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Individual Penalties and Third-Party Rights: The US Perspective

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Prosecutorial discretion

31.1

Generally

31.1.1

In the United States, prosecutors have broad discretion in deciding whether to investigate and charge an individual with a crime.² As a threshold matter, a prosecutor may bring charges if there is probable cause to believe that the accused has committed a crime.³ Prosecutors also have broad discretion as to how to charge a specific offence,⁴ when to bring charges,⁵ and whether to negotiate a plea

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- 1 Joseph V Moreno and Anne M Tompkins are partners at Cadwalader, Wickersham & Taft LLP.
 - 2 See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (holding that the constitutional separation of powers requires broad prosecutorial discretion); *Young v. United States ex. Rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (holding that prosecutors have discretion to decide which persons should be the target of an investigation); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (finding that courts are ill equipped to evaluate the strength of a prosecutor's case, a case's deterrent value, and the government's enforcement priorities). See also American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-4.2 (4th ed. 2015), available at www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition-TableofContents.html.
 - 3 See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (holding that, if a prosecutor has probable cause to believe that the accused committed an offence, the decisions whether to prosecute and what charges to file rest entirely within his discretion). See also *Rinaldi v. United States*, 434 U.S. 22, 29-30 (1977) (*per curiam*) (holding that the prosecutor has discretion to dismiss charges unless dismissal would be contrary to the public interest).
 - 4 See *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979) (holding that it is proper for prosecutors to bring charges under any statute unless brought for a discriminatory purpose).
 - 5 See *United States v. Lovasco*, 431 U.S. 783, 795-96 (1977) (holding that an 18-month delay in bringing charges did not violate the defendant's due process rights).

agreement.⁶ Courts will generally not interfere with charging decisions absent a showing of selective prosecution⁷ or vindictive prosecution.⁸

31.1.2 Principles of Federal Prosecution

Within the discretion provided to federal prosecutors, there is guidance issued by the Department of Justice (DOJ) to help with investigation and charging decisions.

The DOJ's Principles of Federal Prosecution – issued as part of the US Attorneys' Manual (USAM) – provide federal prosecutors with a framework for applying their prosecutorial discretion to 'promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the Federal criminal laws.'⁹ They provide that a prosecutor should commence or recommend prosecution against an individual if the prosecutor has probable cause to believe that the person's conduct constitutes a federal offence and that the admissible evidence will be sufficient to obtain and sustain a conviction unless, in his or her judgment, prosecution should be declined because: (1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.¹⁰

In determining whether a 'substantial federal interest would be served', the Principles of Federal Prosecution counsel prosecutors to weigh all relevant considerations, including (1) federal law enforcement priorities; (2) the nature and seriousness of the offence; (3) the deterrent effect of prosecution; (4) the person's culpability in connection with the offence; (5) the person's history with respect to criminal activity; (6) the person's willingness to co-operate in the investigation or prosecution of others; and (7) the probable sentence or other consequences if the person is convicted.¹¹

The Principles of Federal Prosecution also establish important boundaries as to what a prosecutor cannot consider when determining whether to bring charges against an individual. Among other things, prosecutors cannot consider: (1) the person's race, religion, sex, national origin, or political association, activities or beliefs; (2) the prosecutor's personal feelings concerning the person, the person's associates or the victim; or (3) the possible effect of the decision on the prosecutor's own professional or personal circumstances.¹²

6 See *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (holding there is no constitutional right to plea bargain).

7 See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (selective prosecution of Chinese laundry owners but not similarly situated non-Chinese laundry owners).

8 See *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974) (prosecution of a defendant for a more serious charge in a new trial following a successful appeal of his original conviction).

9 USAM, Principles of Federal Prosecution, §§ 9-27.000 et. seq., available at <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution> (Principles of Federal Prosecution).

