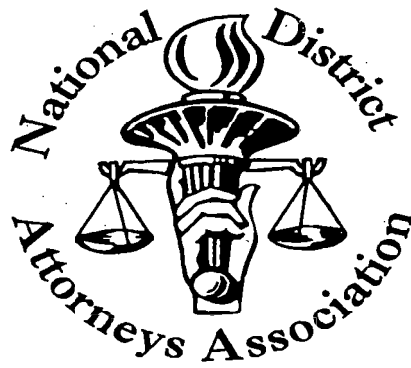




**GOVERNMENT
AFFAIRS UPDATE
MATERIAL**

NATIONAL DISTRICT ATTORNEYS ASSOCIATION

BOARD OF DIRECTORS MEETING

MARCH 1996

GOVERNMENT AFFAIRS MATERIALS

<u>TOPIC</u>	<u>TAB COLOR</u>
HABEAS REFORM	YELLOW
ENVIRONMENTAL AUDIT PRIVILEGE	GREEN
PARENTAL RIGHTS AND RESPONSIBILITIES ACT	PURPLE
MEDICAL CONFIDENTIALITY ACT	PINK
FEDERAL DRUG TESTING PROGRAM	BLUE
TECHNOLOGY AND LAW ENFORCEMENT	GOLD
ASSET FORFEITURE	LIGHT PURPLE
JUVENILE JUSTICE	ORANGE

**PROVIDED SEPERATELY:
ASSET FORFEITURE AND MONEY LAUNDERING DIRECTORY**

MEMORANDUM

TO: NDAA BOARD OF DIRECTORS

RE: HABEAS REFORM

FROM: Jim Polley

DATE: February 29, 1996

The 104th Congress first addressed the issue of habeas reform last year, in the House, as part of the "100 Day Contract." After passage there, further action on the effort languished in the Senate until introduction of the Administration's anti-terrorism bill. Habeas reform was added in order to use the anti-terrorism bill as a vehicle to insure passage and signature by the President. Passed in mid-summer, the combined bill moved to the House where it has been stalled ever since.

Initially the House bill only addressed the anti-terrorism initiatives, in retrospect a tactical error. In a strange union, the NRA and the ACLU combined to fight against the anti-terrorism bill as being intrusive on the lives of private citizens. This is a double win for the ACLU since it also ties up the habeas effort. Victims groups and law enforcement organizations began an effort to convince their Representative to support the anti-terrorism/habeas bill.

When the House returned from fall recess, negotiations began on finding a compromise to the stalled anti-terrorism bill. Both the conservative Republicans and the liberal Democrats objected to the proposal believing that it provided too much police intrusion into private concerns. The delay in solving the anti-terrorism problem jeopardized passage of the habeas reform in this session of the Congress. NDAA was provided with a list of 55 Republican members of the House who opposed the bill and NDAA President Barnes wrote each a letter, with information copies to NDAA state directors and state prosecutor coordinators, urging that they continue to seek a compromise on the anti-terrorism effort to gain passage of habeas reform. Congressman Barr, from Georgia, identified as one of the leaders of the hold-outs was contacted by former NDAA President Charron to insure that he fully understood the stakes involved.

The impasse on the Houses's anti-terrorism bill was finally breached by Mr Hyde and Mr Barr with a combined habeas and anti-terrorism bill. This included a "weakened" anti-terrorism bill, habeas reform, federal victim restitution and alien criminal deportation. The latter two had previously passed the House and victim restitution has passed in the Senate. The "weakened" anti-terrorism measures are more in line with the Senate version and the additional provisions on criminal alien deportation and victim restitution should prove no obstacle to passing the package of legislation in both houses.

Hesitant to bring the issue to the floor of the House for a vote the issue was delayed pending the appropriations and budget fight. In an effort to make some progress, some of the provisions of the anti-terrorism bill were included in an immigration reform measure but were defeated in committee. Then, as part of the appropriations and budget battles habeas reform was added to the bill to raise the debt ceiling but was vetoed by the President. Following that, further action on the anti-terrorism/habeas effort was delayed because of the conflicts over appropriations.

Then the vote was been put off until this year. The House leadership still believed it lacked the votes to get the combined legislation passed. Part of the hesitancy was based on the fear that the effort would take on a new dimension as the campaign to end gun control heated up. There was a distinct possibility that repeal of many of the gun laws could be added as a "third leg" to the habeas and anti-terrorism bill. This combined bill would most likely be defeated in the Senate and, with the added gun issue, would most certainly get a Presidential veto. While this has not transpired to date the threat has not disappeared.

Now the House leadership has "pencilled" in the week of March 11 as the time to vote on habeas reform and the anti-terrorism provisions (see attached article). The proponents of the bill are concerned that the anniversary of the Oklahoma bombing will come-and-go and the anti-terrorism bill will loose its momentum; another serious terrorism threat - the Atlanta Olympic Games- is on the horizon and it would be short sighted of the Congress to lose sight of this very real target. On the other hand the House leadership is still not sure they have the votes to be successful in bring the legislation to the floor of the House. All who follow the bill are in agreement on thing - **this will be a one vote effort**; if it fails then the anti-terrorism bill with what ever else is attached is dead. From the perspective of NDAA this is still the only viable bill to get habeas passed.

There is a possibility that other crime related provisions may be attached to the habeas/anti-terrorism bill. These could include the legislation limiting frivolous prisoner suits, legislation limiting federal intervention in state and local prisons and jails, and legislation mandating victim restitution. These have all passed one or both Houses at one point or another. By attaching these to the habeas/anti-terrorism bill the thought is to give something to everyone.

To support this initiative, NDAA President Barnes has sent every local prosecutor, whether or not a member of NDAA, a letter urging their support and has sent every member of the House a letter urging passage of the bill.

Although Gingrich vows 'no vote'

ARMEY SETS DEBATE ON ANTI-TERRORISM LEGISLATION

Although House Speaker Newt Gingrich (R-GA) told a group of constituents the issue would "not be brought up this year," Majority Leader Richard Armey (R-TX) has scheduled a vote during the week of March 11 on a controversial anti-terrorism bill. The legislation, introduced by Rep. Bob Barr (R-GA) after the Oklahoma City bombing, requires stricter penalties for terrorist activities and gives the government more powers in tracking down suspected terrorist groups.

Sources close to the issue, however, say Armey put the bill on the calendar to take a whip count and that the leader has no plans to bring it to the floor. Gingrich and Armey scrapped plans to vote on the bill in December after several conservative GOP members, as well as liberal Democrats, objected to the legislation.

Gingrich, according to informed sources, last week told a group of constituents at a Georgia town meeting that the issue would not be brought to the House floor. Several audience members questioned the speaker about the issue and expressed their disappointment in his support of the bill (H.R. 2703), says a source at Gun Owners of America, a group opposed to the bill. The group sent flyers "to a few thousand of his closest neighbors" informing them of Gingrich's stance on the issue. "He got jumped pretty hard on the issue," according to a source with the group who attended the meeting. "They came down on him pretty hard."

If the bill is debated on the floor, Hill sources members will attempt to add more than 20 amendments, including a provision by Rep. John Conyers (D-MI) which would serve as a substitute to the bill.

Opponents of the bill, including an unusual coalition of the National Rifle Association, American Civil Liberties Union and the CATO Institute, worry that any House bill would be swept aside during conference for more strident Senate proposals. "The important areas would move to the Senate side," predicts a source at CATO.

Terrifying terror legislation?

DAVID KOPEL

Soon the House of Representatives will vote on an "anti-terrorism" bill. If the current bill becomes law, the American people will suffer a profound loss of liberty, for no real gain in their security.

It is astounding to see the 104th Congress move to expand the power and intrusiveness of the federal government. These are the same Republicans sent to Congress to reduce the federal government's erosion of individual rights. Politicians who think they will win votes by passing a bill with the word "terrorism" in the title will be in for a rude surprise when they learn what's really behind the curtain.

First, the bill authorizes federal law enforcement agents to gather personal "information" — such as reports from credit bureaus, employment records and travel information — without first obtaining a court order, and without even a suspicion that the individual is involved in criminal activity. This provision will turn Uncle Sam into Big Brother.

Second, the bill gives the president the power to label a group a "terrorist organization" and make it a federal felony to support the legal activities of that group. If a president had used this new power to label Nelson Mandela's African National Congress "terrorist" during the time it was engaged in a violent revolutionary war against the apartheid government, it would have been a felony to pay \$5 for a ticket to hear Mr. Mandela give a

speech. It also would have been illegal to send humanitarian aid to the ANC.

Third, illegal wiretaps would be admissible in court, as long as the wiretapping federal official was acting in "good faith." This good faith proviso is a dangerous smoke screen: How do you prove a bureaucrat was acting in bad faith?

Fourth, the bill has become a vehicle for gun control legislation that could never pass this Congress on its own merits. Currently it is illegal to sell someone a firearm if you know it will be used in crime. This bill would apply a five-year mandatory minimum sentence to cases in which the seller allegedly "should" have known that the gun would be used in a crime. This provision would allow anti-gun prosecutors to destroy almost any gun store they chose to target.

Fifth, the bill virtually destroys the right of habeas corpus — the right of persons to ask a federal court to rescue them when they are being held in state prisons in violation of the federal Constitution.

Although the anti-habeas provision is being sold as a measure for speeding up death row executions, it applies to all cases, not just death penalty ones. Recent Supreme Court decisions have already

sharply curtailed habeas petitions, making this provision unnecessary.

Sixth, for the first time in American history, secret evidence — evidence the accused would not even be allowed to see — would be admissible in court. Such evidence could be used in some deportation cases, even those involving legal resident aliens who, if convicted on the basis of "secret evidence,"

would face deportation or federal prison. Once the principle of secret evidence becomes law, it will be hard to resist its application — particularly in cases involving taxes, drugs or unregistered guns — in which informers are commonly used.

Finally, if the House bill passes, it will be sent to a conference committee to be merged with the Senate bill. The Senate bill contains a number of seriously disturbing and dangerous provisions: expanding the use of the military in domestic law enforcement; funding for "Digital Telephony" to make the entire U.S. phone system wiretap-friendly and to allow government officials to tap a phone line without leaving their offices; defining ordinary property and violent crime as "terrorism"; and giving the Bureau of Alcohol, Tobacco and Firearms an extra hundred million dollars, despite the lack of major reforms to prevent another Ruby Ridge or Waco.

The House Republicans wisely resisted President Clinton's demagogic tactics during the health care debate, recognizing that when the American people learned the facts they would not surrender their rights for a false promise of security. They should take a similar stand on this terrorism bill — and then take their case to the American people.

David Kopel is an associate policy analyst with the Cato Institute.



Keeping the Olympics Out of Harm's Way

Security Is Designed To Thwart Terrorism

By Athelia Knight
Washington Post Staff Writer

Athletes aren't the only people training for this summer's Olympic Games in Atlanta. Law enforcement officials are busy conducting simulated terrorist attacks and classes on how to detect explosives and mapping out ways to ensure that the Games, billed as the largest peacetime gathering in history, will be safe.

Olympic participants and visitors will face sophisticated electronic security and surveillance equipment. Athletes and officials traveling in at-risk areas will put their hands under scanning machines that will verify identification. Spectators will pass through metal detectors and won't be allowed to bring in coolers, food or drinks. Concrete barriers will be erected outside of venues and elsewhere to prevent car bombings.

Ever since 11 Israeli athletes were killed at the 1972 Games in Munich, the threat of a terrorist

attack has been a security issue for Olympic organizers. Last year's major terrorist events—the chemical attack in a Tokyo subway in March, the Oklahoma City bombing in April, and the Nov. 4 assassination of Israeli Prime Minister Yitzhak Rabin—have heightened concerns.

"It's not that we expect terror-

ism," said Bill Rathburn, head of security for the Atlanta Committee for the Olympic Games (ACOG). "It's just the potential is there. It's a high-profile event."

The Games, which will mark 100 years of Olympics, are expected to attract 15,000 athletes and coaches from 197 countries, 15,000 media representatives and



COURTESY SENSORMATIC

A security camera on top of Atlanta-Fulton County Stadium is among the anti-terrorist measures that have been installed for the 1996 Olympics.

2 million visitors, including President Clinton and dozens of foreign dignitaries. The Games are spread over 11 sites within a three-mile area in the heart of Atlanta and satellite venues outside of Atlanta and Georgia.

In Atlanta, most spectators—some estimate 500,000 a day—will take city buses or the subway or walk to the Games because downtown streets will be closed to all traffic except emergency vehicles. A special system of buses and vans will carry Olympic athletes, officials and the news media.

Because of the magnitude of the Games, no law enforcement agency has sole responsibility for security. Federal, state and local law enforcement agencies are coordinating efforts.

Participating agencies include the FBI, the CIA, the Defense Department, the Bureau of Alcohol, Tobacco and Firearms (ATF), the State Department, U.S. Customs, Secret Service, Atlanta Police Department, Georgia State Patrol and ACOG's security force.

In addition, local police will help provide security for the prelimi-

nary soccer matches in Birmingham, Ala.; Washington, D.C.; Orlando and Miami and canoe/kayak competition on Tennessee's Ocoee River in Polk County.

Representatives of the agencies, which form the Olympic Security Support Group, have been meeting regularly for months to coordinate security plans. The group is headed by Atlanta police chief Beverly Harvard and Col. Sid Miles, head of the Georgia State Patrol.

"Security will be fair, but firm," said Major Jonathan Gordon, who heads the Atlanta police department's Olympic planning office.

Gordon's department is involved in just about every aspect of security, from watching for people who might be carrying firearms at the Hartsford International Airport to directing traffic on city streets. In addition, the city police have to patrol and respond to 911 calls from residents.

Intelligence Central

On the fourth floor of a building near the Games, a command center for all the agencies involved in security is being set up by the Defense Department. Phones and television monitors are being installed. The center, which was used at the 1994 World Cup, then dismantled and taken to Atlanta, will be manned 24 hours a day by representatives of each agency. There security personnel will watch for trouble spots and develop logistics to respond to them. Intelligence from six other locations—local agencies, state agencies, satellite venues, federal agencies, the Hartsford International Airport and ACOG's security force—will be exchanged at the command center.

John McGaw, head of ATF, said the goal of all the agencies "is to make sure that [the Games] will go off as planned with as little interruption as possible. . . . The key is don't over-react."

ATF, which investigates bombings, is holding classes for state and local police on investigating explosives. The officers are learning procedures to search for suspicious packages and explosives, what to do if they discover a suspect package and the steps they should take at the scene of an explosion.

McGaw has sent letters to the nation's explosive licensees, asking them to help prevent explosives from being stolen and giving instructions for reporting thefts, losses and suspicious purchases or attempted purchases of explosives. ATF agents also are conducting seminars for explosive licensees in Georgia and firearms dealers in Kentucky, West Virginia and the Southeast region.

ATF agents and those in other federal agencies such as the Secret Service and FBI who handle security for the President and heads of states are helping state and local police and public safety staff prepare for the Games.

Explosive experts from ATF, the FBI and the military will be stationed at every venue during the Games. They will train other venue workers in bomb-threat procedures.

ATF, along with military explosive experts, FBI agents, FEMA response teams, and officers from other local, federal and state agencies conducted a simulated hostage-taking and bombing over two days at the unfinished Olympic Stadium last fall to test their readiness.

Plans are under way for another simulated incident—a chemical attack inside one of the city's subway stations—to test the responsiveness of subway employees, hospital staff and others.

"It's good training," said Gene Wilson, who heads the MARTA police force. "We have to test ourselves to make sure we are ready. No single agency can handle any one part of this by itself."

Rathburn, the ACOG security chief, said that his experiences from directing security for the 1984 Games as well as observing security operations at six other Olympic events had helped him get ready for this summer's Games.

Calling All Police

The bulk of the ACOG security force is composed of private security guards who will be provided by Borg-Warner Security Corp. The ACOG force will provide security inside the venues, accreditation stations and Olympic Village.

Finding qualified people to work as security guards for a three-week period during the Games was difficult, Rathburn said. At the 1984 Olympics, officials felt they needed a pool of 20,000 applicants to fill the 12,000 spots for security guards. Their selection pool was so small that they had a hard time hiring that many. Rathburn decided to try another recruiting effort to supplement the private guards. He recruited police officers to pay their own way to Atlanta to provide security at the Games in exchange for free room and meals. He placed an ad in a magazine distributed to police chiefs throughout the world.

More than 8,000 cops, including about 300 police chiefs and other supervisory officials, applied. About 1,800 of them will be coming to Atlanta for about 34 days to work at the Games. "This way we get trained professionals and people with different language capabilities," Rathburn said. Volunteers also are being trained to work on the ACOG security force.

To show the seriousness of the matter, Borg Warner arranged for former Army General Norman Schwarzkopf, who commanded the U.S. forces in the Persian Gulf War, to talk to the security planners.

Schwarzkopf gave them all sorts of tips on logistics. He emphasized planning and mapping ways to get security personnel and vehicles where they are needed and the importance of drills and advance training for the security staff. He also stressed that the security officers get meals and are provided enough drinking water because of the heat.

"These are lessons that we took to heart," said Gordon, who jokingly named their mission "Desert Shield."

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ONE HUNDRED FOURTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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November 30, 1995

Dear Colleague:

On June 20th, the Judiciary Committee favorably reported the "Comprehensive Antiterrorism Act of 1995" (H.R. 1710). Since that date, a number of concerns have been raised by Members about certain provisions in H.R. 1710. Responding to these concerns, we have developed a substitute amendment to the Committee bill. The substitute accommodates the concerns voiced by several Members, yet maintains the effectiveness of the bill to deter future terrorist acts. The substitute amendment will:

- ◆ Require the marking of plastic explosives to allow for more effective detection;
- ◆ Prohibit the possession, importation, and sale of nuclear materials;
- ◆ Prohibit foreign terrorist organizations from raising money in the U.S.;
- ◆ Prevent entry into the U.S. by members and representatives of foreign terrorist groups;
- ◆ Reform asylum laws to stop their manipulation by foreign terrorists;
- ◆ Establish a special deportation procedure for alien terrorists that satisfies due process and protects our national sovereignty;
- ◆ Encourage the development of a machine-readable visa and passport system;
- ◆ Authorize an employer engaged in the business of providing private security services to investigate an employment applicant's legal status and his authorization to work;
- ◆ Authorize lawsuits by Americans against foreign nations responsible for state-sponsored terrorist activity;
- ◆ Provide for the expedited expulsion of illegal aliens from the United States; and

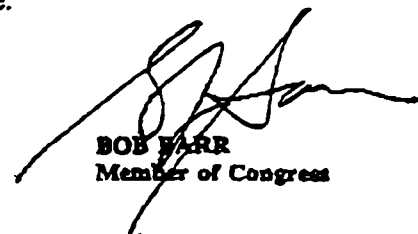
Importantly, the amendment will also:

- ◆ Add Habeas Corpus reform provisions;
- ◆ Add the Victim Restitution Act of 1995 (H.R. 665);
- ◆ Add the Criminal Alien Deportation Improvements Act of 1995 (H.R. 668);
- ◆ Delete the enhanced wiretap authorizations, including emergency wiretap expansion and roving wiretap modifications;
- ◆ Delete the authorization of military involvement in civilian law enforcement situations;
- ◆ Delete the overly broad definition of terrorism;
- ◆ Delete funding for a domestic counterterrorism center and for additional FBI personnel; and, finally,
- ◆ Delete the 40% civil penalty surcharge intended to fund the Digital Telephony law.

Important and significant changes have been made in this bill. The revised version deserves broad support. A "YES" vote on this legislation is a vote for a more secure America and the fight against crime.

We urge your support for this important measure.


 HENRY J. HYDE, Chairman
 Judiciary Committee


 BOB BARR
 Member of Congress

MEMORANDUM

TO: NDAA BOARD OF DIRECTORS

RE: ENVIRONMENTAL AUDIT PRIVILEGE

FROM: Jim Polley

DATE: February 29, 1996

In the First Session of the 104th Congress several initiatives were advanced to pass privilege and immunity legislation. To date these attempts have been unsuccessful at the Federal level and corporate sponsors of such legislation have renewed their efforts at the state level.

Even before the introduction of environmental privilege legislation NDAA made its opposition known to the members of the Congress purported to be considering sponsoring such a bill. Then NDAA President Deschamps sent the Congressional delegations of Colorado and Oregon letters setting out the NDAA position.

Despite this effort, HR1047, the "Voluntary Environmental Self-Evaluation Act" was introduced on February 24th by Congressman Hefley (R-Colorado) and cosponsored by Congressman Hyde, the Chairman of the House Judiciary Committee. The co-sponsorship by Chairman Hyde gave this legislation a strong backing in the House Judiciary Committee and credibility with the leadership of the House. NDAA sent letters to the Congress, EPA and DOJ opposing the audit privilege. Congressman Hyde's position has changed somewhat over the course of the past year and a copy of a recent letter from him to NDAA President Barnes is included in the attached information.

The House Judiciary Committee Subcommittee on Commercial and Administrative Law held a hearing on H.R. 1047, the "Voluntary Environmental Self-Evaluation Act" on June 29. NDAA President Deschamps was invited to testify on behalf of local law enforcement and was, notably, the only local level official invited to do so. In his testimony he challenged the Subcommittee to carefully look at their proposal in terms of other areas of business that would have a rightful claim to a similar privilege and gave a strong caution as to the impact the imposition of a privilege would have on the actual prosecution of a criminal case.

The NDAA position in opposition to the proposed legislation was cited in both the written and oral statements of the EPA and the EPA has subsequently requested to use it as a portion of their background packet on the self-audit privilege. While both DOJ and EPA representatives testified, most of the witnesses were from the industrial supporters of the Act. It was evident, from their testimony, that it was not so much the disclosure that bothered them but the mandated punishments that followed. In a follow-up letter to Chairman Gekas, President Deschamps suggested that mandated punishments was more properly the topic for review, not the all encompassing privilege.

Comparable legislation had been introduced in the Senate but has not made any progress. In a letter to NDAA, Senator Hatch, Chairman of the Judiciary Committee, shared our concern on the need for a privilege and promised to carefully review any legislation.

Not making any progress in passing a federal privilege a different tack was tried. In an end run on the issue of environmental privilege, the House Appropriations Committee Subcommittee on Veterans Affairs, HUD, and Independent Agencies inserted language into the appropriation for the EPA that would preclude the use of federal funds to enforce environmental statutes when using information obtained as the result of self-auditing or self-reporting, if the state has a privilege or immunity statute. This preemption of federal criminal law, through the appropriations process, is unusual. The full Appropriations Committee approved the appropriation, including a number of other controversial limitations on EPA authority, and sent it to the floor of the House for a vote.

In keeping with NDAA policy opposing the environmental privilege, NDAA President Barnes, had sent the Chairman of the Appropriations Committee a letter opposing the privilege. Using this letter, and supported by numerous environmental groups, an amendment was offered on the floor of the House, by the minority, to strike the limiting language. In a rare defeat for the House leadership and with the support of some 60 Republicans, the amendment won and the language was stricken - or so it appeared. Then on Monday night it was brought before the House again and defeated this time. Only one or two Representatives switched their vote, but a number of them failed to return from weekend trips home in time to vote. This time it was a tie, 210-210, and the amendment failed. Subsequently the limiting language was removed from the EPA appropriation when it became obvious that it could not pass in the Senate nor overcome a threatened Presidential veto.

In December NDAA had a meeting with EPA Congressional and Legislative Affairs staff last week ago. Generally discussed NDAA, how our policies are developed, and the structure for our board meetings and summer conferences. They are very appreciative of the role played by local prosecutors in opposing the federal self-audit privilege.

The EPA "planned" to announce their new Incentives for Self-Evaluation policy but were delayed because of the shutdown. The new policy was finally released on Monday, December 18. A copy of the new policy was provided to you at the NDAA Board meeting in Florida. A final version is attached to this memorandum. The EPA had solicited a letter of support from NDAA to use at the formal announcement of the policy. After consulting with the cochairs of the Environmental Crimes Committee NDAA President Barnes provided a letter of support to EPA for their new policy. The NDAA letter was included in the packet released by EPA formally announcing the policy.

**State Legislative Initiatives
Environmental Audit Immunity/Privilege**

States in Which a Bill Passed a Legislative Body:

California: SB 1432/privilege passed Senate. Assembly passed different bill and a health/safety audit bill.

South Dakota: SB 24/immunity passed Senate and House.

Michigan: SB 728/privilege and immunity passed Senate. House hearing on 2/13.

Ohio: SB 138/privilege and immunity passed Senate.

New Jersey: 2 privilege bills under consideration. S 384 passed Senate.

Georgia: SB 244/privilege and immunity passed Senate in 1994.

South Carolina: H 3624/privilege and immunity passed House. S 810/privilege and immunity was passed by Senate. Under revision in committee.

States in Which Hearing Conducted on Bill but No Vote:

Washington: HB 2377/privilege and immunity.

Arizona: SB 1381/privilege and immunity.

Alaska: SB 199/privilege and immunity.

States in Which Bill Introduced but No Vote or Hearing Yet:

Tennessee: HB/privilege and immunity.

West Virginia: SB 146/privilege.

Pennsylvania: SB 1295/privilege and immunity.

Virginia: HB 717/privilege

Additional States with Bill Introduced:

Massachusetts	Vermont	Rhode Island
Missouri	Wisconsin	Maryland
New Hampshire	Iowa	
New York	Minnesota	
Oklahoma	Nebraska	

Corporations See More EPA Leeway

EVEN THOUGH the Clinton administration has put into place a moderate new policy to ease the punishment of corporations that uncover their own environmental violations, momentum is building for more sweeping federal and state laws against use of the paper trail of pollution in courts.

Fourteen states have passed laws since 1993, more than half in the past year, to extend a privilege to internal corporate environmental records, often called audits, which assures that the documents cannot be used as evidence against a suspected violator.

Similar measures have been introduced in 24 other states. Corporations want national protection, however, and are backing bills sponsored on Capitol Hill by Rep. Joel Hefley, R-Colo., and Sen. Mark Hatfield, R-Ore., both from states in the vanguard of the movement.

An environmental coalition report Feb. 12, titled "Dirty Secrets," looked in depth at the alleged checkered environmental records of some of the corporations pushing for the legislation, the first major statement that green organizations have made on this arcane legal issue. "The real purpose of these laws is to strip away the rights of government, communities and pollution monitoring organizations to uncover environmental and public safety hazards," said Chris Bedford, of Takoma Park, Md.'s Environmental Action Foundation, the report's author.

Attorneys for corporations, however, argue that privilege will produce the opposite effect—ensuring that the companies conduct regular self-inspections without fear that they will be punished by enforcers, prosecutors or citizen plaintiffs for work they did in uncovering their own violations.

Paul Wallach, of the Washington, D.C., office of Boston's Hale and Dorr, represents a coalition of 20 corporations lobbying for audit privilege laws—the Corporate Environmental En-



Prediction: Paul Wallach, who represents a coalition of companies, maintains that voluntary audit law will not be abused by wrongdoers.

forcement Council—which includes AT&T, Coors Brewing Co., E.I. du Pont de Nemours & Co. and Procter & Gamble. Mr. Wallach says the laws won't be used to shield willful wrongdoing because they require a company that discovers a violation to take prompt corrective action to maintain the privilege.

Environmentalists say that the looser laws would 'strip away the rights' of communities to uncover public safety hazards.

Official Doubts

Still, Environmental Protection Agency enforcement chief Steve Herman became concerned that the agency's ability to pursue wrongdoers would be impaired by the wave of state laws. After hearings and public comment, the EPA put into place a policy Jan. 24 designed to occupy the middle ground.

Under the policy, a company that discovers a violation through an ongoing audit program, confesses the problem to the agency immediately and corrects the situation within 60 days

would qualify for reduced penalties. Such violations would not be subject to criminal prosecution, and the punitive aspects of any civil penalty would be reduced or waived. (The agency still might levy a fine in such instances to recover the "economic benefit" that a company enjoyed by breaking the law.)

A corporation cannot expect any breaks, however, if its audit was conducted in anticipation of an inspection or lawsuit, or the violation was one that the company has gotten in trouble for in the past. Also, there would be no leniency if the violation caused serious harm or endangerment.

Mr. Wallach praised the work of the EPA: "I think they've gone a long way toward developing a policy in which the penalties for companies doing the right thing should be severely mitigated." But he said that a change in federal law, not just EPA policy, is needed to protect corporations

from what they see as an unfair use of their internal environmental audits by third parties, such as other federal agencies, state regulators or citizen groups in lawsuits against a company.

Losing Leverage?

The possibility of losing leverage is one of the major fears of groups such as Trial Lawyers for Public Justice, the Environmental Defense Fund, Ralph Nader's Public Citizen and other public-interest groups. They say workers, for example, would lose some of the leverage they have gained in recent years by using bad environmental health and safety records against their employers in labor disputes.

In "Dirty Secrets," Mr. Bedford points out that under the law recently upheld by the National Labor Relations Board in a case involving access to environmental audits, workers represented by a union have the same rights of discovery as plaintiffs in a lawsuit. *Detroit Free Press v. Newspaper Guild*, 317 NLRB 155.

Two corporations that have been lobbying for audit privilege legislation at the state level, Bell Atlantic and Caterpillar, recently have been engaged in bitter labor disputes in which their respective workers' unions, the Communications Workers of America and the United Auto Workers, have used internal environmental audit documents.

"Polluting industries want to eliminate oversight and legal action by independent, non-government groups and individuals," such as citizen and labor groups, said Mr. Bedford in a prepared statement. "Corporations do not need secrecy rights to do what they legally are required to do to protect the environment and public safety."

THE NATIONAL LAW JOURNAL

Monday, February 26, 1996

G.O.P. BACKING OFF FROM TOUGH STAND OVER ENVIRONMENT

FEAR OF POLITICAL HARM

Congress Could Loosen Fiscal Vise on E.P.A. and Interior Department Programs

By JOHN H. CUSHMAN Jr.

WASHINGTON, Jan. 25 — Republicans are increasingly worried that by imposing deep cuts on environmental programs they are doing even deeper political damage to their party, and they are beginning to back away from further confrontations on environmental issues.

As a result, it now appears more likely that Congress might loosen somewhat the fiscal vise that has ripped environmental agencies during the long budget impasse, while a number of proposals favoring mining, logging, oil and other big industries could vanish from the legislative landscape.

Administration officials and environmentalists can hardly claim victory yet. The Administrator of the Environmental Protection Agency, Carol M. Browner, said that at a Senate hearing on Friday, she would testify that the cuts already imposed, and the slightly less severe ones still to come, would force the agency to delay some of its highest priorities, including new measures to control dangerous pollutants in drinking water.

But some environmentalists are warning to say, with a hint of wonder at their voices, that they are close to success in making environmental programs what one lobbyist called a "third rail," political slang for issues so close to Social Security that they are best not touched because they carry such a joltage with voters.

Increasingly, Republicans are hearing the same message.

This week, 30 Republican moderates in Congress wrote Speaker Newt Gingrich to complain that the party had "taken a beating this year" over missteps in environmental policy and calling on him to correct the course during the continuing budget talks.

"If the party is to resuscitate its reputation in this important area, we cannot be seen as using the budget

crisis as an excuse to emasculate environmental protection," said the letter, drafted by Representative Sherwood Boehlert, a maverick Republican environmentalist from upstate New York.

Even some of the party's more conservative advisers are sounding similar alarms these days.

"Our party is out of sync with mainstream American opinion," wrote Linda DiVall, a Republican pollster, in reporting to Congressional clients on a recent nationwide survey on environmental issues.

But many in the party's leadership are reluctant to change course. They say the problem is not their agenda but the way they have explained it.

"What is out of sync is the distortion of our record by the Administration and by radical environmental groups who want to continue to over-regulate the economy," said Representative John A. Boehner of Ohio, head of the House Republican Conference.

Environmental groups have mounted a sustained campaign all year to get their millions of members to complain to lawmakers about the Republican agenda, and it appears that the effects are increasingly being felt.

Last week, during the Congressional recess, the entire New Jersey delegation of eight Republicans and five Democrats wrote to the Republican leadership asking that full financing be restored to the Superfund program, a reaction to news that the E.P.A. had suspended the clean-up of hundreds of toxic waste sites.

In his State of the Union address, President Clinton spoke at length about environmental issues, which usually take a back seat to others. He won applause and loud cheers when he denounced the environmental proposals of the Republicans and challenged Congress to "re-examine those policies and reverse them."

The problem for the Republican leadership, though, is that many of those proposals are at the heart of their promise to roll back Federal regulations, and many of the party's leaders, including Senator Bob Dole of Kansas, the majority leader, and Representative Tom DeLay of Texas, one of Speaker Gingrich's loyal lieutenants, are among their most vigorous advocates.

In a speech to the National Association of Manufacturers today, Mr. DeLay, the majority whip, accused Mr. Clinton of lying in his speech when he said that by voting to cut environmental enforcement by 25 percent, Congress was serving the interests of corporate lobbyists at the expense of clean water and children's health.

"That isn't just misrepresenting the truth; that is outright lying," Mr. DeLay said.

But Ms. DiVall, whose clients include a conservative Republican

Presidential candidate, Senator Phil Gramm of Texas, said in her polling report that some of the party's environmental policies were broadly disdained by Democrats and Republicans alike — and by most independents, most young people and most women.

"By greater than a 2-to-1 margin, voters have more confidence in the Democrats than Republicans as the party they trust most to protect the environment," her report said. "Most disturbing is that 55 percent of Republicans do not trust their party when it comes to protecting the environment, while 72 percent of the Democrats do trust their party."

The poll came up with especially strong signals on the Republicans' efforts to cut spending at the E.P.A.

"Attacking the E.P.A. is a non-starter," Ms. DiVall wrote.

Her polling found that only 35 percent of the public would vote to re-elect members of the House who supported the Republican-backed bill cutting financing for the agency, by a third, while 46 percent said they would vote not to re-elect them. If voter turnout in November is higher, she warned, the results would be worse.

Warnings like that seemed to be having an effect today, as the House leadership brought to the floor the latest stop-gap spending bill, to keep the Federal Government open until March. Previous temporary spending bills have singled the E.P.A. out for especially severe cuts, especially in enforcement and clean-up activities.

The measure, passed by the House tonight, would still cut the agency's financing, just as deeply as the spending bill President Clinton vetoed in December but not as deeply as the cuts since Oct. 1, when the fiscal year began.

The Interior Department, another environmental agency that has been operating without a final agreement on its budget, would be financed until March. But the real issue facing that agency is not how much money it can spend, but rather what environmental policies it must follow.

One of the biggest fights of the past year was over changes the Republicans proposed in the mining law. Favored by industry and opposed by environmentalists, the measure was part of Interior bill and the broader budget bill, both of which Mr. Clinton vetoed.

Today, Jack Gerard, an industry spokesman, said the budget impasse had "at least for now halted progress toward passage of mining law reform."

Feeling Threatened, Environmental Groups

Taking More Direct Role in Politics

By Tom Kenworthy
Washington Post Staff Writer

Faced with a Republican-led Congress that they view as hopelessly hostile to their interests, some key national and regional environmental groups are moving to change their tax status so they may participate directly in electoral politics.

Conservation organizations including Friends of the Earth and the Oregon Natural Resources Council have formed political action arms to help elect House and Senate members who are receptive to their agendas.

And other groups, including The Wilderness Society, are considering making the same change, which reduces their ability to collect tax-deductible contributions but allows

them to contribute to political campaigns and spend money independently on behalf of candidates.

Historically, most environmental organizations—with the exception of the Sierra Club, which the Internal Revenue Service stripped of its ability to collect tax-deductible donations 30 years ago during the club's high-profile campaign to block the construction of dams in the Grand Canyon—have engaged in education and lobbying activities but have not participated in partisan politics. But with the recent congressional attacks on many of the nation's most fundamental environmental statutes, some conservation groups are concluding they must fight to defeat their enemies and elect their friends.

"You've got a bunch of unlobbyable

legislators who are not susceptible to any kind of rational discussion of environmental priorities, at best, and at worst you have a bunch of flat earth society members . . . who are out to essentially destroy environmental programs," said Friends of the Earth president Brent Blackwelder.

Blackwelder said that, although the environmental community has succeeded in preventing Congress from approving the most sweeping of the proposed changes in environmental laws, it will make no progress in improving federal protections without getting more directly involved in congressional politics.

"We are simply put on defense 99 percent of the time," he said. "Even when we are doing very good defense, that only gets you back to square one."

Environmentalists who favor a more aggressive political stance point to the recent special Senate election in Oregon, where Rep. Ron Wyden (D) narrowly defeated Republican state Senate President Gordon Smith with the assistance of significant spending by conservation groups. Together, the Sierra Club and the League of Conservation Voters—a group that has acted as the environmental community's political action arm—spent more than \$200,000 on Wyden's behalf and played a key role in his narrow victory.

Also working on behalf of Wyden was the Oregon Natural Resources Council, an influential conservation organization in the Pacific Northwest

that last fall changed its tax status so it could participate in political campaigns. What had been a tax-exempt charitable organization was split into two entities: the ONRC Fund, which retained the tax-exempt status, and ONRC Action, which was set up as an organization with its own political action committee. Contributions to ONRC Action are not tax deductible.

ONRC's executive director, Andy Kerr, said contributions have gone up about 15 percent because contributors now understand that "ONRC can finally take off the gloves" and be more political.

"The environmental movement allowed itself to become an apolitical movement, a movement where lawyers and policy analysts were more highly valued than grass-roots organizers and political hacks," Kerr said. "Any good social movement goes through periodic deaths and resurrections and that is what is happening."

G. Jon Roush, president of The Wilderness Society, said the recent hostility of Congress to environmental protections has rekindled a long-simmering debate among conservation organizations about how political they ought to be.

"We are hamstrung now in influencing policy because the wrong people are getting elected," said Roush, whose organization has nearly 300,000 members. "The Wilderness Society has been kicking it around for several years, but this Congress has given us all a little more incentive to take a hard look at it."

DVERSARIES BACK POLLUTION RULES NOW ON THE BOOKS

BUT FLEXIBILITY IS URGED

Clinton Panel of Activists and Industry to Issue Report — Campaign Use Hinted

By JOHN H. CUSHMAN Jr.

WASHINGTON, Feb. 11 — After a year in which industry and environmental groups have been at war over Republican-led efforts to roll back Federal environmental regulations, a Presidential panel with adversaries from both sides has reached a rare consensus that while an existing system can be improved, it must not be weakened.

Rather than strip away many environmental regulations, as Republicans in Congress tried to do last fall, the panel calls for a new regulatory framework to give businesses more flexibility in preventing pollution — not only if they can perform better than is required under the current system of strict safeguards.

The group included two sides that are more likely to be found in court than at a negotiating table: leading companies in the oil, paper and chemical industries, all of which have supported Republican proposals for regulatory relief, and major environmental organizations that have accused the industries of trying to undo 25 years of progress. It also included members of President Clinton's Cabinet and labor and civil rights groups.

In its final report, the panel, the President's Council on Sustainable Development, also calls for a comprehensive review of taxes and corporate subsidies, aimed at increasing taxes on pollution and consumption in exchange for cutting income taxes.

It urges long-range steps to stabilize the country's population, including more Federal money for family planning and contraceptive research. And it says the United States, "even in the face of scientific uncertainty," should lead the world in heading off serious or irreparable global trends like climate change.

