a search warrant will not justify a warrantless search.

Rule 41(c)(2) of the Federal Rules of Criminal Procedure now provides for a search warrant based on oral testimony such as communicated by telephone from agents in the field to a magistrate. This procedure may drastically reduce the time in which it takes to obtain a search warrant. The effect could therefore be that some situations that would formerly be considered exigent, due to the practical considerations of the time it would take to physically procure a search warrant, may no longer be so urgent because a warrant can be obtained over the telephone in a relatively short period of time.

Although a search of a house would not normally be justified as incident to an arrest in front of the house, the exigent circumstances exception to the warrant requirement has been used successfully to justify a protective sweep-type search where officers know that an accomplice is in the house, that he was likely to have witnessed the arrest, and that evidence could be easily destroyed.

A warrantless exigent search is not justified by the mere possibility
that other persons or suspects could be in a residence nor is a search justified merely by the fact that the evidence sought is of a type that can be easily destroyed. There must be specific articulable facts which indicate that evidence is presently being destroyed or is in imminent peril of being destroyed.

As previously stated, a search under this exception is limited to the need which gave rise to the emergency. Once the danger of destruction of the evidence passes, the officers must search, if at all, on the basis of a search warrant or other recognized exceptions. For example, firemen may enter a burning building to extinguish the blaze without a warrant. Also, a fire marshal or arson inspector may enter during the fighting of the fire to determine the cause of the fire or to obtain evidence of possible arson which is in danger of being destroyed. During this emergency the fire marshal may also allow or summon a law enforcement officer to the scene to make observations or secure evidence of arson or the origin of the fire. Evidence of any offense found by firemen or law enforcement officers during this entry may be seized under the plain view doctrine. However, once the fire is extinguished, and the premises are secured, then the danger to the possible evidence that may be in the premises has passed. Officers desiring to return to search for evidence must now obtain a search warrant. The Supreme Court has held that even though an individual has attempted to burn down his own property, he has not abandoned his expectation of privacy in the premises.

The courts have also found warrantless searches of persons reasonable where delay would make it impossible to obtain the evidence. For example, officers have been permitted to cause a blood sample to be seized from a drunk-driving suspect without a warrant because the delay to obtain a warrant would result in a loss of the evidence of the amount of alcohol in the suspect's blood. Also, officers have been allowed to seize and search clothing or take scrapings from a suspect's fingernails where a delay would result in an opportunity for the suspect to remove or destroy the evidence. The suspect could easily destroy the evidence before officers could obtain a search warrant.
VIII. CONSENT SEARCHES

A. VOLUNTARINESS OF CONSENT

A search conducted pursuant to a valid consent is an exception to the Fourth Amendment's requirements of a warrant and probable cause. An officer should not rely on consent if he has probable cause to obtain a warrant, unless an urgent situation renders the obtaining of a warrant (including a telephonic warrant) impractical. The test of the validity of consent is voluntariness. Whether consent is given freely and voluntarily is decided by the facts as determined by the trial judge, who will look to all of the surrounding circumstances. (One of these circumstances is knowledge of the right to withhold consent, but such knowledge is not essential, i.e., an officer need not advise a subject of his right to refuse to consent, but such knowledge or lack of it is one factor to be considered in determining whether the consent is voluntary.)

The government, of course, has the burden of proving a voluntary consent. This burden is especially heavy if the subject is in custody, but a person who is under arrest or in jail does have the capacity to give a valid consent. Furthermore, consent need not be given in writing, although a written consent is preferable to an oral one, if for no other reason than it is easier to prove. If oral, the consent should be clear and specific.

Coercion applied by law enforcement officers will vitiate consent. Coercion may result from acts or words intended to persuade improperly or even from the situation as a whole without any words. The lower a person's intellectual or educational level or the less experience he has had with the police, the more difficult will be the government's burden in proving that there was no coercion and that the consent was voluntary. Some people, e.g., mental incompetents, altogether lack the requisite capacity to consent. On the other hand, well-educated, successful, or "street-wise" defendants will be hard-pressed to convince a court that they believed that they were obligated to consent.

Actual force or threats by officers will invalidate a consent as in the case of a confession, but, unlike with confessions, fraud will also vitiate the consent. Thus, such practices as obtaining consent at gunpoint, telling the suspect that failure to consent will result in the loss of his job, or misrepresenting the purpose or scope of the search must be avoided.

Mere submission to authority is not valid consent. No valid consent is given in response to an officer's statement that he has come to search or that he has a warrant when, in fact, he has none (or it is defective). On the other hand, it is permissible for an officer to advise
a subject that he will apply for a warrant if consent is refused. An officer must be careful, however, to avoid any hint of a threat in conjunction with such an announcement.

Consent may be limited by the consenter in time, scope, intensity, and the like. Furthermore, it may be revoked at any time, although what has already been discovered before the revocation may be introduced in evidence or used as probable cause to obtain a warrant.

B. AUTHORITY TO CONSENT

If two or more persons share either premises or a thing, e.g., a locker, each assumes the risk that the other will consent to a search and thus lacks a reasonable expectation of privacy. Where two or more persons have common authority, access, and control over a place or thing, any of them can effectively consent to a search of it. Property law, i.e., legal title, is largely irrelevant, and thus, it is the guest and not the motel manager or the tenant and not the landlord who has the authority to consent.

Officers must be extremely careful when authority to consent is in doubt in applying the above criteria. If two persons are roommates, one of them can consent to a search of his own bedroom and such common areas as the kitchen and the living room, but, in all probability, cannot give a valid consent to a search of his roommate's bedroom. Likewise, a wife will have the authority to consent to a search of a closet which she shares with her husband but not of a locked box in that closet to which he alone has the key and to which she does not have access. On the other hand, the head of a household, e.g., a parent, can normally consent to a search of his child's bedroom even though his (the parent's) access may be somewhat limited.

A host can normally consent to a search of a guest's premises if the guest's occupancy is limited in time and scope. Conversely, a guest of indefinite duration with the "run of the house," has been held to have the authority to consent to a search of his host's premises. A person who has possession and control of property belonging to another can consent to its search, so long as the consent is not inconsistent with an express or implied understanding between the parties.

Consent searches on business premises often present difficult problems. An employer ordinarily cannot consent to a search of the personal belongings, e.g., the desk, of an employee. If the search is of areas pertaining to the business itself, e.g., the files, the investigator should be certain that the consenting party has the premises under his control and has at least the apparent authority to consent. Thus a corporate officer or office manager is a proper party from whom to obtain a consent but a secretary, office boy, or janitor is not.
APPENDIX A

LIST OF TOPICS AND RECOMMENDED CASES

Exclusionary Rule

Weeks v. U.S. 34 S.Ct. 314 (1914)
Mapp v. Ohio 81 S.Ct. 643 (1961)

Fruit of the Poisonous Tree

Silverthorne Lumber Co. v. U.S. 40 S.Ct. 182 (1920)

Private Search

Burdeau v. McDowell 41 S.Ct 574 (1921)
U.S. v. Capra 501 F.2d 267 (CA 2, 1974)
Comgold v. U.S. 367 F.2d 1 (CA 9, 1966)

Reasonable Expectation of Privacy (Katz Doctrine)

U.S. v. Fuller 441 F.2d 775 (CA 4, 1971)
Piazzola v. Watkins 442 F.2d 284 (CA 5, 1971)

Open Fields and Curtilage

Hester v. U.S. 44 S.Ct. 445 (1924)
Hodges v. U.S. 243 F.2d 281 (CA 5, 1957)
Ponce v. Craven 409 F.2d 621 (CA 9, 1969)
U.S. v. Pagan 537 F.2d 554 (CA 1, 1976)
Fixel v. Wainwright 492 F.2d 480 (CA 5, 1974)

Plain View

Harris v. U.S. 88 S.Ct. 992 (1968)
Coolidge v. N.H. 91 S.Ct. 2022 (1971)
Ellison v. U.S. 206 F.2d 476 (CA 6, 1953)
**Abandonment**

Friedman v. U.S. 347 F.2d 697 (CA 8, 1965)
Williams v. U.S. 237 F.2d 789 (CA D.C., 1956)

**Undercover or Investigative Entry (Nonforcible)**

Gouled v. U.S. 41 S.Ct. 261 (1921)
Davis v. U.S. 327 F.2d 301 (CA 9, 1964)
U.S. v. Bush 283 F.2d 51 (CA 6, 1960)
Fraternal Order of Eagles v. U.S. 57 F.2d 93 (CA 3, 1932)

**Seizing Non-Testimonial (Identification) Evidence**

Davis v. Miss. 89 S.Ct. 1394 (1969)
Schmerber v. Calif. 86 S.Ct. 1826 (1966)

**Regulatory Inspections**

See v. City of Seattle 87 S.Ct. 1737 (1967)
U.S. v. Biswell 92 S.Ct. 1593 (1972)

**Affidavits (Issuance)**

Coolidge v. N.H. 91 S.Ct. 2022 (1971)

**Affidavits (Premises Described)**

Steele v. U.S. 45 S.Ct. 414 (1925)
U.S. v. Hinton 219 F.2d 324 (CA 7, 1955)
Fine v. U.S. 207 F.2d 324 (CA 6, 1953)
Affidavits (Property Described)

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<td>Cofer v. U.S.</td>
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<td>Warden v. Hayden</td>
<td>87 S.Ct. 1642 (1967)</td>
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<td>U.S. v. Gray</td>
<td>484 F.2d 352 (CA 6, 1973)</td>
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<td>U.S. v. Eisner</td>
<td>297 F.2d 595 (CA 6, 1962)</td>
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Affidavits (Probable Cause)

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Execution of Search Warrants

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## Consent

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<td>Bustamonte</td>
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<td>Bumper v. N.C.</td>
<td>88 S.Ct. 1788 (1968)</td>
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United States District Court
FOR THE
Southern District of Georgia

UNITED STATES OF AMERICA

v.
Richard Roe Premises
509 "E" Street
Glynhco, Georgia

BEFORE Evelyn Highsmith
Name of Judge or Federal Magistrate
Brunswick, Ga.
Address of Judge or Federal Magistrate

The undersigned being duly sworn deposes and says:

That he has reason to believe that

(proper description)

in the Southern District of Georgia

there is now being concealed certain property, namely

A quantity of counterfeit currency, the means and instruments used in acquiring, manufacturing and disposing of such counterfeit currency, and all property that constitutes evidence of the offense.

which are


And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

(probable cause)

...Sworn to before me, and subscribed in my presence.

Judge or Federal Magistrate
APPENDIX C

General Instructions for preparation of Affidavit for Search Warrant.

1. Print your name in the upper right hand corner of affidavit.

2. Print or type the affidavit.

3. Staple any additional pages used.

4. Due date is the last classroom session of Search and Seizure (not date of exam!).
Assume for the purpose of this exercise that U.S. 17 and House St. run North-South and that Ga. 303 (from U.S. 17 to the Gate) and B St. run East-West.
United States District Court
FOR THE

UNITED STATES OF AMERICA

VS.

SEARCH WARRANT

To

Affidavit(s) having been made before me by

that he has reason to believe that

on the person of

on the premises known as

in the

there is now being concealed certain property, namely

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search {in the daytime (6:00 a.m. to 10:00 p.m.)} and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before as required by law.

Dated this day of , 19

Judge (Federal or State Court of Record) or Federal Magistrate

*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime" (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time, day or night" pursuant to Rule 41(c).
RETURN

I received the attached search warrant , 19 , and have executed it as follows:

On , 19 at o'clock M, I searched the person or premises described in the warrant and

I left a copy of the warrant with --------------------------
name of person searched or sworn to "at the place of search"

- together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

This inventory was made in the presence of

and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

Subscribed and sworn to and returned before me this day of , 19

__________________________________
Federal Magistrate
# Evidence

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ASSIGNMENTS

1. Students are expected to familiarize themselves with the "Federal Rules of Evidence." The following rules should be given especially close attention: 101-105; 201; 401-405; 501; 601-611; 614-615; 701-702; 801-802; 803(2), (5), (6), (8); 804(a); 804(b) (1), (2), (3); 901-902 (skim); 1001-1004; 1101(c) & (d).

2. In addition to this text, students should read "Criminal Evidence," by Professor Jon R. Waltz, which is available in the Learning Resources Center.
CHAPTER I - INTRODUCTION

This text on evidence is not intended to cover in depth all phases of evidence, but rather to assist the investigator in understanding the Federal Rules of Evidence and in knowing how the Rules will affect his investigations and presentations in court.

It is imperative that an investigator have a basic understanding of evidence. Unless he is aware of what evidence is potentially admissible, e.g., seemingly unrelated bad acts of a witness, the U.S. Attorney will never have the opportunity to present it to the jury. If the investigator knows what to look for and how to incorporate it into his report, many cases that would otherwise be lost may be saved.

1.1 DEFINITION

Evidence is all the means by which any alleged matter of fact, the truth of which is submitted to inquiry, is established or disproved. Investigators obtain evidentiary facts which tend to prove or disprove the ultimate, main, or principal fact. Evidence is admissible in court under the rules of evidence if it tends reasonably and substantially to prove a fact in issue. Evidence may also be defined as anything offered before a court for the purpose of proving or disproving the question in issue. (The ultimate issue in a criminal trial is always the guilt or innocence of the defendant of the crime with which he is charged.) Evidence is distinguished from proof in that the proof is the result or effect of evidence.

1.2 RULES OF EVIDENCE

The purpose of promulgating rules of evidence is to "secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." (Rule 102).

1.3 APPLICABILITY OF THE FEDERAL RULES

The Federal Rules of Evidence "govern proceedings in the courts of the United States and before United States Magistrates...." (Rules 101 and 1101(a)) The Federal Rules of Evidence do not apply, however, to preliminary questions of admissibility, grand jury proceedings, initial
appearances, preliminary examinations, issuances of search and arrest warrants or bail hearings. (Rule 1101(d)). It is important to note that the rule with respect to privileges applies to all stages of all proceedings (Rule 1101(c)).

1.4 FUNCTIONS OF THE JUDGE AND JURY

In general, the judge decides questions of law and the jury decides questions of fact. (In a court trial, wherein the defendant has waived his right to trial by jury, the judge also decides questions of fact.) (Rule 104(a)).

1.5 THE TRIAL PROCESS

The ordinary trial process in the federal courts consists of:

(a) Opening statements.
(b) Presentation of government's case.
(c) Motion by defense for judgment of acquittal (optional).
(d) Presentation of defendant's case.
(e) Rebuttal (optional).
(f) Closing arguments.
(g) Instructions to the jury.
(h) Verdict.

1.6 DIRECT AND CIRCUMSTANTIAL EVIDENCE

(1) Direct evidence is that which proves the existence of the main fact without any inference or presumption. It is direct when the very facts in dispute are sworn to by those who have acquired actual knowledge of them by means of their senses. An example of direct evidence would be the testimony of a federal officer concerning his purchase of counterfeit notes from the defendant who was charged with the sale of these same counterfeit notes. Here the very facts in dispute are sworn to by the testimony of the federal officer.

(2) Circumstantial evidence is that which tends to prove the principal fact by inference. The use of circumstantial evidence is recognized by the courts as a legitimate means of proof and involves proving material facts which, when considered in their relationship to each other, tend to establish the existence of the main fact. It is the only type of evidence generally
available to show malice, intent, or motive, which exist only in the mind of the perpetrator of the deed. An example of circumstantial evidence would be the testimony of a federal officer regarding his observation of the defendant when approaching the still site, in that he always approached by a very indirect route at night with his automobile lights turned off. In the example in 1.6(1), above, testimony by a second agent that he saw the defendant and the undercover agent together at the time of the alleged sale would constitute circumstantial evidence.

The same evidence may be direct as to one issue and circumstantial as to another. For example, a witness' statement that a homicide defendant said: "I'm going to kill X (the victim)," is direct evidence of one element (intent) and circumstantial evidence of another element (the killing). It is incorrect to categorize circumstantial evidence as "inferior" inasmuch as many cases are proven entirely by circumstantial evidence. Circumstantial evidence may be as convincing as direct evidence, and the jury may find that it outweighs conflicting direct evidence.