10 Id. at 9-27.220.

11 Id. at 9-27.230.

12 Principles of Federal Prosecution, §§ 9-27.260.

DOJ enforcement priorities and policies

31.1.3

The first factor within the Principles of Federal Prosecution for prosecutors to consider – federal law enforcement priorities – are developed annually by the DOJ. Every year, the Attorney General communicates the DOJ's national enforcement priorities, which have ranged from a focus on drug prosecutions during the influx of crack cocaine in the 1980s, to national security and counterterrorism following the attacks of 11 September 2001, and to prosecuting mortgage and financial fraud in the wake of the Wall Street credit crisis of 2008.¹³

In addition the DOJ periodically issues policy guidance that has an impact on prosecutorial discretion, frequently corresponding to changes in DOJ leadership. For example, on 10 May 2017, Attorney General Jeff Sessions issued a memorandum to all federal prosecutors entitled 'Department Charging and Sentencing Policy', which directed that 'prosecutors should charge and pursue the most serious, readily provable offence.'¹⁴ In addition, the memorandum directed prosecutors to disclose to the court 'all facts that impact the sentencing guidelines or mandatory minimum sentences.'¹⁵ By this memorandum, the Attorney General modified charging policies in the USAM, limiting prosecutors' discretion in making charging decisions and sentencing recommendations and requiring any exceptions to be approved by the respective US Attorney. The use of these memoranda by the DOJ leadership is another mechanism by which policy changes are put into effect.

Individual accountability for wrongdoing

31.1.4

Under US law, criminal prosecution and civil actions may be brought against corporations, partnerships, sole proprietorships and other business organisations, notwithstanding their artificial nature as a legal entity.¹⁶ The prosecution of corporate misconduct has long been a stated priority for the DOJ, with a focus on protecting the integrity of the economic and capital markets, protecting consumers and investors, preventing violations of environmental laws and discouraging unlawful business practices.¹⁷ Under this concept of corporate liability, corporations and other business organisations can be indicted, plead guilty, be convicted of offences, be fined and be required to institute remedial measures to prevent future wrongdoing.¹⁸ Just as prosecutors have broad discretion in deciding

13 See, e.g., Press Release, US Department of Justice, Department of Justice FY 2018 Budget Request (23 May 2017), available at <https://www.justice.gov/opa/pr/departement-justice-fy-2018-budget-request> (listing national security, violent crime, and immigration law enforcement as among the DOJ's federal law enforcement priorities for Fiscal Year 2018).

14 Jeff Sessions, Attorney General, US Department of Justice, Department Charging and Sentencing Policy (10 May 2017), available at <https://www.justice.gov/opa/press-release/file/965896/download>.

15 Id.

16 USAM, Principles of Federal Prosecution of Business Organizations, §§ 9-28.000 et. seq., available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

17 Id. at § 9-28.010.

18 Id. at § 9-28.200.

when, how, and whether to prosecute individuals, they have similar latitude in prosecuting and negotiating settlements with corporate defendants.¹⁹

The DOJ's focus on corporate wrongdoing often led to significant settlements with companies, but without any individuals being held accountable for the crimes charged. Following increasing public and judicial criticism about the lack of individual accountability, in September 2015, the DOJ issued a memorandum titled 'Individual Accountability for Corporate Wrongdoing', authored by Deputy Attorney General Sally Quillian Yates (commonly referred to as the Yates Memorandum).²⁰ The Yates Memorandum set forth new policy guidance focusing on prosecuting individuals with responsibility for the crimes for which corporations could be held responsible. In acknowledging the historical challenge of identifying and prosecuting individuals who were aware of or complicit in corporate misconduct, the Yates Memorandum listed six key steps to strengthen the DOJ's pursuit of individual wrongdoers.

- *Provision of evidence against individual wrongdoers:* For a company to receive any consideration for co-operation with the government under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the DOJ all relevant facts about any individual misconduct. This includes identifying all individuals responsible for the misconduct at issue, regardless of their position, status or seniority at the company.
- *Investigative focus on individual wrongdoers:* Both civil attorneys and criminal prosecutors at the DOJ will now focus on individual wrongdoing from the beginning of any investigation of corporate misconduct.
- *Coordination between civil attorneys and criminal prosecutors:* Civil attorneys and criminal prosecutors at the DOJ will more regularly consult throughout all phases of an investigation of corporate misconduct and will consider bringing parallel civil and criminal proceedings to take advantage of the full range of the government's potential remedies, including fines, imprisonment, forfeitures, restitution, and suspension and debarment.
- *No shielding of individuals from liability:* Absent extraordinary circumstances, no resolution of a case of corporate misconduct will provide protection from criminal or civil liability for individuals. Any release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.
- *No corporate resolution without individual resolution:* If the investigation of individual misconduct has not concluded by the time authorisation is sought to resolve the case against the corporation, a plan must be implemented by the DOJ prosecutor on how to resolve the matter prior to the end of any statute of limitations period.

