January
2007
Volume 55
Number 1

United States
Department of Justice
Executive Office for
United States Attorneys
Washington, DC
20530

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Director

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The United States Attorneys' Bulletin is published pursuant to 28 CFR § 0.22(b).

The United States Attorneys' Bulletin is published bimonthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201.

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Send article submissions and address changes to Program Manager, United States Attorneys' Bulletin,
National Advocacy Center,
Office of Legal Education,
1620 Pendleton Street,
Columbia, SC 29201.

Office of Enforcement Operations

In This Issue

Introduction

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It is my great pleasure to write the introduction to this issue of the *United States Attorneys' Bulletin* devoted to the mission of the Criminal Division's Office of Enforcement Operation (OEO). As the Director of OEO, I supervise the operations of almost 100 employees—attorneys, paralegals, security specialists, and secretaries. Our responsibility is to ensure oversight of critical Department of Justice (Department) functions entrusted to OEO by Congress and the Attorney General, and do so accurately and promptly. OEO has been tasked with overseeing the use, by the federal law enforcement community, including the United States Attorneys' offices, federal investigative agencies, and the sections and offices of the Criminal Division, of the most sensitive investigative techniques in the federal arsenal.

The techniques guarded by OEO constitute many of the most important law enforcement tools available to federal prosecutors and agents to ensure success against terrorism, drug trafficking, gang violence, and other crimes menacing our Nation. OEO reviews applications to use the following techniques.

- Most types of electronic surveillance (*e.g.*, the interception of wire, oral, and/or electronic communications pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended; court-authorized video surveillance; certain sensitive uses of consensual monitoring).
- Entry into the Federal Witness Security Program and oversight to ensure the ongoing security of Program witnesses and their families.
- Grand jury and trial immunity.
- Imposition of Special Administrative Measures (SAMs), requiring restrictive confinement conditions on persons in the Attorney General's custody, in addition to those conditions already imposed by the Federal Bureau of Prisons.
- Authority to seek subpoenas directed at the news media.

For some of these techniques, an official in OEO can grant authorization. Many of these matters, however, require the approval of a Deputy Assistant Attorney General, the Assistant Attorney General, or even the Attorney General.

OEO's responsibilities also include the following.

- Adjudicating requests from foreign-national prisoners to transfer from a United States prison to serve their U.S.-imposed prison sentences in their home countries, and, conversely, requests from foreign-held United States citizens to serve their sentences in a U.S. prison.
- Reviewing legislation and proposed Executive Branch policies that would impact federal program areas within OEO's purview.
- Registering the use of certain gambling devices.
- Compiling and maintaining the legislative histories for all federal criminal laws enacted by Congress.
- Providing specialized legislative-history assistance to Assistant United States Attorneys, when requested.
- Overseeing Freedom of Information Act and Privacy Act requests presented to the Criminal Division.
- Giving legal advice to Assistant United States Attorneys and others in the many subject areas that have been entrusted to OEO. Those areas go well beyond the subjects addressed above, and include such diverse matters as outer space law and the laws governing the preservation of archaeological sites. The above list is by no means complete.

Many of OEO's most commonly used functions are described in some detail in the following pages. However, many other responsibilities are not included, such as assisting the Criminal Division to comply with the Crime Victims' Rights Act. The majority of OEO's

responsibilities are explained in the United States Attorneys' Manual and the related Criminal Resource Manual. The Office also maintains an updated listing of the approval, consultation, and notification requirements involving OEO that are applicable to the United States Attorneys' offices and law enforcement agencies. This information, in chart form, is included in this issue, starting on page 31.

OEO provides the Department's decision-makers with the information needed to oversee and shepherd the use of some of the most effective investigative and prosecutorial tools entrusted to the Department to combat crime, violence, and terror. OEO is tasked to safeguard the balance between the evidentiary needs of law enforcement and the need to protect the rights of American citizens to be free from unnecessary incursions into personal privacy. I am particularly proud of the recognition and many awards for objective and effective oversight, given to the members of OEO, individually and as a group, by the Attorney General's Office, the Office of the Assistant Attorney General for the Criminal Division, the U.S. Attorneys' offices, and the investigative agencies. OEO stands ready to help the U.S. Attorneys' offices and federal law enforcement agencies acquire and use these indispensable tools to successfully investigate crimes, prosecute criminals, and sustain convictions. The following articles will provide valuable information and serve as a handy reference. You can remain confident that OEO is always available to assist in investigations and prosecutions, address questions, and advance your prosecutorial efforts. All of OEO's units and program supervisors can be reached at (202) 514-6809.❖

ABOUT THE AUTHOR

❑**Maureen H. Killion** joined the Criminal Division through the Department's Honors Program. She initially served in the Appellate Section and the former Office of Legal Support Services before joining the OEO as a Trial Attorney. Since then, she has served as Chief of the Electronic Surveillance Unit, Associate Director of OEO, and Senior Associate Director of OEO. Mrs. Killion has also served the Division as Acting Chief of International Training Programs. She continues to work on a variety of high-profile electronic surveillance cases and legislative matters since being appointed Director of OEO in 2001.✠

Survey of Title III

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I. Introduction

In 1968, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act (Title III) to legalize and regulate the use of electronic surveillance (wiretapping) by federal law enforcement agencies in criminal investigations, in accordance with Fourth Amendment jurisprudence. As originally enacted, Title III authorized only the interception of wire (voice) and oral (face-to-face) communications to investigate certain crimes. Title III remained intact until Congress amended the statute in 1986 to permit the interception of electronic communications (data transmitted via facsimile machine, computer, and pager) to investigate federal felonies and allowed, for the first time, the interception of criminals using changing facilities or locations, without first having to specify the particular facility or location to be tapped. 18 U.S.C. § 2518(11)(a), (b) (the roving provision). Title III was amended again in the late 1990s to ease the roving provision's burden of proof, and again in 2001 to strengthen law enforcement's ability to combat terrorism (the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001)).

While Congress granted law enforcement the use of this powerful investigative tool, it also recognized the potential for its abuse. Therefore, when it enacted Title III in 1968, it mandated that a high-ranking official in the Department of

Justice (Department) approve all federal wiretap applications before their submission to a federal court for action. 18 U.S.C. § 2516(1). As a result, the Department assigned the Office of Enforcement Operations (OEO) the responsibility of vetting these applications to ensure compliance with Title III and the Department's policies regarding the use of electronic surveillance. OEO's oversight is accomplished through the work of the Electronic Surveillance Unit, which is currently comprised of ten attorneys.

II. Title III requirements

Title III imposes many requirements on federal law enforcement agencies when they seek a wiretap. *See* 18 U.S.C. §§ 2510-2522. Failure to comply with the following three requirements, in particular, will likely result in suppression of the wiretap evidence.

- Acquiring Department approval before submission of the wiretap application to a court.
- Establishing probable cause to believe that evidence of a stated crime will be obtained during the wiretap.
- Establishing necessity for the wiretap.

A. Department approval

Title III requires that a statutorily designated Department official authorize a Title III application seeking to intercept wire or oral communications before the application is submitted to a federal district court judge or a court of appeals judge for consideration. 18 U.S.C. §§ 2516(1), 2510(9). (As a practical matter, most, if not all, Title III applications are reviewed and approved by a federal district court judge. Appellate judges have issued orders when a district court's jurisdiction over the facility/location to be tapped has been questionable.)

As to the interception of electronic communications, Title III permits a United States Attorney to approve those applications before they are submitted to court. 18 U.S.C. § 2516(3). Notwithstanding the statute, Congress and the Department have long agreed that the Department would also approve applications seeking to intercept electronic communications over certain types of facilities, such as computers, facsimile machines, text-messaging pagers, and telephones, before those applications are submitted to a court for action. The Department is not required, however, to review and approve applications seeking to intercept electronic communications over digital display pagers. Those applications may be approved by the United States Attorney. 18 U.S.C. § 2516(3).

When the government fails to obtain Department approval for applications to intercept wire or oral communications before the court issues the order, the wiretap evidence will be suppressed. *See United States v. Reyna*, 218 F.3d 1108, 1112 (9th Cir. 2000) ("The statutory sequence of wiretap authorization makes it clear that prior authorization by senior executive branch officials is an express precondition to judicial approval under [section] 2516; its violation merits suppression. A district court may not delegate to law enforcement officials at any level its singular power to set the surveillance mechanism in motion." (citing *United States v. Chavez*, 416 U.S. 562 (1974))). It should be noted, however, that because Title III does not require prior Department approval before the government seeks an order to intercept electronic communications, there is no suppression remedy for failure to do so. Nonetheless, a government attorney can face disciplinary action if the attorney does not obtain approval for those applications because prior approval is mandated by Department policy.

The issue of whether the Department has to reauthorize a wiretap application if the supporting affidavit has been revised subsequent to Department approval, but before the court issues its order, was decided recently in *United States v. Chan*, No. C 05-00375 SI, 2006 WL 1581946 (N.D. Cal. June 6, 2006). The defense contended that the wiretap was unlawful because the final version of the affidavit contained material revisions that had not been reviewed or approved by the Department. When denying the defense claim, the court found that, in fact, the changes to the affidavit merely clarified and supported certain facts already discussed in the original version, and that the judge was permitted under 18 U.S.C. § 2518(2) to "require the applicant to furnish additional testimony or documentary evidence in support of the application," without further Department approval. The court did note, however, that the Department may need to reauthorize a wiretap application when a significant period of time has elapsed between the Department's initial approval and a court's review of the application, and/or when material facts change or develop subsequent to the Department's

approval that could have affected the official's decision to authorize the application.

In sum, failure to obtain Department approval of a wiretap application to intercept oral or wire communications before it is submitted to a judge will result in suppression and, in the case of applications to intercept electronic communications, disciplinary action for the prosecutor. In addition, the Department may need to reauthorize a wiretap application if a substantial period of time has elapsed between obtaining Department approval and submission of the application to the court (more than thirty days), or if the government subsequently obtains facts that could affect a Department official's decision to approve the application.

B. Probable cause

As with any search warrant, the government must show that there is probable cause to believe that evidence of the crime will be obtained during the search. With regard to the seizure of intangible evidence, such as communications, the standard is no different, and Title III merely codified that basic Fourth Amendment principle at 18 U.S.C. § 2518. *See United States v. Fury*, 554 F.2d 522, 530 (2d Cir. 1977). Under Title III, the government must show that there is probable cause to believe that "an individual (if known) is committing, has committed, or is about to commit a particular offense" and that "particular communications concerning [the alleged] offense will be obtained through such interception" of a particular, specified facility or location. 18 U.S.C § 2518(3)(a),(b). *But see* 18 U.S.C. § 2518(11)(a), (b) (the roving provision provides for exceptions to the specificity requirement for the facility/location). A Title III warrant, however, differs in one important aspect—a Title III order may be issued only if certain crimes are being investigated. If the government is seeking to intercept oral or wire communications, it must establish probable cause that one of the crimes listed under 18 U.S.C. § 2516(1) is being committed, and if the government is seeking to intercept electronic communications, there must be probable cause that a federal felony is being committed. 18 U.S.C. § 2516(3).

When the existence of probable cause has been challenged, the courts consider a number of factors, such as the type of crime, the length of the criminal activity, the nature of the object of the search, and whether stale information has been updated and corroborated, to decide the key issue—whether the object of the search will still be found at the time of the issuance of the warrant. *See United States v. Rhynes*, 196 F.3d 207, 234 (4th Cir. 1999); *United States v. Ozar*, 50 F.3d 1440, 1446 (8th Cir. 1995) ("probable cause to issue the warrant must exist at the time it is issued"). Under this analysis, an isolated criminal act, though recent, by an individual who cannot be tied to ongoing criminal activity will be insufficient to establish probable cause for a search. *See United States v. Lester*, No. 05-5586, 2006 WL 1549938, *2 (6th Cir. June 7, 2006) (Evidence that a single transfer of drug money likely occurred at appellant's home two weeks before the warrant was issued did not establish probable cause that he was involved in the ongoing drug conspiracy and, therefore, did not support the search of the appellant's property.). *See also United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993) ("because the [a]ffidavit does not establish the likelihood that there was an ongoing drug-selling operation in [the] home, the district court [did not err] in finding no probable cause.").

When the government can link the object of the search to the ongoing criminal conduct, and updates and corroborates any stale information, the courts will find probable cause. *See United States v. Urban*, 404 F.3d 754, 775 (3d Cir. 2005) (probable cause for video surveillance updated to within months of warrant application in an investigation spanning several years); *United States v. Diaz*, 176 F.3d 52, 109-10 (2d Cir. 1999) (pen register data updated and bolstered probable cause by showing extensive use of phone to call criminal associates); *Ozar*, 50 F.3d at 1447 (physical surveillance updated and corroborated otherwise stale information); *Wagner*, 989 F.2d at 74 (pen register data used to corroborate informant to support taps on phones); *United States v. Rowell*, 903 F.2d 899, 900, 902-03 (2d Cir. 1990) (pen register data updated and corroborated stale information); *United States v. LaMorte*, 744 F. Supp. 573, 576 (S.D.N.Y. 1990) (probable cause updated to within six months of warrant application; court found that the tangible evidence sought was "not temporary in nature" and not "likely to dissipate over the intervening time" between the act giving rise to probable cause and the execution of the search); *United States v. Gricco*, No. CR.A. 01-90, 2002 WL 393115 (E.D. Pa. Mar. 12, 2002) (probable cause updated to within weeks of warrant application).

In light of the case law, the Department requires that every wiretap application seeking to

tap a new facility or a new location meet a baseline standard of probable cause by showing both of the following.

- Criminal use of the facility or location within six months of the Department's approval.
- Circumstantial evidence, such as phone records or physical surveillance showing, respectively, that the facility or the location has been used for criminal purposes within three weeks (twenty-one days) of the Department's approval.

While appellate courts routinely defer to a lower court's probable cause determination, an affiant's purposeful misstatement of the facts in the affidavit will likely result in a *Franks* hearing and, if found to be material to the probable cause determination, will result in suppression. *See Franks v. Delaware*, 438 U.S. 154 (1978) (evidence must be suppressed if the affidavit contained material information that the affiant knew was false or should have known was false). A *Franks* hearing and/or resulting suppression of the wiretap evidence can occur when an affiant takes one or more of the following actions.

- Disguises the source of the information being relied on for probable cause.
- Conceals an informant's identity by naming him as a target of the investigation.
- Omits facts that bear on an informant's credibility.
- Withholds information about an informant's basis of knowledge.