1.7 BURDEN OF PROOF

The government has the burden of proving criminal charges against the defendant beyond a reasonable doubt. Reasonable doubt is "an actual doubt based upon reason, that exists after considering all of the evidence and not a mere possible or imaginary doubt, but such doubt as would cause a reasonable man to hesitate to act in the important affairs of life." If a reasonable doubt exists after all the evidence has been presented, the defendant is entitled to an acquittal.

The plaintiff has the burden of proving his civil case by a preponderance of the evidence, which means simply the greater weight of the evidence.
2.1 DEFINITION

To save time and expense, a trial judge may accept certain facts without requiring formal proof, i.e., the judge may take judicial notice of the facts offered. The existence of some facts is thought to be so self-evident that no formal proof of them is necessary during a trial. Thus no witnesses need be called and no tangible evidence need be offered to establish these widely accepted facts. Judicial notice is a substitute for formal proof.

2.2 FACTS WHICH CAN BE JUDICIA LLY NOTICED

(1) Facts which can be judicially noticed (Rule 201) are the facts that normally go to the jury in a jury case. They relate to the parties, their properties, their business. These facts must be:

(a) Generally known within the territorial jurisdiction of the trial court (Rule 201(b)(1)).

Some examples are:

(1) There was a financial depression in 1931.

(2) There is very little rainfall in the Sahara Desert.

(3) Oil prices rose during and after the O.P.E.C. boycott.

(b) Facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned (Rule 201(b)(2)).

Some examples are:

(1) May 9, 1977 fell upon a Monday (calendar).

(2) The formula for water is H O (chemistry books).
(c) In addition, laws of foreign countries, the statutes of the United States, treaties, contents of the Federal Register, and the laws of each state may also be judicially noticed.

2.3 DISPUTED FACTS

If there is any evidence which reasonably puts a fact in dispute, judicial notice will not be taken. A judge may not take judicial notice of facts taken from his private store of knowledge.

2.4 DISTINGUISHED FROM PRESUMPTIONS (ARTICLE III)

Presumptions concern inferences that trier of fact is required to make from certain known facts; judicial notice concerns acceptance by the court of certain items as facts because they are matters of common knowledge.

2.5 DISTINGUISHED FROM STIPULATIONS

A stipulation is an agreement made between the opposing attorneys (especially if in writing) regulating any factual matter incidental to the proceedings or trial.

Example: The attorneys may stipulate that the 210 cancelled checks to be offered by the prosecution were written on the defendant's business account at the First National Bank and were all signed by him.
CHAPTER 3 - PRESUMPTIONS (ARTICLE III)

3.1 DEFINITION

A presumption is a rule of law which permits the drawing of a particular inference (conclusion) as to the existence of one fact from the existence of another fact. Rule 301, which actually applies only to civil cases, provides a handy definition of a presumption: Rule 301, states that "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast."

Example: A presumption exists that every person is sane. A defendant is on trial for murder. If insanity is to be an issue (a defense), the defendant must present some evidence that he is insane, after which, the prosecution has the burden of proving that he is sane.

3.2 RATIONALE FOR PRESUMPTIONS

There are several reasons why the courts recognize presumptions:

(1) Procedural expediency, in which there are arbitrary but necessary rules for solutions to problems arising from unexplained occurrences. Example: A person missing for seven years is presumed to be dead.

(2) Comparative availability of evidence to the parties. Example: Once it is established that a defendant possessed narcotics, it is easier for him to produce his prescription than for the government to call all the doctors in the area to testify that they did not give the defendant a prescription.

(3) Generally known results of wide human experience. Example: A letter properly addressed, stamped, and mailed is received.

(4) Social policy. Example: A child born to a married woman is not a bastard.

3.3 CRIMINAL CASES

The inference must be logical and reasonable. In a criminal case, the judge will instruct the jury that if they find the basic fact, they may but are not required to, find the presumed fact.
3.4 CONCLUSIVE AND REBUTTABLE PRESUMPTIONS

Presumptions are usually said to be either conclusive or rebuttable.

(1) The so-called "conclusive presumption" is not a rule of evidence but is rather a rule of law and is of virtually no importance to a federal investigator. The classic example is that a child under seven years of age is conclusively presumed incapable of committing a felony, and no amount of evidence can overcome it.

(2) A rebuttable presumption is one which prevails until it is overcome by evidence to the contrary. Some examples are:

(a) A defendant in a criminal case is innocent.
(b) A defendant in a criminal case is sane.
(c) Evidence is unfavorable to one who has destroyed, concealed, or tampered with it.
(d) A child is not an adulterine bastard.
(e) People do not commit suicide.
(f) Narcotics are possessed illegally.
(g) A person signing an instrument is presumed to have knowledge of its contents.
(h) A letter, properly addressed, stamped, and mailed is received.
(i) Public officers perform their duties according to law and do not exceed their authority.
(j) A person missing for seven years is dead.
(k) Heroin possessors have knowledge that the heroin has been smuggled into the United States.

(3) Examples where no presumption can be made:

(a) Intent in a criminal case cannot be presumed.
(b) Marijuana possessors cannot be presumed to have knowledge that the marijuana has been smuggled into the United States.
(c) A person is not presumed to know his constitutional rights.
4.1 ADMISSIBILITY OF EVIDENCE

To be admissible, evidence must be both relevant and competent. Frequently, evidence is admissible only against one party, e.g., his confession, or for a specific purpose, e.g., to impeach the credibility of a certain witness. This is known as limited admissibility. (Rule 105). In all cases, the admissibility of evidence and the determination of relevancy and competency are questions of law to be determined by the trial judge. (Rule 104(a)).

4.2 RELEVANCY

If a fact offered in evidence relates in some logical way to the main fact, it is relevant. The word relevant implies a traceable and significant connection. A fact need not bear directly on the principal fact. It is sufficient if it constitutesto one link in a chain of evidence or that it relates to facts which would constitute circumstantial evidence that a fact in issue did or did not exist. One fact is logically relevant to another if, taken by itself or in connection with other facts, it proves (or disproves) or tends to prove (or disprove) the existence of the other fact. If the fact is logically relevant, it is also legally relevant unless it is barred by some rule of evidence. The principal question to be resolved in determining relevancy is: Would the evidence be helpful to the finder of fact in resolving the issue? (Rule 401).

Sometimes, a party offers evidence of which the relevancy is not immediately apparent. In such cases, the court may admit the evidence conditioned upon later connection with other evidence which establishes its relevancy. (Rule 104(b)). This is often referred to as establishing a chain of evidence.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues...or waste of time..." (Rule 403). The trial judge exercises broad discretion in such a determination.

4.3 COMPETENCY

The terms relevant and competent are not synonymous. Evidence must not only be logically relevant and sufficiently persuasive but also legally admissible, in other words, competent. Relevant evidence may be incompetent and hence inadmissible because of such reasons as the hearsay rule,
the "best evidence" rule or violation of the Constitution, e.g., a confession involuntarily obtained or tangible evidence illegally seized.

4.4 "CHARACTER" EVIDENCE

(a) Traits (Rule 404(a))

Evidence of a person's character (or character trait) is not admissible in order to prove that he acted in conformity therewith on a particular occasion, i.e., that he must have acted this way again in the instant case. In other words, such traits cannot be introduced to prove the defendant is guilty of the crime charged. The saying, "Once a thief, always a thief," has no place in our system of justice. A defendant can, however, place a pertinent trait of his character in issue (by taking the stand, procuring other witnesses, or both). The trait must be pertinent to the crime charged. Thus, peacefulness is pertinent in an assault case and honesty is pertinent in an embezzlement case, but not vice-versa.

By thus putting his character in issue, a defendant is said to have "opened the door." The defendant and/or his witnesses may be cross-examined and even asked about specific instances of the defendant's conduct as to that trait. For example, a defendant charged with assault has put on a character witness who testifies that the defendant has a reputation for being peace-loving. Such a witness can be asked on cross-examination if he had heard that the defendant had hit another individual at another time (even though no conviction or even arrest resulted). (Note: A prosecutor cannot fabricate such an alleged act; he must have a reasonable, good faith belief that it really occurred.) In addition to cross-examining the defendant's character witnesses, the government may then also put on its own rebuttal witnesses to testify that the defendant has a reputation for being vicious.

(b) Acts (Rule 404(b))

As with traits, prior specific instances of conduct (acts) cannot be used to prove that the defendant acted in conformity therewith, e.g., because the defendant twice robbed banks is not proof that he robbed the bank for which he was indicted in the instant case.
On the other hand, prior acts may be introduced (and, unlike traits, without waiting for the defendant to "open the door") by the government to show something beyond mere likelihood of repetition. Examples are motive, intent, identity, modus operandi, plan and preparation. For example, defendant is on trial for drowning his heavily-insured wife in the bathtub. The fact that his four previous wives had all drowned in the bathtub (while likewise insured) would be admissible in the instant case, not to show "once a murderer, always a murderer" but rather to show motive and modus operandi.

(c) Traits or Acts as Essential Elements

Where a prior act or trait is an essential element of a charge, Rule 404 does not apply and such evidence is admissible. For example, to prove a person guilty of being a felon in possession of a firearm, the government may (and indeed must) prove a prior act (the felony) to secure a conviction in the instant case.
CHAPTER 5 - PRIVILEGES (ARTICLE V)

5.1 CONCEPT OF PRIVILEGE

The Federal Rules of Evidence contain only one rule on privilege. Rule 501 states that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The rules as proposed originally by the Supreme Court were much more specific and enumerated certain privileges. However, Congress declined to accept the proposed rule, and Rule 501, a very broad and general rule, was finally adopted.

The key to understanding Rule 501 is the reference to the common law. If the privilege to be claimed was not recognized at common law, then the privilege must be one established by statutory law.

What exactly is the meaning of privilege? The common law held that certain types of communications were the result of special types of relationships which were meant to be private and that the importance to society of maintaining this privacy outweighed the importance of revealing all relevant evidence to the trier of fact. These communications were deemed confidential, and thus privileged, between the parties to the communications. Thus, if a communication is one which is privileged, the party holding the privilege can preclude the other party from disclosing the communication.

Rule 1101(c) provides that the rule with respect to privilege (unlike the remainder of the rules) applies at all stages of all proceedings, i.e., whenever a witness is called upon to testify.

5.2 TYPES OF PRIVILEGED COMMUNICATION

There are three relationships recognized as privileged that are of importance to federal criminal investigators. These are:

Attorney - Client
Government - Informant
Husband - Wife

5.3 ATTORNEY - CLIENT PRIVILEGE

The attorney - client privilege is strictly interpreted. Not every communication between an attorney and his client will fall under this
(6) SECURITY QUESTIONS

Questions asked for reasons of security do not fall within the Miranda decision. For example, during the execution of a search warrant an agent may ask security questions such as, "Do you have any weapons?" Generally, such questions are permissible if they are for safety reasons only. However, if the questioning is to elicit evidence of a crime, a Miranda warning must be given. In one case, agents were executing a search warrant at a business location regarding a gambling operation. The owner refused to open the door and a forced entry was required. While one agent was talking to the owner, another agent suddenly came up and asked the man, "Do you have any weapons within reach?" to which the man answered "yes" and pointed to a desk drawer. The agent checked the desk, found weapons, and asked the owner, "Where did you get them?" He replied that he had taken them in on a loan. The court held that the first question asked dealt with security only and did not require a Miranda warning. However, the second question had no rational security purpose and was a quest for evidence to be used against the owner and required a Miranda warning.

E. HOW LONG THE WARNING LASTS - SUBSEQUENT INTERROGATION

The Miranda decision does not suggest how long a proper warning, once given, should last in the mind of the person being interrogated. It is obvious that if the person is warned and his waiver obtained, he lawfully may be questioned five minutes later without repeating the warning. It is equally obvious that if he is questioned months later, he should be warned again at that time. The questionable area is somewhere between these two extremes.

The courts have held in several cases that when the person was given his full Miranda warnings before the questioning, it was not necessary to repeat the warning at the beginning of each successive interview. The courts said that they did not believe that anything decided in Miranda was meant to prohibit police officers from ever asking a defendant to reconsider his refusal to answer questions. To so hold would be tantamount to enacting
a "no questioning" rule once a suspect was in custody. A three day lapse between the warning and the questioning has been held to be acceptable.

In one case, where the defendant was arrested, given Miranda, and refused to talk, he was approached three hours later by the agents and again given his Miranda warning. He was urged to cooperate and was given a description of the dismal conditions of federal prisons. The court held that the agents were not reinterviewing the defendant for the purpose of finding out if he had changed his mind about answering questions but for the obvious purpose of wearing down the defendant's resistance and making him change his mind. The confession was inadmissible.

F. EFFECT OF A PREVIOUS FAILURE TO COMPLY WITH MIRANDA

Questioning a person who is already in the custody of other law enforcement officers can present serious problems. In one case, local police arrested a man for robbery, gave him no warnings of any kind, and questioned him for over fourteen hours about local robberies. Three FBI agents then came to the station to question the man about two bank robberies. The agents gave the man a proper Miranda warning and questioned him for two hours, after which he confessed to the bank robberies. The Supreme Court held that the confession was inadmissible even though the FBI agents had given a proper Miranda warning. Here, the Court found that the agents were the beneficiaries of the pressure applied by the in-custody interrogation of the local police and the warning given by the agent was not sufficient to save the confession.

This case may be compared to another situation in which the defendant was arrested for robbery. After being given a proper Miranda warning, he indicated his desire to remain silent, and the questioning ceased. Two hours later, a homicide detective took the man from his cell to another interview room, gave him a proper Miranda warning, and questioned him regarding his involvement in an unsolved murder. The man subsequently confessed, and the statements were used against him at trial.
After a review of the facts, the Supreme Court found no violation of the Miranda rule. There was no refusal to stop questioning or any repeated efforts made by the detectives to have the man change his mind. The second questioning concerned a separate and distinct crime and the man had been removed in time and place from the scene of the earlier questioning.

One must not assume that a person in custody has been given a proper Miranda warning. Therefore, the best procedure to follow is to remove the person in time and place before giving Miranda and questioning him.

G. BY WHOM THE WARNING IS GIVEN

The Miranda decision does not require that the warning be given by the officer who eventually obtains the confession. It merely says that "the person must be warned" or that the police must make his rights "known to him."

H. HOW THE WARNING IS GIVEN

The Miranda decision does not require that the warning be given in any particular manner other than that it must be given clearly and intelligibly. The officer should use language that is simple and direct. Failure to recite any of the rights enumerated in the warning may void a subsequent confession.

I. USE OF THE CONFESSION FOR IMPEACHMENT

A confession which is inadmissible in the government's case-in-chief, i.e., to prove the defendant's guilt, because of a failure to warn when Miranda was required or because it was defective, may still be admissible for the limited purpose of impeaching the defendant's credibility. Thus if the defendant voluntarily elects to take the stand and makes a statement which is inconsistent with the one which he gave to the officer while in custody, his original statement may be introduced on rebuttal to impeach his credibility even though the statement was obtained in violation of Miranda.
Conversely, a defendant who chooses to exercise his Fifth and Sixth Amendment rights while in custody may not be impeached by having made known to the jury the fact that he remained silent when he could have "cleared himself." In any event, an officer should not attempt to avoid the Miranda requirement in hopes of using the confession for a limited (impeachment) purpose.

J. WAIVER OF MIRANDA RIGHTS

Before any admission or confession may be used after a suspect has been advised of his rights, the agent must obtain a valid waiver of rights from the suspect under the Miranda decision. The Court specifically stated in its decision, after enumerating the rights to which the individual was entitled, that "the defendant may waive...these rights provided the waiver is made voluntarily, knowingly and intelligently...Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Further on in the decision, the Court stated: "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."

It is apparent from the decision that there is a heavy burden on the government to prove, first, that a waiver was obtained and, secondly, that the waiver was in fact given voluntarily, knowingly, and intelligently. The easiest way to prove the waiver is to obtain a written waiver signed by the defendant. This written waiver may be in the defendant's own handwriting or may be a pre-printed waiver form which a number of agencies use. The defendant's signature will show that the waiver was given. (But this does not prove a voluntary, knowing, and intelligent action by the defendant. That must be proved separately.)