19 Id.

20 Sally Quillian Yates, Deputy Attorney General, US Department of Justice, Memorandum Regarding Individual Accountability for Corporate Wrongdoing (9 September 2015), available at <https://www.justice.gov/dag/file/769036/download>.

- *Increased focus on civil settlements:* Civil attorneys at the DOJ will focus on recovering as much money as possible for the public, regardless of an individual's ability to pay. Instead, the decision as to whether to file a civil action against an individual should focus on the seriousness of the person's misconduct, whether it is actionable, whether the admissible evidence will be sufficient to obtain a judgment and whether pursuing the action reflects an important federal interest.

To some practitioners, the Yates Memorandum merely memorialised the DOJ's existing practice of prosecuting culpable individuals in white-collar cases. In a speech discussing the Yates Memorandum shortly after its issuance, Deputy Attorney General Yates alluded to the fact that the policies were effectively already in place at the DOJ, but that the purpose of the new guidance was to ensure consistency in application by DOJ attorneys across the country.²¹ Nonetheless, the requirement that the government prove that defendants intentionally and knowingly violated the law remains a significant hurdle, especially in the context of corporate wrongdoing. Indeed, the Yates Memorandum notes that in cases of misconduct in a large corporate setting 'where responsibility can be diffuse . . . it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt.'²²

In fact, since the issuance of the Yates Memorandum, the DOJ has lost several cases brought against individuals in cases in which the company settled.²³ This may be in part because corporations arguably apply different criteria from an individual when faced with allegations of wrongdoing. Corporations weigh the financial and reputational cost of litigation versus paying a corporate fine and settling a matter. Even where the prosecution's evidence may be weak, corporations may decide that there is value in a speedy resolution. The DOJ may be obtaining settlements from corporations on weak evidence, while individuals are willing to litigate on the same evidence in the face of potential jail time.

21 Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (10 September 2015), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

22 Sally Quillian Yates, Deputy Attorney General, US Department of Justice, Memorandum Regarding Individual Accountability for Corporate Wrongdoing (9 September 2015), available at <https://www.justice.gov/dag/file/769036/download>.

23 See, e.g., *United States v. Reichel*, 1:15-cr-10324 (D. Mass. 2016) (acquitting a former Warner Chilcott senior executive of charges involving a conspiracy to pay kickbacks to doctors, following an settlement by the company to pay US\$125 million to settle charges of illegally promoting pharmaceutical products); *United States v. Vascular Solutions, Inc. et al*, 5:14-cr-926 (W.D. Tex. 2016) (acquitting a medical device company and its chief executive of fraud charges for improper promotion of products without US Food and Drug Administration approval); *United States v. Facticeau*, 1:15-cr-10076 (D. Mass. 2016) (acquitting a former medical device chief executive and vice president of sales of 14 felony fraud counts relating to off-label promotion, but finding them guilty of 10 related misdemeanour counts).

See Chapter 6
on beginning
an internal
investigation

The full impact of the Yates Memorandum on the willingness of companies to co-operate with the DOJ in the face of an increased focus on individual criminal and civil liability has yet to be seen. Equally unclear is how the Yates Memorandum will impact the relationship between company attorneys and employees, and whether employees will co-operate with internal investigations knowing that the company is likely to turn over evidence of individual wrongdoing to prosecutors to be perceived as co-operative by the DOJ. Despite initial questions about whether the Trump administration would change course from what was laid out in the Yates Memorandum, Attorney General Sessions has indicated that the DOJ will continue emphasising the importance of holding individuals accountable for corporate misconduct because '[i]t is not merely companies, but specific individuals, who break the law.'²⁴