See, respectively, *United States v. McCain*, 271 F. Supp. 2d 1187, 1191-93 (N.D. Cal. 2003) (portrayal of wiretap evidence as an informant showed a reckless disregard for the truth and precluded a proper determination of probable cause; evidence suppressed); *United States v. Falls*, 34 F.3d 674, 681-82 (8th Cir. 1994) (informant identified as a subject who was committing the crimes in order to protect his identity; no suppression, but the court required prior notice of this practice in the future); *United States v. Meling*, 47 F.3d 1546, 1555-56 (9th Cir. 1995) (deliberate misrepresentation of informant's motive to cooperate and omission of informant's prior record of deception and mental illness; no suppression because probable cause was found "once the FBI's dissembling [was] corrected"); *United States v. Gruber*, 994 F. Supp. 1026, 1035 (N.D. Iowa 1998) (affiant omitted fact that the informant was a member of the organization being investigated; no suppression because subterfuge was designed to protect the informant's safety and not to enhance the affidavit).

Accordingly, the wiretap affidavit must establish that it is more likely than not that communications about the alleged crimes will be intercepted from a specified facility or location during the thirty-day authorization period, and if the affidavit contains any material misrepresentations designed to supply probable cause when it would otherwise be lacking, the evidence will be suppressed.

C. Necessity

Not only does Title III require a probable cause showing for each facility or location to be tapped, but the government must also show that each tap is necessary to achieve the goals of the investigation. Specifically, 18 U.S.C. § 2518(3)(c) requires the government to provide "a full and complete statement as to whether or not other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." *See United States v. Bennett*, 219 F.3d 1117, 1121 (9th Cir. 2000) ("necessity requirement exists in order to limit the use of wiretaps"); *United States v. London*, 66 F.3d 1227, 1237 (1st Cir. 1995) (affidavit needs to outline the government's reasonable, good faith effort to use other investigative techniques); *United States v. Oriakhi*, 57 F.3d 1290, 1298 (4th Cir. 1995) (necessity showing must be based on facts of instant investigation); *United States v. Santora*, 600 F.2d 1317, 1321-22 (9th Cir. 1979) (spinoff affidavits seeking to tap additional facilities must contain a new particularized showing of need); *United States v. Williams*, No. CRIM.A. 99-140, 2000 WL 1273407, *2 (E.D. La. Sept. 5, 2000) ("each wiretap [affidavit], including extensions of existing wiretaps, must be separately justified as necessary in light of the facts of a particular case") .

Typically, investigative techniques employed or considered in criminal investigations include the use of confidential sources/cooperating witnesses, the use of undercover agents/operations, physical surveillance of the subjects or known locations, the analysis of telephone records and call data, grand jury investigations, and the analysis of documentary evidence. Some investigative techniques might be

more useful or typical in some investigations than others (the analysis of bank records would be more fruitful in a money laundering case as opposed to a street-level drug conspiracy), and the courts recognize that some types of investigations share "common investigatory problems." *See United States v. Milton*, 153 F.3d 891, 895 (8th Cir. 1998) ("Although some assertions might appear boilerplate, the fact that drug investigations suffer from common investigatory problems does not make these problems less vexing."); *United States v. Scala*, 388 F. Supp. 2d 396, 405 (S.D.N.Y. 2005) (because organized crime investigations present similar necessity statements from one investigation to another, such similarity does not render the affidavit's necessity showing ineffective).

The courts also recognize that a certain degree of success with one or more investigative techniques does not negate the need for the wiretap. *See United States v. Canales*, 358 F.3d 1221, 1225-26 (9th Cir. 2004) (government does not have to use all possible informants before obtaining a wiretap); *Bennett*, 219 F.3d at 1122; *United States v. Labate*, No. S100CR.632(WHP), 2001 WL 533714 (S.D.N.Y. May 18, 2001) (informant's cooperation did not negate necessity finding under circumstances of case). Likewise, the courts do not require that the government take extraordinary steps to exhaust other investigative avenues before a wiretap becomes necessary. *See United States v. Yeje-Cabrera*, 430 F.3d 1, 10 (1st Cir. 2005); *United States v. Staves*, 383 F.3d 977, 982 (9th Cir. 2004) (the government does not have to release an imprisoned informant in lieu of using a wiretap investigation); *Indelicato v. United States*, 106 F. Supp. 2d 151, 158-59 (D. Mass. 2000) (the government does not have to go to extreme measures, such as offering protective custody, to obtain an informant's testimony).

Notwithstanding a body of favorable case law, failure to establish legal necessity is by far the most common reason courts suppress wiretap evidence, and the issue of suppression typically arises when an affiant does not pursue facts material to the necessity determination, fails to consider or employ common investigative techniques, or misrepresents what investigative avenues have been pursued. *See*, respectively, *United States v. Aviles*, 170 F.3d 863, 867 (9th Cir. 1999) (DEA agent's intentional failure to disclose facts is attributable to the FBI affiant); *United States v. Salemme*, 91 F. Supp. 2d 141, 167-69 (D. Mass. 1999) (the prosecutor and the DEA recklessly disregarded their legal obligation to extract information from the FBI, that if shared with them, would have resulted in the wiretap applications not being approved by the court); *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1111-15 (9th Cir. 2005) (government made limited use of potentially productive methods, particularly physical surveillance); *United States v. Blackmon*, 273 F.3d 1204, 1211 (9th Cir. 2001) (when affidavit was "[p]urged of misstatements, . . . the remainder of the application, which contains generalized statements that would be true of any narcotics investigation, fails to contain sufficiently specific facts to satisfy the requirement of [section] 2518(1)(c))"; *United States v. Aileman*, 986 F. Supp. 1228 (N.D. Cal. 1997) (affiant's omissions and misstatements resulted in suppression of wiretap evidence).

Accordingly, the government's wiretap affidavit must contain an accurate, particularized showing of investigative necessity, based on the facts of the individual case, and each affidavit needs to justify the use of electronic surveillance for every tap sought.

III. Conclusion

Since 1968, the use of electronic surveillance has increased exponentially. In 1991, OEO reviewed 600 requests to seek court-ordered electronic surveillance. In 2005, OEO reviewed over 2,700 such requests. In recent years, OEO has seen a growing number of requests to seek electronic surveillance over facilities using new technology, such as voice over internet (VOIP)—telephone service over the internet, and has witnessed the ever-increasing use of prepaid cellular phones, text-messaging phones, and pagers, by criminals. While Title III, for the most part, has withstood the test of time, it is clear that the statute needs to brought into the 21st century to provide law enforcement with the tools to target the ever-changing ways in which criminals communicate.❖

ABOUT THE AUTHOR

❑**Julie Wuslich** is the Chief of the Electronic Surveillance Unit, and has held that position since 1995. She has spoken on electronic surveillance issues before numerous law enforcement agency audiences, advises on electronic surveillance

issues, and has written training materials for an international symposium on electronic surveillance.✠

Witness Security and Special Operations Unit

Eileen P. Ruleman
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I. Federal Witness Security Program

The Federal Witness Security Program (Program) is one of the most effective and successful weapons ever used in prosecuting persons and groups involved in organized criminal activity. The testimony of more than 8,000 protected witnesses during the past thirty-six years has resulted in the conviction of members of many major organized criminal groups.

The Program was created in the 1960s, as a result of Attorney General Robert Kennedy's war against organized crime. In those days, it was difficult to prosecute members of major racketeering organizations because of the government's inability to protect witnesses willing to testify against such dangerous criminals. Criminal organizations were operating with relative impunity as a result of their ability, willingness, and access to financial resources necessary to intimidate and murder the few individuals who could testify against them. However, since the Program's inception, no participant who has followed the Program's rules has been killed or seriously injured as a result of his or her cooperation with the government.

Originally created to overcome the reluctance of witnesses to cooperate against members of the La Cosa Nostra (LCN), the Program has proven itself flexible enough to meet the needs of the ever-changing nature and wide variety of witnesses whom it must serve. Today, such persons may be witnesses against the LCN, but it is more likely that they are cooperating against international or domestic terrorists, drug traffickers, violent street or prison gangs, or perpetrators of economic crimes.

The Program is administered by Director, Stephen J. T'Kach, who serves as the designee of the Attorney General. Mr. T'Kach, who is an Associate Director in the Office of Enforcement Operations (OEO), determines which individuals are accepted into the Program, oversees the wide-ranging operations of the Program, and serves as an ombudsman for Program participants. Mr. T'Kach is the second Director in the Program's history. Mr. Gerald Shur was the first and he spearheaded the creation of the Program. This continuity has enabled the Program to remain consistent in the areas that are essential to its goals and mission, while providing the flexibility necessary for innovation.

The Witness Security and Special Operations Unit (WSSOU) within OEO is responsible for managing a variety of operational aspects of the Program. The WSSOU receives an average of 230 applications for witnesses to be admitted into the Program each year, and accepts approximately 160. Over 95% of the witnesses authorized are criminal associates of the major targets.

II. Eligibility

Strict criteria must be met before a person is authorized for Program services. The Program is used only as a last resort, when no other means will suffice to keep alive a key witness in a significant prosecution affecting the United States. All applications for Program services must be signed personally by the United States Attorney (USA) in the involved federal jurisdiction. This certifies that the USA considers the case to be of

significant importance to justify the extensive use of government resources required to protect the witness and his or her family members. The signed application, which is submitted to OEO for evaluation, analysis, and review, must contain sufficient details, and must be accompanied by appropriate documentation, to ensure that four basic statutorily mandated criteria are met.

- The significance of the case must be clearly demonstrated.
- The importance of the testimony that the witness will provide, and the lack of alternative sources for it, must be shown.
- The existence of a bona fide threat against the life of the witness must be demonstrated.
- Assurance must be given—if the witness is to be relocated rather than incarcerated—that any danger the witness might pose to a new community is outweighed by the benefits to be gained by his or her testimony.

Assistant United States Attorneys (AUSAs) are strongly encouraged to contact their investigative agents prior to submitting an application, in order to coordinate the proposed protection of the witness.

As part of the overall evaluation process, in addition to a comprehensive criminal background check that is conducted on the witness and any adult family member who is being relocated, the OEO seeks the input of the experts listed below, in each case, before determining whether Program services are warranted.

- Attorneys from the appropriate litigating component of the Department of Justice weigh in on the significance of the case, including whether it merits the unique services of the Program.
- Management personnel from the headquarters of the investigative agency sponsoring the witness must submit a threat assessment detailing the threat believed posed to the witness as a result of cooperation with the government. If the witness, or any of his or her family members, is being relocated in a new community, the agency headquarters also provides an assessment of the risk posed to a relocation community, as well as whether the benefits to be gained from using the witness in the prosecution outweigh any such risk.
- Inspectors from the United States Marshals Service (USMS) conduct an interview of nonprisoner witnesses, as well as any adult family member who is being sponsored for relocation, and provide an assessment of whether they are suitable candidates for the Program. This interview, which allows the USMS to identify potential problems that might prevent successful relocation, is designed to ensure that the witness understands what services can and cannot be provided during Program participation, and that the witness understands his or her responsibilities as a Program participant. The interviewer also asks the witness what he or she may have understood to be promised, and clarifies that neither the prosecutor nor the investigative agency can make any binding promises concerning services provided in the Program. In addition, any exculpatory or impeaching admissions memorialized during the interview may fall under *Brady* and *Giglio*, and AUSAs should make themselves aware of such statutes to ensure compliance with any notice or disclosure requirements**.**
- Psychologists conduct an evaluation of each witness who is being sponsored for relocation, as well as any adult family member sponsored to accompany him or her into the Program.

Although the Witness Security Program is known primarily for its relocation component with the USMS, which has entered the public consciousness through such movies as *Eraser* and *My Blue Heaven,* the fact is that the vast majority of witnesses who enter the Program are not immediately given a new identity and placed into a new community. Rather, 80% of the approximately 160 new witnesses approved for Program services each year are prisoner-witnesses who have been convicted of a crime and must serve time in the custody of the Federal Bureau of Prisons (BOP). These prisoner-witnesses are separated from other prisoners against whom they are testifying, or prisoners who might pose a threat to them while they are in custody. BOP maintains separate Protective Custody Units (PCUs), or "prisons within prisons" as they are commonly known, to house convicted witnesses who cannot safely be placed in the general inmate population. Each PCU is self-contained to help ensure and maintain security of the witnesses, and the location of the specific facility in which a prisoner-witness is housed is not publicized. There are stringent rules by which prisoner-

witnesses must abide and, like relocated witnesses, those who fail to abide by Program guidelines are subject to removal from the Program.

Because participation in the Program is voluntary, both relocated participants and prisoner-witnesses can remove themselves at any time.

Family members of a prisoner-witness, who are endangered as a result of the prisoner's cooperation, are eligible for consideration to receive protection from the USMS through the relocation component while the prisoner is incarcerated.

A witness's participation in the incarceration component of the Program does not guarantee that full Program services of the relocation component will be provided upon his or her release from custody. Many believe that they can return home, or have alternatives which will be sufficient to protect them in lieu of the rigorousness of the full relocation services of the Program. Approximately one-half of prisoner-witnesses receive further services of the Program upon release, according to the 2006 data.

During the early days of the Program, most witnesses who were authorized for services were U.S. citizens. Today, a significant number of witnesses and their family members are foreign nationals. This requires OEO to coordinate their entry and participation with the Bureau of Immigration and Customs Enforcement (ICE) in the Department of Homeland Security, in addition to other agencies.

Special Limited Services is a unique variation of the Program that allows foreign national witnesses who are subject to deportation, and who would be in danger if they returned to their home countries, to remain in the United States. Since these witnesses are not in danger in this country, full Program services are not required and are not provided. Special Limited Services may be extended to individuals who have been denied or are ineligible for an S Visa, or individuals who are facing imminent deportation or detention by ICE which poses a serious threat to them while an S Visa application is pending.

As traditional jurisdictional boundaries have eroded, and crime has become increasingly international in scope, even many small nations have recognized the need for a mechanism to protect their witnesses. The Program's Director, Special Counsel, and WSSOU personnel, frequently provide guidance, expertise, and assistance to foreign governments who are interested in developing their own methods of providing security to witnesses.

A witness who enters the Program maintains a unique and continuing relationship with the government. Once an individual is authorized for Program services, the sponsoring AUSA must arrange any telephone calls, pretrial interviews, or other type of contact with the witness through the WSSOU. Even after subsistence allowances and other types of material support are terminated, investigative agencies and prosecuting attorneys who desire to use their own witnesses must observe certain protocols. Once a witness enters the Program, neither the witness nor any family member can be used as an informant or witness in a new case without the express prior approval of OEO. A request to utilize a current or former Program witness as an informant must be made in accordance with the United States Attorneys' Manual (USAM). Former Program participants who are utilized as informants are the sole responsibility of the investigative agency requesting their assistance, and are not eligible for participation in the Program unless they again become a witness as defined in 18 U.S.C. §§ 3521 -3528. It is a violation of federal law for anyone to disclose or disseminate any information about a witness placed in the Program without the express approval of the Program's Director. *See Id.*

The Program is administered pursuant to the provisions of the "Witness Security Reform Act of 1984," which is codified at 18 U.S.C. §§ 3521 -3528. The guidelines established by the Attorney General concerning the Program are detailed in USAM 9-21.000.