As stated in the Miranda decision, the waiver may be given orally. This type of waiver is more difficult to prove and is generally done by the testimony of agents or others who were present when the oral waiver was given. If the defendant gives
an oral waiver and agrees to talk, but refuses to sign a waiver statement, it is good practice to write down his exact words of refusal to sign for later use and have them witnessed by another agent.

The voluntariness of a waiver will be decided on the facts surrounding each case. Again in Miranda, the Court said: "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. . .Moreover, any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."

In other words, law enforcement personnel are not allowed to wear down a defendant's resistance by long sessions of questioning and holding him for long periods of time when he is prevented from talking to anyone but his interrogators. Evidence of such tactics is almost conclusive against a valid waiver. An agent must be extremely careful as to what he says when attempting to obtain a waiver. As indicated above, nothing should be said that could be construed as any kind of threat or promise or reward to the accused for talking. It is permissible to point out that cooperation with the authorities will be brought to the attention of the U.S. Attorney or the judge and this may have some influence upon them. But comments to the effect that cooperation will lead to some favorable consideration are improper. All of these factors will affect the voluntariness of a waiver of rights.

Even though voluntarily given, a waiver may be revoked by the accused at any time. If, after agreeing to talk and talking for some time, the accused suddenly decides he does not wish to continue the interview or that he wishes to consult an attorney, the previously given waiver is automatically revoked and questioning must stop immediately.

Proving a waiver was given knowingly and intelligently is a separate matter. For instance, the suspect may be incapable of giving a waiver for one of several reasons. He may be physically incapable in that he is hard of hearing or deaf and could not hear the warnings. He may be mentally incapable of understanding the warnings because of very youthful age or because he is a mental
defective whose intelligence would preclude him from understanding the warning. (Age alone, however, does not mean incapacity to waive.) A person can be so sick or so badly injured that he is incapable of full comprehension and intelligent action. The influence of drugs or alcohol may be so great that the person cannot understand his constitutional rights or make an intelligent decision to waive those rights. Finally, there is the problem of those who do not speak or understand English. It will be futile to read them their rights under Miranda if they cannot understand what the agent is saying to them and therefore cannot make a knowing and intelligent waiver. Though some agencies provide their investigators with cards printed in foreign languages, simply reading these cards may not prove an understanding sufficient to show a knowing and intelligent waiver if the investigator does not read or speak the language on the card, inasmuch as his pronunciation may be so poor that what he actually said in the foreign language bears little resemblance to the actual words of the card.

If an accused is arrested and represented by counsel or is under indictment or information, this does not automatically mean he cannot waive his right to silence and right to have counsel present without the permission of the attorney. It only means there is a heavier burden of proof of waiver on the government. Nonetheless, the investigator should be extremely careful that such a waiver is the defendant's voluntary action and not the result of undue pressures, subtle or overt, exerted by the investigator.
12.4 RIGHT TO COUNSEL

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to ...have the Assistance of Counsel for his defense." This right to counsel arises at the time the adversary judicial process begins, i.e., at the time of the indictment (or information) or the initial appearance. After this point, the accused is entitled to have counsel present during any contact with the government regarding the case for which he was indicted or arrested.

This right to counsel may be waived, but a court will not presume the existence of a waiver from a silent record. The right to counsel applies whether or not the suspect is in custody or in a custodial-type situation. Thus an officer cannot procure a cellmate or a cooperating co-defendant to elicit incriminating statements from the subject without the defendant's waiving the right to counsel after he has been indicted or brought before the magistrate for his initial appearance.

This problem should not be confused with Miranda. It simply means that once a person has been indicted or brought before the magistrate for his initial appearance, he must affirmatively waive his right to counsel before he can be questioned without the presence of counsel by a law enforcement officer or anyone acting at the officer's behest, whether or not he is in custody and whether or not he knows the true status of the person questioning him.
APPENDIX A

RELEVANT AMENDMENTS, STATUTES, AND RULES

(1) Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

(2) Fifth Amendment

"No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law..."

(3) Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defense."

(4) Federal Rules of Criminal Procedures: Rule 5(a)

"An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federalaal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C.

(5) Title 18, U.S. Code, Section 3501

Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (3) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer or law enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: PROVIDED, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such commissioner or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such commissioner or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(3) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.
APPENDIX B

PROCEDURES FOR LINEUPS, SHOWUPS, AND PHOTO DISPLAYS

A. A lineup, showup, or photo display may not be "so suggestive as to create a very substantial likelihood of misidentification."

B. Examples of forbidden lineup practices:

(1) Everyone in the lineup except the suspect was known to the identifying witness.

(2) Other participants in the lineup were grossly dissimilar in appearance to the suspect, e.g., age, race, height.

(3) Only the suspect was required to wear distinctive clothing which the culprit allegedly wore.

(4) The witness was told by the police that the culprit had been caught. ("We think your man will be in this group.")

(5) The suspect was pointed out to the witness by police officers before or during the lineup.

(6) The participants in the lineup were asked to try on an article of clothing that would fit only the suspect.

C. Recommended lineup procedure.

(1) Use at least half a dozen participants, all of similar appearance.

(2) Present all of the lineup participants to the witnesses simultaneously.

(3) Do not draw undue attention to any particular lineup participant.

(4) Allow witnesses to request the participants to repeat a bodily movement or words used by the criminal, but ask all lineup participants, not just one of them, to comply with the request unless the witness specifically directs his or her request to a particular participant.

(5) If there is more than one witness, have each convey his reactions while separated from the other witnesses. This is to avoid having other witnesses influenced by the opinions of the others.
(6) Do not say, "Which lineup member is the criminal?", but instead, "Is the criminal in the lineup?"

D. Showups should be avoided as they are inherently suggestive. They should be used only when:

(1) Compelling circumstances dictate the use of a showup rather than some more satisfactory alternative procedure;

(2) "Fresh" identification and efficient law enforcement require an on-the-scene identification, as when the accused is rapidly apprehended and promptly returned to the scene of the crime; and

(3) Extrinsic factors establish the accuracy of the showup identification.

E. Photographic displays should not be shown to a witness if the suspect is in custody and a lineup is reasonable practicable. The display of photographs should not be impermissibly suggestive. Therefore, except where wholly impracticable,

(1) The suspect's photo should be in a group of at least five other photos, and a larger number is strongly recommended.

(2) There should be a reasonable attempt to use photographs of other persons who resemble the suspect.

(3) Photographic displays should not be repeatedly shown to witnesses who have made identifications unless in furtherance of a legitimate investigative purpose.

(4) Law enforcement officers should not indicate in any way which photograph is of the suspect.

(5) No witness should view the photographs in circumstances which permit other witnesses to ascertain his ability or inability to identify the suspect.

F. All photographs shown to any witnesses for the purpose of identifying the suspect, whether or not an identification was made, should remain under the control of the law enforcement agency, so that they will be producible if necessary. A written record of photographic displays for the purpose of identifying a suspect should be made and maintained.
in the suspect's file. Except where wholly impracticable, the record should include:

(1) A record of all photographs shown to any witnesses for the purpose of identifying a suspect, whether or not an identification was made (which record would enable the law enforcement officer to reconstruct the photographic display);

(2) Information identifying the person represented in each photograph;

(3) The presence or absence of any marks, scratches, folds, writings or other notable physical characteristics of the photograph;

(4) The date, time, and location of each display;

(5) The name and address of any law enforcement officers who observed or participated in the display.

(6) The name and address of the witness to whom the photographs were displayed;

(7) Statements made by law enforcement officers to the witness in connection with the photographic display and pertaining to the identification of the suspect;

(8) Whether or not an identification was made; and

(9) Statements or physical expressions made by a witness indicating the degree of certainty with which he is able to identify a photograph as being that of the suspect.
APPENDIX C

Recommended Cases

Nontestimonial (Identification) Evidence

- Davis v. Miss. 89 S. Ct. 1394 (1969)
- Schmerber v. Calif. 86 S. Ct. 1826 (1966)
- Cupp v. Murphy 93 S. Ct. 2000 (1972)
- U.S. v. Dionisio 3 S. Ct. 764 (1973)

Lineups, Photo Arrays, Etc.

- U.S. v. Wade 87 S. Ct. 1926 (1967)
- Foster v. Calif. 89 S. Ct. 1127 (1969)
- Neil v. Biggers 93 S. Ct. 375 (1972)

Privilege Against Self-Incrimination

- Couch v. U.S. 93 S. Ct. 611 (1973)
- Andressen v. Maryland 96 S. Ct. 2737 (1976)
- Murphy v. Waterfront Commission 84 S. Ct. 1594 (1964)
- Kastigar v. U.S. 92 S. Ct. 1653 (1972)
- Griffin v. Calif. 85 S. Ct. 1229 (1965)

Voluntariness of Confessions

- Williams v. U.S. 71 S. Ct. 576 (1951)
- Lynum v. ILL 83 S. Ct. 917 (1963)
- Garrity v. N.J. 87 S. Ct. 616 (1967)
- Haynes v. Wash. 83 S. Ct. 1336 (1963)
- Beecher v. Ala. 92 S. Ct. 2282 (1972)
- Brooks v. Fla. 88 S. Ct. 541 (1967)
- Anderson v. U.S. 63 S. Ct. 599 (1943)
- U.S. v. Springer 460 F. 2d 1344 (1972)
- U.S. v. Duvall 537 F. 2d 15 (1976)
- U.S. v. Reynolds 532 F. 2d 1150 (1976)
Spano v. N.Y. 79 S. Ct. 1202 (1959)
U.S. ex rel. Caminito v. Murphy 222 F. 2d 698 (1955)
Schneckloth v. Bustamonte 93 S. Ct. 2041 (1973)
Mincey v. Arizona 98 S. Ct. 2408 (1978)

The Miranda Problem

Miranda v. Arizona 86 S. Ct. 1602 (1966)
Orozco v. Texas 89 S. Ct. 1095 (1969)
U.S. v. Phelps 443 F. 2d 246 (1971)
Oregon v. Mathiason 97 S. Ct. 711 (1977)
Roy v. Hall 521 F. 2d 120 (1975)
Hines v. LaVallee 521 F. 2d 1109 (1975)
U.S. v. Mandujano 96 S. Ct. 1768 (1976)
U.S. v. Olof 18 CrL 2372 (1975)

Right to Counsel

Massiah v. U.S. 84 S. Ct. 1199 (1964)
U.S. v. Crisp 435 F. 2d 354 (1971)
Brewer v. Williams 97 S. Ct. 1232 (1977)
ENTRAPMENT

1. INTRODUCTION

Entrapment is a legal defense raised by the defendant when he claims that, but for the inducement of government agents, he would not have committed the crime with which he has been charged. The defense is most apt to be raised in situations involving informants and agents working undercover. It is essential that the criminal investigator understand the concept of entrapment as it relates to his actions and the actions of his informants.

2. DEFINITION

Entrapment is defined as the acts of officers of the government in inducing a person to commit a crime not contemplated by him in order to initiate a criminal investigation.

The inducement may consist of

(a) appeals to sympathy,

(b) playing on the emotions,

(c) overzealous persuasion,

(d) persistence (wearing down resistance),

(e) pressure, coercion, and threats.

Government agents may afford the defendant the opportunity to commit a crime. This is not entrapment. They may devise a scheme to reveal criminal activity without entrapping a defendant. It is only when the criminal design originates with a government agent, who induces an otherwise innocent person to become involved, that entrapment arises.

3. GOVERNMENT AGENT

This term includes not only regular government employees, agents, and investigators, but government informants as well. An agent cannot do through an informant what he cannot do himself. If an informant for an agency induces an otherwise innocent person to commit a crime, the defense of entrapment will be valid.
The courts have placed few limitations on the roles that agents and informants can play in the crime itself. The fact that an informant had provided the contraband in a narcotics sale has been held by the U. S. Supreme Court not to constitute entrapment, where the defendant was already predisposed to commit the crime.

4. PERSON OTHERWISE INNOCENT

The Supreme court has clearly established the predisposition of the defendant as the focal point in determining whether there has been entrapment. If the defendant was predisposed (meaning the criminal intent was already in his mind and was not placed there by the government agent) to commit the crime, entrapment will be no defense to him. The predisposition can be shown by:

(a) An existing course of similar conduct.

   Example: The defendants have been selling cocaine for some time when an undercover agent makes a purchase from them. The criminal intent here was not created by the government.

(b) Previously formed intent.

   Example: The defendant had purchased paper and ink and was trying to get a counterfeit operation underway when government agents heard of his intent and provided additional materials and expertise. The criminal intent in this instance was again not the creation of the government.

(c) A ready response to a criminal offer.

   Example: An Undercover agent asks a bootlegger, "How much for a bottle?" The bootlegger promptly replies, "$5.00." Here, it was obviously not necessary for the agent to "lure, inspire, or persuade" the bootlegger, who was clearly ready and willing to commit the crime as soon as an opportunity arose.

5. QUESTION FOR THE JURY

The focal point in an entrapment case is predisposition. Entrapment is a question of fact for the jury to decide. They will make this decision based on the behavior of the government agent and of the defendant.
An agent needs to have the evidence, should the defense of entrapment arise, to show the defendant's predisposition. Such evidence could come from conversations with the defendant indicating his present and previous dealings, interviews with third parties familiar with his past, or court or other records showing past connection with the subject matter.

6. **Recommended Cases**

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# EVIDENCE

## SELF-INCRIMINATION

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## APPENDICES

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CHAPTER II-NONTESTIMONIAL (IDENTIFICATION) EVIDENCE

Nontestimonial evidence is evidence which tends to identify the defendant in some manner such as by fingerprints, palm prints, and footprints; lineups, showups, and photo arrays; blood, urine, sperm, and saliva test; bullet extractions; hair samples; handwriting exemplars; voice prints; modeling of clothing; assuming a certain stance; or uttering certain words. Nontestimonial evidence can be attacked in any one of three different ways - based on the Fourth, Fifth, or Sixth Amendment.

11.1 FOURTH AMENDMENT PROBLEMS

Fourth Amendment attacks on the admissibility of nontestimonial evidence are usually based upon the contention that evidence has been obtained after an initial illegal seizure of the defendant. In one case, a woman was raped by a black male and fingerprints were left at the scene of the crime. Every black male in the town was arrested and fingerprinted. The defendant was convicted as a result of this evidence. The nontestimonial evidence (fingerprints) was held to have been obtained as a result of the initial illegal seizure of the defendant, and his conviction was reversed.

Another common Fourth Amendment attack on nontestimonial evidence is based upon an illegal search after the defendant has been placed in custody. Subsequent searches for certain types of nontestimonial evidence, such as blood type tests and bullet extractions, necessitate a search warrant even when the defendant has lawfully been taken into custody. In one instance, the defendant, after being lawfully placed in custody, was required, over his protest, to submit a blood sample for the purpose of determining blood type. The defendant's conviction was reversed and the evidence suppressed. (It should be noted however, that the existence of exigent circumstances will obviate the need for a search warrant, as in one case where the defendant was required to give a blood sample, as in the situation above, not for the purpose of determining blood type but to determine the percentage of alcohol in his blood. In this instance, exigent circumstances were held to exist due to the evanescent nature of the evidence.) On the other hand, the courts have held that there is no separate Fourth Amendment intrusion involved in subsequent searches and seizures of certain other types of nontestimonial evidence wherein the defendant has no reasonable expectation of privacy, e.g., fingerprinting a lawfully arrested person.
11.2 FIFTH AMENDMENT PROBLEMS

The Supreme Court has held that the self-incrimination clause of the Fifth Amendment applies only to testimonial evidence and not to nontestimonial evidence. However, the due process clause of the Fifth Amendment applies to both testimonial and nontestimonial evidence. Therefore, if evidence has been obtained in violation of the due process clause of the Fifth Amendment, such as where a lineup, showup, or photo display has been so suggestive as to create a very substantial likelihood of misidentification, that evidence will be suppressed. (See appendix C.)

