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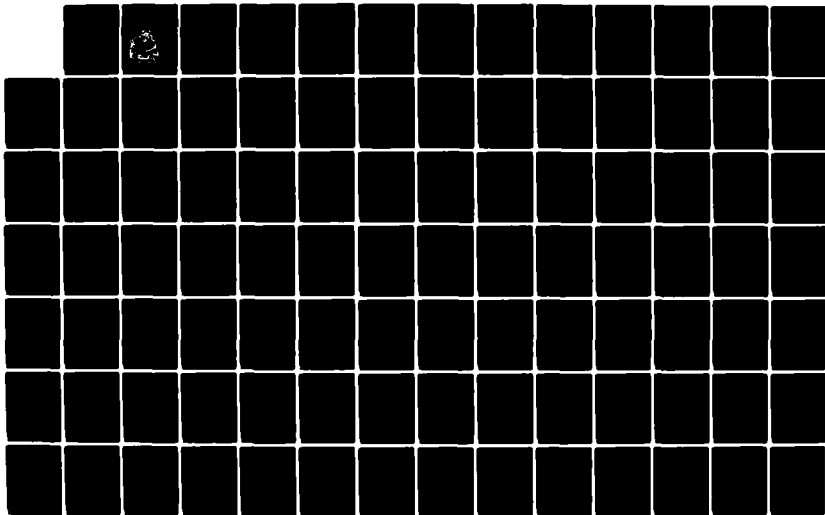
COMMON VIOLATIONS OF THE UNITED STATES CODE IN ECONOMIC
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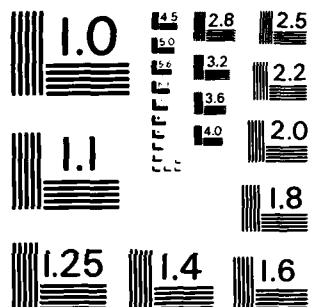
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USACIDC

Pamphlet 195-8

Criminal Investigation

**COMMON VIOLATIONS
OF THE UNITED STATES CODE
IN ECONOMIC CRIME INVESTIGATIONS**



DTIC FILE COPY

The Fraud, Waste and Abuse Monster

Headquarters

U.S. Army Criminal Investigation Command

15 November 1983

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FOREWORD

1. This pamphlet has been prepared to serve as a useful deskbook reference for use by USACIDC special agents, many of whom have had little exposure to the United States Code. Specifically, it is designed primarily to aid agents who are in the Economic Crime Investigator Specialty Program (ECISP) in identifying the relevant Federal criminal offenses which may be applicable to economic crime investigations. Consequently, this pamphlet is not all-inclusive. Only those "white collar crime" offenses associated with investigations of economic crime, fraud, waste, and abuse have been included. Not included, for example, are offenses such as bank robbery, assault, rape, or murder committed on a Federal installation.
2. The following factors convinced the members of the USACIDC SJA office of the need for this publication.
 - a. There is a heightened emphasis throughout the Federal Government, and particularly in DOD, on combating economic crime.
 - b. USACIDC has figured prominently in this effort by expanding the number of ECISP-trained agents.
 - c. Much of the economic crime committed against the Army is perpetrated by civilians who are not subject to the Uniform Code of Military Justice (UCMJ). Accordingly, the legality of the conduct of civilian subjects, particularly in the economic crime area, must generally be measured against civilian Federal criminal statutes.
 - d. Since USACIDC's overall mission primarily involves enforcement of the UCMJ, most USACIDC agents have not previously acquired a familiarity with these Federal statutes, particularly those relating to economic crime.
 - e. Furthermore, generally speaking, local judge advocates have also not acquired a working knowledge of civilian Federal criminal statutes. Accordingly, there is a reduced ability to obtain effective and timely SJA coordination on USACIDC ROIs, as required by CIDR 195-1.
3. Although designed to assist agents in identifying relevant applicable Federal statutes, this pamphlet should not be considered as a substitute for effecting coordination with judge advocates concerning ongoing investigations. Nor is it a substitute for further reference to specific provisions of the US Code or UCMJ prior to arriving at a titling decision.
4. The word "he" and similar pronouns when used in this publication include both the masculine and feminine genders unless otherwise specifically stated.
5. This pamphlet applies to all elements and personnel of the US Army Criminal Investigation Command. Additionally, although this pamphlet is designed primarily for use by USACIDC special agents, it is hoped that other law enforcement personnel and judge advocates from each of the military departments will find it to be a useful reference as well.

Headquarters
US Army Criminal Investigation Command
5611 Columbia Pike, Falls Church, VA 22041



15 November 1983

CID Pam 195-8

Criminal Investigation

A-1

Common Violations of the United States Code In Economic Crime Investigations

Impact on New Manning System. This pamphlet does not contain information that affects the New Manning System.

Interim changes. Interim changes to this pamphlet are not official unless they are authenticated by order of the Commander, US Army Criminal Investigation Command. Users will destroy interim changes on their expiration dates unless sooner superseded or rescinded.

Suggested improvements. The proponent of this pamphlet is the Staff Judge Advocate's Office. Users of this publication are encouraged to submit recommended changes and comments to improve the publication. Comments should be keyed to the specific page, paragraph, and line of the text in which the change is recommended. Reasons will be provided for each comment to insure full understanding and complete evaluation of the recommendation. Comments should be prepared using DA Form 2028 (Recommended Changes to Publications) and forwarded directly to HQUSACIDC (CIJA-ZA), 5611 Columbia Pike, Falls Church, VA 22041.

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Chapter 1

Introduction

1-1. Purpose and Scope

a. Purpose. This pamphlet is intended to provide USACIDC investigative personnel with a deskbook reference for civilian Federal criminal offenses commonly involved in the investigation of economic crime, fraud, waste and abuse. It identifies each such statute, grouped by subject area; lists the maximum punishment for the offense; indicates whether the statute is extraterritorial; cross-references related UCMJ offenses and Military Judges' Benchbook provisions; briefly identifies and explains the elements of the offense and provides examples.

b. Scope. This pamphlet is not designed to serve as a "how to" manual for the investigation of economic crimes. Investigative techniques, search and seizure, evidence handling, and other investigative procedures and policies are treated and regulated by other publications, and reference should be made to such publications as necessary.

1-2. References

a. Required publications.

(1) Manual for Courts-Martial, United States, 1969 (Revised Edition), containing the Uniform Code of Military Justice, cited throughout this publication.

(2) AR 600-50 (Standards of Conduct for Department of the Army Personnel).

(3) DA Pamphlet 27-9 (Military Judges' Benchbook), cited throughout this publication.

b. Related publications.

(1) AR 190-6 (Obtaining Information From Financial Institutions).

(2) AR 190-22 (Searches, Seizures, and Disposition of Property), with USACIDC Supplement.

(3) AR 190-53 (Interception of Wire and Oral Communications, for Law Enforcement Purposes), with USACIDC Supplement.

(4) AR 195-2 (Criminal Investigation Activities).

(5) AR 195-4 (Use of Contingency Limitation .0015 Funds for Criminal Investigation Activities), with USACIDC Supplement.

(6) AR 195-5 (Evidence Procedures).

(7) CIDR 195-1 (CID Operations).

1-3. Explanation of Terms

Special terms applicable throughout this pamphlet are defined in the Glossary. Other special terms used only in a single chapter are defined at the beginning of the chapter.

1-4. Proper Titling of Subjects

a. This publication, as noted above, is designed to serve as an aid in the investigation of economic crimes and the proper titling of subjects in USACIDC Reports of Investigation (ROI). Its usefulness for these purposes thus depends in part upon the reader's basic understanding of the titling process and the legal requirements for titling.

b. In accordance with paragraph 6-6a of CIDR 195-1, only "subjects" will be listed in the title section of final ROIs. A "subject" is a person about whom there is probable cause to believe that the person committed a particular criminal offense. Accordingly, listing someone as a subject necessitates the identification of a specific criminal statute that prohibits the individual's conduct and to which that person is subject.

(1) All active duty Army personnel are subject to the UCMJ. They are also subject to civilian criminal statutes, including State, Federal, and foreign laws, to the same extent as would be a United States civilian in the same situation.

(2) With limited exceptions, civilians are not subject to the UCMJ. They may not properly be titled for violation of its provisions, or the provisions of Army regulations. However, if a civilian's conduct at the same time violates a civilian criminal statute, he may be titled in an ROI for violation of the civilian statute if the offense is otherwise properly within USACIDC's investigative jurisdiction.

1-5. Applicability of Statutes

a. A person may only be made subject to a statute if there is a valid legislative basis for doing so. All Federal statutes are at least territorial in nature. That is, they apply to anyone who commits the prohibited act within the geographical limits of the jurisdiction. The focus of such a statute is upon the location of the crime.

b. Additionally, some statutes are "extraterritorial." That is, they apply anywhere to anyone who violates them. There generally are two types of extraterritorial statutes.

(1) Some Federal statutes, such as bribery, are based upon the nature of the criminal act. Since the United States has the right to ensure the integrity of its governmental operations wherever they take place, it may enact a statute, such as the bribery statute, which applies worldwide. A bribe of a contracting officer employed by the United States in Korea has just as

destructive of an impact on governmental integrity as does the bribe of a contracting officer in CONUS. Similarly, the status of the person who offers the bribe is irrelevant, whether a foreigner or a US citizen. Either, in an appropriate case, may be titled for violation of extraterritorial Federal statutes. In some cases the statute itself specifies that it is extraterritorial. In other cases the Federal courts have determined certain statutes to be extraterritorial. In still other cases, no clear determination has yet been made. Accordingly, close judge advocate coordination should be made before a civilian is titled for an OCONUS violation of Federal law.

(2) Some Federal statutes, such as the UCMJ, are based upon the status of the offender. Statutes such as the UCMJ apply only to a particular class of persons defined in the statute. Only those persons so identified may be titled. Article 2 of the UCMJ defines those persons who are subject to the UCMJ.

1-6. Specification of Offenses

Since an individual is only a subject for purposes of UCMJ, titling if he violates a specific statute which is applicable to him, specific offenses should be cited in the title section of ROIs. For example, there is no offense of "fraud" under either the UCMJ or civilian Federal criminal statutes. There are, however, statutes that prohibit specific types of fraudulent conduct, such as mail fraud, wire fraud, conspiracy to defraud, filing a false claim, etc. Accordingly, the title section of an ROI should indicate the specific offense and statute rather than the generic characterization of the conduct as "fraud."

1-7. Use of this Pamphlet

a. USACIDC personnel should utilize this pamphlet as needed in order to assist in identifying Federal criminal statutes applicable to their investigations. Reference to offenses contained in this pamphlet will assist personnel in understanding the elements of the offense and the evidence necessary to establish or negate probable cause. For the benefit of OCONUS USACIDC elements, those offenses which are extraterritorial are identified.

b. This pamphlet should be used in conjunction with the US Code and the Military Judges' Benchbook, DA Pam 27-9. Although the Benchbook is designed primarily for use by military attorneys and judges at courts-martial, it contains similar information regarding the elements of offenses under the UCMJ.

c. Neither this pamphlet nor the Benchbook should be considered as a substitute for appropriate judge advocate coordination.

Chapter 2

General Provisions

2-1. Principals, 18 USC 2

a. Section 2 of Title 18 of the US Code parallels Article 77 of the UCMJ. It defines as principals anyone who:

(1) Commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission; or

(2) Willfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States.

b. See paragraph 7-1 of the Military Judges' Benchbook, DA Pam 27-9.

2-2. Accessories After the Fact, 18 USC 3

a. Section 3 of Title 18 of the US Code parallels Article 78 of the UCMJ. It punishes as an accessory after the fact any person who, 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.

b. See paragraph 3-1 of the Military Judges' Benchbook, DA Pam 27-9.

2-3. Attempts

a. Unlike the UCMJ (Article 80), the US Code does not contain a general provision making attempts punishable. However, attempts to commit specific Federal criminal offenses are made punishable in some instances by the specific statute itself.

b. See paragraph 3-2 of the Military Judges' Benchbook DA Pam 27-9.

2-4. Assimilative Crimes Act, 18 USC 13

Under Section 13 of Title 18 of the US Code, State law is adopted for areas within the special maritime and territorial jurisdiction of the United States to the extent that Congress has not enacted a statute prohibiting the particular conduct. (See Glossary for definition of "special maritime and territorial jurisdiction of the United States.") Under this section, if a person commits an act or omission within an area of Federal jurisdiction which, although not made punishable by a Federal statute, is prohibited by the law of the State, Territory, Possession, or District in which the Federal enclave is located, that local law becomes Federal law and the individual may be prosecuted under this section and is subject to the same maximum punishment that is established for the offense under local law.

2-5. Misprision of a Felony, 18 USC 4

Maximum Punishment: 3 years and a \$500.00 fine.

Extraterritorial: Yes, if the underlying felony is extraterritorial

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-163.

a. Elements of the Offense.

(1) That the subject had knowledge of the actual commission of a felony cognizable by a court of the United States.

(2) That the subject concealed and did not as soon as possible inform United States authorities of the felony.

b. Commentary.

(1) "Felony" means an offense punishable by death or imprisonment for a term exceeding 1 year.

(2) This offense requires an actual act of concealment. Absent an independent duty to disclose knowledge of the felony, such as that duty imposed upon USACIDC special agents, the mere failure, or even refusal, to disclose the felony is not an offense under this section. "Concealment" is any statement or conduct which prevents another from acquiring knowledge of a fact.

(3) This offense can not be committed by persons who are principals to the underlying felony, or who would otherwise incriminate themselves by disclosing the felony.

c. Example. A secretary, aware that the firm for which she works has submitted fraudulent claims to the Government in connection with a contract, destroys accounting documents and records of the firm which would have demonstrated the fraud.

2-6. Conspiracy and Conspiracy to Defraud, 18 USC 371

Maximum Punishment: 5 years and a \$10,000.00 fine, unless the offense which was the object of the conspiracy is a misdemeanor, in which case the punishment may not exceed the maximum punishment for the underlying misdemeanor.

Extraterritorial: Yes, if the underlying offense is extraterritorial or the conspiracy is one to defraud the United States.

Related UCMJ Offense: Article 81.

Related Benchbook Reference: Paragraph 3-3.

a. Elements of the Offense.

(1) That the subject entered into an agreement with one or more competent person(s) to either:

(a) Commit an offense against the United States; or

(b) Defraud the United States.

(2) That while the agreement continued to exist, and while the subject remained a party to the agreement, one of the conspirators performed one or more overt acts in furtherance of the conspiracy.

b. Commentary.

(1) The agreement in a conspiracy does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be established circumstantially by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out or what part each conspirator is to play.

(2) The overt act required for this offense does not have to be a criminal act. Indeed, it may by itself be an entirely legal act. However, the act must be a clear indication that the conspiracy is being carried out. The overt act may be done either at the time of or following the agreement. It must be clearly independent of the agreement itself. That is, it must be more than merely the act of entering into the agreement or an act necessary to reach the agreement.

(3) It is not necessary that the underlying substantive criminal offense or fraud actually be carried out. However, it must be shown that the conspiracy embraced every element of the substantive offense or fraud.

(4) The Federal criminal conspiracy statute is broader than Article 81. Not only does Section 371 punish conspiracies to commit criminal offenses in violation of Federal law, but it also punishes any conspiracy to defraud the United States.

(5) "Fraud" as used in this statute, is all-inclusive. It is not necessary that the fraud be designed to create a loss, monetary or otherwise, to the United States. It is sufficient if the fraud is designed, or has the effect of, depriving the United States of the loyalty and fidelity of its employees, or the proper functioning or operation of its governmental affairs.

c. Example.

(1) During a unit change of command a 100% inventory of the unit supply room is not conducted. However, the outgoing commander and the incoming commander agree to execute the appropriate government documents indicating that a 100% inventory was conducted and that no losses were discovered. This constitutes a conspiracy to defraud even if in fact all of the unit's property is on hand and there is no loss. The conduct of an inventory is a government procedure established by regulation to safeguard government property. Defrauding the United States of this safeguard is a criminal offense under this section even if no loss in fact occurred.

(2) Two soldiers agree to steal property from a warehouse. In order to effect their scheme, one of the two soldiers borrows the keys to a friend's pickup truck, which the soldier intends to use to carry the property away from the warehouse. Both of the soldiers have committed a conspiracy, even if the larceny is never carried out. The act of borrowing the keys, which is itself a wholly innocent and legitimate act, is a sufficient overt act to complete the offense of conspiracy.

(3) A conspirator while a party to the conspiracy is guilty of all offense committed by any fellow conspirator in furtherance of the conspiracy and within its scope. However, a person may withdraw from or abandon a conspiracy by affirmative conduct which is wholly inconsistent with adherence to the unlawful agreement and which shows that the person has severed all connection with the conspiracy.

Chapter 3

Bribery, Graft, Conflict of Interest, and Other Violations of Public Trust

3-1. Definitions.

For purposes of this chapter, the following definitions apply:

a. "Any matter" or "matter," unless otherwise indicated, includes any proceeding, application, request for a ruling or other determination, contract, controversy, charge, accusation, arrest, or any other particular matter which is before any department, agency, court-martial, officer, or any civil, military, or naval commission.

b. "Gratuity" includes any gift, favor, entertainment, hospitality, transportation, loan, or other tangible benefit for which less than fair market value is paid.

c. "Independent agency" includes agencies such as the Federal Labor Relations Authority or Federal Trade Commission which are not separate departments of the Government as are the Department of Defense and the Department of Justice.

d. "Officer or employee" is used in the generic sense unless otherwise indicated. It includes both military and civilian personnel. However, as used in 18 USC 203, 205, and 207 through 209, it does not include enlisted military members. Additionally, its use in several sections is limited to officers or employees of a particular branch of Government, as indicated.

e. "Official act" means any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

f. "Official responsibility" includes the direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct government actions. Ordinarily, the scope of an employee's official responsibility is determined by reference to the pertinent statute, regulation, Executive Order, job description, or delegation of authority under which the employee held or holds his position.

g. "Participating personally and substantially" includes participating in a matter through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or in any other manner.

h. "Person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed.

i. "Public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or

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branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror.

j. "Senior employees" includes any civilian employee at the executive level, or a 3 or 4 star general. It also means other persons holding positions which have been designated as senior employee positions by the Director, Office of Government Ethics. This includes certain individuals having significant decision-making or supervisory responsibility who are in the grade 0-7 or 0-8, in military rank, or GS-17, in civilian rank.

k. "Special government employee" means a person who is retained, designated, appointed, or employed to perform, with or without compensation, for a period not to exceed 130 days during any period of 365 consecutive days, temporary duties either on a full-time or intermittent basis. The term also includes a Reserve officer while on active duty solely for training for any length of time, or who is serving voluntarily on extended active duty for 130 days or less. It does not include enlisted personnel.

3-2. Offering a Bribe, 18 USC 201(b)

Maximum Punishment: 15 years and a fine of \$20,000 or three times the amount of the bribe, whichever is greater, and may be disqualified from holding Federal office.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-132.

a. Elements of the Offense.

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

(2) That the offer was made to a public official or a person who had been selected to be a public official.

(3) That the subject acted corruptly.

(4) That the subject made the offer or promise with the intent to:

(a) Influence some official act of the official; or

(b) Induce a breach of official duty; or

(c) Induce the official to commit or permit a fraud on the United States.

b. Commentary.

(1) The thing of value need not actually be given. The offense is complete upon making the offer. Nor need the public official actually be influenced. He may even refuse the offer, yet the offense is complete. Nor need the thing of value personally benefit the public official. However, the offer must be made to the public official, either directly or indirectly.

