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Crime Bill - S90107 - Presidential Declaration of Violent Crime and Drug Emergency Areas [4]

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January 30, 1995

MEMORANDUM FOR ABNER MIKVA
COUNSEL TO THE PRESIDENT

FROM: **CLARISSA CERDA**
ASSISTANT COUNSEL TO THE PRESIDENT

SUBJECT: **Implementation of Crime Bill §90107, "Presidential Declaration of Violent Crime and Drug Emergency Areas"**

BACKGROUND

Pursuant to the Crime Bill, the President may declare a jurisdiction a violent crime or drug emergency area and direct federal agency assistance to state and local authorities for crime-fighting. Pub. L. No. 103-322 §90107, 108 Stat. 1988 (1994). This crime emergency declaration power raises various legal and political considerations and, as drafted and implemented by the DOJ proposed rule, it also leaves several problems unresolved.

~~The~~ This section established the declaration process as follows: (1) A state or local CEO requests a presidential declaration through the Attorney General; (2) the Attorney General reviews the request, and (3) forwards the request along with a recommendation to the President, who must reject the request or make the declaration within 30 days of the request's submission. Id. §90107(b).

The statute and DOJ's proposed rule further detail the submission and review process for and requirements of a declaration request. 28 C.F.R. Part 92 (DOJ draft proposal).

To implement the statute and avoid practical problems and political embarrassment, a structure should be devised that facilitates prompt and effective Presidential action so the White House is prepared if and when a crime emergency declaration request is made. This office should pursue a number of implementing strategies, including: comments to DOJ regarding the rulemaking; presidential action via executive order, presidential directive, or internal memorandum; and, if necessary and appropriate, a legislative initiative to amend the crime emergency provision.

SUMMARY OF RECOMMENDATIONS

Recommendations for Comments to DOJ

- The regulations should include a policy statement affirming that a Presidential declaration of a crime emergency area in no way effects civil liberties or criminal procedural safeguards.

- Authority to request declarations should be required to go through or be restricted to states' governors.

- The first line of response to a crime emergency declaration should be the President's establishment of an intergovernmental, interagency command group to coordinate efforts. This would highlight presidential involvement, centralize crime-fighting efforts, and <u>avoid unnecessary financial commitments</u>.

Recommendations for Establishing Internal White House Framework

- The cabinet affairs staffer in charge of DOJ should serve as crime emergency liaison, coordinating communications between the White House and DOJ, and should facilitate administration responses to declaration requests. As necessary, a DOJ agency representative should serve in the White House Office to further facilitate the declaration process.

- Upon receipt of requests for a declaration, DOJ should notify the President through the staff liaison <u>immediately</u>. Thereafter, DOJ should brief the staff liaison on the status of their review of the request on a daily or other appropriate basis. DOJ should also prepare a draft document package (see §4, below) and forward it to the White House to facilitate prompt presidential action.

DISCUSSION

1. Protection of civil liberties during crime emergencies

The DOJ regulations should begin with a general policy statement affirming that, absent explicit and extraordinary governmental action, a crime emergency declaration in no way limits civil and criminal rights, and that all judicial and other remedies remain available to citizens whose rights are abused. Alternatively, a section might reaffirm that in crime emergency areas government officers are liable for any abuses under 42 U.S.C. §1983.

Two examples demonstrate how such a policy statement might be folded into the regulations: The DOJ draft regulations already include a short disclaimer indicating that the declaration-power does not otherise effect presidential powers. 28 C.F.R. §92.6(g)(DOJ draft proposal). An example of a longer policy statement included in agency regulations is found in the DoD regulations governing the domestic use of federal troops, which begins with several paragraphs reaffirming the constitutional and statutory limitations on emergency mobilizations. 32 C.F.R. §215.4.

2. Request authority should be restricted to governors or legislatures

As drafted, the statute explicitly authorizes most any state or subdivision CEO, even local and rural government CEOs, to request a declaration, exposing the executive branch to declaration requests from literally tens of thousands of jurisdictions. Pub. L. No. 103-322 §90107(c)(1). Under FEMA regulations, by contrast, request authority is restricted to governors, 44 C.F.R. §205.33(b). Similarly, domestic mobilization of federal troops in a state can be requested only by a state legislature or governor, not subdivisions. 10 U.S.C. §331.

To create a workable crime emergency chain of command, similar restrictions should apply here. If this would be inconsistent with the statutory text, the draft rule should at minimum be strengthened to require that local officials make their request <u>through</u> the state legislature or the governor, in addition to the current requirement that they demonstrate they have already exhausted all state resources. Alternatively, the Administration should lobby Congress to include an amendment restricting request authority in pending crime legislation.

3. Prevention of crime emergency declaration demands exceeding federal capabilities

Along the same lines, to avoid the political embarrassment of requests overwhelming the DOJ-White House response capabilities and federal resources, DOJ should rigorously screen requests, or even be authorized to reject patently frivolous requests. Under draft 28 C.F.R. §92.6(DOJ proposed draft), the Attorney General may return incomplete requests, or require additional information of those making a request. The Attorney General might further be given a joinder or consolidation power in the case of multiple requests. By analogy, 28 C.F.R. §92.4(a)(DOJ draft proposal) would allow multiple jurisdictions to make single, consolidated declaration requests.

Political embarrassment might result, moreover, if federal responses to crime emergency requests are deemed inadequate-- a real danger, as the Crime Bill provides for no additional funds for crime emergencies. Therefore, to provide effective responses without expense, interagency and intergovernmental coordination of existing efforts should be exphasized as the first line of federal assistance.

4. Internal White House procedure

The draft rules' provision for DOJ-White House communication and the timing of such communication is sparse: 28 C.F.R. §92.6(a)(DOJ draft proposal) provides that "the Attorney General shall review a request... within time for the President to decide [whether to make a declaration] within 30 days".

DOJ-White House communications require more structure. A White House Office staff member-- logically, the cabinet affairs staffer for DOJ-- should serve as the official liaison between DOJ and the White House in order to centralize crime emergency communications in a single person and to ensure rapid response to requests.

The staff liaison's responsibilities should include: facilitating communications between the President, the Attorney General, other federal officers, and other White House offices; the preparation of a package of draft documents-- a draft declaration, rejection, press release, etc.; and briefing and coordinating action with the COS, the Counsel to the President, domestic policy advisors, agency heads, and/or other White House staff as appropriate.