31.2 Sentencing

31.2.1 Generally

Individuals who are convicted of violating a federal criminal law, including white-collar laws, face a range of possible punishments including fines, probation and imprisonment. In determining the nature and range of a potential sentence following a conviction, there are currently two sources of guidance for judges, prosecutors and defence counsel to refer to: criminal statutes in the United States Code²⁵ and the United States Sentencing Guidelines (Guidelines).²⁶

Prior to 1984, federal judges had broad discretion in sentencing criminal defendants up to and including imprisonment, subject only to mandatory minimum or maximum sentences set forth in individual criminal statutes. Certain criminal statutes contain mandatory minimum sentences – for example, aggravated identity theft is punishable by a mandatory minimum sentence of imprisonment for two years, or by a mandatory term of imprisonment for five years if it relates to a terrorism offence.²⁷ Drug trafficking offences typically involve mandatory minimum sentences depending on the nature and quantity of the controlled substance involved and the defendant's criminal history.²⁸ Other statutes establish maximum terms of imprisonment, or a combination of a fine and imprisonment, such as bank fraud, which is punishable by a fine or a term of imprisonment of not

24 Attorney General Jeff Sessions Delivers Remarks at Ethics and Compliance Initiative Annual Conference (24 April 2017), available at <https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-ethics-and-compliance-initiative-annual>.

25 United States Code (U.S.C.), US Government Publishing Office, available at <https://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE>.

26 US Sentencing Guidelines Manual (effective 1 November 2016), United States Sentencing Commission, available at <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf>.

27 18 U.S.C. § 1028A.

28 See, e.g., 21 U.S.C. § 841(b).

more than 30 years.²⁹ Not surprisingly, these broad sentencing parameters often resulted in wide sentencing disparities across jurisdictions for similar conduct.³⁰

In response, Congress passed the Sentencing Reform Act of 1984 (SRA), which led to the creation of the Guidelines.³¹ The Guidelines require a score-based analysis focused on a myriad of factors relating to the circumstances of the offence. This analysis leads to one of 43 different offence levels³² and six criminal history categories.³³ As originally designed, the Guidelines were mandatory. A sentencing judge was required to apply a sentence from within the Guideline range dictated by the score-based analysis. However, in 2006, the Supreme Court in *United States v. Booker* determined that mandatory application of the Guidelines was unconstitutional, and that they are advisory recommendations only.³⁴ As a result of *Booker*, the Guidelines now act as a starting point for a federal judge to determine what sentence should be imposed, consistent with minimum and maximum sentences set forth in the offence of conviction, as well as the factors set forth in the federal sentencing statute.³⁵

Imprisonment

31.2.2

The federal prison system is operated by the Bureau of Prisons, and currently contains over 205,000 inmates in over 120 facilities located throughout the United

29 18 U.S.C. § 1344.

30 See US Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 35-39 (1 May 1987), available at <https://www.fd.org/docs/select-topics---sentencing/Supplementary-Report.pdf>.

31 18 U.S.C. §§ 3551-3586, 3601-3742; 28 U.S.C. §§ 991-998. The SRA required a federal district court judge to consider each of the factors in the federal sentencing statute, 18 U.S.C. § 3553(a), when crafting a sentence, which included: (1) the 'nature and circumstances of the offence' and the defendant's 'history and characteristics'; (2) the general purposes of the SRA; (3) the 'kinds of sentences available'; (4) the 'pertinent policy statements issued by the U.S. Sentencing Commission'; (5) the 'need to avoid unwarranted sentence disparities' between defendants convicted of similar conduct; (6) the 'need to provide restitution to any victims'; and (7) the applicable sentence range recommended by the Guidelines.

32 Guidelines § 5A.

33 Guidelines § 4A1.1.

34 543 U.S. 220, 245-246 (2005) (holding that the Guidelines must be considered as an advisory, not a mandatory, calculation of sentence to be consistent with the Sixth Amendment right to a trial by jury). The *Booker* court held that the federal sentencing statute requires judges to consider the Guidelines sentencing range, and to 'impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.' *Id.*, at 259-260 (citing 18 U.S.C. § 3553(a)).