(2) The act sought to be influenced need not itself be criminal. Indeed, it may be perfectly lawful. However, lawfulness of the act is no defense. It may involve either an affirmative act or an omission. The act may concern some matter currently pending before the official or which may be brought before him in the future. Moreover, it is irrelevant whether or not the official has the authority to bring about the desired result.

(3) The bribe must relate to an official act, not a private matter. For example, an offer of a bribe to a public official to commit an arson would not constitute bribery since arson is not part of a public official's duty.

(4) This section is specifically separately punishable in addition to any concurrently committed obstruction of justice offense. See the Glossary for definitions of "corruptly" and "fraud."

c. Examples.

(1) A bidder offers a contracting officer \$10,000 if the contracting officer awards the bidder a government contract. Note that a contracting officer has the authority to award contracts and the act of awarding the contract would not itself be criminal. Yet, the offer still constitutes bribery.

(2) Same situation, but the bidder promises to give the \$10,000 to the contracting officer's destitute mother rather than the contracting officer.

(3) A contractor offers a contracting officer's representative sexual favors in return for being allowed to deliver goods that don't meet the contract specifications. (This section applies to offers of anything of value.)

3-3. Seeking or Accepting a Bribe, 18 USC 201(c)

Maximum Punishment: 15 years and a fine of \$20,000 or three times the amount of the bribe, whichever is greater, and may be disqualified from holding Federal office.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 92 (AR 600-50, para. 6-2a (1)) or Article 134, as appropriate.

Related MJ Benchbook Reference: Paragraph 3-131.

a. Elements of the Offense.

(1) That the subject is a public official or a person selected to be a public official.

(2) That the subject, directly or indirectly, asked, exacted, accepted, received or agreed to receive something of value (for himself or for any other person or entity).

(3) That the subject acted corruptly.

(4) That the request was made, or the bribe received, in return for:

(a) Being influenced in some official action; or

(b) Acting in violation of his lawful duty; or

(c) Committing or permitting a fraud on the United States.

b. Commentary. Generally, the same comments apply as those made under paragraph 3-2, Offering a Bribe.

c. Examples.

(1) A contracting officer accepts money from a bidder in return for awarding a government contract to the bidder.

(2) A contracting officer promises to award a contract to a bidder if the bidder pays money to a friend of the contracting officer.

(3) Same situation, but the offer is made by an employee in the contracting office who has no actual authority to award contracts. This still constitutes an offense.

3-4. Offering a Bribe to a Witness, 18 USC 201(d)

Maximum Punishment: 15 years and a fine of \$20,000 or three times the amount of the bribe, whichever is greater, and may be disqualified from holding Federal office.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook References: Paragraphs 3-132, 3-165, and 3-170.

a. Elements of the Offense.

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

(2) That the offer was made to a witness before Congress, a Federal court, or any other agency, commission, or officer authorized by Federal law to hear evidence or take testimony.

(3) That the subject acted corruptly.

(4) That the subject made the offer or promise with the intent to influence the witness' testimony or to induce the witness to be absent.

(5) That the testimony was given or was to be given under oath or affirmation.

b. Commentary.

(1) As with bribery of an official, the offer may also take the form of an offer to give something of value to a person or entity other than the witness.

(2) "Agency, commission, or officer" includes grand juries, Article 32 investigations, and courts-martial. See the Glossary for the definition of "corruptly."

c. Examples.

(1) A contractor, under investigation by the Justice Department, offers a number of his employees, who have received subpoenas from a grand jury, an all expense paid two week trip to Grenada, to include the day that the employees are scheduled to testify.

(2) An individual offers a witness money to lie when called to testify before a US district court.

3-5. Seeking or Accepting a Bribe as a Witness, 18 USC 201(e)

Maximum Punishment: 15 years and a fine of \$20,000 or three times the amount of the bribe, whichever is greater, and may be disqualified from holding Federal office.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook References: Paragraphs 3-131 and 3-165.

a. Elements of the Offense.

(1) That the subject was or is to be a witness before Congress, a Federal court, or any agency, commission, or officer authorized by Federal law to hear evidence or take testimony.

(2) That the subject, directly or indirectly, asked, accepted, received or agreed to receive something of value (for himself or any other person or entity).

(3) That the subject acted corruptly.

(4) That the request was made, or the bribe received, in return for being influenced in his testimony, or in return for being absent.

(5) That the testimony was given or to be given under oath or affirmation.

b. Commentary. Note that the witness may be "influenced" to testify either falsely or truthfully. See also the Commentary in paragraph 3-4b.

c. Example. Jones, a witness, tells Smith, a person under investigation, that unless Smith pays him some money he intends to testify falsely that Smith committed the crime.

3-6. Offering Gratuities or Graft to a Public Official, 18 USC 201(f)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-132.

a. Elements of the Offense.

(1) That the subject directly or indirectly, gave, offered, or promised something of value.

(2) That the gift, offer, or promise was not authorized by law.

(3) That the gift, offer, or promise was made to a current or former public official, or person selected to be a public official.

(4) That the gift or offer of a gift was made because of some official act performed or to be performed by the past, present, or future public official.

b. Commentary.

(1) This is a lesser included offense of bribery. The distinction between bribery and graft or illegal gratuities is that bribery involves an intent to influence, whereas graft or illegal gratuities involves compensation for services when no compensation is due. The latter is in the nature of a "tip" for services. In this regard, note that acting "corruptly" is not an element of the offense, as it is in bribery.

(2) This provision also differs from the bribery provisions in that the section is only violated if the gratuity is given or offered for the benefit of the public official himself. It is not violated by gifts to others or other entities.

c. Example. Suppliers of items for the commissary provide "free samples" of their merchandise to the commissary officer.

3-7. Graft, Soliciting or Accepting Illegal Gratuities, 18 USC 201(g)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 92 or Article 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-27 and 3-131.

a. Elements of the Offense.

(1) That the subject is a current or former public official or person selected to be a public official.

(2) That the subject, directly or indirectly, asked, exacted, accepted, received or agreed to receive something of value.

(3) That the subject's conduct was not authorized by law for the proper discharge of his official duties.

(4) That the request was made, or the gratuity accepted, because of some official act performed or to be performed by him.

b. Commentary.

(1) Violations of this section almost necessarily involve a violation of AR 600-50 (paragraphs 2-2b and c, and 6-2) when committed by Army members.

(2) This provision differs from the bribery provisions in that this section is only violated if the gratuity is received or solicited by the official himself. However, gratuities received by others may violate other statutes and, if solicited by a military member, may violate Article 92 (AR 600-50, paragraphs 2-2b and 6-2).

c. Examples.

(1) A personnel clerk charges soldiers \$10 for out-processing each soldier who is on a PCS move. This is graft rather than bribery since the clerk's normal duty is out-processing the soldiers. He is exacting a "tip" rather than being "influenced" in an official act.

(2) A government employee, who belongs to an airline "frequent fliers" club, receives a free airline ticket for having flown a certain number of miles with the airline. The previous trips were at government expense while on TDY. The employee uses the free ticket for personal travel instead of turning it in to the transportation office.

(3) The same fact situation, except that instead of a free ticket the employee receives a seat upgrade from coach to first-class while on a flight that is for official business. This is still an illegal gratuity since it is a personal benefit to the individual rather than the Government.

3-8. Offering Gratuities to a Witness, 18 USC 201(h)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-132.

a. Elements of the Offense.

(1) That the subject, directly or indirectly, gave or offered something of value to a witness before Congress, a Federal court, or any other agency, commission, or officer authorized by Federal law to hear evidence or take testimony.

(2) That the gratuity was given or offered for or use because of the testimony given by the witness at the proceeding, or because of his absence therefrom.

(3) The testimony must have been given or was to be given under oath or affirmation.

b. Commentary.

(1) Although a fine line, a distinction must be made between an illegal gratuity to a witness and compensation for the time spent as a witness. A frequent practice in litigation that is not illegal is for a party to the litigation to compensate its expert witnesses for their time spent testifying. For example, if a doctor spends three hours testifying for the plaintiff in a personal injury case and the doctor would have charged patients in his office \$100 per hour had the doctor been back in his office, the plaintiff may compensate him for his lost time. Section 201(j) provides an exception for "the reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance" and, in the case of expert witnesses, "a reasonable fee for time spent in the preparation of (the expert's) opinion and in appearing and testifying."

(2) The distinction between this section (illegal gratuities) and Section 201(d) (bribery), paragraph 3-4, above, is the same as between illegal gratuities offered to a public official and bribery of a public official, i.e., the difference between "tipping" and seeking to influence. See Commentary to paragraph 3-6, above.

c. Example. In contrast to the example above, it would be a violation of this section for the amount of the doctor's compensation to be dependent upon the outcome of the trial. If, for example, instead of reimbursing the doctor for his lost time the plaintiff offered to give the doctor a third of any monetary judgment obtained, it would be a violation. In such a situation the amount of the "compensation" would be dependent upon the content of the

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doctor's testimony and how persuasive it was to the jury, rather than for his time spent testifying.

3-9. Soliciting or Accepting Gratuities as a Witness, 18 USC 201(i)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-131.

a. Elements of the Offense.

(1) That the subject was or is to be a witness before Congress, a Federal court, or any agency, commission, or officer authorized by Federal law to hear evidence or take testimony.

(2) That the subject, directly or indirectly, asked, exacted, accepted, or agreed to receive something of value.

(3) That the request was made, or the gratuity received, for or because of his testimony at the proceeding, or because of his absence therefrom.

(4) The testimony must have been given or was to be given under oath or affirmation.

b. Commentary. The distinction between this section (illegal gratuities) and 18 USC 201(e) (bribery), paragraph 3-5, above, is the same as between illegal gratuities offered to a public official and bribery of a public official. See Commentary to paragraph 3-6, above.

c. Example. Self-explanatory.

3-10. Seeking or Accepting Illegal Compensation in a Matter Affecting the Government, 18 USC 203 (a)

Maximum Punishment: 2 years, a \$10,000 fine, and automatic disqualification from holding Federal office.

Extraterritorial: Yes.

Related UCMJ Offense: Article 92 (paragraph 6-2b(1)(a), AR 600-50).

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject, directly or indirectly, asked, exacted, accepted, received, or agreed to receive compensation for some service rendered or to be rendered by himself or another.

(2) That the services are in relation to any matter in which the United States is a party or has a direct or substantial interest.

(3) That the services were rendered or are to be rendered at a time when the subject was is a Member or Member-Elect of Congress, a Delegate or Delegate-Elect of the District of Columbia, a Resident Commissioner or Resident Commissioner-Elect, or an officer or employee of any branch of the Federal Government or the District of Columbia.

(4) That the compensation was not provided by law for the proper discharge of official duties.

b. Commentary.

(1) For purpose of this section, Section 205, and Sections 207-209 of Title 18, "officer or employee" does not include enlisted members. However, conduct that would otherwise violate this section, when committed by an enlisted member who is in a position of trust and responsibility in connection with procurement or acquisitions, violates paragraph 6-2b(1)(a) of AR 600-50, and thereby violates Article 92, UCMJ.

(2) The main difference between this section and bribery is that under the bribery section the official action for which something of value is given relates to the employee's official duties. Under this section, the matter in which the individual solicits the compensation need not relate at all to his job as long as it is a matter in which United States is either a party or has a direct and substantial interest.

(3) In order to violate this section, the services for which the compensation is sought must either be rendered or to be rendered while the individual holds his Federal position. However, it is the solicitation of compensation, not the rendering of the services, that constitutes the violation. The solicitation of compensation and the actual receipt of

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compensation are two separate offenses under this section. Furthermore, solicitation or receipt of compensation are both separate offenses from the actual rendering of the services, which is prohibited under Section 205, paragraph 3-12, below.

(4) This section applies to "special government employees," as defined in paragraph 3-1k, only if the matter in which the employee acts involves a specific party or parties and is a matter 1) in which he has at any time participated personally and substantially as a government employee, or, in the case of a special employee who has served more than 60 days in the preceding year, 2) which is pending in the department or agency in which he served or is serving. Nor does this section apply to an employee who is acting for his parents, spouse, child or any person for whom, or for any estate for which, he is serving as a fiduciary, unless he has participated personally and substantially in the particular matter as a Federal employee.

(5) Finally, this section does not apply to retired officers while not on active duty (recall) or otherwise serving as an officer or employee of the United States.

c. Examples.

(1) A civilian attorney-advisor employed by the Army agrees for a fee to represent a government contractor in negotiations involving a contract that the contractor has with the Navy. Note that a violation exists in this situation even though the contract may not be at all related to the attorney's official duties, or may not even involve the same agency that employs the attorney.

(2) A Department of the Army civilian takes a part-time job at night working for an income tax preparer and prepares Federal income tax returns for clients of his civilian employer (in which the Internal Revenue Service is, of course, keenly "interested").

3-11. Offering Illegal Compensation to a Government Employee, 18 USC 203(b)

Maximum Punishment: 2 years, a \$10,000 fine, and automatic disqualification from holding Federal office.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject, directly or indirectly, gave, promised or offered to give compensation to another person for services rendered or to be rendered by that person or another.

(2) That the services are in relation to a matter in which the United States is a party or has a direct or substantial interest.

(3) That the services were rendered or are to be rendered at a time when the person to whom the offer was made was a Member or Member-Elect of Congress, a Delegate or Delegate-Elect of the District of Columbia, a Resident Commissioner or Resident Commissioner-Elect, or an officer or employee of any branch of the Federal Government or the District of Columbia.

(4) That the compensation was not provided by law for the proper discharge of the person's official duties.

b. Commentary. Generally, the same comments and definitions apply as those made under the preceding paragraph 3-10. As with the offense of bribery or offering illegal gratuities, an offense under this section is complete when the offer or promise is made.

c. Example. A government contractor asks a civilian Federal employee to represent the contractor's firm in contract negotiations with another agency, and offers the employee a fee for doing so.

3-12. Illegal Activities in Connection with Claims and Other Matters Affecting the Government, 18 USC 205

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 92 (paragraphs 2-6 and 6-1, AR 600-50).

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is an officer or employee of any branch of the Federal Government or the District of Columbia.

(2) That the subject acted as an agent or attorney in prosecuting a claim against the United States (or received a gratuity or share of such claim in consideration of his assistance) or acted as an agent or attorney for anyone in any matter in which the United States is a party or has a direct and substantial interest.

(3) That the subject's actions were not within the proper discharge of his official duties.

b. Commentary.

(1) As with Section 203, paragraphs 3-10 and 3-11, above, this offense is distinguished from bribery under Section 201 in that the matter in which the Federal employee acts need not be related to his Federal position.

(2) An offense under this section is distinguished from one under Section 203 in that there is no necessity to show compensation or an agreement for compensation. While Section 203 is aimed at the solicitation of compensation, rather than the actual rendering of services (see paragraph 3-10b, above) Section 205 is aimed at the rendering of services, even if done without compensation.

(3) This section applies to "special government employees," as defined in paragraph 3-1k only if the matter in which the employee acts involves a specific party or parties and is a matter 1) in which he has at any time participated personally and substantially as a government employee, or, in the case of a special employee who has served more than 60 days in the preceding year, 2) which is pending in the department or agency in which he served or is serving. Nor does this section apply to an employee who is acting for his parents, spouse, child or any person for whom, or for any estate for which, he is serving as a fiduciary, unless he has participated personally and substantially in the particular matter as a Federal employee.

(4) This section also does not apply to an employee who acts without compensation as an agent or attorney for any other person who is subject to

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disciplinary, loyalty, or other personnel administration proceedings in connection with those proceeding, if such actions would not be inconsistent with the faithful performance of his assigned duties.

(5) This section does not apply to enlisted members. Conduct that would otherwise violate this section which is committed by an enlisted member in a position of trust and responsibility with respect to procurement or acquisitions, violates paragraph 6-2b(1)(a) of AR 600-50, and is a violation of Article 92.

(6) Finally, this section does not apply to retired officers while not on active duty (recall) or otherwise serving as an officer or employee of the United States.

(7) The general definition of "matter" applies to this section, except that this section additionally applies to any proceeding in any court as well as before any department, agency, court-martial, officer, or commission.

c. Examples.

(1) A DA civilian represents a fellow worker in a grievance proceeding within the agency and charges the fellow employee a \$100 fee for doing so. (There would be no violation if the representation was performed without compensation.)

(2) An attorney-advisor employed by the Federal Government represents his brother-in-law in a personal injury suit against the United States.

3-13. Conflict of Interest on the Part of Former Officers or Employees
(Permanent ban), 18 USC 207(a)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None, since this section only applies to former employees.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject has formerly been an officer or employee of the executive branch, an independent agency, or the District of Columbia.

(2) That the subject, after his employment had ended, acted as an agent or attorney on behalf of, or otherwise represented, a person other than the United States.

(3) That the subject did so by making a formal or informal appearance before, or, with the intent to influence, by making an oral or written communication on behalf of the other person to:

(a) Any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or to any officer or employee thereof, and

(b) Did so in connection with any matter involving a specific party or parties and in which the United States or the District of Columbia is a party or has a direct or substantial interest, and

(c) The matter was one in which the former employee participated personally and substantially while in his former Federal position.

(4) That the subject did so knowingly.

b. Commentary.

(1) This provision does not apply to former employees of either the legislative or judicial branch of the Federal Government.

(2) This provision establishes a permanent bar against former executive branch employees acting on behalf of someone else in a matter in which they were involved while employed by the Government. It is also a Government-wide bar and prohibits the former employee from representing someone before any agency if the subject matter of the action involves a matter in which the individual participated personally and substantially while employed by the Government.

(3) However, by a specific proviso in the statute, this section does not apply with respect to communications made solely for the purpose of furnishing scientific or technical information under procedures acceptable to the department or agency concerned. Acceptable procedures for the Army are set forth in paragraphs 5-5 and 5-6 of AR 600-50. The distinction is that in this situation the individual is merely providing information as opposed to actively representing or being an advocate for someone else.

(4) Similarly, this provision does not prohibit an individual from giving testimony as a witness when the testimony is given under oath, or from making a statement that is required to be made under the penalty of perjury.

(5) In addition to the criminal punishments for this offense, the individual may be administratively debarred from representing anyone on any matter involving the same government agency for a period of up to five years.

c. Examples.

(1) (An actual case): A project officer, who was a lieutenant colonel on active duty, was actively involved in developing a program for computerizing MILPERCEN records and in developing specifications for the ADP contract to implement the program. After the contract was let, he retired and went to work for the successful bidder and later represented the contractor in negotiations with the contracting officer over performance of the contract. This is typical of the "revolving door" situation that frequently arises in government contracting. However, there is no violation of this section unless the former employee actively represents the new civilian employer before a government agency. In this example, had the retired officer merely gone to work for the contractor and not represented the contractor in contract negotiations there would have been no violation of this section.

(2) An attorney for the Justice Department assists in investigating and developing a civil or criminal case against an individual or corporation and then leaves his government position in order to represent the individual or corporation in litigation with the Government.

(3) An attorney in the CID Command provides legal advice to the command in an investigation of a civilian contractor and later defends the contractor in a prosecution brought by the Department of Justice.

3-14. Conflict of Interest on the Part of Former Government Employees
(Violation of 2-Year Ban on Representation), 18 USC 207(b)(i)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is a former officer or employee of the Executive branch, an independent agency, or the District of Columbia who left Federal service on or after 1 January 1979.

(2) That the subject, after his employment had ended, acted as an agent or attorney for, or otherwise represented a person other than the United States.