The report will be issued by the White House in the next few weeks, and in the months ahead it appears destined to serve as the environmental platform for Mr. Clinton's reelection campaign. Members of the council, created by the President in 1993, gave a copy of the report to The

THE NEW YORK TIMES, MONDAY, FEBRUARY 12, 1996

For months, Mr. Clinton has been striving to make environmentalism a key issue separating him from the Republicans. The report offers him a coherent environmental credo that

is not anchored in the status quo and that draws support not only from liberals but also from businesses.

"Implicitly, this denounces the kind of work that the Congress has been up to for a year," said Kathleen A. McGinty, who heads the White House Council on Environmental Quality and who as Mr. Clinton's top environmental aide worked closely with the President's Council on Sustainable Development.

"The environment is something that brings us together as a nation. It is a deplorable idea to use it to polarize the nation."

The President's council spent three years touring the country and debating how to balance economic growth and environmental protection. Among the members were leaders of environmental organizations like the Natural Resources Defense Council, the Sierra Club and the Environmental Defense Fund, and executives of the Georgia-Pacific Corporation, the Enron Corporation, and the Chevron Corporation.

"The current polarization is just the reason why our agreement is important," wrote the council's co-chairmen, Jonathan Lash, president

Proposing more flexibility in preventing pollution.

of the World Resources Institute, and David T. Buzzelli, vice president of the Dow Chemical Corporation.

At the outset, council members could not even agree on the basic issue of whether economic growth in itself was a good thing, they recalled.

The report binds no one and the recommendations are often vaguely couched, but these weaknesses may be offset by the political power of a joint statement from such an unlikely coalition.

Mr. Clinton has already begun to adopt the report's language, as he did in calling for tough but flexible environmental standards in his State of the Union speech in January. And some of the report's language is unmistakably redolent of the campaign trail.

"Americans want to take back control of their lives," the report proclaims, at once acknowledging and endorsing a shift of environmental power and responsibility away from the government and toward individuals and enterprises.

The report's chapter on regulations is perhaps the most pertinent to the current political debate.

"We didn't start the conversation by asking, 'What are we going to roll back?'" said Mr. Buzzelli of Dow Chemical. "You have to say, 'What do we have that is worth keeping, and what do we really need to do to get better?'"

Mr. Lash of the World Resources Institute added, "There was a strong feeling on the council that if you pull the foundation stones out, it is really hard to go ahead and build a new building."

Republicans in Congress, strongly supported by business groups, tried and failed last year to undo many environmental regulations, provoking an intense struggle with environmentalists and the Clinton Administration. While Republican leaders have promised to try once again to push through changes this year, the momentum is going against them,

and they are likely to take a more moderate approach.

In recent weeks, however, many business leaders have begun advising Republicans in Congress that they should scale back their earlier proposals, if they expect to succeed in providing any regulatory relief to industry.

The President's council shares some of the goals but few of the methods of the Republican approach, which would have changed how existing environmental laws are carried out by imposing elaborate new studies of costs and benefits, and by opening up new opportunities for industry to challenge burdensome rules in court.

Instead, the council called for adding, not stripping away, a layer of environmental protection. The current system of standards, deadlines, permits, and inspections, while it might be modified, would be retained as a kind of safety net. At a higher level of performance, companies would be free to innovate.

To this end, the report endorsed using financial incentives instead of dictates to discourage pollution, and putting more emphasis on results than on how they are obtained. The aim less costly, but not less effective, pollution control — and, wherever possible, preventing pollution rather than spending to clean it up.

"Regulations that specify performance standards based on strong protection of health and the environment — but without mandating the means of compliance — give companies and communities flexibility to find the most cost-effective way to achieve environmental goals," the report said.

"But this flexibility must be coupled with accountability and enforcement to insure that public health and the environment are safeguarded."

It called for giving agencies like the Environmental Protection Agency specific authority to move away from "one size fits all" regulations. But it warned that a proliferation of pilot programs and demonstration projects would drive the agency's budget up, not down, as Congress has tried to do.

In interviews, members of the council said the report was no less important for having steered clear of detailed prescriptions for new policies, new legislation, or new programs. Instead, they said the council chose to cite ground-breaking programs that are already getting results, often without much publicity.

The "most important finding" of the council, the report said, is that new approaches can work only if they are based on collaboration and consensus.

That has been a consistent refrain of the Clinton Administration all along, but one that has not always worked as hoped. In disputes over issues like forestry and automobile efficiency, some of the Administration's previous efforts at building consensus were disappointing.

The early arguments over whether growth was good or bad finally were answered in the very first words of the statement of beliefs that all the members finally endorsed:

"To achieve our vision of sustainable development, some things must grow — jobs, productivity, wages, capital and savings, profits, information, knowledge and education — and others — pollution, waste and poverty — must not."

That formulation, obvious as it might seem, drove the group toward a central conclusion: that efficiency, profit and environmental protection are all linked. "Pollution is waste, waste is inefficient, and inefficiency is expensive," they summed up.

OPTIONAL FORM 99 (7-90)

FAX TRANSMITTAL

of pages 3

To <u>Jim Polley</u>	From <u>Nancy Stoner</u>
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NSN 7540-01-017-7388	5098-101 GENERAL SERVICES ADMINISTRATION

FOR IMMEDIATE RELEASE
FEBRUARY 7, 1996

SLAUGHTERHOUSE COMPANY PLEADS GUILTY TO ENVIRONMENTAL CRIMES
FORMER PARENT CHIQUITA NOT PROSECUTED DUE TO VOLUNTARY DISCLOSURE

WASHINGTON, D.C. -- John Morrell and Company, until recently a subsidiary of Chiquita Brands, International, today pleaded guilty to dumping slaughterhouse waste into the Big Sioux River in Sioux Falls, South Dakota and deliberately submitting phony test data and discharge reports to conceal its crimes.

Morrell, agreed to pay a \$2 million criminal fine and spend another \$1 million to establish a local environmental cleanup fund, according to a Plea Agreement and Criminal Information today filed in U.S. District Court in Sioux Falls. Sentencing is scheduled for May 13, 1996.

The charges include conspiracy and violations of the Clean Water Act related to Morrell's unlawful discharges of slaughterhouse waste from a company wastewater treatment plant over an 8-year period, from 1985 to 1993. In one 17-month period, from August, 1991 through December, 1992, the company violated its EPA-issued permit more than 130 times, according to the government.

The government declined to prosecute Chiquita, Morrell's parent company, which was responsible for disclosing Morrell's violations to the government in 1993. Morrell was reportedly sold on December 20, 1995, to Smithfield Foods, Inc. in an approximately \$60 million cash/stock transaction.

"I want to praise Chiquita for coming forward and initiating this disclosure," said Lois J. Schiffer, Assistant Attorney General in charge of the Environment and Natural Resources Division. "But its disclosure cannot undo the serious and longstanding environmental violations committed by Morrell."

The Justice Department has a policy that encourages voluntary disclosures of environmental violations by permitting prosecutors to take various factors, including a company's cooperation, prompt disclosure and correction of the violation, into consideration. Other factors considered under the policy

include pervasive non-compliance, knowledge of violations by senior officials and the extent of any environmental compliance program.

Karen Schreier, the U.S. Attorney for South Dakota said, "It is always of special concern when the charge is that a company concealed violations and submitted false reports to the government about pollution. It is impossible to protect the environment if a corporation deliberately violates its permit and then lies about it to the authorities. The entire regulatory system depends on honest reporting."

The government's papers charged that Morrell:

- failed to disclose or stop the violations during a period of 8 years;
- was responsible for more than 130 permit violations;
- knowingly submitted false discharge monitoring reports ("DMRs") to the government;
- deliberately rigged sampling tests to get desired results and conceal violations;
- had a "corporate policy" to exclude information about the violations from company documents;
- directed managers and employees not to discuss the violations with government officials; and
- deliberately refused to expend funds necessary to correct the problem and bring the plant into compliance.

Today's announcement follows the January 1995 guilty pleas of Ronald E. Greenwood and Barry M. Milbauer, two Morrell company managers who are currently awaiting sentencing for conspiring to violate the Clean Water Act. The employees admitted to falsifying DMRs and rigging the sampling tests. The United States has also filed a civil enforcement action against Morrell and, earlier this year, lodged with the court a partial consent decree under which Morrell would take actions necessary to obtain and maintain full compliance with the Clean Water Act. Under today's plea agreement, Morrell has promised to cooperate with the government's ongoing investigation.

Under the Clean Water Act, individuals or businesses with environmental discharge permits must take samples and file monthly discharge reports with the government. The company filed false reports showing levels of the chemical, ammonia nitrogen, within the permitted range although they were actually well over legal limits. Ammonia nitrogen can harm fish, mammals and other

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aquatic life, causing death, deformity and a limiting of species growth and diversity.

Today's action comes as federal and some state legislatures consider bills that would make such cases harder to bring. The legislation would limit the government's ability to learn of environmental violations, including criminal offenses, and create an evidentiary privilege for violations uncovered in internal company audits. In addition, some of these legislative proposals would even immunize polluters who eventually disclose, regardless of how deliberate the act, or the amount of harm to human health and the environment.

Assistant Attorney General Schiffer said, "If enacted, these proposals would make it much easier for offenders to keep both their past misconduct and ongoing pollution hidden from the government and public."

Schreier and Schiffer commended the Environmental Protection Agency Criminal Investigation Division Region VIII for its "outstanding work" in investigating the case. The case is being prosecuted jointly by the U.S. Attorney's Office and the Department of Justice Environmental Crimes Section.

#

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January 22, 1996

Mr. Michael P. Barnes
President
National District Attorneys Association
99 Canal Center Plaza, Suite 510
Alexandria, Virginia 22314

Dear Mr. Barnes:

Thank you for your comments concerning "The Voluntary Environmental Self-Evaluation Act" (H.R. 1047).

I realize that your organization testified against this legislation and am sympathetic to the concerns of prosecutors whenever an evidentiary privilege is proposed. However, I'm sure you also understand that societal good is often furthered through the existence of testimonial privileges. Some privileges have been codified as part of the Federal Rules of Evidence under its Article IV (Relevancy), notably Rule 412 (Exclusion of Past Sexual Behavior), Rule 410 (Inadmissibility of Plea Discussions), and Rule 407 (Subsequent Remedial Measures).

As a cosponsor of H.R. 1047, I am seeking to promote the objective of improving the environment by encouraging cooperative efforts between those who enforce the laws and those who are regulated by them. Without the cooperation I seek to promote, I am afraid there is no hope of a better environment because regulators and prosecutors cannot be everywhere and thus cannot directly control everyone's conduct. We must encourage the regulated to be active as custodians of the environment or we are doomed to failure in improving it.

I note that you suggest an alternative method for accomplishing the goal I describe is to provide for the mitigation of punishment. As the legislation proceeds through the subcommittee and beyond, I will unquestionably be open-minded in considering any suggestion to improve it. I must, however, lodge my concern that whatever procedure is adopted (be it privilege, mitigation of punishment or whatever) must be efficacious, practical, fair and, not least of all, certain. When you suggest that "relief from mandated punishments, permitting self-evaluations and reporting to be used in mitigation or extenuation, or permitting use of corporate records as an affirmative defense" are "less onerous forms of recognizing the value of self-audits and encouraging their widespread use", you are obviously speaking from the

Mr. Michael P. Barnes

January 22, 1996

Page 2

perspective of the prosecutor, who does not necessarily have the same view of what is "onerous" as have the average citizen or businessman who must comply with the welter of environmental laws. My concern is that "less onerous" might translate into "less effective" in improving the environment.

Thank you again for your comments and I look forward to working with you to craft legislation that will balance the responsibilities of the regulators with the legitimate concerns of the regulated.

Sincerely,

A handwritten signature in black ink, appearing to read "Hy Hyde". The signature is fluid and cursive, with the first "Hy" and "Hyde" being distinct and connected by a flourish.

HENRY J. HYDE
Chairman

HH:rvs



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 30 1996

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

Dear Friend:

Enclosed is a copy of the U.S. EPA's new policy, "Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations". Also included in the packet are a fact sheet explaining the policy, and letters from state officials, the Chemical Manufacturers Association, and the Environmental Defense Fund expressing support for our approach.

EPA's self-policing policy offers incentives to regulated entities to conduct responsible self-policing of environmental compliance. For example, where a company finds violations through an environmental audit or compliance management system and promptly discloses those violations in writing, EPA will not seek gravity-based penalties and will not recommend to the U.S. Department of Justice that criminal charges be brought against the entity. The policy also contains important safeguards to protect the public, such as excluding violations which may present an imminent and substantial endangerment or have resulted in serious actual harm; the Agency also retains the right to recover any significant economic benefit gained by the violator. Finally, the policy encourages the sharing of information with the public, protecting the public's right to know.

The final policy supercedes the Interim Policy published on April 3 of last year, and also restates the Agency's long-standing policy and practice of not routinely requesting environmental audit reports and not using such reports to initiate civil or criminal investigations.

If you would like to obtain copies of other materials pertaining to the policy, please call (202) 260-7548.

Sincerely,

A handwritten signature in dark ink, appearing to be "SAH", written over a light-colored background.

Steven A. Herman
Assistant Administrator
for Enforcement and
Compliance Assurance



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ENCLOSURES

- ▶ Fact Sheet on Incentives for Self-Policing Policy
- ▶ Copy of Policy
- ▶ Letter from U.S. Department of Justice
- ▶ Letter from 19 State Attorneys General and Environmental Commissioners
- ▶ Letter from Director of Missouri Department of Natural Resources
- ▶ Letter from Director of Arizona Department of Environmental Quality
- ▶ Letter from National District Attorneys Association
- ▶ Letter from California District Attorneys Association
- ▶ Letter from New York State District Attorneys Association
- ▶ Letter from Richmond County District Attorney
- ▶ Letter from Suffolk County District Attorney
- ▶ Statement from Chemical Manufacturers Association
- ▶ Press Release from Environmental Defense Fund

INCENTIVES FOR SELF-POLICING EPA FACT SHEET

Background, Scope and Timetable

- ▶ EPA's final policy on incentives for self-evaluation and self-disclosure of violations represents a refinement of the March, 1995 Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, which offered regulated entities powerful new incentives to discover, disclose and correct violations of environmental law.
- ▶ The policy is the culmination of an 18-month process to reassess the Agency's incentives to encourage voluntary disclosure and correction of violations. That process began in July of 1994 with a two-day public meeting and included a series of meetings ("dialogues") with stakeholders hosted by the American Bar Association's SONREEL Subcommittee.
- ▶ Under the final policy, the Agency will protect public health and the environment by reducing civil penalties and not recommending criminal prosecution for regulated entities that voluntarily discover, disclose and correct violations.
- ▶ The final policy applies to violations under all of the environmental laws that EPA administers, and will be applied uniformly across EPA's enforcement programs and Regions.
- ▶ The policy takes effect on January 22, 1996, but at the discretion of EPA may be applied to cases that meet all of the conditions of the policy and have not yet been settled.
- ▶ EPA will study the results of the policy within three years and make that study available to the public.

Incentives for Due Diligence, Disclosure and Correction

- ▶ Under the final policy, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence (i.e., systematic efforts to prevent, detect and correct violations, as defined in the policy), and all of the policy's conditions are met (see discussion of safeguards), EPA will not seek gravity-based penalties and will generally not recommend criminal prosecution against the company if the violation results from the unauthorized criminal conduct of an employee.
- ▶ Where violations are discovered by means other than environmental audits or due diligence efforts, but are promptly disclosed and expeditiously corrected, EPA will reduce gravity-based penalties by 75% provided that all of the other conditions of the policy are met.

- ▶ EPA retains its discretion to recover economic benefit gained as a result of noncompliance, so that companies won't be able to obtain an economic advantage over their competitors by delaying their investment in compliance.
- ▶ The final policy also restates EPA's practice of not routinely requesting environmental audit reports.

Safeguards to Protect the Public

- ▶ In addition to prompt disclosure and correction, the policy requires companies to prevent recurrence of the violation and to remedy any environmental harm.
- ▶ Repeated violations or those which may have presented an imminent and substantial endangerment or resulted in serious actual harm are excluded from the policy's coverage.
- ▶ Corporations remain criminally liable for violations resulting from conscious disregard of their legal duties, and individuals remain liable for criminal wrongdoing.
- ▶ The policy contains two provisions ensuring public access to information. First, EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. And second, where EPA requires that a regulated entity enter into a written agreement, administrative consent order or judicial consent decree to satisfy the policy's conditions, those agreements will be made publicly available.

A Positive Alternative to Audit Privilege

- ▶ EPA remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits, or blanket immunities for irresponsible conduct.
- ▶ The final policy is a positive alternative to privileges that could be used to shield evidence of violations of federal environmental law as well as criminal misconduct, deny the public its right to know useful information affecting its health and the environment, drive up litigation costs, and create an atmosphere of distrust between regulators, industry and local communities.
- ▶ The policy eliminates the need for any privilege as against the government, by eliminating or reducing civil penalties and lessening the likelihood of criminal prosecution for those companies that audit, disclose and correct violations and meet the other conditions of the policy.

Federal Register

Friday
December 22, 1995

Part III

Environmental Protection Agency

**Incentives for Self-Policing: Discovery,
Disclosure, Correction and Prevention of
Violations; Notice**

ENVIRONMENTAL PROTECTION AGENCY

[FRL-6400-1]

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Policy Statement.

SUMMARY: The Environmental Protection Agency (EPA) today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements. Incentives include eliminating or substantially reducing the gravity component of civil penalties and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. The policy also restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. This policy was developed in close consultation with the U.S. Department of Justice, states, public interest groups and the regulated community, and will be applied uniformly by the Agency's enforcement programs.

DATES: This policy is effective January 22, 1996.

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this policy is contained in the environmental auditing public docket. Documents from the docket may be obtained by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Robert Fentress or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:

I. Explanation of Policy

A. Introduction

The Environmental Protection Agency today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law. Effective 30 days from today, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly

disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity. EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence. Finally, the policy restates EPA's long-held policy and practice to refrain from routine requests for environmental audit reports.

The policy includes important safeguards to deter irresponsible behavior and protect the public and environment. For example, in addition to prompt disclosure and expeditious correction, the policy requires companies to act to prevent recurrence of the violation and to remedy any environmental harm which may have occurred. Repeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy, and companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Corporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct.

The issuance of this policy concludes EPA's eighteen-month public evaluation of the optimum way to encourage voluntary self-policing while preserving fair and effective enforcement. The incentives, conditions and exceptions announced today reflect thoughtful suggestions from the Department of Justice, state attorneys general and local prosecutors, state environmental agencies, the regulated community, and public interest organizations. EPA believes that it has found a balanced and responsible approach, and will conduct a study within three years to determine the effectiveness of this policy.

B. Public Process

One of the Environmental Protection Agency's most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. Effective deterrence requires inspecting, bringing penalty actions and securing compliance and remediation of harm. But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements. Accordingly, in

May of 1994, the Administrator asked the Office of Enforcement and Compliance Assurance (OECA) to determine whether additional incentives were needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits.

EPA began its evaluation with a two-day public meeting in July of 1994, in Washington, D.C., followed by a two-day meeting in San Francisco on January 19, 1995 with stakeholders from industry, trade groups, state environmental commissioners and attorneys general, district attorneys, public interest organizations and professional environmental auditors. The Agency also established and maintained a public docket of testimony presented at these meetings and all comment and correspondence submitted to EPA by outside parties on this issue.

In addition to considering opinion and information from stakeholders, the Agency examined other federal and state policies related to self-policing, self-disclosure and correction. The Agency also considered relevant surveys on auditing practices in the private sector. EPA completed the first stage of this effort with the announcement of an interim policy on April 3 of this year, which defined conditions under which EPA would reduce civil penalties and not recommend criminal prosecution for companies that audited, disclosed, and corrected violations.

Interested parties were asked to submit comment on the interim policy by June 30 of this year (60 FR 16875), and EPA received over 300 responses from a wide variety of private and public organizations. (Comments on the interim audit policy are contained in the Auditing Policy Docket, hereinafter, "Docket".) Further, the American Bar Association SONREEL Subcommittee hosted five days of dialogue with representatives from the regulated industry, states and public interest organizations in June and September of this year, which identified options for strengthening the interim policy. The changes to the interim policy announced today reflect insight gained through comments submitted to EPA, the ABA dialogue, and the Agency's practical experience implementing the interim policy.

C. Purpose

This policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for

violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management system.

EPA's enforcement program provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing measured in numerous recent surveys. For example, more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors. (A copy of the Price-Waterhouse survey is contained in the Docket as document VIII-A-76.)

At the same time, because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price-Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs, EPA believes that the incentives offered in this policy will improve the frequency and quality of these self-monitoring efforts.

D. Incentives for Self-Policing

Section C of EPA's policy identifies the major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self-correction. These include not seeking gravity-based civil penalties or reducing them by 75%, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. (As noted in Section C of the policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.)

1. Eliminating Gravity-Based Penalties

Under Section C(1) of the policy, EPA will not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected. Gravity-based penalties will also be waived for violations found through any documented procedure for self-policing, where the company can show that it has

a compliance management program that meets the criteria for due diligence in Section B of the policy.

Gravity-based penalties (defined in Section B of the policy) generally reflect the seriousness of the violator's behavior. EPA has elected to waive such penalties for violations discovered through due diligence or environmental audits, recognizing that these voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations. All of the conditions set forth in Section D, which include prompt disclosure and expeditious correction, must be satisfied for gravity-based penalties to be waived.

As in the interim policy, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy. Economic benefit may be waived, however, where the Agency determines that it is insignificant.

After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, e.g., Docket, II-F-39, II-F-28, and II-F-18).

2. 75% Reduction of Gravity

The policy appropriately limits the complete waiver of gravity-based civil penalties to companies that meet the higher standard of environmental auditing or systematic compliance management. However, to provide additional encouragement for the kind of self-policing that benefits the public, gravity-based penalties will be reduced by 75% for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected, even if it was not found through an environmental audit and the company cannot document due diligence. EPA expects that this will encourage companies to come forward and work with the Agency to resolve environmental problems and begin to develop an effective compliance management program.

Gravity-based penalties will be reduced 75% only where the company meets all conditions in Sections D(2) through D(9). EPA has eliminated language from the interim policy indicating that penalties may be reduced "up to" 75% where "most" conditions are met, because the Agency believes that all of the conditions in D(2) through D(9) are reasonable and essential to achieving compliance. This change also responds to requests for greater clarity and predictability.

3. No Recommendations for Criminal Prosecution

EPA has never recommended criminal prosecution of a regulated entity based on voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way. Thus, EPA will not recommend criminal prosecution for a regulated entity that uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of Section D of the policy.

This policy is limited to good actors, and therefore has important limitations. It will not apply, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy all of the conditions of Section D of the policy, violations that caused serious harm or which may pose imminent and substantial endangerment to human health or the environment are not covered by this policy. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual.

Even where all of the conditions of this policy are not met, however, it is important to remember that EPA may decline to recommend prosecution of a company or individual for many other reasons under other Agency enforcement policies. For example, the Agency may decline to recommend prosecution where there is no significant harm or culpability and the individual or corporate defendant has cooperated fully.

Where a company has met the conditions for avoiding a recommendation for criminal prosecution under this policy, it will not face any civil liability for gravity-based penalties. That is because the same conditions for discovery, disclosure, and correction apply in both cases. This represents a clarification of the interim policy, not a substantive change.

4. No Routine Requests for Audits

EPA is reaffirming its policy, in effect since 1986, to refrain from routine requests for audits. Eighteen months of public testimony and debate have produced no evidence that the Agency has deviated, or should deviate, from this policy.

If the Agency has independent evidence of a violation, it may seek information needed to establish the extent and nature of the problem and the degree of culpability. In general, however, an audit which results in prompt correction clearly will reduce liability, not expand it. Furthermore, a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government.

E. Conditions

Section D describes the nine conditions that a regulated entity must meet in order for the Agency not to seek (or to reduce) gravity-based penalties under the policy. As explained in the Summary above, regulated entities that meet all nine conditions will not face gravity-based civil penalties, and will generally not have to fear criminal prosecution. Where the regulated entity meets all of the conditions except the first (D(1)), EPA will reduce gravity-based penalties by 75%.

1. Discovery of the Violation Through an Environmental Audit or Due Diligence

Under Section D(1), the violation must have been discovered through either (a) an environmental audit that is systematic, objective, and periodic as defined in the 1986 audit policy, or (b) a documented, systematic procedure or practice which reflects the regulated entity's due diligence in preventing, detecting, and correcting violations. The interim policy provided full credit for any violation found through "voluntary self-evaluation," even if the evaluation did not constitute an audit. In order to receive full credit under the final policy, any self-evaluation that is not an audit must be part of a "due diligence" program. Both "environmental audit" and "due diligence" are defined in Section B of the policy.

Where the violation is discovered through a "systematic procedure or practice" which is not an audit, the regulated entity will be asked to document how its program reflects the criteria for due diligence as defined in Section B of the policy. These criteria, which are adapted from existing codes of practice such as the 1991 Criminal Sentencing Guidelines, were fully

discussed during the ABA dialogue. The criteria are flexible enough to accommodate different types and sizes of businesses. The Agency recognizes that a variety of compliance management programs may develop under the due diligence criteria, and will use its review under this policy to determine whether basic criteria have been met.

Compliance management programs which train and motivate production staff to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. The policy is responsive to recommendations received during public comment and from the ABA dialogue to give compliance management efforts which meet the criteria for due diligence the same penalty reduction offered for environmental audits. (See, e.g., II-F-39, II-E-18, and II-G-18 in the Docket.)

EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. The Agency added this provision in response to suggestions from environmental groups, and believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery and Prompt Disclosure

Under Section D(2) of the final policy, the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. Section D(4) requires that disclosure of the violation be prompt and in writing. To avoid confusion and respond to state requests for greater clarity, disclosures under this policy should be made to EPA. The Agency will work closely with states in implementing the policy.

The requirement that discovery of the violation be voluntary is consistent with proposed federal and state bills which would reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts.

The policy gives three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring,

and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

The final policy generally applies to any violation that is voluntarily discovered, regardless of whether the violation is required to be reported. This definition responds to comments pointing out that reporting requirements are extensive, and that excluding them from the policy's scope would severely limit the incentive for self-policing (see, e.g., II-C-48 in the Docket).

The Agency wishes to emphasize that the integrity of federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the policy to encourage the kind of vigorous self-policing that will serve these objectives, and not to provide an excuse for delayed reporting. Where violations of reporting requirements are voluntarily discovered, they must be promptly reported (as discussed below). Where a failure to report results in imminent and substantial endangerment or serious harm, that violation is not covered under this policy (see Condition D(8)). The policy also requires the regulated entity to prevent recurrence of the violation, to ensure that noncompliance with reporting requirements is not repeated. EPA will closely scrutinize the effect of the policy in furthering the public interest in timely and accurate reports from the regulated community.

Under Section D(4), disclosure of the violation should be made within 10 days of its discovery, and in writing to EPA. Where a statute or regulation requires reporting be made in less than 10 days, disclosure should be made within the time limit established by law. Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status.

This condition recognizes that it is critical for EPA to get timely reporting of violations in order that it might have clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record. Prompt disclosure is also evidence of the regulated entity's good faith in wanting

to achieve or return to compliance as soon as possible.

In the final policy, the Agency has added the words, "or may have occurred," to the sentence, "The regulated entity fully discloses that a specific violation has occurred, or may have occurred * * *." This change, which was made in response to comments received, clarifies that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination.

In general, the Freedom of Information Act will govern the Agency's release of disclosures made pursuant to this policy. EPA will, independently of FOIA, make publicly available any compliance agreements reached under the policy (see Section H of the policy), as well as descriptions of due diligence programs submitted under Section D.1 of the Policy. Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2.

3. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(3), in order to be "voluntary", the violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of the violation to EPA by a "whistleblower" employee; and imminent discovery of the violation by a regulatory agency.

This condition means that regulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third-party complaint. This concept was reflected in the interim policy and in federal and state penalty immunity laws and did not prove controversial in the public comment process.

4. Correction and Remediation

Section D(5) ensures that, in order to receive the penalty mitigation benefits available under the policy, the regulated entity not only voluntarily discovers and promptly discloses a violation, but expeditiously corrects it, remedies any harm caused by that violation (including responding to any spill and carrying out any removal or remedial action required by law), and expeditiously certifies in writing to appropriate state, local and EPA

authorities that violations have been corrected. It also enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

The final policy requires the violation to be corrected within 60 days, or that the regulated entity provide written notice where violations may take longer to correct. EPA recognizes that some violations can and should be corrected immediately, while others (e.g., where capital expenditures are involved), may take longer than 60 days to correct. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

Where correction of the violation depends upon issuance of a permit which has been applied for but not issued by federal or state authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

5. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation, including but not limited to improvements to its environmental auditing or due diligence efforts. The final policy makes clear that the preventive steps may include improvements to a regulated entity's environmental auditing or due diligence efforts to prevent recurrence of the violation.

In the interim policy, the Agency required that the entity implement appropriate measures to prevent a recurrence of the violation, a requirement that operates prospectively. However, a separate condition in the interim policy also required that the violation not indicate "a failure to take appropriate steps to avoid repeat or recurring violations"—a requirement that operates retrospectively. In the interest of both clarity and fairness, the Agency has decided for purposes of this condition to keep the focus prospective and thus to require only that steps be taken to prevent recurrence of the violation after it has been disclosed.

6. No Repeat Violations

In response to requests from commenters (see, e.g., II-F-39 and II-G-18 in the Docket), EPA has established "bright lines" to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by ensuring that penalties are not waived

for repeat offenders. Under condition D(7), the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. This provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities. It would be unreasonable to provide unlimited amnesty for repeated violations of the same requirement.

The term "violation" includes any violation subject to a federal or state civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations are sometimes settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. Together, these conditions identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct.

7. Other Violations Excluded

Section D(8) makes clear that penalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment. Such events indicate a serious failure (or absence) of a self-policing program, which should be designed to prevent such risks, and it would seriously undermine deterrence to waive penalties for such violations. These exceptions are responsive to suggestions from public interest organizations, as well as other commenters. (See, e.g., II-F-39 and II-G-18 in the Docket.)

The final policy also excludes penalty reductions for violations of the specific terms of any order, consent agreement, or plea agreement. (See, II-E-60 in the Docket.) Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

8. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide information necessary to determine the applicability of the policy. This condition is largely unchanged from the interim policy. In the final policy, however, the Agency has added that "cooperation" includes

assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself. This was added to allow the agency to obtain information about any violations indicated by the disclosure, even where the violation is not initially identified by the regulated entity.

F. Opposition to Privilege

The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits for the following reasons:

1. Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, e.g., *United States v. Dexter*, 132 F.R.D. 8, 9-10 (D.Conn. 1990) (application of a privilege "would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.")

2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information—such as health studies or contaminated sediment data—and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, as some industry commentators have suggested, a privilege of that nature would cloak

underlying facts needed to determine whether such data were accurate.

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The "in camera" (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association, as well as by public interest groups. (See, e.g., Docket, II-C-21, II-C-28, II-C-52, IV-G-10, II-C-25, II-C-33, II-C-52, II-C-48, and II-G-13 through II-G-24.)

G. Effect on States

The final policy reflects EPA's desire to develop fair and effective incentives for self-policing that will have practical value to states that share responsibility for enforcing federal environmental laws. To that end, the Agency has consulted closely with state officials in developing this policy, through a series of special meetings and conference calls in addition to the extensive opportunity for public comment. As a result, EPA believes its final policy is grounded in common-sense principles that should prove useful in the development of state programs and policies.

As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply. The Agency remains opposed to state legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions

needed to deter such misconduct, there is no need for EPA action.

H. Scope of Policy

EPA has developed this document as a policy to guide settlement actions. EPA employees will be expected to follow this policy, and the Agency will take steps to assure national consistency in application. For example, the Agency will make public any compliance agreements reached under this policy, in order to provide the regulated community with fair notice of decisions and greater accountability to affected communities. Many in the regulated community recommended that the Agency convert the policy into a regulation because they felt it might ensure greater consistency and predictability. While EPA is taking steps to ensure consistency and predictability and believes that it will be successful, the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate.

II. Statement of Policy: Incentives for Self-Policing

Discovery, Disclosure, Correction and Prevention

A. Purpose

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.

B. Definitions

For purposes of this policy, the following definitions apply:

"Environmental Audit" has the definition given to it in EPA's 1986 audit policy on environmental auditing, i.e., "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity-based penalties" are that portion of a penalty over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from non-compliance. (For further discussion of this concept, see "A Framework for Statute-Specific Approaches to Penalty Assessments", #GM-22, 1980, U.S. EPA General Enforcement Policy Compendium).

"Regulated entity" means any entity, including a federal, state or municipal agency or facility, regulated under federal environmental laws.

C. Incentives for Self-Policing

1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions of Section D of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

2. Reduction of Gravity-Based Penalties by 75%

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of Section D(2) through D(9) below.

3. No Criminal Recommendations

(a) EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought against a regulated entity where EPA determines that all of the conditions in Section D are satisfied, so long as the violation does not demonstrate or involve:

(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or
(ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.

(b) Whether or not EPA refers the regulated entity for criminal prosecution under this section, the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Audits

EPA will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or
(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and correct violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

(a) emissions violations detected through a continuous emissions monitor

(or alternative monitor established in a permit) where any such monitoring is required;

(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the regulated entity prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third party;

(d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

(e) imminent discovery of the violation by a regulatory agency;

5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required;

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;

7. No Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to human health or the environment, or (ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

E. Economic Benefit

EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet conditions 1 through 9 in section D and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. Effect on State Law, Regulation or Policy

EPA will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

G. Applicability

(1) This policy applies to the assessment of penalties for any violations under all of the federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1986 Environmental Auditing Policy Statement.

(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation(s), nor will this policy apply to violations which have received penalty mitigation under other policies.

(3) This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the

Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

(4) This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this policy.

H. Public Accountability

(1) Within 3 years of the effective date of this policy, EPA will complete a study of the effectiveness of the policy in encouraging:

(a) changes in compliance behavior within the regulated community, including improved compliance rates;

(b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;

(c) corporate compliance programs that are successful in preventing violations, improving environmental performance, and promoting public disclosure;

(d) consistency among state programs that provide incentives for voluntary compliance.

EPA will make the study available to the public.

(2) EPA will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

I. Effective Date

This policy is effective January 22, 1996.

Dated: December 18, 1995.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

[FR Doc. 95-31146 Filed 12-21-95; 8:45 am]

BILLING CODE 5500-00-P



Assistant Attorney General

Washington, D.C. 20530

January 31, 1996

Steven Herman, Esq.
Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Room 3202
Mail Code 2201-A
Washington, D.C. 20044

Dear Assistant Administrator Herman:

Congratulations on the release of EPA's "Final Policy on Incentives for Self-Policing," which expands incentives for regulated entities that voluntarily discover, promptly disclose, and expeditiously correct environmental violations. The Department supports EPA's policy, which, in conjunction with our shared commitment to encouraging voluntary compliance in part through an effective aggressive enforcement program, will promote greater compliance with the environmental laws and protection of the American public.

Self-auditing and other forms of self-policing can play a crucial role in promoting environmentally sound business practices. Since July, 1991, it has been the express policy of the Department to consider in the exercise of criminal prosecutorial discretion self-auditing, self-policing and voluntary disclosure as important mitigating factors. That policy continues to work well, and there are no present plans to change it.

The Department has taken other steps to demonstrate its commitment to encouraging voluntary compliance and disclosure:

- ♦ The Department generally will not seek an environmental audit from a regulated entity prior to receipt of other information suggesting that the entity has committed violations of environmental law. However, once an investigation is begun on the basis of independent information of violations, the Department seeks all relevant information, including audit reports.

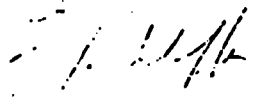
- ♦ The Department views effective programs to prevent and detect violations of law, as well as self-reporting, cooperation and acceptance of responsibility, as mitigating factors in the sentencing phase of environmental criminal cases against corporations.
- ♦ The Department supports the use of EPA's Incentives policy, in conjunction with other applicable settlement policies, in the settlement of civil environmental enforcement actions to which they may apply.
- ♦ The Department has its own small business policy that, subject to limited exceptions, waives all civil penalties for small businesses that participate in and act promptly to remedy violations discovered in a compliance assistance program.

The backbone of environmental protection is voluntary compliance. A vigorous enforcement program prompts voluntary compliance, deters violations, recoups the economic benefit of noncompliance, remedies harm, and punishes non-complying conduct. A strong enforcement program protects companies that obey the law from being competitively disadvantaged by those that do not, and provides a powerful incentive for regulated entities to comply with the laws that protect human health and the environment.

The approach taken in EPA's policy, endorsed by this Department, is sound. The approach taken in state laws and proposed federal legislation of creating evidentiary privileges for polluters that perform environmental audits or providing statutory immunity for violations by such polluters conceals environmental hazards from the public and public authorities, impairs enforcement, and shields misconduct. Therefore, the Department will continue vigorously to oppose such legislation. The Department's policies and EPA's policies contain the right mix of strong enforcement for wrongdoers and leniency for good actors to ensure continued protection of the American public and of our Nation's environment.

It was a pleasure to work with you and your staff to develop this policy. I look forward to continuing to work together cooperatively to implement the policy. Feel free to contact me or my staff at any time if we can be of any additional assistance.

Very truly yours,



Lois J. Schiffer



The Commonwealth of Massachusetts

Office of the Attorney General

200 Portland Street

Boston, MA 02114

SCOTT HARSHBARGER
ATTORNEY GENERAL

(617) 727-2200

January 26, 1996

Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

Dear Administrator Browner:

We are writing to offer our support for the policy on "Incentives for Self-Evaluation" (often referred to as the audit policy) issued by the U.S. Environmental Protection Agency today. This policy encourages responsible self-policing by greatly reducing potential penalties and minimizing the risk of criminal prosecution for companies and other regulated parties that use audits or other means of discovering violations of environmental requirements, promptly report the problems and expeditiously correct the problems. Equally important, the policy accomplishes this purpose while preserving the right of government officials to protect public health and the environment by enforcing in cases involving the most serious types of violations, as well as the right of the public to know the nature of compliance problems disclosed under this policy and the actions taken by the agency in response to the disclosures made. The policy is a carefully constructed compromise that balances the legitimate interests of the public, regulated entities and federal and state enforcement agencies.

We are particularly appreciative of the close consultation between your agency and the states that occurred throughout the process of developing the policy. Many of our recommendations are clearly reflected in the final policy. The consultative model used in developing the policy provides an excellent example of how EPA and the states work in harmony to encourage

both voluntary compliance and effective law enforcement. We look forward to working with EPA on similar efforts in the future.

