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Summary of Changes To Crime Bill
(Current as of March 3, 2000)

In General

References to "1999" in bill titles have been changed to "2000".

References to "2000" in appropriation authorizations have been changed to "2001."

Authorization levels have been adjusted, where necessary, to reflect President's FY 2001 budget. (Note: Only DOJ amounts have been adjusted. OMB will need to advise regarding changes in other agencies funding levels (and check to make sure ours are correct).)

Title I (Supporting Local Law Enforcement)

Section 1005 (Awards to State and Local Law Enforcement) – Amended to delete authorization of appropriations in (c). There is no money for this activity in the FY 2001 budget.

Section 1007(b) (body armor enhancement) - technical change.

Section 1011 (High Tech Crime Act) - various technical changes, especially concerning forfeiture. Note: A new and different version of this proposal is under review within DOJ and has not been included in the redraft.

Title II (Breaking the Cycle of Drugs and Violence)

Section 2022 (drug free teenaged drivers) -- We are advised that section 2022(b) (concerning teenaged drivers, inserted by DOT) raises serious constitutional issues. Deleting this section would clearly be a substantive change; and it remains in the bill for now, pending discussion.

Section 2022(c) – Technical change to the bill.

Section 2023 (temporary emergency scheduling) – Clarifying changes for sectional analysis. Technical changes to the bill.

Section 2027 (drug paraphernalia) – Minor and technical changes to bill and sectional analysis re: forfeitures.

Section 2029 (controlled substances amendments) – Reporting date for the Sentencing Commission changed to December 1, 2000, from June 1, 2000.

Section 2054 (long arm jurisdiction over money launderers) -- Clarifying language added to sectional analysis.

Section 2058 (subpoena of bank records) – Minor change to sectional analysis.

Section 2061 (technical wiretap amendment) – Minor change to sectional analysis.

Section 2076 (restoring property to victims) – Sectional analysis redrafted for clarity and accuracy.

Section 2078 (use of subpoenaed records) – Minor and technical changes to bill. Sectional analysis redrafted for accuracy and clarity.

Section 2079 (forfeiture of property in government custody) – Minor and technical change to the bill. Sectional analysis expanded and clarified to reflect change to the draft bill.

Section 2080 (restraint of property subject to forfeiture) – Sectional analysis updated to reflect more current case citations.

Section 2082 (limitation period for certain challenges) – Sectional analysis updated to reflect more current case citations.

Title III (Juvenile Justice Reform)

Section 3002 (penalty enhancements) -- Minor amendment to conform statute to sectional analysis. Also, technical correction to proposed amendment of 18 USC 1959.

Section 3004 (elimination of statute of limitations) – Technical amendment.

Section 3005 (forfeiture for crimes of violence) – Technical amendment.

Section 3010 (interstate travel to engage in witness intimidation) – Sectional analysis amended slightly to address procedures to be used if death penalty is imposed. [NOTE: Sentencing issues in connection with Jones v. New York may be required.

Section 3011 (expanding pretrial detention eligibility) -- Sectional analysis revised for clarity and accuracy. In addition, a cross reference has been added in the bill to 18 USC

521.

Section 3012 (conspiracy penalty for obstruction of justice) -- Same change to sectional analysis as sec. 3010.

Section 3031 (certain delinquency proceedings) – Revision of (a)(2)(A)(ii).

Title IV (Fighting Terrorism and Violent Crime)

Section 4002 (murder and serious assault on certain officials) – Technical change.

Section 4042 (extradition absent a treaty) – Potential minor amendment regarding a finding of probable cause; language needed. For now, no change made.

Section 4081 (enhanced authority to investigate computer fraud) – Sectional analysis revised for clarity and accuracy.

Section 4091 (forfeiture for alien smuggling) – Sectional analysis revised for clarity and accuracy.

Section 4104 (discretionary authority to use forfeiture proceeds) – Technical changes to sectional analysis.

Section 4121(b) (expansion of the biological weapons statute) – Clarification of 18 USC 175 to ensure that expanded bio weapons provisions not have extraterritorial effect. Conforming change to sectional analysis.

Section 4121(b)(3)(E) and (F)(ii) – Potential ex post facto problems. No change made for now.

Section 4121(d) – 18 USC 175(a) amended slightly to address Jones sentencing problem.

Section 4122(c) (rail and mass transportation anti-terrorism and violence) – 18 USC 1992(a) amended to address Jones sentencing problem. Also, language added to 1992(b) to permit imposition of a fine under title 18 (in addition to imprisonment); we assume this was a technical oversight. Potential Jones problem in 1992(c) (regarding throwing or shooting dangerous objects at trains); however, no new language. For now, no change made.

Section 4122(e) – Proposed 1993 amended slightly to address Jones problem. In addition, technical corrections made to proposed 1993. Technical correction made to

1993 to permit imposition of a fine under 1993. Potential Jones problem in proposed 1993(b); no new language. No change made for now.

Title V (Protecting Americans and Supporting Crime Victims)

Section 5001 (STOP grants) – Various minor and technical amends to “STOP” grants provisions.

Section 5002 (role of the courts) – Technical amendments.

Section 5005 (educational institutions and violence against women) – Technical amendment.

Section 5006 (ten percent VAWA set-aside) – Technical amendment.

Section 5007 – Protection of Victims of Trafficking. The Administration’s comprehensive anti-trafficking proposal has been substituted here. One question here is whether to include the entire proposal or just the DOJ parts (viz., criminal sanctions and “T Visa” proposal). For now, the entire bill is included.

Section 5008 (battered immigrant women) – Technical amendment

Section 5010 (civil legal assistance grants) – New provision that authorizes Civil Legal Assistance grants. This is apparently in the FY 2001 budget; however, its inclusion here appears on its face to be beyond the scope of the current exercise.

Section 5012 (sentencing enhancement) – Changed statutory reporting date for a Sentencing Commission report from June 1, 2000, to December 1, 2000.

Section 5033 (grand jury disclosure) – Technical language change for accuracy.

Section 5038 (abuse and neglect of the elderly in nursing homes) – Issue of possible clarifying language be added to section 1348(b) regarding possible displacement of other remedies. No language suggested; no change made. Issue of providing re: section 1348(d) a statutory definition of “physical or mental harm.” No new language. No change made.

In addition, the “pattern of violations” has been amended for clarity. Also, an erroneous citation to section 1350 has been corrected.

Section 5059 (use of forfeited funds to pay restitution to victims) – This provision has

been deleted. (This concerns use of forfeited funds to pay restitution to crime victims). Part of the provision appears already in title II; the other part is not needed.)

Section 5072 (protection of government employees) – Technical amendments.

Section 5077 (prevention of disposal of certain assets) – Technical amendment.

Title VI (Combating Violent and White Collar Crime)

Section 6001 (fugitive apprehension) – Minor language clarification.

Section 6007 (inapplicability of 18 USC § 2515 to certain offenses) – Minor changes to bill and sectional analysis.

Section 6012 (autopsy authority) -- Potential clarification regarding scope of federal autopsy authority. No new language; no change made.

Section 6024 (medical payment rules in prisons) – Language re: subsistence and medical care for prisoners has been deleted (provisions enacted elsewhere).

Section 6035 (fraud in aircraft parts) – Technical corrections to the “Aircraft Safety Act.” (Note: A related version of this legislation is pending in the conference report in legislation that would reauthorize the Federal Aviation Administration. If that legislation is passed and approved, this section should be deleted.)

Section 6043 (agencies authorized to investigate) – Technical correction.

SECTION-BY-SECTION ANALYSIS FOR TITLE I

SEC. 1. SHORT TITLE.

Section 1 states that the short title of this Act is the “21st Century Law Enforcement and Public Safety Act.”

SEC. 1001. 21ST CENTURY COMMUNITY POLICING INITIATIVE.

Subsection (a) expands the purposes of the COPS legislation by making clear that this grant program is also designed to increase prosecutor presence, as well as police presence, in the community and that it seeks to enhance law enforcement access to new technologies

Subsection (b) amends paragraph (1) of subsection 1701(b) of the Omnibus Crime Control and Safe Streets Act of 1968 to expand the hiring, rehiring, and redeployment of police office grants program [which also provides for equipment, technology, or support systems, and pay overtime] by adding a new subparagraph to also provide funding for promotion of higher education for in-service State and local officers by reimbursing them for college or graduate school costs. It also puts an annual 20 percent limit on grants for other than education costs.

Subsection (c) amends paragraph (2) of subsection 1701(d) by requiring that “integrity and ethics” must be a part of the specialized training for community police offices. It also requires that community policing efforts involving young people must also involve school officials and values-based organizations. A new grant purpose is added for such innovative programs as the TRIAD program that bring together a community’s sheriff, police chief, and elderly residents to address the elderly’s public safety concerns.

Subsection (d) amends paragraph (1) of subsection 1701(f) by permitting the Attorney General to use up to 5 percent of appropriated funds for technical assistance, and amends paragraph (3) to mandate that such technical assistance must also be used to establish and operate regional community policing institutes. It also provides that such training may be made available to police labor and management organizations and to community residents.

Subsection (e) creates two new grant programs: one for law enforcement technology development, the other for community-based prosecution. The first will focus on three areas:

(1) improving police communications through the use of wireless communications, computers, software, videocams, databases, and other equipment that enables more effective law enforcement communication across jurisdictional boundaries and achieves interoperability;

(2) developing and improving access to crime-solving technologies, such as DNA analysis, photo enhancement, and voice recognition, that can now reach even the smallest and most remote departments; and

(3) promoting comprehensive crime analysis abilities by using new techniques and technologies, such as crime mapping, that enable law enforcement to use real-time crime and arrest data -- including non-criminal justice data-- to improve their ability to analyze, predict, and respond to local crime and disorder problems, as well as to take part in and contribute to regional crime analysis.

The new community-based prosecution grant program, also created by subsection (e), will be build on local community policing efforts and allow grant funds to be used for three purposes:

(1) to hire new community-based prosecutors for programs that assign prosecutors to programs such as those that focus on specific geographic areas, address specific violent crimes, or focus on other local crime problems (such as intensive illegal gang, gun, and drug enforcement projects and quality of life initiatives) based on needs identified by local law enforcement, community organizations, and local residents;

(2) to permit the redeploying of prosecutors to these programs, freeing them from their present responsibilities, and enhancing their effectiveness by hiring victim and witness coordinators, paralegals, community outreach, and other personnel; and

(3) to establish programs to assist local prosecutors in implementing methods of identifying and responding to priority crime problems in a community with specially tailored solutions.

At least 75 percent of community prosecution grants must be directed to the first and second above-listed purposes, no more than 10 percent may be used for hiring non-prosecutor personnel, and at least one-quarter of grant funds are reserved for units of local government with populations of less than 50,000.

Subsection (f) amends section 1703 that deals with grant renewals by allowing the Attorney General to use up to 5 percent of community policing [subsection (a)] funds for grants specifically targeted to retain police officers in good standing whose local departments suffer from financial hardship or severe budget constraints, as a result of which such officers may face termination.

Subsection (g) raises the current ceiling on hiring or rehiring costs from \$75,000 to \$125,000 per officer.

Subsection (h) expands the definition of “career law enforcement officer” to include those deputy sheriffs who are charged with “supervising offenders who are released into the community, but also engage in local community policing efforts.”

Section (i) authorizes annual appropriations for the COPS program in the amount of \$1.3 billion in each of the years from fiscal year 2000 through and including 2005. With respect to certain individual programs within COPS it makes these further changes:

(1) increases the amount, from 3 to 5 percent of funds appropriated in any fiscal years, which may be used for technical assistance and evaluations or studies carried out or commissioned by the Attorney General under this title;

(2) replaces the current requirement that not less than 85 percent of total funding must be used for grants under subsections 1701(b) and (c) with the requirement that at least \$600 million be directed for those purposes; and

(3) directs \$150 million of available appropriated funds in any fiscal year to the new law enforcement technology program, and \$200 million to the community-based prosecution program.

SEC. 1002. COMMUNITY PROSECUTION PROGRAM GRANTS.

This section would replace the Community-Based Prosecution Grants for Prosecutors program, the current subtitle Q of title III of the 1994 Crime Act (42 U.S.C. 13702 et seq.), which has never been funded, with a more clearly targeted program to be available to State and local prosecutors willing and able to operate such programs. The proposed provisions in the new subtitle Q are as follows:

Section 31701 empowers the Attorney General to make discretionary grants that will enable State and local prosecutors’ offices to create or expand community prosecution programs.

Section 31702 lists six purposes for such programs:

(1) to develop public safety strategies in partnership with local residents, law enforcement, supervisory agencies, social service and community organizations, businesses, schools, values based organizations, and elected officials;

(2) to create or support activities that identify local crime problems and priorities, lead to problem-solving and strategic planning, and maintain communication between prosecutors and community residents;

(3) to hire community prosecutors and related personnel and use an interdisciplinary team approach to prevent and reduce crime;

(4) to foster proactive approaches to crime that emphasize prevention and enforcement;

(5) to use sentencing alternatives, where appropriate, to restore victims, the community and offenders; and

(6) to build local problem-solving capacity through training and technical assistance.

Section 31703 states that, to be eligible for grants, State, Indian tribal, or local prosecutors, in concert with their jurisdiction's chief executive, shall submit applications in the form which the Attorney General reasonably requires. The grant applications shall (1) request funds for the purposes listed in section 31702; (2) describe the communities to be served, the nature of local crime, including quality of life crimes that impact community safety; and (3) provide assurances that grant funds shall supplement, not supplant, non-Federal funds otherwise available for such purposes.

Section 31704 states that in making grants the Attorney General shall consider (1) demonstrated need and ability to provide the services and (2) participation in other community-based DOJ programs, such as Community Policing and Weed and Seed. To the extent practicable, there shall be an equitable geographic distribution of grant awards. In addition, there will be 5% of appropriated funds awarded as grants to Indian tribes.

Section 31705 provides for annual reports from grantees to the Attorney General who in turn will file a report to Congress evaluating the effectiveness of the grant programs.

Section 31706 directs the Attorney General to reserve no less than 1 percent and no more than 3 percent of each annual appropriation for research and evaluation of the program.

Section 31707 defines "Indian tribe" and "State."

SEC. 1003. RURAL LAW ENFORCEMENT GRANT SET-ASIDES.

This section provides that for appropriate discretionary grant programs that relate to criminal or juvenile justice the Attorney General shall have the discretion to specify that a certain portion of grant funds appropriated in each fiscal year, not to exceed ten percent, may be set aside for awards to applicants in underserved rural areas. A "rural area" is defined as one with a population of 25,000 or less. At the end of any fiscal year, any funds so set aside that remain unspent may be reallocated for distribution to other eligible applicants. The section has three subsections:

Subsection (a) creates rural set-aside authority for the Drug Courts program, which is an entirely discretionary grant program.

Subsection (b) does the same for the Byrne discretionary grant program.

Subsection (c) grants the same authority to create rural set-asides for other Department of Justice discretionary grant programs for which no specific legislative authority is given, many of which have been strongly supported by the Congress. Among these are: the Weed and Seed program, the Juvenile Accountability Incentive Block Grant program (which includes some discretionary funding) and the Enforcing Underage Drinking Law program.

SEC. 1004. AMENDMENTS TO THE POLICE CORPS ACT.

This section makes two amendments to the Police Corps Act (42 U.S.C. 14091 et seq.). The first permits the Director of the Office of the Police Corps and Law Enforcement Education to make payments to reimburse State lead agencies for the costs of recruitment. The second permits the Director to make payments to reimburse for administrative expenses incurred in operating State Police Corps programs with a cap on all such payments set at 8 percent of Police Corps appropriations.

SEC. 1005. AWARDS TO STATE AND LOCAL LAW ENFORCEMENT.

This section would give DEA and other federal agencies the authority to present awards to detailed state and local government employees. Currently, federal agencies can give awards to their employees for outstanding contributions and services under 5 U.S.C. 4503, but have no comparable means of recognizing and rewarding state and local government employees who make such contributions while detailed to federal service. The amendment in this section remedies that omission by making the award authority under 5 U.S.C. 4503 applicable to state and local government employees who are on detail to federal agencies.

SEC. 1006. REAUTHORIZATION OF BUREAU OF JUSTICE ASSISTANCE AND THE BYRNE STATE AND LOCAL LAW ENFORCEMENT ASSISTANCE GRANT PROGRAMS.

Subsection (a) reauthorizes funding to carry out the programs under both part D of Title I of the Omnibus Act (Bureau of Justice Assistance) and all of part E (the Byrne program except for the Corrections Options Grants program which is not reauthorized). For fiscal year 2000 the total amount authorized is \$495,950,000, and for fiscal years 2001 through 2005 such sums as may be necessary.

Subsection (b) adds an additional purpose, creating the 27th program purpose for the Byrne program, to allow funds to be used for comprehensive tracing of firearms recovered by law enforcement, trace analysis, strategy development, and enforcement operations.

SEC. 1007. BODY ARMOR PENALTY ENHANCEMENT.

This proposal will increase the penalties for those who commit Federal crimes while wearing body armor (e.g., "bullet proof vests").

Body armor was designed to save the lives of law enforcement officers who must necessarily and routinely put themselves in harm's way. Unfortunately, when criminals wear body armor, they are emboldened and may commit more serious crimes with relative impunity. The appropriate way to deter this conduct is to enhance the penalty for any person who commits a crime of violence or a drug trafficking crime while using or possessing body armor. This new penalty would be in addition to the penalty already established by Congress for the underlying crime. The proposed penalty, not less than five years' imprisonment, is the same penalty enhancement provided for by the Congress for those who commit crimes of violence or drug trafficking crimes while using or carrying a firearm.

We believe that this provision would deter violent criminals and drug traffickers from wearing body armor. At the same time, it would not create any new federal crime, nor would it interfere with the legitimate use of body armor by law enforcement, private security or, for that matter, civilians who want to protect themselves.

SEC. 1008. EXTENSION OF BULLETPROOF VEST PARTNERSHIP GRANT ACT.

This section provides for increased penalties when an offender violates existing Federal criminal law while wearing body armor. Because body armor emboldens the actor, thus increasing the risk of death or injury to law enforcement officers, the penalty structure ought to be enhanced. Penalties are increased in the same manner as they already are for those who use or carry firearms during and in connection with crimes of violence or drug trafficking. This provision does not create any new Federal offenses.

SEC. 1009. INTEGRATED INFORMATION TECHNOLOGY ASSISTANCE ACT.

This section, entitled the “Integrated Information Technology Assistance Act of 1999,” adds a new part Z to title I of the Omnibus Crime Control and Safe Streets Act of 1968 in order to improve the functioning of the justice system by assisting states, Indian tribal governments, and units of local government in developing and improving integrated justice information sharing systems. Subsection (c) sets forth the new part, whose provisions are as follows:

Section. 2601. Integrated Information Systems Assistance Program. This section establishes the authority of the Assistant Attorney General for the Office of Justice Programs (OJP) to coordinate information technology funding available from OJP and the statutory authorities of OJP’s bureaus to address national integration of justice information systems and cites 20 specific authorities of the Assistant Attorney General. As provided in subsection (c) of proposed section 2601, the Assistant Attorney General for the Office of Justice Programs will ensure that funded programs are developed with the participation of all criminal justice system representatives.

Section 2602. Awards. This section identifies the purposes for which awards under the new part Z may be used. Awards under this part are intended to support the planning, development, update, upgrade, or implementation of justice information systems in furtherance of creating a national integrated justice information sharing capability. They could be used specifically to support statewide or regional integration planning and development and the operation of integration governance structures. These provisions are included in recognition of the importance of planning and governance to successful integrated systems, a need identified by State and local criminal justice leaders who have undertaken the implementation of integrated justice systems. As provided in subsection (b) of proposed section 2602, funds awarded under this program could be combined with other funds awarded under cited Acts to ensure program goals are achieved to maximum benefit.

Section 2603. Applications. This section provides in subsection (a) that applicants may be public agencies, Indian tribal governments, colleges and universities, private non-profit agencies, private organizations, private individuals, or consortia of eligible applicants. The allowance of consortia of eligible applicants is included in recognition that integration requires cooperation of many individual components in both the private and public sector. Subsection (b) describes application requirements for integration planning grants. Subsection (c) describes application requirements for awards for technical assistance, equipment or other support. As provided in subsection (d), assurances required in every application would include the consideration of the information needs of all levels and branches of government, purchase of equipment that supports integrated justice system plans and open system design, consideration of linkages to federal information systems, consideration of wireless technology plans, and consideration of geomapping plans.

Section 2604. Grant limitations. This section, in subsections (a) - (c), limits federal share to 75 percent, limits administrative and evaluation costs to 3 percent of a grant, and sets forth a nonsupplanting requirement. As provided in subsection (d), funding under the new part could be used to pay for the costs of retaining qualified technical personnel for the development of specified projects. Subsection (e) provides that priority will be given to applications that demonstrate that the requested funds will be used to support activities that are in accordance with or in furtherance of the purposes of the part and that support open system design.

Section 2605. Accountability. This section incorporates the fiscal requirements and administrative provisions prescribed by the Attorney General and those set out in part H of the Omnibus Crime Control and Safe Streets Act of 1968.

Section 2606. Review of Applications. This section places the requirements for review of applications in the Assistant Attorney General for the Office of Justice Programs.

Section 2607. Reporting Requirements. This section requires awardees to submit a report to the Assistant Attorney General for the Office of Justice Programs evaluating the effectiveness of their projects funded under this part as well as any additional requested information about such projects.

Section 2608. National Institute of Justice. This section provides the Assistant Attorney General for the Office of Justice Programs with the authority to use the resources of the National Institute of Justice. The Institute is directed to undertake research and development and provide training and technical assistance in support of a national integrated justice system capability.

Section 2609. Waiver of Federal Advisory Committee Act. This section provides that any committees, focus groups, panels, or other groups formed to undertake projects or actions in furtherance of the purposes of the new part Z are not Federal Advisory Committees under 5 U.S.C. App. II and are not subject to the requirements of the Federal Advisory Committee Act.