11.3 SIXTH AMENDMENT PROBLEMS

The Sixth Amendment is the third avenue by which the defendant can attack the admissibility of nontestimonial evidence. The Supreme Court has held that after the initiation of the adversary judicial process, e.g., indictment or initial appearance, a defendant has the right to the presence of counsel at a lineup. On the other hand, the Court has held that there is no similar right to counsel when photographs are displayed to witnesses.
CHAPTER 12 - SELF - INCRIMINATION AND THE
RIGHT TO COUNSEL

12.1 THE PRIVILEGE AGAINST COMPULSORY SELF-INCrimINATION

The Fifth Amendment to the Constitution provides that "No person...shall be compelled in any criminal case to be a witness against himself..." The privilege applies only when the accused is called upon to make a testimonial communication that is incriminating. It does not apply to nontestimonial evidence such as fingerprints, blood tests and line-ups. The Supreme Court has stated that "A party is privileged from producing the evidence but not from its production," i.e., the privilege would not apply in the case of a search warrant execution or a subpoena directed against a third party inasmuch as, in these situations, the accused is not compelled to do anything.

The privilege against self-incrimination covers all witnesses and must be specifically claimed or it will be considered to have been waived by the witness.

The privilege applies not only to those answers or documents which would support a conviction, but also extends to those which might provide a link in the chain of evidence which would be incriminatory. It is therefore available if there is a reasonable possibility that an answer might tend to incriminate.

The privilege is personal and cannot be claimed in a representative capacity, e.g., a corporation president cannot claim the privilege on behalf of the corporation and refuse to produce corporate records, even if the corporate records tend to incriminate him personally. (He could not, of course, be compelled to give oral testimony against himself.)

A grant of immunity pursuant to Title 18, U.S. Code, Sections 6001 - 6005, eliminates the problem of self-incrimination because the witness' testimony cannot be used against him. A grant of (derivative) use immunity is sufficient, and the witness has no right to demand transactional immunity, i.e., total immunity from prosecution, even though all evidence is derived from sources independent of the witness' testimony under a grant of immunity.

12.2 VOLUNTARINESS OF CONFESSIONS IN GENERAL

All admissions and confessions must be made voluntarily. The question to be decided by the court is not whether or not the confession is truthful,
but whether or not it was voluntary, i.e., whether the defendant's will was overborne by officials of the government. A confession is not voluntary if obtained by force, threats, or promises of reward for confessing. On the other hand, an admonition to tell the truth does not vitiate voluntariness, nor does deception standing alone (unless it is carried to the point where the defendant's will is overborne). The standard statement about cooperation, e.g., "Your cooperation will be called to the attention of the U.S. Attorney and the Judge," may be given. (Rule 5 (a) and 18 USC 3501 should also be kept in mind inasmuch as a detention of more than six hours may have an adverse affect on voluntariness.)

"On March 13, 1963, petitioner Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to 'Interrogation Room No. 2' of the Detective Bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present. Two hours later, the officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.'

"At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

"We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way appraised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had 'full knowledge' of his 'legal rights' does not approach constitutional rights."
B. SYNOPSIS OF THE RULE

The Miranda Decision states that when any individual is "taken into custody or otherwise deprived of his freedom of action in any significant way," and is subjected to "questioning initiated by law enforcement officers, . . . he must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."

So some exceptions are made to the warning and waiver requirements. The Supreme Court said, "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." No warning or waiver is required. The reason is that in such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. Another exception is for volunteered statements. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by the Miranda decision.

The majority opinion said, "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." The opinion indicates that what the Court fears is not that the accused might confess but that he might be motivated or forced to confess by "the compulsion inherent in custodial surroundings, . . . informal compulsion exerted by law enforcement officers during in-custody questioning. . . the compulsion to speak in the isolated setting of the police station . . . the government established atmosphere. . . in which their freedom of action is curtailed." Or, as the majority said earlier, "By custodial interrogation (for which warning and
waiver are required), we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

Briefly stated, the law enforcement officer who must comply with the requirements of the Miranda decision has a problem in three different areas. These are as follows:

(a) Separating those persons to whom warnings must be given (and from whom a waiver of rights must be obtained) from those as to whom there are no such requirements.

(b) Giving the warning and proving in court that he gave it.

(c) Obtaining the waiver and proving in court that he did obtain it, when such is the case.

C. TO WHOM WARNINGS MUST BE GIVEN

(1) "TAKEN INTO CUSTODY"

The warning and waiver process is necessary whenever the police initiate questioning of any person, concerning his own guilt, after that person has been taken into custody. But what do the courts mean by the word "custody?" Anyone who has been placed under arrest or who is incarcerated must be warned, even if the arrest or imprisonment is for a totally different offense.

(2) "OR OTHERWISE DEPRIVED OF HIS FREEDOM OF ACTION IN ANY SIGNIFICANT WAY"

The warning and waiver process is also necessary whenever the police initiate questioning of any person, for evidence of his guilt, if the person has been deprived of his freedom of action in any significant way. The real issue is what constitutes deprivation of one's freedom of action.

(a) Interrogation in Home or Office

Interrogation of the accused in his home or office is often noncustodial in nature. However the individual facts of each case will be reviewed by the court to determine if a warning
should have been given. In one case involving the investigation of a killing in a bar, four officers went to a man's apartment to question him. The questioning was in his own bedroom at 4:00 a.m. The Supreme Court found this to be a situation in which the man's freedom of movement had been curtailed in a significant way and a warning should have been given. One may compare the above facts to those in which IRS Special Agents went to a man's home at 8:00 a.m. to question him about his federal income taxes. The man was given the required noncustodial warning as required by IRS. (This noncustodial warning is not a legally sufficient substitute for a Miranda warning.) The man agreed to talk to the agents. The questioning took place in the dining room after the man had left the agents' presence to get dressed, and during the interview he went to other areas of the house to get information. He also indicated additional information was at his business office. The agents and the man left in their separate cars, later meeting at his office. Information obtained at the residence and office was later used in a criminal tax prosecution. The man claimed he should have been given a Miranda warning. The Supreme Court disagreed and concluded that his freedom of action had not been curtailed in any significant way.

(b) Interrogation in a Law Enforcement Office

The fact that the interrogation takes place in a law enforcement office does not of itself trigger the requirement for a Miranda warning. In one burglary investigation, the victim indicated a possible suspect to a police officer who attempted unsuccessfully to interview the suspect. Unable to contact him, the officer left a card at the suspect's residence asking that he call. The suspect did call and a meeting was arranged. The meeting took place at the station which was only a block from the suspect's residence (and he volunteered to come to the station). Upon arrival, the officer invited him into his office, closed the door, and told him that he was not under arrest. The officer told him that he suspected him of the burglary. The suspect confessed to the burglary and then was warned of his Miranda rights. Later, the statement was signed and the suspect left the office. The Supreme Court held that no warning was required since he was not in custody or deprived of his freedom of action in any
significant way.

(c) On-the-Street Detention

A person is not in custody simply because the police have stopped him on the street to ask him questions during the suspicion or fact-finding phase of an investigation. In one case, the police put out a broadcast for a burgandy colored car, which was involved in a purse-snatching incident. Officers stopped a vehicle meeting the general description, advised the driver of the reason for the stop and told him that he could not leave until a license check had been completed. One officer looked into the car and saw a purse. When asked about the ownership of the purse, the driver stated that it had been left there by a hitchhiker. The victim was then brought to the scene and promptly identified a passenger as the thief. The court, in admitting the driver's statement into evidence, held this to be a non-custodial situation. Thus, when an officer makes a brief investigatory stop, Miranda is not required.

(d) Summary

No hard and fast rules exist to determine if a suspect has been deprived of his freedom of action. The courts generally look at the "totality of the circumstances." A good rule of thumb consists of a four prong test to assist in the determination as to whether deprivation of freedom of action existed:

(1) Focus on the subject.
(2) Probable cause to arrest.
(3) Intent of the officer.
(4) Belief of the subject.

In using this test, it is essential that all four parts exist simultaneously. If they do, there is probably a custodial situation.
The following situation illustrates the application of this four prong test. Four officers went to a firearms dealer's premises to check about compliance with Federal firearms regulations. Immediately upon entry, the officers saw an illegal weapon which they held during the interview in which the man made incriminating statements. The Court found that all four prongs were present and that the Miranda warning should have been given.

It is clear that an interview of a businessman in his office during the daytime by one or two officers is quite different from an interview with a lone and frightened individual by several officers in his home at midnight. In the former (business office) case the courts might quite easily hold that a confession, given without warning or waiver, is admissible in evidence. In the latter (home at night) case they may hold that the man was under such psychological duress that he was "otherwise deprived of his freedom of action in a significant way" and hence should have been warned just as if he had been in actual custody.

If an interview for evidence of guilt, without warning or waiver, is to be held in a home or office, it should be conducted by an absolute minimum number of officers, without any language or display of force or duress, and at a reasonable hour of normal activity. If the officer does not intend to arrest on this occasion, he should advise the suspect, at the outset of the interview, that he is not under arrest and that he may discontinue the interview at any time he desires.

If the interrogation occurs in a law enforcement office, the conditions of the interrogation should be kept as "non-custodial" as possible. The suspect should be allowed all available courtesies, such as permission to use the telephone or toilet. If the facilities are suitable, interrogation should be conducted in some semi-public place such as a desk in the corner of the lobby, or in a large room where other desks are occupied by clerical personnel in the performance of their regular duties. He should never appear to be "guarded" or be under constant scrutiny. The deeper the suspect is taken into the recesses of the building and the more isolated he becomes from people in general and from familiar surroundings, the more likely it is that the court will find that he was so significantly deprived of his freedom of action that a Miranda warning should have been given.
D. TO WHOM WARNINGS NEED NOT BE GIVEN

(1) IN GENERAL

In defining what confessions or admissions of guilt are admissible without prior warning and waiver, the Supreme Court said "general on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding . . . any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence . . . there is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

(2) A PERSON COMMITTING A CRIME AT THE MOMENT

An officer, informant or other witness can testify to incriminating statements made by the accused while he was committing the crime without showing any prior warning to the accused of his constitutional rights. For example, an agent working "undercover" and posing as a buyer for stolen securities met with several of the accused in a hotel room to negotiate the deal. The agent testified in court to statements made by the defendants at that time. The defense claimed that the agent violated the defendant's Sixth Amendment right to counsel by not advising them of his true identity before engaging in the conversation in the hotel room. The court rejected this claim. In a similar case, a narcotics informant made a "buy" with an agent concealed in the trunk to overhear the conversation. The plan worked, and the defendant claimed, as in the case above, a violation of his constitutional rights. The court ruled against the defendant, stating specifically that Miranda provides no authority for such an argument, and further, that: "One is not entitled to counsel while he is committing his crime."

(3) PERSONS WHO VOLUNTEER STATEMENTS

One of the general rules stated in the Miranda decision is that an officer can testify in court to a statement volunteered to him by
the accused despite the fact that the accused volunteered the statement in a custodial setting such as a police station and was not given any warning of constitutional rights before he volunteered the statement. For example, a suspect, much to the surprise of everyone, comes into the police station lobby of his own free will, walks up to the sergeant and says, "I'm the guy who killed that man out behind the gas works last Thursday." The sergeant can testify to that statement in court. The **Miranda** decision lays the general rule down as follows:

"There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

(4) **PERSONS QUESTIONED FOR PERSONAL HISTORY DATA ONLY**

Arresting officers and jail personnel frequently ask questions about personal history data, e.g., address, health, family history, distinguishing marks. As a general rule, no warning of rights need be given in these interviews. The suspect is not being asked to incriminate himself.

(5) **PERSONS QUESTIONED AS WITNESSES ONLY**

Persons questioned as witnesses only need not be warned of the constitutional right against self-incrimination. They are not being asked to incriminate themselves and they usually are not in police custody when questioned. Should it happen, however, that questioning of this type of a person in a custodial setting takes such a turn that the person who was thought to be a witness only - not involved in the offense - begins to disclose evidence of his own guilt of a crime, the warnings required by **Miranda** should be given immediately and before any additional questions are asked, if it is intended to use this information against him in court.
privilege. It applies only to those communications meant to be confidential and made to the attorney in his capacity as an attorney, i.e., the attorney must have been consulted or employed to give legal advice, represent the client in litigation, or perform some other function as an attorney. The privilege, when it does apply, covers corporate as well as individual clients, but it does not normally include a right by the attorney to withhold the name of a client.

The privilege does not apply when the attorney serves merely as a conduit for funds. Attorneys act as representatives in real estate transactions, stock sales, and various other actions where their principal functions are to handle the transfer of funds from one party to another. These are not strictly attorneys' functions. When the advice an attorney gives is business advice rather than legal advice, the privilege again does not apply. This is especially important where the attorney acts as both attorney and accountant. When acting as accountant in this dual relationship, there is no attorney-client privilege, and the Federal Courts have never recognized an accountant-client privilege. The key, again, is whether or not the attorney is giving legal advice.

There is one situation in giving legal advice where the attorney-client privilege is not recognized: When the attorney gives advice or renders assistance in planning, perpetrating, or concealing a crime or a fraud. By taking part in a crime or a fraud, the attorney destroys any privilege that would otherwise have attached to confidential communications.

As with most privileges, the presence of a third party during the communication between an attorney and his client will usually destroy the privilege. The exception to the rule that a third party destroys the attorney-client privilege is when the third party is someone necessary for the attorney to accomplish his task as legal adviser and representative. These third parties fall under what is called the "umbrella of the privilege" of the attorney. Included are such persons as the legal secretary who takes notes at meetings between the attorney and client; the investigator hired by the attorney to help him obtain information and conduct interviews; or even an accountant hired by an attorney, or by the client at the attorney's request, to perform essential services in cases of explaining and interpreting financial matters that have become the subject of litigation. The rationale for this exception is that these people are assisting the attorney in performing his functions as an attorney.
5.4 GOVERNMENT - INFORMER

This privilege allows enforcement agencies to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with the enforcement of the law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Unlike other privileges, it is the identity of the informant which is privileged and not the communication. This privilege differs from all the others in that it is waivable only by the Government whereas the others are essentially for the benefit of the individual and waivable by him. Since the privilege exists in behalf of the Government it is deemed to be waived if the informant is put on the witness stand. To provide maximum security regarding their identity and existence, confidential informants should not be used unnecessarily as witnesses, placed in a position where they might become witnesses, or unnecessarily identified in court without their consent. Where disclosure of an informer's identity is essential to the defense of an accused, the trial court may order disclosure. If the Government then withholds the information, the court may dismiss the indictment.

Generally, if it is shown that the informant participated in the act which is the basis for a criminal prosecution, the court will require disclosure of his identity. For example, where the informant has been used to buy narcotics or counterfeit money from the defendant, the courts have held that nondisclosure was improper. On the other hand, where the informant's information is used only to establish probable cause for arrest or search the Government's claim of privilege has ordinarily been sustained.

The decision to reveal an informant's identity does not rest with the individual officer, but is one to be made by the government agency involved. (One way by which the government waives this privilege is by putting the informant on the stand to testify. When this is done, he must be identified as an informant in the case.) When an investigator is testifying as a witness at trial and is asked to identify the informant in the case, he does not have the right to do so without the permission of his agency. If the agency refuses to divulge the identity of the informant, the investigator can be found in contempt of court. The U.S. Attorney's Office has the option of moving to dismiss the case if revelation of the informant's identity is ordered by the court and the agency refuses to give permission.
for divulgence. The greater the role played by the informant in the crime charged, the more likely it is that the disclosure of his identity will be compelled.