Sincerely,

Richard Blumenthal
Attorney General of Connecticut

Bruce M. Botelho
Attorney General of Alaska

Charles W. Burson
Attorney General of Tennessee

Robert A. Butterworth
Attorney General of Florida

Mark Coleman
Executive Director
Oklahoma Department of
Environmental Quality

James E. Doyle
Attorney General of Wisconsin

Christine O. Gregoire
Attorney General of Washington

Kent Hanson
Deputy Attorney General of Nevada

Scott Harshbarger
Attorney General of Massachusetts

Jeffrey R. Howard
Attorney General of New Hampshire

Hubert H. Humphrey, III
Attorney General of Minnesota

Frank J. Kelley
Attorney General of Michigan

Thomas J. Miller
Attorney General of Iowa

Deborah T. Poritz
Attorney General of New Jersey

Mary G. Riveland
Director
Washington State Department
of Ecology

Tom Udall
Attorney General of New Mexico

Dennis C. Vacco
Attorney General of New York

Richard Whisnant
General Counsel
N. Carolina Department of
Environment, Health and
Natural Resources

Grant Woods
Attorney General of Arizona

STATE OF MISSOURI
DEPARTMENT OF NATURAL RESOURCES

Mel Carnahan, Governor • David A. Shorr, Director

OFFICE OF THE DIRECTOR

P.O. Box 176 Jefferson City, MO 65102-0176 (314)751-4422

FAX (314)751-7627

DEC 14 1995

Ms. Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Administrator Browner:

I am writing in support of the direction you and the U.S. Environmental Protection Agency are taking in issuing your policy on "Incentives for Self-Evaluation." This policy will encourage compliance with environmental laws by offering a process which companies and other regulated entities may affirmatively use. It should result in the reduction of potential penalties for entities that conduct audits or use other methods of discovering violations and promptly report and correct them.

At the same time, your new policy does not eliminate your ability to insure a "level playing field" for regulated entities who work hard to avoid violations of environmental laws in the first place. It should additionally protect the rights of citizens — including their expectation that the compliance measures will be publicly available.

This policy will inevitably serve as an alternative to the kind of audit privilege proposals which have been made at both state and federal levels. The audit privileges include an avenue for environmental information to be held secret and unavailable for use in legal proceedings by private citizens as well as public agencies. Many also provide complete immunity for environmental violators under some circumstances. In Missouri, we chose to oppose legislation which would have such results.

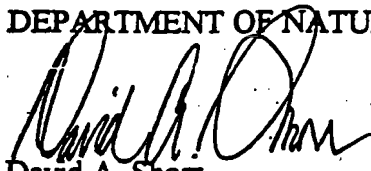
Ms. Carol Browner

Page 2

You are to be congratulated on the extraordinary efforts which your agency made to receive input from the public, the states, regulated communities and public interest groups. We are particularly grateful for your inclusion of Missouri in this process. We feel that it provided a valuable forum to both provide input and receive information. We will use the experience we gained as we continue to develop our own incentives for environmental compliance and protection.

Very truly yours,

DEPARTMENT OF NATURAL RESOURCES

A handwritten signature in dark ink, appearing to read "David A. Shorr", is written over the typed name and title.

David A. Shorr
Director

DAS:mms



ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY

Fife Symington, Governor

Edward Z. Fox, Director

December 29, 1995

Ms. Carol Browner
Administrator
U.S. Environmental Protection Agency
401 M Street SW
Washington, D.C. 20460

Dear Administrator Browner:

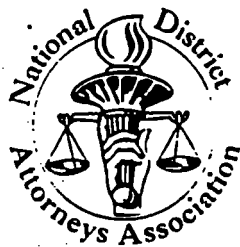
We are writing to offer our support for the policy concept on "Incentives for Self-Evaluation" (often referred to as the audit policy) issued by the U.S. Environmental Protection Agency. This policy encourages responsible self-policing by greatly reducing potential penalties and minimizing the risk of criminal prosecution for companies and other regulated parties that use audits or other means of discovering violations of environmental requirements to promptly report and expeditiously correct problems. Equally important, the policy accomplishes this purpose while preserving the right of government officials to protect public health and the environment by enforcing in cases involving the most serious types of violations. We believe that EPA's environmental auditing policy can be even further designed to achieve greater levels of compliance, however, the policy is a good "first step" in moving towards a national program of voluntary compliance.

We are particularly appreciative of the close consultation between your agency and the states that occurred throughout the process of developing the policy. The consultative model used in developing the policy provides an example of how EPA and the states can work in harmony to encourage both voluntary compliance and effective law enforcement. We look forward to working with EPA on similar efforts in the future.

Sincerely,

Russell F. Rhoades
Director

RFR/fjm



NATIONAL DISTRICT ATTORNEYS ASSOCIATION

99 Canal Center Plaza • Suite 510 • Alexandria, Virginia 22314

Telephone: (703) 549-9222

Fax: (703) 836-3195

Office of the President

December 13, 1995

The Honorable Carol Browner
Administrator
Environmental Protection Agency
Washington, DC 20460

Dear Administrator Browner:

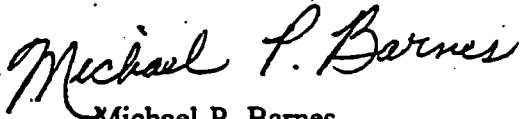
The National District Attorneys Association has long opposed the institution of privileges or immunity, at either the federal or state level, for environmental self-audits or self-reporting. To this end the Association has testified before the Congress as to our concerns and local prosecutors have actively urged their Senators and Representatives to reject legislation enacting federal immunities and privileges. In light of this record of opposing unnecessary and unwarranted criminal privileges and immunities, the National District Attorneys Association strongly supports the Environmental Protection Agency's new policy on "Incentives for Self-Evaluation."

The new policy effectively balances the competing interests of business and public safety. It incorporates important safeguards to the public and to the environment while also managing to encourage both industries and small businesses to conduct self-evaluations and to discover and discontinue any environmental practices which are in violation of the law. The language you have used is carefully drawn and offers the business sector guidelines and alternatives which are both logical and reasonable.

An obvious benefit of the new policy is that it encourages greater compliance with environmental laws and regulations without immunizing those who commit criminal acts, a major failing of the proposals for a self-audit privilege. As local prosecutors, sworn to protect the citizens who have chosen us for office, we cannot acquiesce in efforts to permit those who commit criminal acts to walk away from substantial harm to the public and to the environment in pursuit of financial gain. This policy does not penalize the public and serves as a sensible and practical alternative to pending privilege legislation.

The Environmental Protection Agency is to be commended for offering a workable solution to a complex issue. It addresses the major concerns of the business world while protecting the public from criminal acts. Now, the challenge is for all of us - law enforcement and industry alike - to make it work.

Sincerely,

A handwritten signature in cursive script that reads "Michael P. Barnes". The signature is written in dark ink and is positioned above the printed name.

Michael P. Barnes
President, National District Attorneys Association
Prosecuting Attorney, South Bend, Indiana



CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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GREGORY D. TOTTE

December 8, 1995

Carol Browner

Administrator

U.S. Environmental Protection Agency

401 M Street, S.W.

Washington, D.C. 20460

Dear Administrator Browner:

I am writing on behalf of the California District Attorneys Association, a professional association of California's 58 elected District Attorneys and 2,200 Deputy District Attorneys, in support of EPA's policy on environmental audits, also titled "Incentives for Self-Evaluation."

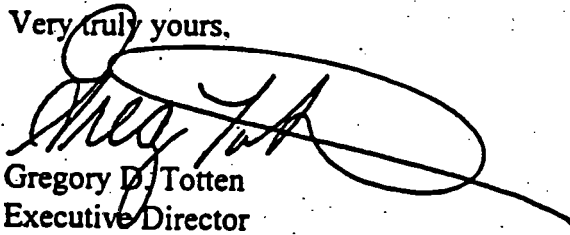
As you may know, California's prosecutors have worked hard to promote a self-regulation policy which encourages responsible businesses to perform environmental self-evaluations. At the same time however, we have strongly opposed efforts to create an express evidentiary privilege or give immunity from prosecution for violations discovered in the course of a self audit.

CDAA remains committed to strong and effective environmental enforcement which provides incentives for businesses to operate responsibly, preserves a level playing field, and punishes bad actors. EPA's audit policy is an example of a policy created to achieve the same ends. It rewards those businesses with regular audits by reducing or eliminating gravity-based penalties for properly reported and corrected violations while recapturing illegally-gained economic benefits where appropriate, and assuring that repeated, serious, and deliberate conduct remains subject to sanctions.

page 2
Carol Browner
December 8, 1995

The EPA environmental audit policy, which was refined through an unprecedented series of public workshops across the nation, is an example of how EPA, law enforcement, business, state government, and the public can work together to encourage voluntary compliance and effective law enforcement. We look forward to working with EPA on similar efforts in the future.

Very truly yours,



Gregory D. Totten
Executive Director

GDT/jt

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January 10, 1996

Hon. Carol Browner
Administrator
United States Environmental Protection Agency
Washington, D.C. 20460

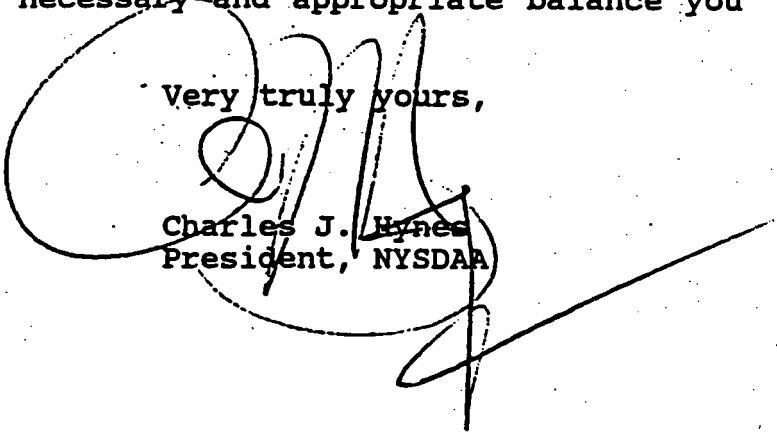
Dear Administrator Browner:

I am writing on behalf of New York's sixty-two, independently elected District Attorneys, to express our support for the Environmental Protection Agency's new policy regarding environmental audits. As you know, the New York State District Attorneys Association has strongly opposed legislation to deny prosecutors access to crucial information or to shield environmental lawbreakers from prosecution and conviction. Your policy reinforces the position of the EPA that passage of such legislation would be extremely detrimental to the criminal enforcement of the environmental laws and would threaten public health and safety.

At the same time, your carefully-developed policy properly balances the interests of businesses and the public. By offering substantial incentives and benefits for companies which conduct environmental self-audits, the EPA has strengthened business efforts to prevent and detect environmental hazards, while at the same time insuring that serious, repeated and intentional violations do not go unpunished.

The majority of criminal environmental enforcement actions in this county have been brought, and will continue to be brought, by local prosecutors, and the EPA policy should serve as a model for state legislatures and regulatory agencies. We intend to continue working with your agency and fellow prosecutors around the country to make this policy work and to resist legislative efforts to undermine the necessary and appropriate balance you have achieved.

Very truly yours,



Charles J. Hynes
President, NYSDAA

OFFICE OF THE DISTRICT ATTORNEY
RICHMOND COUNTY

WILLIAM L. MURPHY
DISTRICT ATTORNEY

DAVID W. LEHR
CHIEF ASSISTANT

36 RICHMOND TERRACE STATEN ISLAND, N.Y. 10301
TELEPHONE (718) 876- 5750

26, 1995

Hon. Carol Browner
U.S. Environmental
401 M Street, S.W.
Washington, D.C. 2

Re: Environmental Self Audit Policy

Dear Administrator Browner:

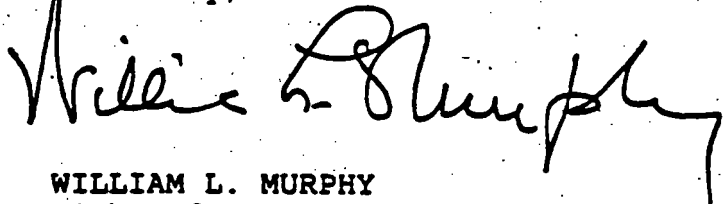
I am writing to offer my support for EPA's final policy on environmental self audits. While self audit incentives are an important tool in civil and administrative compliance, they are a disaster in criminal enforcement. I share the opinion of local prosecutors across the country, in that the most effective way to get compliance is through criminal enforcement. Further, the majority of criminal environmental enforcement actions in this country have been taken by local prosecutors.

I have worked with many groups in opposing self audit legislation. I believe that your agency's policy of offering civil and administrative benefits to violations uncovered by self policing efforts should answer the concerns of the business community without interfering with the criminal prosecutors in the country.

As a past chairman of both the New York State District Attorneys Association Environmental Crimes Committee and the National District Attorneys Environmental Protection Committee and as a past President of the New York State District Attorneys Association, I remain committed to a policy of strong criminal enforcement of our environmental laws. In being so committed, I oppose any self audit privilege legislation or policy and I hope that your new audit policy will obviate the need for any further legislative or administrative concessions.

If I can answer any specific questions, please feel free to call me. Thank you for your careful and complete study into this issue.

Sincerely,

A handwritten signature in dark ink, appearing to read "William L. Murphy". The signature is fluid and cursive, with a large, stylized "M" at the end.

WILLIAM L. MURPHY
Richmond County District Attorney

COUNTY OF SUFFOLK



OFFICE OF DISTRICT ATTORNEY
JAMES M. CATTERSON, JR.
DISTRICT ATTORNEY

December 14, 1995

Ms. Carol Browner
Administrator
United States Environmental Protection Agency
401 M Street, S.W.
Washington, DC 20460

Re: Environmental Audit Policy

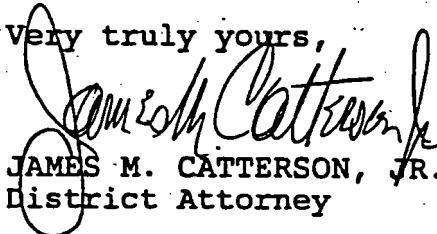
Dear Administrator Browner:

I am writing to express my support for the EPA's soon-to-be adopted environmental audit policy. I am confident the new policy addresses the concerns of industry with regard to disclosure of self discovered violations, and will encourage voluntary compliance with environmental laws.

As former Chairman of the National District Attorneys Association Environmental Protection Committee, and immediate past president of the New York State District Attorneys Association, I was pleased at the level of participation the EPA solicited from local prosecutors in exploring methods of encouraging voluntary compliance.

I am hopeful that the new audit policy will obviate the perceived need for legislation which would create statutory privileges and immunity. Such legislation, if enacted, would have the unintended effect of shielding individuals who intentionally dump hazardous wastes in our woods and streams, and harm legitimate businesses.

Very truly yours,


JAMES M. CATTERSON, JR.
District Attorney

JMC/LAS/js



CHEMICAL MANUFACTURERS ASSOCIATION

**"Incentives for Self-Evaluation" – EPA's New Policy
on Disclosure of Self-Detected Violations**

Statement of David F. Zoll
Vice President and General Counsel
Chemical Manufacturers Association
December 22, 1995

On December 18, EPA released its final policy on the disclosure of violations that regulated entities discover through voluntary self-evaluation. CMA commends the Agency for issuing this policy, as it represents a substantial, positive development in the Agency's views on the subject. We also salute the Agency for instituting the open, 19-month process that gave rise to the new policy. Through the Compliance Management & Policy Group, CMA has been an active participant in this process, particularly by cosponsoring the Price Waterhouse study on attitudes and practices regarding auditing and disclosure and the ABA stakeholder dialogues.

By its new policy, EPA recognizes the increasing importance of companies' own efforts in assuring compliance. EPA has also committed itself to treating companies that find, fix and disclose noncompliance more favorably than those that do not. We believe the new policy will substantially promote the use of environmental auditing and compliance management systems. It should also lead to greater willingness to disclose noncompliance discovered through these activities. The result will be greater environmental protection through the prevention of noncompliance, as well as greater public awareness of regulated entities' compliance status and efforts.

The new policy is a significant improvement over the Agency's April 1995 interim policy. Most important, it offers the same benefits to all entities that voluntarily discover noncompliance and then report it, regardless of whether that reporting was mandatory. The new policy also encourages entities to implement compliance management systems, recognizing that such systems actively prevent noncompliance. The policy extends its protections to violations of reporting requirements, and clarifies that a disclosure does not constitute an admission.

Still, the new policy is not ideal. Potential difficulties lurk in the narrow definition of "repeat violations," as well as in the possible requirement to provide information on "other related compliance problems." Most significant, the policy expresses firm opposition to self-evaluative privilege legislation. Regulated entities have very real and legitimate concerns about the ability of third parties, including state and

CMA IS MOVING!

EFFECTIVE JANUARY 1996, OUR NEW ADDRESS WILL BE: 1300 WILSON BOULEVARD • ARLINGTON, VIRGINIA 22209

local governments, to use self-evaluative materials against the persons generating them. Nothing EPA says or does can bind such third parties. CMA continues to support appropriately qualified legislation that would protect self-evaluative materials from being used by these entities, at least.

CMA also believes that the subject of this policy is sufficiently important to warrant its being codified as a regulation, and we appreciate that the Agency "is still considering this matter." We are also encouraged by the Agency's statement that "EPA personnel will be expected to follow this policy, and the Agency will take steps to assure national consistency in application." The success of the policy will depend on EPA implementing it in an even-handed and reasonable way. We also urge EPA to actively encourage states to adopt similar policies or legislation.

During the next three years, EPA has pledged to complete a study of the policy's effectiveness. CMA believes this is a good idea. In the meantime, one way in which the Agency could certainly increase the effectiveness of the policy would be to revise its "BEN" model for determining the economic benefit of noncompliance. While CMA supports the theory that violators should not be able to undercut law-abiding competitors, the BEN model disregards economic reality and is inappropriately punitive, as CMA and others have explained in a rulemaking petition now pending with EPA. Companies will be encouraged to disclose noncompliance when this model has been revised, and we look forward to working with the Agency on it.



FOR IMMEDIATE RELEASE

Contact: Carol Andress 202 387-3500
Lisa Swann 202 387-3500

EDF PRAISES EPA ENVIRONMENTAL AUDIT POLICY

(18 December, 1995 -- Washington) The Environmental Protection Agency (EPA) and the White House deserve praise for adopting a common sense approach to environmental enforcement, despite pressure from some members of Congress and industry groups, according to the Environmental Defense Fund (EDF).

EPA's final environmental audit policy, issued today, protects responsible companies who operate in good faith. The policy is a response to claims by companies that their environmental audits would be used against them by prosecutors or citizens. Under the new EPA policy, companies that find environmental violations through systematic self-evaluations, and promptly disclose and correct problems will receive reduced, or in some cases no penalty.

"We applaud EPA for issuing a consistent, firm rejection of privilege and immunity for polluters," said EDF policy analyst Carol Andress. "Some members of Congress are pushing for, and several states have hastily enacted so-called 'privilege and immunity' laws that allow companies to shut out government and public access to a wide array of environmental information. Such laws undercut government enforcement abilities, as well as the public's right to know about health and safety concerns in their communities."

"The final policy provides responsible companies a reliable break in penalties without letting scofflaws off the hook," said Andress. It improves on EPA's Interim Policy released in March, 1995 by enhancing public notification when a company voluntarily discloses violations.

"The next challenge for EPA will be to consistently implement the policy to encourage public disclosure and ensure that businesses have an unambiguous incentive to continually improve their environmental performance and prevent pollution," said Andress. "Consistent implementation also must include close scrutiny of state laws granting privilege and full immunity. EPA should take aggressive steps to ensure that violations of federal law are handled consistently in every state and that the public has unfettered access to information on pollution in their community. Without that scrutiny, we risk having some states become safe havens for polluters."

The Environmental Defense Fund, a leading, national, NY-based nonprofit organization, represents 300,000 members. EDF links science, economics, and law to create innovative, economically viable solutions to today's environmental problems.

MEMORANDUM

TO: NDAA BOARD OF DIRECTORS

RE: PARENTAL RIGHTS AND RESPONSIBILITIES ACT

FROM: Jim Polley

DATE: February 29, 1996

Parental Rights bills have been introduced in both Houses of the Congress, and in some 27 states, as a part of the Christian Coalition legislative initiatives. They progressed in the Congress without much notice or fanfare until recently.

Among many other things, the Parental Rights bills would provide a cause of action, in federal or state courts, against local government officials that parents believed were interfering with their methods of child rearing. The latest version of the bill (attached) clearly defines out cases of custody disputes and other litigation between parents. Less clear is its applicability to cases of child abuse and neglect since this is left to interpretation. Cases involving youthful offenders are left out altogether.

NDAA President Barnes sent Senator Grassley, all the other sponsors, and the members of the Senate Judiciary Committee a letter raising NDAA objections. Information copies of the letter were provided to the NDAA officers, Board of Director members and Prosecutor Coordinators from the appropriate states. As a result, NDAA was invited to participate in a meeting last week with a member of Senator Grassley's staff.

During the meeting it was explained that the bill, as currently drafted, presented two problems. In the area of child abuse and neglect, while it was arguable that the statute did not apply it would ultimately be left to the decision of a federal judge whose experience in this area of the law would be minimal. In cases of youthful offenders/juvenile delinquents there is no exception provided at all. Parents could challenge the role of local law enforcement in investigating and taking actions against their child if it ran counter to their beliefs on raising a child - no matter how disruptive to the community.

The staff member was receptive to the NDAA position and invited NDAA to provide language to fix the problems identified with his proposed legislation. After consulting with the NDAA Executive Committee and the co-chairs of the Juvenile Justice Committee, draft language was provided that would remove cases of child abuse and neglect and cases involving youthful offenders from the statute. A copy of this language is attached.

H.R. 1946/S 984

[Amended without strikeouts.]

2/12/96

To protect the fundamental right of a parent to direct the upbringing of a child, and for other purposes.

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Parental Rights and Responsibilities
3 Act of 1995".

4 SECTION 2. PROHIBITION ON INTERFERING WITH OR
5 USURPING RIGHTS OF PARENTS.

6 No Federal, State, or local government, or any official of such a
7 government acting under color of law, shall interfere with or usurp the
8 right of a parent to direct the upbringing of the child of the parent.

9 SEC. 3. STRICT SCRUTINY.

10 No exception to section 2 shall be permitted, unless the
11 government or official is able to demonstrate, by clear and convincing
12 evidence, that the interference or usurpation is essential to accomplish a
13 compelling government interest and is narrowly drawn or applied in a

1 manner that is the least restrictive means of accomplishing the compelling
2 interest.

3 **SEC. 4. CLAIM OR DEFENSE.**

4 Any parent may raise a violation of this Act in an action in a
5 Federal or State court, or before an administrative tribunal, of appropriate
6 jurisdiction as a claim or a defense.

7 **SEC. 5. DOMESTIC RELATIONS CASES AND DISPUTES**
8 **BETWEEN PARENTS.**

9 This Act shall not apply to --

10 (1) domestic relations cases concerning the appointment of
11 parental rights between parents in custody disputes; and

12 (2) any other litigation between parents.

13 **SEC. 6. ATTORNEY'S FEES.**

14 Subsection (b) and (c) of section 722 of the Revised Statutes (42
15 U.S.C. 1988 (b) and (c)) (concerning the award of attorney's and expert
16 fees) shall apply to cases brought under this Act.

17 **SEC. 7. DEFINITIONS.**

18 As used in this Act:

19 (1) CHILD. -- The term "child" has the meaning provided
20 by State statute.

21 (2) PARENT. -- The term "parent" has the meaning
22 provided by State statute.

(3) DIRECT THE UPRISING OF A CHILD.

(A) IN GENERAL.— The term "direct the uprising of a child" includes, but is not limited to the parent's --

- (i) directing or providing for the education of the child;
- (ii) making a health care decision for the child;
- (iii) disciplining the child, including reasonable corporal discipline; and
- (iv) directing or providing for the religious teaching of the child.

(B) LIMITATIONS CONCERNING PARENTAL DECISIONS ON HEALTH CARE.— The term "direct the uprising of a child" shall include a parent's withholding consent to any medical service or treatment except when such care or treatment is necessary:

- (i) to prevent or remedy serious harm to the child;
- or
- (ii) to prevent the withholding of medically indicated treatment from children (including infants) with life threatening conditions.

(C) NO APPLICATION TO ABUSE AND

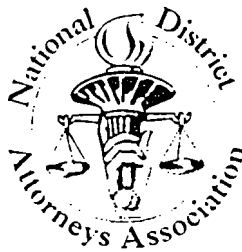
1 **NEGLECT.** -- The term "direct the upbringing of a child"
2 shall not include child abuse and neglect as the terms are
3 defined in state statute.

4 **(4) STATE.** -- The term "State" includes the District of
5 Columbia, the Commonwealth of Puerto Rico, and each territory
6 and possession of the United States.

MEMORANDUM

The attached letter was sent to the following senators, as well as the NDAA Officer and members of the Board of Directors and the prosecutor coordinator for the appropriate states, a total of 95 letters.

Dole
Lott
Warner
Faircloth
Helms
Inhofe
Specter
Abraham
Biden
Brown
DeWine
Feingold
Feinstein
Kennedy
Kohl
Kyl
Leahy
Simon
Simpson
Thompson
Thurmond
Heflin
Hatch
Grassley
Coats
Kassebaum



NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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Telephone: (703) 549-9222

Fax: (703) 836-3195

Office of the President

January 30, 1996

The Honorable Charles E. Grassley
Administrative Oversight and the Courts Subcommittee
Senate Committee on the Judiciary
523 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Grassley:

As the President of the National District Attorneys Association, and as an active local prosecutor, I wish to express our utmost concern and opposition to one of provisions contained in S.984, "Parental Rights and Responsibilities Act of 1995."

Local prosecutors have generally recognized and supported the efforts of the Congress to protect the rights of parents such as those articulated in S. 919, the "Child Abuse Prevention and Treatment Act Amendments of 1995." There, recognition was given to the importance of Congressional leadership in helping states protect children while also recognizing the primacy of state involvement in that effort. We agree that in the fight to protect children from harm, the rights of parents must be protected. However, we are concerned that S. 984 will unduly elevate parental rights at the expense of both children and local law enforcement.

The bill has the very real potential to have a significant and adverse impact on the criminal investigation and prosecution of child abuse. The "Parental Rights and Responsibilities Act" creates a colorable cause of action for any parent suspected, accused or convicted of child abuse to sue the prosecutor and any law enforcement organization involved in any investigation or prosecution. The threat of such litigation can have a chilling effect on the effort of those sworn to protect the local community. Moreover, if we pursue the obligations of our duty, the incessant suits that will be brought will further burden the federal court system, be a financial drain on scarce local assets and endanger child victims through further delays.

Rather than create a cause of action in federal court judicial oversight should be the sole purview of state and local courts under existing rules, statutes, and precedent. State and local courts are better suited to litigate these traditional state issues. Moreover, given the federal courts' inexperience in litigating family matters, that forum seems ill-suited to the tasks assigned by the "Parental Rights and Responsibilities Act".

Sincerely,

A handwritten signature in cursive script that reads "Michael Barnes".

Michael Barnes

President

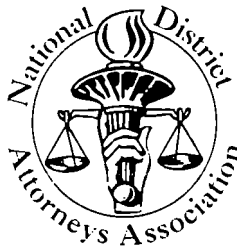
Prosecuting Attorney, South Bend, Indiana

cc: Kolan Davis

Honorable William E. Davis, NDAA Past Vice President

Honorable Gary G. Kimes, NDAA State Director, Iowa

Mr. David Welu, Executive Director, Iowa Prosecuting Attorneys Council



NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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February 22, 1996

Ms. Shannon Royce
135 Hart Senate Office Building
Washington, DC 20510-1501

Dear Ms. Royce:

Thank you for taking the time last week to discuss the Parental Rights and Responsibilities Act with me and, perhaps more importantly, understanding the concerns that local prosecutors have with the bill as currently drafted.

Following up on your suggestion the following changes would assuage the prosecutors' professional concerns with the legislation:

Delete: "including reasonable corporal punishment."

If, as you pointed out, all states include this within their definitions of child abuse and neglect, then the language is superfluous.

Add:

"SEC. CHILD ABUSE AND NEGLECT CASES AND CASES INVOLVING
YOUTHFUL OFFENDERS.

This Act shall not apply to--

(1) The investigation, prosecution and judicial disposition of cases of child abuse and neglect as defined by state statute.

(2) The investigation, adjudication, prosecution or judicial or administrative disposition of cases involving youthful offenders and juvenile delinquents as defined by state statute."

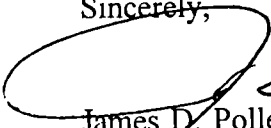
As we discussed the present draft, while addressing child abuse and neglect in definitional terms, is not specific in exempting these cases from the terms of the Act. Further, situations involving juvenile delinquents and youthful offenders are not addressed at all. In the latter case the parents

of a child that is disruptive of community standards of behavior could sue local officials who try and intervene solely on the basis that they want their child to be disruptive or a bully. The draft language provided leans heavily on state law while permitting local law enforcement to work with parents and the community to reduce juvenile crime and protect children from neglect and abuse.

I hope that Senator Grassley will understand the vital role that prosecutors play in developing the community standards that his Act is intended to foster and, at the same time, realize that without these changes local law enforcement will be unduly hampered in carrying out their sworn responsibilities.

Please call if we can provide any further information or assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "James D. Polley, IV", written over a large, loopy circular flourish.

James D. Polley, IV
Colonel (Ret.), U.S. Army
Director, Government Affairs

MEMORANDUM

TO: NDAA BOARD OF DIRECTORS / PROSECUTOR COORDINATORS

RE: MEDICAL RECORDS CONFIDENTIALITY ACT

FROM: Jim Polley

DATE: February 29, 1996

Attached is a copy of S.1360, the "Medical Records Confidentiality Act of 1995." This was previously placed on the NDAA Bulletin Board for your review. The Medical Records Confidentiality Act has lain dormant since December 1995, but DOJ believes that some action may take place this session of Congress and wants to coordinate their position with any NDAA concerns.

For several years there have been efforts to extend privacy law protection and this effort is an extension of that enterprise. In its present form, S.1360 could cause significant problems for local, state and federal law enforcement. The obstacles presented to effective, efficient and timely investigative efforts could raise barriers on a range of criminal activities - from child abuse to health care fraud. For a further discussion see the attached "Comment on S. 1360" provided by another law enforcement organization.

A deal has been brokered by Senator Leahy, as a sponsor of this bill, with Senator Kassebaum, the Sponsor of the "Private Market Insurance Reform Bill" to amend her bill with the addition of medical records privacy. Senator Kassebaum's legislation provide for transferability of health insurance from job-to-job and continuation provisions for someone fired or laid off. It would also prohibit denying insurance for a preexisting medical condition. This has broad, bipartisan support.

This combined health bill is expected to be brought to the floor of the Senate in mid-March and will likely pass. In the House the same alliance of the right and left that have limited other law enforcement initiatives is expected to try and advance this bill as a further protection of individual privacy.

Please review the Act, and in particular Sections 210 and 212, and provide me with any ideas you have or problems you foresee.

Senate Sponsors are:

Daschle D-SD

Frist R-TN

Jeffords R-VT

Kohl D-WI

Stevens R-AK

Dole R-KS

Gregg R-NH

Kassebaum R-KS

Leahy D-VT

Simpson R-WY

Feingold D-WI

Hatch R-UT

Kennedy D-MA

Simon D-IL

McCain R-AZ

Cochran R-MS

Bennett R-UT

Mack R-FL

Pell D-RI

Moseley-Braun D-IL

Health Care Policy
STRONG PRIVACY PROTECTIONS NEEDED
FOR PATIENT RECORDS, SENATE PANEL TOLD

WASHINGTON (BNA) -- Strong privacy legislation is urgently needed to protect the confidentiality of patients' medical records as information technology proliferates in the health care system, witnesses told a Senate panel Nov. 14.

A lack of federal legislation and a patchwork of state laws hinder the health care industry's ability to protect such sensitive personal information from being used for non-medical purposes, according to Carolyn Roberts, former chairwoman of the American Hospital Association's board of trustees. The field at large is trying to protect the confidentiality of patients but the absence of clear guidelines hinders their ability to do so, she said.

At the Senate Labor and Human Resources Committee hearing to consider a bipartisan-crafted bill (S 1360), the proposed Medical Records Confidentiality Act of 1995, Roberts noted that there are no federal penalties for breaches of confidentiality. Penalties provided in the bill for releasing a patient's medical records without permission would dramatically reduce unauthorized disclosures, she added.

"A uniform federal law is the only mechanism that can ensure that individually identifiable health care information be maintained confidentially as it travels from place to place, including across state lines," Roberts said.

According to the bill's sponsor, Sen. Robert Bennett (R-Utah), it would provide patients with more control over their medical records in terms of confidentiality, access, and security, and establish federal standards for handling identifiable health information in the health care system. In the long run, a single federal privacy standard would reduce the cost of health care, he said.

"You have more right to see your credit report and make corrections that deal with your money than you do to your medical report," Bennett said, adding that only 28 states allow patients access to their medical records, while conflicting confidentiality laws exist in 34 states.

Bennett urged the committee to consider privacy concerns that have been raised about the potential forming of consumer information banks that could track medical histories with credit histories and that critics have charged would lead to "super-surveillance" by the federal government.

Changes Suggested

Witnesses suggested a variety of changes to the bill, including recommendations to loosen the access provisions for data processors, strengthen the confidentiality provisions as they apply to insurers and others, and seek greater protection of patients' rights to refuse allowing access to their records.

Roberts suggested the bill be amended to exempt from health care trustee requirements those trustees of medical records data who "merely transmitted the information from one party to another and never actually had access to the information itself."

She also said the agency with oversight and regulatory authority should not be the Department of Health and Human Services as specified in the bill because HHS, as a payer and administrator of health services, also would be subject to requirements of the bill and that would be a conflict of interest. Another existing or new administrative agency ought to be made responsible for administering the program, she recommended.

A call for including protections for disclosure of information was voiced by information industry representative Jeanne Schulte Scott, director of government and legal affairs for CIS Technologies and chairwoman of the Association for Electronic Health Care Transactions, a trade association of vendors and suppliers to the health care electronic data industry.

"The need for a very bright-line distinction between the duties and obligations of a health information service when it is acting as an agent or contractor to a provider/payer trustee and when it is acting as a trustee must be addressed," Scott said. For example, a processor can be the telephone company or an electronic data processor, she added.

Don Detmer, a physician with the University of Virginia Health Sciences Department, called S 1360 "essential for any development of policy and procedures in this information age." But he cautioned that it would be important to include patient representatives on an institutional review board that would consider such related uses of information as medical and outcomes research.

Correcting Medical Information

The bill would require all health information trustees to permit individuals to inspect and copy health information maintained by the trustee and require trustees to correct medical records upon request or take certain actions if they refuse to make requested corrections, according to Kathleen Frawley, director of the Washington, D.C., office of the American Health Information Management Association.

Frawley suggested a provision be added to the bill to exempt health information trustees who do not provide care to individuals.

While the bill would limit the use and disclosure of individually identifiable health information to a variety of legitimate purposes, such as patient care, quality review, education, research, public health, and legal and financial interests, the language is not clear on the distinction

between internal access to health information by caregivers and external disclosure of health information, Frawley said. The language should be amended to ensure there are no barriers placed on providers, she testified.

Aimee Berenson, legislative counsel for the AIDS Action Council, said the bill should not include a broad or routine exception for health research activities involving personally identifiable information. The bill also should set out clear procedures for objecting to the release of medical records in civil litigation, she added.

Janlori Goldman, deputy director of the Center for Democracy and Technology, urged the panel to amend the bill to require consent for disclosure to health researchers. She called the bill the strongest ever considered by Congress to protect medical records privacy but expressed concern that the House budget reconciliation bill contains administrative simplification provisions in it that fail to address privacy protections.

Physician Denise Nagel testified that the bill would give numerous people access to records legally and without the patient's knowledge. She charged that the bill was written to advance the interests of the computer, telecommunications, data processing, and health care industries. A bill written from the patient's perspective would be different, she said.

Nagel urged the committee to amend the bill to "limit the amount of sensitive personal information that insurers can demand." She said the bill would "codify some of the most egregious breaches of ethics, morals, and the Hippocratic oath that this country has ever seen."

MEDICAL RECORDS CONFIDENTIALITY ACT OF 1995
S. 1360
INTRODUCED: OCTOBER 24, 1995

SYNOPSIS:

A BILL To ensure personal privacy with respect to medical records and health care-related information, and for other purposes.

SPONSOR(S):

Mr. BENNETT (for himself, Mr. DOLE, Mr. LEAHY, Mrs. KASSEBAUM, Mr. KENNEDY, Mr. FRIST, Mr. SIMON, Mr. HATCH, Mr. GREGG, Mr. STEVENS, Mr. JEFFORDS, Mr. KOHL, Mr. DASCHLE, and Mr. FEINGOLD) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

TEXT:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.-This Act may be cited as the "Medical Records Confidentiality Act of 1995".

(b) TABLE OF CONTENTS.-The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Purpose.

Sec. 3. Definitions.

TITLE I-INDIVIDUAL'S RIGHTS

Subtitle A-Review of Protected Health Information by Subjects of the
Information

Sec. 101. Inspection and copying of protected health information.

Sec. 102. Correction or amendment of protected health information.

Sec. 103. Notice of information practices.

Subtitle B-Establishment of Safeguards

Sec. 111. Establishment of safeguards.

Sec. 112. Accounting for disclosures.

TITLE II-RESTRICTIONS ON USE AND DISCLOSURE

Sec. 201. General rules regarding use and disclosure.

Sec. 202. Authorizations for disclosure of protected health information for treatment or payment.

Sec. 203. Authorizations for disclosure of protected health information, other than for treatment or payment.

Sec. 204. Health information services.

Sec. 205. Next of kin and directory information.
Sec. 206. Emergency circumstances.
Sec. 207. Oversight.
Sec. 208. Public health.
Sec. 209. Health research.
Sec. 210. Judicial and administrative purposes.
Sec. 211. Non-law enforcement subpoenas.
Sec. 212. Law enforcement.
Sec. 213. Standards for electronic disclosures.

TITLE III-SANCTIONS

Subtitle A-Civil Sanctions

Sec. 301. Civil penalty.
Sec. 302. Civil action.

Subtitle B-Criminal Sanctions

Sec. 311. Wrongful disclosure of protected health information.

TITLE IV-MISCELLANEOUS

401. Relationship to other laws.
Sec. 402. No liability for permissible disclosures.
Sec. 403. Effective date.

SECTION 2. PURPOSE.

The purpose of this Act is to-

- (1) establish strong and effective mechanisms to protect the privacy of persons with respect to personally identifiable health care information that is created or maintained as part of health treatment, diagnosis, enrollment, payment, testing, or research processes;
- (2) promote the efficiency and security of the health information infrastructure so that members of the health care community may more effectively exchange and transfer health information in a manner that will ensure the confidentiality of personally identifiable health information; and
- (3) establish strong and effective remedies for violations of this Act.

SECTION 3. DEFINITIONS.

As used in this Act:

- (1) Certified health information service.-The term "certified health information service" means a health information service that receives personally identifiable health information for the purpose of creating nonidentifiable health information and has been certified by the Secretary pursuant to section 204(b).
- (2) Certified institutional review board.-The term "certified institutional review board" means an institutional review board that has been certified by the Secretary pursuant to section 209(d).