In addition, a DOJ agency representative might be assigned to work within the White House office to assist the White House liaison.

5. DOJ preliminary communications

Regarding the timing of DOJ-White House communications, the Attorney General's office should give the President notification immediately upon receipt of a request. Thereafter, DOJ should continue to update the staff liaison on the review's status on a daily or regular basis.

CONCLUSION

Action is required to implement the Crime Bill's §90107, to address practical problems of implementation, and to avoid political embarrassment. ~~These or other responses should be devised expeditiously~~.

DRAFT

January 27, 1995

MEMORANDUM FOR ABNER MIKVA
COUNSEL TO THE PRESIDENT

FROM: CLARISSA CERDA
ASSISTANT COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Rulemaking re: Designation of Violent Crime and Drug Emergency Areas pursuant to Violent Crime Control Act Sec. 90107

various Crime Bill This as drafted or implemented by the DOJ proposed rule

BACKGROUND

Pursuant to the ~~Crime~~ Act, the President may declare a jurisdiction a violent crime or drug emergency area and direct federal agency assistance to state and local authorities. Pub. Law 103-322 Sec. 90107. ~~The~~ crime emergency declaration power raises ~~major~~ legal and political considerations, and ~~also~~ has several unresolved problems. it

for a decision.

The provision provides for the declaration process to work as follows: (1) a state or local CEO requests a presidential declaration; (2) ~~Next~~, the Attorney General, ~~through whom the CEO makes the request,~~ reviews the request, and (3) forwards it to the President. The President then either declares a crime emergency area or rejects the request. Pub. Law 103-322 Sec. 90107(b). The Act and DOJ's proposed rule establish a procedural framework for the Attorney General to review such requests, detailing a request's submission, required contents, and review. Draft 28 CFR Part 92. Add - WH sentence

within 30 days of submission to DOJ.

PROPOSAL

White House involvement in establishing the declaration process is required. I recommend a process as follows:

1. Internal White House Procedure

The Cabinet Affairs staffer in charge of DOJ should serve as Crime Emergency liaison, coordinating communications between the White House and DOJ and facilitating administration responses to declaration requests. As necessary, a DOJ agency representative should serve in the White House Office to further facilitate the declaration process.

2. White House-DOJ Preliminary Communications and Preparations

DOJ should notify the President through the staff liaison <u>immediately</u> upon receiving a request. Thereafter, DOJ should brief the staff liaison on the status of their review of the request on a daily or other appropriate basis . DOJ should also prepare a document package as described below and forward it to the White House to facilitate prompt Presidential action.

Comment to DOJ

3. Crime Emergency Priority: Federal Coordination of Efforts
The central federal response to a crime emergency declaration should be the President's establishment of an intergovernmental, interagency command group to coordinate efforts. This would highlight presidential involvement, centralize crime-fighting efforts, and avoid unnecessary financial commitments.

Comment to DOJ

4. DOJ Policy Affirming Rights and Remedies
DOJ regulations should include a policy statement affirming that a Presidential declaration of a crime emergency area in no way effects the civil liberties and criminal procedural safeguards.

5. Prevention by gov oversight, etc.

DISCUSSION

1. Internal White House Procedure
DOJ's draft rule's provision for DOJ-White House communication and the timing of such communication is sparse: Draft 92.6(a) provides that "the Attorney General shall review a request... within time for the President to decide within 30 days" whether to make a crime emergency area declaration.

White House-DOJ Liaison for Crime Emergency Requests
A White House Office staff member should serve as the official liaison between DOJ and the White House for crime emergency declaration requests in order to centralize communication in a single person. In addition, a DOJ agency representative might be assigned to work within the White House office to assist the White House liaison. ~~Possible candidates are listed in Attachment 3~~.

Change to conform

The Crime emergency staff liaison should be responsible for briefing the COS and, ~~when necessary, the President~~. In addition, the Staff Liaison should route preliminary and final DOJ communications to White House staff as appropriate. The Staff Liaison would also work with the Office of Cabinet Affairs and the appropriate cabinet members whose agencies would be involved in Crime emergency efforts. Finally, the Staff Liaison would be responsible for facilitating Presidential communications to the Attorney General, other federal officers, and the press office.

National ~~Crime Emergency Advisory Body~~
A final internal need to implement the Crime Emergency declaration process is aiding Presidential decision-making by having an advisory group ready for immediate consultation with

should be part of above

the President. This might be done informally, as by an ad hoc meeting of the President's key advisors; more formally, as by convening a meeting of the Cabinet; or some alternative body, such as a Crime Security Council consisting of White House staff mentioned above. Whether the group's makeup and procedures be formal or informal, it should be given some structure to facilitate rapid responses to requests that will demand immediate attention.

2. DOJ Preliminary Communications

Upon receipt of a request the Attorney General should give the President notification and a background memo or briefing immediately. Thereafter, DOJ should continue to update the staff liaison on the review's status on a daily or regular basis. In addition, a package of draft documents should be readied by either ~~DOJ~~ or by the staff liaison. why? what's in them?

3. Prevention of crime emergency declaration demands exceeding federal capabilities.

Draft 28 CFR 92.6's request requirements ~~protect~~ make against inadequate requests somewhat. Under that provision, the Attorney General may return incomplete requests, or may requestors provide additional information. To avoid the political embarrassment of numerous, simultaneous requests overwhelming the DOJ-White House response capabilities and federal resources, DOJ ~~[illegible]~~ should rigorously screen multiple requests, or even reject patently frivolous requests without presidential referral. Further, the Attorney General might be given a joinder or consolidation power in the case of multiple requests--which draft 92.4(a) now ~~allows~~ requesting jurisdictions at their discretion. awkward wording

Request Authority should be Restricted to Governors or Legislatures

Complicating the multiple request problem, the statute explicitly authorizes most any state or subdivision CEO, even local and rural government CEOs, to request a declaration. Pub. Law 103-322 Sec. 90107(c)(1). Under FEMA, by contrast, request authority is restricted to governors, 44 CFR 205.33(b). For domestic deployment of federal troops the request power is limited to state legislatures. 10 U.S.C. 331.