5.5 HUSBAND - WIFE PRIVILEGE

(a) Testimonial Privilege (also known as Spousal Incapacity, Spousal Immunity, and Anti-Marital Facts)

In a criminal case, the defendant spouse has the privilege of preventing the other (witness) spouse from testifying. Conversely, the witness spouse can exercise the privilege and refuse to take the stand. Thus, a spouse is competent to testify against the other spouse but cannot be compelled to do so. Stated in another way, one spouse can testify against the other if both are willing for the testimony to occur. The rationale for the privilege is that marital harmony would be impaired if the spouses were forced to be adversaries in a criminal case. Subject to the exceptions noted below in this paragraph and in subsection (b), the privilege applies to relevant acts and to communications occurring at any time. The privilege is terminated by divorce. Thus a (witness) ex-spouse can testify against the other (defendant) party even if one or both of them objects to the testimony. The privilege likewise does not apply if (1) the marriage was a sham, (2) the victim of the crime was one of the spouses or the child of either, or (3), according to some courts, both spouses participated in the crime.

(b) Confidential Communications Privilege

A second privilege with respect to husband and wife is grounded upon the desire of society to encourage spouses to be frank and open with each other. Thus, confidential communications between spouses during the marriage are privileged from disclosure even after the marriage has been terminated by divorce or death. It is essential, however, that the communications must have been intended to be confidential. If it is obvious from the circumstances or nature of a communication that no confidence was intended, there is no privilege. For example, communications between husband and wife voluntarily made in the presence of their children old enough to understand them or of other members of the family within the intimacy of the family circle are not privileged. Likewise, communications made in the presence of other third parties are usually regarded as not privileged. The privilege does not extend to communications made before the marriage or after divorce. Furthermore, the privilege applies only
to communications and not to acts unless the court finds the act to have been intended as a confidential communication. Although, as stated above, this privilege survives the dissolution of the marriage (unlike the testimonial privilege), it does not apply where (1) the marriage was a sham, (2) the victim of the crime was one of the spouses or the child of either, or (3), according to some courts, both spouses participated in the crime.

5.6 OTHER PRIVILEGES

Other claims of privileges, such as state secrets, clergyman-parishoner, and psychotherapist-patient, may occasionally be encountered. These (and other) privileges have been the subject of confusing and often contradictory court decisions, and a federal criminal investigator would be well-advised to consult the U.S. Attorney's office before proceeding when the possibility of a claim of one of these privileges arises.
CHAPTER 6 - WITNESSES (ARTICLE VI)

6.1 DEFINITIONS

A witness is a person who gives testimony at a trial. Rule 602 states the general requirement that the witness must testify from personal knowledge, and Rule 603 requires that such testimony be given under oath or affirmation. (Testimony is evidence which comes to court through a living witness.)

6.2 COMPETENCY

Every category of person is competent to be a witness unless specifically excluded by the Federal Rules (Rule 601). The determination of the competency of a witness is made by the judge and not by the jury (Rule 104(a)). A presiding trial judge is never a competent witness (Rule 605) and a juror may not testify as a witness except after verdict, "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." (Rule 606). No one else is automatically excluded by the Federal Rules. Such states as infancy, intoxication, or lunacy do not automatically make a witness incompetent. Rather, the trial judge makes the determination as to witness competency on a case by case basis. (Rule 104(a)).

6.3 CREDIBILITY

Credibility means worthiness of belief and is determined by the trier of fact and not by the judge. Credibility should not be confused with a witness' competency to testify. It must be remembered that competency is determined by the judge, and credibility only becomes a factor if the person is allowed to take the stand. After a witness takes the stand and testifies, it is the jury who determine how much weight to give to the testimony. Where an interpreter is required to obtain the witness' testimony, the interpreter must swear or affirm that a true translation will be made. (Rule 604).

6.4 IMPEACHMENT

The principal purpose of impeachment is to reduce or lessen the likelihood that the jury will believe the witness' testimony. A witness may be
impeached by bringing out other facts on cross-examination or through other witnesses. Impeachment is not a formal motion or something which can be seen. It is found only in the minds of the jury and relates to how much weight is given to the testimony. Traditionally, the person who called the witness was considered to have vouched for him and thus was not permitted to impeach him. The Federal Rules, however, permit any party to impeach a witness, even the party calling the witness. (Rule 607). There are various methods of impeaching a witness. The Federal Rules of Evidence cover only a few of the numerous bases for impeachment. Methods not covered by the Rules have developed from common law as interpreted by the Federal Courts. The principal bases of impeachment are:

(1) Showing bias or interest.

Examples: Family relationship, friendship, obligations, employment, debtor-creditor relationship, etc.

(2) Showing a lack of opportunity to perceive or recollect.

Examples: Distance too great to observe event, poor memory, etc.

(3) Showing false testimony.

Examples: The defendant testifies that he has never possessed heroin. An agent is then called to testify that he had once seized heroin from the defendant.

(4) Showing corruption or likelihood of false testimony.

Examples: Acceptance of bribe, expression of willingness to give false testimony, subornation of perjury, promise of nolle prosequi to testify, etc.

(5) Showing mental or physical incapacity (but not, of course, amounting to incompetency).

Examples: Drunkeness, narcotics addiction, insanity, infancy, poor vision, poor hearing, etc.
(6) Showing **contradiction with other witnesses**.

Examples: One witness said the light was red and the second said the light was green.

(7) Showing **prior inconsistent conduct**.

Example: In a prosecution for theft, it can be shown that the victim did not promptly report the alleged crime.

(8) Showing **prior inconsistent statements**.

Example: The witness testifies that the man wearing the red hat did the shooting, but three months ago, he told others that the man wearing the green hat was the one.

Before the witness' prior inconsistent statement can be introduced through the document, if written, or through other witnesses, if oral, the proponent must first lay a foundation pursuant to Rule 613.

(9) Showing **bad character** (Rule 608(a) (reputation) for truthfulness).

Impeachment through character evidence is limited to the showing of a character (reputation) for truthfulness or untruthfulness. Evidence of any witness' poor reputation for truthfulness may be introduced against him for the purpose of impeachment as in the other categories above. (Witnesses may also testify in the form of an opinion.)

Example: Q: "How long have you known Mr. Brown?"

A: "25 years"

Q: "What is his reputation for truthfulness in the community?"

A: "It is bad."

If a witness' reputation has been attacked, his attorney may call other witnesses on rebuttal to testify that his reputation for truthfulness is good.
(10) Showing specific instances of conduct which reflects on a witness' truthfulness (Rule 608(b)).

Any witness who testifies at a trial may be impeached on cross-examination by being asked about prior specific instances of his conduct if such acts are probative of his truthfulness. For example, a witness may be asked on cross-examination if he embezzled an old lady's life savings but made restitution to avoid prosecution. This act clearly bears on the witness' truthfulness and is thus admissible for the limited purpose of impeaching his credibility.

Similarly, a character witness may be asked on cross-examination about his knowledge of the prior specific bad acts of the witness (usually the defendant) for whom he is vouching. For example, a defendant's character witness may be asked if he had heard that the defendant had embezzled that old lady's life savings for the same purpose and with the same limitations as in the above example.

Evidence of a witness' prior misconduct is limited to cross-examination and extrinsic (outside) evidence is not allowed. For instance, if, in the above example, the witness denied the embezzlement or denied having heard of the embezzlement, the old lady could not be brought in as a rebuttal witness, i.e., the cross-examining attorney is "stuck" with the witness' answer. This is, of course, arbitrary, but is necessary to keep the trial from straying too far from the central issue(s). There are no time limitations in regard to the use of these acts, unlike the use of convictions (discussed below).

(11) Showing conviction of a crime (Rule 609).

Completely independent of sections (9) and (10) above, a witness may be impeached by showing his prior convictions. Convictions may be shown by asking the witness about them on cross-examination or by introduction of the public record. Convictions may be used only if (1) the punishment which could have been received (not what was received) was death or imprisonment for over one year and the judge determines the probative value outweighs the prejudicial effects to the defendant, or (2) the conviction involves dishonesty or false statement regardless of the punishment. The time limit prescribed by the rule is that the conviction is admissible if no more than ten years has elapsed since the conviction or release from prison, whichever occurs later. Arrests may not be used under Rule 609.
(12) Showing religious beliefs or opinions (Rule 610).

Religious belief or the lack thereof may not be used to impeach a witness.

6.5 WITNESS EXAMINATION AND COURT CONTROL.

The judge "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence" so as to ensure efficiency, speed, and protection of witnesses from undue harassment or embarrassment. (Rule 611(a)).

Cross-examination of witness shall be limited to the scope of direct examination and to matters affecting the credibility of the witness. However the judge has discretionary power to allow broader cross-examination. (Rule 611(b)). The use of leading questions is not allowed on direct examination except as may be necessary to develop the witness' testimony. Leading questions are ordinarily permitted on cross-examination (Rule 611(c)).

A witness may be called by either party or by the court itself. Regardless of who called him, the witness may be interrogated by the court. (Rule 614).

Upon request of a party or on the court's own motion, witnesses may be excluded from the courtroom so that they cannot hear the testimony of the other witnesses. However, the court may not exclude a party to the action, a person who is representing a non-natural party, i.e., a corporation, or a person whose presence can be shown as essential to the presentation of the case. (Rule 615).

The procedure for exclusion is often referred to as "invoking the rule." A case agent cannot be excluded inasmuch as his presence in the courtroom is authorized under sections (2) and/or (3) of Rule 615.
7.1 OPINION TESTIMONY BY A LAYMAN OR NON-EXPERT (RULE 701)

(I) Rule 701 concerns opinion testimony by lay witnesses, i.e., witnesses who are not experts. Generally speaking, a layman who is called to the stand to give testimony must restrict himself to describing material facts about which he has firsthand knowledge. The lay witness may not be allowed to give his opinion or conclusion because the court feels he is technically unqualified to express such an opinion or draw such a conclusion due to a lack of some essential skill, training, or experience; or the jurors themselves are fully capable of drawing the right conclusion from the recited facts.

If the opinion is "helpful to a clear understanding of his testimony or the determination of a fact in issue" Rule 701(b) it will probably be allowed. Rule 701 modifies common law restrictions on opinions and inferences by lay witnesses and imposes simple standards of personal knowledge and of helpfulness to the trier of fact (jury).

Some examples of lay opinions that may be given are:

(a) Matters of taste and smell - "It smelled like gunpowder."
(b) Another's emotions - "He seemed nervous."
(c) "He was going very, very fast."
(d) "I've known Clyde Bushmat for fifteen years and I'd recognize his voice anywhere. It was Bushmat's voice on the telephone."
(e) "That's my husband's signature."
(f) "The man was drunk."
7.2 EXPERT TESTIMONY (RULE 702)

Black's Law Dictionary defines experts as "men of science educated in the art, or persons possessing special or peculiar knowledge acquired from practical experience."

One court has said, in relation to Rule 702, that, "Expertise for legal purposes means that a witness has sufficient specialized knowledge, skill, experience, training or education to testify in the form of an opinion."

It is a common misconception that only scientists of one sort or another and perhaps a few engineers can rightly be called experts. The term "expert," within the meaning of Article VII, is far broader. The proficient garage mechanic is an expert in his field even though a Ph.D. may be the last thing he ever hoped to acquire; the trained and experienced television repairman is just as surely an expert as is the most renowned neurosurgeon.

A criminal investigator may thus be called upon to testify as an expert in his particular field, e.g., a customs agent may give an opinion on the black market value of parrots or a Secret Service agent may give an opinion on the genuineness of U.S. currency.

The expert testimony must assist the trier of fact to understand the evidence. In cases where the subject matter is too difficult or too technical for jurors to understand without assistance, expert testimony will be permitted.

7.3 BASES OF OPINION TESTIMONY BY EXPERTS (RULE 703)

(I) An expert may base his opinion on matters:

(a) Personally observed by witness, e.g., testimony of examining physician.

(b) Presented to witness at trial, e.g., hypothetical questions and comparisons such as handwriting and fingerprint cards.

(c) Presented to witness outside of court, e.g., hospital records, lab reports, statements of other doctors.

7.4 COURT APPOINTED EXPERTS (RULE 706)

The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.
CHAPTER 8 - HEARSAY (ARTICLE VIII)

8.1 DEFINITION

Hearsay has been defined as evidence which does not come from the personal knowledge of the witness but from repetition of what he has heard others say had happened at a still earlier time. Under Rule 801 of the Federal Rules of Evidence, "Hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. (A statement is defined as an oral or written assertion or nonverbal conduct of a person, if it is intended by him as an assertion.)

Hearsay evidence is disfavored because of (1) the inability to observe the demeanor of the person (out-of-court declarant) with personal knowledge, (2) the fact that the one with personal knowledge has not been examined under oath, and, (3), most important, the opposing counsel cannot effectively cross-examine the witness on the stand. The witness offering hearsay testimony can always retreat behind the verbal barrier of: "All I know is what he told me." A classic example of inadmissible hearsay would be an agent attempting to testify that another person saw the defendant with an illegal weapon. The defendant could properly demand that the alleged eyewitness with personal knowledge take the stand.

8.2 VERBAL ACTS

Certain utterances are variously referred to as verbal acts, original or operative facts, or utterances circumstantially relevant and are not hearsay. The statements are appropriately described as verbal acts because of their identity with a relevant transaction. Examples are the words of bribery or of illegal sale. In the verbal act situation, the witness on the stand is testifying about words which explain an ongoing and independently admissible act. He is not testifying as to what someone else told him had happened at an earlier time.
Example: An agent, an informant, and a suspect meet, and the following conversation takes place:

Informant: "Well, here's the guy who wants to buy the stuff."

Suspect: "You got the money?"

Informant: "He's got it. Let's see the stuff."

Agent: "How do I know it's good quality?"

Informant: "Don't worry, I'll vouch for it."

Agent: "O.K. Here's the money."

Suspect: "Here's the stuff. So long."

The agent is the witness on the stand. The agent can, of course, testify as to his own statements which are relevant (as these are). The agent can also testify as to what the informant and the suspect said. All the above statements are words uttered contemporaneously with the occurrence of a nonverbal and independently admissible act, the physical passage of the contraband and money; and the words serve to explain or give meaning to the act. Thus the entire conversation is admissible as a series of "verbal acts." The agent is not testifying as to what someone else told him had happened. He perceived a crime being committed and is testifying to facts (verbal and nonverbal) within his personal knowledge. He is, in effect, both an "eye" and "ear" witness.

8.3 ADMISSIONS

Under Rule 801(d)(2) of the Federal Rules of Evidence, an admission is not hearsay. An admission is any statement or act of a party which is offered in evidence against him. It may also be defined as a prior oral or written statement or act of a party which is inconsistent with his position at the trial. In a criminal trial, the government's opposing party is the defendant and his position is "not guilty." Thus the statements of the defendant in the example in (8.2) above are not only admissible as verbal acts but are also admissible as admissions. Admissions may be oral, in writing, or inferred by conduct. They are classified as judicial or extrajudicial.

(1) Judicial Admission - A judicial admission is one made in the course of any judicial proceeding, by pleadings, stipulations (an agreement between the prosecuting attorney and defense counsel respecting
certain facts in the case), affidavits, depositions, or statements made in open court. Such admissions may generally be used against a party even in subsequent actions where there is a different adversary. A plea of guilty can be used as an admission in a civil action arising out of the same subject matter. Thus, a taxpayer's plea of guilty to tax fraud can be used as an admission concerning fraud in a civil suit involving the same acts. A plea of nolo contendere, however, is not an admission.

(2) Extrajudicial Admission - An extrajudicial admission is anything said outside of court by a party to litigation which is inconsistent with facts asserted in the pleadings or testimony in court. It is not limited to facts which are against his interest when made, although the weight of an admission is increased if it is against his interest at the time.

8.4 ADOPTIVE ADMISSIONS

A narrow class of cases permits someone else's statements to be admitted into evidence against a defendant. Where a third party says something in the defendant's presence and "probable human behavior would have been for the defendant promptly to deny the third party's statement if it were not true," such a third party's statement is admissible against the defendant except in a custodial situation. (Rule 801(d)(2)(B))

Similarly admissible are statements by persons authorized by the defendant to speak for him and statements by a defendant's agents and servants made within the scope of and during the course of their employment. (Rule 801(d)(2)(C) and (D)) (Statements of co-conspirators are discussed in the Conspiracy Text.)