35 18 U.S.C. § 3553(a). The federal sentencing statute defines the factors to be considered by the judge in imposing a sentence on a defendant and mandates that sentence imposed should be one that is 'sufficient, but not greater than necessary.' 18 U.S.C. § 3553(a)(2). As a result of the Supreme Court's ruling in *Booker*, courts should consider the Guidelines as one factor in imposing a sentence, but a judge may impose a different sentence if other § 3553(a) factors suggest that the Guidelines range is inappropriate. See *Kimbrough v. United States*, 552 U.S. 85, 91 (2007) ('A district judge must include the Guidelines range in the array of factors warranting consideration').

States.³⁶ Since the 1980s, there has been approximately a tenfold increase in the number of federal prisoners, attributed largely to the expansion of federal criminal statutes, aggressive prosecution efforts and the elimination of parole.³⁷

When calculating a potential sentence of imprisonment under the Guidelines, the judge first looks to the 'base offence level' applicable to the defendant's conviction,³⁸ and adjusts that upward or downward for specific applicable offence characteristics, special instructions and other factors to calculate the 'total offence level'.³⁹ Next, the judge determines the defendant's criminal history category (categories I to VI), which is increased by prior criminal convictions.⁴⁰ Once the total offence level and criminal history category are determined, the judge arrives at the recommended sentence by identifying the applicable range in the Guidelines' sentencing table.⁴¹ Judges have discretion to depart upward or downward from the recommended range upon finding that the case includes one or more aggravating or mitigating circumstance 'of a kind not adequately taken into consideration' by the Guidelines.⁴² They also allow judges to depart from the Guidelines if the government moves for a downward departure based on the defendant's substantial assistance in another case.⁴³ In any case, the judge must state in writing the specific reasons for imposing a sentence outside the applicable Guidelines sentencing range.⁴⁴

31.2.3 Fines

An individual convicted of a federal crime may also be sentenced to pay a monetary fine.⁴⁵ The process a judge uses to calculate an applicable fine is similar to that of determining a sentence of imprisonment. Many criminal statutes set forth the range of fines that may be assessed upon conviction; for those felonies whose statute does not so specify, the fine is set at not more than US\$250,000.⁴⁶ As with terms of imprisonment, the Guidelines contain a fine table that provides the court with an advisory minimum and maximum fine range for defendants, based on the offence level at which the defendant is sentenced.⁴⁷

Judges may depart upwards or downwards from the Guidelines' fine range based on factors such as a defendant's ability to pay, any restitution the defendant

36 Congressional Research Service, *The Federal Prison Population Buildup: Options for Congress* (20 May 2016), available at <https://www.fas.org/sgp/crs/misc/R42937.pdf>.

37 *Id.*

38 Guidelines §§ 1B1.1(a)(1), 1B1.2(a).

39 Guidelines §§ 1B1.1(a)(2), 1B1.1(c).

40 Guidelines § 1B1.1(a)(6).

41 Guidelines § 1B1.1(a)(7).

42 Guidelines § 5K2.0 (quoting 18 U.S.C. § 3553(b)).

43 Guidelines § 5K1.1.

44 18 U.S.C. § 3553(c)(2).

45 18 U.S.C. § 3571(a).

46 18 U.S.C. § 3571(b)(3).

47 Guidelines § 5E1.2. For example, if a defendant is convicted of bank fraud and is sentenced at offence level 18, the fine table sets a guideline range of US\$6,000 to US\$60,000. *Id.*

must make, the potential for collateral consequences the defendant may face (such as civil litigation) and other equitable considerations.⁴⁸ Judges looking to assess a fine should also consider the factors in the federal sentencing statute in calculating the amount, including the seriousness of the offence, promotion of respect for the law, provision of just punishment for the defendant and its deterrent factor.⁴⁹

Probation

31.2.4

The US Probation Department supervises individuals sentenced to a term of probation to ensure compliance with conditions imposed by the sentencing judge. Normally, a term of probation follows a term of imprisonment, but in certain cases a sentence of probation alone may be appropriate.⁵⁰ When imposing probation, the sentencing judge must consider the Guidelines⁵¹ as well as the factors set forth in the SRA.⁵²