To create a workable Crime emergency hierarchy, similar restrictions should apply here. If such a requirement would be inconsistent with the statutory text, the draft rule should, at minimum, be strengthened to require that local officials make their request through the legislature or the governor, in addition to the current requirement that they demonstrate they have already exhausted these resources.

Coordination of Existing Federal Crime Prevention Efforts, not Additional Crime Spending, Should be the Focus of Crime Emergency Declarations funds. Hence, the only available funds are those discretionary, etc.

additional

Political embarrassment might result, further, if federal responses to crime emergency requests are deemed inadequate. The provision provides for no ~~addition~~ spending beyond discretionary spending. Therefore, to provide effective responses without undue expense, the framework should emphasize interagency and intergovernmental coordination of existing efforts as the first line of federal assistance.

This approach might facilitate what is most needed to resolve such crises: intergovernmental cooperation and communication; and public visibility of Presidential involvement in the crisis.

4. Protection of Civil Liberties During Crime Emergencies

Another issue is how to safeguard against the authorities abusing civil and criminal liberties under the color of the emergency declaration. A general policy statement at the beginning of the DOJ regulations should suffice: The statement should affirm that, absent explicitly and extraordinary governmental action, a crime emergency declaration in no way serves as a limitation on civil and criminal rights, and that all judicial and other remedies remain available to citizens whose rights are so abused. Or, the Policy might reaffirm that government officers are liable for such abuses under 42 U.S.C. 1983.

Two examples lend guidance: draft 92.6(g), a short disclaimer indicating that the rule is no limitation on Presidential powers. An example of a longer policy statement is found at the beginning of the DoD regulations on the domestic use of federal troops reaffirming constitutional and statutory protections against abuse.

<u>CONCLUSION</u>

For the foregoing reasons, I recommend you adopt my proposals or some other measures to address these issues.

In light of the above, my recommendations

Appendix 1: Section 90107 Background

Pursuant to section 90107 of the Violent Crime Control Act, Pub. Law 103-322, the President may declare a jurisdiction a violent crime or drug emergency area and direct federal agency action to remedy such a crime emergency. The crime emergency declaration power is a potentially significant presidential function, with major legal and political ramifications. As currently drafted and implemented by the draft DOJ rule, it also has several unresolved problems.

The provision, adopted with bipartisan support and with little debate or fanfare, authorizes the chief executive officer of a state or local government to request the President declare his jurisdiction a crime emergency area. Next, the Attorney General, through whom the CEO makes the request, reviews the request, and forwards it to the President. Finally, no longer than 30 days after the request has been made, the President in his discretion is to determine whether or not to make such a declaration. Significantly, the statute's language empowers the President to declare a crime emergency area whether or nor a request has been made. Pub. Law 103-322 Sec. 90107(b).

The Act and DOJ's proposed rule establish a procedural framework for the Attorney General to review such requests, detailing a request's submission, contents, and review. Draft 28 CFR Part 92. The rule requires the CEOs to demonstrate that all local remedies have been exhausted or are inadequate, Draft 28 CFR 92.5(d), and that the "emergency is of such severity and magnitude that Federal assistance is necessary to ensure an effective response to save lives and to protect property and public health and safety." Draft 28 CFR 92.5(f)(2).

Presidential responses are spelled out in section g:

> (g) FEDERAL ASSISTANCE-- The President May-- (1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, financial assistance, and managerial, technical, and advisory services) in support of State and local assistance efforts; and (2) provide technical and advisory assistance, including communications support and law enforcement-related intelligence information.

missing word

Appendix 2: FEMA Procedures

The FEMA procedures for Presidential declaration of natural disaster areas is instructive. Under FEMA regulations, the disaster declaration process begins when a governor makes a request that the President make disaster or emergency area. 44 CFR 205.33(b). FEMA provides for a clear chain of command: The regulations advise the governor present to the FEMA regional director their request for a declaration, using a set format. Id. The regional director then conveys the request to FEMA's associate director, who in turn passes it to the Director, 205.35(a). The Directors then forwards to the Office of Cabinet Affairs a FEMA "package", including a memorandum and recommendation, draft response letters to the Director and the Governor, a draft press release, among other documents.

Next, according to internal W.H. procedures, the Deputy Secretary to the Cabinet drafts a cover memo to the President, and circulates it to White House department staff, including intergovernmental affairs and Legislative Affairs, and the staff secretary, who then presents the documents to the President for final determination.

This declaration request process has been facilitated by a FEMA agency representative working in the Office of Cabinet Affairs as agency liaison, and by the President's trust and confidence of the FEMA Director James Whit. delete

Nuke

Appendix 3: Crime Emergency Staff Liaison Candidates

Possible DOJ-White Liaisons include:

(1) the Cabinet Affairs Staffer who serves as DOJ liaison; ~~(2)~~ the Domestic Policy advisor for crime policy; (3) the Intergovernmental Affairs Director; or (4) the Counsel to the President; or (5) the National Drug Control Policy Director

January 27, 1995

MEMORANDUM FOR ABNER MIKVA
COUNSEL TO THE PRESIDENT

FROM: CLARISSA CERDA
ASSISTANT COUNSEL TO THE PRESIDENT

SUBJECT: DOJ Rulemaking re: Designation of Violent Crime and Drug Emergency Areas pursuant to Violent Crime Control Act Sec. 90107

BACKGROUND

Pursuant to the Crime Act, the President may declare a jurisdiction a violent crime or drug emergency area and direct federal agency assistance to state and local authorities. Pub. Law 103-322 Sec. 90107. The crime emergency declaration power raises major legal and political considerations, and also has several unresolved problems.

to the AG

The provision provides for the declaration process to work as follows: (1) a state or local CEO requests a presidential declaration. ~~Next~~ (2) the Attorney General, ~~through whom the CEO makes the request,~~ reviews the request, and (3) forwards it to the President. (3) ~~The President then either declares a crime emergency area or rejects the request.~~ Pub. ~~Law 103-322~~, Sec. 90107(b). The Act and DOJ's proposed rule establish a procedural framework for the Attorney General to review such requests, detailing a request'~~s submission,~~ required contents, and review. Draft 28 CFR Part 92. Further in Appx 1.

c. No.

for a decision

and review process

process

PROPOSAL Recs

Unresolved, WH

White House involvement in establishing the declaration process is required. I recommend a process as follows:

Summ

1. Internal White House Procedure

The Cabinet Affairs staffer in charge of DOJ should serve as Crime Emergency liaison, coordinating communications between the White House and DOJ and facilitating administration responses to declaration requests. As necessary, a DOJ agency representative should serve in the White House Office to further facilitate the declaration process. by Pres. EO/Dir/Memo

2. White House-DOJ Preliminary Communications and Preparations

DOJ should notify the President through the staff liaison <u>immediately</u> upon receiving a request. Thereafter, DOJ should brief the staff liaison on the status of their review of the request on a daily or other appropriate basis. DOJ should also

EO / Dir

I rec WH at int. pro

prepare a document package as described below and forward it to the White House to facilitate prompt Presidential action.