In addition to the provisions of the new part Z of title I of the Omnibus Crime Control and Safe Streets Act, described above, section 2001 of this bill makes conforming amendments in the Crime Identification Technology Act of 1998 and authorizes appropriations.

The Crime Identification Technology Act amendments, which appear in subsection (d), revise the assurances section of that Act to address a potential weakness in the Act that allows jurisdictions to avoid necessary coordination by assuring only that a statewide strategy for information systems “will be initiated,” rather than requiring a strategy to be underway. This provision allows states that already have integration plans to use funding to continue their integration efforts, but it does not effectively push states that have not planned for integration into the process. Subsection (d) also remedies the exclusion of public defense agencies from integration funding under the Crime Identification Technology Act.

Subsection (e) authorizes an appropriation of \$20,000,000 for fiscal year 2000 and such sums as may be necessary for fiscal years 2001 through 2005 to carry out the new part Z of the Title I of the Omnibus Crime Control and Safe Streets Act.

SEC. 1010. AUTHORIZATION TO LINK STATE AND LOCAL LAW ENFORCEMENT TO WORLDWIDE POLICE COMMUNICATIONS NETWORK.

The INTERPOL - U.S. National Central Bureau (USNCB), a component of the Department of Justice, discharges the international police-to-police investigative responsibilities that the United States assumed when Congress authorized the Attorney General to "accept and maintain, on behalf of the United States, membership in the International Criminal Police Organization [INTERPOL]." Title 22, U.S. Code, Section 263a.

To carry out these responsibilities, and to serve the increasing international investigative needs of more than 18,000 federal, state and local police forces, the USNCB and various State and city police departments established a network of 55 State Liaison Offices in the 1980's.

INTERPOL State Liaison Offices arrange execution of foreign requests for voluntary witness interviews; for a wide range of other criminal investigative information; and for humanitarian assistance, for instance, notification to families of those ill or dying abroad. Equally important, the State Liaison offices funnel international leads in such matters from state and local police to the USNCB, which ensures that they meet INTERPOL criteria and forwards them as appropriate to any or all of the 177 other INTERPOL members nationwide.

INTERPOL provides the only means by which American state and local police can obtain foreign investigative information for use in state and local criminal cases. However, the INTERPOL State Liaison Offices all lack computers that would enable secure, E-mail message traffic between them and the USNCB. The USNCB must therefore scan, save the text via optical character recognition equipment, and index several thousand pages per month of hard-copy faxed messages. This slows the USNCB's service to state and local police.

The State Liaison Offices, furthermore, cannot directly access INTERPOL's comprehensive law enforcement databases or, when appropriate, its worldwide communications capability. The USNCB must therefore conduct foreign criminal record checks and other queries on behalf of the State Liaison Offices that, with current technology, those Offices could conduct for themselves. (English is one of INTERPOL's four official languages. Outgoing U.S. INTERPOL messages therefore need no translation.)

This section gives USNCB clear statutory authority to buy and install INTERPOL microcomputers for these State Liaison Offices, and to supply any suitable surplus equipment that the USNCB already owns. This will, for the first time, link U.S. state and local law enforcement directly to

INTERPOL's international network, databases, and communications capability, and eliminate time-consuming administrative steps at the USNCB. The resulting efficiencies will markedly speed responses to U.S. and foreign requests for criminal investigative assistance. They should also increase the number of foreign investigative leads that state and local police are able to pursue. The section will also clearly authorize the USNCB's use of federal funds for travel, materials, and the related expenses of training state and local police personnel nationwide in using INTERPOL's computers, and in expanding their knowledge and use of INTERPOL's investigative capabilities.

SEC. 1011. HIGH-TECHNOLOGY CRIME ACT.

(a) This subsection sets forth short title of these provisions.

(b)(1) - (2) involve computer crime sentencing and criminal forfeiture under 18 U.S.C. 1030. The Department of Justice has encountered several instances where intruders have gained unauthorized access to critical systems used in furtherance of the administration of justice, national defense or national security, as well as systems (whether publicly or privately owned) that are used in the provision of "critical infrastructure" services such as telecommunications, transportation, or various financial services, but where proof of damage in excess of \$5000 has not been readily available. Given the extreme risks posed by the initial act of gaining unauthorized access to such systems, federal jurisdiction should not, as current law provides, be restricted to those instances where damage of \$5000 or more is readily demonstrable. Therefore, the amendments proposed in this section permit federal jurisdiction to attach unambiguously at the outset of an unauthorized intrusion into such systems, rather than requiring investigators to wait for estimates of damage to confer jurisdiction.

Proposed paragraph (2) of this subsection modifies 18 U.S.C. 1030(c)(2)(A) to provide a misdemeanor penalty to apply as a baseline to all violations of subsection 1030(a)(5), including those cases when loss of \$5000 or more or other aggravating circumstances cannot be proven. Additional amendments to subsection 1030(c)(2)(C) punish, at the felony level, violations of subsection 1030(a)(5)(A) and (B) that result in aggregate loss of \$5000 or more or that, independent of the amount of monetary damage, modify or impair medical examination, diagnosis, treatment, or care; cause physical injury; threaten public health or safety; or affect computer systems used by or for a government entity in furtherance of the administration of justice, national defense, or national security. The resulting statutory scheme will offer needed flexibility in charging while at the same time enabling application of felony penalties to all serious and harmful violations.

Proposed paragraph (2) also creates a criminal forfeiture provision requiring that anyone convicted of a violation of the Computer Fraud and Abuse Act forfeit to the United States property used or proceeds gained in the commission of the crime. It is the experience of the Department of Justice that forfeiture of property used in the commission of computer crime or proceeds derived therefrom can provide effective punishment and deterrence, and that it makes little sense to return computers to convicted computer criminals. This appears particularly to be the case with respect to hacking into

government computers, even if the offense is a misdemeanor under section 1030(a)(3). This forfeiture provision, to appear as a new subsection 1030(c)(5), is premised on the familiar forfeiture procedures set forth in section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853). It differs, however, in making this forfeiture requirement expressly applicable to all criminal violations of section 1030 -- misdemeanors as well as felonies. A corresponding civil forfeiture provision is also proposed in part (b)(6) of this section.

Subsection (b)(3) concerns the jurisdiction of the Secret Service.

Prior to the 1996 amendments to the Computer Fraud and Abuse Act, the United States Secret Service was authorized to investigate any and all violations of section 1030, subject to an agreement executed between the Secretary of the Treasury and the Attorney General. The 1996 amendments sought to codify some of the operational aspects of those agreements by concentrating Secret Service jurisdiction on certain enumerated subsections. It now appears, however, in retrospect, that such specific enumerations of investigative authority have created the potential unnecessarily to complicate investigations and thwart rather than foster cooperation. It is our understanding that prior agreements, executed by means of a Memorandum of Understanding between the Secretary of the Treasury and the Attorney General, proved not only workable but sufficiently flexible to address the challenges of investigating crimes across geographic and jurisdictional boundaries. Thus, the current amendments revert to an equivalent of the pre-1996 language once again authorizing Secret Service jurisdiction over any and all violations of section 1030, and leave it to the Justice and Treasury Departments to share the workload.

Subsection (b) amends 18 U.S.C. 1030(e) regarding new and amended definitions

Subsection 1030(e)(2) -- Definition of "protected computer"

Given the interdependency and availability of global computer networks, it is increasingly likely that intruders from within the United States will begin to concentrate their unlawful activity on systems located entirely outside of this country. Additionally, individuals in foreign countries may route communications through the United States, even as they hack from one foreign country to another. In such cases, their hope may be that the lack of any U.S. victim would either prevent or discourage U.S. law enforcement agencies from assisting in any foreign investigation or prosecution. This amendment makes clear the intent to include computers outside the United States within the definition of "protected computers" for purposes of section 1030, if there is any activity affecting the United States. By creating a domestic offense in this way, the United States will be able to conduct domestic investigations and prosecutions and thereby provide assistance in international hacker cases.

Subsection 1030(e)(8) -- Definition of "damage"

Truncation of the existing definition of "damage" at subsection 1030(e)(8) is intended to achieve two goals. First, it clarifies, particularly for purposes of prosecutions under subsections 1030(a)(5) and (a)(7) and civil actions under subsection 1030(g), the precise intent requirements to be proven in order to establish a violation. Second, and as discussed more fully in connection with the amendments to subsection 1030(c)(2)(C) above, these amendments are intended to convert the \$5,000 valuation (and other criteria previously used to determine "damage") from jurisdictional requirements to sentencing enhancements.

The statute, as currently written, defines "damage" as impairment to the integrity or availability of data, a program, a system, or information that causes loss of at least \$5000; modifies or impairs medical treatment; causes physical injury; or threatens public health or safety. But violations of subsections (a)(5)(A) and (a)(7) are predicated upon a defendant "intentionally caus[ing] damage without authorization" or "transmitt[ing] in interstate or foreign commerce any communication containing any threat to cause damage to a protected computer," respectively. The concern is that the intent requirements of these sections are susceptible to being misread in conjunction with the technical definition of damage which was, at the time, intended to limit jurisdiction but not modify intent. Importing this technical definition of damage into the intent element could lead courts to mistakenly require the government to prove, for example, in cases brought under § 1030(a)(5)(A), that the defendant not only intended to cause damage, but actually intended to cause damage as defined in the statute -- i.e., that the defendant specifically intended to cause damage of at least \$5000; impair medical treatment; cause physical injury or otherwise threaten public health and safety. Such a misreading might also operate, in cases under § 1030(a)(7), to require the government to prove that a defendant threatened to cause damage of at least \$5000, impair medical treatment, cause physical injury or otherwise threaten public health and safety, when the threat itself is the criminally culpable behavior.

This is not to say that the amount or nature of the damage is no longer relevant to application of the statute. Whereas satisfaction of these elements was previously required in order to confer jurisdiction, the \$5000 monetary threshold and other elements that previously defined "damage" are, by these amendments, now grafted onto the sentencing provisions that apply to violations of subsection 1030(a)(5)(A) and (B) and thus remain relevant to charging and sentencing under those sections. Under this simplified scheme, all violations of subsection 1030(a)(5) involving protected computers are punishable by imprisonment for up to one year. If loss caused to one or more "persons" (a term that makes clear that harm to a business or other legal entity is also covered) -- equals or exceeds \$5,000, the offense is punishable as a five-year felony. Similarly, if the offense modified, impaired, or potentially modified or impaired medical diagnosis or treatment, it is punishable as a five-year felony. Such is also the case if the offense caused physical injury to a person, threatened public health or safety, or affected computer systems used by or for a government entity in furtherance of the administration of justice, national defense or national security.

Subsection 1030(e)(10) -- Definition of "loss"

This amendment is intended to clarify the types of expenses the court may take into account in establishing the \$5000 valuation of "damage," thereby triggering the felony provisions of subsection 1030(c)(2)(C), as amended. This definition of "loss" is entirely consistent with previous versions of the statute.

The 1996 amendments to the Computer Fraud and Abuse Act further sought to specify what constituted "damage" for purposes of charging subsection 1030(a)(5). The legislative history to those amendments described a situation in which an intruder, having gained unauthorized access to and copied portions of a password file, then restores relevant files to their original condition. The Senate Report observed:

Arguably, in such a situation, neither the computer nor its information is damaged. Nonetheless, this conduct allows the intruder to accumulate valid user passwords to the system, requires all system users to change their passwords, and requires the system administrator to devote resources to resecuring the system. Thus, although there is arguably no "damage," the victim does suffer "loss." If the loss to the victim meets the required monetary threshold, the conduct should be criminal, and the victim should be entitled to relief.

Senate Report No. 104-357, 104th Cong., 2d sess., at p. 11 (1996). The legislative history to the 1986 amendments confirms that costs incurred through reliance upon altered data may be included in an overall loss valuation. See Senate Judiciary Committee report No. 99-432, 99th Cong., 2d sess., at p. 11-12 (1986) (loss from purchases made in reliance upon altered stock market analysis).

Codification of the definition of "loss" is a useful addition to the statute that both clarifies its meaning and may help forestall or resolve litigation. It is intended that the definition be broadly construed. The proposed definition is similar to the definition of "loss" recently appended by the U.S. Sentencing Commission to the Federal Sentencing Guidelines (see U.S.S.G. §2B1.1 Commentary, Application note 2), and thus serves also to reconcile procedures by which prosecutors value loss for charging purposes and by which judges value loss for sentencing purposes. Both determinations, in our view, should permit a degree of flexibility and should take into account a wide range of possible harms done to the victims of computer crimes, including reasonable costs of responding to the offense, conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue or costs incurred because of interruption of service.

Subsection (d) concerns the modification of directive to Sentencing Commission

Section 805 of the Antiterrorism and Effective Death Penalty Act of 1996, P.L.104-132, transmitted a directive to the Sentencing Commission to ensure that any individual convicted of a violation of sections 1030(a)(4) or (a)(5), including those found to have violated the misdemeanor

provisions of subsection (a)(5)(C), be imprisoned for not less than 6 months. The Commission has implemented this directive. See Guidelines §§ 2B1.3 and 2F1.1.

Having now had some experience under this statutory scheme, it is our considered opinion that mandatory 6-month imprisonment -- particularly in cases involving misdemeanor violations of subsection 1030(a)(5)(C) -- does not serve the ends of justice. Misdemeanor violations of subsection 1030(a)(5)(C), by their nature, attach to instances in which unauthorized access to a protected computer system is intended but where resulting damage cannot be proven to be intentional or reckless. It has come to our attention that, in some instances, prosecutors have, not unreasonably, elected not to charge some defendants whose actions otherwise would qualify them for prosecution under the statute, knowing that the result would be mandatory imprisonment. In such circumstances, where mandatory imprisonment for 6 months might not be the most appropriate remedy, it is nonetheless appropriate for a federal prosecution to be brought. A conviction, even if not resulting in imprisonment, will become a part of the defendant's criminal history and qualify the defendant for the more substantial recidivist provisions of subsection 1030(c) if the defendant commits a future violation.

The amendment, which replaces the phrase "is imprisoned for not less than 6 months" with the phrase "can be subjected to penalties sufficient to deter such conduct," should lead the Sentencing Commission to eliminate any mandatory minimum but still ensure that sufficient penalties remain in place. Thus, these amendments will not stifle but rather will remove hindrances to aggressive enforcement and prosecution of this section.

Subsection (e) amends the Privacy Protection Act.

The Privacy Protection Act of 1980 ("PPA"), 42 U.S.C. § 2000aa, *et seq.*, makes it unlawful for local, state, or federal law enforcement authorities to "search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication," 42 U.S.C. § 2000aa(a), or to "search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." 42 U.S.C. § 2000aa(b). "Work product materials" are materials, other than contraband, fruits, or instrumentalities of crime, which are prepared or possessed in anticipation of communicating such materials to the public. *Id.* § 2000aa-7(b). "Documentary materials" are materials, other than contraband, fruits, or instrumentalities of crime, upon which information is recorded. *Id.* § 2000aa-7(a). Exceptions notwithstanding, the PPA effectively imposes a "no-search" rule on work product materials, and a "subpoena-first" rule on documentary materials held by third parties with a purpose to use them in conjunction with public communication.

The PPA was passed in response to Zurcher v. Stanford Daily, 436 U.S. 537 (1978). In that case, the Supreme Court upheld a police search, pursuant to a valid search warrant, of the offices of

the Stanford Daily newspaper for photographs taken at the scene of a crime. The Court rejected the newspaper's claim that search warrants could not be used to recover evidence from those engaging in First Amendment-protected activities. Zurcher, 436 U.S. at 565-567. The Court also held that search warrants could be used to recover evidence from innocent third parties. Zurcher, 436 U.S. at 555 ("State's interest in enforcing the criminal law and recovering evidence is the same whether the third party is culpable or not."). Thus, the Court concluded, the only relevant determination is whether "there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."

In response to the Court's ruling, Congress passed the PPA. The goal was to restrict searches for mere evidence of crime held by innocent third parties who were engaged in First Amendment-protected activities--evidence that might otherwise be obtained through less intrusive means such as through consent or a subpoena. The purpose of restricting law enforcement in this fashion, of course, has been to protect the confidentiality of non-evidentiary files also held by this special group of innocent third parties--both the drafts of articles not yet published and the research and other supporting information (e.g., notes and interviews) which they never meant to publish. Thus, an author or publisher (like The Stanford Daily) who is not a suspect in the investigation is protected from having law enforcement agents search through his or her work product or documentary materials in order to find and seize evidence. To preserve the confidentiality of these designated materials, the PPA instructs investigators not to search for the evidence at all, but to compel the innocent third parties to find and produce it themselves. This goal of Congress is one we share, and the amendments proposed here do not alter the PPA's protection for innocent third parties.

It was never Congress's intention, however, to protect *criminals* from court-authorized searches, and the legislative history to the PPA is replete with statements to this effect. For example, the Senate Judiciary Committee Report stated that the purpose of the PPA is to "limit searches for materials held by persons involved in First Amendment activities who are themselves not suspected of participation in the criminal activity for which the materials are sought." S. Rep. No. 96-874, 96th Cong., 2d Sess. 11 (1980), reprinted in 1980 U.S.C.C.A.N. 3950, 3957 (emphasis added). Moreover, the Committee Report stated that the intention in enacting the PPA was "not to limit the ability of law enforcement officers to search for and seize materials held by those suspected of committing the crime under investigation." Id.

Because this statute was enacted before the widespread proliferation of computers, the problem raised by the commingling of protected information and contraband was never fully considered, even though commingling can, of course, occur with paper records. For example, a reporter engaging in tax fraud may commingle critical evidence (e.g., a copy of the fraudulent tax return) with his or her work-related notes in a single filing cabinet. In such a case, the PPA allows law enforcement agents to search the filing cabinet with a warrant because the fraudulent tax return--which is not intended to be disseminated to the public--is not PPA-protected. Similarly, the file cabinet could be searched if it contained contraband (e.g., drugs) because the PPA specifically excludes contraband

from the definition of both work product and documentary materials. Even though the PPA allows for such searches, however, there are no reported cases regarding such commingled paper searches. This may be due, in part, to the fact that the number of people traditionally thought "to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" was relatively small. Therefore, they are infrequently responsible for criminal acts warranting such searches.

The commingling problem takes on new dimensions in today's electronic environment, however, and arises more frequently and with more variations than ever before. For example, agents searching for corporate financial data in a fraud investigation may encounter unpublished drafts of advertisements or annual reports. Moreover, the problem often occurs in the context of electronic bulletin board systems ("BBSs").

BBSs allow individuals to use personal computers to post or transmit computer files, including computer programs or written messages, to one another or to various groups over standard telephone lines. Thus, many computer users who post information on or operate BBSs are inclined to regard themselves as "authors" or "publishers" covered by the PPA--and many accordingly claim for themselves the full range of constitutional and statutory protections afforded, for example, the classical print media. In general, this is not problematic for law enforcement, since most BBSs are legitimate enterprises and will furnish relevant information voluntarily or in response to a subpoena or other process required by law.¹ Unfortunately, however, there are "pirate" BBSs--bulletin boards specializing, at least in part, in the distribution of child pornography, copyrighted software, and access devices--that attempt to use the PPA to shield their illegal activities.

While no court has yet held a BBS to constitute a "similar form of public communication" to newspapers, books, and broadcasts,² that possibility is, under the right facts, certainly foreseeable.

¹See 18 U.S.C. § 2701, *et seq.*, which requires subpoenas with prior notice, court orders, or search warrants for various classes of information.

² In Steve Jackson Games, Inc. v. United States Secret Service, 816 F. Supp. 432 (W.D. Tex. 1993), the district court concluded that the Secret Service violated the PPA in its search, pursuant to warrant, of the business premises of Steve Jackson Games, Inc., and awarded the plaintiff approximately \$50,000 in out-of-pocket expenses and estimated loss of sales, in addition to costs and attorney's fees. It is crucial to note, however, that while the court found a cognizable PPA violation arising from the Secret Service's search and prolonged seizure of the successive drafts of a book Steve Jackson, Inc. was soon to release--it did not hold that the seizure of the Steve Jackson Games bulletin board likewise comprised a PPA violation. *See id.* at 441 ("In any event, it is the seizure of the 'work product materials' that leads to the liability of the United States Secret Service and the United States in this case."). This salient fact has already been identified within the electronic community. *See Rose, Steve Jackson Games Decision Stops the Insanity*, Boardwatch, May 1993, at 53, 57.

Thus, qualifying material, both on the BBS computers and on the computers of contributing authors and editors, would claim the protections of the statute. Indeed, law enforcement agents have already encountered pirate BBSs that have, on their sign-on screens, the following message:

NOTICE TO LAW ENFORCEMENT AGENTS:

The owners and users of this system are exercising First Amendment Rights. . . . Some material on this system is in preparation for public dissemination and is "work product material" protected under the First Amendment Privacy Protection Act of 1980 Each and every person who has such "work product material" stored on this system is entitled to recover at least minimum damages of \$1000 *plus all legal expenses* While the agency you work for *might* pay your legal fees and judgments against you, why take chances?

The language "[s]ome material on this system" is extremely significant. It is seldom the case that a BBS is used solely for illegal purposes such as the distribution of contraband. Were this the case, the computer and the evidence it contains could be seized without regard to the PPA, since contraband is specifically excluded from the definitions of work product and documentary materials. 42 U.S.C. § 2000aa-7(a)(defining "documentary materials"); 42 U.S.C. § 2000aa-7(b)(defining "work product materials"). In most cases, only certain areas of a BBS will be set aside for illegal activities (these areas of the boards are often known as sub-boards or conferences) while other portions are used for completely legal activities such as the legitimate distribution of information. As the quoted language makes clear, however, individuals are well aware that, under the PPA, protected materials can be used to shield contraband and other evidence from search and seizure. That, of course, was never the intent of Congress in enacting the PPA.