8.5 CONFESSIONS

A confession is a comprehensive statement of a person that he is guilty of a crime and embraces all the necessary elements of the offense. This statement is communicated to another person, wherein he acknowledges himself to be guilty of the offense charged, and discloses the circumstances of the act or the share and participation which he had in it. It may be made verbally or in writing, to a court, law enforcement officer, or to any other person.
A confession may be judicial or extrajudicial. A judicial confession is one made before a court in the due course of legal proceedings, including preliminary examinations. An extrajudicial confession is one made elsewhere than in court and may be made to any person, official, or otherwise. All confessions must be corroborated.

8.6 EXCEPTIONS TO THE HEARSAY RULE

Verbal acts, admissions, and confessions are not hearsay. Certain other types of statements, however, are considered to be hearsay, but are admissible anyway because they fall into one of the recognized exceptions to the hearsay rule. Following are those exceptions of the most importance to the investigator.

(1) Excited Utterances: Rule 803(2)

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is admissible. This is also known as "res gestae," which means "things done." The trustworthiness of such statements lies in their spontaneity, for the occurrence must be startling enough to produce a spontaneous and unreflected utterance without time to contrive or misrepresent. For example, when making entry into an apartment on a narcotics violation, one of the occupants says, "I knew Joe (the defendant) would get caught if he kept the 'stuff' here." This would be considered a spontaneous declaration caused by the happening of the entry of the raiding party. Such statements may be made by participants or bystanders, and a person who made or heard such statements may testify about them in court even if the declarant is unidentified.

(2) Recollections

On many occasions, a witness will not remember all the details of the relevant events and will require the use of some type of written materials.
(a) Present Recollection Revived

A witness often must consult his (or another's) written record of the relevant event(s) to revive his recollection. If, after looking at the notes, the witness remembers what happened, he may then proceed to testify. Such testimony is not hearsay. When a witness uses a writing for the purpose of refreshing his recollection, either before or during his testimony, opposing counsel is entitled to see the writing and use it to try to impeach the witness' credibility as per Rule 612.

(b) Past Recollection Recorded

Occasionally, a witness, even after consulting writings, is still unable to remember the relevant matter, e.g., an insurance adjustor who once made a list of items allegedly stolen (during his interview with the insured). If such a witness can, however, state positively that he does presently remember making (or causing to be made) a memorandum about the matter at or shortly after the occurrence and does presently remember that the memorandum was a correct reflection of what occurred, the record itself becomes admissible as an exception to the hearsay rule, not because it is a record of an occurrence, but rather because it reflects the past knowledge of a witness on the stand, who truthfully and accurately recorded it when the matter was fresh in his mind. (Rule 803(5)).
(3) Business Records: Rule 803(6)

Records made in the ordinary course of business by, or transmitted to the maker by, someone with personal knowledge and the duty to make an accurate record are admissible even though the maker or his source does not testify. The witness may be anyone in the business who is familiar with the record system, preferably the custodian. Business and public records are considered to be trustworthy principally because those with personal knowledge are under strict and continuing duty to make accurate records.

(4) Public Records: Rule 803(8)

Records of public agencies which set forth the activities of the agency or matters observed pursuant to duty imposed by law as to which matters there was a duty to report are admissible. Matters observed by law enforcement officers in criminal cases are not, however, within this exception to the hearsay rule.

(5) Former Testimony of an Unavailable Witness: Rule 804(b) (1)

If a witness testified under oath and was subject to cross-examination at a previous proceeding involving substantially the same parties and issues and is now unavailable within the meaning of Rule 804(a), his testimony at the earlier proceeding may be entered into evidence.

NOTE: If a witness is on the stand and offers testimony that is inconsistent with a prior statement and such prior statement was made under oath, e.g., to a grand jury, the prior statement is admissible and not considered to be hearsay. Rule 801(d)(1).

(6) Dying Declarations: Rule 804(b)(2)

Dying declarations are statements made by the victim of a homicide who believed that death was imminent when he made the statement. To be admissible, such statements must relate only to facts concerning the cause of and circumstances surrounding the homicide charged. They are admitted from the necessities of the case to prevent a failure of justice. Furthermore, the sense of impending death is presumed to remove all temptation of falsehood.
(7) Statements Against Interest: Rule 804(b) (3)

"A statement which was, at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability...that a reasonable man in his position would not have made the statement unless he believed it to be true" is admissible. A statement against interest should never be confused with an admission inasmuch as an admission is a statement made by a party (as defined in Rule 801(d)(2)) and a statement against interest is one made by a nonparty.

To prevent a criminal from easily procuring another to "take the rap" for him "a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

As with the other exceptions enumerated in Rule 804(b) (but not those in Rule 803), unavailability of the declarant within the meaning of Rule 804(a) is a condition precedent to the testimony of the witness.
CHAPTER 9 - AUTHENTICATION AND IDENTIFICATION

9.1 AUTHENTICATION IN GENERAL

Before evidence can be admitted at trial, there must be a showing that the evidence is in fact what it is claimed to be, in accordance with Rule 901(a). Such process is called identification or authentication.

For example, the significance of a writing as evidence frequently depends on its authorship. In a fraud case involving a corporation, a document prepared and signed by the defendant corporation's president or treasurer would be a crucial item of evidence. If, however, it was prepared and signed by someone lacking any authority to speak on behalf of the corporation, it would be of no legal consequence whatsoever. Is the writing truly what it purports to be? Such writing will not be receivable in evidence until it has been authenticated. Its genuineness must be demonstrated to the trial judge as a preliminary matter before the jury can consider it. As a further illustration, a telephone conversation may be irrelevant, not because the topic is immaterial, but because the speaker has not been identified, i.e., the conversation has not been authenticated. The condition of fact (that it was Richard Roe, the arms dealer, on the phone) upon which the relevance is based has not been fulfilled. (Rule 104(b)).

Rule 901(b) gives some illustrations of examples of authentication or identification that conform with the rule. There are ten illustrations given, but they are meant to show only how the rule may be applied and are not all-inclusive. For instance, subdivision (b) (1) describes the most obvious method of authentication or identification: Testimony by a witness who has direct knowledge of the event. This witness may be the author of the writing in question or someone who observed the signing of a document. In another case, the witness may be an investigator who can identify contraband that he personally seized and marked during the execution of a search warrant.

9.2 SELF-AUTHENTICATION

Rule 902 deals with evidence that is described as "self-authenticating." In other words, the authenticity of this type evidence is sufficiently apparent or so inherently trustworthy that there is no need to present outside (extrinsic) evidence to prove its authenticity. There are ten categories set forth in the rule pertaining to this type of evidence. Subdivisions (1), (2), and (4) are the ones most likely to be encountered by federal criminal investigators. An example of self-authentication is a copy of a prior conviction. The investigator obtains a copy of such conviction from the clerk of the court,
who attaches a certification that the document is what it purports to be, i.e., a record of conviction. Having been certified as provided in Rule 902, the document may be introduced into evidence without the necessity of a witness on the stand vouching for its authenticity.

If a document or writing does not fit within the ten situations listed in Rule 902, it is not self-authenticating and must be authenticated in accordance with Rule 901.
CHAPTER 10 - REAL AND DOCUMENTARY EVIDENCE
(ARTICLE X)

10.1 REAL EVIDENCE

Real evidence as defined in Black's Law Dictionary is: "Evidence furnished by things themselves...as distinguished from a description of them by the mouth of a witness, e.g., the physical appearance of a person when exhibited to the jury, marks, scars, wounds, fingerprints, etc.; also the weapons or implements used in the commission of a crime, and other inanimate objects..."

When one speaks of real evidence, it is normal to think of tangible items such as bullets, knives, jewels or guns. This type of evidence is said to "speak for itself" since the items can be presented to the jury (trier of fact) for inspection. Because real evidence is thought to be the most trustworthy type of evidence, admissibility is favored.

Real evidence can be either direct or circumstantial evidence depending on the reason it is offered. Direct evidence might be offered to establish the ultimate fact itself, such as the victim's disfigurement as evidenced by a visible facial scar. The evidence is circumstantial where the item is offered as the basis from which to draw an inference, such as rust found inside a metal container implying that moisture was in the metal container at a prior time.

Even though the evidence is thought to "speak for itself," it will probably be of no value to the jury unless the item is identified. This identification will be made by testimonial evidence. For example, a gun introduced into evidence in a murder trial will have relatively little value unless testimony is given to the fact that the gun belonged to the defendant or was taken from the defendant's hand at the time of the shooting. (See Chapter 9, supra.)

10.2 DOCUMENTARY EVIDENCE

Documentary evidence, although generally referred to as a separate type of evidence, is actually a form of real evidence. As with real evidence, the writing or recording is said to "speak for itself," especially as to the contents.
Documentary evidence is defined in *Black's Law Dictionary* as: "Evidence supplied by writings and documents of every kind in the widest sense of the term; evidence derived from conventional symbols (such as letters) by which ideas are represented on material substances. Such evidence as is furnished by written instruments, inscriptions, documents of all kinds, and also any inanimate objects admissible for the purpose, as distinguished from 'oral' evidence, or that delivered by human beings viva voce."

Article X of the Federal Rules of Evidence covers the subject matter of contents of writings, recordings, photographs, printouts of computers, video tapes and similar modern technological processes.

General definitions are set out in Rule 1001. Writings and recordings are discussed in 1001(1) and include modern technological advances in recording and copying. 1001(2) defines photographs and includes X-ray film, video tapes and motion pictures in addition to still photographs. Originals are discussed in 1001(3) and include writings or recordings or any counterpart intended to have the same effect by the person executing or issuing it, e.g., a customer's carbon copy of sales ticket, a computer printout, a negative of a photograph, etc. Duplicates are discussed in 1001(4) and include counterparts produced by the same impression as the original, or from the same matrix; or by means of photography or equivalent reproduction technique, e.g., photostatic copies.

10.3 BEST EVIDENCE RULE

The best evidence rule applies only to documentary evidence. This rule states that the best proof of the contents of a document is the original document itself, and secondary evidence is inadmissible unless failure to offer the original is satisfactorily explained. (Rule 1002.)

The best evidence rule, requiring production of the original document, is confined to cases where it is sought to prove the contents of that document. An "original" of a writing or recording is the writing or recording itself, or any counterpart intended to have the same effect by a person executing or issuing it. Certain documents, such as leases, contracts, or even letters, which are executed (signed) in more than one copy are all considered originals and any one of the copies may be produced as original. An "original" of a photograph includes the negative or any print therefrom. If data is stored
in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original." Production consists either of making the writing available to the judge and counsel for the adversary or reading it aloud in open court. Facts about a document other than its contents are admissible without its production.

For example, the fact that a sales contract was made is a fact separate from the actual terms of the contract and may be proved by testimony alone.

When an original document is not produced, secondary evidence, which might consist of testimony of witnesses or a copy of the writing, will be received to prove its contents if its absence is satisfactorily explained. However, a duplicate (under Rule 1001(4)) is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) under the circumstances it would be unfair to admit the duplicate in lieu of the original. (Rule 1003). Unavailability of the original document is a preliminary question to be decided by the trial judge. (Rules 104(a) and 1008).

The reason for the best evidence rule is to prevent fraud, mistake or error. The best evidence rule will not be invoked to exclude oral testimony of one witness merely because another witness could give more conclusive testimony.

10.4 SECONDARY EVIDENCE

Evidence other than original evidence is classified as secondary evidence. There is no distinction in the Federal Rules delineating a preference for one kind of secondary evidence over another. Rule 1004 simply states that evidence other than the original will be admitted if certain conditions are met. This evidence, i.e., other than the original, all falls under general heading of secondary evidence. It may be either the testimony of a witness or a copy of a document. Before secondary evidence can be admitted, there must be a satisfactory showing of the present or former existence of an original document, properly executed and genuine. In addition, there must be a showing of one of the prerequisite conditions of Rule 1004 allowing admittance of secondary evidence. These conditions are met in one of the following ways:

(I) All originals have been lost or destroyed (unless the loss or destruction was deliberately caused by the party offering the
In the case of a loss, there must be testimony that a diligent search for the original was made, and it could not be found. Some cases have specifically laid down a rule that the search must be made in the place where the document was last known to be located, or that inquiry must be made of the person who last had custody of it. Thus, when the party attempting to prove the contents of a document has destroyed the original in the ordinary course of business, or by mistake, or even intentionally (provided it was not done for any fraudulent purpose), secondary evidence of the contents may be admitted.

(2) The original is not obtainable by judicial process. This would require a showing that the original has not been produced in answer to subpoena, or that it is beyond the jurisdiction of the court, e.g., outside the territorial limits of the United States.

(3) The original is in the possession of the party opponent. In a criminal case not involving corporate records, it is sufficient for the government to introduce secondary evidence of the defendant's records simply by showing that the originals are in the possession of the defendant. He cannot be compelled to incriminate himself by their production. In a civil case, there must be a showing that the party attempting to introduce the secondary evidence first served notice upon his opponent for production of the records and the opponent has failed to produce them.

(4) Finally, if the writing, recording, or photograph is not closely related to a controlling issue of the matter before the court, the judge, in his discretion, may allow secondary evidence to be presented.

In all cases where a document is offered as secondary evidence, it must be shown to be a correct copy of the original, and the admissibility of the secondary evidence is a preliminary matter to be determined by the court. (Rule 1008).

10.5 CHAIN OF CUSTODY

The chain of custody concept applies both to real and documentary evidence. Chain of custody refers to the possession of evidence by the
successive custodians of the evidence tending to prove that the item is the one that it purports to be and is in substantially the same condition as it was at the relevant time, e.g., time of the execution of the search warrant.
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1. INTRODUCTION

In the enforcement of Federal law, one of the more useful tools is the general conspiracy statute, 18 U.S.C. 371. To understand its usefulness, the Federal law enforcement officer must be able to define and understand what is meant by conspiracy.

The great Supreme Court Justice Oliver Wendell Holmes called the crime of conspiracy "a partnership for criminal purposes." Each conspirator, like a business partner, is liable for the acts and statements of his co-conspirators.

The word "conspiracy" is derived from the Latin words "con" and "spirare" which mean to breathe together. In a conspiracy, two or more persons are, in effect, "breathing together." There must be a confederation, a working together to achieve a common goal by concerted action.

The essence of conspiracy is an agreement, together with an overt act, to do an unlawful act or a lawful act in an unlawful manner. It involves deliberate plotting to subvert the law. It is characterized by secrecy, rendering it difficult of detection and requiring more time for its discovery, which adds to the importance of punishing it when discovered. Conspiracy is said to be easier to perpetrate and harder to detect than most other crimes.

The crime of conspiracy is easily defined, but construing its meaning has been the subject of many court decisions which must be kept in mind in investigating conspiracy cases. Conspiracy is further complicated because of the multiplicity of defendants, trials, attorneys, witnesses, and courts, resulting in mass confusion as to who is charged with what and what evidence is admissible against whom. It is for this precise reason that in this text we will discuss the crime of conspiracy element by element, i.e., the agreement (plan or scheme), the unlawful object(s) or means, overt acts, intent, and the number of participants required.

Like a dragnet, conspiracy encompasses all persons connected with the criminal enterprise, not just the man on the street who is caught in the act of selling, smuggling, or possessing contraband. It ensnares the backer, the "big" man behind the scenes, who may commit no overt criminal acts himself. Persons who cannot be convicted of aiding and abetting or of being an accessory because a crime was never consummated may still be caught up in the web of conspiracy. Criminals may be apprehended before the substantive crime is accomplished, i.e., assassination plots, bombings. In
addition, a special rule of evidence greatly expands the use of what would otherwise be hearsay by permitting evidence of the acts and statements of one conspirator to be used against all co-conspirators.

In many criminal investigations, the elements of conspiracy exist, but the investigator either fails to seek out those facts that would prove the conspiracy, or neglects to include a recommendation to charge conspiracy in his report. If the existence of a conspiracy is shown, however, the U. S. Attorney has been provided one more weapon in his arsenal, and a very important one, with which to pursue the successful prosecution of the case.