(3) That the subject did so by making a formal or informal appearance before, or with intent to influence, by making an oral or written communication on behalf of the other person to:

(a) Any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(b) Did so in connection with any matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct or substantial interest, and

(c) The matter was one actually pending under his official responsibility as an officer or employee within a period of one year prior to termination of such responsibility.

(4) That the subject did so within two years after his employment ceased.

(5) That the subject acted knowingly.

b. Commentary.

(1) The two main distinctions between this section and Section 207(a) is the length of the post-employment disqualification and the extent of the former employee's participation in the matter while employed. Section 207(a) imposes a permanent disqualification on former employees when the employee participated "personally and substantially" in the matter while occupying his Federal position. Section 207(b)(i) imposes an additional two-year disqualification with respect to matters that were pending under the former employees official responsibility during his final year of service,

even though the former employee did not "personally and substantially" participate in the matter. This includes, for example, work performed by subordinates of an office or division chief who is ultimately responsible for the matter.

(2) This provision was enacted as an amendment to Section 207, and did not become effective until 1 July 1979. Accordingly, it only applies to individuals who left Federal service on or after that date. Former employees who left Federal service prior to that date are still subject to the permanent disqualification of Section 207(a) with respect to matters in which they personally and substantially participated, however.

(3) As with Section 207(a), this section does not apply to former employees of the legislative or judicial branches. Nor does it apply to communications made solely for the purpose of furnishing scientific or technical information, or to testimony or statements made under oath. See generally the comments under paragraph 3-13.

c. Example. On 1 September 1979, a supervisor signed off on a report prepared by one of his subordinates on the feasibility of obtaining a particular type of equipment for his agency. On 1 July 1980, the supervisor left his Federal employment in order to go to work for the contractor who subsequently received the contract for the equipment that had been evaluated in the report. On 31 August 1981, the former employee writes a letter on behalf of the contractor to the agency urging them to renew the contract. This would violate the section. The former supervisor would be barred from engaging in such representational activities until 30 June 1982 with respect to the report or any other matter which was pending within his official responsibilities between 30 June 1979 and 1 July 1980.

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3-15. Conflict of Interest by Former Senior Employees, 18 USC 207(b)(ii)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is a former senior employee of the Executive branch, an independent agency, or the District of Columbia.

(2) That the subject, after his employment had ended, represented, aided, counseled, advised, consulted, or assisted, in representing a person other than the United States.

(3) That the subject did so by his personal presence at any formal or informal appearance before:

(a) Any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(b) Did so in connection with any matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(c) In which he participated personally and substantially as an officer or employee.

(4) That the subject did so within two years after his employment had ceased.

(5) That the subject did so knowingly.

b. Commentary.

(1) This provision is distinguished from Section 207(a) (see paragraph 3-13) by the broader scope of the disqualification. Under Section 207(a), a former employee who has participated personally and substantially in a matter while a government employee is permanently barred from representing any other person with respect to that matter. Under this section, however, a senior employee who has participated personally and substantially in a matter is barred for two years from making any appearance on behalf of another with respect to the matter, or from providing any assistance whatsoever in any appearance by another.

(2) As with both Section 207(a) and 207(b)(i), this section does not apply to former employees of the legislative or judicial branches. Nor does it apply to communications made solely for the purpose of furnishing scientific or technical information, or to testimony or statements made under oath. See generally the comments under paragraph 3-13.

c. Example. A three-star general participates personally and substantially in the awarding of a research and development contract. He retires from the Army and goes to work for the contractor. Within two years after his retirement, he accompanies the contractor's attorney to a meeting with Army representatives to discuss the progress being made on the contract. During the meeting he consults privately several times with the attorney. This is a violation of this section even if he never says a word during the discussions between the attorney and the Army representatives.

3-16. *Illegal Communications by Former Senior Employees*, 18 USC 207(c)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is a former senior employee of the Executive branch, an independent agency, or the District of Columbia.

(2) That the subject acted as an agent or attorney for, or otherwise represented a person other than the United States.

(3) That the subject did so in any formal or informal appearance before, or with intent to influence, in any oral or written communication on behalf of another to:

(a) The department or agency in which he had served, or to any officer or employee thereof, and

(b) Did so in connection with any matter, and

(c) The matter is pending before such department or agency or is one in which such department or agency has a direct and substantial interest.

(4) That the subject did so within one year after his employment had ceased.

(5) That the subject did so knowingly.

b. Commentary.

(1) This provision establishes a one year "cooling off" period for former senior employees, during which time they are prohibited from even communicating with their former agency on behalf of another in any matter that is pending before that agency or in which the agency has a direct and substantial interest. It is irrelevant whether the former senior employee was involved in any way with the particular matter while in the Federal service, either personally or as a matter within his former official responsibility.

(2) This section does not apply to a former special government employee who served for less than 60 days in a given calendar year. This section also does not apply to appearances or communications or representations by a former senior employee in his capacity as an elected official of a State or local government, or whose principal occupation or employment is with a State or local government. Nor does it apply to a former senior employee whose

principal occupation or employment is with an accredited degree-granting institution of higher education, or a non-profit hospital or medical research organization, when the appearance or communication is on behalf of that institution, hospital, or organization.

(3) As with the other subsections of Section 207, this provision does not apply to scientific or technical communications. Nor does it prevent the former senior employee from giving testimony under oath or from making a statement required to be made under penalty of perjury. See generally paragraph 3-13b.

(4) One distinction between this section and the previously discussed sections of 207 is that 207(c) is not limited to matters involving a specific party or parties, but includes rulemaking as well.

(5) Finally, this section does not apply to an appearance or communication by the former senior employee on a personal or individual matter, such as personal income taxes or pension benefits. Nor does it prevent a former senior employee from making a statement of his own personal opinion or making or providing a statement based upon the former senior employee's own special knowledge in the particular area that is the subject matter of the statement, provided that he receives no compensation for the statement.

c. Example. A retired senior Army officer, whose active duty position had nothing whatsoever to do with personnel law, within one year after his retirement, represents a DA civilian employee union in labor negotiations at a local installation.

3-17. Illegal Activities by Partners of Federal Officers or Employees,
18 USC 207(g)

Maximum Punishment: 1 year and a \$5,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is a partner of an officer or employee in the executive branch, an independent agency, or the District of Columbia.

(2) That the subject acted as an agent or attorney for a person other than the United States, before:

(a) Any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(b) Did so in connection with any matter in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(c) In which the officer or employee has participated personally and substantially.

b. Commentary.

(1) This provision is designed to reach the activities of business partners of Federal employees.

(2) This provision is not restricted to matters involving specific parties, but applies to general rulemaking as well.

c. Example. A Federal employee acts personally and substantially in a procurement action. One of the bidders for the contract is a partnership involving the employee and two of his associates. One of the employee's partners represents the firm in the procurement action, signs the firm's bid, etc. The partner thereby violates this section. (The Federal employee has also violated 18 USC 208, paragraph 3-18, below.)

3-18. Acts Affecting a Personal Financial Interest, 18 USC 208(a)

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 92 (paragraphs 2-1c and 6-1, AR 600-50).

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is an officer or employee of the Executive branch, an independent agency, or the District of Columbia.

(2) That the subject participated personally and substantially as an officer or employee in a matter.

(3) That the matter was one in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as an officer, director, trustee, or employee, or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment, has a financial interest.

(4) That the subject knew of the conflicting interest at the time of his participation in the matter.

b. Commentary.

(1) "Officer or employee" does not include enlisted members of the Armed Forces. However, conduct which would otherwise violate this provision, when committed by an Army enlisted member occupying a position of trust and responsibility with regard to procurement or acquisitions, violates paragraph 6-2b(1)(b), of AR 600-50 and, thereby, Article 92, UCMJ.

(2) This statute contains a specific exception that states that the section will not apply if the officer or employee first advises the official who is responsible for the employee's position of the nature of the conflict, makes a full disclosure of the financial interest, and receives in advance a written determination by the official that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services. Nor will the section apply if the financial interest has been determined to be so insubstantial that employee need not comply with the disclosure procedure. This determination must be published in the Federal Register to be effective.

c. Examples.

(1) (An actual case): A project officer, who was a lieutenant colonel on active duty, was involved personally and substantially in developing a program for the computerization of MILPERCEN records and developing

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specifications for a proposed contract to carry out the program. While in the latter stages of developing this program, he interviewed for employment with several firms who had requested copies of the RFP and were involved in bidding on the contract. Indeed, he was listed as a "key person" in the proposal submitted by one of the bidders even though he was still on active duty at the time the proposal was submitted.

(2) The contracting officer awards a contract to a corporation of which his spouse is president.

(3) (An actual case): A GS-11, Director of Training at an Army activity, was personally and directly involved in leasing and terminating leases on livestock obtained from a non-profit corporation in which he served as a director. Moreover, he would terminate leases on particular livestock in which he was interested so that the animals could be sold at auction, where he could purchase them for his own private business. The proceeds from the sales went to the non-profit corporation. He also arranged for training to take place at his own private ranch for which he was reimbursed from non-appropriated funds.

3-19. Receiving Dual Compensation, 18 USC 209(a)

Maximum Punishment: 1 year and a \$5,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchhook Reference: None.

a. Elements of the Offense.

(1) That the subject is an officer or employee of the Executive branch, an independent agency, or the District of Columbia.

(2) That the subject received salary or supplementation of his Federal salary as compensation for his services as an officer or employee.

(3) That the subject received the salary or supplementation from a source other than the Federal government, or a state or local government.

b. Commentary.

(1) "Officer or employee" does not include enlisted members of the military. However, conduct that would otherwise violate this section, if committed by an Army enlisted person holding a position of trust and responsibility with respect to procurement or acquisitions, violates paragraph 6-2b(1)(c) of AR 600-50, and, thereby, Article 92, UCMJ.

(2) This section does not prohibit continued participation by a Federal employee in a pension, retirement, group insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer of the Federal employee. Nor does it prohibit outside employment by Federal employees. The section is only violated when the salary or supplemental salary is paid for services rendered to the Federal Government. Consequently, a violation of this section will almost always result in a violation of Section 201(g) as well.

(3) With respect to outside employment by DA personnel, see paragraph 2-6 of AR 600-50. Paragraph 2-6 is often supplemented by local command or installation regulations which may impose additional restrictions on outside employment, and such regulations will usually establish an approval procedure by which military personnel must first obtain approval of their chain-of-command before engaging in outside employment. Often the supplementary provisions are specifically made punitive in nature. Accordingly, violation of such local regulations, if punitive, would be a violation of Article 92, UCMJ.

c. Example. (An actual case): The Army operated a training facility for Olympic athletes in a particular sport. Accordingly, the Army employed several coaches for the athletes. However, the pay grade authorized for those positions was not sufficiently high to attract quality coaching personnel. As a result, a non-profit organization, which supported and promoted the sport, supplemented the income of the coaches.

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3-20. Paying Dual Compensation, 18 USC 209(a)

Maximum Punishment: 1 year and a \$5,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense. That the subject paid or contributed to, or supplemented the salary of a Federal officer or employee, in circumstances that made its receipt a violation of 18 USC 209(a) (see paragraph 3-19) by the officer or employee who received it.

b. Commentary. See the Commentary to paragraph 3-19, above. Violation of this section will almost always result in a parallel violation of Section 201(f).

c. Example. Same example as in the preceding paragraph 3-19.

3-21. Offering to Procure Appointive Public Office, 18 USC 210

Maximum Punishment: 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject paid, offered, or promised something of value to a person, firm, or corporation.

(2) That the subject did so in consideration of the use or the promise to use any influence to procure an appointive Federal office.

b. Commentary. The payment or offer may be made to any person, either inside or outside of the Federal Government. Consequently, this section is broader than the bribery statute (see Example 2, below). The "office" need not be one that is in existence at the time of the offer. The offense may involve the creation of an office.

c. Examples.

(1) An individual offers a civilian personnel officer a sum of money to use his influence as CPO to appoint the son of the individual to a Federal position.

(2) An individual offers a sum of money to his neighbor, who is a personal friend of a civilian personnel officer, in return for the neighbor's promise to talk to his CPO friend about appointing the individual's daughter to a Federal position.

3-22. Acceptance or Solicitation to Obtain Appointive Public Office,
18 USC 211

Maximum Punishment: 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

- (1) That the subject solicited or received something of value.
- (2) That the subject did so in consideration of the promise of support or use of influence in obtaining an appointive Federal office for any person.

b. Commentary.

(1) Generally, the same comments and definitions as under the preceding paragraph apply to this offense. A violation of this section, when committed by a public official, may also constitute bribery in violation of Section 201(c).

(2) The thing received need not be a personal emolument. It may also be a political contribution.

c. Examples.

(1) An Army officer offers to help to secure a West Point appointment for the son of a friend in return for use of the friend's retirement cottage for a vacation.

(2) Same situation, except that the offer is made by a friend of a Senator, rather than a military officer. The illegal solicitation may be made by anyone, either in or out of Government.

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3-23. Acceptance or Solicitation of a Fee for Federal Employment, 18 USC 211

Maximum Punishment: 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of Offense.

- (1) That the subject solicited or received something of value.
- (2) That the subject did so in consideration of aiding a person to obtain Federal employment, either:
 - (a) By referring his name to an Executive department or agency, or
 - (b) As a fee because the person has obtained Federal employment.

b. Commentary.

(1) This provision of Section 211 is intended to prohibit an "agency fee" which is typically charged in the public sector by employment agencies for referring prospective employees to an employer.

(2) This section specifically does not apply to such services when rendered by an employment agency pursuant to the written request of an Executive department or agency of the Federal Government.

c. Example. An employment agency which was not given a specific written request for assistance from an agency maintains a file of resumes of individuals seeking Federal employment. It also maintains an active list of Federal job opening and refers appropriate resumes to various agencies, and charges clients a fee for this service.

3-24. Illegal Sales by Retired Officers, 18 USC 281

Maximum Punishment: 2 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is a retired officer of the Armed Forces of the United States.

(2) That the subject represented another in the sale of something to the Government through the department in whose service he holds a retired status.

b. Commentary.

(1) This is a permanent bar against retired officers engaging in selling activity with the branch of service from which they are retired. See paragraph 5-8a(4) of AR 600-50. The Department of Justice has taken the position that this section prohibits the sale of services as well as the sale of goods.

(2) Retired Regular Army officers are required to file and keep current a Statement of Employment (DD Form 1357) with the Finance and Accounting Center, Ft. Benjamin Harrison, Indiana, listing their post-retirement employer. See Appendix B, AR 600-50.

(3) "Selling" includes signing a bid, proposal, or contract; negotiating a contract; contacting an officer or employee of the Government for the purpose of obtaining or negotiating contracts, negotiating or discussing changes in specifications, prices, cost allowances or other contract terms, or settling contract disputes; or any other liaison activity with a view toward consummation of a sale, even though the actual contract is to be negotiated by another person.

(4) This section does not prohibit a retired officer from selling his own services or representing only himself in a sale of goods.

(5) A related civil statute, 37 USC 801(c), prohibits payment of retired pay to a retired regular Army officer for any period within three years after retirement during which he is engaged on behalf of himself or others in selling, contracting, or negotiating for the sale of supplies or war material to DOD, the Coast Guard, the National Oceanic and Atmospheric Administration or the Public Health Service. See paragraphs 5-8a(5) and VI(A)(2)(b) (Appendix G) of AR 600-50. However, this section has been held to only be applicable to sales of tangible property, not services.

(6) This section was replaced by Public Law 87-849, 23 October 1962. However, retired officers were specifically excepted from the repealed statute. Consequently, it now applies only to retired officers.

c. Example. A retired Army officer goes to work for a contractor. He subsequently represents the contractor in bidding on government contracts for the sale of goods to the Army. (Note that there would be no violation of this section if the contract involved the Navy or Air Force.)

3-25. Retired Officers Illegally Prosecuting a Claim, (18 USC 283)

Maximum Punishment: 1 year and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is a retired officer of the Armed Forces of the United States.

(2) That the subject acted as an attorney or agent in prosecuting or assisting another in the prosecution of a claim:

(a) Against the branch of service from which he is retired; or

(b) With which he was directly connected while on active duty.

(3) That the subject did so within two years after his retirement.

b. Commentary.

(1) This is a two-year prohibition, in addition to the other statutory disqualifications discussed earlier (paragraphs 3-13 through 3-16), applicable only to retired officers. Note that the retired officer is disqualified from participating in any claims against the branch of service from which he is retired, regardless of whether or not he had any involvement with the subject matter of the claim while on active duty. See paragraphs 5-8a(2) and (3) of AR 600-50.

(2) This section was replaced by Public Law 87-849, 23 October 1962. However, retired officers were specifically excepted from the repealed statute. Consequently, it now applies only to retired officers.

c. Examples.

(1) A retired Army officer goes to work for a contractor. While on active duty the officer served in the Military Police Corps and during his career he was never involved in any Government contracting or procurement. Within two years of his retirement, the officer assists his new employer in making a claim against the Army for additional money allegedly due as a result of a government change order on a contract.

(2) A retired Army officer goes to work for a contractor. While on active duty the officer was directly involved in developing the specifications for a contract for software to be used by each of the Armed Services. Within two years after his retirement, the retired officer assists his new employer in prosecuting a claim against the Navy resulting from a contract to supply the software to the Navy.

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3-26. Disclosure of Confidential Information, 18 USC 1905

Maximum Punishment: 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject was or is an officer or employee of the United States, or any department or agency thereof.

(2) That the subject published, divulged, disclosed, or in some other manner made known certain information.

(3) That the information was acquired by the subject:

(a) In the course of the subject's employment or official duties; or

(b) By means of an examination or investigation made by the department or agency for which he works; or

(c) By means of a return, report, or record made to or filed with the agency or department.

(4) That the information related to the trade secrets, processes, operation, style of work, apparatus, identity, confidential statistical data, amount or source of income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.

(5) That the disclosure was not authorized by law.

b. Commentary. This statute is intended, among other things, to ensure the confidentiality of information acquired in the contracting process. There need be no intent to defraud or expectation of gain. The disclosure itself constitutes the offense.

c. Example. A contracting officer issues a request for proposals for a research and development contract. He receives several proposals, which he reviews. He then enters into discussions leading to best and final offers with those offerors determined to be in the competitive range. In an effort to obtain concessions from the offerors, the contracting officer tells Offeror A that his price is too high, "Offeror B has offered to do the job for \$50,000 less than you have." He later tells Offeror B that he (the contracting officer) likes B's proposal, but thinks it could be improved even further if B would incorporate a manufacturing process contained in C's proposal, which he then explains to B. Both of these disclosures violate this section.

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3-27. Unauthorized Employment, 18 USC 1916(1)

Maximum Punishment: 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 108.

Related MJ Benchbook Reference: Paragraph 3-66.

a. Elements of the Offense.

(1) That the subject caused an individual to be employed in the Civil Service in an Executive department at the seat of Government.

(2) That the individual was paid out of an appropriation that was not made for the services actually rendered.

b. Commentary. This provision was designed to ensure that Congress controlled the number of Federal employees hired. It prevents an agency head from creating new employment positions out of appropriations not intended for that purpose.

c. Example. An agency head utilizes travel funds to pay for the hiring of a personal secretary.

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3-28. Failure to Return Lapsed Salaries, 18 USC 1916(2)

Maximum Punishment: 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 108.

Related MJ Benchbook Reference: Paragraph 3-66.

a. Elements of the Offense. That the subject failed to turn in to the United States Treasury money accruing from lapsed salaries or from unused appropriations for salary.

b. Commentary. Self-explanatory.

c. Example. An authorized position remains open for several months and, accordingly no salary is paid out of appropriations. Near the end of the fiscal year, the supervisor uses the money to cover a shortage in TDY funds.