Unfortunately, the language of the PPA can be read by courts to provide law enforcement with no way to fulfill its responsibilities without running afoul of the statute. When investigating electronic criminal activity such as the distribution of child pornography or copyrighted software, or the theft of information through computer hacking, law enforcement would be derelict in its duty if it failed to seize a suspect's computers and the contraband or evidence those computers contained. In some of these cases, the computer itself might be contraband: for example, it might be stolen or purchased with a stolen credit card. In other cases, the information in the computer might be contraband: child pornography, illegally copied software, or a file stolen by a hacker. In still other cases, the computer or its software may be an instrumentality of the offense whose seizure will prevent future criminal activity and ensure that the property is properly forfeited. See, e.g., 17 U.S.C. § 505(b)(court must order forfeiture following a copyright violation). Yet in all of these cases, although the seizure of the computer and some of its files is entirely proper, the simultaneous seizure of other files in the same computer may result in civil liability for the government or, in some states, its agents.

This problem, already serious, will accelerate as we continue to move towards a paperless society. In this new electronic environment, where systems with gigabytes of storage already are commonplace, it is simply impossible to extract legally seizable evidence from commingled protected material without examining or seizing, at least temporarily, those protected materials. Often, because of the volume of evidence to be searched or because of technical concerns, law enforcement agents must remove the seized computer or an exact copy of all the data to a laboratory for analysis. See generally United States Department of Justice, Searching and Seizing Computers: Federal Guidelines (1994). Even if agents can conduct the search for evidence on site, it may still be necessary to prohibit the computer owner from accessing the computer while the search is in progress, thus resulting in a seizure of protected material. And whether agents search for evidence at the scene or in a laboratory, it is usually impossible for them to find the relevant materials without taking at least a preliminary look at some or all of the files in the computer--a process that could easily result in a search of protected materials. Nonetheless, the PPA, as originally enacted, might arguably have required investigators to head straight for the evidence or contraband in a suspect's computer or file cabinet without so much as looking at any other nearby materials that might be protected by the statute.

Liability may attach in such cases because the prohibition on searching for or seizing materials is stated in the disjunctive--violations may lie either for searching for, or for seizing such materials. Thus even a temporary on-site seizure or examination may result in liability, although, clearly, such a PPA violation is outside the scope of the issues raised by the Zurcher decision. Zurcher involved a search of a newspaper office, and the warrant was drawn to intentionally reach photographs that had been made in contemplation of publication. The PPA, designed to address the Zurcher decision, accordingly should deter law enforcement from intentionally searching for evidentiary materials in the possession of innocent third parties engaged in information dissemination. But making unlawful the reasonable but incidental seizure of PPA-protected materials pursuant to an otherwise lawful search or seizure carries no similar deterrent effect, and contravenes the clearly stated intent of Congress to neither shield criminals nor unduly hinder law enforcement efforts.

It is unquestionable that, in this regard, the PPA has had an inappropriately chilling effect on law enforcement personnel. For example, in March 1993, the United States Customs Service sought warrants for searches of computers nationwide pursuant to Operation Long Arm, a joint effort between the Customs Service and the Department of Justice to investigate and prosecute those who used computers to import and traffic in child pornography. Of the approximately 40 searches contemplated, four were expected to involve the seizure of computer systems which, in addition to being used to import and store child pornography, were also used to operate computer bulletin board systems. In one of these cases, despite overwhelming evidence indicating the presence of illegally imported child pornography on the subject's computer, an Assistant United States Attorney initially declined to authorize the request for a federal search warrant. Although, after further Justice Department review, the warrant was ultimately executed in that case, the prosecutor's concerns regarding civil liability were clearly justified based upon the plain language of the PPA.

Accordingly, the PPA should be amended so that it does not shield child pornographers, copyright infringers, hackers, and other criminals, while also continuing to safeguard those activities that the PPA was designed to protect. Indeed, the importance of protecting the confidentiality of these sensitive materials is as great today as it has ever been. Thus, the law should limit the intrusiveness of government searches, but not hinder unnecessarily law enforcement's efforts to enforce the criminal laws. The amendments proposed in this section achieve this delicate balance between important values.

The proposed new provisions, at sections 2000aa(a)(3) and (b)(5) of title 42, make it clear that law enforcement agents may still search for or seize contraband, instrumentalities, or non-PPA-protected evidence even if work product or documentary material is incidentally examined or seized during the search. It is important to note, however, that if the items sought are commingled with work product or documentary materials and are held by an innocent third party, existing regulations already require that a search warrant not be used where less intrusive means are appropriate. See, e.g., 28 C.F.R. § 59.4(a) and 28 C.F.R. § 59.4(c)(1)(11)(in determining whether to use a warrant or subpoena to obtain documentary materials, an attorney for the government should consider, among other things, whether there is a close relationship of friendship, loyalty, or sympathy between the possessor of the materials and a suspect). Therefore government agents will need to determine the proper method for obtaining the evidence based upon the facts of the case at hand.

Although these amendments to the PPA address the problem of incidental searches or seizures, it is critical to understand that these changes do not in any way alter the statute's effect in cases like Zurcher. The object of the search at the Stanford Daily, which was not involved in any criminal activity, constituted the very work product materials that are now protected by the PPA. There was, in that situation, no "otherwise lawful" object of a search and seizure. Nothing in the proposed amendments would alter the Act's application in these circumstances. When law enforcement agents encounter a situation like that in the Zurcher case, they will still have to use a subpoena, as the original PPA directed. But in other cases where law enforcement's object is something that may be searched for and seized under law, these amendments to the PPA will insure that investigators can carry out their duties, even when PPA-protected materials may be commingled with seizable ones.

On the other hand, the term "incidental," used in these amendments, clearly prohibits situations in which the search for or seizure of protected materials was an object of the search. The term "incidental," which is used in other statutes (see 18 U.S.C. § 2510(17)), means something which is "occurring or likely to occur at the same time or as a consequence."³ Accordingly, in order to be "incidental" within the intent of this provision, any search or seizure of protected materials would have to be a concomitant consequence of the otherwise lawful search. Additionally, of course, the link between the incidental items and the lawful object of the search or seizure must be reasonable on the

³ The American Heritage Dictionary, Second College Edition (1989).

facts of the case. Indeed, the Fourth Amendment, which requires reasonableness both in the scope of the warrant and in its execution, demands no less. See O'Connor v. Ortega, 480 U.S. 709, 726 (1987); United States v. Henson, 848 F.2d 1374 (6th Cir. 1988); United States v. Tamura, 694 F.2d 591 (9th Cir. 1982).

When work product or documentary materials are seized, both the individual searched and the public may have a continuing interest in having that information returned to its owner and thereafter disseminated to the public. Indeed, the importance of returning property to its owner following a seizure is already explicitly recognized and established in some procedural codes. For example, following a search executed by federal civilian agencies, Rule 41(e) of the Federal Rules of Criminal Procedure authorizes a person to move for return of any items (including PPA-protected materials) seized and held by the government. This is true even when the original seizure was lawful. As the Notes of the Advisory Committee on Rules in 1989 make clear,

Before the [1989] amendment, Rule 41(e) permitted such persons to seek return of their property if they were aggrieved by an unlawful search and seizure. But, the rule failed to address the harm that may result from the interference with the lawful use of property by persons who are not suspected of wrongdoing. . . . Rule 41(e) did not explicitly recognize a right of a property owner to obtain return of lawfully seized property even though the government might be able to protect its legitimate law enforcement interests in the property despite its return--e.g., by copying documents or by conditioning the return on government access to the property at a future time. As amended, Rule 41(e) provides that an aggrieved person may seek return of property that has been unlawfully seized, and a person whose property has been lawfully seized may seek return of property when aggrieved by the government's continued possession of it.

Fed. R. Crim. P. 41 advisory committee's note (1989). Of course, the exact process for recovering seized property is governed by the rules of the forum under whose authority it was seized. For example, return of property seized pursuant to the Uniform Code of Military Justice is governed by the Manual for Courts-Martial, just as the process for returning property seized under state authority is prescribed by state remedies.

Rule 41(e) properly places the burden on the aggrieved party to move for the property's return, and we note that in the PPA context absent such a request the government may be completely unaware that it possesses any work product or documentary materials. For example, without a potentially lengthy and thorough examination, the government may not know there is a five-page newsletter contained within the two gigabytes of data seized pursuant to a search warrant.

Subsections (f) and (g) close a loophole in current law, 18 U.S.C. 2318, which punishes with felony penalties trafficking in (inter alia) counterfeit labels for phonorecords, computer programs, and motion pictures or other audiovisual works. Subsection (f) contains a criminal forfeiture provision for section 2318 which allows counterfeit computer software, audiovisual works of art and other products to be forfeited if they are produced in violation of the law, but not the devices used to produce the counterfeit copies. This amendment would rectify this omission.

Subsections (h) - (j) update the pen register/trap and trace statute in light of changes in communications technology, and authorizes nationwide effect for orders obtained in federal investigations.

SEC. 1012. INCLUSION OF FEDERAL, MILITARY, AND DISTRICT OF COLUMBIA OFFENDERS IN THE DNA IDENTIFICATION INDEX.

Section 811(a)(2) of the Antiterrorism and Effective Death Penalty Act of 1996 authorized the expansion of the DNA identification index to include federal and D.C. offenders. This proposal provides the authorities and assignments of responsibility needed to implement the legislative decision to include such offenders in the index. The proposal also includes some changes in the general provisions governing the DNA identification system.

Subsection (a) -- Expansion of DNA Identification Index

Subsection (a) amends the provision, enacted as part of the antiterrorism legislation adopted in 1996, which authorized the Director of the FBI to expand the DNA identification system to include federal and D.C. crimes. The amendment makes it clear that crimes under the Uniform Code of Military Justice are covered. The amendment also cross-references the procedures for collecting and including samples from federal, military, and D.C. offenders which subsequent amendments add to 42 U.S.C. 14132, as discussed below.

Subsection (b) -- Amendments to DNA Identification Statute

Subsection (b), in paragraph (1), contains amendments that expand the scope of the DNA identification index. The inclusion of DNA identification records of juvenile delinquents would be authorized, in addition to the existing authorization to include identification records of persons convicted of crimes. Authorizing the inclusion of records for juveniles, as proposed in these amendments, conforms the DNA index to the approach of the general criminal history records system, which includes juvenile as well as adult records. See 28 CFR § 20.32. The amendments also authorize the inclusion of analyses of DNA samples voluntarily contributed from relatives of missing persons.

Subsection (b), in paragraph (2), makes a technical correction in a provision which currently requires external proficiency testing of laboratories and DNA analysts "at regular intervals of not to exceed 180 days." The amendment changes this to require "semi-annual" external proficiency testing.

Subsection (b), in paragraph (4), adds new subsections (c)-(e) to 42 U.S.C. 14132. The new subsections set out grants of authority and assignments of responsibility necessary to ensure the consistent inclusion of appropriate categories of federal, military, and D.C. offenders in the DNA identification index. The specific provisions in this part are as follows:

Proposed subsection (c), paragraph (1), directs the Director of the FBI to include in the DNA identification index identification records from persons convicted of or adjudicated delinquent for qualifying federal or D.C. crimes. The pertinent "qualifying" crimes will be defined by the Director of the FBI by regulation. It is expected that qualifying crimes will be defined to encompass sex offenses, crimes of violence as defined in 18 U.S.C. 924(c)(3), and

certain burglary and robbery offenses which may not otherwise be covered.

Paragraph (1) further directs the Director of the FBI to establish standards and procedures for the analysis of DNA samples collected from such persons, and for including the analyses and DNA identification records relating to the samples in the index. Disclosure of information on these records and analyses would be for the purposes specified in 42 U.S.C. 14132(b)(3) -- in essence, for law enforcement identification purposes, for use in judicial proceedings, for certain criminal defense uses, and for statistical, research, and quality control purposes.

Proposed subsection (c), paragraph (2), directs the federal Bureau of Prisons to collect DNA samples from persons in its custody on or after the effective date of the subsection who have been convicted or adjudicated delinquent for qualifying crimes. The effective date will be 180 days after enactment, as provided in subsection (d) of this proposal. There is no ex post facto problem in applying the sample collection requirement to persons convicted of offenses occurring prior to the enactment or effectiveness of this legislation, because collecting DNA samples and indexing the information is a regulatory measure adopted for public safety purposes -- comparable to photographing and fingerprinting -- rather than a punitive measure.

The Bureau of Prisons is responsible for the federal prisoner population, and the D.C. incarcerated felon population will be transferred to its custody over the next few years under the reforms of the D.C. Revitalization Act. Hence, the Bureau of Prisons is well-situated to collect DNA samples from most incarcerated persons who have been convicted of qualifying crimes. Under paragraph (2), the Director of the Bureau of Prisons will specify the time and manner of collecting DNA samples from such persons.

The Bureau of Prisons will have means of inducing cooperation by prisoners in the collection of DNA samples under its general powers, including withholding of privileges or good time credit. In addition, as provided in paragraph (5)(B) of proposed subsection (c), a further option available to the Bureau of Prisons and other agencies responsible for DNA collection will be to restrain and collect a sample involuntarily from a recalcitrant person.

Proposed subsection (c), paragraph (3), directs federal probation offices to collect DNA samples from persons under their supervision on or after the effective date of the subsection who have been convicted or adjudicated delinquent for qualifying crimes. The Director of the Administrative Office of the Courts will specify the time and manner of collecting DNA samples from such persons.

Proposed subsection (c), paragraph (4), in subparagraph (A), directs the Offender Supervision Agency established by § 11233 of the D.C. Revitalization Act, or the Offender Supervision Trustee appointed under § 11232 of that Act, to collect a DNA sample from each person under its or his supervision on or after the effective date of the subsection who has been convicted of a qualifying crime. Under the provisions of the Revitalization Act, the Offender Supervision Agency – or during a transitional period, the Offender Supervision Trustee – is responsible for the supervision of all adult D.C. Code offenders on probation, parole, or supervised release.

Subparagraph (B) of paragraph (4) provides that the District of Columbia Government shall have the authority to collect DNA samples from persons in the custody of or under supervision by the District, including the authority to determine the categories of such persons from whom samples will be collected. While the federal Bureau of Prisons will be responsible for D.C. felon incarceration under the D.C. Revitalization Act's reforms, most incarcerated D.C. offenders remain in the custody of the D.C. Department of Corrections at the present time. Moreover, even after the D.C. Revitalization Act's reforms are fully carried out, the D.C. Department of Corrections will remain responsible for misdemeanor incarceration, and D.C. agencies will remain responsible for the custody and supervision of juvenile delinquents. Subparagraph (B) reserves to the D.C. Government decisions about which of these offenders and delinquents will be subject to DNA sample collection, so long as they remain under the jurisdiction of these local D.C. agencies. This does not affect the collection of DNA samples from persons who are in the custody of or under supervision by federal agencies or the Offender Supervision Trustee, which is governed by proposed paragraphs (2), (3), and (4)(A).

Proposed subsection (c), paragraph (5), provides additional authorities for the agencies that are responsible for collecting DNA samples under paragraphs (2)-(4). Under subparagraph (A) of subsection (5), the responsible agency could waive the collection of a DNA sample from a person if another agency or official has collected or will collect such a sample. This provides the authority to avoid unnecessary and duplicative taking of samples. For example, if the Bureau of Prisons had taken a sample from a prisoner while he was incarcerated, the agency responsible for his post-release supervision (a federal probation office or the Offender Supervision Agency or Trustee) would not be required to do so again following his release.

Subparagraph (B) of subsection (5) provides that the responsible agency may use or authorize the use of such means as are necessary to restrain and collect a sample from a person who refuses to cooperate in the collection of a sample. Other inducements will suffice to secure cooperation in most instances, such as withholding of privileges and good time credit for incarcerated persons, and revocation or threatened revocation of release for recalcitrant persons who are on release when the effort is made to collect a sample. However, the authority to restrain a person and collect a sample involuntarily remains necessary for cases in which other inducements are ineffective.

Proposed subsection (d) contains parallel provisions for military offenders. The subsection directs the Secretary of Defense to define qualifying crimes under the Uniform Code of Military Justice, and to promulgate regulations establishing standards and procedures. The Secretary of Defense would be required to collect samples, or to arrange for such collection by another agency responsible for the person's custody or supervision. The latter authority reflects the fact that many military offenders are housed in BOP facilities, and that military offenders paroled from BOP facilities are supervised by federal probation offices. In such cases, it may be more efficient to have the agency responsible for custody or supervision collect a DNA sample.

Proposed subsection (e) makes it an offense, graded as a Class A misdemeanor, for a person to refuse to cooperate in the collection of a DNA sample, where the collection of such a sample is required pursuant to proposed subsection (c) or (d). The possibility of criminal prosecution will provide the responsible correctional and supervisory agencies with an additional means of inducing federal, military, and D.C. offenders to cooperate in the collection of samples. In relation to offenders who are released under supervision at the time when the effort is made to collect a sample, the existence of this criminal provision will also enable the supervising agency to seek (or threaten to seek) revocation of release for recalcitrant offenders, based on the violation of general release conditions that offenders refrain from committing further crimes or comply with the law.

Subsection (c) -- Conditions of Release

Subsection (c) requires that cooperation in the required collection of DNA samples be imposed as an explicit condition of probation, parole, and supervised release for the perpetrators of federal, military, and D.C. crimes.

Subsection (d) -- Effective Date

Subsection (d) provides that the amendments made by the section shall take effect 180 days after enactment.

SECTION-BY-SECTION ANALYSIS FOR TITLE II

SUBTITLE A – ZERO TOLERANCE DRUG SUPERVISION

SEC. 2001. GRANT AUTHORITY.

The Attorney General may make grants to states and units of local government, state courts, local courts, and Indian tribal governments, acting directly or through agreements with other public or private entities, for programs that support:

- (1) developing and/or implementing comprehensive drug testing policies and practices with regard to criminal justice populations; and
- (2) establishing appropriate interventions to illegal drug use for offender populations.

Applicants may choose to submit joint proposals with other eligible criminal justice/court agencies for systemic drug testing and intervention programs; in this case, one organization must be designated as the primary applicant.

SEC. 2002. ADMINISTRATION.

- (a) Consultation/Coordination--In carrying out this program, the Attorney General will coordinate with the other Justice Department initiatives that address drug testing and interventions in the criminal justice system.
- (b) Guidelines--The Attorney General may issue guidelines necessary to carry out this part.
- (c) Applications--In addition to any other requirements that may be specified by the Attorney General, an application for a grant under this part shall --
 - (1) reflect a comprehensive approach that recognizes the importance of collaboration and a continuum of testing, treatment, and other interventions;
 - (2) include a long-term strategy and detailed implementation plan;
 - (3) address the applicant's capability to continue the proposed program following the conclusion of federal support;

(4) identify related governmental or community initiatives which complement or will be coordinated with the proposal;

(5) certify that there has been appropriate consultation with affected agencies and key stakeholders throughout the criminal justice system and that there will be continued coordination throughout the implementation of the program; and

(6) describe the methodology that will be used in evaluating the program.

SEC. 2003. APPLICATIONS.

To request funds under this part, interested applicants shall submit an application to the Attorney General in such form and containing such information as the Attorney General may reasonably require. Federal funding will be awarded on a competitive basis based on criteria established by the Attorney General and specified in program guidelines.

SEC. 2004. FEDERAL SHARE.

The federal share of a grant made under this part may not exceed 75 percent of the total cost of the program described in the application submitted for the fiscal year for which the program receives assistance under this part, unless the Attorney General waives, wholly or in part, the requirement of a matching contribution under this section. In-kind contributions may constitute a portion of the non-federal share of a grant.

SEC. 2005. GEOGRAPHIC DISTRIBUTION.

The Attorney General shall ensure that, to the extent practicable, an equitable geographic distribution of grant awards is made, with rural and tribal jurisdiction representation.

SEC. 2006. TECHNICAL ASSISTANCE, TRAINING, AND EVALUATION.

(a) Technical Assistance and Training--The Attorney General shall provide technical assistance and training in furtherance of the purposes of this part.

(b) Evaluation--In addition to any evaluation requirements that may be prescribed for grantees, the Attorney General may carry out or make arrangements for a rigorous evaluation of the programs that receive support under this part.

(c) Administration--The technical assistance, training, and evaluations authorized by this section may be carried out directly by the Attorney General or through grants, contracts, or cooperative agreements with other entities.

SEC. 2007. AUTHORIZATIONS OF APPROPRIATIONS.

There are authorized to be appropriated \$125,000,000 for fiscal year 2000 and for fiscal years 2001 through 2005 such sums as are necessary.

SEC. 2008. PERMANENT SET-ASIDE FOR RESEARCH AND EVALUATION.

This section allows the Attorney General to set-aside not less than 1 percent and no more than 3 percent of sums appropriated for this section.

SEC. 2009. ADDITIONAL REQUIREMENTS FOR THE USE OF FUNDS UNDER THE VIOLENT OFFENDER INCARCERATION AND TRUTH-IN-SENTENCING GRANT PROGRAMS.

The proposed language of section two permits states receiving funds under the Justice Department's Violent Offender Incarceration and Truth-In-Sentencing Grant Program (VOI/TIS) to use those funds to pay the costs of providing substance abuse testing and interventions for individuals within correctional facilities and under corrections supervision. Funds received by the states under this program may also be used to defer the costs of providing reports that the Attorney General may require on drug use in prisons. Further, the language requires states receiving funds under the VOI/TIS program to have in-place sanctions and penalties addressing drug trafficking within correctional facilities. Those states that do not have penalties or sanctions addressing drug trafficking within correctional facilities will be assessed a ten percent penalty [reduction] on those funds for each year of non-compliance. Further, the language incorporates into the underlying VOI/TIS statute the current requirement [adopted through the Justice Department's FY 1997 appropriations act] that states receiving VOI/TIS funds adopt a system of controlled substance testing and interventions.

Specifically, this language amends Section 20105(b) of the Violent Offender Incarceration/Truth-In-Sentencing (VOI/TIS) grant program [42 U.S.C. 13701 et seq.] of the 1994 Crime Law by adding the language designated as Section 20105(b)(1)(B), Section 20105(b)(2), and Section 20105(b)(3). The victims' rights language at Section 20105(b)(1)(A) is current law as Section 20105(b). This language is repeated because the proposed amendment re-writes and re-formats the entire subsection.