3. Crime Emergency Priority: Federal Coordination of Efforts

The central federal response to a crime emergency declaration should be the President's establishment of an intergovernmental, interagency command group to coordinate efforts. This would highlight presidential involvement, centralize crime-fighting efforts, and avoid unnecessary financial commitments.

Comment to DOJ

4. DOJ Policy Affirming Rights and Remedies

DOJ regulations should include a policy statement affirming that a Presidential declaration of a crime emergency area in no way effects the civil liberties and criminal procedural safeguards.

RCC comment as regs Review

Regs

However, it finds ~~No DOJ~~ Amending Crime to avoid pol enti- ... necessarily

DISCUSSION

1. Internal White House Procedure

DOJ's draft rule's provision for DOJ-White House communication and the timing of such communication is sparse: Draft 92.6(a) provides that "the Attorney General shall review a request... within time for the President to decide within 30 days" whether to make a crime emergency area declaration.

<u>White House-DOJ Liaison for Crime Emergency Requests</u>

A White House Office staff member should serve as the official liaison between DOJ and the White House for crime emergency declaration requests in order to centralize communication in a single person. In addition, a DOJ agency representative might be assigned to work within the White House office to assist the White House liaison. Pos~~sible candidates~~ are ~~listed in~~ Attachment 3.

Appen 3

person

Cnsl DP council + other approp staff EOP

The Crime emergency staff liaison should be responsible for briefing the COS and, when necessary, the President. In addition, the Staff Liaison should route preliminary and final DOJ communications to White House staff as appropriate. The Staff Liaison would also work with the Office of Cabinet Affairs and the appropriate cabinet members whose agencies would be involved in Crime emergency efforts. Finally, the Staff Liaison would be responsible for facilitating Presidential communications to the Attorney General, other federal officers, and the press office.

<u>National Crime Emergency Advisory Body</u>

A final internal need to implement the Crime Emergency declaration process is aiding Presidential decision-making by having an advisory group ready for immediate consultation with the President. This might be done informally, as by an ad hoc meeting of the President's key advisors; more formally, as by convening a meeting of the Cabinet; or some alternative body, such as a Crime Security Council consisting of White House staff mentioned above. Whether the group's makeup and procedures be formal or informal, it should be given some structure to facilitate rapid responses to requests that will demand immediate attention.

2. DOJ Preliminary Communications

Upon receipt of a request the Attorney General should give the President notification and a background memo or briefing immediately. Thereafter, DOJ should continue to update the staff liaison on the review's status on a daily or regular basis. In addition, a package of draft documents should be readied by either DOJ or by the staff liaison.

3. Prevention of crime emergency declaration demands exceeding federal capabilities.

Draft 28 CFR 92.6's request requirements protect against inadequate requests somewhat. Under that provision, the Attorney General may return incomplete requests, or may requestors provide additional information. To avoid the political embarrassment of numerous, simultaneous requests overwhelming the DOJ-White House response capabilities and federal resources, DOJ's should rigorously screen multiple requests, or even reject patently frivolous requests without presidential referral. Further, the Attorney General might be given a joinder or consolidation power in the case of multiple requests-- which draft 92.4(a) now allows requesting jurisdictions at their discretion.

Request Authority should be Restricted to Governors or Legislatures

Complicating the multiple request problem, the statute explicitly authorizes most any state or subdivision CEO, even local and rural government CEOs, to request a declaration. Pub. Law 103-322 Sec. 90107(c)(1). Under FEMA, by contrast, request authority is restricted to governors, 44 CFR 205.33(b). For domestic deployment of federal troops the request power is limited to state legislatures. 10 U.S.C. 331.

To create a workable Crime emergency hierarchy, similar restrictions should apply here. If such a requirement would be inconsistent with the statutory text, the draft rule should, at minimum, be strengthened to require that local officials make their request through the legislature or the governor, in addition to the current requirement that they demonstrate they have already exhausted these resources.

Coordination of Existing Federal Crime Prevention Efforts, not Additional Crime Spending, Should be the Focus of Crime Emergency Declarations

Political embarrassment might result, further, if federal responses to crime emergency requests are deemed inadequate. The provision provides for no addition spending beyond discretionary spending. Therefore, to provide effective responses without undue expense, the framework should emphasize interagency and intergovernmental coordination of existing efforts as the first line of federal assistance.

This approach might facilitate what is most needed to resolve such crises: intergovernmental cooperation and communication; and public visibility of Presidential involvement in the crisis.

4. Protection of Civil Liberties During Crime Emergencies

Another issue is how to safeguard against the authorities abusing civil and criminal liberties under the color of the emergency declaration. A general policy statement at the beginning of the DOJ regulations should suffice: The statement should affirm that, absent explicitly and extraordinary governmental action, a crime emergency declaration in no way serves as a limitation on civil and criminal rights, and that all judicial and other remedies remain available to citizens whose rights are so abused. Or, the Policy might reaffirm that government officers are liable for such abuses under 42 U.S.C. 1983.

Two examples lend guidance: draft 92.6(g), a short disclaimer indicating that the rule is no limitation on Presidential powers. An example of a longer policy statement is found at the beginning of the DoD regulations on the domestic use of federal troops reaffirming constitutional and statutory protections against abuse.

CONCLUSION

the above or ok

For the foregoing reasons, I recommend you adopt ~~my~~ e proposals or ~~some other measures to address these issues.~~

Appendix 1: Section 90107 Background

Pursuant to section 90107 of the Violent Crime Control Act, Pub. Law 103-322, the President may declare a jurisdiction a violent crime or drug emergency area and direct federal agency action to remedy such a crime emergency. The crime emergency declaration power is a potentially significant presidential function, with major legal and political ramifications. As currently drafted and implemented by the draft DOJ rule, it also has several unresolved problems.