III. Special Operations

The Special Operations component of the WSSOU authorizes the use and targeting of federal prisoners in certain investigations, as set forth in USAM 9-21.050.

IV. Contacts

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Catherine K. Breeden, Chief, Witness Security and Special Operations Unit

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All contacts can be reached at 202-514-3684.❖

ABOUT THE AUTHOR

❑**Eileen P. Ruleman** has been a Deputy Chief of the Witness Security and Special Operations Unit of the Office of Enforcement Operations since June 1997. Ms. Ruleman began her tour of duty with the Witness Security and Special Operations Unit in 1986. Ms. Ruleman started her Department of Justice career in the Federal Programs Branch, Civil Division, in August 1979.✠

The Witness Immunity Unit of the Office of Enforcement Operations

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I. Introduction

Despite its name, the Witness Immunity Unit (WIU) of the Criminal Division's Office of Enforcement Operations has a variety of functions. It is responsible for requests for authorization to immunize witnesses, to prosecute previously immunized witnesses, and to resubpoena previously contumacious witnesses. Further, it handles requests within the Criminal Division seeking waiver of the Department of Justice's (Department) dual prosecution policy (also known as the Petite Policy), and Department-wide requests for authorization to issue subpoenas to attorneys. The WIU is also the point of contact when prosecutors contemplate executing search warrants at law offices, or intend to indict an attorney. Finally, the WIU coordinates global plea agreements. All of these functions are detailed in the United States Attorneys' Manual. The forms that are submitted to the WIU can also be found online, or can be requested from the WIU.

Other divisions within the Department handle immunities for cases brought under the statutes which those divisions oversee. For example, when immunity is sought in a tax case, the request for authorization is sent to the Tax Division, with an informational copy faxed to the WIU. In such a case, the WIU will notify the responsible division whether the Criminal Division concurs or objects to the immunity. In a similar vein, dual prosecution policy requests are handled by the divisions overseeing the crimes which are the subjects of the proposed federal prosecution, such as violations of civil rights or environmental laws.

II. Immunity matters

A. The immunity statute

To the layman, a witness who testifies under a grant of immunity can never be prosecuted for the crimes which he discusses while testifying, *i.e.*, the witness has been given "transactional immunity." Prior to 1970, there were a number of immunity statutes, many of which conferred transactional immunity. In 1970, Congress replaced all those statutes with 18 U.S.C. §§ 6001-6006, which provides for "use immunity." With use immunity, prosecutors cannot make direct or indirect use of immunized testimony, except to prosecute the witness for perjury, giving a false statement, or otherwise failing to comply with the compulsion order. 18 U.S.C. § 6003. It is possible to prosecute a previously immunized witness for crimes related to the immunized testimony if it can be established that no use has been, or will be, made of the immunized testimony, but such

prosecutions are extremely rare and can only be authorized by the Attorney General.

B. Seeking authorization to immunize a witness (USAM 9-23.130)

In seeking authorization to apply for a compulsion order, Assistant United States Attorneys (AUSAs) should follow the steps outlined below.

- Complete the compulsion order request form.
- Have the United States Attorney sign the form.
- Fax the form to the WIU.

The WIU evaluates the request and sends its recommendation to the deciding official. If the request is approved, an authorization letter is faxed to the United States Attorney's office (USAO). Once authorization is received, the AUSA files a motion with the court seeking a compulsion order. The statute requires a showing that a Departmental official approved the application for a compulsion order, and for this reason, most United States Attorneys' offices attach the authorization letter to the motion.

C. The Department's evaluation of the immunity request

Under the immunity statute, the authorizing official must conclude that the testimony or other information being sought are necessary to the public interest. 18 U.S.C. § 6003 (b)(1). The Department closely focuses on several factors, the most obvious of which is relative culpability. Immunity will not be authorized for a witness who is far more culpable than the person against whom he will testify. (The classic situation would be immunizing the armed robber to testify against his getaway driver.) In this situation, the Department will insist that the highly culpable witness first be prosecuted before immunity will be considered.

The Department also looks to determine whether the witness is being investigated by another district. If so, the AUSA seeking the immunity will consult with an AUSA in the other district to determine if there is an objection. In many instances, there is no objection because the crimes under investigation are unrelated to the matters about which the witness will be testifying. If the witness is being investigated for crimes related to his proposed immunized testimony, the Department ordinarily will refuse to authorize the immunity unless the witness's testimony is absolutely essential in an important case, and the two districts can work out a procedure in which the investigating district is not exposed to the immunized testimony.

Many AUSAs are unaware of the Department's "close family relative exception," which is set out in the United States Attorneys' Manual at 9-23.211. The purpose of this internal policy is to preserve family unity. Accordingly, the Department will reject an application that seeks to compel testimony from a close relative (such as a parent or sibling) of the target/defendant. The policy does not apply if the prosecutor plans to question the relative about a business that he operated with the target/defendant, or if the testifying relative himself has culpability. Further, the policy is not applicable if the matter under investigation has overriding prosecutorial concerns.

D. Act of production immunity

Occasions arise when a prosecutor seeks business records, which are plainly not protected by the Fifth Amendment because they are made in the ordinary course of business, not under compulsion, and are not "testimonial" in nature, but the witness insists on immunity before he will produce the records. The witness is asking for an "act of production immunity" because his act of producing the records concedes their existence and his possession of them, and that the records are those described in the subpoena. *United States v. Doe*, 465 U.S. 605 (1984). Whether the Department will authorize immunity depends upon the nature of the business entity whose records are being sought. When it is a sole proprietorship, as in *Doe*, immunity will be authorized. If it is a corporation, even a closely held corporation, immunity will not be authorized because corporations are not protected by the Fifth Amendment, and the witness who produces the records is acting in a representative, not in a personal, capacity. *Braswell v. United States*, 487 U.S. 99 (1988). Likewise, partners in a partnership are considered to be acting in a representative capacity. *Bellis v. United States*, 417 U.S. 85 (1974).

If the immunized sole proprietor is thereafter prosecuted, the records that he produced must be authenticated by an independent witness. Accordingly, act of production immunity should not be considered unless the prosecutor has a witness available who can authenticate the records.

The Department does not have a special authorization letter for act of production immunity, and, consequently, sends the standard authorization letter to the USAO. As a result, it is important that the motion for a compulsion order make clear that the immunity being sought is limited to the act of production of records. For example, if the AUSA who obtained the compulsion order left the USAO, his successor may be left with the task of responding to a motion by the indicted sole proprietor who claimed that he was granted full-blown immunity.

E. States are bound by federal statutory immunity

AUSAs sometimes contact the WIU because counsel for a witness is concerned that a state prosecutor could make use of the immunized federal testimony. This concern is unfounded because, when a witness is immunized under the federal immunity statute, the state prosecutor is likewise prohibited from making direct or indirect use of the testimony. *See Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964).

F. Informal immunity

Unlike the statutory immunity that is handled by the WIU, informal immunity (also known as letter immunity or pocket immunity) is handled in the USAOs. Informal immunity is nothing more than a contract between the prosecutor and the witness, and testimony given under the contract is not compelled because it is given voluntarily pursuant to the terms of the contract. The terms of the contract are negotiated by the parties, and can even allow for derivative use of the information provided. Informal immunity is not binding on any other federal district, or state, because they were not parties to the contract.

G. Immunity for a defense witness

Immunity will not be authorized for a defense witness unless there are extraordinary circumstances. For example, authorization will be granted if it is determined that the defendant would be deprived of a fair trial if the defense witness is not immunized. Should immunity for a defense witness be contemplated, the AUSA should contact the WIU to alert the Department.

H. Requests to prosecute a previously immunized witness (USAM 9-23.400)

It is not necessary to obtain Departmental authorization to prosecute a witness whose immunity was limited to the act of production, or to prosecute a witness for perjury or false statements committed during immunized testimony. Before a previously immunized witness can be prosecuted for any crimes relating to his immunized testimony, however, the Attorney General must personally authorize the prosecution. Prosecutors who contemplate prosecuting a previously immunized witness should contact the WIU for guidance on the materials which must be assembled for submission to the Attorney General in order to establish that the evidence which will be used comes from "legitimate source(s) wholly independent of the compelled testimony." *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

I. Requests to resubpoena a previously contumacious witness (USAM 9-11.160)

When an immunized grand jury witness chooses to continue in contempt, he remains in custody during the lifetime of the grand jury. *See* 28 U.S.C. § 1826. The witness has the "keys to the jail in his hands," and can purge himself of the contempt by choosing to testify. Should the witness persist in his refusal to testify and the grand jury expires, the United States Attorney who wishes to resubpoena him before a successive grand jury must obtain authorization from the Department. The request, in narrative form, should be telefaxed to the WIU. These requests are generally not approved unless it appears that the witness will testify if called before the new grand jury, or that the investigation is highly important and the witness has essential information.

III. The dual prosecution policy (USAM 9-2.031)

The dual prosecution policy (also known as the Petite Policy) applies whenever a federal prosecutor seeks to prosecute an individual for crimes based on substantially the same acts or transactions involved in a prior state or federal prosecution. Some prosecutors are under the impression that the policy does not come into play if a case is "split" with the local prosecutor. An example of a split case occurs when the state

seizes drugs from the defendant and charges him with possession, and the United States charges him with possession of the gun that was seized at the same time. This assumption is not correct, and the federal prosecutor must obtain the Department's authorization to proceed with the gun case if the state case involved attachment of jeopardy.

Requests for waiver of the dual prosecution policy should be in memo or letter form and telefaxed to the WIU. It is strongly recommended that the United States Attorneys' Manual be reviewed beforehand, so that the request addresses the factors set forth therein.

In reviewing the request, the WIU will determine whether the proposed federal case is substantially based on the prior prosecution and, if so, whether waiver of the policy is appropriate. Waiver is granted if it is determined that there is a compelling federal interest in prosecuting the defendant and that the prior proceeding did not vindicate the federal interest. In order to evaluate a request, the WIU must be advised of the facts behind the criminal incident, the charges that were filed in the prior prosecution, the prior sentence, the proposed federal charges, and the likely federal sentence. The request should include background information on the defendant, including his criminal history, and any other significant information that would support a conclusion that there is a compelling federal interest in prosecuting him. Upon completion of its review, the WIU sends a recommendation to the Assistant Attorney General, who is the deciding authority.

IV. Issuing subpoenas to attorneys (USAM 9-13.410)

A single official in the Criminal Division handles all requests seeking authorization to issue subpoenas to attorneys for information relating to the representation of clients. These requests, whether criminal or civil, must be submitted on the appropriate form and telefaxed to the WIU. The request should make clear whether testimony or documents, or both, will be sought under the subpoena. If documents will be sought, the wording of the documents demand must be set out in an attachment to the request.

Because subpoenas to attorneys are extremely sensitive, efforts should first be made to obtain the information from another source. If that is not feasible, and a subpoena is necessary, the subpoena should be narrowly drawn and call for information that is not within the protection of the attorney-client privilege. When it is believed that an exception to the privilege applies (such as the crime/fraud exception), the request should set out the reasons in support of that belief.

Not all subpoenas to attorneys come under the authorization requirement. If the subpoena seeks information that is unrelated to the representation of a client (such as information about the business operations of a firm that, by happenstance, is engaged in the practice of law, or information regarding the attorney's personal activities unrelated to his practice of law), there is no need to contact the Department. Further, if the attorney is willing to supply the information without being served with a subpoena, authorization is not needed. A so-called "friendly subpoena," in which an attorney witness indicates that he is willing to provide the information but asks for a subpoena, does not eliminate the authorization requirement. If a subpoena is involved, and the information sought relates to the representation of a client, authorization must be obtained.

V. Searches of premises of subject attorneys (USAM 9-13.420)

Executing a search warrant at a law office of a subject attorney is an extremely sensitive matter. (For a definition of subject attorney, see USAM 9-13.420.) Such a search cannot be carried out without the express approval of the United States Attorney or pertinent Assistant Attorney General. Further, the Criminal Division (through the WIU) must be consulted. If exigent circumstances do not allow for prior consultation, the WIU can be notified after the search.

When a law office search is first contemplated, it is strongly suggested that the prosecutor telephone the WIU to discuss such things as whether the subject attorney is a sole practitioner, is in practice with nonsubject attorneys, or practices at a corporation's headquarters. If computers will be searched, prosecutors should be prepared to discuss whether they are on a network that is shared with nonsubject attorneys. The prosecutor should also advise the WIU of the taint procedures which will be put in place. Following this initial telephone contact, the WIU can provide prosecutors with sample language that can be used in search warrant affidavits, and sample taint procedures.

Draft copies of the affidavit, search warrant, and taint procedures, should be faxed to the WIU, along with a form that has been signed by the United States Attorney.

VI. Searches for documentary materials held by a disinterested third party attorney (USAM 9-19.221; 9-19.210)

Searches for documentary materials that are held by an attorney who is a disinterested third party are governed by 28 C.F.R. § 59.4. Such searches are extremely rare since the materials sought can usually be obtained by a subpoena. These searches cannot be carried out unless specifically authorized by the Department. Request for authorization should be submitted to the WIU.

VII. Notice of intent to indict an attorney (USAM 9-2.032)

Many AUSAs are unaware of this requirement, which calls for notification to the Department when an attorney will be criminally charged. Notification is not required in all cases, and the United States Attorneys' Manual should be consulted to see whether circumstances of a case call for notification. For example, notice is not required if the indictment has already been reviewed by the Department, such as in Racketeer Influenced and Corrupt Organizations or tax cases. Notification is required if the attorney is alleged to have served as counsel for an ongoing criminal enterprise or organization. It is also required if the charges are based on the attorney's acts on behalf of a client, and the client will be called to testify against him pursuant to a cooperation, nonprosecution, or similar agreement.

The notice is submitted on a form that is telefaxed to the WIU. Because the form is abbreviated, it is suggested that it be accompanied by a memo setting out relevant information, such as whether the prosecutor, or others in the USAO, have had prior dealings with the attorney.

VIII. Global plea agreements (USAM 9-27.641)

These agreements arise when a criminal defendant (usually a corporation) has committed criminal acts in a number of judicial districts. When the defendant seeks to resolve the criminal charges by entering into a guilty plea, the corporation's legal advisers will ask for a promise from the government that charges will not be brought by other districts in the future. Because a single USAO does not have the authority to bind all other USAOs, the Assistant Attorney General in the Criminal Division must authorize the promise of no further prosecutions. The WIU coordinates global plea agreements and forwards the requests to the Assistant Attorney General.

In the usual situation, civil charges will also be filed against the defendant, and the defense will seek to resolve the civil and criminal matters at the same time. Resolution of the civil aspects are handled within the Civil Division, but the criminal prosecutor coordinates with the government's civil attorney so that both matters are resolved simultaneously.