(3) Disclose.-The term "disclose" means to release, transfer, or otherwise divulge protected health information to any person other than the individual who is the subject of such information.

(4) Health care.-The term "health care" means-

(a)(i) preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care, counseling, service, or procedure-

(i) with respect to the physical or mental condition of an individual; or

(ii) affecting the structure or function of the human body or any part of the human body; or

(ii) any sale or dispensing of a drug, device, equipment, or other item to an individual, or for the use of an individual, pursuant to a prescription.

(5) Health care provider.-The term "health care provider" means a person who, with respect to a specific item of protected health information, receives, creates, uses, maintains, or discloses the information while acting in whole or in part in the capacity of-

(a) a person who is licensed, certified, registered, or otherwise authorized by law to provide an item or service that constitutes health care, in the ordinary course of business or practice of a profession;

(b) a federal or state program that directly provides items or services that constitute health care to beneficiaries; or

(c) an officer or employee of a person described in subparagraph (a) or (b).

(6) Health information service.-The term "health information service" means a person that-

(a) uses protected health information to provide services to health information trustees for purposes authorized under the act;

(b) facilitates the transfer and exchange of protected health information between health information trustees;

(c) processes protected health information into standard format for transfer and exchanges between health information trustees;

(d) facilitates authorized access to protected health information; or

(e) transforms protected health information into nonidentifiable health information.

(7) Health information trustee.-

(a) In general.-The term "health information trustee" means-

(i) a health care provider, health plan, health oversight agency, health researcher, public health authority, employer,

insurer, school or university, or health information service insofar as it creates, receives, obtains, maintains, uses, or transmits protected health information;

(ii) any person who obtains protected health information under sections 206, 207, 208, 209, 210, 211, or 212; or

(iii) any employee, agent, or contractor of a person covered under clause (i) or (ii) insofar as such employee, agent, or contractor creates, receives, obtains, maintains, uses, or transmits protected health information.

(b) Duties and responsibilities.-The duties and responsibilities of a health information trustee shall be negotiated between the trustee and any agent or contractor of the trustee.

(8) Health oversight agency.-The term "health oversight agency" means a person who-

(a) performs or oversees the performance of an assessment, evaluation, determination, or investigation relating to the licensing, accreditation, or certification of health care providers; or

(b)(i) performs or oversees the performance of an assessment, evaluation, determination, investigation, or prosecution relating to compliance with legal, fiscal, medical, or scientific standards relating to-

(I) the delivery of or payment for, health care, health services or equipment, or health research; or

(II) health care fraud or fraudulent claims regarding health care, health services or equipment, or related activities and items; and

(ii) is a public agency, acting on behalf of a public agency, acting pursuant to a requirement of a public agency, or carrying out activities under a federal or state law governing the assessment, evaluation, determination, investigation, or prosecution described in clause (i).

(9) Health plan.-The term "health plan" means any health insurance plan, including any hospital or medical service plan, dental or other health service plan or health maintenance organization plan, or other program providing health benefits, whether or not funded through the purchase of insurance.

(10) Health researcher.-The term "health researcher" means a person who, with respect to a specific item of protected health information, receives the information-

(a) pursuant to section 209 (relating to health research); or

(b) while acting in whole or in part in the capacity of an officer or employee of a person described in subparagraph (a).

(11) Individual representative.-The term "individual representative" means any individual legally empowered to make decisions concerning the provision of health care to an individual (where the individual lacks the legal capacity under state law to make such decisions) or the administrator or executor of the estate of a deceased individual.

(12) Law enforcement inquiry.-The term "law enforcement inquiry" means a lawful investigation or official proceeding inquiring into a violation of, or failure to comply with, any criminal or civil statute or any regulation, rule, or order issued pursuant to such a statute.

(13) Person.-The term "person" means a government, governmental subdivision, agency or authority; corporation; company; association; firm; partnership; society; estate; trust; joint venture; individual; individual representative; and any other legal entity.

(14) Protected health information.-The term "protected health information" means any information, including demographic information collected from an individual, whether oral or recorded in any form or medium, that-

(a) is created or received by a health information trustee; and

(b)(i) relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual; and

(ii)(I) identifies an individual; or

(II) with respect to which there is a reasonable basis to believe that the information can be used to identify an individual.

(15) Public health authority.-The term "public health authority" means an authority or instrumentality of the United States, a state, or a political subdivision of a state that is-

(a) responsible for public health matters; and

(b) engaged in such activities as injury reporting, public health, surveillance, and public health investigation or intervention.

(16) Secretary.-The term "Secretary" means the Secretary of Health and Human Services.

(17) State.-The term "state" includes the District of Columbia, Puerto Rico, The Virgin Islands, Guam, American Samoa, and The Northern Mariana Islands.

(18) Writing.-The term "writing" means writing in either a paper-based or computer-based form, including electronic signatures.

TITLE I-INDIVIDUAL'S RIGHTS

Subtitle A-Review of Protected Health Information by Subjects of the Information

SECTION 101. INSPECTION AND COPYING OF PROTECTED HEALTH INFORMATION.

(a) In general.-Except as provided in subsection (b), a health information trustee shall permit an individual who is the subject of protected health information or the individual's designee, to inspect and copy protected health information concerning the individual, including records created under section 102 that the trustee maintains. A health information trustee may require an individual to reimburse the trustee for the cost of such inspection and copying.

(b) Exceptions.-A health information trustee is not required by this section to permit inspection or copying of protected health information if any of the following conditions are met:

(1) Endangerment to life or safety.-The trustee determines that disclosure of the information could reasonably be expected to endanger the life or physical safety of any individual.

(2) Confidential source.-The information identifies or could reasonably lead to the identification of a person who provided information under a promise of confidentiality to a health care provider concerning the individual who is the subject of the information.

(3) Administrative purposes.-The information-

(a) is used by the trustee solely for administrative purposes and not in the provision of health care or the administration of benefits to the individual who is the subject of the information; and

(b) has not been disclosed by the health information trustee to any other person.

(c) Inspection and copying of segregable portion.-A health information trustee shall permit inspection and copying under subsection (a) of any reasonably segregable portion of a record after deletion of any portion that is exempt under subsection (b).

(d) Deadline.-A health information trustee shall comply with or deny (with a statement of the reasons for such denial) a request for inspection or copying of protected health information under this section within the 30-day period beginning on the date on which the trustee receives the request.

SECTION 102. CORRECTION OR AMENDMENT OF PROTECTED HEALTH INFORMATION.

(a) In general.-A health information trustee shall within the 45-day period beginning on the date on which the trustee receives from an individual a written request to correct or amend information-

- (1) make the correction or amendment requested;
- (2) inform the individual of the correction or amendment that has been made; and
- (3) make reasonable efforts to inform any person who is identified by the individual, who is not an officer, employer, or agent of the trustee, and to whom the uncorrected or unamended portion of the information was previously disclosed, of the correction or amendment that has been made.

(b) Refusal to correct or amend.-If the health information trustee refuses to make the correction or amendment, the trustee shall inform the individual of-

- (1) the reasons for the refusal to make the correction or amendment;
- (2) any procedures for further review of the refusal; and
- (3) the individual's right to file with the trustee a concise statement setting forth the requested correction or amendment and the individual's reasons for disagreeing with the refusal.

(c) Statement of disagreement.-After an individual has filed a statement of disagreement under subsection (b)(3), the health information trustee in any subsequent disclosure of the disputed portion of the information-

- (1) shall include a copy of the individual's statement; and
- (2) may include a concise statement of the reasons for not making the requested correction or amendment.

(d) Rule of construction.-This section shall not be construed to require a health information trustee to conduct a formal, informal, or other hearing or proceeding concerning a request for a correction or amendment to protected health information.

(e) Correction.-For purposes of subsection (a), a correction is deemed to have been made to protected health information when information that has been disputed by an individual has been corrected, clearly marked as incorrect, or supplemented by correct information.

SECTION 103. NOTICE OF INFORMATION PRACTICES.

(a) Preparation of written notice.-A health information trustee other than a health information service shall provide, in a clear and conspicuous manner, written notice of the trustee's information practices, including a description of the trustee's health information practices, including notice of individual rights with respect to protected health information.

(b) Model notice.-The Secretary, after notice and opportunity for public comment, shall develop and disseminate model notices of information practices for use under this section.

SUBTITLE B-ESTABLISHMENT OF SAFEGUARDS

SECTION 111. ESTABLISHMENT OF SAFEGUARDS.

(a) In general.-A health information trustee shall establish and maintain appropriate administrative, technical, and physical safeguards to ensure the confidentiality, security, accuracy, and integrity of protected health information created, received, obtained, maintained, used or transmitted by the trustee.

(b) Regulations.-

(1) Promulgation.-

(A) In general.-In promulgating regulations under this act, the Secretary shall follow the procedures authorized under sections 581 through 590 of Title 5, United States Code.

(B) advisory group.-

(i) Determination by the Secretary.-If the Secretary determines that a negotiated rulemaking committee shall not be established as permitted by section 583 of Title 5, United States Code, the Secretary shall appoint and consult with an advisory group of knowledgeable individuals.

(ii) Membership.-The advisory group shall consist of at least 7 but no more than 12 individuals including representatives of-

- (I) Health care professionals and health care entities;
- (II) Health care consumers;
- (III) Third party payors/administrators; and
- (IV) Privacy advocates.

(iii) Responsibilities.-The advisory group shall review all proposed rules and regulations and submit recommendations to the Secretary. The advisory group shall also assist the Secretary in establishing the standards for compliance with rules and regulations, in developing an annual report to the congress on the status of the requirements set forth in this act, their cost impact, and any recommendations for modifications in order to ensure efficient and confidential electronic data interchange of individually identifiable health care information.

(2) Consultation.-The Secretary may promulgate regulations in consultation with privacy, industry, and consumer groups.

SECTION. 112. ACCOUNTING FOR DISCLOSURES.

(a) In general.-A health information trustee shall create and maintain, with respect to any protected health information disclosure that is not related to treatment, a record of the disclosure in accordance with regulations issued by the secretary.

(b) Record of disclosure part of protected health information.-A record created and maintained under subsection (a) shall be maintained as protected health information for not less than 7 years.

TITLE II-RESTRICTIONS ON USE AND DISCLOSURE

SECTION 201. GENERAL RULES REGARDING USE AND DISCLOSURE.

(a) General rule.-A health information trustee may not disclose protected health information except as authorized under this title.

(b) Scope of disclosure.-

(1) Compatibility to purpose.-Protected health information may not be used or disclosed to any person unless the use or disclosure is compatible with and related to the purposes for which the information was obtained.

(2) Limitation on information.-Every disclosure of protected health information by a health information trustee shall be limited to the minimum amount of information necessary to accomplish the purpose for which the information is disclosed.

(c) No general requirement to disclose.-Nothing in this title that permits a disclosure of health information shall be construed to require such disclosure.

(d) Identification of disclosed information as protected information.-Except as provided in this title, a health information trustee may not disclose protected health information unless such information is clearly identified as protected health information that is subject to this title.

(E) Information in which providers are identified.-The Secretary shall issue regulations protecting information identifying providers in order to promote the availability of health care services.

SECTION 202. AUTHORIZATIONS FOR DISCLOSURE OF PROTECTED HEALTH INFORMATION FOR TREATMENT OR PAYMENT.

(a) Written authorizations.-A health information trustee may disclose protected health information for purposes of treatment or payment pursuant to an authorization executed by the individual who is the subject of the information (or a person acting for the individual pursuant to state law) if each of the following requirements is met:

(1) writing.-The authorization is in writing or electronically authenticated, signed by the individual who is the subject of the information, and dated.

(2) Separate form.-Separate forms authorizing disclosures for treatment and payment

processes are provided to the individual.

(3) Information described.-The information to be disclosed is specified, or is described in the authorization.

(4) Trustee described.-The trustee who is authorized to disclose such information is specifically identified, or is described in the authorization.

(5) Recipient described.-The person to whom the information is to be disclosed is specifically identified, or is described in the authorization.

(6) Right to revoke or amend.-The authorization contains an acknowledgement that the individual who is the subject of the information has the right to revoke or amend the authorization.

(7) Statement of intended disclosures.-The authorization contains an acknowledgment that the individual who is the subject of the information has read a statement of the disclosures that the person who receives the protected health information intends to make.

(8) Information restricted.-The authorization includes a proviso that the information will be disclosed solely for a purpose that is compatible with and related to the purposes for which the information was collected or received by the trustee.

(9) Expiration date specified.-The authorization specifies a date or event at which the authorization expires.

(b) Revocation or amendment of authorization.-

(1) In general.-The authorization contains an acknowledgment that the individual may in writing revoke or amend an authorization described in subsection (a), at any time, except that with respect to disclosure of protected health information to permit validation of expenditures for health care that has previously been authorized the authorization may not be revoked.

(2) Notice of revocation.-A health information trustee who discloses protected health information pursuant to an authorization described in subsection (a) that has been revoked shall not be subject to any liability or penalty under this act if the trustee had no actual or constructive notice of the revocation.

(c) Model authorizations.-The Secretary, after notice and opportunity for public comment, shall develop and disseminate model written authorizations of the type described in subsection (a) and model statements of intended disclosures of the type described in subsection (a)(6).

(d) Copy.-A health information trustee who discloses protected health information pursuant to an authorization under this section shall maintain a copy of the authorization.

SECTION 203. AUTHORIZATIONS FOR DISCLOSURE OF PROTECTED HEALTH INFORMATION, OTHER THAN FOR TREATMENT OR PAYMENT.

(a) Written authorizations.-A health information trustee may disclose protected health information pursuant to an authorization executed by the individual who is the subject of the information if the following conditions are met:

(1) General requirements.-The requirements of section 202(a) (1) through (6) are met.

(2) Statement of intended disclosures.-The statement of intended disclosure shall be in writing, on a form that is separate from the authorization for disclosure, and shall be

received by the individual authorizing the disclosure on or before the date the authorization is executed.

(3) Authorization not requested in connection with provision of health care.-The authorization is not requested on a day on which the trustee provides health care to the individual requested to provide the authorization.

(4) Expiration date specified.-The authorization specifies a date or event upon which the authorization expires, which shall not exceed 1 year from the date of the execution of the authorization.

(b) Limitation on authorizations.-A health information trustee may not condition delivery of treatment or payment for services on the receipt of an authorization described in subsection (a).

(c) Revocation or amendment of authorization.-

(1) In general.-An individual may in writing revoke or amend an authorization described in subsection (a).

(2) Notice of revocation.-A health information trustee who discloses protected health information pursuant to an authorization that has been revoked shall not be subject to any liability or penalty under this title if the trustee had no actual or constructive notice of the revocation.

(d) Model authorizations.-The Secretary, after notice and opportunity for public comment, shall develop and disseminate model written authorizations of the type described in subsection (a) and model statements of the intended disclosures of the type described in subsection (a)(2).

(e) Authorization not required.-This section does not apply to sections 204, 205, 206, 207, 208, 209, 210, 211, and 212.

SECTION 204. CREATION OF NONIDENTIFIABLE INFORMATION.

(a) Creation of nonidentifiable information.-A health information trustee may disclose protected health information to a certified health information service for the purpose of creating nonidentifiable health information.

(b) Certification of health information services.-

(1) Regulations.-The Secretary, after notice and opportunity for public comment, shall issue regulations establishing certification requirements for health information services under this title. Such regulations shall include requirements that the health information service establish and maintain appropriate administrative, technical, and physical safeguards to ensure the confidentiality, security, accuracy, and integrity of protected health information.

(2) Certification.-The Secretary shall certify a health information service that meets the certification requirements established by the Secretary under paragraph (1).

SECTION 205. NEXT OF KIN AND DIRECTORY INFORMATION.

(a) Next of kin.-A health care provider, or a person who receives protected health information under section 206, may disclose protected health information regarding an individual to the

individual's next of kin, to an individual representative of the individual, or to an individual with whom that individual has a significant personal relationship if-

- (1) the individual who is the subject of the information-
 - (a) has been notified of the individual's right to object and has not objected to the disclosure;
 - (b) is not competent to be notified about the right to object;or
 - (c) exigent circumstances exist such that it would not be practicable to notify the individual of the right to object; and
- (2) the information disclosed relates to health care currently being provided to that individual.

(b) Directory information.-

(1) Disclosure.-Except as provided in paragraph (2), a health information trustee may disclose the information described in subparagraph (b) to any person if-

- (a) The individual who is the subject of the information-
 - (i) has been notified of the individual's right to object and has not objected to the disclosure;
 - (ii) is not competent to be notified about the right to object; or
 - (iii) exigent circumstances exist such that it would not be practicable to notify the individual of the right to object;and

(b) The information consists only of 1 or more of the following items:

- (i) the name of the individual who is the subject of the information;
- (ii) the general health status of the individual, described as critical, poor, fair, stable, or satisfactory or in terms denoting similar conditions; and
- (iii) the location of the individual on premises controlled by a provider.

(2) Exception.-If disclosure of the location of the individual reveals specific information about the physical or mental condition of the individual, the individual must expressly authorize such disclosure.

(c) Deceased individual.-

(1) Identification.-A health information trustee may disclose protected health information if necessary to assist in the identification of a deceased individual.

(2) Regulations.-The Secretary shall develop and establish through regulation a procedure for obtaining protected health information relating to a deceased individual when there is no individual representative for such individual.

SECTION. 206. EMERGENCY CIRCUMSTANCES.

Any person who receives protected health information under this title may disclose protected health information in emergency circumstances when necessary to protect the health or safety of an individual from serious, imminent harm.

SECTION 207. OVERSIGHT.

(a) In general.-A health information trustee may disclose protected health information to a health oversight agency for an oversight function authorized by law.

(b) Use in action against individuals.-Protected health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, an administrative, civil, or criminal action or investigation directed against the individual unless the action or investigation arises out of and is directly related to-

- (1) receipt of health care or payment for health care; or
- (2) an action involving a fraudulent claim related to health.

SECTION 208. PUBLIC HEALTH.

A health care provider, health plan, health researcher, public health authority, employer, insurer, school or university, or certified health information network service, or person who receives protected health information under section 206, may disclose protected health information to a public health authority or other person authorized by law for use in a legally authorized-

- (1) disease or injury report;
- (2) public health surveillance; or
- (3) public health investigation or intervention.

SECTION 209. HEALTH RESEARCH.

(a) In general.-A health information trustee may disclose protected health information to a health researcher if a certified institutional review board determines that the research project engaged in by the health researcher-

- (1) requires use of the protected health information for the effectiveness of the project; and
- (2) is of sufficient importance to outweigh the intrusion into the privacy of the individual who is the subject of the information that would result from the disclosure.

(b) Obligations of recipient.-A person who receives protected health information pursuant to subsection (a)-

- (1) shall remove or destroy, at the earliest opportunity consistent with the purposes of the project, information that would enable an individual to be identified, unless-
 - (a) a certified institutional review board has determined that there is a health or research justification for retention of such identifiers; and
 - (b) there is an adequate plan to protect the identifiers from

disclosure that is inconsistent with this section; and
(2) shall use protected health information solely for purposes of the health research project for which disclosure was authorized by a certified institutional review board under subsection (a).

(c) Special rule for researchers other than academic centers or health care facilities.-If a health researcher is not located in an academic center, a health care facility or public health agency, the determinations required by a certified institutional review board shall be approved by the secretary before the determination is issued.

(d) Certification of institutional review boards.-

(1) Regulations.-The Secretary, after notice and opportunity for public comment, shall issue regulations establishing certification requirements for institutional review boards under this title. Such regulations shall be based on regulations issued under section 491(a) of the public health service act. The regulations shall ensure that institutional review boards certified under this paragraph have the qualifications to assess and protect the confidentiality of research subjects.

(2) Certification.-The Secretary shall certify an institutional review board that meets the certification requirements established by the Secretary under paragraph (1).

SECTION. 210. JUDICIAL AND ADMINISTRATIVE PURPOSES.

(a) In general.-A health care provider, health plan, health oversight agency, employer, school, university, insurer, or person who receives protected health information under section 206, may disclose protected health information-

(1) Pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or comparable rules of other courts or administrative agencies, in connection with litigation or proceedings to which the individual who is the subject of the information is a party and in which the individual has placed his or her physical or mental condition at issue;

(2) To a court, and to others ordered by the court, if the protected health information is developed in response to a court-ordered physical or mental examination; or

(3) Pursuant to a law requiring the reporting of specific medical information to law enforcement authorities.

(b) Obligations of recipient.-A person seeking protected health information pursuant to subsection (a)-

(1) Shall notify the individual or the individual's attorney of the request for the information;

(2) Shall provide the health information trustee with a signed document attesting-

(a) That the individual has placed his or her physical or mental condition at issue in litigation or proceedings in which the individual is a party; and

(b) The date on which the individual or the individual's attorney was notified under paragraph (1); and

(3) Shall not accept any requested protected health information from the trustee until the termination of the 10-day period beginning on the date notice was given under paragraph

(1).

SECTION 211. NON-LAW ENFORCEMENT SUBPOENAS.

(a) In general.-A health care provider, health plan, health oversight agency, employer, insurer, school or university, or person who receives protected health information under section 206, may disclose protected health information under this section if the disclosure is pursuant to a subpoena issued on behalf of a party who has complied with the access provisions of subsection (b).

(b) Access procedures.-A person may not obtain protected health information about an individual pursuant to a subpoena unless-

(1) A copy of the subpoena together with a notice of the individual's right to challenge the subpoena in accordance with subsection (c), has been served upon the individual on or before the date of return of the subpoena; and-

(2)(a) 15 days have passed since the date of service on the individual, and within that time period the individual has not indicated a challenge in accordance with subsection (c)(1); or

(b) Disclosure is ordered by a court under subsection (c)(2).

(c) Challenge procedures.-

(1) Motion to quash subpoena.-After service of a copy of the subpoena seeking protected health information under subsection (b), the individual who is the subject of the protected health information may file in any court of competent jurisdiction a motion to quash the subpoena.

(2) Standard for decision.-

(A) In general.-The court shall grant a motion under paragraph

(1) unless the respondent demonstrates that-

(i) There is reasonable ground to believe the information is relevant to a lawsuit or other judicial or administrative proceeding; and

(ii) The need of the respondent for the information outweighs the privacy interest of the individual.

(B) Criteria for decision.-In determining whether the need of the respondent for the information outweighs the privacy interest of the individual, the court shall consider-

(i) The particular purpose for which the information was collected;

(ii) The degree to which disclosure of the information would embarrass, injure, or invade the privacy of the individual;

(iii) The effect of the disclosure on the individual's future health care;

(iv) The importance of the information to the lawsuit or proceeding; and

(v) Any other relevant factor.

(3) Attorney's fees.-In the case of a motion brought under paragraph (1) in which the individual has substantially prevailed, the court may assess against the respondent a reasonable

attorney's fee and other litigation costs and expenses (including expert fees) reasonably incurred.

SECTION 212. LAW ENFORCEMENT.

(a) Government subpoenas and warrants.-

(1) In general.-A health information trustee shall disclose protected health information under this section if the disclosure is pursuant to-

(a) A subpoena issued under the authority of a grand jury; or

(b) An administrative subpoena or summons or a judicial subpoena or warrant, which meets the conditions of paragraph (2).

(2) Probable cause requirement.-A government authority may not obtain protected health information about an individual under paragraph (1) for use in a law enforcement inquiry unless there is probable cause to believe that the information is relevant to a legitimate law enforcement inquiry being conducted by the government authority.

(3) Warrants.-A government authority that obtains protected health information about an individual pursuant to a warrant shall, not later than 30 days after the date the warrant was executed, serve the individual with, or mail to the last known address of the individual, a notice that protected health information about the individual was obtained, together with a notice of the individual's right to challenge the warrant.

(4) Subpoena or summons.-Except as provided in paragraph (5), a government authority may not obtain protected health information about an individual pursuant to a subpoena or summons unless a copy of the subpoena or summons has been served on the individual, if the identity of the individual is known, on or before the date of the return of the subpoena or summons, together with notice of the individual's right to challenge the subpoena or summons. If the identity of the individual is not known at the time the subpoena or summons is served, the individual shall be served not later than 30 days thereafter, with notice that protected health information about the individual was obtained together with notice of the individual's right to challenge the subpoena or summons.

(5) Application for delay.-

(A) In general.-A government authority may apply ex parte and under seal to an appropriate court to delay (for an initial period of not longer than 90 days) service of the notice regarding execution of the warrant as required under paragraph (3) or a copy of the subpoena as required under paragraph (4). The government authority may apply to the court for extensions of the delay.

(B) Ex parte order.-The court shall enter an ex parte order delaying or extending the delay of notice, an order prohibiting the disclosure of the request for, or the disclosure of, the protected health information, and an order requiring the disclosure of the protected health information if the court finds that-

- (i) The inquiry being conducted is within the lawful jurisdiction of the government authority seeking the protected health information;
- (ii) There is probable cause to believe that the protected health information being sought is relevant to a legitimate law enforcement inquiry;
- (iii) The government authority's need for the information outweighs the privacy interest of the individual who is the subject of the information; and
- (iv) There is reasonable ground to believe that receipt of notice by the individual will result in-
 - (I) Endangering the life or physical safety of any individual;
 - (II) Flight from prosecution;
 - (III) Destruction of or tampering with evidence or the information being sought;
 - (IV) Intimidation of potential witnesses; or
 - (V) Disclosure of the existence or nature of a confidential law enforcement investigation or grand jury investigation that is likely to seriously jeopardize such investigation.

(6) Information in response to law enforcement inquiry.-Protected health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in any administrative, civil or criminal action or investigation directed against the individual unless the action or investigation arises out of or is directly related to the law enforcement inquiry for which the information was obtained.

(b) Challenge procedures for law enforcement warrants, subpoenas, and summonses.-

(1) Motion to quash.-Within 15 days after the date of service of a notice of execution of a warrant or a copy of a subpoena or summons, of a government authority seeking protected health information about an individual under subsection (a), the individual may file a motion to quash.

(2) Standard for decision.-The court shall grant a motion under paragraph (1) unless the government demonstrates there is probable cause to believe the protected health information is relevant to a legitimate law enforcement inquiry being conducted by the government authority and the government authority's need for the information outweighs the privacy interest of the individual.

(3) Attorney's fees.-In the case of a motion brought under paragraph (1) in which the individual has substantially prevailed, the court may assess against the government authority reasonable attorney's fees and other litigation costs (including expert fees) reasonably incurred.

(4) No interlocutory appeal.-A ruling denying a motion to quash under this section shall not be deemed to be a final order, and no interlocutory appeal may be taken therefrom by the individual.

(c) Exceptions.-A health information trustee may disclose protected health information to a law enforcement agency if the information is requested for use-

- (1) In an investigation or prosecution of a health information trustee;
- (2) In the identification of a victim or witness in a law enforcement inquiry; or
- (3) In connection with the investigation of criminal activity committed against the trustee or on premises controlled by the trustee.

SECTION. 213. STANDARDS FOR ELECTRONIC DISCLOSURES.

The Secretary shall promulgate standards for disclosing, authorizing and authenticating protected health information in electronic form in accordance with this title.

TITLE III-SANCTIONS SUBTITLE A-CIVIL SANCTIONS

SECTION 301. CIVIL PENALTY.

(a) Violation.-Any health information trustee who the Secretary determines has substantially and materially failed to comply with this act shall be subject, in addition to any other penalties that may be prescribed by law, to-

- (1) A civil penalty of not more than \$10,000 for each such violation, but not to exceed \$50,000 in the aggregate for multiple violations; and
- (2) A civil penalty of not more than \$250,000 or exclusion from participation in Medicare and Medicaid, or any other federally funded health care programs, if the Secretary finds that such violations have occurred with such frequency as to constitute a general business practice.

(b) Procedures for imposition of penalties.-Section 1128a of the Social Security Act, other than subsections (a) and (b) and the second sentence of subsection (f) of that section, shall apply to the imposition of a civil, monetary, or exclusionary penalty under this section in the same manner as such provisions apply with respect to the imposition of a penalty under section 1128a of such act.

SECTION 302. CIVIL ACTION.

(a) In general.-An individual who is aggrieved by conduct in violation of this title may bring a civil action to recover-

- (1) Such preliminary and equitable relief as the court determines to be appropriate;
- (2) The greater of actual damages or liquidated damages of \$5,000; and
- (3) Punitive damages.

(b) Attorney's fees.-In the case of a civil action brought under subsection (a) in which the individual has substantially prevailed, the court may assess against the respondent a reasonable attorney's fee and other litigation costs and expenses (including expert fees) reasonably incurred.

(c) Limitation.-No action may be commenced under this section more than 3 years after the date on which the violation was or should reasonably have been discovered.

SUBTITLE B-CRIMINAL SANCTIONS

SECTION. 311. WRONGFUL DISCLOSURE OF PROTECTED HEALTH INFORMATION.

(a) Offense.-A person who knowingly-

(1) Obtains protected health information relating to an individual in violation of this title;
or

(2) Discloses protected health information to another person in violation of this title, shall be punished as provided in subsection (b).

(b) Penalties.-A person described in subsection (a) shall-

(1) Be fined not more than \$50,000, imprisoned not more than 1 year, or both;

(2) If the offense is committed under false pretenses, be fined not more than \$250,000, imprisoned not more than 5 years, excluded from participation in Medicare and Medicaid, or any other federally funded health care programs, or any combination of such penalties; and

(3) If the offense is committed with intent to sell, transfer, or use protected health information for commercial advantage, personal gain, or malicious harm, be fined not more than \$500,000, imprisoned not more than 10 years, excluded from participation in Medicare and Medicaid, or any other federally funded health care programs, or any combination of such penalties.

TITLE IV-MISCELLANEOUS

SECTION 401. RELATIONSHIP TO OTHER LAWS.

(a) State law.-Except as provided in subsections (b), (c), and (d), this act preempts state law.

(b) Privileges.-Nothing in this title shall be construed to preempt or modify state common or statutory law to the extent such law concerns a privilege of a witness or person in a court of the state. This title shall not be construed to supersede or modify federal common or statutory law to the extent such law concerns a privilege of a witness or person in a court of the United States. Authorizations pursuant to sections 202 and 203 shall not be construed as a waiver of any such privilege.

(c) Certain duties under state or federal law.-Nothing in this title shall be construed to preempt, supersede, or modify the operation of-

(1) Any law that provides for the reporting of vital statistics such as birth or death information;

(2) Any law requiring the reporting of abuse or neglect information about any individual;

(3) Any state law relating to public or mental health that prevents or otherwise restricts disclosure of protected health information otherwise allowed under this title;

(4) Any law that governs a minor's rights to access protected health information;

(5) Subpart II of Part E of Title XXVI of the Public Health Service Act (relating to

- notifications of emergency response employees of possible exposure to infectious diseases);
- (6) Any federal law or regulation governing confidentiality of alcohol and drug patient records;
 - (7) The Americans With Disabilities Act of 1990; or
 - (8) Any federal or state statute that establishes a privilege for records used in health professional peer review activities.

SECTION 402. NO LIABILITY FOR PERMISSIBLE DISCLOSURES.

A health information trustee who makes a disclosure of protected health information about an individual that is permitted by this title shall not be liable to the individual for such disclosure under common law.

SECTION 403. EFFECTIVE DATE.

- (a) Effective date.-This act shall take effect 12 months after the date of enactment of this act.
- (b) Regulations.-The Secretary shall promulgate regulations implementing this act not later than 6 months after the date of enactment of this act.

COMMENTS ON S.1360

This bill purports to create a federal privacy law for medical treatment records and other health and health insurance related information. Given past abuses by insurance companies and employers, perhaps some type of protection of patients' privacy is warranted. However, the procedure for law enforcement to access these types of records set forth in the bill is woefully inadequate, fails to acknowledge the already confidential nature of criminal investigations and will delay, compromise and jeopardize not only a whole range of investigations, but a number of accepted investigative techniques and prosecutorial procedures as well. Examples of these include not only health care fraud cases, but murder, assault, and abuse cases, forensic procedure, DNA indexing, competency to stand trial, sentencing in some cases and fugitive apprehension (see attached Exhibit A). Accordingly, the problems created by the terms of this bill affect both federal and state law enforcement.

The definition of "health oversight agency" in S.1360 does not effectively create a "law enforcement exception" to the bill's privacy scheme. In addition, there is a conflict between the terms "health oversight agency" and "law enforcement inquiry" which will raise substantial questions of interpretation and thus generate lengthy and complicated litigation to determine which if any law enforcement entities are exempted.

If law enforcement entities are not deemed "health oversight agencies" (which none would be if needing the records for anything but investigation of health care fraud---and even then the language of the bill is unclear) then the onerous provisions in the bill pertaining to a "law enforcement inquiry" requiring court orders and notification to patients would be invoked. Not only would the administrative task be formidable and highly costly, but notifying patients would impermissibly compromise the confidentiality of any criminal investigation. If the patient is a subject of the investigation, then such notification would no doubt jeopardize the whole of the case.

This issue is particularly problematic in the case of a grand jury---federal or state. The institution of the grand jury has never been considered any type of "agency", much less a "health oversight" one. Under this bill, though, it would have to wear such a hat in a health care fraud investigation and, in any other kind of matter where medical records were required, would have to petition a court and then notify individual patients!

S.1360 not only creates havoc in the access of law enforcement to medical or health information, but also evidences a serious naivete as to law enforcement's use of such records. For example, even if information is disclosed to a law enforcement agency as part of that agency's "health oversight

function", its use is limited to an action or investigation in connection with the health care or payment for the health care that gave rise to the record. The bill prohibits use in an action against the patient, no matter how serious the crime. Obvious bans would include confessions of a crime to an emergency room technician and prior x-rays, surgical records and body fluid or tissue samples used to identify a perpetrator.

The provisions in the bill to ensure the accuracy of patients' health-related information would also impose a heavy and unnecessary burden on law enforcement. Upon receipt of such disclosed information, the law enforcement entity would appear to fall within the definition of "health information trustees." As such, grand juries, prosecuting attorneys, investigative personnel all would have to correct erroneous entries if requested to do so by the patient and would not be able to share the medical information with each other nor with other law enforcement components, without further (undefined) authorization.

Law enforcement has already had experience with what such attempts to protect confidentiality in this area can do to a valid and wide-ranging criminal investigation. The provisions of the Substance Abuse Patient Medical Records Statute (42 U.S.C. Sec. 290dd-2) and the regulations promulgated thereunder (42 C.F.R. Sec. 2.66) are similarly crafted and have delayed, hamstrung and, in a few cases, destroyed large, important fraud investigations against psychiatric and substance abuse treatment facilities (see attached Exhibit B). The problems created by a law like S.1360 (and the regulations which would ensue) governing all medical records would increase geometrically.

Congress may very well see the need for a federal law restricting some access and some uses of health related information in order to protect the privacy of patients. However, it cannot overlook the need for such information in a whole host of legitimate law enforcement inquiries. Accordingly, it is essential that any such privacy statute recognize the confidential nature of criminal investigations in general and in grand jury and search warrant application proceedings in particular and include the broadest possible law enforcement exception to any limitations on access and use of medical and health related information.

EXAMPLES OF LAW ENFORCEMENT USE OF MEDICAL OR HEALTH INFORMATION

I. HEALTH CARE FRAUD CASES - Billing/payment records containing diagnostic codes and names have to be compared to actual treatment/lab/pharmacy/medical transportation/equipment records to investigate and prove elements of fraud in general health care fraud schemes such as upcoding, unbundling and billing for services not rendered and in the following other areas of fraud in the health care industry:

A. Physician Frauds

1. That the services/treatment were never provided.
2. That the service billed for was more expensive than that rendered.
3. That the service was provided fewer times than it was billed.
4. That the service was not rendered by a qualified professional and thus not reimbursable or reimbursable only at a lesser rate.
5. Others to numerous to mention depending on the practice specialty.

B. Durable Medical Equipment Scams

1. That the, for example, wheelchair, oxygen, wound care kits, were medically unnecessary.

C. Psychiatric Hospital Frauds

1. That patient was fraudulently diagnosed as requiring insurance reimbursable in-patient care.
2. That batteries of lab tests, x-rays, shock treatments, occupational therapy, etc. were medically unnecessary.
3. That patients were treated in group rather than individual therapy.

D. Pharmaceutical Diversions/Prescription Drug Fraud

1. That prescribed drugs were medically unnecessary.
2. That the prescribing physician never saw or treated the patient.
3. That the pharmacist filled the prescription with generic and billed the more expensive brand-name.
4. That a clinic was nothing more than a "scrip" mill.

E. Laboratory Scams

1. That specimens were "sink tested" (disposed of and then billed for rather than tested).
2. That specimens billed for were never received for processing.
3. That additional tests beyond those actually ordered by a physician were performed and billed for.
4. That a lab was only a "rolling lab" performing unnecessary tests and giving bogus "free screenings" in order to obtain Medicare/Medicaid numbers for billing purposes.

EXHIBIT A

F. Workers Compensation and Staged Accident Claims

1. That the injuries for which treatment was received were fake or exaggerated.
2. That no treatment was rendered.

G. Nursing Home and Hospital Frauds

1. That services were not rendered, that a lesser service was rendered, that products and pharmaceuticals billed for were never ordered or received, or that medically unnecessary products and pharmaceuticals were billed for.

H. Home Health Care

1. That home treatment/services were never rendered, were medically unnecessary, rendered to an unqualified patient or were rendered by an unqualified provider.

I. Medical Transportation Scams

1. That patients transported did not qualify for transportation.
2. That emergency trips were made for non-emergency reasons.

II. OTHER CRIMES AND ISSUES - Payment/billing records and/or treatment records are often necessary in the following types of cases and procedures:

A. Murder

1. To prove fact of death, cause of death, contributing cause of death, condition of victim prior to death, and to provide clues and proof as to identity of perpetrator (shootings, knifings, poisonings, bombings, bludgeonings, stranglings).

B. Battery and Abuse

1. Sexual assault, child and elder abuse, simple and aggravated assaults: to prove fact and nature of assault, abuse or injury and clues as to identity of perpetrator.

C. Tax Fraud, Money Laundering and other Financial Frauds Allegedly Committed by Health Care Providers

1. To prove source and amount of income.

D. Forensic Odontology

1. Dental and surgical records and x-rays of known persons to aid in identifying unknown skeletal remains.

E. Federal Sentencing

1. To prove that criminal activity engaged in by defendant carried a likely risk of harm to others, thus enhancing his sentence under the sentencing guidelines (e.g., quackery, unnecessary surgery, sale of defective or unsafe

products and pharmaceuticals)

F. State of Mind Issues

1. Psychiatric records to prove competency to stand trial.
2. Psychiatric records to determine mental capacity to commit the crime charged.

G. DNA Issues

1. Tissue or fluid samples and treatment records concerning circumstances under which samples were obtained (blood samples in a lab, semen samples in a sperm bank, biopsy slides) as part of criminal investigation or identification of missing person remains and missing children/adults recovered alive but unidentified.
2. Obtaining blood samples as part of a criminal investigation and CODIS system (the local/state/national law enforcement system of 4 files of DNA records; 40 states now require individuals convicted of certain crimes to provide blood samples for DNA profiling to aid in ID, prosecution and sentencing of offenders).