The Guidelines contain a list of standard conditions that are recommended in all cases of probation,⁵³ along with a list of special conditions to be considered under certain circumstances.⁵⁴ In addition, a judge may impose additional conditions on a defendant's probation term that are reasonably related to the nature and circumstances of the offence, the history and characteristics of the defendant, and the goals of sentencing.⁵⁵ In all cases, the court must provide the defendant with written notice of the conditions.⁵⁶ The court may revoke a defendant's probation at any time before the end of its term for any violation of a probation condition that occurs during that time.⁵⁷

Confiscation of assets

31.2.5

Pretrial asset freeze orders

31.2.5.1

Under US law, the government can seek a temporary order freezing an individual's assets, in both the civil and criminal contexts, before a case is proven at trial. In

48 Guidelines § 5E1.2(d).

49 See 18 U.S.C. § 3553(a).

50 Guidelines § 5B1.1.

51 See, e.g., *United States v. Toobey*, 448 F.3d 542, 546-47 (2d Cir. 2006) (holding that a departure from the Guidelines' prison recommendation to probation may be warranted, but the district court should nonetheless 'consider the Guidelines and all of the other factors listed in § 3553(a)').

52 The SRA directs the sentencing judge, when imposing probation, to consider several factors, including: (1) the nature of the offence and history and characteristics of the defendants; (2) the need for just punishment, deterrence, or public protection; (3) the need to provide the defendant with educational or vocational training, medical care, or other correctional treatment; (4) the types of sentences available; (5) the Guidelines; (6) the need to avoid unwarranted sentencing disparities between defendants with similar records for similar conduct; and (7) the need to provide restitution to victims. See 18 U.S.C. § 3553(a).

53 Guidelines § 5B1.3(c).

54 Guidelines §§ 5B1.3(d), (e).

55 Guidelines § 5B1.3(b).

56 18 U.S.C. § 3563(d).

57 18 U.S.C. § 3564(e), 3565(a).

See Section
31.2.5.2

civil enforcement matters, regulators can seek asset freezes from an administrative law judge once an action is initiated, often in *ex parte* proceedings at which the respondent is not present. In criminal matters, prosecutors can seek asset freeze orders from a district court based on a showing of probable cause that the assets are subject to permanent forfeiture.

In the past, courts were unconvinced by the constitutional argument that pre-trial asset freeze orders were a violation of a defendant's Sixth Amendment right to counsel, even if those assets would otherwise be used to pay lawyers' fees.⁵⁸ However, more recently, the Supreme Court in *Luis v. United States* held that the pretrial restraint of a criminal defendant's assets – which assets were not 'tainted' by the alleged criminal conduct – violates the Sixth Amendment right to counsel.⁵⁹ As a result, prosecutors must now distinguish between tainted and untainted assets and seek to freeze only assets that derive from alleged criminal activity.

31.2.5.2 Civil and criminal asset forfeitures

Permanent government confiscation of property is called a 'forfeiture'. There are generally three types of forfeiture proceedings available to US law enforcement and prosecutors: administrative, civil and criminal.⁶⁰

Administrative forfeiture permits a federal agency to seize personal (non-real) property without initiating a judicial proceeding. The authority derives from the Tariff Act of 1930, which states that the following types of property are eligible for administrative forfeiture: (1) property whose value does not exceed US\$500,000; (2) merchandise whose importation is prohibited; (3) a conveyance used to import, transport or store a controlled substance; or (4) a monetary instrument.⁶¹

The deadlines and notice requirements for the various types of administrative forfeiture proceedings are set forth in the Civil Asset Forfeiture Reform Act of 2000 (CAFRA).⁶² Once property is administratively seized, the federal agency involved must give written notice of the seizure to each party who appears to have an interest in the seized article.⁶³ The notice must contain a description of the property seized; the time, cause and place of the seizure; how a person seeking to claim the property should proceed; and, if known, the name and residence of the owner of the seized property.⁶⁴ If no one contests the administrative forfeiture

58 See *Caplin & Drysdale v. United States*, 491 U.S. 617, 626 (1989) (holding that '[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney'); *United States v. Monsanto*, 491 U.S. 600, 615 (1989) (holding that the right to counsel was not violated when a defendant's assets were frozen pre-conviction).

59 136 S. Ct. 1083 (2016).