An important first step in a global plea agreement is to determine whether any other federal districts are investigating the defendant and, if so, whether there are objections to the promise not to further prosecute. All USAOs must be notified of the proposed plea agreement and be given an opportunity to object. This notification is usually done by e-mail, which can be sent by the office seeking to enter into the global agreement, or by the Executive Office for United States Attorneys. The request that is sent to the WIU must include the text of the notification e-mail, and the objections, if any, that were registered.

In addition to the plea agreement itself, the submission to the WIU must include a memo setting forth the facts, the charges against the defendant, the proposed disposition, and reasons supporting the conclusion that the resolution is in the best interests of the United States. The Criminal Division must also be advised whether the Civil Division has authorized the civil settlement.

As a practical point, make certain that the number of the paragraph in the plea agreement that promises no further prosecution is not changed after the request is sent to the Department because the authorization letter will make specific reference to the numbered paragraph (for example, "I hereby approve the terms of the Plea Agreement, including paragraph 5 . . . .").

IX. Conclusion

The staff of the WIU consists of veteran attorneys with expertise in the area of privilege.

They are always available to provide guidance, and welcome telephone inquiries at 202-514-5541. Further, the WIU is aware that litigation often involves issues that arise unexpectedly, necessitating Departmental authorizations on short notice. Prosecutors who face short deadlines should feel free to contact the WIU to ask for expedited handling of their requests.❖

ABOUT THE AUTHOR

❑**Kathleen N. Coleman** has been with OEO's Witness Immunity Unit for fifteen years, and has developed an expertise in attorney-client privilege. Prior to OEO, she was in the Commercial Litigation Branch of the Civil Division, where she handled cases under the False Claims Act. From 1979 to 1985, she was in the Office of Special Investigations in the Criminal Division, where she did denaturalization and deportation cases of persons who engaged in acts of persecution during WWII. During that assignment, her duties included gathering evidence in foreign countries, such as the Soviet Union. From 1978 to 1979, she was in the Narcotics and Dangerous Drugs Section. From 1976 to 1978, she was an Assistant Attorney General in the U.S. Virgin Islands, where she handled both criminal and civil cases. From 1972 to 1976, she was an Assistant District Attorney in Philadelphia, where she tried cases ranging from misdemeanors to homicides.✠

Office of Enforcement Operations' Policy and Statutory Enforcement Unit

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Office of Enforcement Operations
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I. Introduction

The Policy and Statutory Enforcement Unit (PSEU) is responsible for numerous legal support functions on behalf of the U.S. Attorneys' offices and the Criminal Division. Chief among its functions are the processing, evaluating, and making recommendations on the following requests.

- To subpoena members of the news media.
- To close judicial proceedings in criminal cases.
- To disclose grand jury material to state or local law enforcement officers for the purpose of enforcing state law.
- To grant S nonimmigrant status to eligible alien cooperators.

Besides these primary duties, the Unit also reviews and comments on proposed legislation by Executive Branch agencies, proposed expansions of law enforcement authority by federal agencies, and proposed regulations promulgated by the Bureau of Prisons. It also provides advice to U.S. Attorneys' offices and Criminal Division components when a Department of Justice (Department) employee is subpoenaed or production of Department records is sought in a federal or state proceeding. Further, the PSEU is responsible for processing requests by Criminal Division components to disclose tax return information in nontax criminal cases and processing requests to accept *nolo* or *Alford* pleas in criminal cases within the supervision of the Criminal Division. Finally, the Unit also provides advice in various substantive areas of the law, including issues relating to criminal jurisdiction, interstate property crimes, crimes affecting government operations, the Interstate Agreement on Detainers, mental competency and the insanity defenses, and certain civil matters relating to Criminal Division operations.

II. Subpoenas for testimony or records of members of the news media; interrogations, arrests, and criminal charges against members of the news media; and search warrants directed at members of the news media or others holding documentary materials in relation to some form of public communication

In all matters within the supervisory jurisdiction of the Criminal Division, the PSEU reviews all requests for authorization to issue subpoenas directed to members of the news media or for telephone toll records of members of the news media. The Unit also examines all requests for authorization to interrogate, arrest, or criminally charge a member of the news media for an offense related to the performance of official media duties. These requests are governed by 28 C.F.R. § 50.10. Additionally, the PSEU has joint responsibility, together with the Computer Crime and Intellectual Property Section (CCIPS) of the Criminal Division, for reviewing requests to apply for a search warrant directed at the seizure of work product or other documentary materials possessed by anyone holding them in relation to some form of public communication, including journalists. These requests are statutorily limited by the Privacy Protection Act, 42 U.S.C. §§ 2000aa-2000aa-12.

A. Subpoenas for testimony or records of members of the news media

One of the most sensitive and complex areas of the PSEU's work involves the review of proposals from United States Attorneys' offices to issue subpoenas directed to members of the news media for testimony or evidence or for their telephone toll records. In recognition of the historical and enduring importance of freedom of the press in American society, Department policy directs that government attorneys should ordinarily refrain from imposing upon members of the news media any form of compulsory process which might impair the news gathering function. Members of the Department must balance the public's interest in the free dissemination of ideas and information with the public's interest in effective law enforcement and the fair administration of justice in all cases. *See* United States Attorneys' Manual (USAM) 9-13.400; 28 C.F.R. § 50.10.

The Attorney General's authorization is normally required before the issuance of any subpoena to a member of the news media or for the telephone toll records of a member of the news media. 28 C.F.R. § 50.10(e). However, in cases where the media member, or his or her representative, agrees to provide the material sought and that material has been published or broadcast, the United States Attorney or the responsible Assistant Attorney General may authorize issuance of the subpoena. Thereafter, the authorizing office must submit a report to the Office of Public Affairs, detailing the circumstances surrounding the issuance of the subpoena. *Id.*

Before issuing a subpoena to a member of the news media, or for telephone toll records of a member of the news media, Department attorneys must take all reasonable steps to attempt to obtain the information through alternative sources or means. *Id.* § 50.10(b). In addition, Department attorneys must first attempt negotiations with the media aimed at balancing the interests of the trial or grand jury with the interests of the media before issuing a subpoena to a member of the news media. *Id.* § 50.10(c). Negotiations with the affected media member must also precede any request to subpoena the telephone toll records of any member of the news media, so long as the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the investigation at issue. *Id.* § 50.10(d). As noted above, besides being required by the regulation, where the material sought to be obtained or authenticated has already been published or broadcast in some form, obtaining the media's prior agreement to provide the material or authenticating testimony, either voluntarily or in response to a subpoena, may benefit the United States Attorney's office by obviating the need for obtaining the Attorney General's prior approval to issue the subpoena.

If negotiations with the media fail or the desired material has not been previously published or broadcast, the Attorney General's authorization is required. Department attorneys seeking to issue a subpoena to a member of the news media, or for telephone toll records of a media member, must submit a written request for such authorization to the PSEU. The request must contain the following.

- A summary of the facts of the prosecution or investigation.

- An explanation as to how the information sought to be subpoenaed is essential to the investigation or prosecution.
- A description of the attempts to obtain the voluntary cooperation of the news media through negotiation.
- An explanation as to how the proposed subpoena will be narrowly fashioned to obtain the necessary information in a minimally intrusive and burdensome manner.

Such requests should be submitted as far in advance of the relevant proceeding as possible.

Specific principles applicable to authorization requests for subpoenas to members of the news media are set forth in 28 C.F.R. § 50.10(f)(1)-(6), and for subpoenas for telephone toll records of members of the news media in 28 C.F.R. § 50.10(g)(1)-(4). The Department considers the requirements of 28 C.F.R. § 50.10 applicable to the issuance of subpoenas for the journalistic materials and telephone toll records of deceased journalists. In light of the intent of the regulation to protect freedom of the press, news gathering functions, and news media sources, the requirements of 28 C.F.R. § 50.10 do not apply to demands for purely commercial or financial information unrelated to the news gathering function. *Id*. § 50.10(m). Any questions regarding the regulation, or otherwise concerning subpoenas to the media, should be directed to the PSEU at (202) 305-4023.

B. Interrogations, arrests, and criminal charges against members of the news media

Except in cases involving exigent circumstances, Department attorneys must obtain the express approval of the Attorney General prior to the interrogation or arrest of a member of the news media in connection with either of the following two instances.

- An offense which the media member is suspected of committing during the course of, or arising out of, his or her coverage or investigation of a news story.
- An offense which the media member is suspected of committing while he or she was engaged in the performance of his or her official duties as a member of the news media.

The Attorney General's authorization must also precede the presentment of an indictment to a grand jury or the filing of an Information against a member of the news media for any such offense. *See* 28 C.F.R. § 50.10(h)-(l). Further guidance may be obtained from the PSEU.

C. Search warrants directed at members of the news media or others holding documentary materials in relation to some form of public communication

Search warrants directed at the seizure of any work product materials or other documentary materials possessed by a person reasonably believed to have a purpose of disseminating to the public a newspaper, book, broadcast, or other similar form of public communication, are governed by the Privacy Protection Act of 1980 (PPA), 42 U.S.C. §§ 2000aa-2000aa12. The PPA prohibits the use of such search warrants except under limited circumstances specified within the Act and provides that violations of the Act may result in the imposition of civil penalties against the government. Relevant provisions of the PPA, the text of which is set forth at Criminal Resource Manual 661, are summarized at USAM 9-19.240. Government attorneys should be particularly aware of the potential for triggering the protections of the PPA in executing computer searches. Some computers that may contain nonprotected evidence of a crime, such as child pornography, often also contain legitimate PPA-protected materials, such as draft newsletters on topics of public interest.

All applications for warrants issued under the PPA must be authorized by a Deputy Assistant Attorney General of the Criminal Division. Questions and requests for approval regarding computer-related search warrants should be directed to the CCIPS of the Criminal Division. Whenever proposed computer-related searches involve the traditional media, CCIPS will coordinate its review with the PSEU. Questions and requests for approval regarding all noncomputer media-related searches should be directed to the PSEU.

III. Closure of judicial proceedings

Pursuant to 28 C.F.R. § 50.9, government attorneys may not move for, or consent to, the closure of any judicial proceeding without the express prior authorization of the Deputy Attorney General. The PSEU assists U.S. Attorneys' offices by providing advice in the area of court closures, reviewing requests to close proceedings and, when appropriate, recommending that the Deputy

Attorney General grant the authorization necessary to move or consent to closure.

Both federal law and Department policy recognize a strong presumption against closing proceedings, rooted in both the Sixth Amendment right of the accused to a public trial and other adversary proceedings, *see, e.g., Waller v. Georgia*, 467 U.S. 39 (1984), and in the qualified First Amendment right of the press and public to access a criminal trial and related hearings, *see, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Closure of a courtroom in connection with a criminal proceeding may constitutionally occur under limited circumstances where closure is narrowly tailored toward preserving an important interest. *See, e.g., Waller*, 467 U.S. at 47; *Globe Newspaper*, 457 U.S. at 606-07; *Ayala v. Speckard*, 131 F.3d 62, 70 (2d Cir. 1997). Such overriding government interests may include protecting the safety of an informant or the integrity of an ongoing investigation, *see, e.g., United States v. De Los Santos*, 810 F.2d 1326, 1334 (5th Cir. 1987), or protecting the identity of an undercover police witness, *see, e.g., Ayala*, 131 F.3d at 72. These general principles are encapsulated at 28 C.F.R. § 50.9, which sets forth the Department's policy and the applicable procedures and policies governing courtroom closures.

Any government attorney wishing to close a portion of a judicial proceeding, or to consent to a litigant's request for closure, must first submit a written request seeking the Deputy Attorney General's authorization to do so. Whenever closure is sought in a case or matter under the supervision of the Criminal Division, the request, and any related questions, should be directed to the PSEU. In addition to setting forth the relevant factual and procedural background, the request should include a detailed explanation of the need for closure, addressing each of the factors set forth in 28 C.F.R. § 50.9(c)(1)-(6). In particular, the request should address how an open proceeding will create a substantial likelihood of danger to specified individuals, how ongoing investigations will be jeopardized, or how a person's right to a fair trial will be impaired. The request should also consider whether there are any reasonable alternatives to closure, such as delaying the proceeding, if possible, until the reasons for closure cease to exist. The request should be submitted sufficiently in advance of the proceeding in question to allow time for its adjudication within the Department.

Assuming that authorization to close the proceedings is granted, government attorneys have an obligation to review the records of the closed proceedings every sixty days to determine whether the reasons for closure still apply. 28 C.F.R. § 50.9(f). As soon as the justification for closure ceases to exist, the government must file a motion to have the records unsealed. *Id.* U.S. Attorneys' offices should acknowledge this obligation in their closure requests and advise the PSEU when the records are unsealed. The PSEU will periodically seek updates from U.S. Attorneys' offices regarding the status of closed proceedings.

IV. Disclosure of grand jury material to state and local law enforcement officials

Prior to submitting any request to a court to disclose grand jury material to a state or local law enforcement official pursuant to Federal Rule of Criminal Procedure 6(e)(3)(E)(iv), a United States Attorney must request permission, in writing, from the Assistant Attorney General of the Division with supervisory jurisdiction over the matter that was presented to the grand jury. *See* USAM 9.11-260. *See also* Advisory Committee Notes on the 1985 Amendments ("The Committee is advised that it will be the policy of the Department of Justice under this amendment [now codified at F.R.Cr.P. 6(e)(3)(E)(iv)] to seek such disclosure only upon approval of the Assistant Attorney General in charge of the Criminal Division."), *available at* http://www.law.cornell.edu/rules/frcrmp/NRule6.htm. For any matter falling under the supervisory jurisdiction of the Criminal Division, the PSEU has responsibility for reviewing such requests and recommending their approval or denial to the Deputy Assistant Attorney General who has been empowered to authorize disclosure.

It is the policy of the Department to share grand jury information with state or local officials, for the purpose of enforcing state law, whenever it is appropriate to do so. *See* USAM 9-11.260. Nevertheless, government attorneys should keep in mind that this policy is subject to the Advisory Committee notes to the amended Rule 6(e) that "Federal grand juries [should not] act as an arm of the State," and that a substantial need should exist to support the disclosure. The need to investigate or to prosecute ongoing or completed state or local felony offenses will generally be deemed substantial. *Id.* Government attorneys considering

seeking a disclosure order under this rule must also take into account the potential impact of disclosure upon any pending or anticipated federal investigations or prosecutions. *See, e.g.,* USAM 9-2.031 (Dual and Successive Prosecution Policy ["Petite Policy"]).

United States Attorneys proposing to seek an order allowing the disclosure of grand jury materials to a state or local law enforcement official should provide the following information, in writing, to the PSEU.