H. Civil Rights

1. Lynching, other murder cases.
2. Police brutality.
3. Failure to provide medical treatment to protected class of persons.
4. Forced sterilization of handicapped.
5. Nursing home, prison, mental institution conditions.
6. Psychiatric hospital failure to treat.

I. Identification of Offenders and Fugitive Issues

1. Medical and pharmaceutical records of conditions requiring ongoing treatment of known suspects.
2. Review of databases for identifying medical conditions, treatments, procedures.

Sample Documented Problems Under the Existing
Substance Abuse Statute and Regulations

- I. There is no authorization for the use of substance abuse records held by a person or program to investigate or prosecute a third-party provider, such as an ambulance company which fraudulently bills Medicare or Medicaid for transportation of ambulatory patients to a substance abuse program who do not need such high-cost transportation services.
 - A. The regulations permit use of substance abuse patient records only to investigate or prosecute the person or program holding the records. 42 C.F.R. §2.66. Note, that even if law enforcement agencies were considered "audit" agencies under 42 C.F.R. 2.53, which we do not believe they are, they would have no occasion in this scenario to "audit" the substance abuse programs, only the ambulance company.
 - B. An AUSA, at the suggestion of the Fraud Section, contacted an attorney with the HHS Center for Substance Abuse Treatment (CSAT). She advised the AUSA that she was in agreed that the regulations did not address this use of substance abuse regulations.
 - C. The AUSA was advised to just petition a court for permission to obtain the records under the statutory provision permitting a court to authorized use of the records for good cause shown. 42 U.S.C. §290dd-2 (b)(2)(C).
 - D. The AUSA was effectively advised to ignore the proscription of 42 C.F.R. §2.13 which broadly prohibits the disclosure or use of such records for purposes other than those explicitly authorized by the regs. This regulation was promulgated pursuant to 42 U.S.C. § 290dd-2(g) which gives the Secretary exclusive authority to regulate the issuance and scope of orders issued under §290dd-2 (b)(2)(C).
- II. One district court delayed signing a disclosure order for nine months.

EXHIBIT B

- III. In a multi-district coordinated search and seizure of tens of thousands of protected substance abuse medical records), countless attorney, investigative agent and staff hours were diverted from the investigation to prepare and mail notices to all patients whose records were seized. Nearly 25 percent of the notices were returned with out-of-date addresses and not a single motion to quash a disclosure was filed by a patient.
- IV. In a case involving an April 1993 disclosure application, the court required full briefing of the issues on disclosure when the record custodian objected to disclosure. The court did not grant a disclosure order until January 1994, substantially delaying the investigation.
- V. One magistrate refused to grant the statutorily required order simply out of disbelief the law required such "nonsense," curtailing an investigation.
- VI. Another judge delayed ruling on a motion for a disclosure order after hospital attorneys objected and never ruled one way or the other, substantially frustrating the investigation.
- VII. Another judge refused to grant a disclosure order entirely, thereby terminating a billing fraud investigation.

VIII. Consider the problems created by executing search warrants at psychiatric hospitals with multi-focus programs, which include as one component, a substance abuse treatment program.

A. When the warrant authorizes seizure of electronic evidence, in addition to medical records, it is far more expeditious, less disruptive to the institution and to patients, for floppy disks and other magnetic media, to be seized, and mirror image copies made of hard drives, for review off-site after the search. Such electronic evidence may also be obtained through other compulsory process such as a grand jury subpoena.

B. Under a literal reading of the substance abuse patient medical records privacy act and regulations, the government is then obligated to review each and every document on all the electronic media that has been disclosed, to identify which patients who are identified, are substance abuse patients, triggering notification requirements.

C. There usually is no easy way to make this determination except by undertaking a far more thorough review of the seized evidence than might otherwise be necessary, thereby unnecessarily compromising the privacy the statute is intended to protect.

D. Further, often even hard copy medical records of patients at psychiatric hospitals, or general medical facilities, frequently do not clearly indicate whether a patient is a substance abuse patient and the government must resort to a record by record review of the Diagnostic Statistical Manual codes which are presumably on the intake and/or discharge sheet for each chart.

E. The burden of mistaken judgement falls on law enforcement personnel and the DOJ attorneys supervising the investigations.

IX. Prior to obtaining substance abuse patient records, law enforcement agencies must file a special application with the appropriate court for a disclosure order. Each time additional records are needed in the same investigation, even for patients whose records have already been partially disclosed, the whole application and notification process must be repeated, a colossal waste of time and effort, and an irritant to the patients.

A. For example, an initial subpoena might seek only billing information, but the course of the investigation later dictates the need to obtain actual medical records. This problem either compels investigative agencies to issue broad initial subpoenas, in contravention of the direction of the substance abuse statute to constrict such disclosure to the minimum necessary, or to divert substantial resources from an investigation to file duplicative disclosure applications and to serve duplicative disclosure notices on patients.

X. The investigation of health care fraud involving substance abuse patients is fraught with examples of protected medical records showing up at investigative agencies "uninvited."

A. For example, in qui tam cases, it is not unheard of for the relator to deliver boxes of evidence which unexpectedly include protected substance abuse records. Also, such protected records can unexpectedly show up in computer files or paper records produced to law enforcement agencies.

B. The statute and regulations provide no relief for the unsuspecting "innocent" law enforcement agency or government attorney.

C. Agents and attorneys who have called me advice, have been advised to seal and segregate the records immediately, file an application nunc pro tunc with the appropriate court (even though no such procedure exists under the statute or regulations), explain to the court what happened and the absence of any fault on the part of the agency, and seek retroactive ratification of the disclosure.

D. Discussions with the HHS Center for Substance Abuse Treatment ("CSAT") on creating such a procedure, have been unsuccessful to date.

XI. There is no explicit provision in the substance abuse statute or regulations which permits law enforcement agencies to return substance abuse records which have been seized, to the original record custodian, either when needed by the custodian during the course of the investigation, or at the conclusion of the case, when the records are no longer needed.

A. CSAT has stated that this interpretation of the regulations is incorrect, and that permission for such action by law enforcement is inherent in the regulations -

therefore no amendment is necessary.

B. However, recipients of protected records, which includes law enforcement agencies, are prohibited from further disclosure of the records, unless such disclosure is specifically authorized by the regulations. 42 C.F.R. §2.12 ((d)(2)(3). There is no such specific authorization in the regulations.

C. Worse, the regulations call for "unconditional compliance" and prohibit an unauthorized disclosure even where the holder of the records believes the person seeking the information already has it. 42 C.F.R. §2.13(b).

D. Every time law enforcement follows the "common sense" course of returning records to the original record custodian, there is an actual violation of the regulation.

E. Therefore, law enforcement agents have been advised to include in the original court application, a request for permission to return records to the custodian who produced them, without the need for further patient notification and to include a disclosure that this procedure is not explicitly authorized by the statute or regulations.

XII. The regulations and statute make no reasonable provision for the return of records which are mistakenly turned over to a law enforcement agency.

A. A box of substance abuse records was unnecessarily turned over to a law enforcement agency, which was discovered upon review.

B. The AUSA, who had no use for these records, was advised to have the box sealed and segregated without any further review of the records contained therein, and to file an application with the appropriate court which fully explained the circumstances of the inadvertent disclosure, the lack of a procedure to handle this in the statute and regs, with a request for permission to return the box to the custodian w/o the need for patient notification.

C. This procedure is not explicitly authorized by the regulations and therefore is questionable under a strict reading of the regulations.

XIII. An AUSA sought advice this week on whether substance abuse patient records seized from a methadone clinic can be used to prosecute individuals in collusion with the clinic (who created facially legitimate, but actually phony patient

charts), in order to receive methadone for personal use, without being a legitimate patient.

- A. 42 C.F.R. § 2.06 permits disclosure of substance abuse patient records by court order for purposes of investigating or prosecuting a program or the person holding the records. This section prohibits any information obtained under this section from being used to prosecute a patient, or to be used as a basis for an application under §2.65 to prosecute the patient.
- B. An application to use substance abuse patient medical records to prosecute the patient must be made pursuant to §2.65. Such an application must show that an "extremely" serious crime is being - the enumerated examples all require a showing of a threat of loss of life or serious bodily injury. At least one court has concluded that the enumerated list of examples is basically exclusive. It is unlikely that drug abuse would meet this standard.

MEMORANDUM

TO: NDAA BOARD OF DIRECTORS

RE: FEDERAL DRUG TESTING PROGRAM

FROM: Jim Polley

DATE: February 28, 1996

The President announced a new plan that requires drug testing of anyone arrested in the federal criminal justice system prior to their first appearance before a judge or magistrate. Test results will be made available to the judge or magistrate before a decision is made to detain or release an arrestee on bail pending trial.

The President signed an Executive Directive to the Attorney General directing her to develop the plan for universal testing. At the signing ceremony on Monday, December 18, NDAA was represented by NDAA President Barnes, District Attorney Lynne Abraham and NDAA Executive Director Newman Flanagan. The Attorney General will be directed to report back to the President with an implementing plan by March 31, 1996.

The Anti-Drug Abuse Act of 1988 required the Administrative Office of the US Courts to establish and evaluate pretrial and post-conviction drug testing programs in 8 federal judicial districts. Report conclusions recommended pretrial drug testing of all federal criminal arrestees. The new program will build upon those demonstration projects and their results.

Draft implementation plans require testing of an arrested individual before their first judicial appearance. The Assistant US Attorney prosecuting the case will know the test results and can request that, in positive cases, the judge or magistrate impose appropriate sanction. The government cannot force the arrested individual to submit to the test, but the demonstration programs indicated that over 80% of the individuals agree to be tested. If the testing is refused, the judge is apprised of that fact and can also consider it in making a decision of release from custody.

While the testing program might seem daunting at first glance, testing those arrested for serious offenses is a realistic goal. At this time "no notice" urinalysis tests are routinely held within the military for large groups of individuals. Typically the names of the individuals are chosen in a random or blind fashion. The person to be tested is given little or no notice that the test will be conducted. During the test an observer watches the sample being collected to insure that there is no tampering or switching samples. Then, in a chain-of-custody, the samples are sent to a local lab for testing within 24 hours. Positive samples are tested a second time with more specificity. These tests can be run for a range of drugs but obviously, the more types of drugs tested for the longer it takes and more expensive it becomes.

THE WHITE HOUSE
WASHINGTON

December 18, 1995

MEMORANDUM FOR THE ATTORNEY GENERAL

SUBJECT: Development of the Administration's Federal
Arrestee Drug Testing Policy

Illegal drugs plague our communities, causing despair and illness, and, most importantly, contributing significantly to unacceptable levels of crime and violence. More than half of all individuals brought into the Nation's criminal justice system have substance abuse problems. Too often, the same criminal drug users cycle through the court, corrections, and probation systems still hooked on drugs and still committing crimes to support their habit.

We can and will continue to prosecute and convict these criminal drug users. Yet our criminal justice system must do more to try to reduce drug use. Across the country, employers have accepted their corporate responsibility to reduce the levels of drug use within their workplaces.

So too, the agencies of our criminal justice system must do their part, giving criminal drug users powerful incentives to stay off drugs by putting a high price on continued drug use. These incentives -- commonly referred to as "coerced abstinence" -- should be applied at the earliest possible stage in a person's interaction with the criminal justice system -- following arrest.

To ensure that we are doing all we can to break the cycle of drugs and crime, I am directing you to develop a universal policy providing for drug testing of all Federal arrestees before decisions are made on whether to release them into the community pending trial. I further direct that you establish a policy whereby Federal prosecutors will seek appropriate measures for arrestees who fail pretrial drug tests.

The Federal criminal justice system should serve as a model for State criminal justice systems -- where the majority of criminal cases are processed and the cycle of repeat drug-related offenders is most evident. Therefore, I am also directing you to take all appropriate steps to encourage States to adopt and implement the same policies that we are initiating at the Federal level.

You should report to me in writing by March 31, 1996, on the specific steps you will take to implement this policy.



President Clinton to Order Drug Testing for All Arrested on Federal Charges

By Pierre Thomas
and Ann Devroy
Washington Post Staff Writers

President Clinton will require all people arrested on federal charges to face drug tests as condition of bail and will encourage state and local law enforcement agencies to adopt the same policy, White House and Justice Department officials said last night.

Clinton, faced with accusations that his administration is soft on drugs, has approved an executive order directing Attorney General Janet Reno "to develop a universal policy requiring federal arrestees to submit to drug testing before decisions are made on whether to release them into the community pending trial," according to a draft of the order.

Under the order, which is scheduled for public signing ceremonies Monday, anyone arrested for any federal offense would be asked upon initial detention to submit to a drug test. Should that person refuse, Justice Department lawyers could seek various sanctions, such as asking for detention pending further court proceedings.

Clinton's order directs Reno "to take all appropriate steps to encourage the states to adopt and implement the same policies that we are initiating at the federal level."

Under the terms of the order, about 60,000 people a year in federal custody would face the potential choice of a drug test or detention without bail. If all jurisdictions heed Clinton's recommendation, hundreds of thousands of people nationwide would face that same choice, greatly expanding the scope of routine drug testing.

Justifying the policy, the president's order states, "We should implement testing and sanctions as a way to reduce the level of drug use in the population of offenders under criminal su-

pervision, and thereby reduce the level of drug use and criminal behavior."

Currently drug tests are performed at random on a small percentage of federal inmates and routinely on convicted felons who are on probation.

The blanket federal approach in Clinton's new order seems certain to provoke court challenges on constitutional grounds.

The Supreme Court has said that drug urine tests are "searches" within the Fourth Amendment's protection against unreasonable searches. But in decisions last term and in 1989, the court said the government was justified in requiring such tests under specific circumstances.

In June the court ruled that a public school district may require that all students take drug tests as a condition of playing sports. The court emphasized the importance of deterring drug use in schools, that student athletes have a low-

ered expectation of privacy, and that children lack the fundamental rights of adults.

In 1989 the court upheld the federal testing of railroad workers after accidents and the testing of customs agents involved in drug interdiction. In those cases, the justices said the government's interest in public safety outweighed the workers' privacy rights.

"If the Supreme Court will allow testing of students, certainly we can test persons charged with federal offenses," said one senior Justice Department official.

White House drug policy director Lee P. Brown said the goal of the new policy was to ensure "our prisons and people under lawful control of the criminal justice system are drug free—and clearly in many cases today, they are not. That must stop."

According to a senior White House official, Clinton's intention through the order is to make "drug tests as common as fingerprinting

for federal arrestees" and to increase the pressure on what he said was the 20 percent of those who will not submit to a voluntary test to do so.

Mark Kleiman of Harvard's John F. Kennedy School of Government, who helped develop the proposal, said universal testing of arrestees at the national, state and local levels could greatly reduce the nation's drug problem.

Administration officials contend that repeated Republican efforts to block expanded drug treatment and other proposals, such as drug courts, hurt the national drug control strategy.

Senate Judiciary Committee Chairman Orrin G. Hatch (R-Utah) this week criticized Clinton as putting too much emphasis on drug treatment and too little on law enforcement and interdiction.

Clinton Orders Drug Tests for Those Arrested on Federal Charges

by ALISON MITCHELL

WASHINGTON, Dec. 18 — President Clinton, seeking to take a tough stand on drugs, directed the Government today to require that all people arrested on Federal criminal charges face drug testing.

The move was one of an array of actions planned by the Administration this week to tackle the social problem of crime and drugs.

In an Oval Office ceremony, Mr. Clinton signed an executive order directing Attorney General Janet Reno to put the drug policy in place by March 31.

On his part, Lee P. Brown, the acting director of the White House Office of National Drug Control Policy, met with high school athletic directors in San Diego today to urge them to require drug testing for their joining sports teams in the aftermath of a Supreme Court decision finding such requirements legal.

Clinton plans to veto on Tuesday a spending bill covering the Justice and Commerce Departments because it would end a program for community policing enacted as part of the 1994 anti-crime legislation. Instead, it would create block grants for the states, giving them wide latitude on how they would fight crime.

The President said he would submit to Congress later this week new legislation on juvenile crimes. The proposals, being forwarded by the Administration, would allow more access to juvenile records and give Federal prosecutors discretion to treat serious juvenile offenders as adults.

Clinton Administration initiatives come as the President approaches the 1996 election year, when social issues like crime and drugs are likely to play a major role, and as both parties maneuver for advantage on the issue of drugs. A recent Gallup poll found that Americans view drug abuse as one of the most serious issues facing the country.

Clinton announced the drug policy a day before the Senate Judiciary Committee was to hold a hearing on national trends in drug use. In an appearance on the NBC program "Today," Senator Orrin Hatch, a Utah Republican who has sharply criticized the President's attention to drug issues, said in the last two years, "marijuana has gone up from 1.6 million kids to 2.9 million."

"For 14- and 15-year-olds," Mr. Hatch said, "it's gone up some 200 percent."

Mr. Clinton said the new Federal approach to drug tests would seek to weaken the link between drugs and crime. "Unless we break the cycle of drugs and crime, criminal addicts will end up back on the street committing more crimes and then right back in the criminal justice system, still hooked on drugs," he said.

Almost 50,000 people a year are arrested and processed through the Federal courts on felony charges. Under Mr. Clinton's executive order, a person accused of a Federal crime would be asked to take a drug test upon arrest. While the suspect would have the right to refuse, officials

said, Justice Department lawyers could present that refusal to a judge at a bail hearing and could ask the judge to refuse to grant bail.

If the suspect took the drug test and failed it, prosecutors would request that the court refuse to grant bail or impose additional conditions, like drug treatment and additional testing, before allowing the release.

James Alan Fox, the dean of the College of Criminal Justice at Northeastern University, said that drug tests for people arrested on Federal charges would have some impact, but I don't think we can expect it to

solve all of our problems of drug-related crime. He pointed out that violent crimes like murder and rape were under state, not Federal, jurisdiction. Mr. Clinton urged states today to follow his lead in requiring drug tests.

Ms. Reno contended today that "it is clearly constitutional to condition bail on testing." But Arthur Spitzer, the legal director of the American Civil Liberties Union for the Washington area, said his group would probably challenge such tests.

"If someone is arrested for a drug-related crime, they probably can make drug testing part of the pre-trial conditions," he said. "But lots of people are arrested for crimes that have nothing to do with drug use — failing to file your income tax return, or, here in Washington, we get lots of arrests for people demonstrating at the White House — and I think there's no proper basis for subjecting those people to drug tests."

In recent years, the Supreme Court has said that drug tests are searches and fall under the Fourth Amendment's protection against unreasonable searches. But in two separate cases in recent years, the

Court has approved drug tests for certain employees where there was a risk to public safety.

In another action today, Mr. Clinton declared international heroin control a major objective of foreign policy, which means that countries can be denied American aid if they do not cooperate to prevent the flow of heroin.

Since coming to office, Mr. Clinton has sought to erode the Republicans' sharp advantage with the public on crime-fighting issues, and several polls in the past year have suggested that he has succeeded. The Administration regularly points to the anti-crime legislation passed in 1994, with its promise of putting 100,000 new police officers on the street, and the President's fight for gun control.

The Republicans, in turn, have accused Mr. Clinton of being less than aggressive in fighting drugs. In the past, Mr. Hatch has accused Mr. Clinton of being "AWOL — absent without leadership — in the war on drugs."

Early in Mr. Clinton's term, he sought to live up to a campaign pledge that he would cut the White House staff by a quarter by cutting jobs from the White House Office of National Drug Control Policy.

New drug test law raises questions of privacy invasion

By LAURIE ASSEO

Associated Press Writer

WASHINGTON—Soon there will be a new step in the booking process for anyone arrested on a federal charge. Suspects will be asked to urinate into a cup for a drug test.

And the judges who decide whether to release federal defendants on bail will be told whether they passed or failed the drug test or refused to take it at all.

The idea is to find people who are using drugs and get them to stop, thus reducing the chance they'll commit more crimes.

But defense lawyers call President Clinton's anti-drug initiative an unconstitutional invasion of privacy, particularly because it will apply even to people who aren't suspected of using drugs.

Robert Fogelnest, president of the National Association of Criminal Defense Lawyers, questions whether there is any connection between drugs and many defendants. "A 57-year-old businessman charged with a banking violation? A guy who gets arrested for selling eagle feathers? It doesn't make sense."

At the very least, it will be one more instance of Americans being asked to give up some of their privacy as part of the nation's war on drugs—something many people appear willing to do.

"The more government intrudes, the more it makes it sound as if it's reasonable to intrude," said Mary Cheh, a George Washington University law professor.

Earlier this year, the drug war was expanded to include student athletes. The Supreme Court ruled that public schools can require athletes to be tested for drugs even if they aren't suspected users. Such students have little expectation of privacy anyway, the court said.

The justices also have allowed drug testing of public employees in cases involving safety or security, such as railroad workers involved in train accidents even if they are not suspected of using illegal substances.

ANALYSIS

Drug testing is commonplace among private employers, where the Constitution's Fourth Amendment protection against unreasonable searches does not apply.

This week, Clinton, citing a link between drugs and crime, directed Attorney General Janet Reno to develop the policy under which everyone arrested on federal criminal charges will be asked to submit to a drug test.

Federal prosecutors may recommend that judges detain defendants who test positive, or release them on condition they undergo more drug tests or treatment. If a defendant refuses to be tested, the judge could take that into account in deciding whether to grant bail.

The administration acknowledges that federal prosecutors can't force someone who is arrested to take a drug test. But officials say most people agree to take drug tests when requested under current federal policy.

"This is a program to destroy the drug market by taking away their best customers," said Mark Kleiman, a Harvard associate professor of public policy. "I don't think anybody is arguing that continuing to use drugs is some sort of constitutional right for arrestees."

The District of Columbia's court system has been requesting drug tests from everyone arrested in the past decade. People are told they have the right to refuse and that the results will be used only to determine bail—not to help decide whether they are innocent or guilty.

Susan Shaffer, deputy director of the district's pretrial services, said judges don't deny bail to people because of a positive result, but they do order further tests or treatment as a condition of bail. Someone who violates those conditions can be held in contempt of court.

Since the testing began, the rate of pre-trial releases has gone up because judges know any drug use is being monitored and reported, Shaffer said.

Cheh said she doesn't expect the federal testing program to cause major changes in federal judges' bail decisions.

The Constitution's Eighth Amendment prohibits excessive bail, but it can be denied if a judge thinks a defendant might flee or be a danger to the community.

A positive drug test could lead a judge to require further testing or treatment as a condition of bail, Cheh said. But she predicted that in the vast majority of cases, judges will not deny bail because of a positive result or a refusal to take the test.

Consent is a key issue, she said, adding that the federal plan could be vulnerable to legal challenge if people aren't told they have a right to refuse.

A Wonder Drug's Worst Side Effect

Kids Turning to Easy-to-Get Ritalin for a Quick—and Sometimes Deadly—High

By Laura Sessions Stepp

Washington Post Staff Writer

Slade, a student at Thomas S. Wootton High School in Rockville, usually waited until lunch before approaching a couple of buddies at school. When the time came he said, "Let's go to my office," and they'd steal away to a concrete stoop outside that Slade claimed as his own. He reached into his pocket for several tiny pills. The cigarette lighter came next, or his newly acquired driver's license, or anything else he could find to crush the pills into powder. Sometimes he used the heel of his shoe, grinding the tablets on the pavement before scooping up the powder with a rolled-up dollar bill.

One snort gave Slade, who asked that his last name not be used, a jolt akin to drinking a quick cup of strong coffee. Two snorts, and "I thought I could do more work. I felt like going to class." From last April until late summer, Slade snorted

his way to high several times daily. His drug of choice: methylphenidate, brand name Ritalin.

Touted as a wonder drug for children with attention deficit disorders, methylphenidate is also muscling its way into the illicit drug culture with a speed that alarms substance abuse counselors and federal drug experts. Kids tag it "Vitamin R," "R-ball" or "the smart drug" and seek it out, believing it will help them study better and party harder. With more than 2 million children taking it legally, procuring it illegally is a cinch—a cousin's medicine cabinet, a deal cut in the school bathroom, a mother's bedside table (the drug is sometimes prescribed for depression in adults). And because it's a legal drug, many young people see no harm in either snorting it or gulping down larger-than-therapeutic doses.

"We have always had some problems with [methylphenidate] abuse and traffic," says Gene Haislip, chief of diversion control for the Drug Enforcement Administration. "But it has never been pervasive because there never was much

available. . . . That situation [has begun] to change radically."

A stimulant related to amphetamines, methylphenidate has been a favorite of street hookers for years. But its abuse among schoolchildren is relatively recent and therefore poorly documented. The annual survey "Monitoring the Future," by the University of Michigan, gives a hint of a trend: In 1994, more than twice as many high school seniors—representing about 350,000 students nationwide—said they had abused methylphenidate as in 1993.

Anecdotal reports of methylphenidate abuse are also beginning to surface in the Washington area and around the country.

At Episcopal High School, a boarding school in Alexandria, three students were expelled last spring after 25 students were discovered misusing the drug, according to school officials. Headmaster Lee S. Ainslie said four boys for whom Ritalin was prescribed shared the drug with other students who were hoping it would improve their concentration and help them make better grades on exams and papers.

Officials at Episcopal, which has an honor code, asked everyone involved to come forward. "The three students who were expelled were asked to leave not because they were misusing the drug but because they lied about their involvement," Ainslie said. The other students were allowed to stay at school but were punished.

This past fall, a ninth-grader was expelled from St. Andrews in Bethesda, another private, Episcopal-related school, for obtaining a couple of methylphenidate pills from a friend and approaching younger students with them.

Schools in Roanoke, Va., West Palm Beach, Fla., suburban Cincinnati and Merion, Pa., have reported similar expulsions.

Montgomery County Police Sgt. Michael Mancuso said officers are beginning to find methylphenidate on students arrested for selling or possessing other drugs.

This hardly surprises Kristin, a junior last year at Seneca Valley High School in Germantown. "I could get it all the time," she says. "My mom was prescribed for it. She stopped taking it, and I'd take hers. My best friend's little brother had some, and I had two friends who had it prescribed."

Kristin, now attending a county alternative school, says she used to snort methylphenidate every day, usually at home or at her friend's house. "We were little perfectionists," she says of herself and her friend. "We'd use a mortar and pestle and grind it up real fine."

Seneca Valley Principal Wayne Whigham, like other administrators contacted for this story, says he hasn't seen evidence of methylphenidate abuse this year, but he has heard reports "that kids are doing it." Wootton's new principal, Rebecca Newman, says she closed parts of the school grounds this year after students reported that last year certain classmates were using drugs, including methylphenidate, around the school.

For many children who have been given a diagnosis of attention deficit disorders, methylphenidate helps them focus on cognitive tasks and expands their attention span according to Tony Tommasello, associate professor of clinical pharmacy at the University of Maryland at Baltimore. But for children without an attention disorder (and for some ADD kids), it produces a quick burst of energy, even euphoria, that lasts several hours if snorted or ingested in relatively large quantities.

A normal dose is 5 to 10 milligrams, depending on one's size. The child who exceeds that dose risks tremors, seizures, hypertension, psychosis, even stroke, according to pharmacologist Earl Siegel, deputy director of the Drug and Poison Center at the University of Cincinnati. The misconception is that it's innocuous, like taking [over-the-counter stimulant] No-Doz. It's certainly stronger than that," Siegel says. Several deaths have been attributed to its abuse, including that of a high school senior in Roanoke.

One student at T.C. Williams High School in Alexandria remembers swallowing several times the normal amount in a school bathroom last winter. "I was happy all weekend long," she recalls.

The following Friday she took even more and regretted it by the time she arrived home. "I felt like I was going to die," she says. "I was shivering, my toes were tingling. I said, 'God, this sucks.'"

According to the DEA, emergency room admissions attributed to methylphenidate numbered 1,171 in 1994, up slightly from previous years. The proportion of children involved in such incidents also has risen, to more than half the total. These figures may in fact be too low, according to the DEA's Haislip, because they're taken primarily from urban hospitals, and methylphenidate abuse is largely a suburban problem.

One reason the drug is popular among some younger teens is cost, typically between \$1 and \$5 per pill. "Ritalin's really the only drug you can get when you're younger," says a 13-year-old student at a Herndon middle school. The boy, for whom Ritalin is prescribed, pockets the pills his mom leaves with his lunch money; he then sells or gives them away.

Sally Eller, a social worker and coordinator of

the Phoenix II alternative school in Gaithersburg, believes methylphenidate can be addictive even in lower doses—a claim strongly disputed by the manufacturer—because she has known too many kids who "had to have their Rit."

One of those kids is Drew, who also went to Wootton last year and says he stole Ritalin from his cousin. "Originally, it took two or three pills to get high," Drew says. "Then it was 10 or 15."

Eller, a social worker, says, "I've been in this work for 15 years and I see the prescribing of Rit getting worse and worse. Kids are misusing the drug and doctors aren't aware."

Advocates of methylphenidate therapy say that counselors like Eller and the DEA are overreacting. "The reports . . . appearing in the media [are] isolated events," says Todd Forte, a spokesman for Ritalin manufacturer Ciba-Geigy Corp. "The abuse speaks more to society's problems than to the medication."

Harvey Parker, co-founder of Children and Adults With Attention Deficit Disorders (CHADD), a national support group, says that twice within the last six months, CHADD has alerted parents to the potential for methylphenidate abuse through its newsletter.

But CHADD is partly responsible for the drug's meteoric rise, the DEA's Haislip says. The organization promotes methylphenidate, using the name Ritalin, at seminars and in its written material to parents, he says.

A DEA background paper chastises the group for taking money from Ciba to help pay for seminars and brochures. "The relationship between [Ciba] and Ritalin raises serious concerns about CHADD's motive in proselytizing the use of Ritalin," the paper states.

A CHADD spokesman says Ciba contributed \$820,000 to the organization from 1987 through 1994, slightly less than 11 percent of CHADD's total revenue. "I see nothing wrong with taking that money as long as we're not influenced in our actions," says co-founder Parker, also CHADD's treasurer. Parker strongly denies that his organization promotes Ritalin over other ADD medication.

Drug abuse experts are worried because CHADD, supported by several physicians' groups, has petitioned the federal government to loosen restrictions on the production and prescription of the drug. Lift the regulations and there will be even more methylphenidate on the market, some experts say. "It's probably in everybody's best interest that it continue to be closely monitored . . . so the abuse factors don't overshadow the positive use," Siegel says.

Colorless, odorless pills, 'roofies', send rape rate soaring

Parents of teen-age girls should be scared . . . A lot of these kids don't have any respect for their bodies to begin with. And we've got an awful lot of parents who aren't doing a lot of parenting.

Bonnie Lashbrook
Student peer counselor

By DAVID KIDWELL
and CONNIE PILOTO
Knight-Ridder Newspapers

MIAMI—Imagine all the fears of parents whose daughters have hit dating age packed into one white pill the size of a dime.

It may be the mightiest Mickey Finn ever concocted.

And it's not the fiction of Sam Spade novels and Humphrey Bogart movies. These days, it costs about \$3 at the high school water fountain. It is colorless, odorless and quickly dissolves in a can of Diet-Coke.

In about 10 minutes, it creates a drunklike effect that lasts eight hours. It enhances the effects of alcohol, causing loss of inhibition, extreme sleepiness, relaxation, and—perhaps worst of all for its victims—amnesia.

The pill is made of a drug called Rohypnol, pronounced ro-hip-nol. Your kids know them as "roofies." Chances are better than good they've heard of them. Of more than a dozen teen-agers interviewed for this story, all know of the drug and know kids who use it.

And police are concerned—particularly about roofie rape.

In Broward County, Fla., 10 men have been arrested on roofie rape charges in the past three years. The most recent came Feb. 1, when two Pembroke Pines brothers and a friend were charged with repeatedly raping a 15-year-old Cooper City girl

after they secretly put a roofie in her wine cooler.

One Broward County man who pleaded guilty to roofie rape in a 1993 case—Mark Anthony Perez of Fort Lauderdale—told authorities he used roofie as many as 20 women.

The problem hasn't been as prevalent in Dade County, where police departments reported a handful of suspected sexual assaults related to roofies in the past five to six months.

A 17-year-old Coral Springs girl raped on Jan. 7 while she was under the influence of roofies lost 10 hours between having dinner with friends and waking up in a strange hotel bed. Police are investigating a 29-year-old suspect who was at the dinner.

"Her panties were around her ankles and a condom next to her," said the girl's mother. "My daughter didn't know this guy. She doesn't remember a thing."

"This man is a rapist and he's going around doing this to other women," she said. "I want people to know how dangerous this is."

"It's a big, big deal out there right now," said Bonnie Lashbrook, a student peer counselor at Cooper City High School.

"Parents of teen-age girls should be scared . . . A lot of these kids don't have any respect for their bodies to begin with. And we've got an awful lot of parents who aren't doing a lot of parenting."

Rohypnol is a potent and hypnotic sedative used in some countries to put out surgery patients. They are legally prescribed as sleeping pills in about 80 countries, but not the United States.

The sudden emergence of the once obscure sedative has thrown police agencies for a loop. Before 1992, it didn't exist here. Earlier this month, police seized 5,000 pills in a raid at a Pembroke Pines home. Last year, 60,000 pills were seized at Port Everglades. In November, Broward Sheriff's deputies seized 10,000 pills from a Hollywood apartment and arrested two Colombians who lived in Miami.

The pills were being packaged in vitamin bottles and labeled in Spanish. They were shipped from Colombia and distributed locally by two suspects, said BSO spokesman Jim Leljedal.

It has proliferated to such a point that the Drug Enforcement Administration and the Florida Department of Law Enforcement have joined forces with local police to have Rohypnol's status as an illegal drug enhanced to make penalties equal to cocaine and heroin.

"It's just that we have a chance in law enforcement to get ahead of this thing before it gets too out of control," said Cooper City Police Capt. Jim Harn, whose agency is investigating several roofie rape cases.

The incident involving the 15-year-old from Cooper City happened in June at a Sweet 16 party at the Merrimac Hotel on Fort Lauderdale Beach, police said.

Charged with her rape are brothers Sidney Harmon, 19, and Scott Harmon, 17, of Pembroke Pines, and Moises Ventura, 18, of Miramar.

The Harmons' mother has said her sons are innocent. The Ventura family has declined comment.

According to friends, Scott and Moises were inseparable friends who liked to start fights and cause trouble. Sidney, who aspires to be a paramedic, is a quiet, sensitive boy, friends say.

Erica Verriotto, 17, said she was friends with all three boys for several years. "Scott was kind of a troublemaker sometimes, you know?" she said. "Nothing really serious. He used to like, start fights. You know, yell at people who cut him off in traffic and stuff."

"But Sid, no way," she said. "I trust Sid no matter what."

Cooper City detectives say several other girls have come forward with similar stories about the group of boys, but no charges have yet been filed.

"A lot of times the guys don't think they've done anything wrong," said Cooper City police detective Gregg Lupo. "This is not a rape in their eyes. They think if the girl is not awake or alert enough to say, 'No,' it's not rape."

Sharp Rise in Use of Methamphetamines Generates Concern

By CHRISTOPHER S. WREN

WASHINGTON, Feb. 13 — A startling rise in the use of methamphetamine in California and the Southwest has raised fears among law-enforcement officials that the trend toward dangerous stimulants could read across the country, much as crack did in the 1980's.

To stanch the tide of what is described as an extremely dangerous drug, the Drug Enforcement Administration today convened its first conference of Federal, state and local law-enforcement officials to formulate a national strategy to combat the trafficking and abuse of methamphetamines, which induce manifestations of irrational aggression and paranoia.

"When I first took office, people talked about it being a problem in the West," said Attorney General Janet Reno, who took office in March 1993. "Let us disabuse ourselves of that notion and recognize that it is reading across this country."

"There should be no question, no question in anybody's mind that methamphetamine poses a real and serious threat to the citizens of our nation," Mrs. Reno told participants at the conference.

Nicknamed "speed" in pill form or "ice" when smoked, methamphetamine accounted for an escalation in overdoses, emergency hospital admissions, drug shootings and related violence in Los Angeles, San Francisco, Phoenix and other Western cities, according to the statistics cited today. From 1992 to 1994, methamphetamine-related deaths increased nationally by 145 percent. In Los Angeles, the deaths increased to 219 in 1994 from 68 in 1992, and in Phoenix, to 122 in 1994 from 20 in 1992.

The synthetic drug has been found in cities as far afield as Atlanta and Minneapolis. But it has yet to catch on in New York City, which is already awash in cocaine, crack and heroin. Law-enforcement officials are at a loss to explain why, but some think it may be only a matter of time. "I want to make sure that we're not in front on this," said Patrick Artnett, the chief of the New York City Police Department's narcotics division, who participated in the conference. "If it represents a significant problem on the West Coast and it comes East, then we'll be ready for it."

Donald L. Petty, the assistant special agent in charge of the Drug Enforcement Administration's operations in New York, said that so far, "in the city, we're finding no use at all." But Mr. Petty added, "As it becomes trendy in California, it will become trendy in New York as well." Thomas A. Constantine, the head of the Drug Enforcement Administration, reported today that methamphetamine accounted for a 71 percent rise in drug-related emergency hospital admissions in Los Angeles and was the No. 1 cause of drug overdoses in San Diego, where 26 homicides had also been traced to the drug. "The violence can be incredible," Mr. Constantine said.

In one particularly grisly murder last July, a New Mexico man high on methamphetamine and alcohol beheaded his 14-year-old son and tossed the severed head from his van window onto a busy highway.

Methamphetamine abuse has its roots in the late 1960's, when its violent consequences hastened the demise of the hippie culture with the warning "speed kills." Of late, methamphetamine has been used mostly by blue-collar, white males, sometimes in rural areas. But Patrick O'Dea, an intelligence analyst for the drug agency, said college students and young professionals were taking up the stimulants, as were some Hispanic men.

The appeal of the drug is that its cost is a fraction of cocaine's, but it provides a similarly intense euphoria, which lasts longer than cocaine but leaves a nastier letdown or "crash."

Young men use methamphetamine for sexual stimulation. Truck drivers have taken them to stay awake on long-distance runs. Because methamphetamine suppresses appetite, it has also been tried by

teen-age girls trying to lose weight.

Methamphetamine is usually swallowed or snorted, but it is available in modified form for smoking, like crack. But while a crack binge typically lasts 12 to 18 hours, a binge on methamphetamine can go on for several sleepless days, as the user fights off the "tweaking" or downhill slide that follows the euphoria. Some high-intensity users have pushed on without sleep for as long as 15 days, leaving themselves in a condition which can lead to imagining nonexistent threats and complicated plots against them.

Dr. S. Alex Stalcup of Concord, Calif., who specializes in drug addiction, said methamphetamine provoked violent agitation through the release of adrenalin. "What are you like after 15 days without sleep — charming, friendly, easy going?" he said.

Some methamphetamine users try to offset the crash with alcohol, producing what Dr. Stalcup described as "as dangerous a person as I can imagine." Once motorcycle gangs traded in methamphetamine, but in the last few years they have been eclipsed by organized Mexican traffickers who mass produce a purer and more potent form of the drug and distribute it through their networks for cocaine, heroin and mari-

juana in the western United States.

Methamphetamine is manufactured from ephedrine, an ingredient used in cold and asthma medicine, as well as from a substitute called pseudo-ephedrine. In March 1994, United States Customs Service officials at Dallas-Fort Worth International Airport seized 3.4 tons of ephedrine made in India being shipped through Switzerland to a fictitious company in Mexico. Later, they stopped an ephedrine shipment of 2.3 tons destined for Mexico.