The provision, adopted with bipartisan support and with little debate or fanfare, authorizes the chief executive officer of a state or local government to request the President declare his jurisdiction a crime emergency area. Next, the Attorney General, through whom the CEO makes the request, reviews the request, and forwards it to the President. Finally, no longer than 30 days after the request has been made, the President in his discretion is to determine whether or not to make such a declaration. Significantly, the statute's language empowers the President to declare a crime emergency area whether or nor a request has been made. Pub. Law 103-322 Sec. 90107(b).

The Act and DOJ's proposed rule establish a procedural framework for the Attorney General to review such requests, detailing a request's submission, contents, and review. Draft 28 CFR Part 92. The rule requires the CEOs to demonstrate that all local remedies have been exhausted or are inadequate, Draft 28 CFR 92.5(d), and that the "emergency is of such severity and magnitude that Federal assistance is necessary to ensure an effective response to save lives and to protect property and public health and safety." Draft 28 CFR 92.5(f)(2).

Presidential responses are spelled out in section g:

> (g) FEDERAL ASSISTANCE-- The President May-- (1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, financial assistance, and managerial, technical, and advisory services) in support of State and local assistance efforts; and (2) provide technical and advisory assistance, including communications support and law enforcement-related intelligence information.

Dis. Decl.

Appendix 2: FEMA Procedures

The FEMA procedures for Presidential declaration of natural disaster areas is instructive. Under FEMA regulations, the disaster declaration process begins when a governor makes a request that the President make disaster or emergency area. 44 CFR 205.33(b). FEMA provides for a clear chain of command: The regulations advise the governor present to the FEMA regional director their request for a declaration, using a set format. Id. The regional director then conveys the request to FEMA's associate director, who in turn passes it to the Director, 205.35(a). The Directors then forwards to the Office of Cabinet Affairs a FEMA "package", including a memorandum and recommendation, draft response letters to the Director and the Governor, a draft press release, among other documents.

Next, according to internal W.H. procedures, the Deputy Secretary to the Cabinet drafts a cover memo to the President, and circulates it to White House department staff, including intergovernmental affairs and Legislative Affairs, and the staff secretary, who then presents the documents to the President for final determination.

This declaration request process has been facilitated a FEMA agency representative working in the Office of Cabinet Affairs as agency liaison, and by the President's trust and confidence of the FEMA Director James Whit.

Appendix 3: Crime Emergency Staff Liaison Candidates

Possible DOJ-White Liaisons include:

(1) the Cabinet Affairs Staffer who serves as DOJ liaison; (2) the Domestic Policy advisor for crime policy; (3) the Intergovernmental Affairs Director; or (4) the Counsel to the President; or (5) the National Drug Control Policy Director

January 27, 1995

MEMORANDUM FOR ABNER MIKVA
COUNSEL TO THE PRESIDENT

FROM: **CLARISSA CERDA**
ASSISTANT COUNSEL TO THE PRESIDENT

SUBJECT: **DOJ Rulemaking re: Designation of Violent Crime and Drug Emergency Areas pursuant to Violent Crime Control Act Sec. 90107**

BACKGROUND

Pursuant to the Crime Bill, the President may declare a jurisdiction a violent crime or drug emergency area and direct federal agency assistance to state and local authorities. Pub. Law 103-322 Sec. 90107. The crime emergency declaration power raises major legal and political considerations, and, as drafted and implemented by the DOJ proposed rule, it also leaves several problems unresolved.

The provision provides for the declaration process to work as follows: (1) A state or local CEO sends a request to the Attorney General for a presidential declaration; (2) the Attorney General next reviews the request; and finally (3) forwards the request along with a recommendation to the President for a decision. Pub. L. No. 103-322, Sec. 90107(b). The statute and DOJ's proposed rule detail the requirements of and submission and review process for a declaration request. Draft 28 CFR Part 92.

White House action is required to address issues unresolved by the draft rules, including: comments to DOJ regarding the rulemaking; presidential action via executive order, presidential directive, or presidential memorandum; and, if necessary and appropriate, efforts to get Congress to amend the crime emergency provision.

SUMMARY OF RECOMMEDATIONS

Recommendations for Comments to DOJ

- A policy statement should affirm that a Presidential declaration of a crime emergency area in no way effects the civil liberties and criminal procedural safeguards.

- Request authority should be restricted to or routed through governors to the extent possible to screen requests.

- The central federal response to a crime emergency declaration should be the President's establishment of an intergovernmental, interagency command group to coordinate efforts. This would highlight presidential involvement, centralize crime-fighting efforts, and avoid unnecessary financial commitments.

Recommendations for Establishing Internal White House Framework via Executive Order or Presidential Directive or Memorandum

- The Cabinet Affairs staffer in charge of DOJ should serve as Crime Emergency liaison, coordinating communications between the White House and DOJ and facilitating administration responses to declaration requests. As necessary, a DOJ agency representative should serve in the White House Office to further facilitate the declaration process.

- DOJ should notify the President through the staff liaison immediately upon receiving a request. Thereafter, DOJ should brief the staff liaison on the status of their review of the request on a daily or other appropriate basis . DOJ should also prepare a document package as described below and forward it to the White House to facilitate prompt Presidential action.

DISCUSSION

1. Protection of Civil Liberties During Crime Emergencies

Another issue is how to safeguard against the authorities abusing civil and criminal liberties under the color of the emergency declaration. A general policy statement at the beginning of the DOJ regulations should suffice: The statement should affirm that, absent explicitly and extraordinary governmental action, a crime emergency declaration in no way serves as a limitation on civil and criminal rights, and that all judicial and other remedies remain available to citizens whose rights are so abused. Or, the Policy might reaffirm that government officers are liable for such abuses under 42 U.S.C. 1983.

Two examples lend guidance: draft 92.6(g), a short disclaimer indicating that the rule is no limitation on Presidential powers. An example of a longer policy statement is found at the beginning of the DoD regulations on the domestic use of federal troops reaffirming constitutional and statutory protections against abuse, 32 C.F.R. 215.4.

2. Request Authority should be Restricted to Governors or Legislatures

Complicating the multiple request problem, the statute explicitly authorizes most any state or subdivision CEO, even local and rural government CEOs, to request a declaration. Pub.