Chapter 4

Theft, Loss, Misuse, or Wrongful Disposition of Government Property

4-1. Larceny of Government Property, 18 USC 641

Maximum Punishment: If the property stolen exceeds the value of \$100, 10 years and a \$10,000 fine. If the value of the property stolen does not exceed \$100, 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 108 or 121, as appropriate.

Related MJ Benchbook References: Paragraphs 3-66, 3-90, and 3-91.

a. Elements of the Offense.

(1) That the subject either:

(a) Wrongfully embezzled, stole, purloined, or knowingly converted something of value; or

(b) Without authority sold, conveyed, or disposed of something of value.

(2) That the property either:

(a) Belonged to the United States; or

(b) Was made or being made under a contract with the United States.

(3) That the subject acted knowingly and intentionally.

b. Commentary.

(1) Unlike Article 121 and other provisions of the UCMJ, this provision in the US Code makes no distinction between wrongful appropriation and larceny, or other wrongful dispositions of property. Rather, it covers all forms of wrongfully taking, obtaining, withholding, or using government property. Any misappropriation or misapplication violates this section, regardless of whether the subject intended to deprive the Government of the property permanently or only temporarily.

(2) "Property" includes anything of value. It includes both tangible and intangible personal property. Accordingly, it includes the theft of information, computer time, computer data, and the like. However, it does not include real property.

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(3) While one Federal circuit court has held that 18 USC 641 does not apply to services, a second Federal circuit court has held that services are subject to the statute. Compare Chappel v United States, 270 F.2d 474 (9th Cir. 1959) with Burnett v United States, 222 F.2d 426 (6th Cir. 1955). Both cases involved the use of the services of military subordinates for private benefit. Chappell's conviction was reversed, but Burnett's was affirmed. Other Federal courts have questioned and criticized the Chappel case. Since there seems to be no persuasive reason for limiting the broad language of 18 USC 641, agents should continue to title subjects, when appropriate, for larceny of services under this section. (However, because of the differences in statutory language, Article 121 of the UCMJ does not apply to services, but rather only to tangible personal property.)

(4) If faced with a situation in which government employees' time is used for a private or non-official purpose, agents should also consider the application of other criminal statutes. If the subject is civilian, consideration should be given to 18 USC 1001, since typically time cards or other government work records or documents will falsely reflect that the employee was working on government business during the time his services were being misappropriated. If the subject is military, since Article 121 does not apply to theft of services, consideration should be given to Article 92. Misuse of government property and services is covered by paragraphs 2-4 and 6-2a(4) of AR 600-50. Additionally, in appropriate circumstances, theft of the services may be a violation of Article 134. See United States v. Abeyta, 12 MJ 507 (ACMR 1981) (theft of taxi services). Finally, regardless of whether the subject is military or civilian, consideration should be given to the application, if appropriate, of State law under the Assimilative Crimes Act.

(5) "Value" means the face, par, market value, or cost price, either wholesale or retail, whichever is greater.

(6) This section is also violated even if the United States is not the legal owner of the property. Property is considered to be property of the United States if the United States has a superior possessory interest in the property, such as evidence in a property room. The section specifically includes any property made or being made under contract for the United States. It also includes property of non-appropriated fund instrumentalities. Finally, 32 USC 710(a) specifically states that military property issued by the United States to the National Guard remains the property of the United States. Thus, a theft of such property would violate 18 USC 641.

(7) The subject need not know that the property is government property at the time of the theft as long as he had the necessary criminal intent.

c. Examples.

(1) An employee of a contracting office, using a government leased duplicating machine and photo copying paper, copies bid proposals and other

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information submitted by several bidders for a government contract. He then returns the original files but provides the copies to a competitor-bidder.

(2) An individual steals a .45 caliber handgun from the interior of a private automobile. Even if the individual did not know that the handgun belonged to the United States, a violation of this section has occurred if the weapon in fact belonged to the United States.

(3) A crate of .45 caliber handguns is stolen from the civilian manufacturer. At the time of the theft, the handguns were being prepared for shipment to a US Army depot, pursuant to a contract for production of the weapons. A violation of this section has occurred even though the United States did not own the weapons and even though the thieves might not have known that the weapons were under contract for the United States.

4-2. Receiving or Concealing Stolen Government Property, 18 USC 641

Maximum Punishment: If the value of the property is more than \$100, 10 years and a \$10,000 fine. If the value of the property does not exceed \$100, not more than 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-179.

a. Elements of the Offense.

(1) That certain property was received or concealed by the subject, or retained by him with the intent to convert it to his use or gain.

(2) That the property either:

(a) Belonged to the United States, or

(b) Was made or being made under a contract with the United States.

(3) That the subject knew at the time he received, concealed, or retained the property that the property had been embezzled, stolen, purloined, or converted.

b. Commentary. See the Commentary for the preceding paragraph 4-1b.

c. Example. In the preceding Example 1 in paragraph 4-1c, the bidder who received the stolen information would be guilty of a violation of this section.

4-3. Failure to Account for Public Money, 18 USC 643

Maximum Punishment: If the amount embezzled is more than \$100, 10 years and a fine equal to the amount embezzled. If the amount embezzled does not exceed \$100, not more than 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 108, 121, or 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-66, 3-68, 3-90 and 3-91.

a. Elements of the Offense.

(1) That the subject was or is an officer, employee, or agent of the United States.

(2) That in that capacity the subject received public money which he was not authorized to retain as salary, pay, or emolument.

(3) That the subject failed to render a proper account for the funds as provided by law.

(4) That the subject acted willfully and with criminal intent.

b. Commentary.

(1) The thrust of this offense is the failure to properly account for money entrusted to the care of an employee. A custodian of funds is required both to execute any required forms and to deliver any money he is charged with, less money paid out for authorized purposes. As long as he is unable to either deliver cash that he has not paid out for governmental purposes, or satisfactorily explain the reason why he cannot account, he has violated this section. See United States v. Doyle, 3 USCMA 585, 14 CMR 3 (1954) (Opinion of Latimer, J.).

(2) Although the statute does not specifically mention intent, it has been held that criminal intent is required for a conviction under this statute. The statute is intended to shift the burden of going forward with evidence to explain the loss. Once it is shown that the subject received public money and cannot account for all of it, a prima facie case is made out. The burden then shifts to the subject to explain the shortage. See 18 USC 3487.

(3) The phrase "as provided by law" includes Army regulations, such as finance and accounting regulations governing the disbursement, payment, and accounting for funds.

c. Example. A pay officer is unable to account for a shortage in the funds remaining after making all authorized payments, and he cannot provide an adequate explanation for the shortage.

4-4. Misuse of Public Funds by Custodians, 18 USC 648

Maximum Punishment: If the amount embezzled exceeds \$100, 10 years and a fine equal to the amount embezzled. If the amount embezzled does not exceed \$100, 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 121.

Related MJ Benchbook References: Paragraphs 3-90 and 3-91.

a. Elements of the Offense.

(1) That the subject was or is an officer or other person charged by statute with the safe-keeping of public money.

(2) That in that capacity the subject loaned, used, converted to his own use, deposited in any bank, or exchanged for other funds some portion of the public monies entrusted to him for safe-keeping.

(3) That the subject acted without authority to do so.

b. Commentary. There need be no loss to the Government. Any misapplication of public money by a custodian violates this section.

c. Example. The cashier in the finance and accounting office, whose job it is to disburse funds for official business, cashes the personal check of a friend, without authority, as a personal favor. This is an offense even though the United States may have suffered no loss.

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4-5. Failure to Deposit Federal Monies, 18 USC 649

Maximum Punishment: If the amount embezzled exceeds \$100, 10 years and a fine equal to the amount embezzled. If the amount embezzled does not exceed \$100, 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 121.

Related MJ Benchbook References: Paragraphs 3-90 and 3-91.

a. Elements of the Offense.

(1) That the subject had possession or control of money of the United States.

(2) That in that capacity the subject failed to deposit it with a public depository of the United States when required by the Secretary of the Treasury or other agency head.

(3) That the subject's failure was willful and intentional.

b. Commentary. Self-explanatory.

c. Example. Self-explanatory.

4-6. Disbursing Officer Paying Less Than Lawful Amount, 18 USC 652

Maximum Punishment: If the amount withheld exceeds \$100, two years and a fine in an amount double the amount wrongfully withheld. If the amount does not exceed \$100, one year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 121 or 132(3).

Related MJ Benchbook References: Paragraphs 3-90, 3-91, and 3-120.

a. Elements of the Offense.

(1) That the subject was or is a person charged with the payment of appropriated funds.

(2) That in that capacity the subject paid to another clerk or employee of the United States a sum less than provided by law.

(3) That the subject required the employee to give a receipt or voucher in an amount greater than actually paid to and received by the employee.

(4) That the subject acted willfully and intentionally.

b. Commentary. The purpose of the statute is to insure that funds are properly paid out.

c. Example. A cashier in a finance and accounting office obtains a soldier's signature on a travel voucher, but actually pays him less than the amount indicated on the voucher.

4-7. Misuse of Public Funds, 18 USC 653

Maximum Punishment: If the amount withheld exceeds \$100, 10 years and a fine in an amount equal to the value of the property embezzled. If the amount does not exceed \$100, 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 121.

Related MJ Benchbook References: Paragraphs 3-90 or 3-91.

a. Elements of the Offense.

(1) That the subject was or is a disbursing officer or acting disbursing officer.

(2) That in that capacity the subject converted, loaned, deposited, transferred, or applied some portion of the public money entrusted to him otherwise than as provided by law.

b. Commentary. Self-explanatory.

c. Examples.

(1) A pay officer withdraws public funds for his personal use. This constitutes an offense even though he had no intention of defrauding the Government and repaid the amount in full.

(2) An Army officer in charge of making payments on a government contract pays out money on that account even though he knows that the contractor's claim for payment is fraudulent because the contractor submitted false labor expenses.

4-8. Conversion of Personal Property by Federal Officers or Employees,
18 USC 654

Maximum Punishment: If the amount withheld exceeds \$100, 10 years and a fine in an amount equal to the value of the property embezzled. If the amount does not exceed \$100, 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 121.

Related MJ Benchbook References: Paragraphs 3-90 and 3-91.

a. Elements of the Offense.

- (1) That the subject is a Federal officer or employee.
- (2) That the subject wrongfully converted to his own use the property of another.
- (3) That the property had come into his possession or under his control while he was in the execution of his office.

b. Commentary. The purpose of the statute is to insure integrity on the part of government employees who deal with private property.

c. Examples.

(1) A CID agent apprehends a civilian and when conducting a search incident to the apprehension discovers \$300 on the individual which he seizes as evidence. When the agent executes the DA Form 4137, he only records receipt of \$200 and pockets the other \$100.

(2) A postal clerk steals items out of the mail that he is charged with delivering.

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4-9. Larceny of Personal Property Within the Special Maritime and Territorial Jurisdiction, 18 USC 661

Maximum Punishment: If the property taken is of a value in excess of \$100, 5 years and a \$5,000 fine. If of a value not exceeding \$100, 1 year and a \$1,000 fine.

Extraterritorial: No.

Related UCMJ Offense: Article 121.

Related MJ Benchbook References: Paragraphs 3-90 and 3-91.

a. Elements of the Offense.

- (1) That the subject took and carried away personal property of another.
- (2) That he did so with the intent to steal or purloin.
- (3) That the offense occurred within the special maritime and territorial jurisdiction of the United States.

b. Commentary. See the Glossary for the definition of "special maritime and territorial jurisdiction of the United States." For purposes of Title 18, this includes, but is not limited to, any land reserved or organized for the use of the United States and under the exclusive or concurrent jurisdiction of the United States or any other place organized or purchased from a State "for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 18 USC 7.

c. Example. An individual steals the purse of a government employee from the desk in her office on an Army installation.

4-10. Receiving Stolen Property Within the Special Maritime and Territorial Jurisdiction, 18 USC 662

Maximum Punishment: 3 years and a \$1,000 fine if the property received exceeds \$100 in value, or 1 year and a \$1,000 fine if the property does not exceed \$100 in value.

Extraterritorial: No.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-179.

a. Elements of the Offense.

(1) That certain property belonging to another was bought, received, or concealed by the subject.

(2) That the property was bought, received, or concealed within the special maritime and territorial jurisdiction of the United States.

(3) That the property bought, received or concealed had been feloniously taken, stolen, or embezzled from any other person.

(4) That at the time the property was bought, received, or concealed by the subject, he knew that the property had been so taken, stolen, or embezzled.

b. Commentary.

(1) It does not matter where the property was initially stolen or wrongfully taken. It need not have been stolen within the special maritime and territorial jurisdiction, as long as it was received, bought, or concealed by the subject within the special maritime and territorial jurisdiction.

(2) Knowledge on the part of the subject may be established circumstantially such as by demonstrating that he obtained the property at a fraction of its market value, or under other circumstances indicating that the subject knew that the property had been wrongfully acquired.

c. Example. (An actual case): An individual was found on an Army installation in possession of items that had been stolen in three separate thefts. He gave contradictory statements as to how he obtained the property, had bought the items for half their wholesale price, had sold some of the items for a substantial profit, and had large quantities of the items in their original packages.

4-11. Wrongful Solicitation or Embezzlement of Gifts, 18 USC 663

Maximum Punishment: 5 years and a \$5,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 121.

Related MJ Benchbook References: Paragraphs 3-90 and 3-91.

a. Elements of the Offense. That the subject either:

(1) Solicited a gift of money or other property and represented to the prospective donor that the gift was being solicited for the use of the United States; and

(2) Had the intention of embezzling, stealing, or purloining such gift;
or

(3) Came into possession of money or property which had been donated for the use of the United States; and

(4) Embezzled, stole, or purloined such money or property, or converted the same to any other use or purpose.

b. Commentary. The thrust of this offense is obtaining the property under false pretenses by falsely representing that the solicited gift is for the United States. Note that this section defines two distinct offense of either wrongful solicitation of gifts or embezzlement of gifts.

c. Example. (An actual case): The Army operated a training center for athletes for an Olympic event. Horses were needed for the training, since horseback riding is part of the Olympic event. The GS-11 Director of Training at the training center received telephone calls at his government telephone in his government office at the training center from prospective horse donors. While representing himself to be the Director of Training and an employee of the United States, he solicited and encouraged prospective donors to donate their horses to the Army's training center. Forms were even provided to prospective donors upon which they could formally donate their horses to the United States. Once the horses were actually donated, they were systematically misappropriated and diverted to a private association of which the GS-11 Director of Training was an officer. The horses were then sold at auctions and the proceeds from the sales went into the treasury of the private association.

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4-12. Insufficient Delivery of Money or Military Property, 18 USC 1023

Maximum Punishment: 10 years and a \$10,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 121 or 132(3).

Related MJ Benchbook References: Paragraphs 3-90, 3-91, and 3-120.

a. Elements of the Offense.

(1) That the subject had charge, possession, custody, or control of certain money or property.

(2) That the property was military or naval property or intended to be military or naval property.

(3) That the subject delivered to a person having authority to receive such property, a certain amount of the property.

(4) That the amount of property so delivered was less than that for which the subject received a certificate or receipt.

(5) That the subject had the intent to defraud the United States or the intent to conceal such money or other property.

b. Commentary. The property involved may either already be in the military system and on property books, or it may be property intended for use by the military.

c. Example.

(1) A contractor who is under contract to deliver 100,000 rounds of ammunition knowingly and intentionally delivers only 90,000 rounds, even though the contractor received payment for delivery of a full 100,000 rounds.

(2) A supply sergeant, in an effort to make up inventory shortages, deceives soldiers into signing for TA-50 items not actually issued to the soldiers.

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4-13. Wrongful Purchase or Receipt Military Property, 18 USC 1024

Maximum Punishment: 2 years and a \$500.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 108.

Related MJ Benchbook Reference: Paragraph 3-66.

a. Elements of the Offense.

(1) That the subject purchased or received in pledge from any person certain property.

(2) That the property was furnished by the United States to a member of the Armed Forces, National Guard, or Naval Militia.

(3) That at the time the property was purchased or received, the subject knew or had reason to believe that the property had been so furnished by the United States.

b. Commentary. The property protected by this section is any military property, such as arms, equipment, ammunition, clothing, military stores, or other property, that has been furnished to a soldier for use in the proper performance of military duties. It protects only property of the United States that has been furnished for military use. It does not cover property actually owned by the soldier. Note that if the individual who sells or gives up the property is a military member, that individual commits a corresponding violation of Article 108, UCMJ.

c. Example. A pawn broker knowingly allows a soldier to pawn his Army issued gas mask at the broker's pawn shop.

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4-14. Misuse of the Franking Privilege, 18 USC 1719

Maximum Punishment: A \$300.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject mailed a private letter, packet, package, or other matter by using an official envelope, label, or indorsement authorized by law.

(2) That the subject thereby avoided payment of postage or registry fee.

b. Commentary. Self-explanatory.

c. Example. An officer uses postage-paid government envelopes to correspond with his realtor concerning the rental of the officer's house located at the officer's former duty station.

4-15. Interstate Transportation of Stolen Property, 18 USC 2314

Maximum Punishment: 10 years and a \$10,000 fine.

Extraterritorial: Yes, to a limited extent. See the Commentary below.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject transported in interstate or foreign commerce certain property.

(2) That the property was of a value of \$5,000.00 or more.

(3) That at the time the property was transported, the subject knew that the property had been stolen, converted, or taken by fraud.

b. Commentary.

(1) "Property" includes any goods, wears, merchandise, securities, or money.

(2) This provision is extraterritorial only to a limited extent. Congress has the power to legislate to protect commerce between the United States and other nations. However, it does not have the authority to protect commerce flowing between other nations. Thus, if a subject who is in Germany transports stolen goods from Germany to the United States, a violation of this section would exist. If, on the other hand, the subject transports the stolen goods between Germany and France, no violation of this section would occur.

(3) The subject need not personally transport the property. It is sufficient if he directly causes the property to be transported.

(4) "In interstate or foreign commerce" means that the property must be transported across state or US territorial lines or between the United States and a foreign country. It need not be transported for a commercial purpose.

c. Example. (An actual case): A captain in Germany stole substantial amounts of military property, mostly TA-50 items, from his unit supply room. He then packaged the items and mailed them to his father (a retired lieutenant colonel) who resided in the United States.

4-16. Receiving or Concealing Stolen Property in Interstate or Foreign Commerce, 18 USC 2315

Maximum Punishment: 10 years and a \$10,000.00 fine.

Extraterritorial: No.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-179.

a. Elements of the Offense.

(1) That the subject either:

(a) Received, concealed, stored, bartered, sold, or disposed of certain property; and

(b) The property was of a value of \$5,000.00 or more; or

(c) Was pledged or accepted certain property as security for a loan; and

(d) The the property was of a value of \$500.00 or more.

(2) That the property was moving as or was a part of interstate or foreign commerce.

(3) That the subject knew that the property had been stolen or unlawfully converted or taken.

b. Commentary. The same definitions as in the preceding paragraph apply.

c. Example. (An actual case): A captain in Germany had stolen substantial quantities of military property, especially TA-50 items, from his unit supply room and had mailed them back to his father, a retired lieutenant colonel, who lived in the United States. The captain's father stored the items in a room at his house before the property was disposed of through undetermined means. The father violated this section.

Chapter 5

Perjury, Fraud, and False Statements

5-1. Falsifying Obligations of the United States, 18 USC 471

Maximum Punishment: 15 years and a \$5,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 123.

Related MJ Benchbook Reference: Paragraph 3-93.

a. Elements of the Offense.