- Title of the grand jury investigation and the target(s) involved.
- Origin, purpose, and general nature of the grand jury investigation.
- Status of the grand jury investigation and any resulting prosecution(s).
- State(s) for which authorization to disclose grand jury information is sought and officials to whom information would be disclosed.
- A listing of the specific information or materials sought to be disclosed.
- General nature of potential state offenses and existence, if any, of ongoing state investigations or other efforts regarding the grand jury matters sought to be disclosed.
- Extent, if any, of state knowledge or awareness of the federal grand jury investigation, and extent of prior state involvement, if any, in federal grand jury proceedings under Rule 6(e)(3)(A)(ii).
- Impact of disclosure to state on ongoing federal grand jury investigative efforts or prosecutions, including an analysis of any Petite Policy implications which may result, *see* USAM 9-2.031.
- Whether the state has a substantial need for the grand jury information or materials sought to be disclosed.
- Whether reasonable alternative means exist through which the state might obtain the information contained in the grand jury materials sought to be disclosed.
- Whether disclosure would violate a federal statute (*e.g.*, 26 U.S.C. § 6103), regulation, or a specific Departmental policy.
- Whether disclosure would reveal classified information to persons without an appropriate security clearance, compromise the government's ability to protect an informant, or improperly reveal trade secrets.

If the request is authorized, the government attorney seeking judicial authorization to disclose the grand jury material should include in the proposed order a provision that further disclosures by the involved state officials shall be limited to those persons who require disclosure of the material to assist in their enforcement of state criminal laws.

As with all other matters within its purview, the PSEU invites AUSAs to contact the Unit at (202) 305-4023 with any general or case-specific questions concerning grand jury disclosure pursuant to Rule 6(e)(3)(E)(iv).

V. The S Visa Program: arranging for cooperating aliens to remain in the United States

The PSEU is responsible for reviewing all applications for S nonimmigrant visa status and all subsequent applications for adjustment of status to legal permanent resident, and recommending approval or disapproval of such applications to the Deputy Assistant Attorney General of the Criminal Division delegated with authority to certify the applications to the Department of Homeland Security (DHS). The PSEU also coordinates the development and implementation of the S visa program in conjunction with sponsoring law enforcement agencies and the DHS.

A. The S Visa Program

The Violent Crime Control Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994), amended the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 208 (1952) (codified in scattered sections of 8 U.S.C.) to establish a new "S" nonimmigrant visa classification available to a limited number of aliens who supply critical, reliable information necessary to the successful investigation and/or prosecution of a criminal organization, or who supply critical, reliable information concerning a terrorist organization, if the alien is eligible to receive a State Department reward under the Rewards for Justice Program. *See* 8 U.S.C. § 1101(a)(15)(S); 22 U.S.C. § 2708.

Essentially, the S visa program provides a means for ensuring that an alien witness or informant who would otherwise be inadmissible

or subject to removal from the United States, for example, due to his or her prior criminal history, may lawfully remain in the United States for purposes of assisting law enforcement authorities. The program also helps to protect witnesses who would likely be subject to danger, as a result of their cooperation, if they were deported. Once the PSEU notifies the DHS's Immigration and Customs Enforcement (ICE) that an S visa application is pending with OEO, the alien will not be deported prior to a final decision being rendered on the application. While the application is pending, an alien may be given employment authorization and, subject to ICE discretion, may be released from ICE detention if in custody.

The S visa program grants S nonimmigration status for up to three years to alien witnesses or informants who: 1) possess critical, reliable information about a criminal organization or enterprise; 2) are willing to supply, or have supplied, such information to federal or state law enforcement authorities or a federal or state court; and 3) whose presence in the United States is essential to the success of an authorized criminal investigation or prosecution of an individual involved in the criminal organization or enterprise. *See* 8 U.S.C. § 1101(a)(15)(S). No more than 200 aliens meeting these criteria may be granted S nonimmigrant status per fiscal year. *Id.* § 1184(k)(1). An additional fifty slots are available for aliens who provide critical, reliable information concerning a terrorist organization *and* who qualify for a reward under the Department of State's rewards program. *Id. See also* 22 U.S.C. § 2708(a). These annual numerical limitations have never been reached. The parents, spouse, and children of an eligible alien witness or informant are also eligible for S nonimmigrant status, and such derivative applicants do not count toward the numerical limits.

Characteristics rendering an alien inadmissible to the United States, such as drug trafficking, a criminal conviction, the commission of a crime of moral turpitude, or unlawful entry into the United States, are waived by the DHS when S nonimmigrant status is granted. Aliens who comply with the conditions of the S visa program are eligible to apply for adjustment of status to lawful permanent resident.

B. Applying for S Visas

S Visa applications must be sponsored by a law enforcement agency (LEA) and endorsed by an agency headquarters official and by the United States Attorney for the district in which the relevant investigation or prosecution occurred. *See* 8 C.F.R. § 212.4. Federal and state law enforcement agencies, courts, United States Attorneys, and local prosecutors, are considered to be law enforcement agencies for purposes of S visa sponsorship. However, prosecutors and courts may not wish to serve as the official sponsor of an S visa application because of the obligations assumed by the sponsoring agency, including monitoring the alien, reporting to the Criminal Division regarding the alien's compliance with the terms of S visa status after S nonimmigrant status is granted, and requesting permission to apply for adjustment of status to lawful permanent resident.

To apply for an S visa, a sponsoring LEA should submit a completed application package to the PSEU for processing. Applications may be obtained from the PSEU or from ICE, but are also generally available through the sponsoring LEA. Based upon the information contained in the application, the PSEU assesses whether an alien is eligible for an S visa and which grounds of inadmissibility set forth in 8 U.S.C. § 1182 require waiver.

In determining whether an S visa is appropriate, the Criminal Division balances the value of an alien's cooperation against the factors making an alien inadmissible. To enable this assessment, the sponsoring LEA and the U.S. Attorney's office endorsing the application should ensure that the application contains: 1) a thorough and accurate description of the nature and import of the investigation or prosecution; 2) a detailed explanation of the nature, extent, and import, of the alien's cooperation, including the results of the alien's cooperation; and 3) complete information about each applicable ground of inadmissibility, including any extenuating circumstances. The PSEU also uses the information contained in the application to obtain the views of the Criminal Division components with jurisdiction over the underlying investigation or prosecution as to the significance of the matter or case in which the alien is providing assistance.

Once the PSEU completes its analysis, the OEO makes a recommendation to a Deputy Assistant Attorney General of the Criminal Division who has been delegated authority by the Assistant Attorney General to decide whether or not the application merits certification. Applications certified for approval by the

Criminal Division are forwarded to the DHS, which has the authority to waive the applicable grounds of inadmissibility and grant the S visa.

Upon granting the application, the DHS notifies the OEO and the sponsoring LEA. While the alien is in S visa status, the sponsoring LEA is required to monitor the alien and file quarterly and annual reports with the PSEU, notifying the Criminal Division of the alien's whereabouts and whether the alien has complied with the conditions of S visa status. *See* 8 U.S.C. § 1184(k)(4) (conditions of status).

C. Adjustment of status to lawful permanent resident

An alien may remain in S visa status for no more than three years. Prior to the end of that period, the sponsoring LEA may apply for adjustment on behalf of the alien (and any eligible family members) to lawful permanent resident status. *See* 8 U.S.C. § 1255(j). The LEA should submit an adjustment application form and supporting memoranda, together with current National Crime Information Center reports for the alien and any eligible family members, directly to the PSEU. (The LEA submits a separate set of documents to the DHS.) On the basis of the adjustment application materials, the Criminal Division determines whether the alien has complied with the conditions of S visa status and whether adjustment of status is appropriate, and forwards its recommendation to the DHS, which renders a final decision. Notably, if the necessary documents to seek adjustment of status are not filed before the end of the three year period, the alien may be deported and the sponsoring LEA must reinitiate the S visa application process.

D. Additional information

Additional information regarding the S visa program may be found in the United States Attorneys' Manual at 9-72.000, in the Criminal Resource Manual at 1861-1867, or by contacting the PSEU at (202) 305-4023. ❖

ABOUT THE AUTHOR

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Ms. Healy would like to thank Stanley Rothstein, Chief of PSEU, and Deborah Sorkin, Deputy Chief of PSEU, for their contributions to this article.

Special Administrative Measures

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I. Overview

Special Administrative Measures (SAMs) are restrictions which the Attorney General can request to limit inmate communications that might disclose classified information or facilitate serious acts of violence or terrorism. Consideration of the appropriate use of SAMs is the responsibility of every Assistant U.S. Attorney handling a national security case, terrorism-related matter, or dangerous violent criminal, and should be part of the overall planning and case strategy at the precharging stage. SAMs may become appropriate at later stages, during trial or post conviction, even if they are not sought or obtained at the detention hearing or other initial stage of the prosecution. Thus, prosecutors must remain vigilant for appropriate circumstances which call for the imposition of SAMs at any stage of the prosecution.

OEO's staff is responsible for reviewing requests to impose SAMs on Federal Bureau of Prisons (BOP) inmates, pursuant to 28 C.F.R. § 501.2 (to prevent the unauthorized disclosure of National Security Information (NSI) classified

information), 28 CFR § 501.3 (to prevent acts of violence and terrorism), and pursuant to the inherent authority of the Attorney General (for non-BOP federal pretrial detainees). These special measures may include particular restrictions on visitors, mail and telephone usage, and preclearance of attorneys and paralegals. SAMs are designed to prevent inmates from contacting coconspirators outside of the prison and directing them to disclose classified information, harm witnesses, or incite others to commit acts of terrorism. SAMs are generally valid for a period of one year, unless modified or vacated.

II. Authorization process

In order to obtain a SAM on an inmate, either pretrial or postconviction, the United States Attorney must make a written request to the Director of the Office of Enforcement Operations (OEO). OEO staff then prepares a draft document outlining the restrictions, based on the facts and requirements presented. The draft is sent to the United States Attorney's office for review and any requests for modification of the provisions are addressed by OEO staff. A final proposed document is prepared and sent through the appropriate channels in the Criminal Division and the Deputy Attorney General's Office, and finally to the office of the Attorney General for approval. SAMs are rather lengthy documents, often in excess of fifteen pages. In the original SAM documents, subsequent renewal and modification authority is delegated to the Assistant Attorney General of the Criminal Division. Subsequent renewals of SAMs are authorized at the written request of the United States Attorneys' offices. Any interim modifications which lessen restrictions on the inmate may be authorized by the Director of OEO.

III. Additional information

In addition to processing the SAMs (originals, extensions, and modifications, as well as vacating them when requested by the USAO), OEO provides legal advice and input into SAM policy decisions. The basic provisions of the SAM Program continue to be the subject of regular debate, discussion, and revision between the Criminal Division and the Deputy Attorney General's Office, in conjunction with various other Department of Justice (Department) components, including the BOP, U.S. Marshals Service, FBI, and U.S. Attorney's offices. This has resulted in the proposed revision of model documents and streamlined policies for the monitoring and control of SAM inmates throughout the federal system.

Because many inmates currently held under SAM conditions of confinement are relevant to the war on terror, many individual SAM cases present new and challenging issues that must be resolved through discussion and the development of new strategies, yet still must be handled expeditiously. This process requires ongoing meetings among the Criminal Division and the other components mentioned above. OEO has been involved in many SAM-related policy decisions, including review, analysis, and agreement on revisions to the restrictions on the inmate communications' section of the model SAM, and analyzing and commenting on a separate BOP-proposed rule to grant the warden ability to limit terrorist inmates' communications. Additionally, OEO provides legal research and advice regarding challenges to SAM provisions and the interpretation of SAM provisions in case -specific matters. Finally, OEO fields responses to other initiatives, including a G8 proposal introduced by the Department of Homeland Security to reduce radicalization in prison.

IV. Conclusion

While rare, SAMs are an essential part of the Department's efforts to combat violent crime and acts of terror. OEO can provide further information regarding the BOP regulations and policies used to limit prisoner communications, clarify the criteria for SAMs and the procedures to follow in implementing and renewing SAMs, and help address the constitutional issues related to the imposition of SAMs.❖

ABOUT THE AUTHOR

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The International Prisoner Transfer Program

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I. Introduction

Although the International Prisoner Transfer Program has been in existence since 1976, it remains a program about which most federal prosecutors have scant knowledge or understanding. This article will provide an overview of the program, discuss how a transfer request is processed, identify the criteria that are used when making a transfer determination, describe how the transferred sentence is administered in the receiving country, and discuss the role of federal prosecutors in the transfer program. *See also* http://www.usdoj.gov/criminal/oeo/index.htm.

II. Background

The transfer program was formally established in November 1976, after the bilateral Treaty on the Execution of Penal Sentences between the United States and Mexico entered into force. Treaty on the Execution of Penal Sentences, Nov. 25, 1967, U.S.-Mex., 28 U.S.T. 7399. A major impetus for the United States to develop an international prisoner transfer program was the well-publicized reports of American nationals being incarcerated abroad, especially in Mexico, under abusive and inhumane conditions. In addition, "Midnight Express," first a popular book and then later a film about an American in custody in horrible conditions in a Turkish prison, fueled the drive for Congress to pass legislation authorizing the transfer program.

Since signing the Mexican Treaty, the United States has entered into other bilateral transfer treaties and has acceded to two multilateral transfer conventions, the Council of Europe Convention on the Transfer of Sentenced Persons (the COE Convention) in 1985, and the Inter-American Convention on Serving Criminal Sentences Abroad (the OAS Convention) in 2001. Together these international agreements give the United States prisoner transfer relationships with almost seventy countries. Although the United States prefers not to enter into any new bilateral transfer treaties because of the time and cost involved in their negotiation and passage, it is almost certain that, in the future, additional countries will accede to the COE and OAS Conventions, thereby increasing the number of countries with which the United States has a transfer treaty relationship.

These transfer treaties permit the United States and its treaty partners to return a foreign national, who is sentenced and imprisoned in their country, to the prisoner's home country to serve the time remaining on his sentence. The transfer program works in two directions. First, a country may receive one of its nationals from a foreign country which has convicted and sentenced the national for committing a criminal offense. That country accepts responsibility for enforcing or administering the transferred sentence. Second, a country may return foreign nationals who have been convicted and sentenced for a crime to their home country to serve their sentences. The country sending or transferring the foreign national is referred to as the "sending" or "sentencing" country, whereas the country receiving the prisoner and administering the transferred sentence is referred to as the "receiving" or "administering" country.

Most of the prisoners the United States has transferred to foreign countries have been convicted in federal courts. A majority of these transferred federal offenders have committed a drug offense. In addition to transferring federal offenders, state offenders are also eligible to apply for transfer. Currently, all states have legislation permitting them to participate in the transfer program. However, when a foreign national is in a state prison, he must first obtain the approval of the state before his application can be reviewed and approved by the Federal Government. Although the Department of Justice frequently approves state cases, if a compelling federal interest exists or if treaty requirements have not been satisfied, it will deny the transfer request. Because many states do not actively participate in the transfer program, the Department continues to

engage in ongoing efforts to increase state participation.