60 The DOJ's Asset Forfeiture and Money Laundering Section publishes an Asset Forfeiture Policy Manual, most recently updated in 2016, to set forth DOJ policy and provide guidance to US Attorneys' Offices on the DOJ's Asset Forfeiture Program. See Asset Forfeiture Policy Manual, available at <https://www.justice.gov/criminal-afmls/file/839521/download>.

61 19 U.S.C. § 1607.

62 Pub. L. No. 106-185, 114 Stat. 202 (2000).

63 19 U.S.C. § 1607(a).

64 19 C.F.R. § 162.45.

within the deadline specified, claimants lose their ability to contest the forfeiture. If a timely claim of the property is received, the matter is referred to the United States Attorney's Office for a judicial proceeding.

Civil forfeiture is an *in rem* proceeding that is brought directly against a piece of real or personal property that is involved, derived from or traceable to one or more enumerated federal crimes.⁶⁵ The property itself is the defendant and no charge against an individual is necessary. In a civil forfeiture proceeding, the government must prove, by a preponderance of the evidence, that the property is subject to forfeiture.⁶⁶ If a claimant raises an innocent owner defence, he or she has the burden of proving that the claimant is an innocent owner of the property by a preponderance of evidence.⁶⁷

Criminal forfeiture is an action brought as part of a criminal case against a defendant, not against a specific asset. It is an *in personam* action and requires the government to include a forfeiture charge against the defendant in the indictment, and prove that the property was used or derived from one or more enumerated federal crimes.⁶⁸ The indictment or criminal information must contain notice to the defendant that the government is seeking forfeiture of property as part of any sentence.⁶⁹ If a defendant disposes of the original asset subject to forfeiture, the government may obtain substitute assets⁷⁰ or may obtain a money judgment in an amount equal to the criminal proceeds.

When a criminal defendant is found guilty on charges that include the potential criminal forfeiture of property, the jury then determines whether the government has established 'the requisite nexus between the property and the offense committed by the defendant'.⁷¹ If so, a preliminary order of forfeiture is entered against the defendants. If there are any third parties with an interest in the property, they may seek an ancillary proceeding to prevent the seizure by the government.⁷² Once the trial judge has disposed of any third-party claims, a final order of forfeiture is entered and the defendant's interest in the property is divested.⁷³

A defendant can challenge the dollar amount of a criminal or civil forfeiture as a violation of the Eighth Amendment to the US Constitution, which restricts the government's ability to impose 'excessive fines' as punishment.⁷⁴ Among other

65 18 U.S.C. §§ 981 and 983-5.

66 18 U.S.C. § 982(c)(91).

67 18 U.S.C. § 982(d)(1).

68 18 U.S.C. § 982.

69 Fed. R. Crim. P. 32.2(a).

70 Prosecutors may seek the forfeiture of 'substitute assets' in place of tainted property when certain conditions are met. See 21 U.S.C. § 853(p) (incorporated by reference in various criminal forfeiture statutes).

71 Fed. R. Crim. P. 32.2(b)(4).

72 Fed. R. Crim. P. 32.2(c).

73 Fed. R. Crim. P. 32.2(c)(2).

74 See *Alexander v. United States*, 509 U.S. 544, 558-59 (1993) (holding that the excessive fines clause of the Eighth Amendment applies to in personam criminal forfeiture for purposes of determining whether a penalty is 'excessive'); *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (holding that the excessive fines clause applies to civil forfeitures of conveyances and real property used to

factors, courts conducting such a review will look to whether the forfeiture is disproportionate to the defendant's conduct and, therefore, excessive.⁷⁵

31.2.6 Compensation orders

Under the Mandatory Victims Restitution Act of 1996 (MVRA),⁷⁶ defendants convicted of certain federal crimes, as well as defendants sentenced to probation, must in most circumstances make restitution to each of their victims in the full amount of the victim's financial losses that resulted from the defendant's crimes.⁷⁷ Restitution by the defendant must be ordered regardless of the defendant's economic circumstances, or any third-party compensation received by the victim.⁷⁸ Judges must, however, consider a defendant's economic circumstances when deciding on a payment schedule and form of restitution.⁷⁹

Judges must reduce a restitution amount to be paid to a victim if the victim recovers compensatory damages from the defendant for the same loss in a civil proceeding.⁸⁰ In addition, if a victim has received insurance proceeds as compensation for a loss suffered due to the defendant's crimes, the defendant's restitution must be paid to the insurance company.⁸¹