(1) That the subject falsely made, forged, counterfeited, or altered an obligation or security of the United States.

(2) That the subject did so with the intent to defraud.

b. Commentary. See the Glossary for definitions of relevant terms.

c. Example. A DA civilian falsely alters his government paycheck to increase the amount.

5-2. Uttering False, Forged, or Counterfeited Obligations of the United States, 18 USC 472

Maximum Punishment: 15 years and a \$5,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 123.

Related MJ Benchbook Reference: Paragraph 3-94.

a. Elements of the Offense.

(1) That the subject:

(a) Passed, uttered, published, or sold; or

(b) Attempted to pass, utter, publish or sell; or

(c) Brought into the United States; or

(d) Possessed or concealed an obligation or security of the United States.

(2) That the obligation or security had been falsely made, forged, counterfeited, or altered.

(3) That the subject knew that the obligation or security had been so made, forged, counterfeited, or altered at the time the subject took the actions described in subparagraph (1).

(4) That the subject did so with intent to defraud.

b. Commentary.

(1) See the Glossary for definitions of relevant terms.

(2) This offense is a specific intent crime. Before a subject may be titled for this offense in a report of investigation, there must be evidence to establish probable cause to believe that the subject knew that the instrument had been falsely made, counterfeited, altered, or forged, and that with that knowledge the subject attempted to use the instrument to defraud someone.

c. Example. The DA civilian employee in the preceding example attempts to cash the altered paycheck at his bank.

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5-3. Falsely Making, Altering, or Forging a Public Record, 18 USC 494

Maximum Punishment: 10 years and a \$1,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 107, 123, or 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-65, 3-93, and 3-172.

a. Elements of the Offense.

(1) That the subject falsely made, altered, forged, or counterfeited a certain writing.

(2) That the subject did so for the purpose of defrauding the United States.

b. Commentary.

(1) "Writing" includes any bond, bid, proposal, contract, guarantee, security, official bond, public file, affidavit, or other writing.

(2) It is not necessary that the intended fraud be successful. It is sufficient if the subject had the necessary intent at the time he falsely made or altered the document. No actual loss to the United States is required.

(3) See the Glossary for definitions of relevant terms.

(4) Compare paragraph 5-6.

c. Example. A contractor falsified time cards for his employees by inflating the number of hours allegedly worked, thereby increasing his costs on a cost-reimbursement contract.

5-4. Uttering or Publishing a False Public Record, 18 USC 494

Maximum Punishment: 10 years and a \$1,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 123.

Related MJ Benchbook Reference: Paragraph 3-94.

a. Elements of the Offense.

(1) That the subject uttered, published, or possessed with the intent to utter or publish as true, a certain writing.

(2) That the writing was false or had been forged, altered, or counterfeited.

(3) That such forgery, alteration, or counterfeiting had been done with the intent to defraud the United States.

(4) That the subject knew at the time of his utterance, publication or possession that the writing had been so falsified, forged, altered, or counterfeited.

b. Commentary. See paragraph 5-3c, above. Also, compare paragraph 5-7.

c. Example. In the preceding example, the contractor's secretary knowingly takes possession of the doctored time cards in order to prepare the contractor's claim for reimbursement.

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5-5. Transmitting a False Record to the United States, 18 USC 494

Maximum Punishment: 10 years and a \$1,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 132.

Related MJ Benchbook References: Paragraphs 3-115 and 3-116.

a. Elements of the Offense.

(1) That the subject transmitted or presented a certain document or writing at an office or to an officer of the United States.

(2) That the document or writing had been falsified, forged, or counterfeited.

(3) That such falsification, forgery, alteration, or counterfeiting had been done with the intent to defraud the United States.

(4) That the subject knew that the document was so falsified, forged, altered, or counterfeited at the time of the transmittal or presentment.

b. Commentary. See paragraph 5-3c. See the Glossary for definitions of relevant terms. Also, compare paragraph 5-8.

c. Example. In the preceding example, the secretary provides the false time cards and request for reimbursement to the contractor's associate who, knowing of the falsity, nevertheless presents them to the contracting officer for payment.

5-6. Falsely Making or Altering a Document, 18 USC 495

Maximum Punishment: 10 years and a \$1,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 107, 123, or 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-65, 3-93, and 3-172.

a. Elements of the Offense.

(1) That the subject falsely made, altered, forged, or counterfeited a certain writing.

(2) That the subject did so for the purpose of obtaining or receiving money from the United States.

b. Commentary.

(1) "Writing" is an all-inclusive term and includes such documents as a deed, power of attorney, order, certificate, receipt, contract, or any other writing. Compare paragraph 5-3.

(2) The subject's purpose may be to obtain the money for himself, or to enable some other person to obtain the money, either directly or indirectly.

(3) See the Glossary for definitions of relevant terms.

c. Example. A billeting officer falsely executes a statement of non-availability in order to enable another government employee to fraudulently obtain an increased amount of per diem.

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5-7. Uttering or Publishing a False Writing, 18 USC 495

Maximum Punishment: 10 years and a \$1,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 123.

Related MJ Benchbook Reference: Paragraph 3-94.

a. Elements of the Offense.

- (1) That the subject uttered or published as true a certain writing.
- (2) That the writing was false, forged, altered, or counterfeited.
- (3) That the subject knew the writing to be false, altered, forged, or counterfeited at the time of uttering or publishing.
- (4) That the subject intended to defraud the United States.

b. Commentary.

- (1) See the Glossary for definitions of relevant terms.
- (2) Unlike Uttering a False Record under 18 USC 494 (see paragraph 5-4), possession with intent to defraud does not violate this section.

c. Example. Self-explanatory.

5-8. Using a False Writing in Connection with a Claim, 18 USC 495

Maximum Punishment: 10 years and a \$1,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 132(2)(A).

Related MJ Benchbook Reference: Paragraphs 3-115 and 3-116.

a. Elements of the Offense.

(1) That the subject transmitted or presented a certain writing at an office or to an officer of the United States.

(2) That the writing was presented or transmitted in support of, or in relation to, any account or claim.

(3) That the writing was falsely made, altered, forged, counterfeited.

(4) That the subject knew that the writing was falsely made, altered, forged or counterfeited at the time of presentment or transmittal.

(5) That the subject did so with the intent to defraud the United States.

b. Commentary. See the Glossary for relevant definitions. Also, compare paragraph 5-5.

c. Example. Self-explanatory.

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5-9. Forging or Altering a Military Discharge Certificate, 18 USC 498

Maximum Punishment: 1 year and a \$1,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-172.

a. Elements of the Offense.

(1) That the subject forged, counterfeited, or falsely altered a certificate of discharge from the military or naval service of the United States.

(2) That the subject did so knowingly and intentionally.

b. Commentary. A DD Form 214 is considered to be a certificate of discharge. See the Glossary for relevant definitions.

c. Example. An individual alters his DD Form 214 so as to give the appearance of an Honorable Discharge, rather than the Under Other Than Honorable Conditions one that he actually received.

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5-10. Wrongful Possession or Use of a Forged Military Discharge Certificate,
18 USC 498

Maximum Punishment: 1 year and a \$1,000.00 fine.

Extraterritorial: Yes

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject possessed or used a certificate of discharge from the military or naval service of the United States.

(2) That the certificate of discharge had been forged, counterfeited, or falsely altered.

(3) That the subject knew that the certificate had been forged, counterfeited, or falsely altered at the time of the possession or use.

b. Commentary. See the Glossary for relevant definitions.

c. Example. (An actual case): A former soldier, who had been discharged in the grade of E-4, used a DD Form 214 which had been falsely altered to show his former grade to be E-6, to enlist in the Reserves in the pay grade of E-6.

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5-11. Falsely Making or Altering a Government Transportation Request,
18 USC 508

Maximum Punishment: 10 years and a \$5,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 107 or 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-65 and 3-172.

a. Elements of the Offense.

(1) That the subject falsely made, forged, counterfeited, or altered, in whole or in part, a form or request, requesting transportation by common carrier at government expense.

(2) That the subject did so knowingly.

b. Commentary. See the Glossary for relevant definitions.

c. Example. A government employee falsely signs his supervisor's name to an unauthorized GTR for the purpose of getting air transportation home on leave.

5-12. Uttering a False Transportation Request, 18 USC 508

Maximum Punishment: 10 years and a \$5,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject passed, uttered, published, sold, or attempted to pass, utter, publish or sell, a form or request for transportation by common carrier at government expense.

(2) That the form or request had been falsely made, forged, counterfeited, or altered.

(3) That the subject knew that the form or request had been falsified, forged, counterfeited, or altered at the time it was passed, uttered, published, or sold by the subject.

b. Commentary. See Glossary for relevant definitions.

c. Example. Using the preceding example, after forging the GTR, the employee presents it to the ticket office.

5-13. Concealing or Covering Up a Material Fact, 18 USC 1001

Maximum Punishment: 5 years and a \$10,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject falsified, concealed, or covered up a certain fact by some trick, scheme, or device.

(2) That the fact was a material fact.

(3) That the fact related to a matter within the jurisdiction of a department or agency of the United States.

(4) That the subject did so knowingly and willfully.

b. Commentary. See the discussion in paragraph 5-14b, below.

c. Example. (An actual case): A contractor received a government contract to perform certain construction work for the Army. The contract specified that the work was not to be subcontracted out. Nevertheless, the contractor subcontracted the work out immediately after receiving award of the contract. In order to conceal this fact from government inspectors and contracting officer representatives, the contractor arranged with the subcontractor to place the firm name of the contractor, his office address and telephone number on the sides of the subcontractor's vehicles and construction equipment.

5-14. Making or Using a False Statement, 18 USC 1001

Maximum Punishment: 5 years and a \$10,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 107 or 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-65 and 3-149.

a. Elements of the Offense.

(1) That the subject made a certain statement or representation, or used a certain writing or document.

(2) That the statement, representation, or writing was false, fictitious, or fraudulent, in whole or in part.

(3) That the subject knew that the statement, representation, or writing was false, fraudulent, or fictitious.

(4) That the false, fictitious, or fraudulent portion of the statement, representation, or writing was material.

(5) That the statement, representation, or writing was made or used in a matter within the jurisdiction of a department or agency of the United States.

b. Commentary.

(1) See the Glossary for definitions of the relevant terms.

(2) "In a matter within the jurisdiction of any department or agency of the United States" is a very broad and expansive term, and includes any statements made to agents of the United States in connection with their official duties. This, in turn, includes not only officers or employees of the United States, but also includes statements made to any person or agency that is acting on behalf of the United States. Thus, even a false statement made by a subcontractor to a private contractor is a violation of this section if subcontractor knew that the statement was to be used by the contractor in the presentation of an account or claim to a government agency. Similarly, false claims presented by a physician to a private insurance carrier that was the Government's agent for medicare payments have been held to be included within this section.

(3) For purposes of this section, a "statement" means some sort of affirmative representation of fact. It has been held by a number of Federal courts that false denials of criminality made by suspects to Federal law enforcement agencies do not fall within this section. This has been termed the "exculpatory no" exception. However, if the suspect or subject goes beyond a mere denial, and affirmatively states false facts, the exception is inapplicable, since affirmative misrepresentations violate this section, even though made by a suspect or subject.

(4) This offense should be distinguished from making a false official statement, under Article 107 of the UCMJ. As that article has been defined by the military courts and the Manual for Courts-Martial, a statement made by a suspect is not considered to be an "official" statement. Section 1001 imposes no such "officiality" requirement, except to the extent that the matter must still be within the jurisdiction of a department or agency of the United States. Thus, a statement by a military subject which might not be considered a false official statement under Article 107, may still be a violation of 18 USC 1001 and Article 134 if made, for example, to a USACIDC special agents.

(5) "False, fictitious, or fraudulent" as used in this section, means more than simply "inaccurate." In order to be a "false, fictitious, or fraudulent" statement, the person making the statement must have known that the statement was untrue at the time it was made, or, at a minimum, must have made the statement with reckless disregard for first learning the truth. Furthermore, a statement may be rendered false or fraudulent by material omission. In either case, there must be an intent to deceive. However, there need be no intent to defraud. Although, the two concepts are close in meaning, an intent to deceive is different from an intent to defraud, and means only that the subject intended to mislead. In this regard, it is not necessary that the attempted deception was successful.

c. Examples.

(1) A government contractor submits false documents to the contracting officer in connection with a contract dispute.

(2) A soldier goes on extended TDY to attend a course. The course extends over a holiday period and the soldier takes leave over the holiday. However, he fails to note the leave taken on the travel voucher which he completes at the conclusion of his TDY.

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5-15. Possession of False Papers to Defraud the United States, 18 USC 1002

Maximum Punishment: 5 years and a \$10,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

- (1) That the subject possessed a certain writing or document.
- (2) That the writing or document was false, altered, forged, or counterfeited.
- (3) That the subject knew that the writing or document was false, altered, forged, or counterfeited.
- (4) That the subject had the intent to defraud the United States.
- (5) That the subject possessed the writing or document for the purpose of enabling another to obtain a sum of money from the United States.

b. Commentary. See the Glossary for relevant definitions.

c. Example. A government contractor is under Federal investigation for contract fraud. During the course of the investigation, a search warrant is executed at the contractor's office and a number of his records seized. Review of the records reveals falsified contract documents and cost summaries which the contractor intended to use to fraudulently inflate his contract claims.

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5-16. False Acknowledgment, 18 USC 1016

Maximum Punishment: 2 years and a \$2,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is an officer authorized to administer oaths, or to take and certify acknowledgments.

(2) That the subject made a certain acknowledgment, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person.

(3) That the acknowledgment, certification, or statement was knowingly made falsely.

(4) That the acknowledgment, certification, or statement was with respect to a proposal, contract, bond or other matter submitted to, made with, or taken on behalf of the United States.

(5) That the oath or affirmation with respect to which the false acknowledgment, certification, or statement was made, was required by law or regulation, or was with respect to the financial standing of any principal, surety, or other party to such proposal, contract, bond, or other matter.

b. Commentary. See the Glossary for relevant definitions.

c. Example. Self-explanatory.

5-17. False Certification, 18 USC 1018

Maximum Punishment: 1 year and a \$500.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 107.

Related MJ Benchbook Reference: Paragraph 3-65.

a. Elements of the Offense.

(1) That the subject is a public officer or person authorized by Federal law to make or give a certificate or other writing.

(2) That the subject knowingly made and delivered as true a certain certificate or writing.

(3) That the certificate or writing contains a statement which he knew to be false.

b. Commentary. See the Glossary for relevant definitions.

c. Example. Self-explanatory.

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5-18. Making a Fraudulent Voucher or Receipt for Military Property,
18 USC 1022

Maximum Punishment: 10 years and a \$10,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 107 or 132(4).

Related MJ Benchbook References: Paragraphs 3-65 and 3-121.

a. Elements of the Offense.

(1) That the subject is authorized to make or deliver certificates, vouchers, receipts, or other papers certifying the receipt of military property.

(2) That the subject made or delivered such a certificate, voucher, receipt, or other paper to another person.

(3) That the subject did so without the full knowledge of the truth of the facts stated therein.

(4) That the subject did so with the intent to defraud the United States.

b. Commentary. See the Glossary for relevant definitions.

c. Example. Self-explanatory.

5-19. Mail Fraud, 18 USC 1341

Maximum Punishment: 5 years and a \$1,000.00 fine.

Extraterritorial: No, except to the extent that the offense is committed through use of the United States civilian or military postal system OCONUS.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject devised, or intended to devise, a scheme or artifice to defraud, or to obtain money or property by means of false or fraudulent pretenses.

(2) That the subject did one of the following acts for the purpose of executing or attempting to execute this scheme.

(a) Deposited an item of mail in a USPS depository.

(b) Took or received mail from the USPS.

(c) Knowingly caused the mail to be utilized by another person.

b. Commentary.

(1) The mail fraud statute is perhaps the most far-reaching Federal criminal statute. "Scheme or artifice" includes any plan that is intended to deceive. The scheme or artifice itself need not be criminal. It is sufficient if it is deceptive or fraudulent in the generic sense of the words. The object of the scheme need not be to obtain money. The "loss" occasioned by the fraud may include a deprivation of faithful service on the part of government officials or employees, or, for example, may include a scheme to deprive public officials of information material to a decision which they are required to make in their official capacities. Nor need the letter or item of mail itself be false or contain false information, as long as is sent through the mails in furtherance of a scheme to defraud.

(2) Each separate item of mail sent through the mail in furtherance of the scheme constitutes a separate offense. If 10 letters are sent in furtherance of a fraudulent scheme, 10 separate offenses of mail fraud are committed.

(3) The mail matter need not be mailed to the victim of the scheme. It is sufficient if the mailing is in any way connected with and in furtherance of the scheme.

(4) As noted, the mail matter itself need not be fraudulent or false on its face. Nor need it actually succeed in misleading or defrauding. It need only be reasonably calculated to deceive persons of ordinary comprehension.

(5) The mail matter need not be mailed by the offender. It is enough if the acts of the subject precipitate the reasonably foreseeable use of the mails by another.

(6) See the Glossary for relevant definitions. For purposes of this section, "false" statements include statements made with reckless disregard for their truth or falsity. However, mere negligence as to accuracy, or even intentional falsehoods, do not constitute an offense unless the false information relates to a material fact and is reasonably calculated to deceive.

(7) The mailing must be in furtherance of the scheme and must be reasonably foreseeable by the subject. For example, if a subject is investigated because of some fraudulent scheme and during the investigation a USACIDC field office mails an RFA to another office, no mail fraud has been committed. The mailing is not in furtherance of the scheme, but rather is made in an attempt to thwart the scheme. Similarly, if contractor C tells contractor S that he (C) will stop by S's office to pick up fraudulently prepared time cards intended for submission to the Government on C's contract with the Government, and instead S deposits them in the mail, C has not committed a mail fraud. This is true even though the use of the mail by S was in furtherance of a scheme to defraud and may constitute a mail fraud by S. It was not reasonably foreseeable to C that S would use the mail in that manner. (C probably also would not be guilty of the offense of mail fraud for this particular mailing, even though the offense may have been committed by a co-conspirator. Since C sufficiently told S that C would be by to pick up the time cards, the mail fraud offense committed by S probably was not within the intended scope of the conspiracy and C did not share S's criminal intent.)

(8) This section only applies to use of the United States (including the military) postal system. This section is not violated if, for example, the German Bundespost is utilized.

c. Examples.

(1) A government contractor uses the mail to send bribes to the government officer supervising a contract with the contractor's firm. This constitutes mail fraud on the part of the contractor even though nothing within the items of mail may itself be false or fraudulent. Indeed, the envelopes may only contain money and no statements whatsoever. Nevertheless, the use of the mails to pay the bribes furthers the contractor's scheme to defraud the Government of the faithful services of the contracting officer.

(2) A military officer or Department of the Army civilian files a fraudulent travel voucher at the local finance and accounting office, seeking reimbursement of fraudulent expenses. In filing the DD Form 1351-2, the individual indicates in block 11 that he wishes to be paid by check mailed to his residence. Two weeks later, after the voucher is processed, the finance

and accounting office mails a check to the individual in settlement of the fraudulent voucher. The individual has committed a mail fraud. Even though the subject is not the individual who deposited the item of mail matter in the mail, he knowingly caused the check to be delivered to him through the reasonably foreseeable use of the mail by the manner in which he executed the voucher.