L. No. 103-322 Sec. 90107(c)(1). Under FEMA, by contrast, request authority is restricted to governors, 44 CFR 205.33(b). For domestic deployment of federal troops the request power is limited to state legislatures. 10 U.S.C. Sec. 331.

To create a workable Crime emergency hierarchy, similar restrictions should apply here. If such a requirement would be inconsistent with the statutory text, the draft rule should, at minimum, be strengthened to require that local officials make their request <u>through</u> the legislature or the governor, in addition to the current requirement that they demonstrate they have already exhausted these resources.

3. Prevention of crime emergency declaration demands exceeding federal capabilities and political embarrassment.

Draft 28 CFR 92.6's request requirements protect against inadequate requests somewhat. Under that provision, the Attorney General may return incomplete requests, or may requestors provide additional information. To avoid the political embarrassment of numerous, simultaneous requests overwhelming the DOJ-White House response capabilities and federal resources, DOJ's should rigorously screen multiple requests, or even reject patently frivolous requests without presidential referral. Further, the Attorney General might be given a joinder or consolidation power in the case of multiple requests-- which draft 92.4(a) now allows requesting jurisdictions at their discretion.

Political embarrassment might result, further, if federal responses to crime emergency requests are deemed inadequate. The provision provides for no addition spending beyond discretionary spending. Therefore, to provide effective responses without undue expense, the framework should emphasize interagency and intergovernmental coordination of existing efforts as the first line of federal assistance.

This approach might facilitate what is most needed to resolve such crises: intergovernmental cooperation and communication; and public visibility of Presidential involvement in the crisis.

4. Internal White House Procedure

DOJ's draft rule's provision for DOJ-White House communication and the timing of such communication is sparse: Draft 92.6(a) provides that "the Attorney General shall review a request... within time for the President to decide within 30 days" whether to make a crime emergency area declaration.

<u>White House-DOJ Liaison for Crime Emergency Requests</u>

A White House Office staff member should serve as the official liaison between DOJ and the White House for crime emergency declaration requests in order to centralize communication in a single person. In addition, a DOJ agency representative might be assigned to work within the White House office to assist the White House liaison.

The Crime emergency staff liaison should be responsible for briefing the COS and, when necessary, the President. In addition, the Staff Liaison should route preliminary and final DOJ communications to White House staff as appropriate. The Staff Liaison would also work with the Office of Cabinet Affairs and the appropriate cabinet members whose agencies would be involved in Crime emergency efforts. Finally, the Staff Liaison would be responsible for facilitating Presidential communications to the Attorney General, other federal officers, and the press office.

5. DOJ Preliminary Communications

Upon receipt of a request the Attorney General's office should give the President notification and a background memo or briefing <u>immediately</u>. Thereafter, DOJ should continue to update the staff liaison on the review's status on a daily or regular basis. In addition, a package of draft documents should be readied by either DOJ or by the staff liaison.

<u>CONCLUSION</u>

For the foregoing reasons, I recommend you adopt my proposals or some other measures to address these issues.

Appendix 1: Section 90107 Background

Pursuant to section 90107 of the Violent Crime Control Act, Pub. L. No. 103-322, the President may declare a jurisdiction a violent crime or drug emergency area and direct federal agency action to remedy such a crime emergency. The crime emergency declaration power is a potentially significant presidential function, with major legal and political ramifications. As currently drafted and implemented by the draft DOJ rule, it also has several unresolved problems.

The provision, adopted with bipartisan support and with little debate or fanfare, authorizes the chief executive officer of a state or local government to request the President declare his jurisdiction a crime emergency area. Next, the Attorney General, through whom the CEO makes the request, reviews the request, and forwards it to the President. Finally, no longer than 30 days after the request has been made, the President in his discretion is to determine whether or not to make such a declaration. Significantly, the statute's language empowers the President to declare a crime emergency area whether or nor a request has been made. Pub. L. No 103-322, Sec. 90107(b).

The Act and DOJ's proposed rule establish a procedural framework for the Attorney General to review such requests, detailing a request's submission, contents, and review. Draft 28 CFR Part 92. The rule requires the CEOs to demonstrate that all local remedies have been exhausted or are inadequate, Draft 28 CFR 92.5(d), and that the "emergency is of such severity and magnitude that Federal assistance is necessary to ensure an effective response to save lives and to protect property and public health and safety." Draft 28 CFR 92.5(f)(2).

Presidential responses are spelled out in section g:

> (g) FEDERAL ASSISTANCE-- The President May-- (1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, financial assistance, and managerial, technical, and advisory services) in support of State and local assistance efforts; and (2) provide technical and advisory assistance, including communications support and law enforcement-related intelligence information.

Appendix 2: FEMA Procedures

The FEMA procedures for Presidential declaration of natural disaster areas is instructive. Under FEMA regulations, the disaster declaration process begins when a governor makes a request that the President make disaster or emergency area. 44 CFR 205.33(b). FEMA provides for a clear chain of command: The regulations advise the governor present to the FEMA regional director their request for a declaration, using a set format. Id. The regional director then conveys the request to FEMA's associate director, who in turn passes it to the Director, 205.35(a). The Directors then forwards to the Office of Cabinet Affairs a FEMA "package", including a memorandum and recommendation, draft response letters to the Director and the Governor, a draft press release, among other documents.

Next, according to internal W.H. procedures, the Deputy Secretary to the Cabinet drafts a cover memo to the President, and circulates it to White House department staff, including intergovernmental affairs and Legislative Affairs, and the staff secretary, who then presents the documents to the President for final determination.

This declaration request process has been facilitated a FEMA agency representative working in the Office of Cabinet Affairs as agency liaison, and by the President's trust and confidence of the FEMA Director James Whit.

MEMORANDUM

TO: Clarissa Cerda
FROM: Dan Manatt
DATE: January 18, 1995
DEADLINE: January 13-- PAST DUE
RE: Crime Act Sec. 90107 Implementing Rule

RECOMMENDATION: CC Attn. NC No Obj. Concur Object Edit DC

This memo analyzes the Draft Proposed Rule for Crime Bill Section 90107 which raises significant federalism and presidential emergency powers issues which were presumably addressed during Congressional consideration. The Draft Rule is not itself objectionable, but merits consideration of the larger issues the Act itself poses.