"We suddenly realized the magnitude of the problem we were dealing with," said Mark Golubock, the chief of the International Chemical Control Unit at the Federal drug agency.

MEMORANDUM

TO: NDAA BOARD OF DIRECTORS

RE: TECHNOLOGY AND LAW ENFORCEMENT

FROM: Jim Polley

DATE: February 29, 1996

For the last several years DOJ, at the behest of Congress and the defense industry, has been involved in exploring the transfer of military technology to law enforcement use. From the Congressional and corporate perspective this is a means of salvaging the defense industrial base with the reduction in our military forces; from the law enforcement perspective it provides a research and development capability that the diversified law enforcement organizations could otherwise not afford. While the initiative started with military technology it has since spread to other areas of technology research and development that can be converted for law enforcement use.

The concept of using advanced technology for law enforcement purposes is not without criticism and potential legal problems. Much of the initial efforts have been devoted to developing items for use by the police without regard for the legal basis for their use. To this end the ABA has been studying the application of advanced technology in terms of privacy expectations and other recognized legal principles framing police work. NDAA President Barnes requested Philadelphia DA Lynne Abraham to represent NDAA in the ABA effort to develop standards for the application of the new technology. Attached is part of the ABA draft report.

Police Surveillance of Streets Turns to Video Cameras and Listening Devices

By TIMOTHY EGAN

REDWOOD CITY, Calif. — The year 1984 may have passed with barely a sinister hint of George Orwell's police state. But in 1996, American law enforcement is watching you, and listening, using advanced technology to record what goes on in entire city blocks.

Since late December, the police in this bayside suburb of San Francisco have hidden sophisticated listening devices throughout a section of the city that has been plagued by gang shootings and random gunfire.

The listening system of the Redwood City Police Department is designed to detect gunfire, send a signal back to headquarters, then locate the shots within 10 yards of where they were fired.

As part of a Federal grant, a similar system may soon be installed in Washington or another major city.

In Baltimore, the police last month wired a 16-block area of downtown with enough video cameras to allow them to monitor every street, sidewalk and alley 24 hours a day. The system watches — and records — everything.

"This is our way to say, 'We care, and we're watching,'" said Frank Russo, the director of public safety for the Downtown Partnership of Baltimore, a business group working with the police to run the new system.

As the audio and video sentries move into neighborhoods, few people are complaining about the intrusion.

"When you ask people if they are more concerned about gunfire or police sensors, they say gunfire," said Bonnie Miller, a resident here who serves on a committee that will decide whether to make the listening system a permanent part of the Redwood City Police Department. "In fact, I would say the neighborhoods here want it in at all cost."

The digital watchdogs on the West Coast and the video patrol on the East Coast are the talk of law enforcement. A police officer's new best friend could turn out to be a recorder or a camera attached to a street light, the police say.

"There's no question our system works," said Sgt. Frank Wilkins of the Redwood City Police Department. "We used to have so much

gunfire New Year's Eve that people would just shudder inside their homes. This last New Year's was the quietest in a long time."

And that was before the system, which is in only an experimental stage, was even operating; the Redwood City police had put out the word that they *might* be testing it.

"When people think somebody is watching, or listening — hey, even my heartbeat goes up when I drive by" a speed trap, Sergeant Wilkins said. "It's perception."

Although these pilot projects are a long way from Robocop, the people who helped design them say they reflect the dawning of an age in which technology will augment, or even replace, human patrols.

Baltimore considered a novel addition to its video coverage: a "panic button" that could be activated during a crime.

"Basically you would hit a button near a telephone pole, and that would open up an intercom, so in a sense the police would then be listening as the crime took place as well as watching it all," Mr. Russo said. "Some of the toys that are out there now are really pretty amazing."

In the end, the panic button was rejected because of budget considerations. Even without it, the new system could cost up to \$1 million for the 16-block trial area alone.

The Redwood City system, developed by Trilon Technology, a company based in the Bay Area, has cost \$25,000 so far. It is still being tested in this racially diverse, middle-class city of 70,000 people.

But a similar system, using a type of sonar spun off of Defense Department research, may soon be installed in Washington or another major city. Officials at Alliant Techsystems, which is developing these acoustic sensors under a Federal grant, say their system can reduce the time it takes the police to respond to a shooting by about 85 percent.

"You can get there so much faster that the difference may literally be between life and death," said Bill Labuda, who is developing the system.

Civil libertarians on the left and gun enthusiasts on the right have had only minimal complaints about the new system. But there is a concern that once a technology is in place, it

can be used to pry, spy or otherwise go well beyond the mere recording of events in public places.

"I think this is a great tool — it's wonderful what it's done already," said Ms. Miller, who lives in the part of Redwood City that has been wired for gunfire. "But if they wanted to,

the police could slightly alter it to listen in to homes. That's where the Big Brother stuff comes in."

Indeed, the Redwood City police say they could, with minor adjustments, focus their sensors on conversation inside houses instead of merely picking up high-decibel gunfire in public areas.

And in Baltimore, officials acknowledge that they could just as easily tilt their video cameras to look inside windows rather than remain trained on the street.

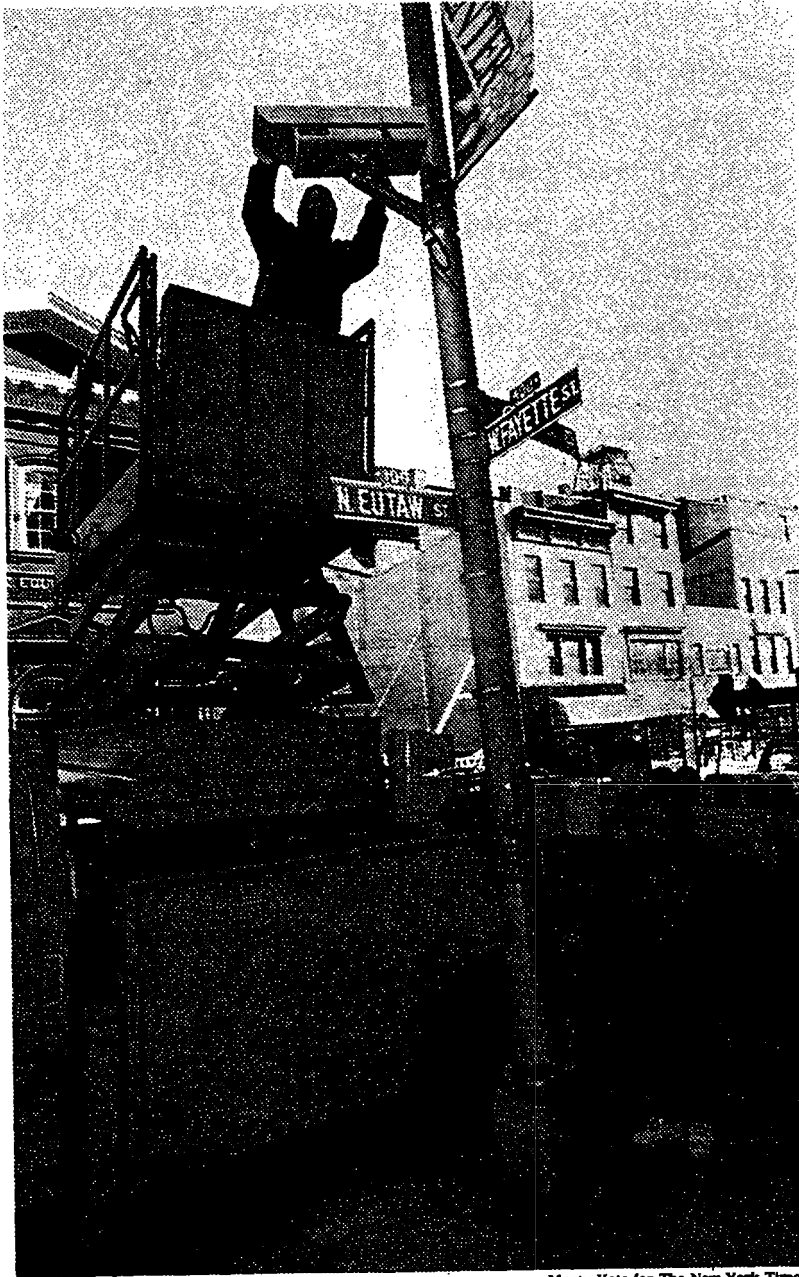
The line between whiz-bang public-safety devices and unlawful intrusion is generally crossed when technology is used to go into a private space where there is no reason to presume that a crime is being committed, legal scholars say.

They point to a case in Wyoming, where the police used a thermal imager — which can detect extra heat inside a home or any other building — to arrest and convict two men on charges of growing marijuana under a bank of artificial light.

Last October the United States Court of Appeals for the 10th Circuit, in Denver, ruled that it was unconstitutional for the police to use an imager to scan homes without first obtaining search warrants. But other courts have held that using the imagers to detect abnormal heat does not violate Fourth Amendment protection against unreasonable search and seizure. The Supreme Court is likely to settle the thermal-imaging cases.

But a new round of cases is sure to arise as soon as acoustic sensors or video cameras are used outside of public spaces, legal experts say.

"It's pretty clear that Big Brother has arrived and he's looking into new areas to invade," said Randall Coyne, a professor of law at the University of Oklahoma who specializes in privacy issues. "You could argue that these cameras, these listening devices, in and of themselves constitute an illegal search. And perhaps more chilling, there is now this notion that you're never alone, you're never free."



Marty Katz for The New York Times

In Baltimore, the police have installed enough video cameras to allow them to monitor a 16-block downtown area 24 hours a day.

Others say Americans have grown so accustomed to airport searches, video surveillance in malls and banks, and constantly operating recorders at cash machines and other devices that moving the big eye or ear to a more public space is not a major threat.

"It's not unlike the cameras in banks, supermarkets and subway systems that are already part of our daily lives — and that make us feel safer," said Mayor Kurt L. Schmoke of Baltimore. He said he might ex-

pand Baltimore's system to other parts of the city if it proved a success during its trial run this year.

The police monitor the cameras inside an eight-by-eight-foot kiosk. Each camera keeps a record of a given area for up to four days. It will be used both to alert the police that a crime is occurring and to record an event, so that a record exists of what happened in a certain area.

"Monitoring is not the primary function — it's the fact that everything is being recorded," said Mr. Russo. "So if someone reports a crime from 3 A.M. in a given area, we can go back and look at that." Baltimore's Police Commissioner Thomas Frazier, compared the system to "a high-tech neighborhood watch program."

But Professor Coyne said the

The aim is public safety. But what is the price?

price of this safety was loss of liberty. "It is just chilling to me that there is a permanent record being made of your every public action," he said.

In Redwood City, the acoustic sensors are welcomed in the neighborhood where they have been installed.

"I like it very much," said Eva Yang, who runs a small liquor store with her husband. "You know when someone shoots they can catch them real quick."

"It's a great idea — long overdue," said Gregory Louis, a school bus driver.

The Redwood City police say they have had inquiries about their project from police departments around the world. They see themselves as technological pioneers, not glorified hall monitors.

"The great thing about this is, if somebody commits a crime we know almost instantly," said Capt. James R. Granucci. "We are almost literally catching them in the act, with a gun still smoking."

THE WASHINGTON POST

Sensitive Detector Would Give D.C. Police Hearing Aid

By Scott Bowles

Washington Post Staff Writer

Washington's war on crime is measured in grand scales. Success seems to hinge on task forces, sweeping drug sting operations, anti-gun initiatives.

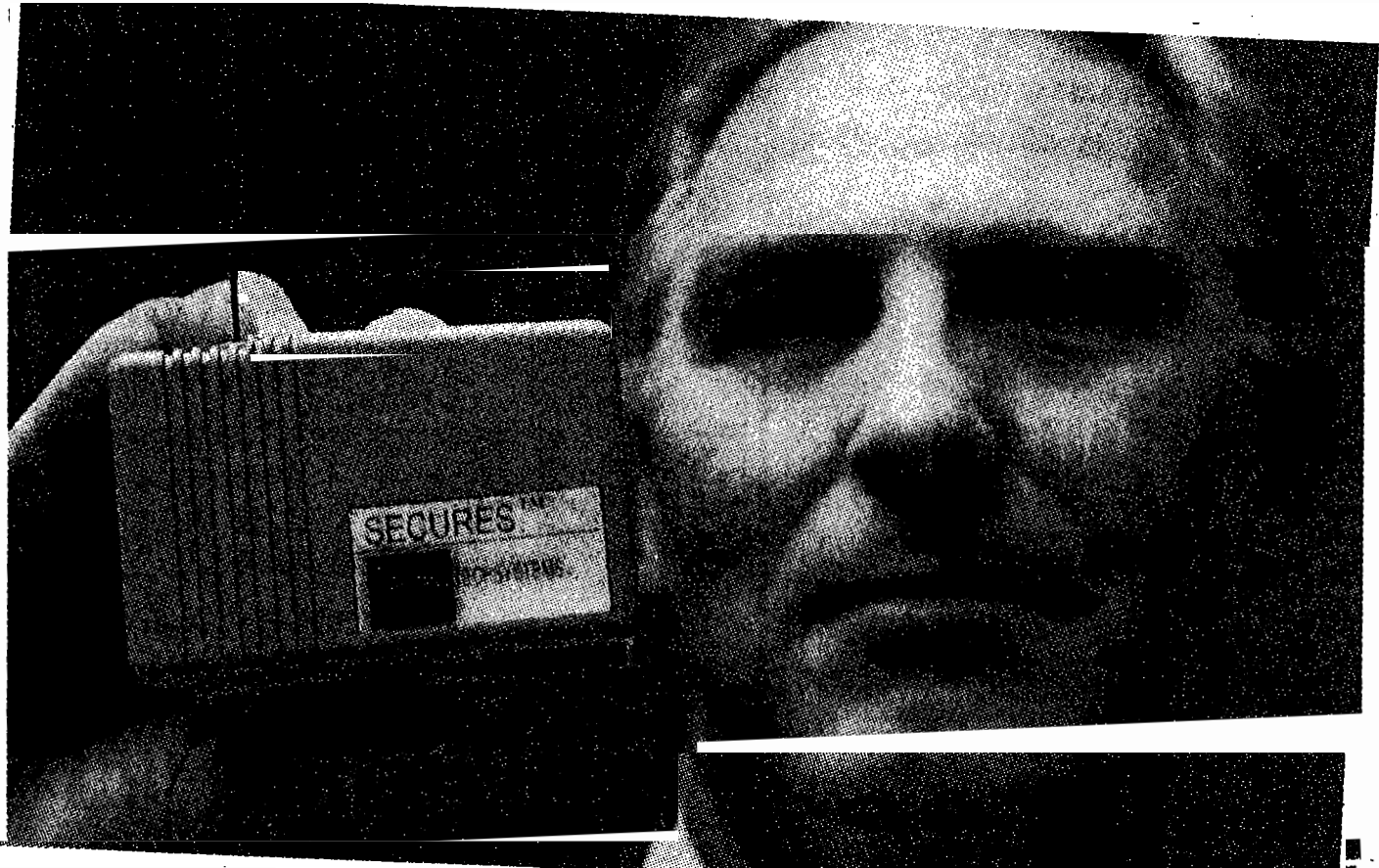
But the future of safeguarding the nation's capital may soon rest on a cigarette pack-size microphone, placed inconspicuously on street lamps, light signals and buildings.

The highly sensitive microphone, which can detect a gunshot within a block and pinpoint the sound to within 10 feet of the source, has caught the attention of police departments in Washington and a half-dozen other cities vying to test the system for the federal government this summer.

Whoever lands the pilot program will be watched by the nation's law enforcement agencies, which are turning to technology to police rough neighborhoods where officers cannot always be present.

The system also will fall under the scrutiny of civil libertarians, who worry that the price for public safety could be a loss of personal privacy.

Bill Labuda swears he is not Big Brother, but he thinks the sonar detection system that he engineered should give gun-toters a reason to worry.



Bill Labuda shows the sonar detection device developed by Alliant Techsystems in Rosslyn. D.C. police and other city police

departments have applied to the federal government to test the microphone, which can detect a gunshot a block away.

Some See Privacy Issues in Microphone

MICROPHONE, From B1

"The police will be able to respond to a shooting 85 percent quicker," said Labuda, an engineer for Alliant Techsystems in Rosslyn, which developed the system. "That means more arrests, that means quicker medical attention for people who get shot. That can mean the difference between life and death."

Labuda and his colleagues began developing the sonar system two years ago under a federal grant from the Defense Department, which funds research into new technology for military and nonmilitary uses. With the help of the D.C. police, engineers programmed the microphone to detect the sound of gunshots while ignoring similar noises, such as cars backfiring.

"We asked the police to bring the guns we'd normally hear on the street, so we could record the sounds," Labuda said. "We expected them to bring us several handguns."

Instead, officers showed up with pistols, assault rifles, Uzis and shotguns.

"They said, 'This is what's on the street.' We got quite a variety of samples," Labuda said.

Depending on where a microphone is placed, it can detect a gunshot along an entire city block. When placed on top of a traffic signal at an intersection, "we can monitor all four streets that run from that corner," Labuda said.

When a gunshot is detected, the microphone relays a signal to a computer, which alerts a dispatcher that a gun was fired and where. Each microphone

will cost about \$2,000, including installation, Labuda said.

Already the system has become the talk of law enforcement, and police departments from several other cities, including Los Angeles, Phoenix, Charlotte and Little Rock, have expressed interest in playing host to the test program. The Justice Department says it is reviewing applications and expects to make a decision in March.

Other cities also are leaping to create listening posts. In Redwood City,

"This isn't Big Brother trying to spy on people."

—A Baltimore police spokesman about that city's on-street video cameras

Calif., a bayside suburb of San Francisco, police have established a similar, though cruder, system of microphones that covers a five-block area of the city plagued by drugs and shootings. The system, activated in November, uses five microphones to alert police to sounds similar to gunshots.

"We already are getting positive responses," said Sgt. Frank Wilkins of the Redwood City Police Department. "People have been writing us letters saying, 'I don't know what you did, but our neighborhood was a lot quieter this New Year's Eve.'"

Last month, Baltimore installed video cameras along a 16-block downtown stretch of Howard Street, enabling police to monitor the area 24 hours a day.

The system also keeps a record of goings-on for 96 hours before the video is erased, allowing investigators, essentially, to return to the scene if a crime is reported in the area.

"If criminals know that there are eyes trained on them, they're less likely to try something," said Baltimore police spokesman Robert Weinhold. "We have a lot of community support. This isn't Big Brother trying to spy on people."

But some civil liberty and privacy groups worry that once the technology is in place, the risk of police abuse rises. "Once a camera or microphone is set up in a public place, there is going to be more demand to use it for other purposes," said David Banisar, a spokesman for the Washington-based Electronic Privacy Information Center. "It isn't hard to alter a microphone to pick up conversations inside someone's home."

Banisar said that electronic surveillance has not proved to be a deterrent to crime and that police agencies "would be better off using proven methods, like having officers on the street, than looking for dangerous technological Band-Aids."

Some District residents, however, said they welcome new attempts to patrol the streets.

"If they build a robo-cop, he can stand guard in my yard," said Harriet Thomason, 54, a 35-year resident of the Trinidad neighborhood, one of the toughest in Northwest Washington. "I know those kids don't try selling drugs when the police drive by. Maybe they won't if the police are watching them on television."

Jan 25, 96

18:20 No.012 P.02

MEMORANDUM

TO: ABA Task Force on Technology and Law Enforcement

FROM:  Sheldon Krantz

DATE: January 8, 1996

SUBJECT: Draft Guiding Principles Report

1. Given the seriousness of the crime problem in America, law enforcement agencies need enhanced capabilities to prevent and detect crime, including enhanced access to emerging technologies to assist in surveillance, search and seizure, and other crime prevention and detection activities.
2. The emerging technologies, whether utilized by governmental agencies, criminal elements, or the private sector, have significant implications for traditional notions of rights of privacy in this country. Neither walls nor outer clothing may be barriers to surveillance or searches and seizures, for example. This raises concern since, in contrast to totalitarian states, this country has historically given the highest priority to restricting undue governmental interference with privacy rights. It must be noted, however, that emerging technologies raise concerns that transcend those relating to governmental intrusions with rights of privacy. Sophisticated criminal organizations now use encryption devices to deny law enforcement access to essential data bases, even after search warrants have been obtained. Private entities are collecting and selling extensive personal data largely immune from regulation or public scrutiny. The significance of all of these developments is not yet fully understood and must be.
3. Parallel efforts to promote creative uses of emerging technologies to enhance public safety and to preserve traditional privacy rights inevitably create complex policy choices. This Task Force, which includes prosecutors, criminal defense lawyers, law enforcement officials, judges, privacy experts, and academics, was formed for the purpose of assessing the types of considerations which need to be weighed in public debate, in legislative bodies, within and between agencies of criminal justice, and in the courts in balancing the rights and concerns relating to public safety (such as reducing gun-related crime or the danger of physical harm to law enforcement agents) and privacy interests (such as protecting the sanctity of the home or the confidentiality of personal or proprietary information). While the issues relating to private intrusions on privacy rights also raise important public policy questions, they fall, for the most part, outside of the primary focus of the Task Force. We have identified in our report, however, areas in which we believe steps should be taken to proscribe or further regulate activities of the private sector. In making its assessment of balancing public safety and privacy concerns, the Task Force has concluded that the following guiding principles are pertinent:

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Jan 25, 96

18:20 No.012 P.03

A. The primacy of privacy rights in one's home against undue governmental intrusions, and existing prior judicial authorization requirements relating thereto, should apply to the surveillance of activities occurring within the home, whether or not government agents need to physically enter the property for the surveillance and seizure of conversations and activities occurring outside of public view or normal hearing range.

B. Given the primacy of privacy rights in one's person and effects against undue governmental intrusions, exceptions to well-established search and frisk requirements, such as those now permitting the use of detection devices at airports and public schools, should be formulated with caution. This is particularly true of situations in which intrusive surveillance devices, such as detection devices which can see through clothing, might be utilized in street settings in a discriminatory and unregulated fashion.

C. The limited privacy interests in conduct or conversations which occur in public areas are often outweighed by law enforcement's need to observe or listen to these activities as part of their criminal prevention and detection responsibilities. Thus, the observation of conduct or the listening to conversations in public areas should normally not require prior judicial approval regardless of the enhancing sophistication of the surveillance techniques which are used or the expectation of the parties being observed or overheard.

D. Law enforcement agencies [in conjunction with appropriate prosecutors' offices,] should provide guidance to their officers on the use of intrusive surveillance in public areas in order to ensure that such surveillance is used in an appropriate manner. Law enforcement agencies should ensure that intrusive surveillance of targeted individuals should be:

1. restricted in time;
2. restricted for serious criminal activity;
3. utilized in a non-discriminatory manner; and
4. utilized in a manner that does not unduly infringe on the rights of innocent third parties.

Such restrictions would be particularly appropriate in situations where intrusive surveillance is done in a covert manner.

E. Law enforcement agencies should be fully accountable to the public for their crime prevention and detection activities. To ensure such accountability, law enforcement agencies should give general notice to the public about the types of both covert and non-covert surveillance activities in which they may engage and should periodically report to the public about the nature and extent of such activities during particular time periods.

F. Legislative bodies should periodically review the manner and means by which law enforcement agencies engage in surveillance activities in order to ascertain whether an appropriate balance between public safety and privacy interests is being maintained. Among the

matters to be reviewed would be the nature of the internal administrative guidelines on surveillance activities, the extent to which the guidelines are complied with by the agency's personnel, and the agency's record in meeting its notice and reporting obligations.

G. While searches of computer data bases and the interception of electronic communication are often critically important in the investigation of serious crime, these investigative techniques need to be carefully circumscribed. Akin to legislative concerns about wiretapping, in the absence of carefully defined guidelines, there are unique risks of overly-broad searches and seizures and undue intrusions into confidential and proprietary information and the privacy rights of innocent third parties. In order to avoid these concerns, law enforcement agencies and legislative bodies should formulate particularity and minimization requirements and other appropriate safeguard relating to the items and hardware or electronic communications to be seized.

H. While there are important privacy interests in encrypting electronic communications and stored data in order to preserve their confidentiality, law enforcement agencies should have the authority to decrypt encoded electronic communications and stored data in situations where they have received prior judicial authorization to seize the communications or data. Legislative bodies should consider supplementing existing judicially authorized procedures for seizing encrypted electronic communications and stored data by requiring persons who know or have access to the encryption codes to provide them, unless doing so would violate constitutional or other recognized privileges.

I. In light of the importance of ensuring the accuracy and utility of enhanced surveillance technologies and identifying ways to minimize their intrusiveness into privacy interests and to address surveillance counter-measures developed by sophisticated criminal organizations, funding should be provided to support research and development, to establish national standards, and to provide technical assistance and training to law enforcement agencies.

J. While the Task Force has been asked to devote primary consideration to conflicts existing between public safety and privacy concerns, it believes attention should be given as well to the largely unregulated compilation and sale by private enterprise of personal data, the use of sophisticated surveillance technologies by private policing and investigative agencies, and the use of these technologies and counter-measures against law enforcement surveillance by criminal organizations. These areas deserve immediate public attention and legislative action.

K. In fashioning means for encouraging compliance by law enforcement agents with administrative guidelines and statutory requirements on forms of surveillance and searches and seizures which are not otherwise regulated by constitutional restrictions, systems for public accountability, positive incentives, internal discipline and compensation schemes should be emphasized over exclusionary rules of evidence.



MEMORANDUM

SUBJECT: Where to From Here Regarding Visual/Personal Surveillance

FROM: Wayne R. LaFave

DATE: November 24, 1995

During our deliberations last Sunday morning, I attempted to describe a framework which I believe would serve us well in trying to put together standards of a fairly specific type regarding each of the general categories of technologically-enhanced surveillance: video; tracking; magnification/illumination; detection; and aerial. I was asked to flesh it out and put it in writing, which is the primary purpose of this memo. However, I have also addressed a few of the other matters which Sheldon mentioned Sunday morning as aspects of what we need to be doing.

Chris's fine memo on *Proposals for Standards on Visual/Personal Surveillance* put before us two options: the factor weighing approach, and the specific rule approach. As you may recall, I expressed the view on Saturday afternoon that the latter was to be preferred over the former. I still believe that to be the case, as it seems to me that a new set of standards which does not at some point get down to specifics simply will not have any impact upon our intended audiences. Also, I had some difficulties with the particular factor weighing approach set out in that memo, as it seemed to me to contain some rather dubious propositions and, in any event, to be sufficiently "mushy" in character that standing alone it would not provide meaningful direction for those we hope to influence.

This is not to suggest, however, that we simply need to choose between the specific and the general and move on from there. As I believe the balance of our deliberations reflected, and as was so well indicated by Sheldon's outline on the easel Sunday morning, we actually have a variety of tasks to pursue at this point. Yes, we *do* want specific standards dealing with the aforementioned surveillance categories, though here I mean "specific" in the sense of providing adequate direction and not in the sense of actually providing the exact words which might be utilized in drafting statutes or administrative regulations. The direction we provide might well extend to such things as: (i) what grounds are needed for various types of surveillance activities; (ii) who should have the responsibility for deciding in advance whether those grounds are present; and (iii) what sanctions/controls are most appropriate as to each of the situations distinguished in terms of quantum of evidence or nature of decisionmaker. But before we do that, we need to better define the problem we are addressing (both for our own good, and for the good of our intended audiences). Also, we need also to articulate some general concepts which ought to guide our thinking and that of others in coming up with specific limitations and controls upon official use of visual/personal surveillance techniques. In other words, our job here must be pursued on three levels. I have some comments as to each of those levels.

I. The First Level: Statement of the Problem

Sheldon outlined on the easel the suggested contents of our statement of the problem, which would serve as an introduction to the new standards. I'm not sure I copied down exactly what he had up there, and in any event am having some difficulty reading my own handwriting, but what I think he suggested was that we should make these three points: (1) the level of crime; (2) the invasion of traditional notions of privacy by technological surveillance; and (3) the unregulated availability of new technology. I essentially agree, though I believe I would express the three points here a bit differently. As I see it, our introduction should seek to make these three points:

(1) that the level of crime is high, that consequently the public is greatly concerned about the crime problem, and that consequently it is in one sense in the public interest that the technological innovators who once produced gadgetry for fighting wars now supply new weapons for fighting the "war on crime," and that our law enforcement agencies have available for use these new technological devices which will assist in detecting and deterring crime.

(2) that at the same time there is a competing public interest, i.e., that of not permitting unreasonable inroads upon our traditional expectations of privacy or upon a host of other values, all of which might collectively be referred to as our right to be left alone and/or our right to be free from a police presence which is oppressive in character.

(3) that there presently exists or soon will exist a great variety of technology made available to law enforcement agencies generally which has the capacity to serve the first public interest stated above and, at the same time, to significantly injure the second public interest stated above, from which it follows that meaningful limitations and controls upon the use of such gadgetry is essential; these restraints will sometimes but not inevitably arise out of litigation grounded in constitutional provisions, and often must occur as a result of innovative legislative or administrative actions.

Sheldon suggested that many of us could contribute thoughts and information which would help in the development of this introduction. That certainly is the case, for a variety of talents are needed to flesh out each of the three categories. Some can speak more meaningfully about the dimensions of the crime problem; some can be more helpful in describing the nature of the existing or developing technology, etc. With all of this input, Chris and/or Sheldon could then produce a draft of an introduction which, by virtue of their talents, would end up looking like a horse rather than a camel. What I have tried to do in the following is to address the second of the three points.

But just as the new technology might aid in the war on crime, it also has the potential for intruding upon cherished liberties of the citizenry. By their nature, the crime detection and crime deterrence activities of our law enforcement agencies (whether or not they include the use of technological devices) cannot be focused exclusively upon the guilty or upon those persons known to be potential lawbreakers. And thus to the extent that the technology available to police *can* intrude upon our privacy or other values, the risk is one shared by the public generally. As for the nature of that risk, what is in jeopardy is not only those expectations of privacy which the Supreme Court has found to be so compelling as to be within the protections of the Fourth Amendment, but also many other important values as well.

Certainly it is important to everyone that each of us have a place of ultimate repose, our residence, within which there should exist a high expectation of privacy. The Fourth

Amendment provides important protections here, although it is fair to say that notwithstanding the Supreme Court's *Katz* approach our homes and curtilage ordinarily receive constitutional protection (except regarding electronic eavesdropping) only when there has been a physical intrusion into those areas. But certainly our widely shared desires for privacy extend well beyond this. As Prof. Amsterdam once put it, the privacy in our homes is worth little if it does not exist unless we go to extraordinary means to protect it, such as by papering over transoms and plugging up keyholes to ensure that our every word and move is not amenable to official surveillance. (More recent cases indicate that the necessary extraordinary measures may include in-premises incineration of all garbage and the plugging of all vents and similar openings.) Certainly this broad right of a place of repose is threatened by modern devices which can see through walls, provide unexpected vantage points for looking into the home, make the slightest opening a useful vantage point via illumination or magnification, or cause objects within the home to signal their presence to persons outside.

Fourth Amendment rights are not nonexistent outside the home; certain other places, such as our work areas, receive at least some protection, and our persons and effects still are protected even when in other locations. Modern devices which permit discovery of what is otherwise undetectable within a workplace, a container or upon our persons certainly threaten such Fourth Amendment interests. In using the *Katz* analysis, the Supreme Court has concluded that the Amendment does *not* protect various public activities, such as our movements from place to place. It is nonetheless fair to conclude that unrestrained police surveillance even of such "public" activities would have a chilling effect upon several of our constitutional rights, including the right to travel, the right of association, and the right to discourse. Also, there are other widely shared expectations which, apart from whether they have a constitutional foundation, manifest values of importance in a free society. Even when outside our place of ultimate refuge, we ordinarily expect a degree of privacy to attend our activities merely by virtue of the anonymity we usually possess while moving about in the midst of others, especially in an urban setting. And certainly there is a general expectation that ordinarily we will be left alone unless we actually engage in conduct which causes a certain level of official suspicion. All of these interests are unquestionably threatened by a variety of modern devices which make it relatively easy for police to monitor our public movements and activities.

Finally, it is well to take note of a broader interest, one which in a sense encompasses all of those heretofore mentioned plus a bit more. The general public wishes to be free of the intimidating effects of a pervasive police presence. Totalitarian societies are often very effective in fighting crime, but at a price we are unwilling to pay. As the matter is often put, we simply would not tolerate a policeman on every corner. In the past, we did not have to fear having a policeman on every corner, nor did we ordinarily have to fear that our actions and movements would be subjected to extended surveillance without good reason, as simple economics ensured against tactics such as these which would be exceeding costly or so unlikely to be productive. But when all of this watching and following can be done by gadgets rather than people, and when the gadgets are mass produced at lower and lower costs, then economics no longer serves as a sufficient restraint. The ultimate threat of modern technology, then, is a stifling police presence.

II. The Second Level: Guiding Principles

Last Sunday morning, Sheldon also put on the easel a category called "Guiding Principles," which I believe was at one point referred to as guiding principles to assist in striking the balance between the public interests which would be benefited and jeopardized by the various surveillance techniques. It is not entirely clear to me just what this means, though I believe that what is needed is something beyond the factors set out in Option I of Chris's memo, which that memo acknowledged did not itself fill the bill. I have set out below certain things I would view as guiding principles, in the sense that they are broad policy considerations which either a legislative (state legislature; city council) or administrative (police) agency ought to take into account when drafting actual guidelines as to specific kinds of surveillance techniques. I do not view this as necessarily a complete list.

Let me state my own confusion up front. What I don't know at this point is whether something along the lines of the following, refined and augmented with the contributions of others, belongs in our final product in some combination of standards and commentary. I sort of think so. As things now stand, we plan to say something more specific about each of the five categories of surveillance, along the line of Option II in Chris's memo. Yet, we do not plan to actually draft model legislation or model police rules and regulations (wisely, I think). That being so, I think a case can be made for including something along the line of general principles bearing on the performance of those tasks by others. I guess that is what was going through my mind when I wrote up the following; I asked myself what advice I would give if a legislator or police chief sought it. As you will see, many of the comments which follow draw upon Chris's fine work and also upon discussions at our committee meetings, including some in which there was a significant difference of opinion. Anyway, here they are:

(1) *Practices to be Regulated.* Any visual/personal surveillance practice which is facilitated, enhanced or accomplished by technological assistance should be subjected to some form of limitation and control whenever the totally unrestrained resort to such practice, at the complete option of every individual law enforcement officer, would impact upon the freedom and privacy of citizens to a degree inconsistent with the aims of a free society. Such impact might be an intrusion upon those interests protected by the Fourth Amendment or instead or in addition an intrusion upon such other values as freedom of travel, freedom of association, freedom of speech, enjoyment of anonymity, enjoyment of a place of private repose, a general expectation that absent suspicious conduct we should not be subjected to intensive official scrutiny, and also freedom from the chilling effects of a pervasive police presence.

(2) *Legislative Regulation.* The imposition of limitations and controls upon visual/personal surveillance practices deserving some regulation is to some degree an appropriate function of legislative bodies. When the need is for governing standards and/or applicable sanctions which should be uniform throughout the jurisdiction served by the legislature, then it is proper for the legislature to impose those standards and sanctions. When the need is for greater flexibility and the expertise of enforcement agencies, the legislation might instead merely mandate rulemaking on a certain subject and of a certain type by law enforcement agencies. Federal or state legislation is appropriate as a means of providing added or effective controls as to conduct covered by the Fourth Amendment (as with existing legislation on wiretapping and electronic eavesdropping), and especially as a means of imposing meaningful limits upon conduct not touched by the Fourth Amendment (as with existing legislation regarding bank records and pen registers). Matters of local interest are appropriately dealt with by city councils, especially by

ordinances requiring certain regulatory action be undertaken by a local police department or that certain structural controls be a part of that department's organization.

(3) *Administrative Regulation.* The imposition of limitations and controls upon visual/personal surveillance practices deserving some regulation is also an appropriate function of law enforcement agencies. As the ABA Standards on the Police Function already recognize, "administrative rule making by police agencies" is needed as to "investigative techniques, and enforcement methods" (Standard 1-4.3). Such self-regulation is necessary when mandated by state or local legislative bodies (see item (2) above), but is also appropriate in other circumstances as well, especially when the nature or kind of needed limitations and controls are such that local conditions, enforcement expertise as to the local crime problem, or the structure of the local department bear upon their definition.

(4) *Interests Properly Served by Permitted Surveillance.* Technologically-assisted visual/personal surveillance which is permitted subject to stated limitations and controls should serve one or more legitimate law enforcement interests, including the detection of crime, the deterrence of crime, and the prevention of harm to victims, witnesses, bystanders and police. Not infrequently, carefully defined standards for the use of such surveillance procedures must take into account the particular interest to be served, for certain procedures may be reasonable only with respect to some particular interest. For example, certain unique high-deterrence needs (e.g., at airport boarding checkpoints) will justify procedures not permissible for other purposes, just as certain measures may be permissible upon a certain degree of suspicion or incident to some other practice only if taken for protective purposes.

(5) *Relevance of Nature and Extent of Crime.* Although it cannot be said that the seriousness of the crime to be investigated or the magnitude of the problem as to a particular type of crime or as to crime generally is always irrelevant, the greatest of care must be taken regarding the use of such factors when setting surveillance standards or authorizing particular surveillance activities under those standards. For one thing, there is the undeniable historical fact that one constant in past times has been that the people of each particular era believed they were confronted with a serious crime problem which, in the eyes of some of them, merited removal of some or many of the existing restraints on the police. For another, as the Supreme Court has concluded in the Fourth Amendment area and as is equally true as to surveillance regulation generally, a sliding-scale approach by which each form of intrusion becomes more or less justifiable because of the particular crime under investigation is unworkable; the result would be an overly-sophisticated, ever-expanding and contracting test which neither those being controlled nor those purportedly doing the controlling could understand. But at the same time, a nature-of-crime consideration might enter into the articulation of limitations on certain surveillance techniques in precisely the fashion that has occurred as to wiretapping and electronic eavesdropping: only specific crimes of a certain degree of seriousness could be the object of investigation. Beyond this, it is doubtless the case that if police agencies are allowed to undertake minimally intrusive yet longer term surveillance activities at a particular location for either detection or deterrence purposes, police knowledge of the nature and the extent of the crime problem at that place has a bearing upon whether such surveillance should be commenced or continued.

(6) *Public Input.* The desired police-public relationship discussed later (see item (14)) can also be aided if law enforcement agencies are receptive to (and, indeed, sometimes seek) public input regarding the appropriate scope and extent of police action, including surveillance activities. In addition, that input can sometimes be of assistance in formulating rational surveillance policies.