The language also adds several requirements to the conditions a state must meet in order to receive funding under the VOI/TIS program. Under the language added at (B), the state must have implemented a program for drug testing/sanctioning and treatment for violent offenders housed in their corrections facilities. This plan needs to include sanctions for inmates who test positive. The language at (2) would permit the state to use funds received under the VOI/TIS program to pay the costs of the testing and interventions required under the new section 20105(b)(1)(B). Language at (2) also permits

funds to pay the costs of certain drug reporting requirements. The language at (3) requires states to address the problem of drug trafficking within and into correctional facilities with a system of penalties and sanctions. Such sanctions and penalties would comply with guidelines issued by the Attorney General. A state's failure to comply with this requirement would result in a ten percent reduction in their VOI/TIS funds. Further, as an incentive for those states that do comply, those funds resulting from the reductions, would be re-distributed among those states in compliance.

Currently the provisions at (B) are found in the Conference Report [see H. Rpt.104-863 at 16] that accompanies the Department's FY 1997 appropriations act. The language at (2) and at (3) is new.

The proposal makes the language at (B) a permanent part of the VOI/TIS statute, and adds the language at (2) and at (3).

SEC. 2010. REAUTHORIZATION OF RESIDENTIAL SUBSTANCE ABUSE TREATMENT GRANT PROGRAM.

This section reauthorizes appropriations for the Residential Substance Abuse for State Prisoners (RSAT) grants program for the fiscal years 2000 through 2005.

SEC. 2011. USE OF RESIDENTIAL SUBSTANCE ABUSE TREATMENT GRANTS TO PROVIDE FOR SERVICES DURING AND AFTER INCARCERATION.

The language of new subsection (c) amends the (RSAT) program, which is currently part S of the Omnibus Crime Control and Safe Streets Act of 1968. This program was originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. Under the proposal, the use of funds awarded to the states under the RSAT program is expanded to include aftercare (post-incarceration) services.

SEC. 2012. REESTABLISHMENT OF DRUG COURTS.

Despite its status as having been "repealed" by the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-103 at section 114(b) (1) (a), Drug Courts have continued to be funded in that and all subsequent appropriations acts. This legislation formally reestablishes the program in subsection (a), makes conforming technical amendments in subsection (b) and in subsection (c) re-authorizes funding.

Subsection (a) reestablishes the Drug Courts program as Part V of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) and includes the following sections described below.

Section 2201. GRANT AUTHORITY. This section empowers the Attorney General to may make grants to States, State courts, local courts, units of local government, and Indian tribal governments, directly or through agreements with other entities, for the purpose of operating diversion programs that provide for continuing judicial supervision over offenders with substance abuse problems who are not violent offenders. These programs are required to operate with an integrated system of sanctions and services. They must include mandatory periodic drug testing during any supervised release or probation periods, drug abuse treatment for each participant and must involve the possibility of prosecution, confinement, or incarceration for noncompliance or failure to show satisfactory progress. Finally, Drug Court programs must provide for offender management, aftercare and such services as relapse prevention, health care, education, vocational training, job and housing placement, and child care or other family support services for each participant as needed.

Section 2202. PROHIBITION OF PARTICIPATION BY VIOLENT OFFENDERS. This section bars participation by violent offenders as defined by the following section and requires the Attorney General to immediately suspend funding for any grant under this part, pending compliance, for any program not in compliance.

Section 2203. DEFINITION. This section defines “violent offender” as a person with one or more prior felony convictions for violent crimes of violence that involve the actual or attempted use of force with intent to cause death or serious bodily harm, or who is charged with or has previously been convicted of any crime, during the course of which offense the person carried, possessed, or used a firearm or dangerous weapon, or if a death or serious bodily injury occurred, or if force was used against the person of another, regardless of whether such occurrences were elements of the offense.

Section 2204. ADMINISTRATION. This section empowers the Attorney General to issue regulations and guidelines necessary to carry out the program and directs the Attorney General to consult with the Secretary of Health and Human Services and other appropriate officials.

The section also directs that grant applications must include a long-term strategy and detailed implementation plan, an explanation of the inability to secure adequate funding elsewhere without Federal assistance, and a certification that the grant will supplement, and not supplant other available funding. In addition, the application must identify related governmental or community initiatives which complement or will be coordinated with the proposal and certify appropriate consultation and coordination with all affected agencies in planning and implementing the program. It must certify that offenders will be supervised by one or more designated judges with responsibility for the program. Plans for obtaining necessary support and continuing the program when federal support ends must be spelled out. Finally, it must describe the methodology to be used in evaluating the program.

Section 2205. APPLICATIONS. This section states that the Attorney General shall prescribe the form and information required for the application and requires it to be submitted by a chief justice of a State or the chief executive of a State, local government unit or tribal government.

Section 2206. FEDERAL SHARE. This section limits the federal share to 75 percent of total program costs, unless the Attorney General waives all or part of the matching contribution.

Section 2207. GEOGRAPHIC DISTRIBUTION. This section directs that there be an equitable geographic distribution of grant awards.

Section 2208. REPORT. This section requires the grantee to file an annual report on the program's effectiveness.

Section 2209. TECHNICAL ASSISTANCE, TRAINING, AND EVALUATION. This section empowers the Attorney General to provide technical assistance and training directly or in collaboration with the Secretary of Health and Human Services, or through grants, contracts, or other cooperative arrangements with other entities. And apart from evaluations prescribed to be prepared by or for the grantees, the Attorney General may also arrange for program evaluations.

Subsection (b) inserts part V in the table of contents for title I.

Subsection (c) authorizes appropriations of such sums as may be necessary to carry out the program and directs the Attorney General to reserve not less than 1 percent and not more than 3 percent of those sums for research and evaluation of the program.

SEC. 2013. EXCEPTIONS TO TIME LIMITS FOR BYRNE PROGRAM GRANTS FOR CERTAIN PURPOSES.

This section creates a substitute for the present subsection 504(f) of the Omnibus Crime Control and Safe Streets Act of 1968 which preserves the present three exceptions to the rule limiting Byrne grants to 4 years. They are now included as clauses:

- (1) participating in multijurisdictional drug task forces and gang task forces;
- (2) victim assistance programs; and
- (3) drug and alcohol abuse treatment in prisons and jails.

The section creates similar exceptions for three drug-related purpose grants:

- (4) community-based programs for adult and juvenile drug-dependent and alcohol-dependent offenders;
- (5) monitoring of drug-dependent offenders; and

(6), those innovative programs demonstrating new approaches to enforcement, prosecution and adjudication of drug and other serious crimes that include all aspects of community-based intervention, surveillance and supervision.

Finally, the section also creates the same exception, in clause (7) for grants providing alternatives to prevent detention, jail, and prison for persons who pose no danger to the community.

SEC. 2014. PROVISION TO FREE EXISTING PRISON SPACE FOR VIOLENT OFFENDER INCARCERATION.

Subsection (a) of this section rennumbers certain subsections of section 20105 of the 1994 crime Act that created the Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) Incentive Grants program. Subsection (b) inserts new provision permitting any State or unit of local government with unexpended grant funds granted to it under the Part A program (for any of fiscal years 1996 through 1999) to expend up to 25 percent of those funds to implement graduated sanctions, provided that these expenditures are made for the purpose of freeing up additional prison space for violent offenders. Subsection (b) also defines “graduated sanctions.”

SUBTITLE B – ANTI-DRUG PROVISIONS

SEC. 2021. NATIONAL STANDARD TO PROHIBIT OPERATION OF MOTOR VEHICLES BY INTOXICATED INDIVIDUALS.

This section is intended to encourage all States to adopt a uniform .08 blood alcohol content (BAC) as the *per se* standard for driving while intoxicated. The proposal will help focus national attention on a problem which claimed the lives of more than 16,000 people in 1997. This proposal adds a new section 165 to subchapter I of chapter 1 of title 23, United States Code, which will require that the Secretary of Transportation to withhold 5 percent of appropriated funds for federal highway aid programs for fiscal year 2003 (10 percent for each thereafter) unless they adopt and enforce a law that considers as intoxicated an individual who registers .08 blood alcohol content level when operating a motor vehicle.

SEC. 2022. DRUG FREE TEENAGE DRIVERS.

This section will establish a demonstration program designed to drug test all first time driver license applicants. This proposal is designed to make it clear to parents and youth alike that drugs and driving don’t mix and is intended to help reduce drug use by young persons. In addition, the program will assist parents and States to identify youth drug offenders. The program will be run in several states for two years to measure the programs effectiveness.

Subsection (b) instructs the National Highway Traffic Safety Administration (NHTSA) to establish a program in several states to drug test first time applicants for driver licenses. If an applicant tests positive for drug use, the State which is operating the program will not provide a driver license to that individual and will require that the applicant complete a State drug treatment program and not test positive again upon re-application.

Subsection (c) directs the Secretary of the NHTSA to establish an incentive grant program for States to assist States in improving their laws relating to controlled substances and driving. To qualify for a grant States will have to enact, enforce, and publicize a law which makes it illegal to drive in the State with any measurable amount of an illegal controlled substance in the driver's body. An individual who is convicted of such illegal driving shall be referred to appropriate services, including intervention, counseling, and treatment. Proposed paragraph (2) requires states to enact, enforce, and publicize a law which makes it illegal to drive in the State when driving is impaired by the presence of any drug or chemical substance. The State shall provide that in the enforcement of such law, a driver shall be tested for the presence of a drug or chemical substance when there is evidence of impaired driving and a driver will have the driver's license suspended. An individual who is convicted of such illegal driving shall be referred to appropriate services, including intervention, counseling, and treatment. In addition, States will have to enact and enforce the suspension of a driver's license if the driver is convicted of any criminal offense relating to drugs. All beginning driver applicants and other individuals applying for or renewing a driver's license will be provided information about the drug driving laws and will be required to answer drug-related questions on their applications.

SEC. 2023. AMENDMENTS CONCERNING TEMPORARY EMERGENCY SCHEDULING.

This section authorizes the Attorney General to schedule a controlled substance on an emergency basis when that substance poses an immediate threat to health and/or public safety. The section provides protections for legitimate researchers.

SEC. 2024. AMENDMENT TO REPORTING REQUIREMENT FOR TRANSACTIONS INVOLVING CERTAIN LISTED CHEMICALS.

As currently structured, section 310(b)(3) of the Controlled Substances Act (21 U.S.C. 830(b)(3)) requires reporting of certain transactions involving ephedrine, pseudoephedrine and phenylpropanolamine. However, after discussions with industry and review of the data presently subject to this reporting requirement, it has been determined that the following transactions may be exempted from the reporting requirement with no negative impact on law enforcement goals. This section also provides that the Attorney General with the authority to revoke any of these exemptions for an individual regulated person if drug products distributed by that person are being used in violation of this title or title III of the Controlled Substance Import and Export Act.

Specifically, this section provides as follows:

In subsections (a) and (b), the existing paragraphs “(A)” and “(B)” are redesignated as paragraphs “(B)” and “(C)”, respectively and a new paragraph (A) is inserted. The new “(A)” states that, as used in this section (i.e., section 303 of the Controlled Substances Act), the term “drug product” is defined as a pharmaceutical substance in dosage form that has been approved for marketing in the United States under the Food, Drug and Cosmetic Act.

Subsection (c) inserts the phrase “or who engages in an export transaction” after “nonregulated person” in the redesignated subparagraph (B)

Subsection (d) establishes exemptions from the reporting requirement of the redesignated paragraph (B). The first four exemptions are limited to the domestic distribution of drug products. While the fifth exemption applies to exports of the three listed chemicals, regardless of their form, which have been reported to the Attorney General pursuant to 21 U.S.C. 954 or 971 or which have received a waiver pursuant to 971(e)(2).

The first exemption deals with drug product samples containing no more than 2 solid dosage units or 2 dosage units in liquid form, not to exceed 10 ml of liquid. Samples of these products are primarily distributed through direct mailing to residences and in package inserts in newspapers although direct promotions in retail outlets are also employed. The number of dosage units in a sample distributed in this manner is limited by the fact that firms have to protect themselves against the possibility that a child might open a sample sent through the mail or as a newspaper package insert. For this reason samples are limited to 2 dosage units in solid or liquid form. There are a number of states which have specific laws limiting the quantity of various products which can be distributed as samples to households.

The second exemption is designed to deal with infrequent deliveries to customers of drug products by retail distributors. As long as the frequency of the deliveries and the quantity of drug product distributed in this manner is consistent with the definition of a retail distributor, the distribution would not be reportable.

The third exemption is related to the second one. There are pharmacies which will regularly deliver these drug products and other OTC products to long term care facilities (LTCF) for use by a specific resident patient or for the general use of the resident patients. It can be argued that in the latter case the LTCF is no longer a nonregulated person since it is dispensing the products to its residents. However, to avoid any uncertainty, this activity is specifically listed as an exemption. Retail distributors should insure that the frequency and volume of these distributions is consistent with the definition of a retail distributor. The term “long term care facility” is defined at 21 CFR 1300.01(b)(25).

The fourth exemption applies to distributions of prescription drugs. To date, diversion of these drug products when they have been dispensed pursuant to a prescription has not been a problem.

The fifth exemption (D)(v) exempts from the reporting requirement of 21 U.S.C. 830(B) those exports which are reported pursuant to 21 U.S.C. 954 or 971 or which are subject to a waiver of the advance notification requirement pursuant to 21 U.S.C. 971(e)(2).

The final category authorizes the Attorney General to exempt by regulation other types of transactions in general or other types of transactions for specific listed chemicals or drug products if it is determined that the reporting of these transactions is not necessary to the enforcement of this title or title III. As used in this paragraph, the phrase "this title" refers to Title II which is the Controlled Substance Act and the phrase "Title III" refers to the Controlled Substances Import and Export Act.

The new paragraph (E) provides a specific mechanism for the revocation of an exemption established by or granted pursuant to paragraph (D) and establishes procedural rights for a firm to demand an expedited hearing to contest the revocation of an exemption.

SEC. 2025. AMPHETAMINE PENALTY INCREASES.

This section would increase penalties for amphetamine, a substance closely related to methamphetamine, to the same level as methamphetamine penalties.

Presently, amphetamine is a schedule II substance subject to a maximum twenty-year term of imprisonment for illegal trafficking under 21 U.S.C. 841(b)(1)(C) (like powder cocaine with which it is sentenced identically under the sentencing guidelines). In 1998, Congress sharply elevated the penalties for methamphetamine but did not address the penalties for amphetamine.

Amphetamine manufacture and trafficking are, however, becoming a more serious problem, making it appropriate to increase amphetamine penalties as regulatory and other law enforcement measures have made it harder for clandestine methamphetamine producers to find the primary methamphetamine precursors, primarily ephedrine and pseudoephedrine. As a result, more criminals are turning to the more widely available amphetamine precursor phenylpropanolamine.

According to data from scientific literature, the common form of clandestinely manufactured amphetamine is approximately as potent as the common form of clandestinely manufactured methamphetamine. This section directs the Sentencing Commission to amend the sentencing guidelines to increase penalties for amphetamine offenses. The directive would make amphetamine offenses subject to prison sentences for domestic trafficking and importation equal to the minimum statutory penalties available for methamphetamine. In addition, this section makes a conforming amendment to 21 U.S.C. 843(d)(2) to increase the maximum penalties for possessing or making any equipment knowing or having reason to believe it will be used to manufacture amphetamine. Currently, the provision only applies to methamphetamine.

SEC. 2026. ANABOLIC AGENTS.

The purpose of section is to expand the authority of the Attorney General to control substances which are being abused for purposes of enhancing physical appearance, strength or athletic performance. Presently, the Attorney General's authority in this area is limited to anabolic steroids. However, there are other substances which may be abused in a manner similar to anabolic steroids and which may present a threat to individual and public health and safety. This new section provides the Attorney General with the authority to control these substances. It also amends the sentencing guidelines of the United States Sentencing Commission so that an appropriate level of sentencing applies to the trafficking in these substances.

SEC. 2027. DRUG PARAPHERNALIA.

Subsection (a) amends subsection (d) of section 422 of the Controlled Substances Act (21 U.S.C. 863(d)) by adding 'packaging' to the list of uses included in the definition of 'drug paraphernalia'. The Drug Enforcement Administration [DEA] has historically participated in narcotics investigations which involved individuals who sold materials which were primarily intended to facilitate the distribution of illegal drugs, but who could not effectively be prosecuted because the items they sold were not clearly defined under § 863(d) as "drug paraphernalia". For example, small glassine envelopes are primarily used by traffickers to package single dose quantities of heroin. *See United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976)(involved heroin packaged in glassine envelope); *United States v. Gomez*, 103 F.3d 249, 252 (2d Cir. 1997)("An inventory search of [defendant's] car . . . yielded 62 glassine envelopes of heroin, a small quantity of cocaine, a holster and bullets."); *United States v. Rosa*, 11 F.3d 315, 324 (2d Cir. 1993)("The [narcotics] Organization consisted of a highly structured distribution network that purchased relatively pure narcotics, diluted them, packaged them in glassine envelopes at locations known as 'mills,' and sold them through 24-hour street sales locations known as 'spots.' At its peak, the Organization received gross income from heroin sales of more than \$8 million a month."); *United States v. Sagaille*, No. 91-5714, 1992 U.S. App. LEXIS 20723, *3 (4th Cir. Aug. 28, 1992)("Drug paraphernalia, including aluminum foil, ziplock baggies, razor blades and glassine packets were found in the kitchen cabinet"); *United States v. Blake*, 888 F.2d 795, 797 (11th Cir. 1989)("A subsequent search of the bag revealed drug paraphernalia in the form of numerous glassine envelopes and little zip-lock bags typically used for packaging crack cocaine among the contents of the luggage."). *See also* Janet Allon, *Some Label All-Night Deli 'Drug' Store*, THE NEW YORK TIMES, p. 7 (Feb. 18, 1996)("A police raid last August yielded two guns, drug paraphernalia like vials and glassine envelopes but no actual drugs. Four people, some of whom worked there, were arrested and the deli closed for a few days."); *Police raid store, arrest two on paraphernalia charges*, THE BALTIMORE SUN, p. 2B (July 5, 1995)("Acting on a tip from a disgruntled neighbor yesterday afternoon, police raided a West Baltimore variety store, where they arrested two employees and reported seizing more than \$60,000 worth of suspected drug paraphernalia. . . . Police said thousands of packages of glass vials, vial caps, glassine bags, and laxatives and sweeteners to mix with cocaine and heroin were seized. Such items are used by drug

dealers for packaging their wares, police said.”); Michael T. Kaufman, *Seizing The Bullets In Drug War*, THE NEW YORK TIMES, p. 27 (Apr. 30, 1994)(“‘We were able to obtain 32 million individual items of illegal drug paraphernalia,’ said Inspector Joseph Raguso, who commanded the operation. There is no typographical error in the preceding sentence: ‘32 million’ is what the inspector said. Glassine envelopes -- clear envelopes used to hold powdered drugs -- and crack vials represented the largest share, and though the inspector could not break it down, there were apparently several million vials taken from the 18 stores that nominally sold soda, magazines and candy, or that rented videos.”).

This packaging material is similarly used by traffickers to identify and advertise specific drug brand names. See *United States v. Gore*, 154 F.3d 34, 38 (2d Cir. 1998) (“[Informant] went inside a building and bought two glassine envelopes of heroin, branded with the name ‘Fuji Power’ from [defendant]”.); *United States v. Muniz*, 60 F.3d 65, 67 (2d Cir. 1995)(“The mail box to Apartment 6C was found to contain 137 glassine envelopes of heroin, each bearing a rubber-stamped brand logo: ‘Flatliner,’ ‘Terrific,’ or ‘Monster.’”); *United States v. Rivera*, 971 F.2d 876, 880 (2d Cir. 1992)(“The operation was developed by [the defendant] and sold heroin under the brand names ‘Obsession,’ ‘Sledge Hammer,’ and ‘Delirious.’ The organization maintained a ‘cutting mill’ or ‘table,’ at which pure heroin was diluted and packaged in ten dollar glassine envelopes stamped with a brand name.”).

But many Federal prosecutors have been reluctant to prosecute the manufacturers, distributors and possessors of glassine envelopes, and similar such packaging, because the “drug paraphernalia” definition was limited, in relevant part, to “any equipment, product, or material . . . which is primarily intended or designed for use in . . . concealing”. Because the glassine envelopes, or similar such packaging, were transparent, the perception among prosecutors was that they could not “conceal[]”, and therefore, were not included in the existing “drug paraphernalia” definition. See *United States v. Certain Real Property Located at 16510 Ashton*, 47 F.3d 1465, 1467 (6th Cir. 1995)(Court described property seized during search as “what the United States characterizes as ‘drug paraphernalia’ In actuality, this paraphernalia was approximately 1,000 glassine envelopes. Also, ‘Katie,’ a drug sniffing dog, alerted in the vicinity of a safe in the Detroit house. However, not found in either house was any trace of drugs, large amounts of cash, or guns. *Nor was any more obvious paraphernalia discovered.*”)(Emphasis added).

This amendment will remedy this problem by expressly including packaging in the definition of “drug paraphernalia”, and thus make it much easier to prosecute the individuals who manufacture these packaging materials, the individuals who sell them, and the individuals who possess them. This amendment would also bring the Federal paraphernalia definition more in line with the trend at the state level for state codes to specifically include “glassine envelopes” in their drug paraphernalia definitions. See MD. CODE ANN. Health -- Controlled Dangerous Substances § 287 (1998)(“Except as authorized by this subheading, it is unlawful for any person: . . . (d) To possess or distribute controlled paraphernalia, which shall mean: . . . (2) Gelatin capsules, glassine envelopes or any other container suitable for the packaging of individual quantities of controlled dangerous substances in sufficient

quantity to and under circumstances which reasonably indicate an intention to use any such item for the illegal manufacture, distribution, or dispensing of any such controlled dangerous substance.”); NY CLS PENAL § 220.50 (1998)(“A person is guilty of criminally using drug paraphernalia in the second degree when he knowingly possesses or sells: . . . (2) Gelatine capsules, glassine envelopes, vials, capsules or any other material suitable for the packaging of individual quantities of narcotic drugs or stimulants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use, the same for the purpose of unlawfully manufacturing, packaging or dispensing of any narcotic drug or stimulant”).