31.2.7 Disqualification and other consequential orders

In addition to imprisonment, fines, probation, forfeitures and other direct sanctions that may be imposed by a criminal court, there are a number of other federal, state and local legal and regulatory restrictions that may result as 'collateral consequences' of a criminal conviction.⁸² These are opportunities and benefits that are no longer fully available to a person, or legal restrictions a person may operate under, because of their criminal conviction. They are imposed automatically upon conviction, even if not expressly included in the criminal court's judgment, or by action of a civil court or administrative agency. Examples of collateral consequences of a criminal conviction may include (1) disqualification from jury

facilitate the transport, sale, or possession of controlled substances under 21 U.S.C. §§ 881(a)(4) and (7)).

75 See *Alexander*, 509 U.S. at 558-59.

76 Pub. L. No. 104-132, § 204, 110 Stat. 1214, 1227 (codified at 18 U.S.C. §§ 3556, 3663 and 3664).

77 See *Hughey v. United States*, 495 U.S. 411, 413 (1990) (holding that restitution may only be awarded for losses resulting from the specific conduct for which the defendant was convicted). The *Hughey* decision was subsequently modified by Congress pursuant to the Crime Control Act of 1990, which authorised courts to order any restitution amount agreed to in a plea agreement, and broadened restitution payable to any person directly harmed by the defendant's conduct in the course of a scheme or conspiracy. See Pub. L. No. 101-647 § 2509, codified at 18 U.S.C. § 3663.

78 18 U.S.C. § 3664(f)(1)(A)-(B).

79 18 U.S.C. § 3664(f)(2).

80 18 U.S.C. § 3664(j)(2).

81 18 U.S.C. § 3664(j)(1).

82 See ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standards 19-2.1 and 19-3.1 (3d ed. 2003), available at www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_toc.html.

service and loss of voting rights; (2) ineligibility for federal employment or military service; (3) inability to obtain a passport or possess a firearm; and (4) for individuals with professional licences, such as attorneys, certified public accountants and securities brokers, suspension or loss of licence.

Appendix 1

About the Authors

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A former federal prosecutor, Joseph has extensive trial and appellate experience handling complex investigations and litigation involving the DOJ, the SEC, and other domestic and international law enforcement agencies. Representative matters include money laundering, cyber fraud, securities and accounting fraud, insider trading, international bribery (including the US FCPA and the UK Bribery Act), and other white-collar criminal and civil matters.

Joseph served in the DOJ's National Security Division's Counterterrorism Section, was appointed a Special Assistant US Attorney for the Eastern District of Virginia, and served on the FBI's 9/11 Review Commission staff. A decorated combat veteran, he is a lieutenant colonel in the US Army Reserve and has served on active duty as a military prosecutor in Europe, the Middle East and Africa.

He earned a law degree from St John's University School of Law, a master of business administration degree from St John's University Peter J Tobin College of Business and a bachelor of arts degree from Stony Brook University. He is dual-qualified to practise in the United States and as a solicitor in England and Wales, and is a certified public accountant.

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Anne represents companies and financial institutions, as well as their officers and directors, in criminal, civil and administrative investigations. She has extensive experience in crisis management, internal investigations and enforcement matters across a variety of industries, including financial services, telecommunications, pharmaceutical/healthcare and government contracting.

Anne was the US Attorney for the Western District of North Carolina from April 2010 to March 2015, where she led numerous high-profile, complex criminal and civil investigations, including a public corruption case involving the former mayor of Charlotte, the national

security case against former general and CIA Director David Petraeus, various securities and financial fraud cases, as well as significant matters involving the mortgage-backed securities industry. Previously, Anne was an Assistant US Attorney in the Western District of North Carolina, which included a detail to the Regime Crimes Liaison Office in Baghdad to assist the Iraqi Special Tribunal investigation into international humanitarian crimes committed by members of Saddam Hussein's regime.

Anne received a law degree from the University of North Carolina School of Law, a master of public administration degree from the University of North Carolina at Chapel Hill, and a bachelor of arts degree from the University of North Carolina at Charlotte.

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