This is not to suggest that prevailing public attitudes should always determine the extent and degree of surveillance that is undertaken. To take the most obvious point first, constitutional rights are not subject to reduction via majority vote, and thus a device which makes searches (in the Fourth Amendment sense) cannot be widely employed merely because of a public expression of tolerance for resort to such surveillance to thwart certain criminal activity. Even as to nonsearch surveillance which is highly intrusive (e.g., technologically-assisted tracking), it is good policy not to treat such public expressions as sufficient to trump the interest of those who would be singled out in not being the objects of extended official surveillance. On the other hand, public input which provides the police with additional information about the nature and extent of crime at certain locations can be very helpful, for such information is often very relevant to the development of rational decisions about where to establish surveillance activity and what kind of surveillance to undertake. Public input is also very important as to those surveillance activities which are overt, minimally intrusive, broad in the coverage of the persons surveilled, and undertaken entirely or primarily in the interest of deterrence--as with the now common practice of placing cameras in public areas where street crime is heavily concentrated or where the residents are believed to be uniquely susceptible to being victimized by such activity. Especially when the area selected is a particular residential area, the residents of that area are closely connected to that surveillance in two significant ways: they are the intended beneficiaries of this effort at crime deterrence in that locale; but they are also the persons who will bear the brunt of the surveillance because they will be rather continuously within the scrutiny of these cameras. In that setting, certainly it is relevant whether those residents collectively believe that the security they will have gained outweighs the privacy they have lost. Consequently, before a police (or city council) decision is made regarding such a surveillance system, it is important to determine whether there exists a consensus about the contemplated scheme among those residing in the area to be served.

(7) *Assessing the Relative Invasiveness of Surveillance Techniques.* In establishing standards for certain surveillance techniques, in determining whether a particular technique should be permissible in a specific setting or under specific circumstances, and also in determining which of alternative techniques would constitute the lesser intrusion (see Item (8)), it is necessary to make a judgment about just how intrusive various surveillance techniques are in general or in particular cases. A variety of considerations should inform that judgment, including the following:

(i) *The nature of the place surveilled.* In the privacy hierarchy, the home is obviously at the top of the list. Also very private is what is carried on the person. Other places, such as areas of work and automobiles, are generally less private, yet they are in turn generally considered as much more private than noncurtilage private lands or public areas.

(ii) *The care taken to ensure privacy.* People should not be required to go to extreme measures to achieve privacy, and thus the fact that not every conceivable means of surveilling has been cut off is hardly determinative. But the presence or absence of the usual means of ensuring privacy is properly considered. A barn with a large opening covered with netting instead of heavy burlap is less private; a back yard surrounded by a high solid wood fence is more private than an unfenced yard.

(iii) *Whether either the surveilling or the installation of surveillance equipment requires a physical intrusion.* While *Katz* opened up the Fourth Amendment somewhat to encompass certain nonphysical intrusions, it remains true that most searches involve a physical intrusion.

(iv) *The nature of the object surveilled.* Conversational privacy ranks high. At the other extreme, contraband possession ranks low, so much so that if such possession can be discovered without incidental discovery of other information it is deemed no search. Impersonal

objects are protected, but do not deserve quite as much protection as information about the intimate details of our life.

(v) *Uniqueness and sophistication of the technology.* The more unique and sophisticated the equipment, the more reason there is to deem its use invasive. A spy satellite is one thing, use of a flashlight is quite another! But the fact that the equipment is sometimes (as compared to commonly) used by the public or has not been prohibited for public use does not support the conclusion that use of the same equipment by government officials is insignificant. The mere fact that we tolerate (or must suffer) occasional intrusions from private sources by such equipment hardly means that government-sponsored intrusions of the same kind are not very threatening to cherished values.

(vi) *The extent to which the technology enhances the natural senses of the police.* Sometimes technological surveillance is defended on the ground that the same facts could in some theoretical sense be found by the natural senses; illustrative is calling tracking no search because the surveillee's total travels could have been observed by an array of hypothetical bystanders, or calling aerial surveillance no search because the enclosed yard could have been seen from atop a hypothetical double decker bus where no such buses exist. Such analysis ignores the hard realities of such situations, which reflect that in actuality the technological assistance was in all likelihood critical to the obtaining of the information in question. Much more defensible is the notion that such assistance is minimally invasive when used only to confirm what was momentarily just discovered by the natural senses, or only to discover from a distance what was readily determinable from up close had the police not wanted to ensure their presence remained unknown to the suspects.

(vii) *The extent to which the contemplated surveillance would be focused in a temporal and spatial sense.* It is a fair generalization that longer periods of surveillance are more intrusive than shorter ones. Following a vehicle by use of a tracking device for a hour is one thing, doing it for a day is quite another; using a nightscope to make a single and fast look into a dwelling is one thing, but a fixed, long-term surveillance of the same character is quite another. By similar reasoning, surveillance which reveals information or activity concerning a wider physical area will ordinarily be deemed more intrusive than a more focused scrutiny. One reason why time and space dimensions are important is that they often bear upon another significant consideration: the number of persons who become the objects of surveillance. (It must be noted, however, that in certain special circumstances the all-encompassing nature of the surveillance may actually be a critical factor in finding that the surveillance is proper; illustrative is the airport screening which is upheld because it is nonarbitrary in the sense that *all* passengers are checked.)

(8) *Mandating or Encouraging the Least Intrusive Alternative.* The various kinds of visual/personal surveillance technology which are now available or which are likely to become available in the future are by no means the same in terms of their intrusiveness. Some are obviously deserving of greater concern than others because of their respective magnitudes of intrusiveness, just as it may generally be said that these techniques are typically more intrusive than those which do not rely upon technology. This being the case, an effective regulatory scheme should include provisions which either mandate or else strongly encourage resort to the least intrusive alternative whenever feasible. While the Supreme Court's Fourth Amendment limitations generally eschew the so-called "least intrusive alternative" limitation, it nonetheless has special meaning and importance in the present context. For one thing, as technological advances make available to law enforcement a greater number of surveillance alternatives and also more techniques which are unusually intrusive, the opportunity and need to avoid "investigative overkill" is greater. For another, while at an earlier time it could ordinarily be said that the most intrusive alternatives were the most time-consuming and expensive, so that the least intrusive alternative was typically elected purely as a matter of efficiency, technology is now providing

alternatives which are highly intrusive but at the same time relatively inexpensive and not manpower intensive.

(9) *Minimizing Intrusion Upon the Innocent.* By the nature of things, visual/personal surveillance techniques utilized by law enforcement agencies, including those which involve reliance upon modern technology, often result in an intrusion into the privacy, liberty or security of one or more innocent persons. Although this is inevitable to some extent, it is important that such intrusions be avoided to the degree feasible. This can be accomplished by careful assessment of the relative adequacy of surveillance utilization standards which vary considerably in their sweep, in terms of the extent to which they would likely subject innocent persons to the surveillance in question. If an acceptable level of detection/deterrence/protection can be achieved by permitting a certain technique only when there is probable cause, then a reasonable suspicion standard would be inappropriate. Similarly, if an acceptable level can be achieved under the reasonable suspicion standard, then it would be inappropriate to instead adopt a much broader standard which contemplates surveillance of a large number of people without regard to any individualized suspicion.

(10) *Ensuring Fairness in Surveillance Selectivity.* Totally apart from the fact that a certain type of intrusion via surveillance is deemed reasonable upon certain facts or when for a certain objective, there exists an additional necessary characteristic of any valid surveillance activity: the objects of the surveillance must have been fairly selected. Indeed, this is true even when, in a sense, there has been no significant intrusion at all, as with use of a device which makes no seizure and no search (e.g., one which can identify contraband and nothing else on a person or in an effect without any detention of that person or thing); no one would seriously suggest that because of the lack of intrusiveness, use of such equipment only against blacks would be tolerable. By training and supervision and other appropriate means, law enforcement agencies should strive to ensure that all surveillance targets (whether a particular person or a particular group of persons, e.g., all those passing a certain point or presenting themselves in a certain locale) are fairly selected. In addition, as to all surveillance activities which draw part of their justification from the fact that a large number of persons are being subjected to precisely the same form of limited intrusion, procedures should be in place to ensure that this equality in treatment occurs and that particular individuals in the group are not unjustifiably singled out and scrutinized more intensively.

(11) *Ensuring Notice When Feasible.* The very nature of most surveillance activities is such that the objective of the surveillance would be thwarted if advance or contemporaneous notice were given to those being surveilled. In such circumstances, advance notice obviously is not necessary. However, there are various other surveillance-type activities, especially those conducted primarily or exclusively for purposes of deterrence, in which advance notice, contemporaneous notice, or both is feasible. One such situation is when unconcealed surveillance cameras are placed in certain public areas; another (as courts have emphasized) is when the nature of the surveillance is such that some brief detention or other inconvenience is imposed upon those persons passing a certain checkpoint. There should be advance publicity about places of fixed surveillance and also about the use of (but not necessarily the location of) checkpoints. Warning signs should also be displayed at the location of these activities. The point here is *not* that any surveillance is reasonable as long as the public is forewarned, or that those forewarned have thereby consented if they appear at the place surveilled, for neither is the case. Rather, the underlying consideration is that in terms of maximizing the deterrence objective or of avoiding public alarm about the potential of suspicionless, high-volume surveillance, advance and/or

contemporaneous notice can in some circumstances achieve those objectives and thus make reasonable what would otherwise be questionable surveillance activity.

(12) *Mandating Termination of the Intrusion.* Virtually all forms of visual/personal surveillance conducted by resort to sophisticated technology have the capacity for long-term use. For example, the electronic tracking of the movements of a person or vehicle might be conducted for hours or for days, as might a magnification-or-illumination aided surveillance at a fixed location. Obviously, the longer such surveillance is conducted, the greater the intrusion upon those who are the objects of such surveillance, which means that a meaningful regulatory scheme must include provisions regarding when such procedures must be terminated. Quite clearly termination is called for when the objective of the surveillance has been realized. More difficult is the question of when termination must occur absent such success, and the same answer may not be appropriate for all types of procedures. Certainly some should have fixed time limits, at least absent an extension granted by the authorizing person or agency. In some instances, it may suffice that the surveilling officers are required to determine for the record why they find the surveillance sufficiently promising to continue it.

(13) *Ensuring Control and Accountability.* Virtually all forms of technologically assisted personal/visual surveillance, even those not as intrusive as electronic eavesdropping, share with that practice a most troublesome characteristic. The objects of the surveillance are ordinarily totally unaware of the surveillance, meaning that even gross excesses in the use of these surveillance techniques will not become known by the victims and will not lead to an official complaint to the law enforcement agency involved or to similar action which could bring to public attention the nature and extent of the police abuse. That being the case, it is imperative that a system of control and accountability exist within each law enforcement agency regarding all surveillance activities involving significant intrusions into privacy or similar valued interests. Legislation mandating such control/accountability is appropriate, but in any event police agencies should establish necessary procedures. Limits upon access to highly intrusive surveillance equipment should be imposed. Supervisory officers authorized to approve personal/visual surveillances should be designated. The grounds upon which individual surveillances were approved (or, were undertaken, when approval is unnecessary or not feasible) should be contemporaneously made a matter of record. Periodic command review should be made of those records or summaries thereof. Periodic reports should be made to the public indicating the amount of each type of surveillance activity.

(14) *Perception of Fairness and Control.* More so perhaps than any other type of public agency, police departments rely very heavily upon cooperation by the public they serve. No police agency can effectively "fight crime" by itself; public assistance in reporting crime and in a variety of other ways is essential. That being the case, it is equally essential that law enforcement agencies have wide approval amongst their constituencies. A regime of technologically assisted visual/personal surveillance can jeopardize such approval if it is widely perceived that such surveillance is being unfairly applied, is being conducted without meaningful controls, or is being carried out with such pervasiveness and intensity as to be intolerable. A department engaged in rulemaking on the subject of surveillance should be sensitive to that point and should ensure that the community is informed that effect controls exist to limit surveillance activities. Also essential here is a meaningful complaint/discipline system which will afford the public assurance that the occasional rogue cop will be identified and dealt with.

III. The Third Level: Grounds for Surveillance Activity

A. **Probable Cause.** Much of the surveillance activity we are dealing with falls outside the Fourth Amendment but yet, we have decided for the reasons earlier stated, ought to be encompassed within our analysis. As to that activity, we are of course free to fashion any kind of standard we deem appropriate. But we are also covering a fair amount of what is admittedly Fourth Amendment activity as well, and as to that we must be careful not to assert or even imply a broader police authority than is supported by the Supreme Court's decisions. Because in the area of mainstream law enforcement the Supreme Court has time and again asserted that probable cause and nothing less is needed to justify a search for evidence of crime, it follows that we should likewise use the probable cause standard as to all search activity having that purpose. (There will be a few situations in which it will be unclear whether the search or nonsearch characterization is applicable under existing law, and there also will be situations when it would be hard to articulate precisely where the search-nonsearch line is. As to those, it seems to me we can either (i) simply give warning of the uncertainty or ambiguity, or (ii) play it safe by making sure that all doubtful cases and all areas of ambiguity are put into the probable cause camp.)

In general, Chris's memo does a fine job of identifying just what must and need not be in the probable cause category. I do have a few areas of concern, however, which I quickly stated last Sunday morning and which I have elaborated below. They are:

(1) *Video Surveillance.*

(a) The category should not be described as surveillance "of" a home, which would include surveillance from outside of those coming and going, but surveillance "within" the home.

(b) Here, as is also true as to some of the other forms of surveillance discussed later, we are given what I take it are intended to be two separate and mutually exclusive categories, namely, "a home or similar location," and "public or quasi-public areas." Though I don't have specific language in mind, I think it would be helpful if the two categories are described in terms that more obviously match up, in the sense of clearly being direct opposites. Also, I don't much care for "or similar location" because there is no indication of what the point of similarity is (e.g., does it mean and other places of residence, permanent or temporary, such as a motel and hotel rooms; does it mean other buildings, including work places?). And I wonder if a "quasi-public area" isn't also a "quasi-private area." In a sense, my basic problem may be insoluble, in that there is no perfectly precise phrase which captures what we are after, so we may have to opt for one of the two solutions I mentioned above.

(c) I would not put in the provision that consent is not an exception, as I think the usual rules should apply here as well, so that the undercover agent's consent would suffice as to a camera worn by him, but if the camera (or several of them) had to be surreptitiously installed within the premises then it would depend on whether it was the agent's or the surveiltee's premises.

(d) In item 3(a), I doubt that this should be limited to probable cause of criminal activity which is to occur; there may be instances in which important evidence of criminal activity, but not the activity itself, would be a legitimate object of video surveillance.

(e) I believe items 3(b) and (c) as to turning the camera on and off are not realistic.

(2) *Tracking Devices.* I agree with the position taken in Chris's draft that full probable cause is not necessary as to tracking activity itself. But, by the reference to "tracking," is this provision meant to cover only keeping track of the thing while it is moving, or also locating the object while it is stationary? Assume these facts: police, with the court order required here, are

following a panel truck into which the suspect was seen to place a drum of noncontraband chemicals within which a "beeper" was put prior to purchase of the drum by the suspect. The truck is being tracked visually and also with the beeper, but the police get trapped behind a major accident, so that the truck both disappears from view and can no longer be located at all (or at least in any precise sense) by trying to pick up the beeper noise. The police turn off their equipment and drive on, but it is their good fortune to receive an anonymous tip that the truck in question was seen driving into a windowless storage facility in a certain community and then departing that facility 30 minutes later. The police have no idea where the truck now is, nor do they know where that storage facility is, but they locate 17 such structures in the community and then use their equipment to discover in which one the beeper-plus-drum is located. Surely this case cannot be dismissed on the theory that no search has occurred, as *Knotts* says it covers only conduct "voluntarily conveyed to anyone who wanted to look," and that does not describe the private unloading of the truck. Rather, the case seems similar to what *Karo* viewed as a search: "the monitoring of a beeper in a private residence." But if it is a search, doesn't this mean there must be probable cause as to the specific warehouse in which the drum is then located? Apparently not, as *Karo* says it will suffice that the court order describes "the object into which the beeper is to be placed, the circumstances that led agents to wish to install the beeper, and the length of time for which beeper surveillance is requested." It is astonishing the Court deemed it unnecessary to say one word by way of explaining why this is so. If there is an explanation, I take it it is that using the beeper on the 17 locations reveals nothing of the contents of 16 but does reveal the contents of the one where the drum actually is, so the very nature of the beeper is that it performs the function of probable-cause-as-to-place function. That is, no probable cause as to where the drum is is necessary, as only where it is will be searched! But, that leaves the problem the Court in fn. 5 of *Karo* says it can leave to another day: whether the earlier warrant authorizing the monitoring may issue on reasonable suspicion or must issue on probable cause. The trouble is, the draft on p. 23 assumes that question has been answered, for it requires only reasonable suspicion. Yet, it is not easy to see how that could be the answer, given the Court's adamant insistence in *Ybarra* and *Hicks* that in mainstream law enforcement (that is, outside the "special needs" inspection-regulatory search cases) a search for evidence, no matter how minor, requires full probable cause. I'm not sure what the best way is to handle this, but I would think that at a minimum we should caution that reasonable suspicion is good enough for tracking, but that if it is contemplated the monitoring will ultimately be used to perform a search, i.e., to locate the object within premises, then the court order probably would not provide a basis for that search as well unless the order was grounded in probable cause (not as to the likely place of delivery, but as to the object's relation to criminal activity).

(3) *Magnification & Illumination Devices*. I agree that some of this activity constitutes a Fourth Amendment search (and/or that some is virtually indistinguishable from a search and thus is deserving of a probable cause requirement). I like much of what Chris has done (on p. 25 of his memo) in trying to distinguish the situations requiring probable cause from those that do not. But I still have two problems:

(a) Are we sure that the stated exception to Item 1 will *never* encompass a 4th Amendment search, for if we are not sure we have a problem, as under the exception a search for evidence is being permitted on reasonable suspicion only, which the Supreme Court in the *Ybarra-Hicks* line of cases says is not permissible. To be sure, this is a tough area in which to be certain of anything, but I am troubled because there are lower court cases holding that at least some magnification/illumination into the home (e.g., very high-powered magnification which even reveals the content of the person's reading matter; use of illumination not just to overcome time-of-day darkness, but to overcome the permanent darkness provided by the nature of the premises and the way it is closed up) constitutes a search. Part of my problem, I guess, is that I remain

to be convinced of the correctness of the statement on p. 26 that the sophistication of the device is not relevant; even the Supreme Court (in *Dow*) seems to be saying otherwise.

(b) In the other direction, I wonder if item 1 is not sometimes too demanding. I think there are cases in which there is not probable cause but yet at least ordinary illumination should be permitted though all three prerequisites for the exception cannot be met. For example, a householder calls the police at midnight and reports hearing a noise from a neighbor's yard and comments that the neighbor is out of town for the night. The police come to the scene and discover that the door from the patio into the family room is unlocked. I am not at all troubled by the prospect of the cops shining a light into the family room.

(4) *Detection Devices*. Because we are here dealing with devices that can look through walls and clothing, surely much of such surveillance will constitute a search for which probable cause is needed. Item 2(b) on p. 28 recognizes one such situation. However, the balance of this material fails to require probable cause in some circumstances where I think it is necessary.

(a) Part of my problem is with item 2(a), top of p. 28, but since the problem there, as I see it, is essentially one of how a "special needs" category needs to be defined, I will return to it later when I discuss surveillance standards other than probable cause and reasonable suspicion.

(b) Item 1 on p 27, I take it, is intended to encompass the *Jacobsen-Place-Prof. Loewy* situation, i.e., one deemed no search because by a relatively nonintrusive means the police discover contraband where there is contraband but discover nothing else there or elsewhere by use of their detection device. If that is so, I wonder if the phrase "device can only reveal information which might provide cause to believe an illicit item is present" is sufficiently narrow. My problem is that surely there are all sorts of nonillicit items which, if probably present under certain circumstances, would establish probable cause that illicit items are also present, but I don't think the Supreme Court's language extends to such situations. In *Place*, the Court concludes the dog sniff was no search because it "does not expose noncontraband items" and "discloses only the presence or absence of narcotics, a contraband item." In *Jacobsen*, relying on *Place*, the Court stressed the test "merely discloses whether or not a particular substance is cocaine," an "illegitimate" substance, and "nothing more, not even whether the substance was sugar or talcum powder." Thus, I'd suggest we try for some different language, such as: If the detection device can reveal nothing other than the presence or absence of an illicit item, then ... Perhaps this leaves uncertain just how definite the revealing really is, but at least it can be said that the same uncertainty is inherent in *Place* and *Jacobsen* (e.g. drug dogs aren't always right), so that we are at least attempting to track the category the Court has created.

(c) Finally, I would remind you again (as indicated in my 7/27/95 memo) that we need to be careful as to what it is that may be characterized as "an illicit item." Assuming a device which detects guns and only guns, the discovery of a gun by its use would be a nonsearch under the *Jacobsen-Place* theory if the discovery occurred at an airport checkpoint, for carrying guns aboard a commercial airliner is prohibited. At the other extreme, if (as is increasingly the case) a state makes carrying a concealed weapon permissible upon resort to procedures which virtually anyone could satisfy, then obviously use of the device on the streets of that state would be a search. (Having bought the NRA argument that more guns is better, the state would have forfeited any claim that concealed weapons need to be discovered and seized!) A much harder case is that in which the state's prohibition on concealed weapons is not total but close to it. Perhaps it is arguable that if 98 out of 100 carried weapons would be illegally possessed, use of the device should be deemed no search even though it can be said that, technically speaking, the other two persons (innocent persons!) were searched. That argument would make more sense to me if the rare cases of lawful possession were by, e.g., private detectives, who are state-

licensed and thus amenable to a degree of state regulation beyond that applicable to the general public.

(5) *Aerial Surveillance*. Although the situations may be rare, I find in the Supreme Court's cases an indication that at least in some circumstances an aerial surveillance, at least of a dwelling, would be a search (the Court talks about when intimate details re use of the home or curtilage are observed, and also about surveillance at an elevation where overflight is "rare"). In those situations, full probable cause would be necessary under the 4th Amendment, but the provision on p. 30 allows all aerial surveillance on the lesser reasonable cause.

B. *Reasonable Suspicion*. Next, there will be some technologically aided personal/visual surveillance which does not constitute a mainstream law enforcement search (in the Fourth Amendment sense) for evidence of crime, meaning that we need not require probable cause. As to at least some of this, however, we will want to require some lesser evidentiary standard, a sort of junior grade probable cause, to ensure that such surveillance is not unfocused. Chris has used the phrase "reasonable cause" to describe this lesser standard. I thought he said at the meeting that he intended by use of this phrase to describe a level of proof lying somewhere between probable cause and reasonable suspicion. If that is what is contemplated, I would be against it for precisely the reasons the Supreme Court gave when it rejected a similar proposal as to certain highly intrusive, nonroutine practices related to safeguarding our borders: creation of such an intermediate standard involves a level of sophistication beyond what would actually work in practice. Chris's memo, however, p. 21 fn.37, says that reasonable cause is the same as reasonable suspicion. If that is the intention, then I would propose that we use the phrase "reasonable suspicion" as our standard. Part of my problem is that I am accustomed to seeing the term reasonable cause used in cases and statutes to mean probable cause, not something less. Also, I think "reasonable suspicion" does have a fairly clear meaning to most people, one which is appropriate here. A requirement of reasonable suspicion as to a person, thing or place suggests a fairly narrow focus, a singling out which is neither random nor based on a hunch. There must be a particularized and objective basis for the suspicion. Moreover, the reasonable suspicion assessment should be made based on all available information, and may include those inferences and deductions that trained law enforcement officers are expected to make. Now, what categories of surveillance should be subjected to this reasonable suspicion standard?

(1) *Video Surveillance*. Chris's memo, top p. 21, contemplates such a lesser standard for video surveillance in public or quasi-public places for crime detection purposes. I am sympathetic to that position. As noted earlier, some more work may be needed as to how to draw the line between these cases and those calling for probable cause.

(2) *Tracking Devices*. Chris's memo, p. 23, contemplates the use of such a lesser standard for tracking. I agree, subject to my earlier comment about the need for probable cause if a tracking order is to serve as the justification of search of premises. As to item 1(a), the exception where the device will reveal only the presence of illicit items, I have a problem, but I'm not sure the problem is why we have this exception or what it means. My point is that very often the tracking will be of an illicit item, but the police (because they know a certain individual is traveling with that item) will by the tracking not only know where the object is but also in all likelihood where that suspect is. Is the exception inapplicable in that case, and, if not, why is that case being treated differently from the standpoint of a need for a court order?

(3) *Magnification and Illumination Devices*. Chris's memo, bottom p. 25, contemplates the use of such a standard when the device is being used to observe a public or quasi-public

location. I sort of agree with this, at least as to many situations I can think of, but I wonder if item 2 does not cover too much ground. Maybe I am reading the "observe" verb too broadly, but I am troubled by the fact that a cop can't even turn on his flashlight without reasonable suspicion. As that illustration reveals, perhaps what underlies my concern here is my belief that the intrusiveness of devices in this area vary considerably. In particular, a flashlight seems different than many other devices, as by its nature its use is brief, for when the light comes on those toward whom the light is directed have immediate notice that they are being observed, and thus they are usually not without means to limit what is thereafter discovered. That situation, it seems to me, is very different from that longer-term surveillance, even in public areas, which allows those being watched to be watched continuously without their even knowing of the surveillance. In other words, the flashlight is much different from binoculars and telescopes and also from nightscopes and similar devices which allow one to see in the dark but do so in such a way that use of the device is unknown by those being watched.

(4) *Detection Devices.* Chris's memo, p. 27, item 1(b), would use this standard when the device can only provide information providing probable cause as to the presence of contraband. As I stated earlier, I think the provision has to be narrowed down to cover only where contraband itself is discovered. For the very same reason, if the concept of reasonable suspicion is to be meaningful here, given the nature of the category, I would think that the suspicion-of-what statement would be different than in item 1(b); instead of that "evidence of criminal activity will be discovered," it would be that "such an illicit items will thereby be discovered." If those changes are made, I have no general quarrel with this provision. But, why is it limited to monitoring of a "person, effect, or home." If police must have reasonable suspicion before they point the device at my footlocker, then why don't they also need reasonable suspicion before they point it at my storage facility?

(5) *Aerial Surveillance.* Under Chris's memo, p. 30, this lesser standard would apply to all aerial surveillance. I earlier discussed the point that a few situations would be actual searches and thus need to be separated out, for there probable cause would be necessary. Beyond this, I wonder whether as to certain other situations this provision is not too demanding. Perhaps the question is just what the term "aerial surveillance" is intended to cover here, since I can think of many situations of surveillance from aircraft I have seen in the cases in which one might question whether the controls contemplated here would be appropriate. For example, what about: using a plane to visually surveil the movement of another aircraft; using an aircraft to watch traffic passing from one marker to another on the highway so as to time speeds, reported to police below; overflight of federal lands to see if any marijuana patches are spotted. Especially if the term is rather broadly defined, then I wonder about the requirement in item 2 that there be reasonable cause as to a particular area. My question is, how wide an area? I have seen cases in which the police really did not have the foggiest idea where to look, but just spread out in all directions from some logical starting point to try to locate something as to which it would be hard to claim any genuine privacy expectation -- e.g., where a very large piece of mobile construction equipment was removed from the construction site, and planes flew all over the area and finally spotted the gigantic piece of machinery hidden in a wooded area.

C. *Reasonably Necessary: Location of Frequent Violations.* Chris's memo takes the position, which I believe is most sound, that there are certain types of surveillance techniques which are so minimally intrusive or which serve such a significant need that (i) they should be allowed even without individualized reasonable suspicion, but (ii) should not be left entirely uncontrolled. (Although I earlier took the position that a system which tried to identify and use several sub-probable cause degrees of individualized suspicion would not work, it is not

Inconsistent with that conclusion to suggest that certain other tests, involving something other than *individualized* suspicion, might be appropriate.) This approach is reflected in Chris's proposals at several points, namely: on p. 20, the proposal that video surveillance for the purpose of deterring crime be allowed upon a finding that "it is necessary to deter a significant crime problem in the area"; on p. 27-28, the proposal that both varieties of detection devices (revealing contraband only, revealing other matter) be allowed upon a finding that "it is necessary to detect or deter a significant crime problem in the area." I have some difficulty with those standards. For one thing; the bald word "necessary" would, I think, be a source of problems, if for no other reason than that it is not apparent whether the reference is to absolute or reasonable necessity and whether the necessity goes to the point of whether there are not other means of achieving the desired detection or deterrence or also the point of just how important it is that such detection or deterrence occur. Related to this is a feeling on my part that the detection and deterrence situations may be a bit different. Thus, I would suggest splitting that into two separate tests, one of which I would state as follows: reasonably necessary because of the probable frequency of illegality of the particular type to be surveilled at a certain location.

What I am thinking about here is something which is different in nature from the reasonable suspicion discussed in part B above. Reasonable suspicion will ordinarily focus on a particular person or object, though it might occasionally exist as to a place (e.g., as where the police have a suspicion that a particular drug transaction is to occur at a certain place at or about a certain time). Even in the latter situation, surveillance of a place will have a relatively short time frame. But there are other situations in which none of the above varieties of individualized suspicion will exist, but it will nonetheless be quite certain that at a certain locale several offenses of a particular type will happen over time. Illustrative is the case in which the police can document that a certain park has become an open-air drug market. In situations such as this, I would think that a continuing course of surveillance (not permanent, but yet longer than could be justified on the basis of a time/place particularized suspicion) which is not excessively intrusive could be permitted on the basis of the information showing the frequency of violations at that locale. While this concept would seem to have no utility with respect to tracking surveillance, I would be inclined to structure our standards so that the other four varieties of surveillance could be engaged in on this basis. (While aerial surveillance as we now conceive of it may seem unlikely as to long-term surveillance, I think this is not inevitably so, and such surveillance for a longer haul may occur more often if nonpiloted airborne surveillance vehicles are developed.)

If we do take this step, there are two problem areas as to which we need to be especially careful because in both instances Fourth Amendment activity is involved. Item 2(a) at the top of 28 of Chris's memo would recognize that in some instances an actual search via detection device (a search because the device reveals more than contraband) would be permissible without probable cause or even individualized suspicion. That is a serious problem because, again, the Court has stated time and again that nothing less than probable cause will suffice, at least in mainstream law enforcement, for a search made to acquire evidence of crime. While it is true that in some special circumstances (e.g., border crossing, aircraft boarding) we allow search of all of a self-selected group, that is a different matter (covered in category D, below). Even as to suspicionless drug testing of a self-selected group, the Court has said it is permissible only where "not designed to serve the ordinary needs of law enforcement" (*Von Raab*).

The second problem arises out of item 1(a) on page 27 of Chris's memo, for it contemplates as to contraband-only detection devices (and as to others as well per item 2(a) on p. 28) that surveillance without either probable cause or individualized reasonable suspicion might occur even when the device used requires "a brief seizure." When that is the case, we are once

again back in Fourth Amendment territory and have to be very careful. It is true that the Supreme Court feels differently about seizures than searches; thus the *Terry-Place* rule, allowing brief detention of persons or things on reasonable suspicion of criminal activity. But here we are talking about the absence of individualized reasonable suspicion, meaning that the only analogy left is the checkpoint cases. When I described this "reasonably necessary" category last Sunday, I made reference to the *state* cases on DWI checkpoints as providing a useful analogy, which caused a bit of a flap because that suggested I was proposing such checkpoints could constitutionally be used for a variety of other purposes. But that was not my point; I only meant that the requirement in those cases that police supervisors document their selection of a locale based past experience (e.g., by traffic accident statistics) shows how the necessary probability of crime frequency at a locale might be shown. I did not mean to suggest then (and do not suggest now) that detention of all those passing a point could be justified merely because the point is on a common route near a major drug marketing area. One could try to stretch the existing checkpoint cases to cover such a situation, but it would be a stretch, as those cases have to do with a few "special needs" situations (e.g., finding illegal aliens) or else activities rather closely related to the privilege of using the highways (e.g., checks for driver's licenses, vehicle registration, intoxication). This leaves, then, only *Brown v. Texas*, the 1979 cases holding a person acting no differently from others in the area could not be stopped merely because he was in a neighborhood frequented by drug users, where the Court dropped the enticing suggestion the outcome might be different if the seizure had been "pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."

D. Reasonably Necessary: Deterrence Objective. Another sub-reasonable suspicion standard I suggested last Sunday is: reasonably necessary as a means to deter criminality at a certain location. Here again, special care would be necessary as to any surveillance technique which included an actual search or seizure, but we can say that there are at least some "special needs" situations re deterrence as to which the need is so great that seizures and searches may be made, e.g., the hijacker detection system, which is grounded in the quite understandable notion that the potential hijacker must always be dealt with before he is on an airplane with a weapon. That system, therefore, is one illustration of the general concept, namely, one where the need to deter really is 100%, justifying measures not permissible for other reasons. Of course, when neither a search nor a seizure is involved and the contemplated surveillance is neither covert nor highly intrusive, then this test would provide a basis for allowing surveillance when the deterrence need is well below 100% but yet is substantial, at least as compared with the intrusion which would result. On this basis, long-term or permanent camera monitoring of certain public areas could be justified.

Returning to the hijacker detection system, I would imagine that with the growing concern over more sophisticated nonmetal explosive devices concealable on the person, there will be pressure to replace or supplement the magnetometer with some device that can "see" a variety of objects on the person. This brings me to the limitation on the use of such a device stated at the top of p. 28 of Chris's memo, which I simply do not understand as it is now written. If the device does not reveal intimate detail, then what is all this appropriate gender stuff about? I take it this is prompted by the device discussed in the N.Y. Times some months ago about a device which revealed so much as to allow sorting by sex of passersby. I would think the point, then, is that if the device does reveal such intimate details, then and only then should that material be exposed only to a single officer of appropriate gender. In any event, there is certainly no reason why all kinds of "non-pertinent material" need to be viewed by a person of a certain gender, which is what the provision as drafted says.

E. Reasonable as a Protective Measure. I do believe that any effort to draft standards in this area needs to take separate account of the use of these devices as a means of protecting the officer, victims, witnesses or bystanders. I say this for two reasons. One is that some of the devices being developed seem to be intended especially for such a purpose; when the developers of some of this equipment tell us they have a particular use in mind, we should think specifically about that use. In particular, I have in mind Millitech Corporation's x-ray-like camera, which they say would allow police to frisk suspects at some distance and to locate potentially threatening persons within premises or adjoining rooms. The other reason is that the Supreme Court has understandably been willing to grant broader power for this purpose than to find evidence of crime, and thus, as to surveillance techniques which *do* constitute a search (as is true of the Millitech camera), we are more likely to find authority to use the equipment by singling out protective action as a separate purpose which may be undertaken under a broader set of circumstances. I would suggest that Chris think about this point more broadly, taking into account possible protective uses of all the varieties of surveillance equipment we are examining in this endeavor. But to suggest what I have in mind, let me simply suggest some possibilities as to the Millitech device:

(1) *Terry Frisk.* Although (to repeat myself once again) searches for evidence in mainstream law enforcement require probable cause, the same is not true of searches for protective purposes. The clearest example is the frisk part of the *Terry* rule; a frisk (a form of search, albeit a limited one) may be undertaken on reasonable suspicion that the person is armed and dangerous. This raises the question of whether that test should also suffice as to use of the Millitech camera. Perhaps some would say no on the basis that *Terry* stresses the limited and two-step aspect of the frisk process, which distinguishes it from an ordinary search of the person in which a variety of objects are discovered. But I think it can be argued that the use of the device, as compared to the traditional *Terry* frisk, is not only safer for the officer and bystanders, but is in a real sense no more intrusive. For one thing, the device does not identify everything carried by the person, but only displays a variety of shapes, which is not that much different from the traditional frisk, where the officer's hands reveal to him a variety of shapes of many objects, not just weapons. For another, the device avoids the necessity for another type of highly intrusive activity, the actual placing of hands over the suspect's entire body, which itself has caused the courts concern. For still another, it may be argued that use of the device, as compared to the traditional frisk, identifies weapons with a greater certainty and locates them with greater precision, so that post-frisk searches into clothing will be fewer in number and more limited in scope.

(2) *Entry of Premises Without Notice.* This last Term, the Supreme Court finally got around to holding that the requirement that officers entering premises ordinarily give notice of their authority and purpose is grounded in the Fourth Amendment. It seems clear this is the case whether the entry is to arrest or to search, and whether the entry is with or without a warrant. The Court acknowledged, but did not have occasion to elaborate upon, an exception where entry without notice is allowed to prevent destruction of evidence or harm to the officer or others. The trouble is, the lack of notice sometimes leads to harm when those inside misperceive who is coming in and why. All that being true, it would seem to me that if the Millitech device or some similar piece of equipment can actually see through outer walls, then use of that device should be permitted whenever it would otherwise be the case that entry without notice for self-protection would be permissible. That use is a search, but it would seem unobjectionable given that ordinarily what is seen is what the officer would moments later see upon entry. Use of the device would provide greater protection, for it could reveal such things as whether there is a person lurking behind the door or whether a shotgun is in a readily accessible location near the door. It

would also dissipate the fear on some occasions, by revealing no persons or no guns are about, so that bypassing notice would become unnecessary.

(3) *Protective Sweep*. In the *Bule* case the Supreme Court adopted a two-pronged test regarding the reasonableness of a protective sweep to protect officers lawfully within premises to arrest. Specifically, the police may (i) routinely enter "spaces immediately adjoining the place of arrest from which an attack could be immediately launched," and (ii) may enter more remote parts of the premises on a reasonable suspicion that area "harbors an individual posing a danger to those on the arrest scene." That being so, I think a good argument can be made that looking through the wall into the same areas on the same grounds would be permissible; it would be in some respects less intrusive and would tend to give the officer a more definite reading concerning others on the premises.

(4) *Rescuing Kidnapping Victim*. Another situation, as to which there may be greater uncertainty because the point of reference is not a Supreme Court holding but rather the observations of a single Justice, concerns rescuing a kidnap victim. The reference I have in mind is Justice Jackson's oft-quoted observation in *Brinegar* that he would "candidly strive hard" to uphold a roadblock around the place of a recent kidnapping, even though the police were to "search every outgoing car," as "it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life." I suspect this is a proposition few would disagree with. If that is so, then surely it might be even easier to uphold use of the Millitech device or some similar equipment in that context, for it would be less intrusive.

IV. More on the Third Level: Who Decides What?

At this third level, where we are trying to be reasonably specific without necessarily presenting draft statutes or regulations, I would think it possible to say something meaningful about the choice of decisionmaker as to the various surveillance techniques covered. Sometimes, when reflecting Fourth Amendment requirements, we would be saying this is the way it *must* be, but in other circumstances we might put matters in less definite terms. Even then, we could be helpful by identifying some pros and cons. Let me sketch this out rather briefly:

(1) *The Surveilling Officer*. One concern I have with Chris's draft is that there is generally no recognition that exigent circumstances may sometimes make it impossible for the officer who plans to do the surveillance to check out the basis for doing so with someone else. This is especially the case when the someone else is a judge, but can even be true as to other avenues of approval. While some forms of surveillance by their nature require a bit of planning (e.g., arranging for an airplane), I think that exigent circumstances could arise as to any of the various surveillance procedures we will be discussing. That being the case, we should build in an exigent circumstances exception to any general get-approval requirement.