I. ISSUE/BACKGROUND

The Crime Bill Section 90107 creates the Violent Crime and Drug Emergency Areas procedure whereby state and local leaders may request the President to declare their jurisdiction an emergency area, and to provide federal assistance to alleviate the crime emergency.

DOJ's draft proposed rule implementing Section 90107 stays close to the Act's text, and is neither long nor overly detailed. The Draft Rule largely details criteria for DOJ review of requests, and what information states must provide in making an emergency request, including crime data, certification of existing state efforts, resources, plans for resolving the emergency, etc. Draft 28 C.F.R. 92.5-6.

The President is required to decide whether to declare an emergency area within 30 days of receipt of request. The AG is responsible under the legislation to receive and review requests, and may return a request not providing the required information, in which case no presidential action is required.

II. LEGAL ISSUES

The President apparently may declare an emergency area unilaterally, see sec. 90107(b), or after a request for such declaration and DOJ review of the request, sec.90107(f). Therefore, Presidential emergency powers are significantly expanded by the new emergency power created by the Act, but are circumscribed by a 1 year limit, which the President may extend for up to 180 days.

The Act also included boilerplate language indicating that the legislation would not otherwise diminish or detract existing presidential or AG authority. Sec. 90107(j).

Nonetheless, the Act will potentially raise a number of important constitutional questions regarding emergency powers and federalism.

III. POLITICAL & POLICY ISSUES

MINORITY CONCERNS

Civil liberties are often pitted against public safety in crime emergency executive actions-- such as illustrated by the recent Chicago public housing searches and urban curfews around the country. Although not addressed by the draft rule, you may wish to consider to extent to which minorities are likely to be disproportionately impacted by crime emergencies, and possible responses and safeguards.

* EOP-DOJ LIAISON

The rule provides for DOJ review of state and local requests, Draft 62.6, and Presidential decision-making, but does not provide for DOJ-EOP liaison to facilitate the latter function. For instance, DOJ does not have to notify the President upon receiving a request. Nor is the AG required to notify the President of DOJ action requesting additional information, which effectively negatives the request until it is corrected. Nor is an EOP office or official named as the DOJ contact/liaison.

The liaison function may be satisfied by informal procedures (or formal procedures I am not aware of); nonetheless, I raise the issue for your attention.

IV. RECOMMENDATION

I recommend you consider these issues further, as they impact your areas of responsibility. The rule itself seems an appropriate application of the Act's mandate. However, collateral issues should be considered now to avoid difficulties when and if the crime emergency powers are ever exercised by the executive in the near or distant future.

Also:

* Practically, we can be bombarded

* Procedurally, why open us Pres. power to public rec ?

final" and inserting "a prior conviction for a felony drug offe has become final".

(b) Section 1012(b) of the Controlled Substances Import a Export Act (21 U.S.C. 962(b)) is amended by striking "one or mo prior convictions of him for a felony under any provision of th title or title II or other law of a State, the United States, a foreign country relating to narcotic drugs, marihuana, or depre sant or stimulant drugs, have become final" and inserting "o or more prior convictions of such person for a felony drug offen have become final".

(c) Section 401(b)(1)(A) of the Controlled Substances Act (2 U.S.C. 841(b)(1)(A)) is amended by striking the sentence beginni "For purposes of this subparagraph, the term 'felony drug offen means".

(d) Section 102 of the Controlled Substances Act (21 U.S 802) is amended by adding at the end the following new paragrap

"(43) The term 'felony drug offense' means an offense th is punishable by imprisonment for more than one year under a law of the United States or of a State or foreign country th prohibits or restricts conduct relating to narcotic drugs, marihuan or depressant or stimulant substances.".

SEC. 90106. ADVERTISING.

Section 403 of the Controlled Substances Act (21 U.S.C. 84 is amended—

(1) by redesignating subsections (c) and (d) as subsectio (d) and (e), respectively; and

(2) by inserting after subsection (b) the following new su section:

"(c) It shall be unlawful for any person to place in any new paper, magazine, handbill, or other publications, any writte advertisement knowing that it has the purpose of seeking or offeri illegally to receive, buy, or distribute a Schedule I controlled su stance. As used in this section the term 'advertisement' include in addition to its ordinary meaning, such advertisements as tho for a catalog of Schedule I controlled substances and any simil written advertisement that has the purpose of seeking or offeri illegally to receive, buy, or distribute a Schedule I controlled su stance. The term 'advertisement' does not include material whi merely advocates the use of a similar material, which advocat a position or practice, and does not attempt to propose or facilit an actual transaction in a Schedule I controlled substance.".

42 USC 14053.

SEC. 90107. VIOLENT CRIME AND DRUG EMERGENCY AREAS.

(a) DEFINITIONS.—In this section—

"major violent crime or drug-related emergency" mea an occasion or instance in which violent crime, drug smuggli drug trafficking, or drug abuse violence reaches such level as determined by the President, that Federal assistance needed to supplement State and local efforts and capabiliti to save lives, and to protect property and public health a safety.

(*)

"State" means a State, the District of Columbia, th Commonwealth of Puerto Rico, the United States Virg Islands, American Samoa, Guam, and the Northern Maria Islands.

(b) DECLARATION OF VIOLENT CRIME AND DRUG EMERGEN AREAS.—If a major viol t crime or drug-related emergency exis

throughout a State or a part of a State, the President may declare the State or part of a State to be a violent crime or drug emergency area and may take appropriate actions authorized by this section.

(c) PROCEDURE.—

(1) IN GENERAL.—A request for a declaration designating an area to be a violent crime or drug emergency area shall be made, in writing, by the chief executive officer of a State or local government, respectively (or in the case of the District of Columbia, the mayor), and shall be forwarded to th Attorney General in such form as the Attorney General may by regulation require. One or more cities, counties, States, or the District of Columbia may submit a joint request for designation as a major violent crime or drug emergency area under this subsection.