In recent years, the United States has processed approximately 1,500 transfer applications each year. Of this total, the United States denies about sixty percent of these applications, with the denial rate being highest for Mexican applications, in part, because so many of these applicants are considered to be domiciliaries of the United States. In 2005, the United States transferred 281 foreign nationals back to their home countries and accepted the return of eighty-four Americans, most of whom were incarcerated in Mexican prisons. During the early years of the transfer program, the United States transferred many more American nationals back to the United States than foreign nationals to their home countries. With the advent of the Federal Sentencing Guidelines and the abolition of parole, the situation reversed itself in the early 1990s. Now the United States transfers about three times more foreign nationals out of the country than Americans back into the United States. Not surprisingly, because of our shared borders, a large percentage of these transfers are with Mexico, followed by Canada. This net outflow of prisoners results in a significant cost savings to the United States.

III. Benefits of the International Prisoner Transfer Program

When some individuals first learn of the transfer program, they inquire about the motivation for the United States to participate in the program. Skeptics wonder what benefit the United States realizes from transferring a criminal, who has violated United States laws, to his home country and, conversely, what interest is served when the United States receives an American from a foreign government after that American has been convicted of committing a serious crime abroad.

The United States first considered entering into prisoner transfer treaties in the early 1970s in response to reports that some Americans imprisoned abroad had been convicted in unfair judicial proceedings or had been subjected to torture and inhumane conditions while confined in foreign prisons. The United States, like most other countries, is protective of its citizens and is concerned about poor or unfair treatment accorded its nationals in other countries, even when these nationals may have acted unlawfully. As the United States began to explore the prisoner transfer option, it recognized that other benefits, besides protecting the health, well-being, and rights of its nationals, could be obtained by prisoner transfer. Foremost among these benefits was that genuine rehabilitation, and eventual reintegration of a prisoner into his home society, were much more likely to occur when the prisoner served his sentence in his own country, where he would be near his family, friends, and a familiar culture. In addition, the United States realized that the imprisonment of foreign nationals created a significant administrative burden on its prison staff by requiring the prisons to adapt their practices and procedures to prisoners having differing languages, customs, cultural backgrounds, and dietary requirements. The United States believed that prisoner transfer could reduce this burden. Moreover, the United States recognized that confining the nationals of another country created diplomatic tension with the foreign country and that returning the foreign national to his home country would reduce this tension.

As the United States began to participate in the prisoner transfer process, it also recognized that there were two other significant benefits to the program. The first was a law enforcement benefit while the second was an economic one. Normally, after a foreign national completes the service of a sentence in the United States, he is referred to the Bureau of Immigration and Customs Enforcement (ICE) for deportation or removal proceedings. Frequently, after the removal order has been issued, such prisoners are returned to their home country, without notification to the home country of their arrival, and without providing the home country with any pertinent information about the individual, such as the specifics of the criminal conduct in which the individual engaged or any continuing risks that the individual might pose. As a result, the home country often knows nothing about the person released into its midst. Consequently, it is unable to take precautionary steps to ensure the safety of its populace, help the former prisoner to receive necessary medical or rehabilitative assistance, or reintegration into its society.

In many instances prisoner transfer is preferable to traditional removal. When a prisoner is transferred, the United States provides the receiving country with detailed information about the prisoner, including official accounts of the criminal conduct committed. Unlike the removal

of a former prisoner, a transferred prisoner is placed directly in the custody of law enforcement officials from the receiving country. This transfer procedure permits the receiving country to monitor the prisoner's activities, address any treatment or rehabilitative needs of the prisoner, assist in the eventual reintegration of the prisoner into society, and take appropriate steps to protect society from the prisoner. This last benefit is particularly significant for certain types of repeat or predatory offenders, such as sexual offenders. Many countries, such as Canada, have systems to monitor these offenders, and to provide notice to communities when such an offender is living in their neighborhood.

Although not a factor motivating the negotiation of the transfer treaties, the United States recognizes that these agreements also create an economic benefit to both the Federal Government and the state governments participating in the transfer program, by reducing the number of prisoners confined within their prisons. Approximately twenty-seven percent of all federal prisoners are foreign nationals and states also have significant foreign populations. For every prisoner transferred, the federal or state government recognizes a savings equal to the cost of imprisoning that person for the period remaining on the sentence.

IV. Administering the Transfer Program and making the transfer decision

Fourteen separate international agreements, as well as federal implementing legislation, 18 U.S.C. §§ 4100-4115, provide the legal authority for the International Prisoner Transfer Program. Congress authorized the Attorney General to act as the central authority for the program, and the Attorney General delegated his authority to the Office of Enforcement Operations (OEO) within the Criminal Division. *See* 18 U.S.C. § 4102; 28 C.F.R. §§ 0.64-1, 0.64-2. The International Prisoner Transfer Unit (IPTU), a unit within OEO, oversees the daily operation of the program. It receives considerable assistance from the Federal Bureau of Prisons (BOP) in various stages of the transfer process.

Prisoner transfer cannot occur unless the sentencing country, the receiving country, and perhaps most critical, the prisoner, consent to the transfer. The decision whether or not to approve transfer is a discretionary one that must be made by both the sentencing country and the receiving country. Under the International Prisoner Transfer Program, a prisoner does not have a "right" to transfer to his home country, nor can the sentencing country force the prisoner to transfer.

Although the United States approves virtually all transfer applications submitted by Americans imprisoned abroad, it is more selective when reviewing the transfer applications of foreign nationals, approving approximately forty percent of these transfer applications. The overall approval rate is lowered significantly by the large number of Mexican nationals who apply for and are denied transfer. The lower approval rate for Mexican nationals is attributed to two main factors. First, the transfer treaty with Mexico prohibits the transfer of domiciliaries and many Mexicans satisfy the treaty domiciliary test by having lived in the United States for over five years. Second, the United States knows that Mexico applies a number of restrictive criteria—most notably that the remaining sentence cannot exceed five years—and will deny applicants who do not satisfy these criteria. The United States continues to express its concern over the restrictive criteria used by Mexico but has been unsuccessful in having Mexico modify its criteria.

Each transfer application submitted to the Department presents a unique set of facts that must be evaluated on its individual merits. However, for the Department to approve a transfer application submitted by a foreign national incarcerated in a United States prison, it must first collect pertinent information from the responsible United States Attorney's office (USAO) and law enforcement agency, and then determine if the case satisfies the requirements of the applicable treaty and federal implementing legislation. *See* 18 U.S.C. §§ 4100-4115. The basic requirements that must be satisfied by all successful applicants are as follows.

- The prisoner must be convicted and sentenced.
- The prisoner, sentencing country, and receiving country, must consent to the transfer.
- The prisoner must be a national of the receiving country.
- A minimum period of time must remain on the sentence, typically at least six months.

- The judgment and conviction must be final, with no pending appeals or collateral attacks.
- No charges or detainers may be pending against the prisoner in the sentencing country.
- Dual criminality must exist (the crime of conviction must also be a crime in the receiving country).

Depending on the applicable treaty, there may also be additional requirements.

In addition to the treaty and statutory requirements, the IPTU has developed a set of guidelines that assists it in evaluating each transfer request. These guidelines focus on four broad areas, with the first being the likelihood of social rehabilitation. One of the major goals of the transfer program is to return the prisoner to his home environment where, hopefully, there is familial and peer support, for in this type of environment, the prisoner has the best chance of successful rehabilitation and reintegration into society. In addition, since most foreign national prisoners are deported when they are released from custody, it may not make sense to allow them to remain in a foreign prison where they must adjust to a society different from the one to which they will ultimately be deported. To assess the likelihood of social rehabilitation of the prisoner, the IPTU examines various facts that include the following.

- The strength of the prisoner's family and other social ties to the sentencing and receiving countries.
- Whether the prisoner accepted responsibility for his criminal conduct.
- Cooperation with law enforcement.
- The criminal history of the prisoner.
- The seriousness of the offense.
- The role of the prisoner in the offense.
- The presence of aggravating and mitigating circumstances.
- The prisoner's remaining criminal ties to the sentencing and receiving countries.

Thus, a first time offender who had a minor role in a criminal offense and has strong family and social ties in the receiving country is a much more likely transfer candidate than a career offender who has family in the United States and has lived here for many years.

The second focus of the guidelines, and one of particular interest to the USAOs, is on law enforcement concerns. These include the following.

- The seriousness of the offense, including if public sensibilities would be offended by the transfer.
- Any public policy issues that would be implicated by the transfer.
- The possibility that the transfer would facilitate the prisoner's renewed association with his criminal associates in his home country.
- Possible sentencing disparity in the home country (of greatest concern for the most serious offenses).
- Whether law enforcement or the prosecutor need the prisoner for pending or future trials, investigations, or debriefings.
- The existence of unpaid fines, assessments, and restitution.

The third major concern that is examined is the likelihood that the prisoner will return to the United States. Allowing a foreign national to serve his remaining sentence in his home country makes sense only if the prisoner will remain in his own country after release. A fundamental reason for the transfer is the belief that rehabilitation is most likely to occur in the prisoner's home environment, an objective that would not be realized if the prisoner returns to the sentencing country. A number of factors are considered in making this determination, including the following.

- The strength of the prisoner's ties to the United States.
- The strength of the prisoner's ties to his home country.
- The location of the prisoner's family.
- Previous deportations and illegal entries.
- Previous prisoner transfers.

With respect to this last factor, it is the policy of the Department to deny all transfer requests if the prisoner participated in a previous prisoner transfer.

The final concern, which arises infrequently, is whether the transfer presents any serious humanitarian concerns. Such concerns typically

involve the terminal illness of the prisoner or a close family member. Although humanitarian concerns are never viewed in isolation, it is possible that when compelling humanitarian concerns are present, a transfer will be approved unless outweighed by other negative variables.

After considering all legal requirements and using these guidelines to evaluate the unique facts in each case, the United States will decide whether to approve the transfer request. In those cases where the United States denies the request, it will inform all pertinent parties and notify the prisoner that, provided that there will be at least six months remaining on the sentence, he can reapply for transfer in two years. Occasionally the denial may be based on one factor, such as a pending appeal, which will probably cease to be an impediment to transfer in less than two years. In those situations, the IPTU will entertain an earlier reapplication and frequently will reconsider the case without a specific request.

When the United States, after confirming that all statutory and treaty requirements have been satisfied, decides to approve the case, the next step is to inform the prisoner's home country and to request their decision on the transfer request. If the receiving country approves the transfer, the next step is for the IPTU to make arrangements for a consent verification hearing to be held. This hearing, mandated by 18 U.S.C.§ 4107 and conducted by a federal magistrate, is held to confirm that the prisoner consents to the transfer and understands the full consequences of the transfer. If the prisoner gives his consent to the transfer, the BOP makes arrangements with the foreign country to send escorts to the United States to accompany the prisoner on his return and then moves the prisoner to a prison facility near the departure point.

With respect to Americans who are transferring back to the United States, BOP will send escorts to return the prisoner to the United States, where the prisoner will remain in BOP custody pending a review of the transferred sentence by the United States Parole Commission. The Parole Commission is responsible for reviewing the sentence and applying the sentencing guidelines to the transferred sentence to determine a release date for the prisoner. 18 U.S.C. § 4106A. If the projected release date has already passed, BOP will release the prisoner; otherwise BOP will retain custody of the prisoner until his sentence has been successfully served.

V. Administration of the sentence in the foreign country

When a prisoner is transferred, the responsibility for administering the sentence belongs exclusively to the receiving country. The sentencing country, however, retains the power to modify or vacate the sentence, including the power to grant a pardon. Under most of the treaties, the receiving country will continue the enforcement of the transferred sentence. Such continued enforcement will be executed under the laws and regulations of the receiving country, including any provisions for the reduction of the term of confinement by parole, conditional release, good-time release, or otherwise. Under the French and Turkish bilateral treaties and the COE Convention, the receiving country has the additional option of converting the sentence, through either a judicial or administrative procedure, into its own sentence. When a sentence is converted, the receiving country substitutes the penalty under its own laws for a similar offense. The receiving country, however, is bound by the findings of facts insofar as they appear in the judgment, and it cannot convert a prison term into a fine or lengthen a prison term. Only a few countries have elected to convert transferred sentences. The United States has adopted the continued enforcement method of administering the transferred sentence.

Some assume that when a sentence is transferred, the prisoner will always serve the same period of time in prison in his home country that he would have served if he had remained in the United States. As a practical matter, however, this is not usually the case. Sometimes the actual time that the transferred prisoner spends in prison in the receiving country may be less than the time he would have served in the sentencing country. This disparity appears most often in transfers to Canada and many European countries, especially in drug cases where there is an opportunity for parole. Other times, because of differences in the availability of prison credits, the prisoner may spend more time in prison in his home country. Of particular interest to federal prosecutors is the information provided to the Department that indicates that most transferred Mexican nationals serve sentences which closely approximate the sentences they would have served had they remained in the United States. Furthermore, due to changes in Mexican law, Mexican prisoners who have committed drug offenses frequently

discover that because of the difference in prison credits awarded, they will spend a longer period of time in custody in a Mexican prison than if they had remained in the United States.

Although it is possible that some transferred prisoners may serve less time in prison, such a result is neither unexpected nor inconsistent with the goals of the transfer program. The United States and its treaty partners recognized at the time they entered into these international agreements that the administration of the sentence by the receiving country, which involved applying criminal laws unique to that country, could result in the prisoner serving less prison time than if he had remained in the sentencing country. These same countries, however, were willing to accept this result in return for the ability to have their foreign nationals transferred. It is important to realize that it is not unusual for a returning American to serve less time in an American prison than he would have served if he had remained incarcerated in the sentencing country. Thus, it would place the United States in an awkward diplomatic position to accept this benefit for its citizens, yet object to a transfer of a foreign national because he might experience a similarly beneficial sentencing outcome.

VI. Role of the United States Attorneys' offices in the Transfer Program

An USAO may be faced with issues surrounding the prisoner transfer program at two distinct phases of the criminal process. First, the issue of a possible prisoner transfer may arise during plea negotiations. It is not uncommon, during plea negotiations, for a foreign national to ask the USAO to guarantee that he will be transferred in return for a guilty plea. Because the discretion to grant or deny transfer requests is vested in the Attorney General, the USAO is without the power to make this promise. The USAO, however, can represent that it will support the application, or that it will not oppose the transfer. It should be clear in the agreement that any representation is being made by the particular USAO, and not by the Department as a whole. *See* USAM § 9-35.100.