Subsection (b) amends subsection (e)(4) of section 422 of the Controlled Substances Act (21 U.S.C. 863(e)(4)) by expressly stating that the display with or on an item of any name brand, insignia or other indicator which is associated with illegal drugs or which is used to advertise or identify an illegal drug is a matter which may be considered in determining whether the item should be considered drug paraphernalia. This consideration had been implicit in this subparagraph.

Subsection (c) amends subsection (a)(10) of section 511 of the Controlled Substances Act (21 U.S.C. 881(a)(10)) by correcting an incorrect citation for the definition of “drug paraphernalia.”

SEC. 2028. COUNTERFEIT SUBSTANCES/IMITATION CONTROLLED SUBSTANCES.

This section has two purposes. The first is to expand the definition of counterfeit substance. The current definition is generally worded to apply to controlled substances which are counterfeit versions of legitimately produced controlled substances. The application of this definition to a counterfeit version of an illicit substance such as heroin or cocaine is less clear. The expansion of the definition will clarify this issue and make clear that the phrase “counterfeit substance” applies to any controlled substance which is represented to be or which imitates another controlled substance regardless of whether that controlled substance is of licit or illicit origin.

The second purpose of this section is to add a new definition for imitation controlled substances. An imitation controlled substance differs from a counterfeit substance in that a counterfeit substance is a controlled substance while an imitation controlled substance is not.

The need to deal with imitation controlled substances may not be clear to those not familiar with investigative techniques used in drug investigations. A traditionally very effective law enforcement practice when investigating a drug operation is for law enforcement officers, in an undercover capacity, to purchase drugs from the traffickers. A unique situation arises, however, when the target receives prior notice that his buyers are law enforcement.

In the past, dealers who learned that their buyers were connected with law enforcement would simply not show up at the prearranged sale site. However, there have been instances in which the dealers have shown up, and either sold, or tried to sell, noncontrolled substances to law enforcement officers, all the while claiming the substance was a controlled substance, with the intent to "rip-off" the police, i.e., give the officers phony drugs and keep the money.

Most states have already enacted "look-alike"/"Turkey" laws to remedy this problem and the statutes have been consistently upheld. This section is an amalgam of state statutes, with particular emphasis on examples of conduct that would suggest an individual was trying to sell a noncontrolled substance as a controlled substance.

Also like the majority of state statutes, this amendment includes specific language that it is not a defense to an offense involving an imitation controlled substance that the defendant believed it actually was a controlled substance.

It is important to note that the expanded definition of "counterfeit substance" in section 102(7) of the Controlled Substances Act (21 U.S.C. 802(7)) is written in the disjunctive. Therefore, a "counterfeit substance" is a substance which satisfies 102(7)(A)(i) or (ii) or (iii). Of course, there may be instances when a substance may satisfy more than one of these alternatives; however, it is only necessary that it satisfy one of the alternatives for it to fall within the definition. This definition has been patterned after the structure of the definition of "controlled substance analogue" at section 102(32) of the Controlled Substances Act (21 U.S.C. 802(32)). This definition is also worded in the disjunctive and sets out three alternatives; a "controlled substance analogue" is a substance which satisfies one of these alternatives.

Specifically, section 2028(a) amends Section 102(7) of the Controlled Substances Act (21 U.S.C. 802(7)) by--

- (1) inserting "(A)" after "(7)";
- (2) designating the text after "a controlled substance" as clause "(i)";
- (3) inserting "characteristic," after "number,";
- (4) striking the period at the end and inserting a semicolon; and
- (5) adding at the end the following:

"(ii) which falsely purports to be or is represented to be a different controlled substance; or

(iii) which is manufactured or designed in such a manner, or is distributed, dispensed, or otherwise transferred under such circumstances, such that a reasonable person would believe that the substance is a different controlled substance."

"(B) The term "imitation controlled substance" means a substance, which is not a controlled substance, that is represented (expressly or by implication) to be a controlled substance.

"(C) The term "imitation controlled substance" does not include a placebo which is directly applied to the body of a research subject or a patient or which is delivered to a research subject or a person for his own use, by, or pursuant to the order of, a practitioner for a lawful purpose."

Section 102(8) of the Controlled Substances Act (21 U.S.C. 802(8)) is amended by inserting ", an imitation controlled substance," after "controlled substance".

Section 102(11) of the Controlled Substances Act (21 U.S.C. 802(11)) is amended by (1) inserting "to deliver an imitation controlled substance or" after "controlled substance or" in the first sentence and by (2) inserting ", an imitation controlled substance," after "controlled substance" in the second sentence. Note that there is no need to add "counterfeit substance" to these subsections since a "counterfeit substance" is by definition a controlled substance.

Section 102(44) of the Controlled Substances Act (21 U.S.C. 802(44)) is amended by (1) striking "or" after "marihuana," and (2) inserting ", anabolic agents, or listed chemicals, or an offense that is punishable by imprisonment for more than one year under any provision of this title or title III" after "stimulant substances". This amendment expands the definition of the term "felony drug offense" to include offenses involving anabolic agents and listed chemicals as well as any offense which is a felony violation of title II or title III.

Section 401(a) of the Controlled Substances Act (21 U.S.C. 841(a)) is amended by--

- (1) deleting "or" at the end of paragraph (1);
- (2) striking "create" in paragraph (2) and inserting "manufacture";
- (3) inserting "manufacture," after "intent to" in paragraph (2);
- (4) deleting the period at the end of paragraph (2) and inserting "; or"; and
- (5) adding at the end the following paragraph:

"(3) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, an imitation controlled substance."

Note that section 401 specifically references controlled substances in (a)(1) and counterfeit substances in (a)(2) even though a counterfeit substance is by definition a controlled substance. The reason both terms are used here is to establish the basis for the different sentencing structure for offenses involving controlled substances which are counterfeit substances.

Subsection (f) amends section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b)) by establishing a new penalty structure for counterfeit substances and imitation controlled substances. The sentence for violations involving counterfeit substances will be based on the controlled substance contained in the counterfeit substance or the controlled substance which the counterfeit substance is represented to be, whichever provides the greater sentence. The maximum sentence for violations involving imitation controlled substances will be one-half of the sentence which would apply to the controlled substance which the imitation controlled substance is represented to be.

Subsection (f) also presents a number of factors which the trier of fact may consider in determining whether a substance is a counterfeit substance or an imitation controlled substance.

The presence of any two (2) of the factors shall be prima facie evidence that the substance is an imitation controlled substance; however, the presence of two factors is not required to make such a determination. In addition, the factors presented may be used, mutatis mutandis, to determine whether a controlled substance is a counterfeit substance.

Specifically, subsection (f) amends section 401(b) of the Controlled Substances Act (21 U.S.C. 841(b) by redesignating paragraphs (4), (5), (6) and (7) as paragraphs (6), (7), (8) and (9), respectively, and by inserting new paragraphs (4) and (5) as follows:

(4)(A) In the case of a counterfeit substance, such person shall be sentenced in accordance with this section based on the controlled substance which the counterfeit substance is represented to be or based on the controlled substance which is actually contained in the counterfeit substance, whichever provides the greater sentence.

(B) Paragraph 5(B) may be applied, mutatis mutandis, to make a determination that a controlled substance is a counterfeit substance.

(5)(A) In the case of an imitation controlled substance, such person shall be sentenced in accordance with this section based on the controlled substance which the imitation controlled substance is represented to be or in accordance with (b)(2) of this section, whichever provides the greater sentence.

(B) In the case of a violation of this title or title III involving an imitation controlled substance, the following provisions shall apply:

(i) The trier of fact may consider the following factors in addition to any other factor that may be relevant for purposes of determining whether a substance was an imitation controlled substance. The presence of any two (2) of the following factors shall be prima facie evidence that the substance was an imitation controlled substance; however, the presence of two factors is not required for a determination that a substance is an imitation controlled substance:

(I) The person in control of the substance expressly or impliedly represents that the substance is a controlled substance or has the effect of a controlled substance;

(II) The person in control of the substance expressly or impliedly represents that the substance because of its nature or appearance can be sold or delivered as a controlled substance or as a substitute for a controlled substance;

(III) The person in control of the substance utilizes evasive tactics or actions to avoid detection by law enforcement authorities or other authorities such as school authorities;

(IV) The physical appearance of the substance is, or is designed to be, substantially identical to a specific controlled substance. This may be determined by such factors as color, shape, size, markings, taste, odor, consistency, packaging, labeling, or other identifying characteristics;

(V) The substance is packaged or distributed in a manner normally used for the illegal distribution of controlled substances; or

(VI) The distribution or attempted distribution includes an exchange or demand for money or other property as consideration, and the amount of the consideration is substantially greater than the reasonable retail market value of the substance.

(ii) It shall not constitute a defense that the accused believed the imitation controlled substance to actually be a controlled substance."

Section 403 of the Controlled Substances Act (21 U.S.C. 843) is amended--

(1) in paragraph (a)(2) by inserting "or list I chemical" after "controlled substance" each place it appears;

(2) in paragraph (a)(3) by inserting "or a laboratory supply (as defined in section 402 of this title)" after "controlled substance";

(3) and in paragraph (a)(5) by inserting "or substance" after "drug" each place it appears and by inserting "imitation controlled substance" after "controlled substance".

Section 506(a) of the Controlled Substances Act (21 U.S.C. 876(a)) is amended by inserting "imitation controlled substances," after "controlled substances,".

Section 509 of the Controlled Substances Act (21 U.S.C. 879) by inserting ", imitation controlled substances, or listed chemicals" after "controlled substances".

Subsection (j)(1) amends section 511(a) of the Controlled Substances Act (21 U.S.C. 881(a))

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(A) in paragraph (1) by inserting "and imitation controlled substances" after "controlled substances";

(B) in paragraph (2) by inserting ", imitation controlled substance," after "controlled substance";

(C) in paragraph (6) by inserting ", imitation controlled substance," after "controlled substance"; and

(D) in paragraph (8) by inserting "and imitation controlled substances" after "controlled substances".

Subsection (j)(2) amends section 607(a)(3) of the Tariff Act of 1930 (19 U.S.C. 1607(a)(3)) is amended by inserting ", imitation controlled substance," after "controlled substance".

Subsection (j)(3) amend Section 607(b) of the Tariff Act of 1930 (19 U.S.C. 1607(b)) is amended by inserting ", 'imitation controlled substance'," after "'controlled substance'".

Note that it is not necessary to add counterfeit substances to these various sections amended by subsection (j) since counterfeit substances are by definition controlled substances.

Subsection (k) amends section 1010(a) of the Controlled Substances Act (21 U.S.C. 960(a)) by deleting the "or" at the end of (a)(2), inserting ", or" at the end of (a)(3), and by adding a new (a)(4) as follows:

"(4) knowingly or intentionally imports or exports a counterfeit substance or an imitation controlled substance."

Note that 21 U.S.C. 960(a) already references controlled substances in (a)(1) and that counterfeit substances are being added in the new (a)(4) even though a counterfeit substance is by definition a controlled substance. The reason both terms are used here is to establish the basis for the different sentencing structure for offenses involving controlled substances which are counterfeit substances.

Subsection (l) amends section 2516(1)(e) of Title 18 by inserting "or a violation of the Controlled Substances Act or the Controlled Substances Import and Export Act, (Title 21, United States Code, Section 801 et seq.)" after "United States".

SEC. 2029. AMENDMENTS TO CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT.

Paragraphs (1) and (2) of subsection (a) amend section 401 (b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) in paragraphs (A)(vi) and (B)(vi), respectively. The purpose of these amendments is to make the sentencing structure for fentanyl and its analogues more commensurate with that of heroin on a dosage unit basis. This is important because fentanyl is a far more powerful drug than heroin. In fact, one gram of fentanyl is equivalent to 83 grams of heroin and one gram of 3-methylfentanyl, a fentanyl analogue, is equivalent to 400 grams of heroin. This dramatic difference in potency is not reflected in the current sentencing structure.

Paragraph (3) amends Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) by removing Schedule III substances from the penalty provisions of paragraph (D) and by changing references to paragraphs (4) and (5) to reflect their new designation as paragraphs (6) and (7).

Paragraph (4) amends Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) adding a new (E) which contains the modified penalty provisions for violations of 401(a) involving Schedule III controlled substances.

Paragraph (5) amends Section 401(b)(2) of the Controlled Substances Act (21 U.S.C. 841(b)(2)) by expanding the penalty provisions for violations of 401(a) involving Schedule IV controlled substances.

Paragraphs (5) and (6) also amend section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) in their respective paragraphs by deleting the list of prior convictions which would lead to increased penalties and replacing it with the term "drug felony offense". This term is defined at section 102(44) of the Controlled Substances Act (21 U.S.C. 802(44)).

Sections 10(a)(6) and (a)(7) amend Section 401(b)(3) of the Controlled Substances Act (21 U.S.C. 841(b)(3)) by expanding the penalty provisions for violations of 401(a) involving Schedule V controlled substances.

Paragraph (8) amends section 401(b)(8) of the Controlled Substances Act (21 U.S.C. 841(b)(8)), as redesignated by section 9(e), by expanding the scope of this section to include all violations rather than just those which occur on Federal land.

Paragraphs (9) and (10) amend sections 401(b)(1)(A),(B) and (C) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A),(B) and (C)) to delete references to parole.

Subsection (b) amends sections 402(c)(2)(B) of the Controlled Substances Act (21 U.S.C. 842(c)(2)(B)) by adding anabolic agents and listed chemicals to the list of prior convictions under other Federal, state or foreign laws which would lead to increased penalties. This section also adds felony drug offense convictions to this list.

Subsection (c) amends sections 403(d)(1) of the Controlled Substances Act (21 U.S.C. 843(d)(1) by substituting the phrase "felony drug offense" for the list of prior convictions which will lead to increased penalties.

Subsection (d) amends section 1010 of the Controlled Substances Import and Export Act (21 U.S.C. 960) by making conforming changes and additions in the text of subsection (b) to reflect the changes made to section 401 of the Controlled Substances Act by (a).

Subsection (e) deals with issue of the sentencing guidelines to insure that all of the increases in penalties included in this act are fully implemented. However, the text in this section dealing with Schedule IV substances excludes flunitrazepam. The reason for this is that the Drug-Induced Rape Prevention and Punishment Act of 1996 (Pub. L. 104-305) made flunitrazepam subject to a stricter penalty structure than that which applies to other Schedule IV substances. Section 2(b)(3) of that law provided specific instructions to the Sentencing Commission for offenses involving flunitrazepam.

SEC. 2030. CONFORMING AMENDMENT CONCERNING MARIHUANA PLANTS.

This section corrects an inconsistency in the penalties relating to marihuana plants that exists between 21 U.S.C. 841(b) and 21 U.S.C. 960(b). The former statute applies to domestic controlled substance trafficking violations and the latter to controlled substance importation offenses. Each provision contains a complex sentencing scheme that sets forth the penalties for violations involving numerous types of drugs depending on the quantity of a particular substance involved. The sections and penalties are, with the exception of the difference addressed by the instant proposal, identical.

The least serious trafficking and importation violations, involving relatively small amounts of marihuana, are punishable by up to five years' imprisonment and appear at 21 U.S.C. 841(b) (1)(D) and 21 U.S.C. 960(b)(4).⁴ The former provides for an up to five-year penalty for trafficking in "less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight." The latter provides for an up to five-year penalty for importing "less than 50 kilograms of marihuana, except in the case of 100 or more marihuana plants regardless of weight."

⁴Simple possession of marihuana is a misdemeanor, 21 U.S.C. 844.

There appears to be no sound reason for this difference between 50 and 100 marihuana plants in the "except" clauses of the two otherwise parallel statutes. Accordingly, the proposed amendment would modify 21 U.S.C. 960(b)(4) to make it read the same as 21 U.S.C. 841(b)(1)(D), by striking "100" plants and inserting "50" plants. The amendment adopts 50 as opposed to 100 as the proper method of eliminating the current disparity because a mature marihuana plant weighs approximately one kilogram, and both provisions apply to "less than 50 kilogram" offenses.

SEC. 2031. CONFORMING AMENDMENT RELATING TO FLUNITRAZEPAM PENALTIES.

This amendment would harmonize the penalties for domestic trafficking in and unlawful importation of flunitrazepam, the so-called "date rape" drug, as a result of the enactment of inconsistent provisions in Public Law 104-305, the Drug-Induced Rape Prevention and Punishment Act of 1996. That Act included penalty increases for both domestic trafficking in and unlawful importation of flunitrazepam (more commonly known as rohypnol), presently classified as a schedule IV controlled substance. With respect to importation, the Act provided that any person who manufactured with intent to import or imported any quantity of flunitrazepam would be treated as if the violation involved a schedule I or II drug, i.e., the offender would be subject to a maximum penalty of 20 years' imprisonment. However, with respect to domestic trafficking violations involving flunitrazepam, the Act provided that the 20-year penalty level, otherwise applicable to any amount of a schedule I or II drug, would apply to flunitrazepam only if the violation involved exactly "1 gram of" that substance. It further provided that a five-year maximum penalty would apply to a domestic flunitrazepam violation that involved exactly "30 milligrams" of that drug. These provisions, even apart from their inconsistency with the importation penalty, make no sense since they do not provide for violations involving amounts other than the precise amounts referred to (i.e. they omit language, clearly intended, that the higher penalty apply to 1 gram or more of the drug and the lower penalty to between 30 milligrams and 1 gram, respectively). Rather than fix these internal problems with the domestic trafficking penalty scheme for flunitrazepam, the proposed amendment would eliminate the requirement that any particular quantity of flunitrazepam be proven to have been involved, in order for the 20-year maximum penalty to apply. This conforms to the penalty scheme adopted by Congress for importation violations of flunitrazepam in 21 U.S.C. 960, and is consistent with the notion that illegal flunitrazepam transactions should be punished identically with those involving schedule I and II drugs -- for which no quantity requirements exist under 21 U.S.C. 841(b)(1)(C) in order for the 20-year penalty provisions to apply.

SEC. 2032. INCREASED PENALTIES FOR USING MINORS TO DISTRIBUTE DRUGS.

This provision would amend Section 420 of the Controlled Substances Act (21 U.S.C. 861) to increase the current mandatory minimum penalty for using or employing minors to distribute drugs from one year to three years. Similarly, the provision would increase the mandatory minimum penalty for a second or subsequent violation of this statute from one year to five years. The proposed increases are

necessary to punish persons who use or employ minors to distribute illegal drugs and to deter others from engaging in such reprehensible conduct.

SEC. 2033. INCREASED PENALTIES FOR DISTRIBUTING DRUGS TO MINORS.

This provision would amend Section 418 of the Controlled Substances Act (21 U.S.C. 859) to increase the mandatory minimum penalty for distributing drugs to minors from one year to three years. The provision also would increase the mandatory minimum penalty for second and subsequent offenses from one year to five years. Again, the increased penalties are necessary to punish adequately those persons who distribute drugs to minors as well as to deter others from engaging in such conduct.

SEC. 2034. INCREASED PENALTY FOR DRUG TRAFFICKING IN OR NEAR A SCHOOL OR OTHER PROTECTED LOCATION.

This provision would amend Section 419 of the Controlled Substances Act (21 U.S.C. 860) to increase the mandatory minimum penalty for distributing drugs in or near a school or other protected location. The provision also would increase the mandatory minimum penalty for second and subsequent offenses from one year to five years. The increased penalties for drug trafficking in or near schools or other protected locations are consistent with the other proposed penalty increases in this legislation and are aimed at protecting children from drug trafficking and abuse, punishing drug dealers who target children, and deterring others who might engage in such conduct.

SEC. 2035. SERIOUS JUVENILE DRUG TRAFFICKING OFFENSES AS ARMED CAREER CRIMINAL ACT PREDICATES.

This section would amend the Armed Career Criminal Act (ACCA) , 18 U.S.C. 924(e)(2)(A), to permit the use of an adjudication of juvenile delinquency based on a serious drug trafficking offense as a predicate offense under that Act. The ACCA targets for a lengthy period of at least 15 years' imprisonment those felons found in unlawful possession of a firearm who have proven records of involvement in serious acts of misconduct involving drugs or violence.

SEC. 2036. INCREASED PENALTIES FOR USING FEDERAL PROPERTY TO GROW OR MANUFACTURE CONTROLLED SUBSTANCES.

This provision would increase the penalty for cultivating or manufacturing a controlled substance on federally owned or leased land. Currently, the extra penalty for using federal land to grow or manufacture illegal controlled substances is only an increased fine 21 U.S.C. 841(b)(5). A significant amount of the domestic marijuana crop is grown on federal lands and a substantial number of methamphetamine laboratories also have been discovered on federal lands. Federal law enforcement agencies believe that the use of federal lands for cultivating and manufacturing controlled substances has increased because there is no possibility that the land will be forfeited as is the case if the cultivation or manufacture took place on private property.

SEC. 2037. CLARIFICATION OF LENGTH OF SUPERVISED RELEASE TERMS IN CONTROLLED SUBSTANCE CASES.