AG reg pwr

(2) FINDING.—A request made under paragraph (1) shall be based on a written finding that the major violent crime or drug-related emergency is of such severity and magnitude that Federal assistance is necessary to ensure an effective response to save lives and to protect property and public health and safety.

necessary not, less th imperative

(d) IRRELEVANCY OF POPULATION DENSITY.—The President shall not limit declarations made under this section to highly populated centers of violent crime or drug trafficking, drug smuggling, or drug use, but shall also consider applications from governments of less populated areas where the magnitude and severity of such activities is beyond the capability of the State or local government to respond.

rural area

(e) REQUIREMENTS.—As part of a request for a declaration under this section, and as a prerequisite to Federal violent crime or drug emergency assistance under this section, the chief executive officer of a State or local government shall—

(1) take appropriate action under State or local law and furnish information on the nature and amount of State and local resources that have been or will be committed to alleviating the major violent crime- or drug-related emergency;

(2) submit a detailed plan outlining that government's short- and long-term plans to respond to the violent crime or drug emergency, specifying the types and levels of Federal assistance requested and including explicit goals (including quantitative goals) and timetables; and

(3) specify how Federal assistance provided under this section is intended to achieve those goals.

(f) REVIEW PERIOD.—The Attorney General shall review a request submitted pursuant to this section, and the President shall decide whether to declare a violent crime or drug emergency area, within 30 days after receiving the request. President.

(g) FEDERAL ASSISTANCE.—The President may—

(1) direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, financial assistance, and managerial, technical, and advisory services) in support of State and local assistance efforts; and

(2) provide technical and advisory assistance, including communications support and law enforcement-related intelligence information.

(h) DURATION OF FEDERAL ASSISTANCE.—

(1) IN GENERAL.—Federal assistance under this section shall not be provided to a violent crime or drug emergency area for more than 1 year.

(2) EXTENSION.—The chief executive officer of a jurisdiction may apply to the President for an extension of assistance beyond 1 year. The President may extend the provision of Federal assistance for not more than an additional 180 days.

(i) REGULATIONS.—Not later than 120 days after the date of enactment of this Act, the Attorney General shall issue regulations to implement this section.

(j) NO EFFECT ON EXISTING AUTHORITY.—Nothing in this section shall diminish or detract from existing authority possessed by the President or Attorney General.

Subtitle B—National Narcotics Leadership Act Amendments

SEC. 90201. IMPLEMENTATION OF NATIONAL DRUG CONTROL STRATEGY.

(a) PROGRAM BUDGET.—Section 1003(c) of the National Narcotics Leadership Act of 1988 (21 U.S.C. 1502(c)) is amended—

(1) by redesignating paragraphs (5), (6), and (7), as paragraphs (6), (7), and (8), respectively; and

(2) by inserting after paragraph (4) the following new paragraph:

"(5) The Director shall request the head of a department or agency to include in the department's or agency's budget submission to the Office of Management and Budget funding requests for specific initiatives that are consistent with the President's priorities for the National Drug Control Strategy and certifications made pursuant to paragraph (3), and the head of the department or agency shall comply with such a request.".

(b) BUDGET RECOMMENDATION.—Section 1003(b) of the National Narcotics Leadership Act of 1988 (21 U.S.C. 1502(b)) is amended—

(1) by striking "and" at the end of paragraph (6);

(2) by striking the period at the end of paragraph (7) and inserting "; and"; and

(3) by adding at the end the following new paragraph:

"(8) provide, by July 1 of each year, budget recommendations to the heads of departments and agencies with responsibilities under the National Drug Control Program, which recommendations shall apply to the second following fiscal year and address funding priorities developed in the annual National Drug Control Strategy.".

(c) CONTROL OF DRUG-RELATED RESOURCES.—Section 1003 of the National Narcotics Leadership Act of 1988 (21 U.S.C. 1502) is amended—

(1) in subsection (d)—

(A) by amending paragraph (2) to read as follows:

"(2) request the head of a department or agency or program to place department, agency, or program personnel who are engaged in drug control activities on temporary detail to another department or agency in order to implement the National Drug Control Strategy, and the head of the department or agency shall comply with such a request;

(B) by striking "and" at the end of paragraph (6);

(C) by striking the period at the end of paragraph (7) and inserting a semicolon; and

(D) by adding after paragraph (7) the following new paragraphs:

"(8) except to the extent that the Director's authority under this paragraph is limited in an annual appropriations Act, transfer funds appropriated to a National Drug Control Program agency account to a different National Drug Control Program agency account in an amount that does not exceed 2 percent of the amount appropriated to either account, upon advance approval of the Committees on Appropriations of each House of Congress; and

"(9) in order to ensure compliance with the National Drug Control Program, issue to the head of a National Drug Control Program agency a funds control notice described in subsection (f)."; and

(2) by adding at the end the following new subsections:

"(f) FUNDS CONTROL NOTICES.—(1) A funds control notice may direct that all or part of an amount appropriated to the National Drug Control Program agency account be obligated by—

"(A) months, fiscal year quarters, or other time periods; and

"(B) activities, functions, projects, or object classes.

"(2) An officer or employee of a National Drug Control Program agency shall not make or authorize an expenditure or obligation contrary to a funds control notice issued by the Director.

"(3) In the case of a violation of paragraph (2) by an officer or employee of a National Drug Control Program agency, the head of the agency, upon the request of and in consultation with the Director, may subject the officer or employee to appropriate administrative discipline, including, when circumstances warrant, suspension from duty without pay or removal from office.".

(d) CERTIFICATION OF ADEQUACY OF BUDGET REQUEST.—Section 1003(c)(3)(B) of the National Narcotics Leadership Act of 1988 (21 U.S.C. 1502(c)(3)(B)) is amended—

(1) by inserting "in whole or in part" after "adequacy of such request"; and

(2) by striking the semicolon at the end and inserting "and, with respect to a request that is not certified as adequate to implement the objectives of the National Drug Control Strategy, include in the certification an initiative or funding level that would make the request adequate;".

SEC. 90202. OFFICE PERSONNEL RESTRICTION.

Section 1003 of the National Narcotics Leadership Act of 1988 (21 U.S.C. 1502) is amended by adding at the end the following new subsection:

"(f) PROHIBITION ON POLITICAL CAMPAIGNING.—A Federal officer in the Office of National Drug Control Policy who is appointed by the President, by and with the advice and consent of the Senate, may not participate in Federal election campaign activities, except that such an official is not prohibited by this subsection from making contributions to individual candidates.".

SEC. 90203. NATIONAL DRUG CONTROL STRATEGY OUTCOME MEASURES.

Section 1005(a) of the National Narcotics Leadership Act of 1988 (21 U.S.C. 1504(a)) is amended—