2. HISTORY AND RATIONALE OF CONSPIRACY

Conspiracy originated in the "Ordinance of Conspirators" in the year 1305, in the reign of Edward I of England. However, conspiracy did not become a common-law crime until the beginning of the Seventeenth Century in England. The United States Supreme Court has stated that the consistent rationale of a long line of conspiracy decisions rests on the very nature of the crime of conspiracy. The Court "repeatedly has recognized that a conspiracy poses distinct dangers quite apart from those of the substantive offense.

'This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement--partnership in crime--presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which is has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.'"
3. **CRIMINAL ACT**

Various Federal statutes make conspiracy a crime. The general conspiracy statute, Title 18, U.S. Code, Section 371, is as follows:

"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 "or any agency thereof" words have been construed by the Court, in which it said: "The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful functions of any department of government." To "defraud the United States" has been broadly interpreted to mean to "cheat the government out of property or money, (or)--to interfere with or obstruct one of its lawful governmental functions by deceit, craft, or trickery, or at least by means that are dishonest." Thus, this section prohibits both a conspiracy to commit an offense specified under other Federal statutes and a conspiracy to defraud the United States under which a violation of a specific substantive offense section need not be involved.

Conspiracy, under the general conspiracy statute, is punishable if its object is an offense prohibited by an act of Congress in the interest of public policy, regardless of whether it entails criminal sanctions or merely a civil suit for a penalty. Conspiracy is a felony if the substantive crime which is its object is a felony or is a violation of a non-criminal statute, calling for, e.g., a civil penalty. If the substantive crime which is the object is a misdemeanor, the conspiracy is also a misdemeanor.

4. **BASIC POINTS OF CONSPIRACY**

1. Agreement of the conspirators (plan or scheme).
2. Unlawful object or means.
3. Overt act.
CONSPIRACY

4. Intent.
5. Two or more persons

5. AGREEMENT

The essence of conspiracy is the act of agreement itself, that is, the conscious union of wills upon a common undertaking. Seldom, if ever, is there proof of a formal agreement, but proof of a formal agreement is not necessary. The agreement does not have to be put into words, either oral or written. It is judicially sufficient that there was a meeting of the minds of the parties and that a common understanding was reached to accomplish jointly their illegal (or as the case may be, legal) object. In view of the fact that the agreement is rarely susceptible to direct proof, circumstantial evidence such as statements, acts and conduct of the parties may be used to prove the agreement, i.e., the agreement may be inferred.

Since the act of agreeing by its very nature is a group act, unless at least two persons commit it, no one does. When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone. Although he may possess the requisite criminal intent, there has been no criminal act.

There is no agreement when one of two parties, though sympathizing with the accomplishment of an objective, does not intend to make a contribution toward it. Thus, the mere expression of willingness to acquiesce in or refuse to obstruct another's unlawful enterprise does not make a person party to an agreement.

The crime of conspiracy is distinct from the substantive offense which the parties intend to accomplish; and it is complete upon the forming of the agreement (and the commission of an overt act in furtherance of the agreement).

The agreement may have any number of objects, most of which may be innocent, but if any one of the objects is to commit an offense against the United States, the agreement becomes an illegal conspiracy under 18 U.S.C. 371.
A person need not know the identity of any of his co-conspirators, but he must be aware of the existence of at least one other person or an "agreement" would not be possible.

A person is only liable to the extent of his understanding of the agreement and what is reasonably foreseeable therefrom. If A, B, and C agree to rob a bank and a guard is killed, the entire occurrence is embraced within the conspiracy. On the other hand, if A and B later, unbeknownst to C, decide to and do kill A's wife for the insurance proceeds, C is not responsible, as this latter homicide is not a reasonably foreseeable consequence of the original agreement to rob the bank. Likewise, if X and Y agree to embezzle from the bank, and X is discovered by his supervisor and kills him, Y is not liable for the murder because murder is not a reasonably foreseeable consequence of embezzlement, unlike the inherently dangerous crime of robbery in the earlier example.

6. UNLAWFUL OBJECT OR MEANS

The Supreme Court has held that "the conspiracy is the crime and that is one, however diverse its objectives." Whether several offenses are multiple objects of a single agreement or the separate objects of distinct agreements is of considerable importance for purposes of multiple punishment and double jeopardy, since generally there can be only one conspiracy conviction when there has been only one agreement.

The object of a conspiracy is to do an unlawful act or a lawful act by unlawful means. As noted above, the object need not be a crime. It will be enough to find a conspiracy if the object contemplated is corrupt, dishonest, or fraudulent.

The word "impossibility" has caused a great deal of confusion in reference to the object of a conspiracy. The object sought may be unattainable because of human error in the execution of the scheme or because one or more of the conspirators or even all the conspirators are legally incapable of committing the substantive crime which is the object of the conspiracy. Thus, one can be convicted for conspiracy to sell narcotics even though the "narcotics" turned out to be legal substances. Similarly, one can be convicted of conspiring to rape his own wife or even to kill a dead man.

7. OVERT ACT

At common law the crime of conspiracy was indictable upon the mere formation of the agreement. In enacting the general conspiracy statute, 18 U.S.C. 371, the Federal government required, in addition to the agreement, that an overt act in
furtherance of the conspiracy be proved. A non-criminal and relatively minor act is held to satisfy this requirement. An overt act may be any act that is preliminary or preparatory in nature; it may consist of opening a bank account, buying a car, placing a telephone call, or it may be the commission of the substantive crime itself.

The overt act is required for two reasons. First, it provides proof that the agreement is at work and not lying dormant or in a state of wishful thinking. In other words, the unlawful vehicle is in motion toward the agreed goal. Secondly, it constitutes the point in time where an individual can withdraw without incurring any criminal liability, since the crime of conspiracy is not complete until there has been an overt act. Likewise, a conspiracy is not terminated until the last overt act is performed that is necessary to accomplish the object of the conspiracy.

One overt act committed by any member of the conspiracy is all that has to be proved. This one act is sufficient as to all present members of the conspiracy as well as to all others who subsequently join.

8. INTENT

Intent is an integral part of conspiracy. There are two necessary requirements:

a. Intent to agree, and
b. Intent to achieve the object.

Under no circumstances will mere knowledge of the existence of the unlawful intent make the defendant guilty without some evidence of the intent to agree to achieve the object of the conspiracy. The participation by the defendant must be more than acquiescence, knowledge, or sympathy; it must be the intentional agreement with the object of effecting the purpose of the conspiracy or other proof that there was a meeting of the minds.

9. TWO OR MORE PERSONS

18 U.S.C. 371 requires the existence of two or more conspirators. Therefore, one person cannot be guilty of conspiracy, since obviously he cannot agree with himself.

Under common law a husband and wife were considered as one and could not conspire with each other. However, the Federal courts today consider them as individuals and hold that they can conspire with each other.
A corporation is a legal entity and may be indicted as a conspirator, the rationale being that the intent and acts of its agents are imputed to the corporation when the agents are acting on behalf of the corporation and within the scope of their duties. When two corporations and an officer of each are indicted, the necessary plurality is evident. It is also apparent that a corporation, one of its officers, and a third person may combine for unlawful means. Thus, it is generally agreed that a corporation can be counted as one of the necessary parties to make up a conspiracy, as long as there are two human minds to meet.

"Wharton's Rule" holds that when by definition the intended substantive offense requires a plurality of actors, a conspiracy prosecution cannot be maintained if only the minimum number of parties logically necessary for the commission of the substantive offense agree to commit it. Wharton's Rule applies to crimes which always require more than one participant, e.g., the giving and taking of bribes, buying and selling contraband goods, dueling, bigamy, incest, adultery. It is a general rule that conspiracy prosecutions are barred when the object is to commit a crime which requires the concerted action of all the participants. Lower courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons they may not be convicted of a conspiracy to commit it. Where concert of action is necessary to an offense, a conspiracy does not lie, but even in such cases, the implication of a third person will make it a conspiracy.

Inasmuch as a sale requires two persons, the buyer and the seller, Wharton's Rule normally prevents prosecution of the buyer and seller for conspiracy. This is not to imply that a buyer and seller cannot be convicted for conspiracy, because Wharton's Rule generally serves only to bar the conviction for conspiracy of the ultimate purchaser of the conspiracy's product and not of those who purchase on a regular basis for resale or who knowingly contribute to the success of the overall venture.

Another situation involving the buyer and seller that must be considered is where the seller vends an item to a member of a conspiracy with knowledge of his vendee's criminal activity. The Supreme Court has stated that "one does not become a party to a conspiracy...through sales of supplies or otherwise, unless he knows of the conspiracy," and the inference of such knowledge cannot be drawn merely from his knowledge that the buyer will use the goods illegally. The government must prove that the accused associated himself with the principals in the sense that he had a stake in the success of the venture, i.e., that he participated in the agreement.
10. CONSPIRACY EXCEPTION TO THE HEARSAY RULE

Rule 801 (d) (2) (E) of the Federal Rules of Evidence provides that:

A statement is not hearsay if...the statement is offered against a party and is...a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

A conspirator is criminally responsible for the acts and statements of his co-conspirators. Each conspirator is the partner and agent of every other member of the conspiracy, even if the actor cannot be identified or the accused was unaware of his identity.

The general rule is that everything said, done, or written by one of them during the existence of the conspiracy and in execution or furtherance of the common purpose is admissible in evidence against all of the other conspirators. The conspiracy is complete with the first overt act and is terminated by the last overt act. Anything said or done in furtherance of the conspiracy between the agreement and the last overt act is admissible against all. Thus, in a criminal prosecution for conspiracy, great latitude is allowed in the presentation and admission of evidence.

In order for a statement to be admissible, there must first be evidence (as a foundation) that the conspiracy existed. Such independent evidence must be strong but need not itself prove guilt beyond a reasonable doubt.

11. LIABILITY OF NEW CONSPIRATOR

Liability for acts and statements of co-conspirators before and during the period of a particular individual's participation in the conspiracy should not be confused with that individual's liability for the substantive crimes of the others.

Acts and statements made by members of the conspiracy before a particular individual joined are admissible to convict that individual of the crime of conspiracy, but the late joiner cannot be convicted of the substantive crimes committed by his co-conspirators before he joined the conspiracy.
CONSPIRACY

On the other hand, a particular conspirator is liable for conviction for substantive crimes committed by his co-conspirators during the period in which he was a conspirator (if such substantive crimes are in furtherance of the conspiracy).

12. WITHDRAWAL

Withdrawal from the agreement before the first overt act is committed will preclude prosecution. The Federal conspiracy statute requires an overt act to be committed before the crime is complete in order to provide a locus poenitentiae or point of repentance.

The most recent Supreme Court decision states that to withdraw from a conspiracy, a conspirator must perform some affirmative act inconsistent with the object(s) of the conspiracy and must communicate his withdrawal in a manner reasonably calculated to alert the other co-conspirators to his withdrawal.

The withdrawal of a single conspirator by arrest or by his own affirmative acts, does not terminate the conspiracy or change the status of the remaining members. But, the withdrawing member will escape liability for the subsequent acts of his former conspirators. However, once an overt act has occurred, no one can escape liability, as the crime of conspiracy is already complete. (Withdrawal after the first overt act, on the other hand, will cause the statute of limitations on the conspiracy to begin running as to the one withdrawing.)

13. MERGER

It has been repeatedly declared in decisions of the Supreme Court that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. The substantive offense is not merged in the charge of conspiracy, and the parties may be punished for their agreement to commit a crime as well as for the completed crime. The commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses. The fact that the punishment for conspiracy may be greater than the punishment for the substantive offense is immaterial.

14. EFFECT OF ACQUITTAL

An acquittal of conspiracy is not a bar to prosecution for the substantive crime, even when that crime was the single overt act laid in the conspiracy indictment. If there is an acquittal of all but one of the conspirators, then that
remaining conspirator cannot be convicted of conspiracy since the necessary plurality does not exist. This is based on the principle that one person cannot conspire with himself. However, a single individual may be convicted of conspiracy when those with whom he is alleged to have conspired are dead, unknown, beyond the jurisdiction of the court, or are not prosecuted. In these situations the burden of proof is on the government to show that there was at least one other person with whom the defendant could have conspired.
PARTIES TO CRIMINAL OFFENSES

Parties to federal criminal offenses consist of (1) the actual perpetrators, (2) those who aid and abet in the commission of the crime, (3) accessories after the fact, and (4) those who are guilty of misprision of a felony.

1. Aiding and Abetting 18 USC 2

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal." (18 USC 2(a))

"Aiding and Abetting" consists of three essential elements. The first is that there must be an affirmative act of association. Judge Learned Hand, in defining this element, stated:

"In order to aid and abet another to commit a crime, it is necessary that a defendant in some way associate himself with the venture; that he participate in it as in something that he wishes to bring about; that he seeks by his action to make it succeed."

Knowledge is the second required element. Criminal intent must exist in the mind of the aider and abettor (but no direct communication with the principal is required).

The third requirement is that a crime have been committed before one can be convicted of aiding and abetting, although it is not necessary that the actual perpetrator be first convicted, arrested, or even identified.

18 USC 2(b) provides an alternative basis for conviction of "Aiding and Abetting":

"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."
"Causing" is defined as procuring or bringing about the commission of a crime which would be an offense against the United States if it were committed by the defendant or by anyone else.

An indictment need not specifically charge "Aiding and Abetting". Inasmuch as aiders and abettors are principals, all indictments must be read as if the alternative provided by 18 USC 2 were embodied in each count. Thus one who aids and abets a bank robbery will be indicted for the substantive offense of "Bank Robbery" because he is a principal as defined in 18 USC 2.

2. Accessory After the Fact - 18 USC 3

"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."

In order for the offense of accessory after the fact to exist, there must have been a commission of an offense against the United States by a principal. That is to say, a violation of 18 USC 3 can be committed only after the commission of the substantive crime. The defendant must (1) have knowledge of the commission of the offense and (2) in some way willfully assist in preventing or hindering the apprehension, trial, or punishment of the offender. (As in 18 USC 2, conviction, apprehension, or even identification of the perpetrator is not a condition precedent to conviction under 18 USC 3).

"Except as otherwise expressly provided by an act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years." (18 USC 3)
3. **Misprision of a Felony - 18 USC 4**

"Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined not more than $500 or imprisoned not more than 3 years, or both."

The elements necessary to prove "Misprision of a Felony" are (1) the commission of the felony by the principal, (2) knowledge of the commission of the felony by the defendant, (3) concealment (by an affirmative act) and (4) failure to disclose on the part of the defendant.

An affirmative act toward concealment is necessary; mere silence after knowledge of the commission of a felony is insufficient. There must be more than a mere failure to disclose, such as suppression of evidence, harboring of criminals, or intimidation of witnesses.
I. INTRODUCTION

In the course of his career, a federal agent will run into many people who are unwilling to cooperate with him or his investigations. Unfortunately, the law offers little or no help in dealing with such people. However, in order to discourage people from resorting to force and violence against federal agents, Congress has passed Title 18, United States Code, Section 111.

18 U.S.C. 111

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

II. WHO IS COVERED

In order to determine which federal officers are covered by 18 U.S.C. 111, it is necessary to look at 18 U.S.C. 1114.

18 U.S.C. 1114 - PROTECTION OF OFFICERS

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States Marshal or Deputy Marshal or person employed to assist such Marshal or Deputy Marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee
of the Postal Service, any officer
or employee of the Secret Service
or of the Drug Enforcement Adminis-
tration, any officer or enlisted
man of the Coast Guard, any officer
or employee of any United States
penal or correctional institution,
any officer, employee or agent of
the Customs or the Internal Revenue,
or any person assisting him in the
execution of his duties, any Immi-
igration officer, any officer or
employee of the Department of
Agriculture or of the Department
of the Interior designated by the
Secretary of Agriculture or the
Secretary of the Interior to enforce
any Act of Congress for the protection,
preservation, or restoration of
game and other wild birds and
animals, any employee of the Depart-
ment of Agriculture designated by
the Secretary of Agriculture to
carry out any law or regulation, or
to perform any function in connection
with any Federal or State program
or any program of Puerto Rico, Guam,
the Virgin Islands of the United States,
or the District of Columbia, for the
control or eradication or prevention
of the introduction or dissemination
of animal diseases, any officer or
employee of the National Park Service,
any officer or employee of, or
assigned to duty in, the field ser-
vice of the Bureau of Land Management,
or any officer or employee of the
Indian Field Service of the United
States, or any officer or employee
of the National Aeronautics and Space
Administration directed to guard and
protect property of the United States
under the administration and control
of the National Aeronautics and Space
Administration, any security officer
of the Department of State or the
Foreign Service, or any officer or
employee of the Department of Health,
Education, and Welfare, or of the
Department of Labor or of the Department of the Interior, or of the Department of Agriculture assigned to perform investigative, inspection, or law enforcement functions, while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under Sections 1111 and 1112 of this title.