(3) A West Point cadet writes to a mail-order term paper firm to purchase a paper on electrical engineering. The mail-order firm, in turn, mails back a term paper on the subject. The cadet then submits the term paper to his instructor in electrical engineering, representing the paper to be his own work product. The cadet is guilty of two separate mail frauds. Both the letter sent to the mail-order firm and the receipt of the paper in the mail constitute a mail fraud. The mail-order firm may also be guilty of a single mail fraud if it knew or had reason to know that the paper would be fraudulently submitted. Note that in neither instance was the item of mail sent to the victim, i.e., the United States Army, nor was the content of either item of mail false or fraudulent in and of itself.

(4) (Based on an actual case): A commissary officer collects from a variety of sources and individuals "cents-off" coupons distributed by manufacturers of merchandise, i.e., "get 30 cents-off your next purchase of a 1 lb. can of our mountain grown coffee." The officer pays the individuals from whom he collects coupons one-third of the coupons' face value, i.e., on a thirty cents-off coupon he pays the individual 10 cents. The commissary officer then includes these coupons with those regularly collected by the commissary cashiers when selling commissary merchandise, and mails the coupons to the various manufacturers for reimbursement. He receives back through the mail checks from the various manufacturers for the amount of the coupons and pockets a portion of the proceeds equal to the total of the coupons he purchased. The commissary officer has committed a separate mail fraud for each mailing which he made to a manufacturer and for each check received in the mail from the manufacturers. The "fraud" in this situation is the misrepresentation implicitly made to each manufacturer that the coupons submitted by the commissary officer were received in the normal course of business and thereby represent a corresponding sale of the manufacturer's merchandise. Manufacturers issue such coupons as a promotional matter to further the sale of their product.

5-20. Wire Fraud, 18 USC 1343

Maximum Punishment: 5 years and a \$1,000.00 fine.

Extraterritorial: No.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None

a. Elements of the Offense.

(1) That the subject devised, or intended to devise, a scheme or artifice to defraud, or to obtain money or property by false or fraudulent pretenses.

(2) That the subject transmitted or caused to be transmitted by means of wire, radio, or television some writing, signal, sign, picture, or sound, for the purpose of executing the scheme or artifice.

(3) That the transmission was made in interstate or foreign commerce.

b. Commentary.

(1) This statute closely parallels the mail fraud statute. The chief difference between the two sections is that a mail fraud is committed whenever the mail is used in furtherance of the scheme or artifice to defraud, regardless of where the mail is being sent to or from. The wire fraud statute, however, requires a transmission in interstate or foreign commerce. That is, the transmission must cross state lines or cross the United States' border.

(2) Otherwise, the wire fraud statute has the same scope as the mail fraud statute, and terms of art appearing within each section, such as "scheme or artifice," have the same definitions. See paragraph 5-19b, above.

(3) The transmission may be by means of wire, radio, television, or other similar means of communication. It includes interstate telephone calls.

c. Examples.

(1) A government contractor located in northern Virginia makes telephone calls to a government contracting officer in the District of Columbia and offers the contracting officer a bribe. The contractor has committed wire fraud, regardless of whether or not the contracting officer accepts the offer of a bribe. Prior to placing the call, the contractor had already devised a scheme to defraud, i.e., to deprive the United States of the loyal services of one of its contracting officers, and he placed the telephone call across State lines for the purpose of executing that scheme.

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COMMON VIOLATIONS OF THE UNITED STATES CODE IN ECONOMIC
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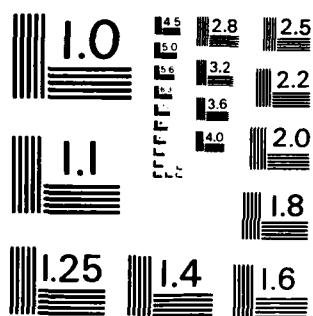
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(2) (An actual case): An individual who worked for a computer firm that handled the maintenance on some computers utilized by a certain bank became familiar with the bank's security procedures during his various visits to the bank's computer room. Utilizing the information that he had obtained, the individual placed a telephone call (intrastate, not interstate) to the bank's local office. Using the security codes which he had obtained, he was able to place an order for an international wire transfer of funds in the amount of \$10,200,000.00 from the bank's main office to a Swiss bank account. The individual committed a wire fraud (at the time the largest one in history), not based upon his local telephone call to the bank, but upon the wire transfer of funds from this country to the Swiss bank account.

(3) A government employee utilizes a government telephone to make unauthorized long distance personal telephone calls to a relative in another State. Each such call is a separate offense.

5-21. Perjury, 18 USC 1621

Maximum Punishment: 5 years and a \$2,000.00 fine.

Extraterritorial: Yes, specifically.

Related UCMJ Offenses: Article 131 or 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-113 and 3-169.

a. Elements of the Offense.

(1) That the subject made a certain statement, either orally or in writing.

(2) That the statement was made either:

(a) After having taken an oath before a competent tribunal, officer or person in any case in which Federal law authorized an oath to be administered; or

(b) In a declaration, certificate, verification, or other statement under penalty of perjury, as permitted under 28 USC 1746 (see Commentary below).

(3) That the statement or testimony contained matter which the subject did not believe to be true at the time the statement was made or the testimony given.

(4) That the subject acted willfully.

(5) That the matter was on a material point or issue.

b. Commentary.

(1) See the Glossary for relevant definitions.

(2) Mere inaccurate statements do not constitute perjury. Rather, the individual must knowingly give the false information and must subjectively believe it to be false at the time it is offered.

(3) The truthfulness or falsity of the information must be judged in the context of the entire statement or testimony given. Normally, a statement that is literally true cannot be the basis of a perjury offense. However, in certain circumstances a statement which is literally true may be the key information upon which a perjury offense is founded. See Example 1 below.

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c. Examples.

(1) (An actual case): An individual was asked under oath whether he had a Swiss bank account. The individual replied that the company had such an account. (The individual also had one.) This was sufficient to support a perjury offense even though his answer that "the company had one" was literally true. The perjury involved in this situation is not based upon the literal truthfulness or the falsity of the individual's answer. Rather, it is based upon the falsity of his implicit denial that he did not have a personal account.

(2) An individual testifies falsely when giving a deposition in a civil trial in Federal court.

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5-22. Subornation of Perjury, 18 USC 1622

Maximum Punishment: 5 years and a \$2,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-170.

a. Elements of the Offense. That the subject procured another individual to commit perjury, as defined in paragraph 5-21.

b. Commentary. See generally paragraph 3-21b. "Procure" means to induce, influence, persuade, or cause.

c. Example. An individual pays a witness to lie when testifying at a trial in a US district court.

5-23. Perjury Before a Grand Jury, 18 USC 1623

Maximum Punishment: 5 years and a \$10,000.00 fine.

Extraterritorial: Yes, specifically.

Related UCMJ Offenses: Article 131 or 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-113 and 3-169.

a. Elements of the Offense.

- (1) That the subject committed perjury, as defined in paragraph 5-21.
- (2) That the offense was committed in any proceeding before, or ancillary to, any Federal court or grand jury.

b. Commentary.

(1) A violation of this particular section may occur not only by oral or written testimony, but by making use of any false material information, including any book, document, paper, record, recording, exhibit, or other material.

(2) This section also has one specific exception that is not contained in the other perjury and false statement offenses covered in this Chapter, or that are punishable under the UCMJ. This section provides that if the individual corrects himself and admits that a prior statement was false, the individual cannot be prosecuted for the offense if the admission occurs in the same continuous court or grand jury proceeding and if it occurs at a time when the earlier false declaration has not substantially affected the proceeding, or if it has not become manifest that such falsity has been or will be exposed. In most situations and for most offenses, an offense of making a false statement or committing perjury or false swearing is complete and established as soon as the statement is made. For the special species of perjury covered by this section, however, Congress saw fit to allow an individual an opportunity to have a change of heart and to correct himself prior to discovery of the perjury.

c. Example. See examples given in paragraph 5-21c.

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5-24. Tampering with Public Records, 18 USC 2071(a)

Maximum Punishment: 3 years and a \$2,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-172.

a. Elements of the Offense.

(1) That the subject either:

(a) Concealed, removed, mutilated, obliterated, a record or document filed or deposited in a Federal public office, or destroyed, or attempted to do so; or

(b) Took and carried away with the intent to conceal, remove, mutilate, obliterate, or destroy such a record or document.

(2) That the subject did so willfully and unlawfully.

b. Commentary. See the Glossary for relevant definitions.

c. Example. In an effort to conceal his thefts and/or mismanagement, a commissary officer removes and destroys inventory records.

5-25. Wrongful Handling of Public Documents by a Custodian, 18 USC 2071(b)

Maximum Punishment: 3 years and a \$2,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-172.

a. Elements of the Offense.

- (1) That the subject had custody of a certain record or document.
- (2) That the record or document had been filed or deposited in a public office of the United States.
- (3) That the subject concealed, removed, mutilated, obliterated, falsified, or destroyed the record or document.
- (4) That the subject did so willfully and unlawfully.

b. Commentary. See the Glossary for relevant definitions.

c. Example. See preceding example.

5-26. Making False Entries in Public Accounts, 18 USC 2073

Maximum Punishment: 10 years and a \$5,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 107 or 134, as appropriate.

Related MJ Benchbook References: Paragraphs 3-65 and 3-172.

a. Elements of the Offense.

(1) That the subject is an officer, clerk, agent, or other employee of the United States and is charged with the duty of either:

(a) Keeping accounts or records of any kind; or

(b) Receiving, holding, or paying monies or securities to, for, or on behalf of the United States; or

(c) Receiving or holding in trust for any person money or securities.

(2) That the subject made a false report, record or entry.

(3) That the entry or record was connected or related to his duties.

(4) That the subject had the intent to deceive, mislead, injure, or defraud.

b. Commentary. See the Glossary for relevant definitions.

c. Example. In contrast to the example given in paragraph 5-24c, the commissary officer would violate this section if he falsely altered the commissary records, rather than destroying them, as a means of covering the losses.

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5-27. Interstate Transportation in Furtherance of a Scheme to Defraud,
18 USC 2314

Maximum Punishment: 10 years and a \$10,000.00 fine.

Extraterritorial: No.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject devised, or intended to devise, a scheme or artifice to defraud or to obtain money or property fraudulently.

(2) That in execution or concealment of the scheme, the subject transported or caused to be transported, or induced a person to travel in, or be transported in interstate commerce.

(3) For the purpose of defrauding that person of money or property having a value of \$5,000.00 or more.

b. Commentary.

(1) This is a companion interstate fraud provision to both the mail fraud and wire fraud statutes discussed previously. The terms of art contained within it are to be given the same broad scope as outlined in paragraph 5-19b.

(2) A key difference, however, between this section and either the wire fraud or mail fraud provisions, is the requirement that the scheme be aimed or targeted at the person who does the traveling in interstate commerce.

c. Example. An individual in California creates a number of false diaries purporting to be those of Adolf Hitler. He then entices an individual in New York to fly to California and purchase the diaries for \$1,500,000.00.

Chapter 6

False Claims, Contract Frauds, and Related Offenses

6-1. Wrongfully Taking or Using Papers Related to Claims, 18 USC 285

Maximum Punishment: 5 years and a \$5,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-172.

a. Elements of the Offense.

(1) That a certain document, record, file or paper had been filed, deposited, or kept by the authority of the United States.

(2) That the document had been prepared, presented or intended to be used to obtain the payment of money or the allowance of a claim.

(3) That the subject either:

(a) Took and carried away the document from the place where it had been filed, deposited or kept; or

(b) Presented, used, or attempted to use a document that had been wrongfully taken and carried away.

b. Commentary. Self explanatory.

c. Example. Self-explanatory.

6-2. Conspiracy to Defraud with Respect to a Claim, 18 USC 286

Maximum Punishment: 10 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offenses: Article 81 or 132, as appropriate.

Related MJ Benchbook References: Paragraphs 3-3 and 3-114 through 3-117.

a. Elements of the Offense.

(1) That the subject entered into an agreement with another to defraud the United States.

(2) That the object of the conspiracy was to obtain, or aid in obtaining, the payment or allowance of a false, fictitious, or fraudulent claim.

(3) That while the agreement continued to exist, and while the subject remained a party to the agreement, one of the conspirators knowingly committed at least one overt act in furtherance of the conspiracy.

b. Commentary.

(1) See the Glossary for relevant definitions.

(2) The agreement in a conspiracy does not have to be in any particular form or expressed in any formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be established by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out, or what part each conspirator is to play.

(3) An "overt act" is any affirmative act done by any of the conspirators. It need not in and of itself be a criminal act, but it must be a clear indication that the conspiracy is being carried out. The overt act may be done either at the time of or following the agreement. The overt act must be clearly independent of the agreement itself, that is, it must be more than merely the act of entering into the agreement or an act necessary to reach the agreement.

c. Example. A firm has a cost-reimbursement contract with the Government to build a weapons system. Several officers of the firm agree to "pad" their expenses by allocating to their costs on the government contract a variety of costs actually incurred on a separate contract with another civilian company. The president of the firm, who is one of the conspirators, insures that the documentation necessary to support the claim is altered accordingly.

6-3. Making or Presenting a False Claim, 18 USC 287

Maximum Punishment: 5 years and a \$10,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 132(1).

Related MJ Benchbook References: Paragraphs 3-114 and 3-115.

a. Elements of the Offense.

(1) That the subject made or presented a certain claim to an officer or employee of the United States.

(2) That the claim was false, fictitious, or fraudulent, in whole or in part.

(3) That the portion of the claim found to be false, fictitious, or fraudulent related to a material fact.

(4) That the subject knew that the claim was false, fictitious, or fraudulent at the time the claim was made or presented.

b. Commentary.

(1) See the Glossary for relevant definitions.

(2) Making a claim means the preparation of a claim and taking some act to get it started in official channels. It is an act by the subject which becomes a demand upon the United States or one of its officers. Making a claim is ordinarily a separate act from presenting it. A claim may be made in one place and presented in another. It is not necessary that the claim be approved and paid or that it be made by the person to be benefitted by the allowance or payment of the claim.

(3) "Presenting" means offering the claim for approval or payment.

c. Example. A DA civilian employee submits a false travel voucher to the finance and accounting office for payment.

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6-4. Contracting in Excess of Specific Appropriations, 18 USC 435

Maximum Punishment: 1 year and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject was an officer or employee of the United States at the time of the offense.

(2) That the subject contracted for the erection, repair, or furnishing of a public building or for a public improvement.

(3) That the amount of money obligated under the contract was for a larger amount than the specific sum appropriated for such purpose.

(4) That the subject knew that the amount contracted for exceeded the appropriated sum.

b. Commentary. For practical purposes, a violation of this section will necessarily be a violation of 31 USC 1341(a), discussed in paragraph 6-5, below.

c. Example. Congress appropriates \$3,000,000.00 as a line item appropriation for the construction of a mess hall at Ft Blank. The contracting officer enters into a \$3,200,000.00 contract for the mess hall, intending to augment the construction funds with local operation and maintenance funds.

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6-5. Obligating or Expensing in Excess of Available Appropriated Funds,
31 USC 1341(a)

Maximum Punishment: 2 years and a \$5,000 fine (31 USC 1350).

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject was an officer or employee of the United States or District of Columbia at the time of the offense.

(2) That the subject made, authorized, or created an expenditure or obligation of certain appropriated funds.

(3) That the expenditure or obligation:

(a) Exceeded the amount appropriated; or

(b) The funds for such purposes had not yet been appropriated.

(4) That the subject knew that sufficient funds were not available.

b. Commentary.

(1) Before any officer in the Executive branch can spend public funds of the United States, there must be an Act of Congress appropriating the money and defining the purpose for which the appropriation is made. Accordingly, an appropriation has been defined as a statutory authorization to make payments out of the Treasury for specified purposes. In addition, an appropriation carries with it the authority to enter into contracts for goods or services, or, in other words, to obligate the Government to make future payments within the amounts provided and for the purposes specified in the appropriation act or continuing resolution.

(2) Additionally, Congress usually provides limits on the time period for which appropriations are available. Thus, appropriations for the Army fall into one of the following three categories: one-year, multiple-year, or no-year. These time limits define only the period for which the appropriations are available for obligation. The funds carried in the annual appropriation acts are one-year appropriations unless the act specifically provides otherwise. Accordingly, many of the appropriation headings in the Department of Defense appropriation acts, such as those providing for the pay and allowances of military personnel and for maintenance and operation, have a one-year period of availability for obligation. This limit requires that the funds in these appropriations be either spent, or obligated for future expenditure by a contract, or otherwise obligated within the fiscal year for which they are made. Funds not obligated during this period "lapse" and are no longer available for obligation.

(3) A basic test for the validity of obligations is that the supplies or services contracted for must be intended to serve bona fide needs of the fiscal year for which the appropriation is made. The general rule for lawfully obligating a fiscal year appropriation is that the supplies or services are intended to serve a bona fide need of the fiscal year in which the need arises or to replace stocks used in such fiscal year.

(4) Accordingly, a person violates this section either by spending more money than Congress has authorized, or by spending money before Congress authorizes and appropriates expenditure of it.

(5) The main difference between a violation of this section and a violation of 18 USC 435, discussed in the preceding paragraph 6-4, is that 18 USC 435 is limited in its application to individuals who actually enter into a contract, and to situations where the contract is for one of the limited purposes described in that section. This section of Title 31, however, is broader in scope and applies to individuals who authorize an expenditure or obligation. Thus, a finance and accounting officer who knowingly pays out on an already complete contract more money than is available for that purpose will violate this section, but would not be guilty of a violation of 18 USC 435, since it was not the finance and accounting officer who entered into the contract.

c. Example. On September 29th, right before the end of the fiscal year, there is \$20,000 left in the O&M account for an installation. Rather than lose the ability to obligate these funds, the contracting officer enters into contracts for new freezers for the mess halls on post for \$20,000. The "old" freezers were still operational and not scheduled to be replaced for another eight months. Since there was no bona fide need in the current fiscal year for the new freezers, the obligation of funds was improper and the funds will be "deobligated" when auditors discover the impropriety. However, since a valid contract still will exist the contracting officer's actions violate this section since he entered into an obligation (for bona fide needs of the next fiscal year) without Congress having appropriated necessary funds.

6-6. Wrongfully Accepting Voluntary Services, 31 USC 1342

Maximum Punishment: 2 years and a \$5,000 fine (31 USC 1350).

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is an officer or employee of the United States or the District of Columbia.

(2) That the subject either:

(a) Accepted voluntary services of another for the United States or the District of Columbia; or

(b) Employed personal services in excess of that authorized by law.

(3) That the subject acted knowingly and willfully.

b. Commentary. The purpose of this section is to prohibit unauthorized creation of obligations for services. This statute specifically makes an exception in cases of emergency involving the safety of human life or the protection of property. Additionally, gratuitous services offered after a prior written agreement waiving all claims against the Government are also permissible.

c. Example. An installation recreation officer requests a group of teenagers to paint the post recreation center. A violation occurs because the officer may have obligated the Government.

6-7. Expending or Obligating Funds in Excess of an Apportionment,
31 USC 1517(a)

Maximum Punishment: 2 years and a \$5,000 fine (31 USC 1533).

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject is an officer or employee of the United States or the District of Columbia.

(2) That the subject authorized, created, or made a certain obligation or expenditure.

(3) That the obligation or expenditure was:

(a) In excess of an apportionment ; or

(b) In excess of the amount permitted by Army regulations.