The second occasion when the USAO may be involved in the transfer program is during the postsentencing phase of the case when the transfer application is being processed. To ensure a thorough, fair, and principled review of each application, the IPTU collects and evaluates pertinent information from various sources, including input from law enforcement agencies. Among the most important information that the IPTU collects for each case are comments from the prosecuting USAO. Soon after receiving the case, an IPTU analyst will fax an inquiry sheet to the USAO seeking its views on the requested transfer, and asking if there are any pending appeals or collateral attacks. The form also provides space for comments and the USAO is always free to submit additional documentation to support its views. As noted by former Assistant Attorney General Michael Chertoff, now head of the Department of Homeland Security, it is critical that the USAO provide timely responses to these inquiries. *See* Memorandum to all USAOs, dated August 7, 2002, from Michael Chertoff, Assistant Attorney General. The IPTU, recognizing the strong interest that the USAOs have in the cases they have prosecuted, carefully reviews all comments that the USAOs submit, and considers these comments to be critical information in rendering its transfer decision.

Over the years, many USAOs have provided thoughtful and informative responses to IPTU inquiries. The IPTU considers legitimate law enforcement concerns raised by USAOs very seriously, and in most situations, these concerns will cause denial of the transfer request. Problems arise, however, when the USAO fails to provide case-specific reasons for opposing the transfer, and instead registers only generic complaints about the transfer program. Such complaints typically express a general dislike of the program, a belief that the prisoner should serve his sentence in the United States, an unsupported belief that the prisoner will return to the United States and commit a new offense, a concern that the prisoner will serve a shorter term in the foreign country, or a distrust of the integrity of the foreign prison system.

As discussed above, standing alone, the fact that the prisoner may serve less time in a foreign prison does not usually justify denying a transfer request. Nor are concerns about the integrity of the prison system of our treaty partners a basis to deny a transfer request. Since the majority of the transfer requests come from Mexican inmates, some USAOs have voiced concerns about the integrity of the Mexican prison system. Although problems have existed in the Mexican criminal justice system, the current government has taken substantial steps to combat and reduce corruption. From the information available to the Department,

there appears to be little or no support to substantiate the view that transferred prisoners are able to buy or negotiate a lesser sentence in Mexico. To reduce the potential for corruption, Mexico generally limits its transfer approvals to low security, first-time offenders who are from low-to-middle socioeconomic class, and who have no connection to a drug cartel or organized crime. Mexico has instituted this policy because it believes that such inmates, due to their lack of resources and connections, are less likely to be in the position to take advantage of any corruption existing in the system.

The Department has little information that would substantiate the belief that a transferred prisoner will return to the United States and commit new crimes. It has been our experience that offenders who are transferred to distant locales, especially to countries in Europe or Asia, are unlikely to reappear in the United States following their release from confinement abroad. Although there is no guarantee against recidivism for any category of offender, the possibility that a foreign national will return to the United States following completed service of his sentence at a prison in his home country can be greatly minimized by ensuring that inmates obtain removal orders prior to transfer, and by limiting approvals to those candidates who have strong family ties to their home countries and who have minimal or no prior criminal records. The IPTU, in conjunction with the Department of Homeland Security, ensures that all Mexican nationals have a removal order before they are transferred to Mexico.

Finally, a blanket policy of objecting to transfer without a substantial basis to do so would be inconsistent with the treaty obligations of the United States. The treaties and conventions governing the transfer of prisoners express a foreign policy determination of the United States that prisoner transfer should be available to foreign nationals incarcerated here, just as it should be available to American nationals incarcerated abroad. Furthermore, since the prisoner transfer treaties are part of United States law, the United States has an obligation to give a good faith consideration to each case.

VII. Conclusion

For thirty years, the United States has participated in the International Prisoner Transfer Program. As a result, thousands of qualified foreign nationals have been returned to their home countries to serve their criminal sentences. It is expected that these numbers will increase as more countries accede to the two existing prisoner transfer conventions and as the states become more active participants in the program. Although transfer is not appropriate for all inmates, the prisoner transfer program does offer significant rehabilitative, law enforcement, and diplomatic benefits in many cases.❖

ABOUT THE AUTHOR

❑**Paula A. Wolff** has been Chief of the International Prisoner Transfer Unit in the Office of Enforcement Operations of the Criminal Division of the United States Department of Justice since September 2000. She was a Trial Attorney in the Terrorism and Violent Crime Section from 1996 to 2000, and in the General Litigation and Legal Advice Section from 1986 to 1996, where she was Acting Deputy Chief from 1994-1996.✠

Gambling Devices and Legislative History Unit

Gladys Wilson
Chief, Gambling Devices and Legislative History Unit
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The Office of Enforcement Operations' (OEO) Gambling Devices and Legislative History Unit (GDLHU) engages in two very different functions. The legislative history function of the Unit is of utmost importance to criminal prosecutors, as it is designed to assist the United States Attorneys' offices (USAOs) and Criminal Division personnel in understanding Congress's intent behind the passage of federal criminal legislation. The office prepares legislative histories of all federal criminal statutes enacted into law. The Unit maintains histories on all criminal statutes assigned to the Criminal Division from 1940 to the present and has histories on file of major enactments prior to 1940, including three statutes from the first Congress.

A typical legislative history compilation includes the Bill in all of its forms.

- House and/or Senate Report.
- Debate pages from the Daily Congressional Record.
- Similar Bills from the current session and from the immediate past Congress with attendant Reports.
- Hearings.

The Unit performs research within the compiled legislative histories for the USAOs and other high ranking government officials, when requested. The staff also assists personnel within the Criminal Division, the Department of Justice, and other government agencies in the surrounding Washington, D.C., area perform their research. These legislative histories are not available to the public.

The GDLHU recently compiled in-depth legislative histories for a number of public laws, including the Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260, and the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960. Legislative histories regarding the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), and Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, were compiled as soon as documents were available. These documents have been instrumental in assisting several Assistant United States Attorneys with case preparation.

As its second function, the Gambling Devices Section has jurisdiction over 15 U.S.C. § 1173, which pertains to gambling registration of manufacturers and dealers. The Gambling Devices Act of 1962, 15 U.S.C. §§ 1171-78, requires any person who possesses or receives gambling devices to register with the GDLHU before the device enters interstate commerce. When the applicant's complete information is received, the registration becomes effective. During Calendar Year 2005, the Section processed approximately 2,500 requests for registration under the Act. The office also answers fax or telephone inquires and offers assistance to other federal agencies and state and local law enforcement agencies regarding gambling registration. Information pertaining to the statute and registration function of the Unit is available on-line at http://www.usdoj.gov/criminal/oeo/gambling.❖

ABOUT THE AUTHOR

❑**Gladys Wilson** is the Chief, Gambling Devices Registration Unit in the Office of Enforcement Operations and has been employed with the Department of Justice for thirty-six years.✠

Office of Enforcement Operations (OEO)

Law Enforcement Tools	Review Process and Statutory and/or Regulatory Citation
Approval Requirements	
Electronic Surveillance Unit **[(202) 514-6809]** Interception of Wire, Oral, and/or Electronic Communications	18 U.S.C. 2516(1) allows, with Attorney General delegation, approval of requests to apply for court-ordered wire and/or oral communications by Department officials starting at Deputy Assistant Attorney General (including Acting), and can be approved as high up as Attorney General. (The Attorney General has delegated this authority to all Assistant Attorneys General, but only Deputy Assistant Attorneys General in the Criminal Division.) While 18 U.S.C. 2516(3) does not require Department approval for an application for an order to intercept electronic communications, Department policy (set out in the U.S. Attorneys' Manual) requires such approval (similar to above) for all electronic communications except for numeric pagers.
Interception of Wire, Oral, and/or Electronic Communications - Roving	18 U.S.C. 2518(11) provides that these requests must be approved by an Assistant Attorney General (including Acting) or higher.
Video Surveillance	Pursuant to Attorney General order, an OEO Associate Director (or higher) must approve the proposed use of certain video surveillance, including consensual video surveillance and non-consensual video surveillance where a court order will be required to be obtained because the conduct to be viewed and/or recorded evinces a reasonable expectation of privacy.
Consensual Monitoring of Non-Telephonic Conversations in Sensitive Circumstances	Pursuant to Attorney General memorandum, in order for investigative agencies to utilize non-telephonic consensual monitoring in certain listed sensitive circumstances, such as the investigation of a high-ranking federal or state official, an OEO Associate Director (or higher) must approve the proposed monitoring.
Emergency Title III and/or Pen Register/Trap-and-Trace Device	18 U.S.C. 2518(7) and 18 U.S.C. 3125 allow for the emergency use of Title III electronic surveillance and emergency pen registers/trap-and-trace devices, respectively, where an emergency situation exists involving certain limited factors, including an imminent danger of death or serious bodily injury to any person, conspiratorial activities characteristic of organized crime, and/or an immediate threat to a national security interest. The emergency interception of wire, oral, and/or electronic communications is first reviewed in OEO, but then must be approved by the Attorney General, Deputy Attorney General, or Associate Attorney General. (OEO always contacts a Deputy Assistant Attorney General before any further action is taken.) An emergency pen/trap can be approved by a Deputy Assistant Attorney General or higher. (The emergency pen/trap provision includes in its definition of emergency situation any ongoing attack on certain protected computers.)
Witness Immunity Unit **[(202) 514-5541]** Use Immunity for Prospective Grand Jury and Trial Witnesses	Pursuant to 18 U.S.C. 6001-6005 and 28 CFR 0.175, requests from the United States Attorneys' offices, Department components, and congressional committees for immunity in matters assigned to the Criminal Division are reviewed in OEO, then submitted to the Assistant Attorney General for signature. (Any Deputy Assistant Attorney General may sign.) For immunity requests assigned to other Divisions, a concurrence memorandum is prepared for the signature of the Assistant Attorney General/DAAG. *See also* USAM 9-23.000, *et seq*.
Attorney Search Warrant	Pursuant to USAM 9-13.420, approval to seek a warrant to search the premises of an attorney who is the suspect, subject, or target of an investigation must be obtained from the United States Attorney or pertinent Assistant Attorney General. The USAM requires consultation with OEO's Witness Immunity Unit, which will prepare all necessary memoranda for the signature of the Assistant Attorney General/DAAG.

Law Enforcement Tools	Review Process and Statutory and/or Regulatory Citation
Search Warrant Where Documentary Material is Held by a Disinterested Third Party in a Confidential Relationship - Where the Party is an Attorney	Pursuant to 28 CFR 59.4 and USAM 9-19.220, *et seq.*, and only in those cases where the supervisory responsibility for the matter is in the Criminal Division, requests must be submitted to OEO for review prior to applying to the court for a search warrant for documentary material in the hands of a disinterested third-party attorney who is in a confidential relationship with the person against whom the evidence is sought. A Deputy Assistant Attorney General must approve the request. Should the disinterested third party not be an attorney, this review is conducted in OEO's Policy and Statutory Enforcement Unit. (See *infra*.)
Dual Prosecution	Pursuant to USAM 9-2.031, OEO makes recommendations regarding the requested waiver of the Department's Petite policy to allow prosecution of a defendant for the same act or transaction for which he or she had already been prosecuted by the state or federal governments. Approval for a *Petite* waiver must be obtained from the Assistant Attorney General/DAAG.
Attorney Subpoena	Pursuant to USAM 9-13.410, all requests for grand jury or trial subpoenas that seek information from an attorney relating to the representation of a client are reviewed in OEO, with final action on the request by the Assistant Attorney General/DAAG. (This requirement relates to both criminal and civil matters.)
Global Plea Agreement	Pursuant to USAM 9-27.641-.644, OEO reviews and coordinates proposed multi-district plea agreements, and makes recommendations to the Assistant Attorney General/DAAG, who must make the final decision.
Prosecution of Previously Immunized Witness (*Kastigar*)	Pursuant to USAM 9-23.400, OEO reviews requests to prosecute previously immunized witnesses and prepares an in-depth analysis/recommendation and action memorandum for the signature of the Attorney General.
Subpoenaing Contumacious Witness Before Successive Grand Juries	Pursuant to USAM 9-11.160, OEO reviews the request to subpoena a contumacious grand jury witness and prepares a recommendation for the Assistant Attorney General/DAAG.
International Prisoner Transfer Unit [(202) 514-3173] Prisoner Transfers, and Overseeing the International Prisoner Transfer Program	Pursuant to 18 U.S.C. 4102 and 28 CFR 0.64-1 and 0.64-2, OEO oversees the International Prisoner Transfer Program. OEO Associate Directors (and higher) have the authority to approve or disapprove requests for the transfer of American prisoners from foreign countries to the U.S. to complete their sentences. The Associate Directors also approve/disapprove requests regarding foreign prisoners who wish to transfer from American prisons to their own countries. The U.S. has treaty relationships with over 60 countries regarding this program.
Witness Security and Special Operations Unit [(202) 514-3684] Witness Security Application (excluding DC Short-Term Relocation Program)	Pursuant to 18 U.S.C. 3521, *et seq.*, the Attorney General is responsible for all matters relating to the relocation and protection of witnesses in certain federal and state proceedings. This authority has been delegated by the Attorney General, and is exercised by the Associate Director of OEO who has been designated the Director of the Witness Security Program, and, in his absence, the Director of OEO. Decisions regarding accepting witnesses into the Program and terminating participation in the Program, as well as major policy decisions, are handled at this level. Pursuant to USAM 9-21.800, the Chief of OEO's Witness Security and Special Operations Unit (or higher) must approve requests from federal investigative agencies to utilize in certain investigative activities relocated witnesses or former protected witnesses (or anyone relocated because of a witness's cooperation) as informants. If the action is to include the consensual monitoring of non-telephonic conversations of such a person, then an OEO Associate Director (or higher) must approve this aspect of the proposed action.
Witness Security Application (DC Short-Term Relocation Program)	Pursuant to 18 U.S.C. 3521, *et seq.*, OEO oversees the DC Short-Term Relocation Program (formerly Short-Term Protection Program), a derivative of the Witness Security Program established in 1991 to combat the problem of gang-related violence and intimidation against witnesses in Superior Court cases in the District of Columbia. Decisions regarding this Program are handled as above.