III. "FORCIBLY"

In order for there to be a violation of 18 U.S.C. 111, there must be, at the very least, a present apparent ability to inflict bodily harm upon the agent accompanied by a threat or attempt to inflict such harm. An implied threat of the use of force sometime in the indefinite future does not constitute a violation. The courts have said that a refusal to cooperate, or a deliberate attempt to mislead or deceive the agents also does not come within this statute. The word "forcibly" has been construed to modify each of the verbs following it.

IV. "ENGAGED IN OR ON ACCOUNT OF THE PERFORMANCE OF HIS OFFICIAL DUTIES"

Federal officers are covered by 18 U.S.C. 111 while they are engaged in the performance of their official duties. Therefore, a person who forcibly assaults an agent in the course of an interview or forcibly impedes an agent executing a search warrant has violated 18 U.S.C. 111. In addition, forcibly assaulting a person at a party because he is an agent would also be a violation of the statute since the agent was assaulted "on account of the performance of his official duties."

Until recently there was disagreement among the various federal judicial circuits as to whether the statute required the person committing the act to know that the person he assaults is a federal officer. The Supreme Court has recently ruled that knowledge of the federal officer's identity or purpose is not a necessary element of the offense.

V. DEADLY OR DANGEROUS WEAPON

Although the use of a knife or firearm would certainly qualify for the increased penalty provided for when a
deadly or dangerous weapon is used forcibly to assault, resist, oppose, impede, intimidate or interfere with a federal officer, the courts have ruled that a normally innocent object such as a telephone or a shoe would also qualify when so used. Any object which is used, or attempted to be used, which may endanger life or inflict great bodily harm can, in certain circumstances, be a dangerous weapon.

VI. RIGHT TO RESIST

Occasionally, people charged with a violation of 18 U.S.C. 111 allege that at the time they assaulted the officer, they were not aware that an arrest was taking place. They state that, for this reason, they were entitled to use whatever force was necessary to defend themselves or others apparently subject to a hostile attack. The courts have held that a person may justifiably use reasonable force in self-defense if he neither knows nor should know that he is being arrested and reasonably believes he is being subjected to a hostile attack against his person.

A bystander, however, has no right to intervene if there is reason for him to be aware that an arrest is being made by a peace officer or that the arrest is lawful. Before intervening, a bystander must make a reasonable effort to inquire into the nature and purpose of the attempted arrest and the authority of the one making it unless circumstances make such inquiry impossible or fruitless.

It makes no difference as far as the law is concerned whether there is probable cause for the arrest or search. An agent, even if effecting an arrest without probable cause, is still engaged in the performance of his official duties, provided he is not on a frolic of his own, and is protected from interference or assault. To avoid an allegation of self-defense, however, an agent should always announce his identity and purpose when making an arrest or search.
In December 1974 Congress passed a law relating to protection of privacy in administrative processes of Federal executive agencies. The President signed the legislation on January 1st, and the Privacy Act (P.L. 93-579) became effective on September 27, 1975.

The Office of Management and Budget has been assigned the leadership role in developing guidelines and administering the provisions of the Act. In a memo to the Agency and Department Heads OMB stated that the attainment of the objectives of the Privacy Act will "require changes in policies and procedures for personnel administration, payroll, records management, security, procurement, information system design, computer operations, communications management and many others." 1/

I. PURPOSE OF THE ACT

The Privacy Act gives Americans a greater say in the way records about them are kept and eliminate needless intrusions on personal privacy through the keeping of extraneous records. It is intended to assure that:

- there are no Federal Government personal record-keeping systems whose very existence is secret.
- Federal personal information files are limited to those which are clearly necessary.
- individuals have an opportunity to see what information about them is kept and to challenge its accuracy.
- personal information collected for one purpose not be used for another purpose without the consent of the individual.

II. SUMMARY OF KEY REQUIREMENTS

The new law requires the agencies to do some things they have not done before, and these are in addition to the requirements imposed by the Freedom of Information Act. Here are some examples of new requirements:

1. All agencies must publish annually in the Federal Register a list and description of their record systems that contain personal information, retrieved by personal identifier. When

1/ Memorandum to the Heads of Executive Departments and Agencies, on Implementation of the Privacy Act of 1974, dated March 12, 1975; with attachments. (117 pages)
agencies plan to establish or modify systems of records containing personal information, they must notify OMB and Congress, 60 days prior to putting plans into action.

2. Agencies may collect only such personal information as is relevant and necessary to carry out a purpose required by statutes or Executive orders.

3. When collecting personal information, agencies must inform individuals about the authority for requesting the information, the purposes and uses to which the information will be put, whether response is mandatory or voluntary and the effects on them if they do not provide the information.

4. Agencies must determine and publish with systems notices "routine" uses for the personal information they collect, and must get written consent from individuals to use personal information for any other purpose, or to transfer such information to another agency for some other purpose.

5. Agencies must publish in the Federal Register their procedures for complying with the Act, including fees, means for granting access and for amending.

6. Agencies must usually grant individuals access to the records about themselves. Individuals must be allowed to review their records, to make copies, and to file material to correct or dispute records they feel are inaccurate.

7. Besides establishing appropriate administrative, technical, and physical safeguards for records, agencies must set up rules of conduct and training for employees who deal with records.

8. If an agency has released records that subsequently are corrected or disputed, the agency must notify known previous recipients about the correction or dispute.

9. Agencies must keep records (and make them available to individuals) showing what disclosures other than FOIA and internal agency uses have been made of individual records.

10. Other provisions of the law allow individuals to sue agencies for improper use of records and to recover damages from agencies, and provide penalties for officials who willfully violate the key sections of the law.
11. The law prohibits federal, state and local agencies from denying benefits to individuals who refuse to disclose their Social Security Number, unless the number is required by statute or by regulation in effect prior to January 1, 1975.

12. The law assigns the leadership role in administering its provisions to the Office of Management and Budget. It also creates a temporary study commission to examine some particular issues relating to protection of privacy and to report within two years.

III. SUMMARY OF PROVISIONS

PRIVACY ACT OF 1974

ESTABLISHING RECORDS CONTAINING PERSONAL INFORMATION

A "record" as defined by the law, contains a person's name or some other identifier plus as little as one item of information about that person. The types of information contained in "records" may include an individual's education, financial transactions, medical history and criminal or employment history. (Sec. 3(a) (4))

Agencies must give notice to Congress and OMB when they propose to establish or modify a system of records so that the privacy impact of that proposal may be examined.

Agencies must annually publish in the Federal Register a notice of the existence and character of their record systems. (Sec. 3 (3) (4)) The list must include:

1. Name and location of each record system;
2. Categories of individuals on whom records are maintained in the system;
3. Categories of records in the system;
4. Routine uses and users of the records contained in the system;
   A "routine use" is defined as "the use of such record for a purpose which is compatible with the purpose for which it was collected."
5. Agency policies regarding storage, retrievability, access controls, retention and disposal of records;
6. Title and business address of the agency official who is responsible for each system of records;
7. Agency procedures whereby an individual can be notified if the system of records contains a record pertaining to him;
8. Agency procedures allowing individuals access to and correction of records; and
9. Sources of records in the system.

At least 30 days prior to publishing the annual notice described above, agencies must publish in the Federal Register a notice of any changes - past or proposed - in the previously published routine use of the information in the system and provide an opportunity for interested persons to comment - (Sec. 3(e)(11))

COLLECTION OF INFORMATION

Agencies may maintain in their records only such personal information as is relevant and necessary to accomplish an agency purpose as required by statute or Executive Order. Such information should be complete and accurate for its intended use. (Sec. 3(e)(1))

Agencies should collect personal information to the greatest extent practicable directly from the individual involved, particularly when information is to be used in determination of rights and benefits. (Sec. 3(e)(2))

When collecting personal information, agencies must inform individuals of the authority (statute or Executive Order) for collecting the information, the purposes and routine uses to be made of the information, and the consequences of not providing the information. (Sec. 3(e)(3))

Agencies must not maintain any records describing how any individual exercises rights guaranteed by the First Amendment, unless authorized by statute, or by the individual, or pertinent to authorized law enforcement activity. (Sec. 3(e)(7))

SAFEGUARDING OF INFORMATION

Agencies must establish administrative, technical and physical safeguards appropriate to the particular records to insure their security and confidentiality. (Sec. 3(e)(10))

Agencies must establish rules of conduct for persons involved in the design, development, operation or maintenance of any system of records, and must instruct employees in required procedures including penalties for noncompliance. (Sec. 3(e)(9))
USE OF INFORMATION IN MAKING DECISIONS

Agencies must maintain records used in making determinations about individuals with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to individuals. (Sec. 3(e)(5))

Agencies may release or disclose individual records to employees who need the records in performing their duties, or for a "routine use" (i.e., a use compatible with the purpose for which the record was established). In these cases, the individual's consent is not required for disclosure of the information. (Sec. 3(b)(1) and (3))

RELEASE OF INFORMATION FROM RECORDS

Individual records may not be released to third parties without the subject individual's written consent except in the following cases. (Sec. 3(b))

- As required by the Freedom of Information Act;
- Intra-agency transfers on a need-to-know basis;
- A published "routine use";
- To the Bureau of Census;
- To the National Archives for historical purposes (but not when National Archives is just the temporary repository of inactive agency records);
- For statistical research or reports, provided records are not individually identifiable;
- For criminal law enforcement purposes, subject to written request from the law enforcement agency;
- In an emergency to protect the health or safety of the individual; or
- To Congress (or a congressional committee, sub-committee or joint committee), the General Accounting Office, or under order from a court of competent jurisdiction.
If an agency is required to release records under court orders, the agency must make a reasonable effort to notify the individual. (Sec. 3 (e)(8))

Before releasing information to someone outside the government, agencies must make a reasonable effort to assure that the information is accurate, complete, timely and relevant. (Sec. 3(e)(6))

If an agency has previously disclosed to persons or agencies records that subsequently are corrected or disputed, the agency must notify recipients about the correction or dispute. This provision applies for five years or the life of the records, whichever is longer. (Sec. 3 (c)(4))

ACCOUNTING FOR DISCLOSURE OF RECORDS

Except for FOIA and internal transfers, agencies must maintain an accounting of the date, nature and purpose of each disclosure of a record as well as the name and address of the person and agency to whom the disclosure was made. This accounting must be retained for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made. The individual must have access to this accounting upon request. (Sec. 3(c)(3))

INDIVIDUAL ACCESS TO AND CORRECTION OF RECORDS

Agencies must allow individuals to gain access to records about themselves. (Sec. 3(d)(1)) This includes:

- Permitting the individual, accompanied by a person of his choosing, to review the records; and
- Giving the individual a copy of all or any portion of the record in a form comprehensible to him.

Agencies must permit individuals to request amendment of records pertaining to them. (Sec. 3(d)(2)) Some additional requirements that specifically apply to this provision:

- Agencies must acknowledge requests to amend records within 10 working days of receipt.
- After acknowledgement, the agency must promptly correct the information in question or inform the individual why it will not amend the record. The agency must also inform the individual of the agency procedures for requesting a review of that decision as well as the name and business address of the official responsible for the review.

If the individual disagrees with an agency's decision not to amend a record, the agency must conduct a review of that refusal within 30 working days. (This time limit may be extended by the head of the agency for good cause.)

If after review, the agency still refuses to amend the record, the individual must be allowed to file a statement of his views on the matter and the agency must inform the individual of the provision for judicial review.

If the agency later discloses to other agencies information about which the individual has filed a statement of disagreement, the agency must provide a copy of the statement and may, if appropriate, include an explanation of its refusal to amend the records. (Sec. 3(d)(4))

Agencies are specifically required to publish rules that include the following provisions:

- Procedures for notifying an individual on request if a specific system of records contains information pertaining to him. (Sec. 3(f)(1))

- State reasonable time, places, and requirements for identifying individuals who request their records before making records available. (Sec. 3(f)(2))

- Procedures for disclosing records to individuals on request (including special procedures for medical or psychological records), and procedures for reviewing individuals' requests to amend their records. (Sec. 3(f)(3) and (4))

- Fees to be charged for copying records excluding costs of search or review of records. (Sec. 3(f)(5))

Agencies may not use exemptions under the Freedom of Information Act to withhold records from an individual which are accessible to the individual under the Privacy Act. (Sec. 3 Par. (2))
Individuals may bring civil actions against an agency when the agency:

- Refuses to amend the individual's record as requested
- Fails to review such a refusal when requested
- Refuses to give an individual access to his records
- Fails to maintain records in an accurate, relevant, timely, and complete manner and thereby causes an adverse effect on the individual
- Fails to comply with other provisions of the law and thereby causes an adverse effect on the individual

In deciding such cases, the court may inspect disputed records in camera,* may award the individual damages for willful or intentional actions against him (not less than $1,000); may order the agency to correct its records; and may award attorney fees and costs to the individual if he substantially prevails. (Sec. 3(g)(2), (3), (4), and (5)

**PENALTIES**

An agency official who is found to have knowingly and willfully disclosed information protected under the Privacy Act will be fined not more than $5,000. (Sec. (3)(i)(1))

An agency official who is found to have willfully maintained a system of records which was not reported will be fined not more than $5,000. (Sec. 3 Par (i)(2))

Any person who receives a record under false pretenses will be fined not more than $5,000. (Sec. 3 Par (i)(3))

*In camera - This term means that a Judge may inspect records in private, literally in his/her chambers although in cases involving a large volume of material, the court may choose to inspect records on site.*
EXEMPTIONS

General exemption may be claimed for records maintained by CIA, or a criminal law enforcement agency (Sec. 3(j))

Other specific exemptions may be claimed for

- Investigatory material compiled for law enforcement purposes, (with certain exceptions). (Sec. 3(k) (2))

- Records maintained to provide protective services to the president, and statistical records required by statute. (Sec. 3(k)(3) and (4))

- Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section under an implied promise that the identity of the source would be held in confidence. (Sec. 3(k)(5))

- Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity of fairness of the testing or examination process.

- Evaluation material in connection with promotion in the armed services. (Sec. 3(k)(7))

No exemptions may be utilized unless claimed in an agency's publication of its records systems. There is no exemption from the requirement to publish notices of records systems.

MISCELLANEOUS PROVISIONS

- While the private sector is not addressed by the Act, certain firms may be subject to the Act if they keep records for a Federal agency under contract.

- The Act establishes a Privacy Protection Study Commission which will be making recommendations to the President and the Congress,
in part, on the applicability of the principles of the
Act to the private sector and State and local government. The
Commission consists of seven members, two each appointed
by the House and Senate, and three appointed by the President.
They are --

David Linowes, Chairman
Willis Ware, Vice Chairman
William B. Dickinson
William O. Bailey
Congressman Edward I. Koch
Congressman Barry Goldwater, Jr.
Robert J. Tennesessen

- Federal, State, or local agencies must not deny an individual any
right, benefit, or privilege because the individual refuses to dis­
close his social security number. This provision does not apply in
the case of disclosures required by Federal statute, or to Federal,
State, or local records systems in existence and operating before
January 1, 1975. (Sec. 7(a))

- If a Federal, State, or local agency requests an individual's social
security number, the agency must inform the individual whether
disclosure is mandatory or voluntary, by what authority it is
requested, and what use will be made of the number. (Sec. 7(b))