(4) That the subject acted knowingly and willfully.

b. Commentary. In recognition of the need for more effective fiscal management in the Government, Congress enacted a legislative rider in the General Appropriation Act of 1951 which amended section 3679 of the Revised Statutes, the so-called Anti-Deficiency Act, in such a way as to establish a system of administrative control over the funds of all Executive agencies at all echelons. Thus, even though Congress appropriated \$16 billion under the heading of "Operation and Maintenance, Army" for the fiscal year 1982, the funds, once appropriated, were available for use by the Army not in excess of the amounts that had been apportioned by the Office of Management and Budget at the request of the Army or at a rate greater than authorized by the Department of Defense. The apportionment, which reflects the budgetary control at the presidential level over the use of funds, is made on a quarterly or other periodic basis to avoid a need for deficiency or supplemental appropriations which might otherwise arise during the fiscal year. In the example given, the apportionment for the first quarter of fiscal year 1982 under the "Operation and Maintenance" heading might be \$3.8 billion if the rate of use is to be kept constant during the year. The remainder would then be set aside for contingencies or to effect savings wherever possible.

c. Example. A contracting officer has \$1,000 left in the installation's operation and maintenance account (a subdivision of funds under AR 37-20). Nevertheless, he enters into a contract for spare parts at a cost of \$5,000.

6-8. Wrongful Destruction of War Contractor Records, 18 USC 443

Maximum Punishment: In the case of a corporation, a \$50,000.00 fine. In the case of a natural person, 5 years and a \$10,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject secreted, mutilated, obliterated, or destroyed certain records.

(2) That the records were:

(a) Of a war contractor and relation to a war contract of \$25,000.00 or more; or

(b) Of a war contractor or purchaser in relation to the disposition of termination inventory of a value of \$5,000.00 or more.

(3) That the subject acted willfully.

(4) That the act or acts occurred:

(a) With regard to subparagraph 2(a) above, within 5 years after final settlement of such war contract; or

(b) With respect to subparagraph 2(b) above, within 5 years after such disposition of termination inventory.

b. Commentary. A "war contract" is any contract, agreement, or purchase order entered into by a contracting agency in connection with or related to the prosecution of a war, or to perform any work or to make or furnish any material to the extent that such work or material is required for the performance of a contract related to the prosecution of a war. A "war contractor" means any holder of a war contract.

c. Example. Self-explanatory.

6-9. Receiving Kickbacks From Public Works Employees, 18 USC 874

Maximum Punishment: 5 years and a \$5,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 127.

Related MJ Benchbook Reference: Paragraph 3-101.

a. Elements of the Offense.

(1) That the subject induced another person, who was an employee in the construction or maintenance of a public building, to give up any part of the compensation to which that person was entitled under his contract of employment.

(2) That the subject did so by force, intimidation, or threat of procuring the employee's dismissal from employment, or by any other manner whatsoever.

b. Commentary.

(1) This section does not prohibit the normal collection of authorized union dues or the existence of a "closed shop" whereby all employees on a particular project are required to belong to a union and pay union dues.

(2) "Public building" includes any public work or any building or work financed in whole or in part by loans or grants from the United States.

c. Example. (An actual case): A foreman of a subcontractor on a public construction project who had the power to hire and fire, acting for his own benefit and enrichment, required employees to surrender part of their wages as a prerequisite for keeping their jobs.

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6-10. Illegal Kickbacks, 41 USC 51 and 54

Maximum Punishment: 2 years and a \$10,000.00 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject, directly or indirectly, made or received a payment, gift, or gratuity of some kind.

(2) That the payment was made by or on behalf of a subcontractor:

(a) To any officer, partner, employee, or agent of a prime contractor holding a negotiated contract with the United States; or

(b) To an officer, partner, employee, or agent of a higher tier subcontractor holding a subcontract under the negotiated prime contract with the United States.

(3) That the payment was made either:

(a) As an inducement for the award of the subcontract or order from the prime contractor or any subcontractor; or

(b) As an acknowledgment of a subcontract or order previously awarded.

(4) That the subject acted knowingly.

c. Commentary.

(1) The purpose of this statute is to insure that subcontracts under a government contract are awarded to the most responsible subcontractor, rather than as a result of pay-offs. In addition to the criminal penalties provided, the amount of any such illegal kickback may be recovered by the United States from the subcontractor, or may be set-off against any amounts that remain due under the contract. The statute also creates a conclusive legal presumption once it is shown that a subcontractor paid fees, commissions, compensation, gifts, or gratuities to a prime contractor or another higher tier subcontractor in connection with the award of the subcontract, that the cost of such expense was included in the price of the subcontract and ultimately passed on to the United States.

(2) "Subcontractor" includes any corporation, partnership, or business association of any kind which holds an agreement or purchase order to perform all or any part of the work or to make or furnish any article of service required for the performance of a negotiated contract or subcontract.

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(3) "Person" includes any subcontractor, corporation, association, trust, joint-stock company, partnership, or individual.

(4) "Negotiated contract" means a contract made without formal advertising.

c. Example. A subcontractor seeks a subcontract with a prime contractor who holds a negotiated research and development contract with the Government. In order to obtain the subcontract, the subcontractor pays the vice-president of the contractor a \$5,000 kickback.

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6-11. Entering into a Contract, Combination, or Conspiracy in Restraint of Trade, 15 USC 1

Maximum Punishment: In the case of a corporation, a fine of \$1,000,000.00. In the case of any other person, 3 years and a \$100,000.00 fine.

Extraterritorial: No.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject entered into a certain contract, combination, or conspiracy with at least one other person.

(2) That the subject acted knowingly.

(3) That the contract, combination or conspiracy unreasonably restrained trade.

b. Commentary.

(1) This section is known as the Sherman Anti-Trust Act. Its purpose is to insure commercial competition and the free flow of commerce and trade. The statute is based on congressional belief that our economy functions best when there is full and vigorous competition in the market place. It is based on the idea that the law of supply and demand, as enforced by the consumer, will insure the highest quality products at the lowest possible price.

(2) "Contract, combination, or conspiracy" are broad and all-inclusive terms. They included any agreement, arrangement, understanding or other meeting of the minds. As with other criminal conspiracies (see paragraphs 2-6 and 6-2), the agreement does not have to be in any particular form or expressed in formal words. It is sufficient if the minds of the parties reach a common understanding to accomplish the object of the conspiracy, and this may be proved by the conduct of the parties. The agreement does not have to express the manner in which the conspiracy is to be carried out, or what part each conspirator is to play.

(3) Conspiracies punishable under the Sherman Act do differ from other criminal conspiracies punishable under 18 USC 371 or 18 USC 238 in one important respect. Unlike the other cited statutes, there is no requirement under the Sherman Act that the conspirators commit an overt act in furtherance of the conspiracy. The contract, combination, or conspiracy alone violates this section.

(4) The Sherman Act has been interpreted to only prohibit unreasonable restraints of trade. Congress recognized that nearly every commercial contract or combination restrains trade to some extent. The Sherman Act only prohibits those which are not supportable by a legitimate business justification. There is no litmus test for when a particular contract, combination, or conspiracy is "unreasonable." It depends upon the facts and circumstances in each case. Some types of contracts, combinations, or conspiracies have been deemed by the courts to be per se or automatically "unreasonable." These include price-fixing, monopolies, or organized boycotts and refusals to deal. Other types of agreements must be evaluated on a case-by-case basis, with consideration both for their anti-competitive effect and their potential business justifications.

(5) For example, it would not be unlawful for executives of a fast food corporation to agree upon the price at which the corporation will sell its products to its franchisees, or to even suggest resale prices for the products, as long as the franchisees were free to set their ultimate prices to consumers. However, it would be unlawful for the executives of the company to agree with executives of another fast food company on the prices at which both companies would sell their hamburgers to the public.

(6) Many types of contract frauds in acquisitions and procurement will also involve a Sherman Act violation, since most such frauds will usually involve a fraudulent obtaining of the contract. Such activity necessarily unreasonably interferes with full and free competition in the market place with respect to DOD materials and services.

c. Examples.

(1) A bidder on a government contract and the contracting officer agree that the contracting officer will award the contract to the bidder in return for a bribe. Not only does this conduct constitute bribery, it also constitutes a Sherman Act violation since the contract is to be awarded on the basis of illegal considerations, rather than the economic considerations of the market place.

(2) Similarly, a Sherman Act violation would exist if a subcontractor paid a kickback to a prime contractor or higher tier subcontractor in return for award of a subcontract, in violation of the Anti-Kickback Statute.

(3) An offeror on a government contract, through collusion with a government employee, obtains "inside information" concerning the criteria by which the contracting officer intends to evaluate the responsiveness of offers on a particular government contract. Using the information thus acquired, the offeror tailors his proposal to meet the criteria and offers a price on the contract identical to the Government's internal estimate. The illegal conspiracy here is between the government employee who supplied the information and the offeror.

Chapter 7

Obstruction of Justice

7-1. Influencing or Injuring Officers, Jurors, or Witnesses, 18 USC 1503

Maximum Punishment: 5 years and a \$5,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-165.

a. Elements of the Offense.

(1) That the subject endeavored to influence, obstruct, or impede, the due administration of justice.

(2) That the subject endeavored to do so:

(a) Corruptly; or

(b) By threats of force; or

(c) By any threatening letter or communication.

b. Commentary.

(1) This section is violated by any attempt to influence, intimidate, or impede any witness, juror, or court officer by means of force, threat, or by corrupt means. A witness, juror, or officer may be intimidated or impeded by any threat of force, threatening letter or communication, or actual injury. Such persons may be corruptly influenced by bribes or other gratuities. The due administration of justice may also be impeded by similar conduct directed at parties to the litigation.

(2) "Administration of justice" means the performance of acts or duties required by law in the discharge of that duty. It includes actions of courts, through their officers, essential to free and full consideration and determination of matters properly before the court.

c. Examples.

(1) The subject bribes a witness to testify falsely before a grand jury. This constitutes acting corruptly.

(2) The subject fire-bombs the home of a witness in retaliation for the witness having testified in a US district court.

7-2. Influencing a Juror by Writing, 18 USC 1504

Maximum Punishment: 6 months and a \$1,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject attempted to influence the action or decision of a grand or petit juror of a United States court, upon an issue or matter pending before the juror.

(2) That the subject did so by writing or sending to the juror a written communication, in relation to such issue or matter.

b. Commentary. The purpose of the statute is to protect jurors' independence from outside interference. Accordingly, it does not apply to written communications received at the request of a grand jury.

c. Example. (An actual case): An individual sends an unsolicited letter to the foreman of a grand jury asking the jurors to disregard the testimony of several government witnesses and instead permit the individual to appear before the grand jury as a witness.

7-3. Obstruction of Agency Proceedings, 18 USC 1505

Maximum Punishment: 5 years and a \$5,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject willfully endeavored to influence, obstruct, or impede the due and proper administration of the law under which a proceeding is being had before a department or agency of the United States.

(2) That the subject did so:

(a) Corruptly; or

(b) By threats of force; or

(c) By a threatening letter or communication.

b. Commentary.

(1) This is a parallel provision to 18 USC 1503, paragraph 7-1, above. It is designed to protect agency proceedings to the same extent that 18 USC 1503 protects judicial proceedings.

(2) Article 32 proceedings are protected under this provision.

c. Example.

(1) A contractor submits false documents as part of his appeal of a contract dispute to the Army Board of Contract Appeals.

(2) (An actual case): A contractor was convicted under this section for obstructing a AAA audit by hiding some of his books and providing auditors with misleading information.

7-4. Injuring Parties or Witnesses Before an Agency, 18 USC 1505

Maximum Punishment: 5 years and a \$5,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: None

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject injured a party or witness in his person or property.

(2) That the subject did so in retaliation for the individual attending or having attended an agency proceeding, inquiry, or investigation, or on account of the individual having testified at such proceeding.

b. Commentary. This is, of course, further designed to protect agency proceedings and protect witnesses and parties from retaliation.

c. Example. A contractor fires one of its employees for having made a statement adverse to the contractor to the contracting officer with regard to a contract dispute.

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7-5. Obstruction of Criminal Investigations, 18 USC 1510

Maximum Punishment: 5 years and a \$5,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-165.

a. Elements of the Offense.

(1) Either that the subject:

(a) Willfully endeavored to obstruct, delay, or prevent the communication of information relating to a violation of a Federal criminal statute by any person to a criminal investigator; and

(b) Did so by means of bribery, misrepresentation, intimidation, force, or threats of force.

(2) Or that the subject injured a person in his person or property because the individual provided such information to a criminal investigator.

b. Commentary.

(1) "Criminal investigator" means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigation of or prosecutions for violations of the criminal laws of the United States. It includes USACIDC personnel.

(2) Four separate types of conduct are prohibited by this section. An individual violates this section if he attempts to obstruct a criminal investigation, delay a criminal investigation, prevent the communication of information to investigators, or injure an individual because that person provided information to investigators. Furthermore, as to the former three illegal purposes, the offenses may be committed by any of the means listed in this section, i.e., bribery, misrepresentation, intimidation, force, or threats of force.

(3) As with all of the obstruction of justice sections, it is immaterial whether the attempted obstruction is successful. In a sense, each of the obstruction of justice sections is an attempt statute. That is, they each prescribe the endeavoring to obstruct justice. Consequently, it is the attempt that violates each of these sections, regardless of whether the attempt is successful.

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(4) In this regard, it is immaterial whether the witness or informant actually feels threatened or apprehends harm. It is sufficient if the subject engages in conduct calculated to intimidate or deter the witness.

c. Examples.

(1) During the course of a joint FBI-USACIDC contract fraud investigation, several officers of a government contractor provide false and misleading information to investigators in an effort to throw the investigation off track.

(2) During the course of the same investigation, one of the officers of the corporation offers a USACIDC special agent money if the agent will destroy an incriminating exhibit previously seized by the agent.

(3) A government contractor threatens to fire one of its employees if the employee tells Federal investigators what the employee knows about a contract fraud committed by the contractor.

(4) A government contractor fires one of its employees for having provided a statement to Federal investigators which implicated the contractor in a contract fraud.

7-6. Threatening Victims, Witnesses, or Informants, 18 USC 1512(a)

Maximum Punishment: 10 years and a \$250,000 fine.

Extraterritorial: Yes, specifically. 18 USC 1512(f).

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-165.

a. Elements of the Offense.

(1) That the subject, with respect to another person, knowingly:

(a) Used, or attempted to use, intimidation or physical force against that person; or

(b) Threatened, or attempted to threaten, that person; or

(c) Engaged in misleading conduct towards that person.

(2) That the subject did so with the intent to:

(a) Influence the testimony of any person in an official proceeding;
or

(b) Cause or induce any person to withhold testimony, a record, document or other object from an official proceeding; or

(c) Cause or induce any person to alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding; or

(d) Evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding;
or

(e) Be absent from an official proceeding to which that person has been summoned by legal process; or

(f) Hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission, or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings.

b. Commentary.

(1) This section became effective on 12 October 1982. It is part of the Victim and Witness Protection Act of 1982. This section, and the sections described in paragraphs 7-7 and 7-8, below, overlap to some extent, both with

each other and with the previously discussed obstruction of justice offenses. However, Congress felt the need to enact additional statutory provisions, broader in scope than existing obstruction of justice sections, in response to the current nationwide emphasis on the rights of witnesses and victims.

(2) The declared purpose of the Victim and Witness Protection Act of 1982 is to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to insure that the Federal Government does all that is possible within the limits of available resources to assist victims and witnesses without interfering with the constitutional rights of the defendant; and to provide a model for legislation for State and local governments.

(3) For purposes of this section, "official proceeding" is a broad and all-inclusive term. An "official proceeding" need not be pending or about to be instituted at the time an offense is committed under this section. Furthermore, the testimony, record, document, or other object sought to be illegally suppressed need not be admissible in evidence or free from a claim of privilege. An individual violates this section even if he attempts to illegally suppress an inadmissible item of evidence or testimony.

(4) By specific provision in the statute, if the subject engages in activity prohibited by the statute, it need not be shown that the subject knew that the official proceeding was a Federal proceeding, or that the judge or law enforcement officer was an officer or employee of the Federal Government.

(5) The threatening conduct need not be aimed at the person who the subject is trying to influence. For example, threats may be directed at relatives or friends, etc.

c. Example. A contractor, who is under Federal investigation, arranges a meeting with an "enforcer." He tells the enforcer that he (the contractor) is the subject of a criminal investigation, but reveals to the enforcer neither the nature of his (the contractor's) business nor the nature of the criminal investigation. He asked the enforcer to "persuade" several of his employees not to cooperate with investigators. If the enforcer attempts to do so, he will violate this section even though he has no knowledge that it is a Federal investigation that he is attempting to obstruct.

each other and with the previously discussed obstruction of justice offenses. However, Congress felt the need to enact additional statutory provisions, broader in scope than existing obstruction of justice sections, in response to the current nationwide emphasis on the rights of witnesses and victims.

(2) The declared purpose of the Victim and Witness Protection Act of 1982 is to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; to insure that the Federal Government does all that is possible within the limits of available resources to assist victims and witnesses without interfering with the constitutional rights of the defendant; and to provide a model for legislation for State and local governments.

(3) For purposes of this section, "official proceeding" is a broad and all-inclusive term. An "official proceeding" need not be pending or about to be instituted at the time an offense is committed under this section. Furthermore, the testimony, record, document, or other object sought to be illegally suppressed need not be admissible in evidence or free from a claim of privilege. An individual violates this section even if he attempts to illegally suppress an inadmissible item of evidence or testimony.

(4) By specific provision in the statute, if the subject engages in activity prohibited by the statute, it need not be shown that the subject knew that the official proceeding was a Federal proceeding, or that the judge or law enforcement officer was an officer or employee of the Federal Government.

(5) The threatening conduct need not be aimed at the person who the subject is trying to influence. For example, threats may be directed at relatives or friends, etc.

c. Example. A contractor, who is under Federal investigation, arranges a meeting with an "enforcer." He tells the enforcer that he (the contractor) is the subject of a criminal investigation, but reveals to the enforcer neither the nature of his (the contractor's) business nor the nature of the criminal investigation. He asked the enforcer to "persuade" several of his employees not to cooperate with investigators. If the enforcer attempts to do so, he will violate this section even though he has no knowledge that it is a Federal investigation that he is attempting to obstruct.

7-7. Harassing Victims, Witnesses, or Informants, 18 USC 1512(b)

Maximum Punishment: 1 year and a \$25,000 fine.

Extraterritorial: Yes.

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-165.

a. Elements of the Offense.

(1) That the subject intentionally harassed, or attempted to harass, another person.

(2) That the subject thereby hindered, delayed, prevented, or dissuaded any person from:

(a) Attending or testifying in an official proceeding; or

(b) Reporting to a law enforcement officer or judge of the United States the commission, or possible commission, of a Federal offense or a violation of a condition of probation, parole, or release pending judicial proceedings; or

(c) Arresting or seeking the arrest of another person in connection with a Federal offense; or

(d) Causing a criminal prosecution, or parole or probation revocation proceeding to be sought or instituted, or assisting in such prosecution or proceeding.

b. Commentary. See the comments under paragraph 7-6b. This is a separate offense from section 1512(a), and separately punishes the successful obstruction.

c. Example. An individual makes repeated late night harassing anonymous telephone calls to the wife of a prospective witness in a Federal criminal proceeding. Because of this harassment directed against his wife, the witness decides to change his story and not testify at the prospective criminal proceeding.

7-8. Retaliating Against Victims, Witnesses, or Informants, 18 USC 1513

Maximum Punishment: 10 years and a \$250,000 fine.

Extraterritorial: Yes, specifically. 18 USC 1513(b).

Related UCMJ Offense: Article 134.

Related MJ Benchbook Reference: Paragraph 3-165.

a. Elements of the Offense.

(1) That the subject engaged, attempted to engage, or threatened to engage in certain conduct that:

(a) Caused or would cause bodily injury to another person; or

(b) Damaged or would damage the tangible property of another person.