This section resolves a conflict in the circuits as to the permissible length of supervised release terms in controlled substance cases. Under 18 U.S.C. 3583(b), "[e]xcept as otherwise provided," the maximum authorized terms of supervised release are 5 years for Class A and B felonies, 3 years for Class C and D felonies, and 1 year for Class E felonies and certain misdemeanors. The drug trafficking offenses in 21 U.S.C. 841 prescribe special supervised release terms, however, that are longer than those applicable generally under section 3583(b). Those longer terms, which may include lifetime supervised release, were enacted in 1986 in the same Act which inserted the introductory phrase "Except as otherwise provided" in section 3583(b). Because of this clear legislative history and intent, three courts of appeals have held that section 3583(b) does not limit the length of supervised release that may be imposed for a violation of 21 U.S.C. 841 when a greater term is there provided. United States v. LeMay, 952 F.2d 995, 998 (8th Cir. 1991); United States v. Eng, 14 F.3d 165, 172-3 (2d Cir.), cert. denied, 513 U.S. 807 (1994); United States v. Garcia, 112 F.3d 395 (9th Cir. 1997). Two courts of appeals, however, have reached the opposite result, holding that the length of a supervised release term that can be imposed for controlled substance cases is limited by 18 U.S.C. 3583(b). United States v. Gracia, 983 F.2d 625, 630 (5th Cir. 1993); United States v. Kelly, 974 F.2d 22, 24-5 (5th Cir. 1992); United States v. Good, 25 F.3d 218 (4th Cir. 1994).

Although the issue has not arisen with frequency, the conflict is entrenched and should be dealt with definitively.

Accordingly, the amendment would add the words "Notwithstanding section 3583 of title 18" to the title 21 controlled substance offenses in the parts of those statutes dealing with supervised release to make clear that the longer terms there prescribed control over the general provision in section 3583.

SEC. 2038. TECHNICAL CORRECTION TO ENSURE COMPLIANCE OF SENTENCING GUIDELINES WITH PROVISIONS OF ALL FEDERAL STATUTES.

This section would amend 28 U.S.C. 994(a) to assure that sentencing guidelines promulgated by the United States Sentencing Commission are consistent with the provisions of all federal statutes. Currently, section 994(a) contains a requirement of consistency only with statutes in titles 28 and 18 of the United States Code. No discussion of this somewhat peculiar limitation appears in the legislative history, see S.Rep. No. 98-225, 98th Cong., 1st Sess., p. 163 (1983). The limitation seems to have been based on the mistaken assumption that all provisions pertinent to the promulgation of sentencing guidelines were contained in those two titles. However, other provisions, such as mandatory minimum sentences in title 21, are relevant and clearly are meant to act as constraints on the guidelines. This amendment will insure that guidelines are not created that are inconsistent with the provisions of any relevant enactment of Congress.

SEC. 2039. EXCLUSION OF PERSONS WHO HAVE BENEFITTED FROM ILLICIT ACTIVITIES OF DRUG TRAFFICKERS.

This section will provide for exclusion of spouses and children whom the Attorney General or a consular officer has reason to believe are or have been, within the previous five years, benefitting from the illegal activities of controlled substance violators, when such persons have known or reasonably should have known that they were receiving benefits from such illicit activities. Such aliens will be subject to the same standard applicable to drug traffickers, and their associates who direct or assist them, without having to meet current RICO limitations relating to the expenditure of funds in the United States. The provision is subject to waiver in certain limited, enumerated circumstances.

SEC. 2040. ENHANCING PROSECUTIONS IN INTERNATIONAL DRUG AND MONEY LAUNDERING CASES.

This section creates a rebuttable presumption that will apply to the forfeiture of the proceeds of foreign drug offenses under 18 United States Code § 981(a)(1)(B). It is derived from the presumption in 21 United States Code § 853(d) which provides that, in criminal cases, income earned by a drug trafficker during the time he is trafficking in illegal drugs is presumed to be drug proceeds if the trafficker has no other obvious source of income.

The presumption in § 853(d), which has been in effect since 1984, has been used successfully in cases where a drug trafficker has been convicted and the government seeks to forfeit a large sum of cash, or deposits in a bank account, that the drug dealer acquired during the time in which he was engaged in the illegal activity, but the evidence linking the funds specifically to the drug offenses is lacking. Because of the statutory presumption, the court is empowered to find that the currency accumulated by the drug trafficker during the time he was committing the drug offense was in fact drug

proceeds, and is therefore subject to forfeiture, unless the defendant rebuts the presumption by proffering evidence that the money came from some legitimate source.

The proposed presumption would work the same way in the civil forfeiture context. In other words, if the government brings a civil forfeiture action against a sum of money in the United States that was acquired by a person during the time in which the person was committing a foreign offense for which forfeiture is authorized under § 981(a)(1)(B), the court would be empowered to presume that the money represented the proceeds of the foreign offense and it would be subject to forfeiture unless the person claiming the funds offered proof that the funds were derived from a legitimate source. The presumption is essential to the ability of law enforcement to forfeit the proceeds of foreign crimes because of the difficulty in tracing the proceeds of foreign offenses without access to foreign records.

This section also establishes rebuttable presumptions applicable to international money laundering forfeitures for violations of 18 United States Code § 1956 and 1957, which frequently involve sophisticated efforts to transfer, by wire or other means, large sums of money through shell corporations or bank secrecy jurisdictions in a manner calculated to avoid detection. In such cases, a rebuttable presumption is necessary to allow the government to overcome the efforts made to obscure the true nature of the transaction and to force the claimant to come forward with evidence regarding the source of the money. Moreover, without such a presumption, some courts may not permit the government to draw any inference from the absence of evidence that the money came from a legitimate source. See United States v. Rutgard, 108 F.3d 1041 (9th Cir. 1997) (government's argument that money was forfeitable under § 982 as property involved in money laundering because there was no evidence of a legitimate source improperly shifted burden of proof to the defendant).

Both of these presumptions provisions were contained in the "Forfeiture Act of 1996." The definition of "shell corporation" is taken from Financial Action Task Force recommendation 13 which defines "domiciliary companies," a diplomatic term for shell corporations.

SEC. 2041. IMPORT AND EXPORT OF CHEMICALS USED TO PRODUCE ILLICIT DRUGS.

This provision gives the Drug Enforcement Administration the authority to require that exporters of certain listed chemicals to drug producing areas of the world document to DEA the ultimate consignee and use of the listed chemical. This provision clarifies DEA's authority to require advance notification of imports and exports including identifying the importer in the country of destination.

If the importer is not the end user of the listed chemical, establishing the bona fides of the importer does not mean that the listed chemical will not be diverted. In the case of specific listed chemicals such as those essential for the production of cocaine that are shipped to the Andean region, it is necessary to have the authority to determine the final destination and use of the chemical. This proposal will authorize DEA to require by regulation additional information concerning the ultimate

consignee and use of shipment of listed chemicals. The U.S. exporter involved in the transaction would be required to provide this information in addition to the information which is routinely supplied to DEA. This provision will also provide DEA with the authority to require advance notification on all imports of certain chemicals which are of greater concern to the agency. Examples of this would be ephedrine and pseudo-ephedrine which are immediate precursors for methamphetamine.

This section will also correct a technical omission from previous legislation by imposing a direct obligation for advance notification of transshipment of listed chemicals through the United States. Currently, the Department of Justice requires this by regulation but has had to rely on its authority to control imports and exports to support the regulation. This section also provides a mechanism for disposition of suspended shipments, and gives the Attorney General injunctive authority under the Import Export Act, two important features not provided by current law.

SEC. 2042. AMENDMENTS OF DRIVE-BY SHOOTING STATUE.

This proposal would amend the so-called drive-by shooting statute, 18 U.S.C. 36, to correct a number of flaws. The provision was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322). No reported cases under it exist.

The first paragraph under subsection (a) would change the title of the offense. The present title is misleading since the offense does not require that the shooting or any conduct emanate from a car or other vehicle.

Section 36 contains a definition of the key term "major drug offense." The second paragraph under subsection (a) proposed here is technical and would amend the citation of the continuing criminal enterprise statute to refer to 21 U.S.C. 848(a), which sets forth the punishment for the CCE offense referred to in section 36(a). The current reference to 21 U.S.C. 848(c) as the punishment provision is wrong since subsection (c) does not punish anything but is merely definitional.

The third paragraph under subsection (a) would consolidate existing paragraphs (a)(2) and (a)(3) of section 36, and in so doing would make these aspects of the definition of "major drug offense" more sensible and clear. Presently, for example, while paragraphs (a)(1) and (a)(3) of section 36 define offenses that are genuinely "major," paragraph (a)(2) incorporates into the definition of "major drug offense" a conspiracy to commit any drug offense, including even a misdemeanor one. This is not consistent with the evident intent and appropriate scope of the statute. Therefore, one change wrought by the amendment is to limit the coverage of conspiracy to conspiracies to violate the major substantive offenses described in 21 U.S.C. 841(b)(1)(A) and 21 U.S.C. 960(b)(1), which involve large quantities of drugs. The amendment would also add attempts to commit such offenses. Lastly, the amendment strikes as vague surplusage the descriptive language in current paragraph (a)(3) that refers to an "offense involving major quantities of drugs".

The fourth paragraph under subsection (a) would add an intent to "kill" to the enumerated "intent" that must accompany the proscribed conduct of shooting into a group in furtherance of a major drug offense. The present statute lists only intent to "intimidate, harass, injure, or maim" but punishes for murders. That being the case, it is necessary and appropriate that an intent to "kill" also be encompassed by the offense. Otherwise, a defendant might defend against a charge of murder by arguing that he did not have an intent merely to intimidate, injure, or maim, as the statute presently provides, but rather an intent to kill. Cf. United States v. Dawlett, 787 F.2d 771 (1st Cir. 1986)(holding that the obstruction of justice statute as then constituted did not reach a case in which a witness was killed since the statute then proscribed only violent acts intended to influence but not prevent testimony).

SUBTITLE C – ANTI-DRUG AND ORGANIZED CRIME

MONEY LAUNDERING ACT

SEC. 2051. ILLEGAL MONEY TRANSMITTING BUSINESSES.

As a recent study by the Treasury Department has revealed, an increasingly popular means of laundering drug proceeds and remitting the proceeds to South American countries and elsewhere involves the use of money transmitting businesses in the United States. For example, cash proceeds of drug trafficking in New York may be deposited with a money transmitter by couriers under the pretext of sending money back to relatives in Colombia. The operation of an illegal money transmitting business is a violation of federal law under 18 U.S.C. § 1960.

The proposal clarifies the scienter requirement in § 1960 to avoid the problems that occurred when the Supreme Court interpreted the currency transaction reporting statutes to require proof that the defendant knew that structuring a cash transaction to avoid the reporting requirements had been made a criminal offense. See Ratzlaf v. United States, 114 S. Ct. 655 (1994). The proposal makes clear that the defendant must know that the money transmitter was unlicensed, and that a license was required by state law. He need not know, however, that the operation of an unlicensed business is a criminal offense.

Also, when Congress enacted § 1960 in 1992, it provided for criminal but not civil forfeiture. The proposal corrects this oversight, and thus allows the government to forfeit property involved in the operation of an illegal money transmitting business even if the perpetrator is a fugitive.

SEC. 2052. RESTRAINT OF ASSETS OF PERSON ARRESTED ABROAD.

This section relates to situations where a person has been arrested in a foreign country and there is a danger that property subject to forfeiture in the United States in connection with the foreign offenses will disappear if it is not immediately restrained. In the case of foreign arrests, it is possible for the property of the arrested person to be transferred out of the United States before U.S. law enforcement officials have received from the foreign country the evidence necessary to support a finding a probable cause for the seizure of the property in accordance with federal law. This situation is most likely to arise in the case of drug traffickers and money launderers whose bank accounts in the United States may be emptied within hours of an arrest by foreign authorities in the Latin America or Europe.

To ensure that property subject to forfeiture in such cases is preserved, the new provision provides for the issuance of an ex parte restraining order upon the application of the Attorney General and a statement that the order is needed to preserve the property while evidence supporting probable cause for seizure is obtained. A party whose property is restrained would have a right to a post-restraint hearing in accordance with Rule 65(b), Fed.R.Civ.P.

SEC. 2053. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.

This section deals with financial records located in foreign jurisdictions that may be material to a claim filed in either a civil or criminal forfeiture case.

It is frequently the case that in order for the government to respond to a claim, it must have access to financial records abroad. For example, in a drug proceeds case where a claimant asserts that the forfeited funds were derived from a legitimate business abroad, the government might need access to foreign bank records to demonstrate in rebuttal that the funds actually came from an account controlled by international drug traffickers or money launderers.

Numerous mutual legal assistance treaties (MLAT's) and other international agreements now in existence provide a mechanism for the government to obtain such records through requests made to a foreign government. In other cases, the government is able to request the records only through letters rogatory.

This proposal deals with the situation that commonly arises where a foreign government declines to make the requested financial records available because of the application of secrecy laws. In such cases, where the claimant is the person protected by the secrecy laws, he or she has it within his or her power to waive the protection of the foreign law to allow the records to be made available to the United States, or to obtain the records him- or herself and turn them over to the government. It would be unreasonable to allow a claimant to file a claim to property in federal court and yet hide behind foreign secrecy laws to prevent the United States from obtaining documents that may be material to the claim. Therefore, proposed subsection 986(d) provides that the refusal of a claimant to waive secrecy

in this situation may result in the dismissal of the claim with prejudice as to the property to which the financial records pertain.

SEC. 2054. LONG-ARM STATUTE FOR FOREIGN MONEY LAUNDERS.

This section amends the civil penalty provision of 18 U.S.C. § 1956(b). The first new provision is a long arm statute that gives the district court jurisdiction over a foreign bank that violates the money laundering statute, provided that the bank maintains an account in the United States and that the bank receives service of process pursuant to the applicable statutes or rules of procedure. The purpose of the provision is to ensure that a bank that violates the money laundering laws of the United States and that conducts banking business through an account in the United States does not escape liability under Section 1956(b) by asserting that its contacts with the United States are not sufficient to satisfy the "minimum contacts" requirements for in personam jurisdiction.

The second provision, modeled on 18 U.S.C. § 1345(b), gives the district court the power to restrain property or take other action necessary to ensure that a defendant in a §1956 action does not dissipate the assets that would be needed to satisfy a judgment under that section.

SEC. 2055. LAUNDERING MONEY THROUGH A FOREIGN BANK.

Section 1956 makes it an offense to conduct a transaction involving a financial institution if the transaction involves criminally derived property. Similarly, section 1957 creates an offense relating to the deposit, withdrawal, transfer or exchange of criminally derived funds "by, to or through a financial institution." For the purposes of both statutes, the term "financial institution" is defined in 31 U.S.C. § 5312. See 18 U.S.C. § 1956(c)(6); 18 U.S.C. § 1957(f).

The definition of "financial institution" in § 5312 excludes foreign banks. Thus, as presently drafted, the government cannot rely on that definition to prosecute an offense under either § 1956 or § 1957 involving a transaction through a foreign bank, even if the offense occurs in part in the United States. For example, if a person in the United States sends criminal proceeds abroad -- say to a Mexican bank -- and launders them through a series of financial transactions, the government could not rely on the definition of a "financial institution" in § 1956(c)(6) to establish that the transaction was a "financial transaction" within the meaning of § 1956(c)(4)(B) (defining a "financial transaction" as a transaction involving the use of a "financial institution"), or that it was a "monetary transaction" within the meaning of § 1957(f) (defining "monetary transaction" as, inter alia, a transaction that would be a "financial transaction" under § 1956(c)(4)(B)).

The amendment closes this loophole by including foreign banks within the definition of "financial institution" in § 1956(c)(6). The definition is the same as the one set forth in 12 U.S.C. § 3101(7) which is already employed in § 1956(c)(7)(B) for another purpose.

SEC. 2056. SPECIFIED UNLAWFUL ACTIVITY FOR MONEY LAUNDERING.

This amendment enlarges the list of foreign crimes for which money laundering prosecutions may be brought in this country when the proceeds of a foreign crime are laundered in the United States. Certain foreign offenses involving violence and bank fraud already have been made predicates for money laundering. Thus the government is already able to prosecute persons who use U.S. financial institutions to launder proceeds generated through the commission of some foreign crimes. By enlarging the list of foreign crimes set forth in the money laundering statute, the proposal makes it possible for the government to exercise this power in cases involving all crimes of violence and crimes as to which the U.S. is under an obligation to extradite or prosecute offenders.

The provision also expands the prosecution authority to include the laundering of the proceeds of frauds against foreign governments or foreign governmental entities and crimes of public corruption. Passage of this amendment would send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities.

SEC. 2057. CRIMINAL FORFEITURE FOR MONEY LAUNDERING CONSPIRACIES.

Current law provides for the forfeiture of property involved in the substantive money laundering offenses set forth in titles 18 and 31. It also provides for the forfeiture of property involved in conspiracies to commit violations of 18 U.S.C. §§ 1956 and 1957 because such conspiracies are charged as violations of § 1956(h). There is no provision, however, for the forfeiture of property involved in conspiracies to violate the title 31 money laundering offenses because such conspiracies are charged as violations of 18 U.S.C. § 371, a statute for which forfeiture is not presently authorized. The amendment plugs this loophole by providing for forfeiture of the property involved in a conspiracy to commit any of the offenses listed in § 982(a)(1) following a criminal conviction on the conspiracy count.

SEC. 2058. SUBPOENAS FOR BANK RECORDS.

This section amends the statute governing subpoenas for bank records in forfeiture cases, 18 U.S.C. § 986, to make it applicable to all § 981 and 982 forfeitures including the provisions added since 1992, as well as civil forfeitures for currency reporting offenses under 31 U.S.C. § 5317(c). The amendment also makes it possible to issue a subpoena before a civil complaint is filed, and strikes a meaningless cross-reference to a non-existent statute, 18 U.S.C. § 985.

SEC. 2059. CHARGING MONEY LAUNDERING AS A COURSE OF CONDUCT.

This amendment allows the government to charge a defendant who engages in a series of money laundering offenses with a single money laundering violation, thus making it unnecessary to charge each individual transaction as a separate count in the indictment, as is the case under current

law. See United States v. Martin, 933 F.2d 609 (8th Cir. 1991) ("it is the individual acts of money laundering which are prohibited..., and not the course of action..."); United States v. Kramer, 73 F.3d 1067 (11th Cir. 1996) ("transfer" under § 1956(a)(2) is not a continuing offense; each transfer is a separate offense); United States v. Smith, 46 F.3d 1223 (1st Cir. 1995) (each transfer of funds is a separate § 1957 offense even though they all flow from a single lump sum and all occur on the same day); United States v. Prescott, 42 F.3d 1165 (8th Cir. 1994) (charging multiple financial transactions as a continuing course of conduct in a single count is duplicitous); United States v. Conley, 826 F. Supp. 1536 (W.D. Pa. 1993) (dismissing duplicitous charge with leave to refile).

The amendment would thus allow money laundering to be charged in the same manner as a mail fraud under 18 U.S.C. § 1341. See United States v. Margiotta, 646 F.2d 729, 733 (2d Cir. 1981) (although it could do so, the government need not charge each mailing as a separate mail fraud count; the essence of the crime is carrying out a single scheme to defraud). It would be necessary, however, for the court to instruct the jury that it had to find, unanimously, that the series of financial transactions constituted a single scheme or continuing course of conduct. See United States v. Mastelotto, 717 F.2d 1238 (9th Cir. 1983) (mail fraud count may encompass a scheme to defraud, but jury must agree that there was a single scheme).

If the government charges a defendant under this provision, the defendant would be liable to a maximum penalty equal to whatever the penalty would be for the commission of a single violation, instead of to separate sentences for each transaction as he would be if the transactions were charged in separate counts. The amendment does not in any way, however, preclude the government from charging each transaction as a separate violation of § 1956(a)(1), (2) or (3) or § 1957 if it elects to do so.

SEC. 2060. VENUE IN MONEY LAUNDERING CASES.

This amendment is intended to resolve the continuing confusion in the courts over the proper venue for a money laundering prosecution.

In United States v. Cabrales, 118 S. Ct. 1772 (1998), the Supreme Court held that a money laundering prosecution may be brought in any district where the financial or monetary transaction takes place, but not in the district where the specified unlawful activity took place, if the financial or monetary transaction occurred wholly in another district. *Id.* (where drug offense occurred in Missouri and financial transaction occurred wholly in Florida, defendant charged with substantive money laundering must be prosecuted in Florida; conspiracy could be charged in either place).

The court suggested, however, that the situation might be different if the defendant had transported the funds from the district where the underlying crime occurred to the district where the financial or monetary transaction was conducted. In that case, the court said, the money laundering offense might be considered a continuing offense. *Id.* ("money laundering . . . arguably might rank as a

'continuing offense,' triable in more than one place, if the launderer acquired the funds in one district and transported them into another district"). Several courts of appeals have ruled that venue is appropriate in the district where the specified unlawful activity occurred in that situation. See United States v. Angotti, 105 F.3d 539 (9th Cir. 1997) (venue is proper where defendant committed the SUA because that is where defendant obtained the money involved in the money laundering transaction); United States v. Abuhouran, 1996 WL 451368 (E.D. Pa. 1996) (same); United States v. Beddow, 957 F.2d 1330 (6th Cir. 1992), reh'g, en banc, den., 1992 U.S. App. LEXIS 5051 (1992) (venue is proper in district where defendant committed the SUA and began movement of the money to the district where it was laundered).

The amendment codifies the suggestion made in the Cabralles decision, making it clear that a substantive money laundering prosecution may be brought in the district where the underlying specified unlawful activity took place if the defendant participated in the movement of the criminal proceeds from that district to the district where the financial or monetary transaction occurred.

Finally, the amendment codifies the present rule that venue for attempts and conspiracies is not limited to the district where the completed offense would have occurred, but will lie in any district where an overt act was committed. See United States v. Angotti, 105 F.3d 539 (9th Cir. 1997) (venue for § 371 conspiracy to launder money lies in any district where an overt act in furtherance of the conspiracy took place); United States v. Cabrales, 109 F.3d 471 (8th Cir. 1997) (same; even if venue for the substantive money laundering counts would be elsewhere).

SEC. 2061. TECHNICAL AMENDMENT TO RESTORE WIRETAP AUTHORITY FOR CERTAIN MONEY LAUNDERING OFFENSES.

In 1994, the penalty provision for certain currency transaction reporting offenses, including "structuring," were moved from 31 U.S.C. § 5322 to § 5324. The amendment simply conforms the wiretap statute to contain the appropriate cross-reference.