Law Enforcement Tools	Review Process and Statutory and/or Regulatory Citation
Use of Prisoner in Investigative Activities	Pursuant to USAM 9-21.050, the Chief of OEO's Witness Security and Special Operations Unit (or higher) must approve requests from federal investigative agencies to utilize in certain investigative activities, or to target, prisoners who are in the custody of the Attorney General (Bureau of Prisons, Marshals Service). If the action is to include the consensual monitoring of non-telephonic conversations of such a person, whether the prisoner is a consenting party or non-consenting target of the investigation, then an OEO Associate Director (or higher) must approve this aspect of the proposed action.
Use of Bureau of Prisons Employee in an Undercover Capacity	Pursuant to USAM 9-21.050, the Chief of OEO's Witness Security and Special Operations Unit (or higher) must approve requests from federal investigative agencies to use a Federal Bureau of Prisons employee in an undercover capacity.
Policy and Statutory Enforcement Unit [(202) 305-4023] Media Subpoena	Pursuant to 28 CFR 50.10 and USAM 9-13.400, the Attorney General must, with limited exceptions, personally approve the issuance of subpoenas to members of the news media, the issuance of subpoenas for their telephone toll records, and their interrogation, arrest, or indictment for conduct committed in connection with their official duties. Where the Criminal Division has supervisory responsibility for the statute under which the case is being investigated, OEO conducts the initial review of requests from the United States Attorneys' offices and Criminal Division Sections, and then prepares an appropriate memorandum and action document for the Attorney General's signature.
Nolo or *Alford* Plea	Pursuant to USAM 9-16.010 and 9-16.015, United States Attorneys may not consent to a *nolo contendere* or *Alford* [*North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970) (defendant pleads guilty but maintains innocence with respect to the charge)] plea without the approval of the Assistant Attorney General responsible for the subject matter, the Associate Attorney General, the Deputy Attorney General, or the Attorney General. In matters for which the Criminal Division has responsibility, requests for Assistant Attorney General approval to consent to a *nolo contendere* or *Alford* plea should be submitted to OEO. OEO will coordinate the review of the request by the Criminal Division sections responsible for the underlying substantive area and then submit the request to the Assistant Attorney General for decision.
Courtroom Closure	Pursuant to 28 CFR 50.9 and USAM 9-5.150, a request from a United States Attorney's office or Criminal Division attorney for authorization to move to close court proceedings in a case under a statute for which the Criminal Division has supervisory responsibility is reviewed in OEO, with a recommendation and proposed action memorandum prepared for the signature of the Deputy Attorney General.
Grand Jury Disclosure	Pursuant to Rule 6(e)(3)(E)(iv) of the Federal Rules of Criminal Procedure and USAM 9-11.260, OEO reviews requests from United States Attorneys' offices and Criminal Division attorneys for authorization to move to disclose grand jury material to state and local governments for law enforcement purposes, in matters in which the grand jury was investigating violations for which the Criminal Division has supervisory responsibility. The requirement for approval arises from an agreement referenced in the notes to the 1985 amendments to Rule 6(e)(3)(C)(iv), the predecessor to Rule 6(e)(3)(E)(iv). Authority to approve these requests has been delegated to the Deputy Assistant Attorney General supervising OEO.
Search Warrant Where Documentary Material is Held by Disinterested Third Party in a Confidential Relationship	Pursuant to 28 CFR 59.4 and USAM 9-19.220, *et seq.*, and only in those cases where the supervisory responsibility for the matter is in the Criminal Division, requests must be submitted to OEO for review prior to applying to the court for a search warrant for documentary material in the hands of a disinterested third party who is in a confidential relationship with the person against whom the evidence is sought (such as a member of the clergy or therapist). A Deputy Assistant Attorney General must approve the request. Should the disinterested third party be an attorney, this review is conducted in OEO's Witness Immunity Unit. (See *supra*.)

Law Enforcement Tools	Review Process and Statutory and/or Regulatory Citation
Search Warrant Regarding Material Subject to the Privacy Protection Act	Pursuant to 42 U.S.C. 2000aa and USAM 9-19.240, requests for authorization to seek a search warrant allowing the seizure of non-computer "work product" or other documentary material held for dissemination to the public by disinterested persons with a purpose to publish is reviewed in OEO and requires the approval of a Deputy Assistant Attorney General. (Computer-related matters, except those involving traditional media or other sensitive circumstances, are handled by CCIPS.)
S Visa Application	OEO is responsible for reviewing requests by law enforcement agencies for S visa status pursuant to 8 U.S.C. 1101(a)(15)(S) for foreign witnesses and informants, and makes recommendations to the Assistant Attorney General, who has responsibility pursuant to 8 CFR 214.2(t)(4)(ii) to decide whether approval will be recommended to the Department of Homeland Security. For aliens who have been granted S visa status, the Assistant Attorney General determines whether the alien has complied with the conditions of the S visa status and, based on this determination, makes the appropriate recommendation as to whether the alien should be permitted to apply to adjust to lawful permanent resident status. OEO makes recommendations on these adjustment-of-status applications as well. The Assistant Attorney General's authority in this area has been delegated to the Deputy Assistant Attorney General supervising OEO.
Demand for Department Testimony or Documents	Pursuant to 5 U.S.C. 301, the Department promulgated 28 CFR 16.21, *et seq*., to govern the release of documents or testimony of DOJ employees in federal and state cases to which the government is or is not a party. OEO reviews, and makes recommendations upon, requests from government attorneys seeking permission either to refuse disclosure or to make disclosure where the regulations vest such decision in higher authority.
Ex-parte Motions for Tax Returns and Tax Return Information Under 26 U.S.C. 6103	Pursuant to 26 U.S.C. 6103(i)(1) and USAM 9-13.900, for cases handled by Criminal Division attorneys, the approval of the Assistant Attorney General (or higher Department official) is required before the Criminal Division attorney may file an *ex parte* motion for disclosure of tax returns or tax return information under 26 U.S.C. 6103. (For cases handled by a United States Attorney's Office, the approval of the United States Attorney is sufficient.)
Gambling Devices and Legislative History Unit [(202) 514-1333] Registration of Gambling Devices	Pursuant to 15 U.S.C. 1171-1178, the Chief of OEO's Gambling Devices and Legislative History Unit registers companies and entities that have complied with the requirements of the Gambling Devices Act of 1962. The registration process in OEO is purely a ministerial act.

Law Enforcement Tools	Review Process and Statutory and/or Regulatory Citation
Under the OEO Director's Purview [(202) 514-6809] Special Administrative Measures (SAMs)	Pursuant to 28 CFR 501.2 (national security) and 501.3 (prevention of acts of violence and terrorism), OEO is responsible for the coordination of the Federal Bureau of Prisons' Special Administrative Measures Program. Under Section 501.2, the Attorney General may implement SAMs that are reasonably necessary to prevent a BOP inmate from disclosing classified information when the Attorney General determines that the unauthorized disclosure of such information would pose a threat to the national security and that there is a danger that the inmate will disclose such information. Under Section 501.3, the Attorney General may implement SAMs that are reasonably necessary to protect persons against the risk of death or serious bodily injury when the Attorney General finds that there is a substantial risk that a BOP prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. SAM restrictions ordinarily include housing the inmate in administrative detention and/or limiting certain privileges, such as correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to prevent the disclosure of classified information (501.2) or to protect persons against the risk of acts of violence or terrorism (501.3). In an extreme situation, and where an adequate showing of need has been made, the SAM may include a requirement that attorney-client conversations be monitored. (Such a SAM restriction has been imposed only once in the history of the SAMs Program.) The original imposition of a SAM for up to one year must be approved by the Attorney General, but extensions may be approved by the Assistant Attorney General. While modifications to a SAM normally also require the approval of the Assistant Attorney General, any lessening of one or more SAM restriction may be approved by the Director of OEO.
Use of Classified Investigative Technologies in Criminal Cases	Pursuant to Deputy Attorney General memorandum dated 1/31/02 ("Procedures for the Use of Classified Investigative Technologies in Criminal Cases"), OEO is responsible for recommending to the DAG the approval/disapproval of requests to use classified technologies in criminal investigations and prosecutions. "Classified investigative technology" is defined as "any hardware, software, or other investigative technology that... is designed to intercept or acquire information of evidentiary value as a result of a system or process which is based, in whole or in part, upon information which, at the time of its use, has been classified pursuant to Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order," and where there is a reasonable possibility of one of the following: "(a) the evidentiary information to be obtained by the technology will be sought to be introduced into evidence in order to prove any charge brought by the United States; (b) disclosure of details concerning such technology will be necessary to authenticate evidentiary information sought to be introduced into evidence in order to prove any charge brought by the United States; or (c) the use of the particular technology will be the subject of a motion to suppress or other such litigation." At the same time of the above request, to the extent an investigative agency has not already done so, it shall notify the relevant USAO(s) of such proposed deployment. Immediate deployment may be authorized in an emergency involving either immediate danger of death or serious bodily injury to any person or imminent harm to the national security. The USAO shall also promptly notify OEO of any legal challenges to the use of classified investigative technologies where there may be access to, and/or disclosure of, classified technologies that have been used in a criminal investigation. Also, if a case is being prosecuted or being considered for prosecution where a classified investigative technology was deployed without adherence to the above policy, the relevant USAO shall notify OEO as soon as it learns of such deployment. At that time, the Assistant Attorney General of the Criminal Division shall supervise all litigation regarding the potential disclosure of classified investigative technologies.

Consultation Requirements	
International Prisoner Transfer Unit [(202) 514-3173] Transfer of American Prisoners Who Are on Probation	18 U.S.C. 4104(a) requires the Attorney General or his designee to determine, prior to consenting to the transfer to the United States of an American national on probation, whether the U.S. district court that would be responsible for supervising the transferring probationer is willing to undertake the supervision.
Transfer of Foreign National Prisoners Who Are on Probation	18 U.S.C. 4104(f) requires the Attorney General or his designee, prior to consenting to the transfer from the United States of a foreign national prisoner on probation, to obtain the assent of the court exercising jurisdiction over the probationer.

Law Enforcement Tools	Review Process and Statutory and/or Regulatory Citation
Policy and Statutory Enforcement Unit [(202) 305-4023] Public Benefit Paroles	Requests by the State Department for public benefit paroles are referred by the Director of Parole for the Department of Homeland Security to OEO. OEO then canvasses the litigating sections of the Criminal Division to determine whether any section objects to the persons named in the request being paroled into the United States. The result of this canvassing are reported back to DHS's Director of Parole. The requirement for this consultation is set forth in an Interagency Protocol for Approval of Requests for Significant Public Benefit Paroles dated June 1998.
Proposed Bureau of Prisons Regulations	The Criminal Division, at the request of the Office of Legal Policy, provides comments on proposed Bureau of Prisons (BOP) regulations. The Criminal Division's views are provided by the Chief of the Policy and Statutory Enforcement Unit pursuant to a delegation of authority from the Assistant Attorney General of the Criminal Division. Pursuant to the delegation memorandum, signed by then-Assistant Attorney General Chertoff on November 2, 2001, the Assistant Attorney General is advised by OEO whenever a proposed BOP regulation raises sensitive or controversial issues.
Criminal Jurisdiction in Bureau of Prisons Facilities	The Bureau of Prisons (BOP) consults with the Environment & Natural Resources Division and OEO before acquiring or retroceding criminal jurisdiction over prison facilities. OEO's Policy and Statutory Enforcement Unit prepares the reply for the Director of OEO after consultation with the affected United States Attorney.
Criminal Jurisdiction on Military Bases	Military regulations require consultation with the affected United States Attorney before the Secretary of Defense or a subordinate military department acquires from or retrocedes to a state criminal jurisdiction over military facilities. In 1983, the Office of General Counsel of the Department of Defense requested the military departments to include the now former General Litigation and Legal Advice Section of the Criminal Division in the consultation process. This responsibility now resides in OEO. The Policy and Statutory Enforcement Unit prepares the reply for the Director of OEO after consultation with the affected United States Attorney.
Criminal Jurisdiction in Indian Country	Congress has authorized the Secretary of the Interior to accept retrocession by the states of civil and criminal jurisdiction previously conferred upon them over certain Indian reservations within their boundaries. 25 U.S.C. 1323. Executive Order No. 11435, 33 F.R. 17339 (Nov. 21, 1968), requires the Secretary to consult with the Attorney General before accepting the retrocession of criminal jurisdiction. Upon receipt of a request for concurrence, OEO prepares a response for the Assistant Attorney General, Criminal Division, after consultation with the affected United States Attorney(s). There is no express delegation from the Attorney General to the Assistant Attorney General of the Criminal Division.

Law Enforcement Tools	Review Process and Statutory and/or Regulatory Citation
Notification Requirements	
Witness Immunity Unit **[(202) 514-5541]** Prosecution of Attorney	Pursuant to USAM 9-2.032, OEO reviews notifications to the Criminal Division of the proposed prosecution of attorneys. A recommendation is then prepared for the Assistant Attorney General as to whether further review of the matter is believed necessary.
International Prisoner Transfer Unit [(202) 514-3173] Return from the United States of a Transferred Offender Whose Transfer Was Not in Accordance with the Transfer Treaty or United States Laws	If a United States court finds that the transfer of an offender to the United States was not in accordance with the transfer treaty or federal laws and orders the offender to be released from federal custody, 18 U.S.C. 4114(a) requires the Attorney General, or his designee, within 10 days of the final court order, to notify the foreign country imposing the transferred sentence of this determination. This notice, which informs the sentencing country of the court's decision and requests if the sentencing country wants the offender returned, must also inform the sentencing country that it must respond to the notice by a specified date which can be no longer than 30 days from the date of the notice.
Under the OEO Director's Purview [(202) 514-6809] Notification of Certain USA PATRIOT Act Disclosures to the Intelligence Community and Homeland Security Officials	Pursuant to Attorney General guidelines of September 23, 2002 ("Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation"), OEO must be notified after certain disclosures to the Intelligence Community and/or Homeland Security Officials under Section 203 of the USA PATRIOT Act involving grand jury and Title III material (which have statutory or rule-based restrictions on dissemination). OEO keeps records of those disclosures and follows up to ensure that notice provisions, *i.e.*, Fed.R.Crim.P. 6(e), are complied with to the extent possible. The initial discloser of the covered information is responsible for advising the recipient(s) of any restrictions on the dissemination or use of the disclosed information, as well as the need to provide OEO with notice of any further disclosure of this information that the recipient(s) may make.
Coordination Role	
Under the OEO Director's Purview [(202) 514-6809] Victim-Witness Coordinator for the Criminal Division	By a June 17, 1993, memorandum, then-Acting Assistant Attorney General John C. Keeney designated the Office of Enforcement Operations as the component responsible for housing the Criminal Division's victim-witness coordinating efforts. By a January 10, 2005, memorandum, then-Assistant Attorney General Christopher Wray appointed the first full-time Criminal Division Victim-Witness Coordinator. Responsible for providing training, guidance, and assistance to each Section's Victim-Witness Liaison, the Coordinator also monitors and evaluates the Division's victims' assistance efforts and prepares an annual report for the Attorney General, which is submitted through the Office for Victims of Crime. Section Chiefs and trial attorneys in the Division's litigating components remain the responsible officials in the Criminal Division for identifying the victims of crime, and for performing services mandated by the Attorney General's Guidelines for Victim and Witness Assistance. A designated Associate Director of OEO acts as the Point-of-Contact for complaints against the Division filed pursuant to the Crime Victims' Rights Act.

Request for Subscription Update

In an effort to provide the UNITED STATES ATTORNEYS' BULLETIN to all federal law enforcement personnel who wish to receive it, we are requesting that you e-mail Nancy Bowman (nancy.bowman@usdoj.gov) with the following information: Name, title, complete shipping address, telephone number, number of copies desired, and e-mail address. If there is more than one person in your office receiving the BULLETIN, we ask that you have one receiving contact and make distribution within your organization. If you do not have access to e-mail, please call 803-705-5659. Your cooperation is appreciated.