(2) That the subject did so with the intent to retaliate against another person for:

(a) The attendance of a witness or party at an official proceeding, or any testimony given or any record, document or other object produced by a witness in an official proceeding; or

(b) The giving of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings, given by a person to a law enforcement officer.

b. Commentary. See paragraphs 7-6b and 7-7b.

c. Example. A subject threatens to injure the parents of a witness who testified against him in grand jury proceedings.

Chapter 8

Racketeer Influenced and Corrupt Practices

8-1. Explanation of Terms. For purposes of this Chapter, the following definitions apply:

a. "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. An "enterprise" is an ongoing organization of individuals who associate for a common purpose of engaging in a course of conduct. The term encompasses both legitimate and illegitimate activities. Governmental agencies, offices, and departments such as a local police department, sheriff's office, governor's office, or court are also included within the term.

b. "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after 15 October 1970, and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

c. "Person" includes any individual or entity capable of holding a legal or beneficial interest in property.

d. "Racketeering activity" means:

(1) Any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic, or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year.

(2) Any violation of the following provisions of Title 18 of the United States Code:

(a) Section 201, relating to bribery and graft (see paragraphs 3-2 through 3-9);

(b) Section 471 or 472, relating to falsification of documents (see paragraphs 5-1 and 5-2);

(c) Section 1341, relating to mail fraud (see paragraph 5-19);

(d) Section 1343, relating to wire fraud (see paragraph 5-20);

(e) Section 1503, relating to obstruction of justice (see paragraph 7-1);

(f) Section 1510, relating to obstruction of criminal investigations (see paragraph 7-5);

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(g) Section 2314 or 2315, relating to interstate transportation of stolen property (see paragraphs 4-15, 4-16, and 5-27).

(3) Any felony offense of manufacture, importation, receiving, concealing, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, including the UCMJ.

e. "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof.

8-2. Investing Racketeering Income, 18 USC 1962(a)

Maximum Punishment: 20 years, a \$25,000 fine, forfeiture of any interest acquired or maintained in violation of 18 USC 1962, and forfeiture of any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise which the subject has established, operated, controlled, conducted, or participated in the conduct of, in violation of 18 USC 1962.

Extraterritorial: Yes, since in order to establish a violation of this section, "racketeering activity" involves an offense chargeable under State or Federal law, and the investment interest must affect interstate or foreign commerce.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject has participated as a principal in a pattern of racketeering activity.

(2) That the subject received income which was derived, directly or indirectly, from such pattern of racketeering activity.

(3) That the subject used or invested any part of such income or the proceeds of such income, directly or indirectly, to acquire an interest in, or the establishment of, an enterprise.

(4) That the enterprise is engaged in, or its activities affect, interstate or foreign commerce.

b. Commentary.

(1) The purpose of this provision is to deprive individuals who engage in racketeering activity of the ability to make use of their ill-gotten gains. This section is directed at the acquisition of an interest, often in a legitimate business, through the use of income received from racketeering activity.

(2) This section does not apply to a purchase of securities on the open market for purposes of investment, without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, if the securities of the issuer held by the purchaser, the members of his immediate family and his or their accomplices in any pattern of racketeering activity after such purchases do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer either in law or in fact, the power to elect one or more directors of the issuer.

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(3) Under the penalties provision of RICO, 18 USC 1963(a), the offender will be subject both to a fine and to imprisonment as well as forfeiture of the income derived from the racketeering activities and any interest in an enterprise affecting interstate or foreign commerce which the subject has acquired through his illegal income.

c. Examples.

(1) A contractor on two different occasions bribes a local contracting officer in order to receive the award of two government contracts. The subject decides to diversify his business dealings and uses the money received on the first contract to purchase and operate a gas station. He uses the money received from the second contract to purchase and operate a local convenience store. Both of these purchases constitute a violation of this section. His interest in both the gas station and the convenience store is subject to forfeiture, in addition to his own potential fine and imprisonment.

(2) During the course of completing a government contract, the contractor uses the mail to submit several fraudulent claims to the Government. He takes the money and, with other individuals, establishes an illegal gambling operation. This also constitutes a violation of this section. The "enterprise" in which an individual invests his illegal income, in this case the gambling operation, may be either a legitimate or illegitimate activity.

8-3. Acquiring An Enterprise Through Racketeering, 18 USC 1962(b)

Maximum Punishment: 20 years, a \$25,000 fine, forfeiture of any interest acquired or maintained in violation of 18 USC 1962, and forfeiture of any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise which the subject has established, operated, controlled, conducted, or participated in the conduct of, in violation of 18 USC 1962.

Extraterritorial: Yes, since in order to establish a violation of this section, "racketeering activity" involves an offense chargeable under State or Federal law, and the enterprise must involve interstate or foreign commerce.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject acquired or maintained, directly or indirectly, an interest in or control of an enterprise.

(2) That the enterprise is engaged in, or its activities affect interstate or foreign commerce.

(3) That the subject did so through a pattern of racketeering activity.

b. Commentary. This section outlaws the acquisition or maintenance of any interest or control in any enterprise through illegal activity. The gravamen of the crime is the illegal acquisition or maintenance of an interest or control in an enterprise.

c. Example. A contracting officer offers to award government contracts to a contractor in return for a bribe. The contracting officer specifies that, rather than money, what he wants is 20 shares of stock in the contractor's corporation. Accordingly, the contractor assigns 20 shares of stock to the contracting officer and sends them to him through the mail. The contracting officer has illegally acquired an interest in the contractor's corporation through a pattern of racketeering activity, i.e., solicitation of a bribe, receipt of a bribe, and a mail fraud.

8-4. Engaging in Racketeering Activity, 18 USC 1962(c)

Maximum Punishment: 20 years, a \$25,000 fine, forfeiture of any interest acquired or maintained in violation of 18 USC 1962, and forfeiture of any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise which the subject has established, operated, controlled, conducted, or participated in the conduct of, in violation of 18 USC 1962.

Extraterritorial: Yes, since in order to establish a violation of this section, "racketeering activity" involves a violation of state or Federal law, and the enterprise must involve interstate or foreign commerce.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

- (1) That the subject is employed by or associated with an enterprise.
- (2) That the enterprise is engaged in or its activities affect interstate or foreign commerce.
- (3) That the subject conducted or participated, directly or indirectly in the conduct of the enterprises affairs.
- (4) That the subject did so through a pattern of racketeering activity.

b. Commentary. This section outlaws the use of an enterprise to commit illegal acts. It is designed to reach those persons who, by employment or association, use an enterprise to engage in unlawful activities. Note the expansive definition of "enterprise" in paragraph 8-1a.

c. Examples.

(1) A contracting officer solicits a bribe from two different bidders on government contracts. He has violated this section. In this case, he is an individual employed by an "enterprise", i.e., the government contracting office. The enterprise is clearly engaged in activities which affect interstate commerce, i.e., the awarding of government contracts. The contracting officer conducted the affairs of the enterprise through a "pattern of racketeering activity", i.e., the solicitation of two bribes. (Note also that if the contracting officer successfully receives the bribes and uses the money so received to purchase an interest in another enterprise that affects interstate commerce, he will commit a separate violation of the statute.)

(2) Several officers of a contracting firm engage in a number of mail frauds and other predicate offenses with respect to a government contract. Bribes are paid to government officials, the mails are used to submit

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false claims, etc. In this case the "enterprise" is the contracting firm. It is irrelevant whether the firm is incorporated, a partnership, or even an unincorporated division of a corporation. Note that an "enterprise" may consist of a "group of individuals associated in fact although not a legal entity."

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8-5. Conspiracy to Engage in Racketeering, 18 USC 1962(d)

Maximum Punishment: 20 years, a \$25,000 fine, forfeiture of any interest acquired or maintained in violation of 18 USC 1962, and forfeiture of any interest in, security of, claim against or property or contractual right of any kind affording a source of influence over any enterprise which the subject has established, operated, controlled, conducted, or participated in the conduct of, in violation of 18 USC 1962.

Extraterritorial: Yes, since in order to establish a violation of this section, "racketeering activity" involves an offense chargeable under state or Federal law, and the enterprise must involve interstate or foreign commerce.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense. That the subject conspired with another person or entity to violate 18 USC 1962(a), (b), or (c).

b. Commentary. See paragraph 2-6b for a general discussion of conspiracy law. Several Federal courts have held that for purposes of this section, a corporation can be guilty of conspiracy with its own officers.

c. Example. See the preceding example in paragraph 8-4c(2).

Chapter 9

Copyright Infringement

9-1. Criminal Copyright Infringement, 17 USC 506(a)

Maximum Punishment: If the offense involves the reproduction or distribution within a 180 day period either of at least 1,000 phonorecords which infringe the copyright in one or more sound recordings, or at least 65 copies which infringe the copyright in one or more motion pictures or other audio visual works: 5 years and a \$250,000 fine. If the number of phonorecords reproduced or distributed within any 180 day period is more than 100 but less than 1,000, or if the number of motion picture or audio visual copies reproduced or distributed within any 180 day period is more than 7 but less than 65: 2 years and a \$250,000 fine. In all other cases, the maximum punishment is 1 year and a \$250,000 fine.

Extraterritorial: No.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject infringed the rights of a copyright owner, as defined in 17 USC 106.

(2) That the work so infringed had not been the subject of a "first sale."

(3) That the subject acted willfully and knowingly.

(4) That the subject acted for the purpose of commercial advantage or private profit.

b. Commentary.

(1) By law, the owner of a copyright is given several exclusive rights, including the right to reproduce the copyrighted work, to display the work, or to distribute it by sale or other transfer of ownership, rental, lease, or lend. This section is designed to protect that copyright interest with criminal sanctions for those who willfully infringe upon one of those rights.

(2) However, under the "first sale doctrine" when a copyright owner parts with the title to a particular copy of his copyrighted work, he divests himself of his exclusive right to sell or otherwise dispose of that particular copy. The person to whom he sells the work is entitled to sell or otherwise dispose of that particular copy as he so chooses and may even resell it for a

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profit. However, the copyright owner still retains the exclusive right to reproduce the copyrighted work, and the purchaser of a particular copy still may not make copies of it.

(3) There are statutory exceptions to the exclusive rights of copyright holders, such as use or reproduction for criticism, comment, newsreporting, teaching, scholarship, research, and the like. If involved in investigating a potential copyright infringement offense, close coordination should be effected with local judge advocates to insure that a copyright violation has occurred and that the apparent infringement is not within one of the statutory exceptions.

c. Example. A soldier purchases a video disk recording of "Star Wars" from a commercial outlet and reproduces a number of copies from it, which he then sells for a profit to other soldiers.

9-2. Trafficking in Counterfeit Labels, 18 USC 2318

Maximum Punishment: 5 years and a \$250,000 fine.

Extraterritorial: No.

Related UCMJ Offense: None.

Related MJ Benchbook Reference: None.

a. Elements of the Offense.

(1) That the subject trafficked in a counterfeit label affixed or designed to be affixed to a phonorecord, motion picture, or audio visual work.

(2) That the subject did so knowingly.

(3) That the subject did so:

(a) Within the special maritime and territorial jurisdiction of the United States; or

(b) Through the use or intended use of the US mail (including APO/FPO mail) or a facility of interstate or foreign commerce; or

(c) That the counterfeit label is affixed to or encloses or is designed to be affixed to or enclose, a copyrighted motion picture or other audio visual work, or phonorecord of a copyrighted sound recording.

b. Commentary.

(1) "Counterfeit label" means an identifying label or container that appears to be genuine, but which is not.

(2) "Traffic" means to transport, transfer, or otherwise dispose of to another as consideration for something of value, or to make or obtain control of with intent to so transport, transfer or dispose of.

(3) "Audio visual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

(4) "Copy" includes any material objects, other than phonorecords, in which a work is fixed by any method now known or later developed and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. It includes the material object in which the work is first fixed.

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(5) "Phonorecords" are material objects in which sounds other than those accompanying a motion picture or other audio visual work are fixed by any method now known or later developed and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. It includes the material object in which the sounds are first fixed.

(6) "Motion pictures" are audio visual works consisting of a series of related images which, when shown in succession, impart an impression of motion together with accompanying sounds, if any.

(7) "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sound accompanying a motion picture or other audio visual work, regardless of the nature of the material objects, such as disk, tapes, or other phonorecords, in which they are embodied.

c. Example. A club manager at an officer club located in Germany arranges with an individual in California to purchase pirated copies of several motion pictures. He receives the copies through the mail and displays the movies at the club, charging an admission fee. After the movies have been shown at the club he leases them out to other officer clubs in Germany.

PPENDIX A **STANDARDS OF CONDUCT VIOLATIONS**

This chart is a quick reference to assist special agents in making titling decisions concerning the most common violations of the Standards of Conduct. Persons will only be listed for those criminal offenses over which USACIDC has investigative jurisdiction. In cases which develop both criminal and administrative violations, the administrative violations of standards of conduct (AR 600 50) deemed non-criminal in nature will not be reflected in the offense listing of a report of investigation, nor will the offenders be listed in the title block. They will, however, be called to the action commander's attention in the synopsis of the report. Preliminary inquiries which conclude that only an administrative violation occurred will be documented on CID Form 66 and called to the action commander's attention. Special agents should consult the appropriate sections of the United States Code or AR 600 50 before making a titling decision. Punitive violations of AR 600 50 by servicemembers will be listed as violations of Article 92, UCMJ (para. AR 600 50). Violations of the US Code by servicemembers will be listed as violations of Article 134, UCMJ (18 USC ____). Criminal violations by civilian personnel will be listed as violations of the US Code (e.g., 18 USC ____). Special agents are cautioned that this guide applies to Standards of Conduct violations and cannot be relied upon as a substitute for timely legal advice.

VIOLATION	CRIMINAL VIOLATIONS		ADMINISTRATIVE SANCTIONS
	MILITARY	CIVILIAN	MILITARY AND CIVILIAN
Conflicts With Personal Financial Interests and Gov't Duties *	18 USC 208	18 USC 208	2 1b
Participate in Contracts or a Particular Matter Which Affect Personal Financial Interests or Prospective Employment	6 2b(1)(b)(EMs only) 18 USC 208 (Officers)	18 USC 208	2 1b 2 1n
Misuse Official Position	18 USC 201	18 USC 201	2 1e
Accept Gratuities from Prohibited Source	18 USC 203	1b USC 203	2 2b exceptions 2 2c
Use Gov't Facilities, Property, and Manpower for Non-Official Purpose	6 2a(4); Art 121 UCMJ	18 USC 641	2 4
Release Procurement Info	6 2a(3)		2 1f
Unauthorized Commitments or Statements with Respect to Awards of Contracts			2 1g
Commercial Solicitations of Subordinate DOD Personnel	6 2a(2)		2 1i
Accepting or Presenting Memento to Visiting Senior DA Personnel	Art 108 UCMJ		2 3b
Use Official Title in Connection With Commercial Enterprise	6 2a(5)		2 5
Outside Activity Which Discredits the Gov't	Art 133 134 UCMJ		2 6a(2)
Gambling on Gov't Property or on Duty	Art 133 134 UCMJ		2 7
Indebtedness Which Discredits the Gov't	Art 133 134 UCMJ		2 8
Bribery	6 2a(1); Art 133 134 UCMJ	18 USC 201	
Act as Attorney in a Claim Against US While in position of Trust in Gov't	6 2b(1)(a) (EMs Only) 18 USC 205 (Officers)	18 USC 205	
Receive Pay from Private Source for Gov't Services	6 2b(1)(c) (EMs only) 18 USC 209 (Officers)	18 USC 209	
Violate 18 USC 201 224 (Bribery, Graft, and Conflicts of Interest)	6 2c (Officer only) Art 133 134 UCMJ	18 USC 201 224	
Act as Agent of Foreign Principal	18 USC 219	18 USC 219	
Disclose Confidential Business Information	18 USC 1905	18 USC 1905	
Misuse of Franking Privileges	18 USC 1719	18 USC 1719	
Create Appearance of Using Office for Private Gain Giving Preferential Treatment Impeding Gov't Efficiency Losing Impartiality Making Gov't Decision Outside Official Channels Discrediting Gov't Integrity or Public Confidence			1 5a(1) 1 5a(2) 1 5a(3) 1 5a(4) 1 5a(5) 1 5a(6)
Use Inside Info			2 1d
Incompatible Membership in Assn			2 1h
Assign Reservists to Positions Which Benefit Their Civilian Business			2 1j
Accept Subsistence in Kind or Reimbursement from Private Source			2 2d
Accept Any Extravagant Benefits			2 2d
Give or Solicit Contributions for a Gift to Superior			2 3a
Accept Gifts from Subordinate			2 3a
Outside Employment Which Interferes With Gov't Position			2 6a(1)
Begin Employment at Place Under Sanction			2 6c (Military only)

* Former SM's and DA Civilians who either participate in a matter which they controlled during their government employment or who act as an attorney against the government within one year of leaving the government service may have violated 18 USC 207(a) or (b), respectively.

Prepared by OSJA HQUSACIDC
January, 1983

Glossary

Terms

Agency

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense. 18 USC 6.

Claim

A "claim" is a demand for a transfer of ownership of money or property.

Corruptly

A person acts "corruptly" if he acts voluntarily or intentionally and with a bad purpose or improper motive. The purpose or motive usually involves an expectation of improper financial gain or reward, but may include any unlawful purpose.

Department

The term "department" means one of the Executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the Government. 18 USC 6.

False and Fictitious

A statement is "false" or "fictitious" if it is untrue when made and if the person making the statement, or causing it to be made, did not believe it to be true when made. "False" or "fictitious" statements are untrue representations of material fact, made with knowledge of the untruthfulness.

Forge

To "forge" means to alter a document without authority in such a manner that the document, as altered, would, if genuine, apparently impose a legal duty on another or change another's legal rights. A document has such apparent ability if it is capable of paying an obligation, delaying, increasing, diminishing, or releasing a person from an obligation, or transferring to another a legal right.

Fraudulent

"Fraudulent" means intentionally deceitful.

Intent to Deceive

The term "intent to deceive" means to purposely mislead, cheat, or trick another, or to cause another to believe as true that which is false.

Intent to Defraud

"Intent to defraud" means acting purposely and with the specific intent to deceive or cheat. Usually, the intent is either to cause a financial loss to another or to effect a financial gain for oneself. There is no requirement, however, that the person sought to be defrauded actually suffer a loss.

Interstate Commerce

The term "interstate commerce" includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia. 18 USC 10.

Knowingly

A person acts "knowingly" if he acts voluntarily and intentionally, and not on the basis of mistake or accident.

Obligations or Securities of the United States

The term "obligation or other security of the United States" includes all bonds, certificates or indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps. 18 USC 8.

Special Maritime and Territorial Jurisdiction of the United States

The term "special maritime and territorial jurisdiction of the United States" includes:

a. The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

b. Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

c. Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

d. Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

e. Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the law of the United States, or any State, Territory, district, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State. 18 USC 7.

United States

The term "United States," as used in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except the Canal Zone. 18 USC 5.

Utter

The term "utter" means to use a writing with the representation, by words or actions, that it is genuine and will be paid in full when presented for payment by a person or organization entitled to payment.

Willfully

A person acts "willfully" if he acts purposely and intentionally.

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FOR THE COMMANDER:

OFFICIAL:

JOSEPH OSTROWIDZKI
Colonel, GS
Chief of Staff


ELIZABETH JEFFERSON

Chief
Administrative Services Division

DISTRIBUTION:

A plus 1 ea special agent
300 CIJA

DATE
TIME