SEC. 2062. KNOWLEDGE THAT PROPERTY IS THE PROCEEDS OF A FELONY.

Section 1956(c)(1) provides that a person must know that the property involved in a money laundering transaction is the proceeds of *some* form of unlawful activity, but that the person need not know *which* form. In other words, as long as he knows that the property is derived from a criminal offense of some kind, it is not a defense for the defendant to say, "I didn't realize it was drug money; I thought it was bribe money."

In fact, one court in the Northern District of Ohio has held that the defendant must *know* that the offense is a felony, but that is not correct. Although the offense must in fact be a felony, it is not necessary that the defendant be aware that the legislature has so classified the offense. See United States v. Stavroulakis, 952 F.2d 686, 692 n.2 (2d Cir. 1992), cert. denied, 1992 U.S. LEXIS 2948

(U.S. 1992) (defendant need not know that the underlying activity is unlawful or that it constitutes a felony; it is sufficient for the government to show that the defendant knew that the property was the proceeds of an activity, such as gambling involving more than a certain amount of money, that is defined as a felony under state [or federal] law). The amendment clarifies this point.

SEC. 2063. MONEY PURCHASED ON THE BLACK MARKET.

Much, if not most, of the drug money generated in the United States is sold on the black market peso exchange to South American customers. In this way, the drug trafficker exchanges U.S. dollars for the local currency he needs to pay his employees and continue his drug trafficking operation. *See* "FinCEN Advisory: Colombia Black Market Peso Exchange," November, 1997. One of the best ways to interrupt the recycling of drug money in this fashion is to confiscate the money sold on the black market under the civil forfeiture laws.

Unfortunately, current law allows a third party in possession of laundered drug money to defeat the forfeiture action by asserting that he did not know the money was derived from drug trafficking at the time he purchased it on the peso exchange. In other words, he has no affirmative duty to inquire as to the source of the money or to take any steps to avoid purchasing money derived from illegal activity. *See United States v. Funds Seized From Account Number 20548408 at Baybank, N.A.*, 1995 WL 381659 (D. Mass. 1995) (wealthy Colombian who purchased 182 dollar-denominated money orders totaling \$100,000 was innocent owner; he had no duty to inquire as to source of the money); *United States v. Real Property 874 Gartel Drive*, 79 F.3d 918 (9th Cir. 1996) (in contrast to other innocent owner statutes, claimant in a money laundering case governed by § 981(a)(2) can prevail simply by showing lack of knowledge; there is no requirement that claimant take all reasonable steps to avoid acquiring criminal proceeds); *United States v. \$705,270.00 in U.S. Currency*, 820 F. Supp. 1398, 1402 (S.D. Fla. 1993) (because § 981(a)(2) does not contain a consent prong, the "all reasonable steps" test does not apply).

Indeed, by simply asserting "lack of knowledge," black market customers can defeat efforts to confiscate drug proceeds more easily in money laundering cases than in most other contexts. *See e.g. United States v. One Parcel of Real Estate (1012 Germantown Road)*, 963 F.2d 1496 (11th Cir. 1992) (in drug cases, innocent owner defense requires proof that claimant "took all reasonable steps to prevent illegal use of his property"); *United States v. Property Identified as 1813 15th Street, N.W.*, 956 F. Supp. 1029 (D.D.C. 1997) (taking "some" steps to bar drug dealers from property not sufficient; landlady must take all reasonable steps, such as evicting tenants convicted of drug offenses); *United States v. 5.382 Acres*, 871 F. Supp. 880 (W.D. Va. 1994) ("Unless an owner with knowledge can prove every action, reasonable under the circumstances, was taken to curtail drug-related activity, consent is inferred and the property is subject to forfeiture.").

The section takes the standard used in drug cases and other contexts and applies it to money laundering. It requires that a person who buys laundered drug money on the black market must

establish that he was a *bona fide* purchaser who took all reasonable affirmative steps to make sure that he was not buying property derived from a criminal offense.

SEC. 2064. FUGITIVE DISENTITLEMENT.

This provision authorizes the district court to bar a fugitive from justice from attempting to hide behind his fugitive status while contesting a civil forfeiture action against his property. It reinstates what is commonly known as the fugitive disentitlement doctrine under which "a person who is a fugitive from justice may not use the resources of the civil legal system while disregarding its lawful orders in a related criminal action." United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) (applying the doctrine to bar an appellant who was resisting extradition from participating in related civil forfeiture proceedings).

Eng and similar cases in other circuits applied a judicially created rule intended to protect the integrity of the judicial process from abuse by a fugitive in a criminal case. But in Degen v. United States, 116 S. Ct. 1777 (1996), the Supreme Court held that as a judge-made rule, the sanction of absolute disentitlement goes too far. In the absence of legislative authority to bar a fugitive from filing a claim, courts must resort to other devices to prevent a fugitive from abusing the discovery rules or otherwise taking advantage of his fugitive status in litigating a civil forfeiture case, such as imposing sanctions for failure to comply with discovery orders.

These devices, however, are not adequate to address the problems that arise when fugitives contest forfeiture actions. See United States v. Funds Held in the Name of Wetterer, 17 F. Supp.2d 161 (E.D.N.Y. 1998) (because of Degen, claimant that is *alter ego* of fugitive may file claim challenging forfeiture of bank account held by perpetrator of mail fraud/child sex abuse scheme who is resisting extradition in Guatemala). Moreover, if a forfeiture action involves a business, perishable property, or any other asset whose value depreciates with time, the government cannot simply stay the civil case until the fugitive is apprehended. In such cases, delay is prejudicial to the government, "for if its forfeiture claims are good, its right to the properties is immediate." Degen, 116 S. Ct. at 1778. Finally, as the Supreme Court acknowledged, the law should not encourage "the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored." Id.

This provision addresses these concerns through legislation, thus imposing the straightforward sanction of disentitlement that judges by themselves are not able to impose without statutory authorization. Under the proposal, the doctrine would apply in all civil forfeiture cases such as Eng as well as the ancillary proceedings in criminal forfeitures in which fugitive third-parties might otherwise be able to file claims. For the purposes of this provision, a fugitive from justice would be any person who, in order to avoid criminal prosecution, purposely leaves the jurisdiction or decides not to return to it. See 951 F.2d at 464.

SEC. 2065. MONEY LAUNDERING TRANSACTIONS; COMMINGLED ACCOUNTS.

This amendment is intended to resolve confusion regarding the requirement in 18 U.S.C. § 1957 that the monetary transaction involve more than \$10,000 in criminally derived property.

The first issue concerns cases in which more than \$10,000 in criminally derived property is deposited into a bank account and commingled with other funds before an amount in excess of \$10,000 is withdrawn. The government is only required to prove that the withdrawal involved at least \$10,000 in criminally derived funds. See United States v. Adams, 74 F.3d 1093 (11th Cir. 1996) (at least \$10,000 of the property involved in the monetary transaction must be traceable to SUA proceeds). It is not required to prove that all of the money withdrawn from the account was tainted money. See United States v. Johnson, 971 F.2d 562 (10th Cir. 1992) (in the context of a withdrawal, government is not required to prove that no untainted funds were commingled with the unlawful proceeds); United States v. Sokolow, 81 F.3d 397 (3rd Cir. 1996) (where \$20,000 in dirty money was commingled, government was not required to trace to prove that all money involved in the transaction was dirty; following Johnson). But the courts differ over what proof is required that the \$10,000 threshold has been reached.

If the defendant withdraws more than \$10,000 from the account, the government will argue that the transaction involves at least \$10,000 in tainted proceeds because the tainted funds are the first to be withdrawn (i.e., a tainted property is "first out" rule). The defendant, on the other hand, will argue that the transfer involved only clean money because the illegal money remained in the account (i.e., a tainted property is "last out" rule).

The government's interpretation is supported by the Second Circuit's decision in United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986), which held, for forfeiture purposes, that the government may establish that tainted funds were involved in a transfer from a bank account by employing a "first out" rule. But the Ninth Circuit has held, for Section 1957 purposes, that the defendant is entitled to a presumption that criminally derived property is the "last out," so that a withdrawal in excess of \$10,000 may not satisfy the \$10,000 requirement if more than \$10,000 in clean money was in the account at the time of the withdrawal). See United States v. Rutgard, 108 F.3d 1041 (9th Cir. 1997).

The amendment resolves this controversy by including within the definitions in Section 1957(f) a clear statement that any withdrawal of funds in excess of \$10,000 from an account containing more than \$10,000 in commingled funds will be considered a transaction involving more than \$10,000 in criminally derived property.

To avoid creating any inference that a different rule would apply to Section 1956 cases, a parallel amendment is made to the definitions in that statute codifying the unanimous rule that for Section 1956 purposes, any transaction involving an account containing commingled funds is considered to be

one involving SUA proceeds. See United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997) (where defendant deposited \$451,000 in fraud proceeds and \$2.2 million in other funds into accounts, subsequent transfers from those accounts 'involved' SUA proceeds); United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995) (government met burden of showing check drawn on account involved SUA proceeds by showing that \$80,000 in proceeds were deposited into the account and commingled with other funds; strict tracing not required); United States v. Rodriguez, 53 F.3d 1439 (7th Cir. 1995) (purchase of house involved SUA proceeds even though only \$1,000 of \$17,000 payment was drug money); United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994) ("it is sufficient to prove that the funds in question came from an account in which tainted proceeds were commingled with other funds"); United States v. English, 92 F.3d 909 (9th Cir. 1996) (following Garcia); United States v. Marbella, 73 F.3d 1508 (9th Cir. 1996) (once SUA proceeds are commingled in an account, any withdrawal from that account involves proceeds, even if the balance in the account drops to zero between the time the proceeds are deposited and the time of the withdrawal); United States v. Bencs, 28 F.3d 555 (6th Cir. 1994) (money launderer may not escape liability by commingling drug proceeds with other assets); United States v. Jackson, 935 F.2d 832, 840 (7th Cir. 1991) (transactions drawn on account containing commingled funds "involve" proceeds of SUA); United States v. Jackson, 983 F.2d 757 (7th Cir. 1993) (jury instruction that "substantial portion" of laundered funds had to be SUA proceeds was unnecessarily favorable to defendant; only some of commingled funds need be proceeds).

The other issue addressed by the amendment is whether, to satisfy the \$10,000 threshold, the government may aggregate a series of related sub-\$10,000 transactions. There is no case law on this issue; however, it arises repeatedly and should be resolved by making it clear that aggregation to meet the \$10,000 threshold is permitted, provided that the individual transactions "are closely related to each other in terms of time, the identity of the parties involved, the nature of the transactions and the manner in which they are conducted." For example, if a person wires \$9,000 out of his account on each of three successive days, and the manner in which the transfers are made suggests that they were intended to accomplish the transfer of more than \$10,000, the defendant would not be able to escape liability under Section 1957 by hiding behind the \$10,000 threshold.

SEC. 2066. FUNGIBLE PROPERTY IN BANK ACCOUNTS.

This amendment makes several clarifying changes concerning the forfeiture of fungible property in civil cases when no property traceable to the underlying offense is available.

First, and most important, amendment extends the period within which the forfeiture action must be commenced for the provisions of § 984 to apply from one year to two years, which is consistent with the Senate-passed version of the statute when it was enacted in 1992. The one-year limitations period has proven to be too short, particularly in cases involving undercover investigations where the government must refrain from seizing the laundered money until the investigation is over to avoid jeopardizing the case. See United States v. All Funds Presently on Deposit at American Express Bank, 832 F. Supp. 542 (E.D.N.Y. 1993) (seized property returned to Ecuadorian money exchanger despite

evidence of drug trafficking because seizure occurred 18 months after money laundering and outside of § 984's one-year limitations period). The amendment makes clear that for the purposes of the limitations period, a forfeiture action is "commenced" either when the property is seized or when an arrest in rem is served.

The amendment also makes clarifying changes that are necessary to make sure that the provisions of § 984, including the limitations set forth in the statute, only apply to instances where the government seeks to invoke the fungible property provisions of the statute because neither the property actually involved in the offense giving rise to forfeiture nor any property traceable to it is available for forfeiture. If such property is available, there is no need to invoke § 984 and none of its provisions would apply. This answers the question raised in Marine Midland Bank, N.A. v. United States, 11 F.3d 1119 (2d Cir. 1993), where the appellate court remanded a case to determine if the limitations relating to interbank accounts in § 984 applied when property traceable to a money laundering offense was forfeited under § 981.

The amendments also make clear that § 984 does not abrogate any other applicable theory of forfeiture. See American Express Bank which suggested, in dicta, that § 984 was intended to abrogate the case law authorizing the forfeiture of facilitating property under § 981(a)(1)(A). Under § 984, a court may forfeit fungible property in place of any property forfeitable under any civil forfeiture statute, including facilitating property if the forfeiture of such property is authorized by another statute. See United States v. All Monies, 754 F. Supp. 1467, 1473 (D. Haw. 1991) (facilitating property is forfeitable in money laundering cases under § 981(a)(1)(A); United States v. Certain Accounts, 795 F. Supp. 391, 396 (S.D. Fla. 1992) (same).

The amendment also makes the statute applicable to all civil forfeitures. See American Express Bank (questioning failure to make § 984 applicable to drug offenses).

Finally, the amendment provides that a "financial institution" includes a foreign bank so that interbank accounts maintained by foreign banks are covered by the provision exempting interbank accounts from the application of the rule permitting the forfeiture of fungible property.

The retroactive application provision in subsection (b) makes the amendments applicable to cases arising since the original effective date of Section 984.

SEC. 2067. DISCOVERY PROCEDURE FOR LOCATING LAUNDERED MONEY.

This section amends 21 U.S.C. § 853(m) to give the court the discretion to exclude a convicted defendant from a post-trial deposition conducted for the purpose of locating the defendant's forfeited assets if the defendant's presence could frustrate the purpose of the inquiry. The provision is necessary because otherwise, under Rule 15 of the Federal Rules of Criminal Procedure, the defendant would have the right to be present at a deposition conducted for the purpose of locating assets that have been

declared forfeited. United States v. Saccoccia, 913 F. Supp. 129 (D.R.I. 1996). If, for example, the assets include funds in bank accounts that the defendant had hoped to conceal from the government and the court, the defendant's presence at the deposition could frustrate its purpose because upon learning that the government had discovered the location of his secret accounts, the defendant could quickly take steps to remove the assets before government agents could recover them.

SEC. 2068. REPATRIATION OF PROPERTY PLACED BEYOND THE JURISDICTION OF THE COURT.

In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of "substitute assets" when the defendant has placed the property otherwise subject to forfeiture "beyond the jurisdiction of the court." Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

Other countries, such as the United Kingdom, address this problem by authorizing the court to order the defendant to repatriate the property that he has sent abroad. Because the sentencing court has in personam jurisdiction over the defendant, it can use this authority to reach assets that are otherwise beyond the jurisdiction of the court, as long as the defendant retains control of the property.

This section amends 21 U.S.C. § 853 to authorize the sentencing court to issue a repatriation order either post-trial as part of the criminal sentence and judgment, or pre-trial pursuant to the court's authority under 21 U.S.C. § 853(e) to restrain property, including substitute assets, so that they will be available for forfeiture. See United States v. Sellers, 848 F. Supp. 73, 77 (E.D. La. 1994) (pre-trial repatriation order). Failure to comply with such an order would be punishable as a contempt of court, or it could result in a sentencing enhancement, such as a longer prison term, under the U.S. Sentencing Guidelines, or both. The government has the authority to grant use immunity to a defendant for the act of repatriating property to the United States pre-trial or while an appeal was pending if such act would tend to implicate the defendant in a criminal act in violation of the Fifth Amendment. Id. (no 5th Amendment violation if government does not use evidence of the repatriation in its case in chief).

SEC. 2069. LAUNDERING PROCEEDS OF TERRORISM.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) made it a criminal offense to provide material support or resources to an organization designated by the Secretary of State as a "foreign terrorist organization." In other words, the new offense, which was codified at 18 U.S.C. § 2339B, effectively prohibits terrorist fundraising in the United States by making it a crime to raise money in the United States and to send that money abroad to a foreign terrorist organization.

Section 2339B, however, was not added to the list of money laundering predicate offenses in Section 1956(c)(7)(D). This is a serious omission. While it is now an offense to *raise* money for the material support of a foreign terrorist organization, it is not an offense to *launder* the money to conceal or disguise its source, location, ownership, nature or control. Obviously, persons intent on providing material support to foreign terrorist organizations will take steps to conceal or disguise any funds raised in violation of Section 2339B. Making such activity a violation of the money laundering statute will give law enforcement a valuable weapon to use against them. Accordingly, this amendment adds § 2339B to the list of money laundering predicates.

SEC. 2070. BULK CASH SMUGGLING.

As recent Congressional hearings and investigative reports in the press have revealed,⁵ currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses, as well as income not reported for income tax purposes — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

Presently, the only law enforcement weapon against such smuggling is Section 5316 of Title 31, United States Code, which makes it an offense to transport more than \$10,000 in currency or monetary instruments into, or out of, the United States without filing a report with the United States Customs Service. The effectiveness of § 5316 as a law enforcement tool has been diminished, however, by a recent Supreme Court decision. In United States v. Bajakajian, 118 S. Ct. 2028 (1998), the Supreme Court held that § 5316 constitutes a mere reporting violation, which is not a serious offense for purposes of the Excessive Fines Clause of the Eighth Amendment. Accordingly, confiscation of the full amount of the smuggled currency is unconstitutional, even if the smuggler took elaborate steps to conceal the currency and otherwise obstruct justice.

Confiscation of the smuggled currency is, of course, the most effective weapon that can be employed against these smugglers. Accordingly, in response to the Bajakajian decision, the Department of Justice proposed making the act of bulk cash smuggling itself a criminal offense, and to authorize the imposition of the full range of civil and criminal sanctions when the offense is discovered. Because the act of concealing currency for the purpose of smuggling it out of the United States is inherently more serious than simply failing to file a Customs report, strong and meaningful sanctions, such as confiscation of the smuggled currency, are likely to withstand Eighth Amendment challenges to the new statute.

⁵ See “Dirty Money,” *The Bergen Record*, May 31, 1998 p.1; *id.* June 7, 1998 p.1; *id.* June 14, 1998 p.1.

The new offense, which would be codified at 31 U.S.C. § 5331, would make it an offense for anyone to knowingly conceal more than \$10,000 in currency or other monetary instruments on his person or in any conveyance, article of luggage, merchandise or other container, and to transport or attempt to transport that currency across the border with the intent to avoid the reporting requirements in Section 5316. In other words, the offense has three elements: 1) concealment; 2) transportation (or attempted transportation); and 3) specific intent to evade filing a complete and accurate report with the Customs Service.

The statute is intended to apply to persons who commit any of a wide variety of smuggling offenses involving bulk cash — from the money brokers for the drug cartels who stuff \$20 bills into trucks bound for Mexico or appliances being exported to Colombia, to couriers who attempt to cross the border with currency concealed in their luggage. It would also apply to efforts to move money into or out of the United States at places other than ports of entry where CMIR reports are customarily filed. In other words, unlike the CMIR statute, which only applies once the duty to file the Customs report has been triggered, Section 5331 would apply to a person who had not yet reached the border, or was traveling at a place other than a port of entry, but was traveling (or intending to travel) toward the border with the intent to cross it, and had already concealed the money with the intent to evade the reporting requirement.

The penalty section provides for incarceration of up to 5 years. In addition, and in lieu of any criminal fine, the penalty section authorizes the confiscation of the smuggled money in accordance with the usual procedures for criminal and civil forfeiture. (The civil forfeiture provisions are essential to permit confiscation of discovered currency in cases where the smuggler is not found, is a fugitive, or is not the legal owner of the money; the innocent owner provisions of 18 U.S.C. § 981(a)(2) would, however, protect innocent owners of smuggled money.) Confiscation of smuggled goods has been regarded as the appropriate penalty for smuggling offenses since the first Customs laws were enacted in the 18th Century. To address concerns that such confiscation is a blunt instrument that should be mitigated in some circumstances to avoid a hardship, the bill explicitly authorizes courts to mitigate forfeitures of currency involved in currency reporting offenses to avoid Eighth Amendment violations by considering a range of aggravating and mitigating circumstances. Those circumstances include the value of the currency or other monetary instruments involved in the offense; efforts by the person committing the offense to structure currency transactions, conceal property or otherwise obstruct justice; and whether the offense is part of a pattern of repeated violations.

It must be stressed, however, that bulk cash smuggling is an inherently more serious offense than simply failing to file a Customs report. Because the constitutionality of a forfeiture is dependent on the “gravity of the offense” under *Bajakajian*, it is anticipated that the full forfeiture of smuggled money will withstand constitutional scrutiny in most cases. For the confiscation to be reduced at all, the smuggler will have to show that the money was derived from a legitimate source and not intended to be used for any unlawful purpose. Even then, the court’s duty will be to reduce the amount of confiscation to the maximum that would be permitted in accordance with the Eighth Amendment and the aggravating and mitigating factors set forth in the statute.

Subsection (e) of the bill makes conforming amendments to the existing criminal and civil forfeiture provisions for the reporting and structuring violations in Title 31. Its purpose is simply to put all of these provisions in one place (e.g. by moving some of the existing forfeiture provisions for currency reporting violations from title 18 to title 31 and combining them with the provisions that are already codified at 31 U.S.C. § 5317(c)), and to set forth rules for mitigating the forfeitures to avoid constitutional violations in accordance with *Bajakajian*. This is necessary to address the concern expressed by the Court in *Bajakajian* that Congress had not made it clear that trial courts are authorized to reduce forfeitures down to the maximum level permissible to avoid violating the Excessive Fines Clause when a statute, on its face, appears to authorize only the full amount of structured or unreported currency.

Again, this does not imply that such forfeitures must be reduced in all cases. In structuring cases, for example, a pattern of repeated conduct over a period of time would likely support the confiscation of the full amount of structured currency irrespective of whether the defendant met his burden of showing that the property was derived from a legitimate source and was not intended to be used for any unlawful purpose.

SEC. 2071. CURRENCY COURIERS.

An essential component of the money laundering cycle in drug cases is the consolidation of cash proceeds of drug sales at a collection point. Typically, money laundering organizations employ couriers to pick-up cash at various locations and transport it to another location. A number of recent cases illustrate this process. See United States v. \$141,770.00 in U.S. Currency, 157 F.3d 600 (8th Cir. 1998) (currency packaged in three-layers of zip-lock bags wrapped in fabric-softener sheets found in hidden vehicle compartment); United States v. \$189,825.00 in U.S. Currency, 8 F. Supp.2d 1300 (N.D. Okla. 1998) (currency bundled and hidden in gas tank); United States v. \$206,323.56 in U.S. Currency, 998 F. Supp. 693 (S.D. W.Va. 1998) (courier flees during highway stop when drug dog detects concealed currency); United States v. \$94,010 U.S. Currency, 1998 WL 567837 (W.D.N.Y. 1998) (currency concealed in false compartment).

The common elements in these cases include the transportation of a large quantity of currency, bundled in street denominations and concealed in a vehicle, on an interstate or other major highway, by a person or persons who disclaim any knowledge of where the currency came from or where it is to be delivered. Yet under current law, the person transporting the currency may not be guilty of any money laundering offense. *See United States v. Puig-Infante*, 19 F.3d 929 (5th Cir. 1994) (simply transporting drug proceeds from Fla. to Tex. not a money laundering offense).

This section amends the money laundering statute to make it an offense for anyone to transport more than \$10,000 in currency concealed in a vehicle traveling in interstate commerce (e.g. on an interstate highway) knowing that the currency was derived from some kind of unlawful activity, or knowing that the currency was intended to be used to promote such activity. The courier's willful blindness regarding the source or intended use of the currency would be sufficient to establish the requisite knowledge.

SEC. 2072. VIOLATIONS OF SECTION 6050I.

Sections 981 and 982 are the civil and criminal forfeiture statutes pertaining to money laundering. Presently, they provide for forfeiture for money laundering violations under the Bank Secrecy Act (31 U.S.C. § 5311 *et seq.*) and the Money Laundering Control Act (18 U.S.C. §§ 1956-57). The amendment would add Section 6050I of the Internal Revenue Code to this list in both statutes.

Section 6050I of the Internal Revenue Code of 1986 is the statute that requires any trade or business receiving more than \$10,000 in cash to report the transaction to the IRS on Form 8300. Subsection (f) makes it an offense to structure a transaction with the intent to avoid the filing of such form. Thus, Section 6050I is the counterpart to 31 U.S.C. §§ 5313 and 5324 which require the filing of CTR and CMIR forms by financial institutions whenever a \$10,000 cash transaction takes place, and by other persons whenever they send more than \$10,000 in currency into or out of the United States. Including a reference to Section 6050I in Sections 981 and 982 thus means that violations of the Form 8300 requirement will be treated the same as CTR and CMIR violations for forfeiture purposes.

SEC. 2073. FOREIGN JUDGMENTS AGAINST CRIMINALLY DERIVED PROPERTY.

The United States was the eighth country to ratify the United Nations Convention Against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter the Vienna Convention), and has been under an obligation to meet the Convention's requirements since the treaty went into effect on November 11, 1990.

Article V of the Vienna Convention requires the member nations (the Parties) to enact legislation providing for the forfeiture of proceeds and instrumentalities of drug trafficking and drug-related money laundering offenses. Specifically, paragraph 1(a) of Article V says that each Party shall adopt measures authorizing the forfeiture of "proceeds derived from offenses established in accordance with article 3, paragraph 1, [which defines the predicate drug and drug-related money laundering offenses], or property the value of which corresponds to that of such proceeds."

The United States is in full compliance with these requirements insofar as they relate to domestic forfeitures. The drug and money laundering forfeiture statutes enacted by Congress since 1978 authorize the forfeiture of both drug proceeds and property involved in money laundering offenses where the underlying crime is committed in the United States. The substitute assets provisions of these statutes permit the forfeiture of property of "equivalent value" when the property traceable to the criminal offense is unavailable. See 21 U.S.C. § 853(p). Indeed, these statutes frequently serve as models for other Parties seeking to comply with the Vienna Convention's requirements. Additional legislation, however, will support our compliance with the Convention's international forfeiture obligations.

Under Article V, a Party must provide for the forfeiture of drug proceeds derived from an offense occurring in another country by providing forfeiture assistance to a Party in whose jurisdiction the underlying drug or money laundering offense occurred. This obligation applies both to the drug proceeds themselves and to property of equivalent value. Under 18 U.S.C. § 981(a)(1)(B), the United States can initiate a civil action against foreign drug proceeds that would result in the seizure and confiscation of such property. But because that statute is a civil in rem statute, it does not authorize the forfeiture of substitute assets of equivalent value.

The proposed statute is intended reinforce our compliance with the Vienna Convention in this regard by giving our treaty partners access to our courts for enforcement of their forfeiture judgments. Under the proposal, once a defendant is convicted of a drug trafficking or money laundering offense in a foreign country and an order of forfeiture is entered against him, the foreign country, as the Party requesting assistance under the Vienna Convention, would file a civil action as a plaintiff in federal court seeking enforcement of the judgment against assets that may be found in the United States. The Requesting Party, however, would not be allowed to file for enforcement without approval from the United States Department of Justice, thereby permitting the United States to screen out requests that are factually deficient or based on unacceptable foreign proceedings.

The concept of placing the Requesting Party in the posture of a plaintiff seeking enforcement of a judgment is drawn from Canada's Mutual Legal Assistance in Criminal Matters Act. Section 9 of the Act provides, in pertinent part:

Where the Minister [of Justice] approves a request of a foreign state to enforce the payment of a fine imposed in respect of an offense by a court of criminal jurisdiction

of the foreign state, a court in Canada has jurisdiction to enforce the payment of the fine and the fine is recoverable in civil proceedings instituted by the foreign state, as if the fine had been imposed by a court in Canada.

The Justice Department has been informed by Canadian Justice Ministry authorities that, although this provision has not yet been applied, it is expected to cover foreign criminal forfeiture orders. Canada views Section 9 as part of its response to the Vienna Convention.

Enactment of this proposal would bring the United States into line with an important trend in international law enforcement while preserving our in rem/in personam distinctions and without requiring the government to become a party to the enforcement of a foreign order. Laws providing for the enforcement of foreign confiscation orders have been enacted by a number of jurisdictions, including Australia, Denmark, Hong Kong, Japan, the Netherlands, Singapore, and the United Kingdom. We can anticipate that more countries will enact laws to give full faith and credit to their treaty partners' "equivalent value" forfeiture orders. If we expect such countries to enforce our forfeiture orders against substitute assets located abroad, we must be prepared to render reciprocal assistance.

SEC. 2074. PROCEEDS OF FOREIGN CRIMES.

This section is a parallel provision to the previous section and is also intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C. § 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under § 1956(c)(7)(B).

SEC. 2075. AUTHORIZATION TO SHARE RECOVERED PROPERTY WITH COOPERATING FOREIGN GOVERNMENTS.

Section 981(i) authorizes the sharing of forfeited property with foreign governments in certain circumstances. It currently applies to all civil and criminal forfeitures under 18 U.S.C. §§ 981-82, which are the forfeiture statutes for most federal offenses in Title 18. Older parallel provisions applicable only to drug cases and Customs cases appear in 21 U.S.C. § 881(e)(1)(E) and 19 U.S.C. § 1616a(c)(2), respectively.

The amendment simply extends the existing sharing authority to all other criminal and civil forfeitures, including those undertaken pursuant to RICO, the Immigration and Naturalization Act, the anti-pornography and gambling laws, and other statutes throughout the United States Code. Because the amendment makes the parallel provisions in the drug and customs statutes unnecessary, Section 881(e) is amended to remove the redundancy.

SEC. 2076. RESTORING RECOVERED PROPERTY TO VICTIMS.

Current law authorizes the Attorney General to restore forfeited property to non-owner victims only in one category of cases: those relating to bank fraud. *See* 18 U.S.C. § 981(e). This means that when money is recovered in a money laundering case, it *may not* be used for victim restitution. This section rectifies this unnecessary and inequitable situation.

SEC. 2077. IN PERSONAM JUDGMENTS.

In money laundering cases, the court is authorized, as part of a criminal forfeiture order, to direct the defendant to pay a money judgment equal to the total value of the laundered property. For example, in United States v. Voigt, 89 F.3d 1050, 1084 (3rd Cir. 1996), the Third Circuit held that “when a defendant has been convicted of committing \$1.6 million in money laundering offenses . . . , the government . . . is entitled to \$1.6 million in criminal forfeiture; that amount represents property “involved in” money laundering activity for purposes of § 982(a)(1).” The court went on to explain that a money judgment for the amount of money the defendant laundered does not, by itself, give the government the right to seize any of the defendant’s property. To do that in the criminal case, the government must either trace property directly to the criminal offense, or satisfy the money judgment, in whole or in part, by forfeiting specific substitute assets pursuant to Section 853(p). Nevertheless, “the government continues to be entitled to \$1.6 million in criminal forfeiture,” *id.* at 1088, which the government may seek to enforce in any manner authorized by law. *See also* United States v. Holland, 160 F.3d 377, 380 (7th Cir. 1998) (defendant ordered to pay judgment equal to value of property concealed from bankruptcy court and subsequently laundered); United States v. Sokolow, 1995 WL 113079 at *1 (E.D. Pa. 1995) (because money is fungible, government need not receive the identical money involved in the money laundering offense, so long as the amount involved is known), *aff’d* 81 F.3d 397 (3rd Cir. 1996); United States v. Cleveland, 1997 WL 537707 at *11 (E.D. La. 1997) (government entitled to a money judgment equal to the amount of money defendant laundered in money laundering case, adjusted to eliminate double counting); United States v. Stewart, 1998 WL 720063 (E.D. Pa. 1998) (court enters money judgment for “aggregate sum of all money laundering counts for which defendant was convicted,” adjusted to eliminate double counting); United States v. Henry, 850 F. Supp. 681, 683 (M.D. Tenn. 1994) (court enters money judgment for \$191,206, which was the amount of Medicare fraud proceeds defendant was convicted of laundering), *aff’d* 64 F.3d 664, 1995 WL 478635 (6th Cir. 1995) (Table).

In one of the largest money laundering cases prosecuted to date, Operation Polar Cap, a group of defendants was found guilty of laundering \$136 million, only a fraction of which they personally retained. The balance of the money was sent, in the course of the money laundering operation, to bank accounts in the United States and abroad that were held by South American drug traffickers.

Nevertheless, the defendants were ordered — jointly and severally — to pay a money judgment equal to \$136 million. United States v. Saccoccia, 823 F. Supp. 994, 1006 (D.R.I. 1993), *aff'd* 58 F.3d 754 (1st Cir. 1995); United States v. Saccoccia, 898 F. Supp. 53, 56 (D.R.I. 1995) (the money judgment may be satisfied out of the laundered funds, property traceable thereto, or substitute assets).

In general, when forfeiture is ordered in a criminal case, the court must conduct an “ancillary proceeding” pursuant to 21 U.S.C. § 853(n) to give third-parties an opportunity to establish that they, not the defendant, are the true owners of the forfeited property. In the case of a personal money judgment, however, there can be no third-party interest involved. This amendment simply makes it clear that no ancillary proceeding is necessary in such instances.

SEC. 2078. USE OF SUBPOENAED RECORDS.

Section 3322 of title 18 was enacted in 1989 as part of the FIRREA Act to facilitate the recovery of the proceeds of bank fraud. It allows a federal prosecutor with access to grand jury information in a criminal case to share the information with another federal prosecutor for the purpose of recovering the criminally derived funds. The amendment extends the provisions of Section 3322 by making them applicable in money laundering cases.

SEC. 2079. CRIMINAL FORFEITURE OF PROPERTY IN GOVERNMENT CUSTODY.

This provision is intended to resolve any ambiguity that may exist as to whether a federal agency that has obtained lawful custody of property pursuant to a civil seizure warrant or otherwise may retain custody of the property without obtaining another warrant or restraining order when the property is made the subject of a forfeiture count in a criminal case. *See United States v. Schmitz*, 156 F.R.D. 136 (E.D. Wis. 1994) (once government files criminal forfeiture action, it no longer has authority to retain property seized for civil forfeiture under § 881 unless it obtains a restraining order under § 853(e) or a seizure warrant under § 853(f)). The amendment makes clear that if the property is already in the custody of the government, obtaining a new seizure warrant or restraining order is unnecessary.

SEC. 2080. RESTRAINT OF PROPERTY SUBJECT TO CRIMINAL FORFEITURE.

Sections 413(e)(1) of the Controlled Substances Act permits the pretrial restraint of property subject to criminal forfeiture. Specifically, the statute allows the restraint of property subject to forfeiture under “subsection (a),” which is the provision listing the types of property that may be forfeited upon the conviction of the defendant. An identical provision appears in the RICO statute. *See* 18 U.S.C. § 1963(d)(1). In both cases, the purpose of the statute is to prevent the criminal defendant from disposing of his forfeitable property before or during the trial.

Both statutes also permit the court to order the forfeiture of “substitute assets” if the property subject to forfeiture under subsection (a) is unavailable. *See* 21 U.S.C. § 853(p); 18 U.S.C. § 1963(m). One appellate court has ruled that because substitute assets take the place of property otherwise subject to forfeiture, the substitute property may also be restrained pre-trial under §§ 853(e)(1) and 1963(d)(1). If it were otherwise, the court held, the defendant could defeat the substitute assets provision by disposing of the substitute property after the indictment was returned, but before he was convicted. *See In Re Billman*, 915 F.2d 916 (4th Cir. 1990).

The other appellate courts, however, have interpreted the restraining order provision more narrowly, ruling that since it specifies property subject to forfeiture under “subsection (a),” it does not permit the pre-trial restraint of substitute assets which are forfeitable under subsection (p) (in drug and money laundering cases), and subsection (m) (in RICO cases). *See United States v. Gotti*, ___ F.3d ___, 1998 WL 568974 (2d Cir. Sept. 8, 1998); *United States v. Floyd*, 992 F.2d 498 (5th Cir. 1993); *In Re Assets of Martin*, 1 F.3d 1351 (3rd Cir. 1993); *United States v. Ripinsky*, 20 F.3d 359 (9th Cir. 1994); *United States v. Field*, 62 F.3d 246 (8th Cir. 1995).

Because this issue is a matter of statutory construction, it can be remedied only through the enactment of corrective legislation. For example, in the *Gotti* case, the Second Circuit said that it might be wise to allow the pre-trial restraint of the assets of a suspected racketeer and money launderer who was facing trial on those charges, but in light of the plain language of the present statute, Congress would have to amend the statute to make that possible. *Gotti*, 1998 WL 568974 at *6.

The amendment corrects this loophole by simply adding “or (p)” to the restraining order provision for drug and money laundering cases.

SEC. 2081. INCLUDING TRIBAL GOVERNMENTS IN THE DEFINITION OF A FINANCIAL INSTITUTION.

This amendment is necessary because some financial speculators have suggested to Indian tribes that they may offer “off-shore banking” on Indian reservations by forming tribal banks that may conceal deposit records from the Federal Government. The amendment simply clarifies present law to make it clear that the BSA and the money laundering statutes apply to banks owned or operated by Indian tribes.

SEC. 2082. LIMITATIONS PERIOD FOR CHALLENGES TO CASH SEIZURES BY PRISONERS.

In money laundering cases, cash or other property involved in the money laundering offense is generally seized by a federal agency and forfeited in accordance with the customs laws, which are incorporated by reference into the money laundering forfeiture statute. 18 U.S.C. § 981(d).

Under the customs laws, the seizing agency may forfeit certain property administratively — that is, without referring the case to the United States Attorney — if the forfeiture is uncontested, and if certain criteria regarding the nature and value of the property are met. 19 U.S.C. § 1607. *See Yskamp v. DEA*, ___ F.3d ___, No. 98-6148, 1998 WL 887697 (3rd Cir. Dec.21, 1998). The seizing agency, however, must take steps that are “reasonably calculated” to ensure that persons with an ownership or possessory interest in the property are aware of the forfeiture action and the procedure for contesting it. *See United States v. Randall*, 976 F. Supp. 1442 (M.D. Ala. 1997); *United States v. Schiavo*, 897 F. Supp. 644, 648-49 (D. Mass. 1995).

Generally, a property owner who fails to challenge an administrative forfeiture may not later seek judicial review of the agency’s action. *See Linarez v. Department of Justice*, 2 F.3d 208, 213 (7th Cir. 1993) (“A forfeiture cannot be challenged in district court under any legal theory if the claims could have been raised in an administrative proceeding, but were not.”). But the district courts do have equitable jurisdiction to review administrative forfeitures to ensure that the government took adequate steps to provide proper notice. *United States v. Schinnell*, 80 F.3d 1064 (5th Cir. 1996) (“once the administrative forfeiture was completed, the district court lacked jurisdiction to review the forfeiture except for failure to comply with procedural requirements or to comport with due process”); *see Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647 (2d Cir. 1998); *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995).

Challenges to administrative forfeitures are routinely and almost exclusively filed by federal prisoners who were arrested and incarcerated in connection with the criminal offense that gave rise to the forfeiture action. In such cases, the prisoner was aware that his property was seized at the time of the arrest, but for whatever reason determined that it was not in his interest to challenge the forfeiture. Later, however, the prisoner claims that he did not challenge the forfeiture because the government failed to provide him with adequate notice that the forfeiture was taking place. The usual claims are that the government sent the notice to a home address instead of to the place of incarceration, or sent the notice to a place of incarceration from which the prisoner had been moved, or sent the notice to the correct place of incarceration but failed to ensure that the jailer delivered the notice to the prisoner. In recent years, the number of such cases has been legion. *See e.g. Small v. United States*, 136 F.3d 1334 (D.C. Cir. 1998); *United States v. Clark*, 84 F.3d 378 (10th Cir. 1996); *United States v. Real Property . . . Lido Motel*, 135 F.3d 1312 (9th Cir. 1998); *United States v. Real Property (Tree Top)*, 129 F.3d 1266 (6th Cir. 1997) (Table Case); *Weng v. United States*, 137 F.3d 709 (2nd Cir. 1998); *United States v. Giraldo*, 45 F.3d 509, 511 (1st Cir. 1995); *United States v. One Parcel . . . 13 Maplewood Dr.*, 1997 WL 567945 (D. Mass. 1997); *Whiting v. United States*, ___ F. Supp. 2d ___, 1998 WL 847933 (D. Mass. Nov. 30, 1998); *Aguilar v. United States*, 8 F. Supp.2d 175 (D. Conn. 1998); *Scott v. United States*, 950 F. Supp. 381 (D.D.C. 1996).

This amendment is intended to resolve two issues that have split the courts regarding such prisoner challenges to administrative forfeitures. First, the courts disagree on the statute of limitations on such claims. *Compare Williams v. Drug Enforcement Administration*, 51 F.3d 732 (7th Cir. 1995) (applying two-year statute of limitations but noting that the contours of the exercise of the court's equitable jurisdiction are "largely undefined") with *Polanco v. U.S. Drug Enforcement Administration*, 158 F.3d 647 (2d Cir. 1998) (claimant has 6 years from date he discovered, or had reason to discover, his property was forfeited, not from date it was seized; if claimant never received notice, 6 years runs from end of the 5-year period in which government could have filed a forfeiture action). As the Second Circuit acknowledged, its rule means that a prisoner actually has 11 years from the time his property was seized to file his challenge. Thus, in a recent case in New York, a prisoner whose property was seized at the time he was arrested for drug trafficking in 1990, and who did nothing to contest the forfeiture action at that time, was allowed to file a challenge to the administrative forfeiture in 1997, more than seven years after the seizure took place. *Valencia-Romero v. United States*, 1998 WL 938949 (E.D.N.Y. 1998).

The courts are also divided as to the appropriate remedy when it turns out that the government's efforts to send notice to a prisoner were inadequate. In most cases, the court will simply vacate the declaration of forfeiture and direct the seizing agency to institute a new forfeiture action. *See United States v. Volanty*, 79 F.3d 86, 88 (8th Cir. 1996) (district court did not abuse discretion in permitting government to correct due process violation by vacating administrative forfeiture and instituting new judicial forfeiture proceeding). But the courts recognize that this may not be possible if, as is frequently the case, the prisoner has waited so long to file his challenge to the administrative forfeiture that the statute of limitations bars the government from filing a new claim. In such cases, some courts will address the forfeiture action on the merits without requiring a new complaint to be filed, thus ensuring that the prisoner does not receive a windfall as a result of his delay in challenging the forfeiture. *See United States v. Boero*, 111 F.3d 856 (2d Cir. 1997); *United States v. Marolf*, 973 F. Supp. 1139 (C.D. Cal. 1997); *Kadonsky v. United States*, 1998 WL 119531 (N.D. Tex. 1998). But other courts hold that the property must be returned to the prisoner. *See Clymore v. United States*, ___ F.3d ___, 1999 WL 3366 (10th Cir. Jan. 7, 1999).

The amendment addresses both of these problems by providing that challenges to uncontested administrative forfeitures must be filed within 2 years of the entry of the declaration of forfeiture pursuant to 19 U.S.C. § 1609, and by providing that the remedy in cases where a court finds that the notice was inadequate is to refile the forfeiture complaint without regard to the expiration of the statute of limitations on the forfeiture action. Both provisions, and most of the legislative language, is taken from a proposal introduced in 1997 by Reps. Hyde and Conyers and approved by the House Judiciary Committee. *See* H.Rep. 105-358, 105th Cong., 1st Sess., at p.3. The amendment does not change the current rule that the lack of procedural due process in the administrative forfeiture proceeding is the only ground on which a person may seek judicial review of an uncontested administrative forfeiture. *See United States v. Deninno*, 103 F.3d 82 (10th Cir. 1996) (jurisdiction is limited to adequacy of due process in the administrative forfeiture proceeding); *United States v. Schiavo*, 897 F. Supp. 644, 647