Whether leaving matters to the surveilling officer should suffice in any other circumstances is a matter about which there may be a difference of opinion (and about which I have no clearly-formed opinion at this point). Doing so, however, seems to me least defensible as to those surveillance practices which are highly intrusive (e.g., at least in my view, extended tracking of a person's movements). As to less intrusive activities, it might be argued that at least sometimes the *Watson* principle has merit. (*Watson*, allowing warrantless arrests in public places even absent a showing of exigent circumstances, was supported by at least some of the Justices on the ground that exigent circumstances would be present very often and that it wasn't worth the

candle to add on yet another requirement that police attempt to discern those cases in which this was not the case.)

(2) *Supervisory Police Officers.* Consistent with the administrative model of policing supported by the existing ABA Standards on the Police Function, there is certainly much to be said for requiring (absent exigent circumstances) that decisions regarding the grounds for surveillance be made by supervisory police, absent a Fourth Amendment command otherwise. This would mean, in the scheme described earlier, that surveillances requiring reasonable suspicion would ordinarily be for supervisory officers to make. It would also appear to be the case that those surveillance activities which find their justification in the frequency of criminality at a certain location would be for police supervisors to make (perhaps this time supervisors at a higher level). Indeed, it would seem imperative that such officials be involved in some way, as the grounds for surveillance relate to the *department's* collected data on crime patterns in the community.

(3) *Prosecutors.* There is no particular type of surveillance practice that jumps out at me as uniquely suited for prosecutors, but generally speaking I would not discourage their involvement. In current practice as to Fourth Amendment activities, a few places mandate prosecutorial scrutiny, but even where that is not the case such scrutiny is not at all uncommon. My sense is that this is all to the good, even if as a consequence the prosecutor's Initials on the documents cause the judicial decisionmaker to lighten up on the intensity of his own scrutiny of the sufficiency of the grounds offered. At least when the exclusionary rule is applicable, I think the prosecutor has good reason to play it safe; though judicial involvement is explained on the ground it is desirable to involve someone who is detached from the law enforcement enterprise, some view the prosecutor's screening as a significant safeguard because he or her is *not* detached and thus will want to ensure in advance that the police efforts will result in admissible evidence.

(4) *Judges.* Whenever the surveillance involves activity falling within the Fourth Amendment, then the decisionmaker must ordinarily be a judge. It is unclear whether it is desirable that the judge have the final authority in other cases as well, though I would think an argument in that direction would have more force in some circumstances than others. Consider, for example, the "reasonably necessary" cases which permit surveillance of large number of persons, even absent any suspicion as to any particular person, because of the magnitude of a particular crime problem at a particular place. Because of the breadth of the surveillance in those cases, it might be argued that there is virtue in having a judge scrutinize the data which in the first instance would be assembled and reviewed by police supervisors. Indeed, it might be that the police would themselves be more comfortable with such an arrangement, especially were we to decide that this basis for surveillance would even permit brief detention of large numbers of persons or vehicles.

(5) *Legislative Body.* It was earlier stated that legislative activity on the subject of surveillance might be appropriate because the legislature could articulate some standards for application by others or could mandate rulemaking on certain subjects by law enforcement agencies. That is not the point here, for now the question is who should make the decision that a particular surveillance is permissible. When the contemplated surveillance is to be more or less permanent in nature and by its nature will encompass virtually the totality of the governed, it then makes considerable sense to view the political process as providing meaningful limitations upon the surveillance activity. Illustrative of the kind of surveillance which would fit this description is the airport hijacker detection system. When the universe of those to be surveilled becomes smaller and takes on characteristics unlike those of the total population, there is then good reason

to be concerned about reliance on the political process as a means of limiting police limitations. A majority might well subscribe to close surveillance of those persons and powerful segment of the community perceived by others to be culpable for such crimes. But when the surveillance is less than universal in its application, it is not fair to require those to have their privacy regularly limited in some fashion. It may be appropriate that there be a political component to the surveillance decision. For example, if the police are contemplating placing overt surveillance cameras in a particular residential area, it is not irrelevant whether those residing there favor or oppose such surveillance.

V. Still More on the Third Level: Sanctions

The major issue here is the exclusionary rule versus something else. I will acknowledge up front that I am generally pro-exclusionary rule. Yes, I admit it does not deter when police act for purposes other than obtaining a conviction, but I do believe it is a real deterrent in the remaining circumstances. Hard evidence is lacking (I can't produce cops who will say they were thinking about making an illegal search but then changed their minds when they thought of the exclusionary rule, any more than death penalty proponents can produce people saying they contemplated killing someone but then backed down upon reflection on the death penalty). But circumstantial evidence is not lacking, including that *Mapp* had these effects: (i) dramatically increased resort to search warrants; (ii) dramatically increased police training on search and seizure; (iii) much police-prosecutor cooperation on search and seizure issues where virtually none had existed before. All empirical studies of which I am aware, including those of the ABA's Dash Committee, show general police acceptance of the exclusionary rule, while opposition comes from politicians seeking hot buttons. And even the best motivated, upon hearing "you acted illegally but the evidence is admissible," will likely conclude they have really been told "you acted legally." For all these reasons, I hope we do not take a negative attitude toward the exclusionary rule. Having said that, I would add that I do not deem it at all inappropriate for us to consider whether there are certain circumstances where the case for the exclusionary rule is less compelling and the case for some alternative more compelling.

(1) *Fourth Amendment Activity*. As to those surveillance activities which do involve searches or seizures, the Supreme Court has provided the answer, so I think we should just leave it at that. We need to be very careful with our use of language, however, so as not to suggest that something other than what the Supreme Court has said controls. For example, in item 3 on p. 21 of Chris's memo there appears this language: "Bad faith failure to follow the court order should result in exclusion of all evidence obtained during this surveillance." Similar language appears elsewhere in the memo. I have two problems with this, in terms of its faithfulness to the principles of the *Leon* case: (i) It can easily be read as saying that the good faith defense is applicable even as to errors in execution of the warrant, as compared to errors related to issuance of the warrant. That is contrary to *Leon* itself, which cautions that its discussion "assumes, of course, that the officers properly executed the warrant and searched only those places for those objects that it was reasonable to believe were covered by the warrant." and is contrary to many lower cases holding *Leon* inapplicable when the mistake was some aspect of the warrant's execution not attributable to erroneous assertions in the warrant itself. (ii) The "bad faith failure" language is inappropriate even when *Leon* is unquestionably applicable. If good faith provides an exception to exclusion, then it is for the prosecution to show the good faith, as *Leon* says, but if bad faith failure is necessary to exclusion then I would think the burden has now shifted to the defendant to show bad faith.

(2) *Legislative Requirements.* If the state legislature adopts statutes dealing with some of this surveillance activity and the statutory requirements exceed those of the Fourth Amendment, it is clear that there is no constitutional mandate that exclusion be the remedy for violation. A fair summary of legislation dealing with what might be called Fourth Amendment *related* activity is the following: (i) infrequently the statute itself will expressly state that exclusion is the remedy for violation of the statute; (ii) infrequently the statute itself will expressly state that exclusion is not an allowable remedy; and (iii) in the rest of the cases the issue will be decided by the courts, often by making a judgment as just how directly the statutory requirements at issue serve to advance Fourth Amendment interests. I'm not sure we should push one way or another on this subject, but it might be worth giving the caution that there is a legitimate exclusion-or-not issue for the legislature to consider and that if the legislature fails to act on that matter the decision will be made for it by the courts.

(3) *Administrative Regulations.* Finally, we have the situation in which the violation is of the police department's own regulations regarding when and how surveillance activities are to be undertaken. Relevant here are the observations from the Supreme Court's *Caceres* decision, namely, that for a court to mandate exclusion for violation of an administrative regulation "would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations" and, in any event, might well be counterproductive because it would discourage "the formulation of additional standards to govern prosecutorial and police procedures." Also, I would think that when the required procedure (whether mandated by statute or by administrative regulation) is to obtain approval from a supervisory police officer, failure to obtain or follow the supervisor's authorization would be more readily perceived by the police themselves as a matter calling for police discipline.

MEMORANDUM

TO: DISTRICT ATTORNEY LYNNE ABRAHAM

RE: STANDARDS ON VISUAL/PERSONAL SURVEILLANCE

FROM: Jim Polley

DATE: November 14, 1995

I'm not even close to being an expert on this but several observations may be in order.

The general issues raised, that is the "legality" of use, are ones I raised a year ago with the DOJ Office of Science and Technology. This is the part of Justice that is to serve as a clearing house for technology transfer between the Department of Defense and the police forces. The basic concept is to alter, change or make less lethal the tools of war and make them available for police use. A prime example is the global positioning capability that can tell a soldier where he/she is to within 10 meters via satellite. The police can use this to keep a constant watch over patrol cars and even individual officers; it could also be used as a surveillance technique. The Office of Science and Technology would also serve as a mechanism to make the law enforcement community more attractive as a market place for industry.

When I got a briefing from DOJ I asked about the legal basis for using many of the technologies. DOJ's worry was the "liability" of use; i.e. civil liability if the technology is used wrongly or hurts someone, rather than determining if it could be used by law enforcement at all or what limitations should be placed on use. To review the civil liability problem they had assembled a panel that included the ACLU, criminal defense bar, police agencies and in-house attorneys but prosecutors, federal or local, were not included. This is a very police oriented idea without regard for the actual usability of the new technologies.

Unless this has changed, the Defense Department "toys" are being made available to the police without any indication whether they can even be used. The example I heard used, and which is included in the ABA proposal, is the passive weapons detector. The Office of Science and Technology was indicating that a series of passive detectors could be placed on lamp or phone poles along a street and would alert police when someone walked by carrying a weapon. To my question of what the police could or would then do I got no response. It was clear that no thought had been given to the issues raised in the ABA paper. As with many areas of technology the novelty of availability has overcome the practicality of application.

The use of technology also has high Congressional interest for two reasons. First, many see it as a method of either saving law enforcement funds or increasing law enforcement abilities. Many of the 1994 Crime Bill initiatives involve technology enhancement and while most are not specifically applicable to this issue the general thoughts of Congress on the value of technology are. Secondly, and more pragmatically, many members of Congress see the transfer for Defense technology to law enforcement as a vital economic stimuli for the defense industry that has been hurt by the downsizing of our military forces. This has led to some strange alliances (Pat

Schroeder and Phil Gramm) in efforts to bolster local economies by finding new market places. Because of this the DOJ Office of Science and Technology has many patrons in the Congress.

In conclusion, several thoughts.

- * Any attempt to limit or deny the law enforcement market will encounter Congressional hostility.
- * District attorneys need to play a stronger role in developing uses for emerging law enforcement technology - to determine "usability."
- * Technology advances will out pace the ability to write "black letter law."
- * Any guide lines on use should be general in nature.

Sorry I don't have anything more concrete for you.

11/7/95

**PROPOSALS FOR STANDARDS ON
VISUAL/PERSONAL SURVEILLANCE**

by
Christopher Slobogin, Reporter
TECHNOLOGY & LAW ENFORCEMENT TASK FORCE

INTRODUCTION

This memorandum explores various ways of regulating the use of technology to observe persons, their movements, and their effects.¹ As Professor LaFave has helpfully explained,² this technology comes in several forms and enhances law enforcement ability to observe in a number of ways. For example, video cameras with pinhole lenses are virtually undetectable by the target and yet can view the most private areas; tracking devices such as beepers, over-the-horizon radar, and fleeing vehicle tagging systems can follow vehicles electronically when police cannot; magnification devices--ranging from binoculars to satellite photography--vastly improve the police's visual range; illumination devices--ranging from flashlights to infra-red cameras--make night-time surveillance more feasible; detection devices using x-ray, heat radiation sensors and other technologies can discern explosives, weapons, and drugs through clothing, luggage and even

¹. Thus, it does not deal with use of technology to overhear conversations, intercept communications, or obtain or seize effects and documents, subjects to be governed by other Standards.

². Wayne LaFave, *Visual/Personal Surveillance: Conceptualization and Statement of Issues Regarding Use of Technology to "See" Evidence of Criminality*, July 27, 1995.

walls; and airplanes and helicopters are increasingly being used to observe outdoor activities otherwise difficult to monitor.

It is evident that the usual rules regulating searches and seizures, having to do with warrants, probable cause, and so on, are relevant in deciding whether and how to regulate use of these devices. However, special rules governing the use of visual surveillance technology can be justified on at least two grounds.³ First, precisely because these devices enhance police powers of observation, they present the potential for vastly expanding government's ability to intrude upon the privacy of citizens. Compared to the normal search, visual surveillance technology not only increases government's capacity to monitor the target's potentially criminal activity, but also increases the probability that innocent activity, of both the target and third parties, will be observed (consider, for instance, the potential scope of video or aerial surveillance). Secondly, because most surveillance devices are used surreptitiously (in contrast to the usual search or seizure), an innocent target will typically never know the surveillance has taken place; while this fact in a sense reduces the privacy invasion, it also means that the spectre of civil lawsuits and media attention that might have a moderating impact in the normal case will be extremely rare here. At the same time,

³. Both of which also apply to regulation of interception of communications.

general knowledge of the fact that unregulated surreptitious monitoring occurs might chill legitimate conduct.⁴

Professor LaFave's memo and Professor Slobogin's memos of April 4, 1995, and August 14, 1995 describe in summary form the courts' approach to regulating use of this technology. As Professor LaFave notes, constitutional doctrine should not necessarily be dispositive of our efforts on the Task Force. However, it can provide useful background. This memo will begin by providing more detail about the relevant caselaw than did the previous memos. It will then develop two approaches to regulation of visual surveillance that might serve as springboards for Standards in this area.

THE CASELAW: POSSIBLY RELEVANT FACTORS

The initial question under Katz, as described by Professor Amsterdam, is "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."⁵ Assuming surveillance does implicate the fourth amendment, the second question concerns what is necessary to authorize it: a warrant based on probable

⁴. David Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563, at 571-73 (1990).

⁵. Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, at 403 (1974).

cause, something more, or something less. In deciding whether a particular police method is a search and, if so, what constitutional restrictions should be placed on it, the courts have focused on several factors:

(1) The nature of the place to be surveilled. Not surprisingly, given Katz' emphasis on expectations of privacy, the courts are most reluctant to allow unregulated enhanced surveillance when it focuses on the home. On the other hand, when the surveillance is of other areas the fourth amendment is often thought to be irrelevant. The Supreme Court has held that use of a beeper to detect movement within a house is a search and requires some type of judicial authorization (based either on probable cause or reasonable suspicion). Karo. However, use of a beeper to detect movement on the public roads is not a search. Knotts. Also not considered a search by the Supreme Court is use of illumination devices to inspect the interior of a car through the window, Brown, the interior of a barn located on open fields, Dunn, or the outside of boat. Lee. Aerial surveillance of the curtilage is not a search, Ciraolo, even if it takes place 400 yards above the ground. Riley. Use of magnification equipment during such surveillance is also not a search, at least when the surveillance is of "business curtilage." Dow Chemical.

Most lower courts concur in these results. The majority hold that police viewing of the interior of the home with the naked eye does not implicate the fourth amendment, at least if the viewer is

standing at a lawful vantage point that is not too contrived.⁶ But, with several significant exceptions (detailed below), the lower courts have found that perusing the interior of a home with enhancement devices (whether binoculars, cameras or dogs) is a search, usually requiring a warrant, but sometimes permissible upon reasonable suspicion.⁷ Generally, perusal of the body using an x-ray device is treated similarly.⁸ At the same time, consonant with the Supreme Court's opinions, the lower courts have normally held that using enhancement devices to view cars, garages, curtilage, open fields or public areas is not a search.⁹

(2) The ease with which surveillance can take place (i.e., the extent to which the place's privacy is reasonably assumed). In gauging the privacy associated with a place, whether a home or

⁶. WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(b) ("At least when the officer only employs his natural senses, the prevailing rule is that such uses of the senses 'made from a place where a police officer has a right to be do not amount to search in the constitutional sense.'").

⁷. *Id.* § 2.2. Perhaps the leading case in this regard is *United States v. Kim*, 415 F.Supp. 1252 (D.Haw. 1976) (comparing the use of magnification devices to see into an apartment to use of wiretapping). The statement in the text might also be true with respect to public restrooms and the "private" areas of business, given the courts' willingness to protect these areas even from naked eye viewing. LAFAVE, *supra* note 6, §§ 2.4(b) & (c).

⁸. *United States v. Haynie*, 637 F.2d 227 (4th Cir. 1980). As Professor LaFave notes, "[i]t is beyond dispute" that use of an x-ray device is a search, "which would mean that use of it against a particular suspect would require probable cause, though under the 'special needs' branch of Fourth Amendment law the x-ray can be used in the context of certain checkpoint operations, most significantly as part of the hijacker detection system." LaFave memo, *supra* note 2, at 20.

⁹. LAFAVE, *supra* note 6, § 2.2(g).

something else, the courts have also looked at the suspect's privacy-enhancing conduct. Thus, in holding a flashlight inspection of a barn to be outside the fourth amendment's purview, the Supreme Court noted that the upper portion of the "wall" through which police observed the interior consisted only of netting material. Dunn. The fact that the 10-foot high fence in Ciraolo would not have kept observers on a truck or a doubledecker bus from seeing the backyard helped justify the aerial surveillance in that case. Similarly, lower courts have often considered relevant to the search issue such facts as the presence of fences and curtains, the height of windows, and whether objects were out of the line of normal sight from lawful viewing points.¹⁰

In the same vein, some courts have spoken of whether targets of surveillance have assumed the risk that their actions would be observed, a concept borrowed from the Supreme Court's undercover investigation cases, e.g., Lewis, White, Miller, Smith. For instance, the assumption of risk idea seems to lie behind Justice O'Connor's statement, in her concurring opinion in Riley, that if the height and type of flyover used by the police is "rare" among civilian flyers, then it should be considered a search; conversely, she seemed to be saying, one assumes the risk that a flyover that is not a "rare" occurrence is by the police.

¹⁰. *Id.*, § 2.2(c).

(3) The degree to which the surveillance requires a physical intrusion onto private property (i.e., the location of the observer). In Ciraolo and Dow, the Court implied that had the government physically intruded upon the curtilage rather than flown over it, a search would have occurred, but since there was no intrusion, there was no search. Similarly, a dog sniff of luggage is not a search in part because it does not intrude into the luggage. Place. Many lower courts have echoed the view, which harks back to pre-Katz trespass analysis, that the absence of an intrusion eliminates fourth amendment concerns. Several courts have even held that using binoculars to look in the home from a lawful vantage point is not a search because no intrusion is involved.¹¹

¹¹. Id., § 2.2(c). As to what constitutes a lawful viewing point, it is important to note that the target's own property, as well as public and third party property, may qualify. The Supreme Court has apparently held that viewing the interior of a structure from the open fields does not implicate the fourth amendment. Dunn. Lower courts have also routinely held that viewing the interior of a home from that part of the curtilage that invites the public (e.g., a sidewalk, etc.) is not a search. Id., § 2.3(c). A related issue is whether the surveillance requires a seizure or entry to be implemented. As noted above, most of the enhancement devices at issue here are used surreptitiously, and thus do not require a seizure of a person or effect in order to be effective. However, using some of the detection devices may require such a seizure (e.g., using a dog or a weapons detector might require detention of an individual or luggage). Similarly, placement of a video camera or a beeper might require entry into a dwelling under circumstances that normally would constitute a search. While the validity of this conduct is important for fruit of the poisonous tree analysis, it should be analyzed separately from the validity of the ensuing surveillance.

(4) The nature of the object(s) surveilled. In Ciraolo, the Court stated that Katz' rule protecting the privacy of conversations "does not translate readily into a rule of constitutional dimension that one who grows illicit drugs is entitled to an expectation of privacy." Along the same lines, testing cocaine is not a search, Jacobsen, nor is a dog sniff of luggage which alerts the police only to the presence of contraband. Place. Observation of impersonal objects other than illicit substances may also be less subject to regulation. In Dow the Court noted that the photographs taken by the camera revealed only physical details of Dow's plant, not "identifiable human faces, secret documents" or other "intimate detail."

(5) The availability of the technology to the general public. Spying on business curtilage using a \$22,000 mapmaking camera purchasable on the open market is not a search, but the same observation "using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally prescribed absent a warrant." Dow. Further, use of "an electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions" than the camera-search in Dow.

(6) The extent to which the technology enhances the police's natural senses. A number of lower courts have distinguished between devices that "replace" rather than simply "improve" human

senses.¹² Using the examples given in Dow, a satellite or a device that can see through walls could be said to replace one's senses rather than enhance them because these devices can see things that the police would never be able to see with the eye. Conversely, when the enhancement device is used simply to "confirm" something already seen by the naked eye (e.g., use of binoculars to confirm an inadvertent sighting), its use is less likely to be seen as a search, even if the surveillance is of the home.¹³

(7) The extent to which the conduct of the surveillance is unnecessarily pervasive, invasive, or disruptive (i.e., the extent to which the government takes steps to minimize the intrusion). As a final aspect of visual surveillance regulation, several courts have considered a complex of factors analogous to those associated with minimization in the electronic surveillance context. Most significantly, they have looked at the number of people or objects surveilled (the pervasiveness issue). For instance, while the lower courts accept the idea that a dog sniff of luggage is generally not a search, several have expressed concern over routine use of dogs to sniff all packages in a particular area.¹⁴ Similarly, while aerial surveillance is generally not considered a search, courts have condemned random aerial patrols over wide-

¹². See Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOL. 1, 103 n. 326 (1989).

¹³. *Id.*, at 49 n. 48.

¹⁴. LAFAVE, *supra* note 6, § 2.2(f).

ranging areas.¹⁵ Justice Brennan's dissent in Jacobson cautioned against reading that case to permit police dogs to "roam the streets at random, alerting the officers to people carrying cocaine," or to allow drug scanning devices on street corners "to scan all passersby" or in police cruisers "to identify all homes in which the drug was present."

Conversely, "dragnet" use of such a device in a context where everyone recognizes the danger of not doing so (e.g., magnetometers in an airport) might be enthusiastically welcomed, and thus not considered intrusive.¹⁶ In this type of situation, the pervasiveness of the search may make it less invasive, at least when everyone is subjected to it rather than allowing government to single out particular individuals on no suspicion.¹⁷ Also relevant to the invasiveness issue is the duration of the surveillance and its intensity. Courts have leveled criticism at prolonged observation (e.g., in one case, officers observed the interior of a home, including private sexual conduct, for nine days), as well as at observation that is insufficiently limited in objective (e.g., one court required that observations be limited "to the times when

¹⁵. Power, *supra* note 12, at 65 n. 197.

¹⁶. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 62-63 (1991).

¹⁷. As Professor LaFave points out, "even if the use of ... a device is no search, there is reason to be concerned about allowing individual officers to determine where and at whom the machine is to be directed, and thus some control mechanism (even if only internal to the police department) may be needed." LaFave memo, *supra* note 2, at 20.

[restroom] crimes are most likely to occur").¹⁸ One or two courts have also expressed concern about "blanket surveillance" which observes a target's every public movement, especially if done conspicuously.¹⁹ Conversely, in some contexts, invasiveness might be mitigated through providing notice of the surveillance (as with use of public video surveillance, for instance).

Finally, the disruptiveness of the surveillance might be a factor. The Supreme Court has suggested that aerial surveillance that is "conducted [with] hazard to persons or property on the surface" or that interferes with "normal use of the home or curtilage" is a search. Riley. Lower courts also look at the height of the aircraft and resulting disruption.²⁰

OPTION I: FACTOR WEIGHING APPROACH. One approach to Standards in this area would be to list the foregoing factors, or some combination thereof, and recommend that they all be considered in determining when particular use of an enhancement device is permissible. Specifically, Standards could provide something along the following lines:

In determining the conditions under which use of visual surveillance technology may occur, police and the courts should consider:

- (1) The nature of the place to be surveilled.

¹⁸. Powers, *supra* note 12, at 79 n. 246.

¹⁹. *Id.* at 85-86 n. 269.

²⁰. *Id.* at 52. nn. 166, 254.

- (2) The ease with which surveillance can take place (i.e., the extent to which the place's privacy is reasonably assumed).
- (3) The degree to which the surveillance requires a physical intrusion onto private property (i.e., the location of the observer).
- (4) The nature of the object(s) surveilled.
- (5) The availability of the technology to the general public.
- (6) The extent to which the technology enhances the police's natural senses.
- (7) The extent to which the conduct of the surveillance is unnecessarily pervasive, invasive, or disruptive (i.e., the extent to which the government takes steps to minimize the intrusion).

If an analysis of these factors indicates that a very significant invasion of privacy would result from the surveillance (e.g., video surveillance of the home), then it should only be permitted upon issuance of a warrant and under conditions that meet the requirements set out in Standards 3.1 through 5.17 [the current electronic surveillance provisions]. If an analysis of these factors indicates that a *de minimis* invasion of privacy would result from the surveillance (e.g., brief binocular observation of a person on a public street), then it should be left to the officer's discretion. Intermediate invasions of privacy would require, depending upon their relative significance, probable cause, reasonable suspicion, or some lesser degree of justification. [Whether such justification exists should be determined in advance of the surveillance by a judicial officer (when probable cause is required), or by a prosecutor or specially designated law enforcement official (when other justification is required), except when such advance authorization is not practicable.]²¹

²¹. Whether *ex ante* review should be required and, if so, what type, are issues not addressed further in discussion of this proposal. The bracketed sentence, derived from discussions at the Task Force's first meeting, is offered as one approach to this issue. There are obviously several others.

This "factor-weighting" approach can be questioned on at least two grounds. First, several of the factors listed above may not be appropriate considerations either as a constitutional or as a policy matter. While factors (1) and (7), dealing respectively with the place surveilled and the minimization concept, seem central to any analysis of the extent to which visual surveillance technology should be permitted, the other factors' relevance to this endeavor can be challenged to varying degrees.

For instance, factor (2), focusing on ease of observation, is problematic to the extent it provides less protection to those who, for economic or other uncontrollable reasons, cannot take steps to protect their privacy.²² More importantly, basing the degree of protection from government surveillance on the extent to which one makes an effort to evade it runs the risk of encouraging a closed society, in which people routinely curtail contact with the outside world.²³ Such a risk is exacerbated with the advent of the technologies at issue here, since further precautions (thicker

²². Ronald J. Bacigal, *Some Observations and Proposal on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, at 541-42 & nn. 94-95; Comment, *Law Enforcement Use of High Technology*, 24 CAL. W. L. REV. 83, at 92 (1988); Amsterdam, *supra* note 5, at 404.

²³. As Professor Amsterdam stated: "[S]o far as I am presently advised of the state of the mechanical arts[,] anyone can protect himself against surveillance by retiring to the cellar, cloaking all the windows with thick caulking, turning off the lights and remaining absolutely quiet. This much withdrawal is not required in order to claim the benefit of the amendment because, if it were, the amendment's benefit would be too stingy to preserve the kind of open society to which we are committed and in which the amendment is supposed to function." Amsterdam, *supra* note 5, at 402.

walls, heavily curtained windows, avoidance of public exposure) are necessary to render them ineffective. Similarly, many commentators view the assumption-of-risk rationale for reducing privacy protection to be tautological: in a real sense, we only "assume" those risks of unregulated government intrusion which the courts tell us we have to assume.²⁴

Factor (3), focusing on the location of the observer, may also be an inappropriate consideration. Under this factor, as with factor (2), those with less wherewithal may have reduced protection from surveillance simply because they cannot distance themselves from "lawful vantage points." More importantly, as a logical matter, the location of the observer has little to do with the degree of privacy intrusion. Surveillance of one's bedroom (or one's closed-in backyard) is equally intrusive whether conducted via binoculars or by an officer who has trespassed and remains hidden from view. Professor Steinberg has also argued that attributing significance to whether a physical intrusion has occurred encourages the police to engage in "non-physical" searches that are actually more intrusive (compare the scope of the aerial

²⁴. As Professor Coombs stated: "Once we decide the parameters of the government's power, the claimant 'assumes' whatever risk inheres in that legal rule." Mary Irene Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593, 1642-43 (1987). See also, Steinberg, *supra* note 4, at 604 (speaking of the "circularity" of assumption of the risk reasoning); Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 668-672 (1988).

surveillance in Riley to entry of the defendant's backyard to view the marijuana eventually seized from there).²⁵

Factor (4), which makes germane the object(s) of the surveillance, could be of questionable pertinence to the extent it permits dragnet searches of the type described by Brennan in his Jacobsen dissent. On the other hand, if limited by factor (7) (the minimization factor), consideration of the fact that surveillance will only reveal nonprivate or illicit items may well be an important variable in the analysis, as several commentators have argued.²⁶

Factor (5), dealing with the availability of the technology to the public, is closely related to factor (2) in that it tries to capture one aspect of the risks we could be said to "assume" as citizens in this society. Thus, if the assumption-of-risk rationale is flawed, this one may be as well. It may also be problematic as a practical matter. Because many of the devices described above are already available to the public (e.g., binoculars, telescopes, and \$22,000 mapmaking cameras),²⁷ giving full scope to this factor would significantly reduce privacy in the

²⁵. Steinberg, *supra* note 4, at 591.

²⁶. Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246-48 (1983); Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1121-28 (1987); Steinberg, *supra* note 4, at 617.

²⁷. Cf. David Boyd's comment that "If the police have it, the criminals will soon get it." Presentation to Task Force on Law Enforcement and Technology, August 26, 1995.

home and elsewhere. On the other hand, if a device is unavailable to the public as a legal matter (as is true with wiretapping equipment pursuant to Title III), one might posit that its use is a search. In other words, if the public demands, via legislation, that private use of certain technological devices be banned, it should reasonably expect privacy from their unregulated use.²⁸

Factor (6), having to do with whether a device merely replaces rather than enhances naked eye observation, may ultimately be premised on a false distinction. Presumably, if the enhancement device did not in some way "replace" police vision, it wouldn't be used in the first place. If, for instance, an officer on a truck could have seen over the fence in Circolo, why didn't the police use that method? If the police in Knotte could have tailed Petschen's car, why didn't they? In each case, the enhancement device was apparently viewed as a more efficient, if not a necessary, way of pursuing the police investigation.

In short, many of the factors listed above may be of dubious value in determining the extent to which use of visual surveillance technology should be regulated. In any event, some commentators seem to think so. In coming up with their own calculus, for example, Professor Power and Professor Steinberg make no mention of many of these factors. Professor Power, focusing solely on

²⁸. Cf. Power, *supra* note 12, at 106 ("[u]nless society demands privacy from use of a particular technology, it cannot reasonably expect privacy from such use.").

factors (1), (5) and (7), would regulate use of visual surveillance technology in the following manner:

1. The government must have a "legitimate justification" for the surveillance, which requires the articulation of a "rational reason for making the observation."²⁹

2. The observation must be "reasonably implemented," meaning that the government must be sensitive to the time and duration of the observation as well as its invasiveness. (Cf. factor (7)).³⁰

3. Applying these general principles, "[a]ll fourth amendment protections should apply to unnatural or enhanced observations into houses and public restrooms, much as physical searches of such areas normally require warrants based on probable cause."³¹ (Cf. factor (1)).

4. Further, surveillance of areas other than houses and restrooms with technologies that, analogous to electronic surveillance, are available only to the government, should mandate "judicial supervision in all cases."³² (Cf. factor (5)).

Steinberg's analysis has three components (the first focusing on factor (4) and the last two derived from factor (7)), all of which are to be "balanced" in determining whether a particular type of sense-enhanced search requires a warrant:

1. The specificity of the information revealed by the sense-enhanced search;
2. The duration of the sense-enhanced search; and

²⁹. *Id.*, at 69, 74.

³⁰. *Id.*, at 86.

³¹. *Id.* at 95. Professor Katz would agree with this part of Power's test. Since he believes warrants are also necessary to search the curtilage, he would also require a warrant for aerial surveillance of curtilage and the private part of businesses as well. Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 INDIANA L. J. 549, 583-84 (1990).

³². Power, *supra* note 12, at 111.

3. The extent to which the sense-enhanced search requires officers to focus on a particular individual.³³

Under Steinberg's scheme, the extent to which a sense-enhanced search focuses on more than one object or person or provides more than a "snapshot" of the object or person determines whether a warrant is required. Thus, while a dog sniff for contraband would not require a warrant (given its specificity and duration), aerial surveillance and use of binoculars would, because of their wide-ranging scope akin to a general warrant. Steinberg has more trouble categorizing the use of beepers, noting that they can be focused on one individual, but that they can also be monitored for virtually unlimited periods of time and provide a fairly complete picture of a person's travels.³⁴

The foregoing discussion should make readily apparent the second possible problem with the factor-weighting approach: its relative lack of guidance. The amorphous case-by-case nature of this analysis has two possible disadvantages. First, it may leave too much discretion to the police³⁵ (although this problem can be alleviated by an *ex ante* review requirement of the type described in the last sentence of the proposed Standard). Second, it might

³³. Steinberg, *supra* note 4, at 613.

³⁴. *Id.*, at 624.

³⁵. Professor Amsterdam dubbed a multi-factor scheme similar to that described above as a "Rohrshach blot" approach to the fourth amendment and quoted Justice Jackson to the effect that, under such an approach, "the people would be 'secure in their person, houses, papers and effects' only in the discretion of the police." Amsterdam, *supra* note 5, at 394 (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson J., dissenting)).

cause the police to refrain from acting when they should, or in good faith confusion act wrongly, thereby increasing the cost to the state by undermining effective law enforcement. Accordingly, many commentators have argued that effective regulation of the police requires clear rules. At the same time, as Professor LaFave has cautioned, bright-line rules should not be sought purely for their own sake. Rather, such rules should be carefully evaluated according to four criteria: (1) whether they in fact have "clear and certain boundaries [that make] case-by-case evaluation and adjudication unnecessary;" (2) whether they produce "results approximating those which would be obtained if accurate case-by-case application of the underlying principles were practicable;" (3) whether they are "responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable;" and (4) whether they are "subject to manipulation and abuse."³⁶ The following proposals can be judged accordingly.

OPTION II. THE SPECIFIC RULE APPROACH. A second regulatory approach might try to categorize the various types of visual surveillance devices and develop rules specific to each one. In his memo of July 27, 1995, Professor LaFave has provided just such a categorization and suggested the parameters of rules for each

³⁶. Wayne LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982).

each category. These rules, and the gist of related commentary, might look something like the following:

Video Surveillance. Video surveillance of a home or similar location should be subject to the same provisions that apply to electronic interception of communications [see Chapter 2 of these standards], with the following exceptions:

1. The consent of one or more of the subjects should not exempt video surveillance from said provisions. (Compare Standard 2-4.1).
 2. The application should provide facts showing, and the judicial officer issuing the warrant should find, that aural surveillance has failed or reasonably appears to be unlikely to succeed. (Compare Standards 2-5.3(i) & 2-5.4(c)).
 3. The warrant should direct the officers executing it to minimize video surveillance:
 - (a) by installing the video equipment so as to view only those areas where the judicial officer finds there is probable cause to believe criminal activity will occur; and
 - (b) by activating visual surveillance only when aural monitoring or other factors reasonably indicate activity pertinent to criminal conduct is occurring; and
 - (c) by terminating visual and aural surveillance of innocent activity after two minutes, with reasonable spot checks permitted thereafter. (Compare Standard 2-5.8(i)).
 4. Bad faith failure to minimize should result in exclusion of all evidence discovered during the surveillance. (Cf. Standard 2-2.3).
 5. The warrant should be valid for a maximum period of five days. (Compare Standard 2-5.8(j)).
 6. Extensions should be granted for no longer than five days. (Compare Standard 2-5.9).
- Video surveillance of public or quasi-public areas should be subject to the following conditions:

1. If the purpose is to detect a particular crime:

(a) the surveillance should be authorized only if a judicial officer finds reasonable cause³⁷ to believe that the crime will occur in the area to be surveilled; and

(b) the court order should direct that the surveillance be limited to its objective, both in terms of area and duration.

2. If the purpose is to deter crime rather than detect it:

(a) the surveillance should be authorized only if a judicial officer finds it is necessary to deter a significant crime problem in the area;

(b) the authorization should direct that the public be notified of the surveillance, that private areas not be subjected to surveillance, and that telescopic capacity be used only upon reasonable cause to believe criminal activity is taking place.

(c) tape recording should be prohibited.

3. Bad faith failure to follow the court order should result in exclusion of all evidence obtained during the surveillance.

Several courts have recognized that video surveillance of the home should be subject to restrictions similar to those imposed on wiretapping.³⁸ The additional restrictions on video surveillance suggested above might be justified on the ground that visual and aural surveillance together are much more intrusive than aural

³⁷. "Reasonable cause" is meant to be analogous to reasonable suspicion in the sense that it is a less strenuous requirement than probable cause. On the other hand, it does not necessarily connote any particular quantum of certainty below probable cause.

³⁸. United States v. Torres, 751 F.2d 875 (7th Cir. 1984); People v. Teicher, 422 N.E.2d 506 (N.Y. 1981). But see, United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987) (holding that certain provisions in Title III are not constitutionally required).

monitoring alone. Thus, at least one court has held that warrantless audio and video surveillance of a suspect's room violated the fourth amendment even though it occurred while a police informant, who consented to the surveillance, was present.³⁹ The special "last resort" and minimization rules suggested above, requiring use of audio surveillance alone whenever possible, have also been implicitly accepted by some courts.⁴⁰ Finally, the bad faith exclusionary rule and the shorter duration on the court order have been incorporated in proposed federal legislation (although the proposed durational limit was ten days rather than five).⁴¹ As to what might be a "similar location" to a home, of possible relevance are court decisions requiring a warrant for video surveillance of a store⁴² and an employee's break room.⁴³

The suggested provisions concerning use of video surveillance to detect public crime are based on Professor Power's "legitimate justification" and "reasonable implementation" notions; while surveillance of public conduct is relatively less intrusive, it should not be permitted on a random basis. The provisions concerning use of video surveillance to deter crime are taken

³⁹. United States v. Shabazz, 883 F.Supp. 422 (D. Minn. 1995).

⁴⁰. Cf. Torres & Teicher, *supra* note 38, both of which focused on the fact that wiretapping had not worked or would not work).

⁴¹. H.R. 6343, 98th Cong., 2d Sess. (1984).

⁴². State v. Thomas, 642 N.E.2d 240 (Ind. App. 1994).

⁴³. State v. Bonnell, 856 P.2d 1265 (Hawaii, 1993).

directly from Professor Granholm's article on the subject,"
described in Professor LaFave's memo.⁴⁵

Tracking Devices. Use of electronic devices to track persons, vehicles or effects should be subject to the following conditions:

1. Installation of such a device should be permitted only if there is reasonable cause to believe that the device will assist the police in discovering evidence of serious crime. The reasonable cause finding should be made by a judicial officer, except under the following circumstances:

(a) the tracking device will reveal only the presence of illicit items.

(b) obtaining a court order at the time of installation is not practicable, and a court order authorizing the installation is subsequently sought within a reasonable period of time.

2. Tracking, whether or not authorized by court order, should be limited to a maximum period of 30 days.

3. Obtaining information about a particular vehicle's movement from an automated transportation tracking system should be permitted only if a judicial officer finds reasonable cause to believe the information will assist a criminal investigation.

The first two sections of these proposed provisions follow the suggestions of Professor Fishman.⁴⁶ Although the Supreme Court has held that installation and use of a beeper to track public movements is not a seizure or a search and thus need not be

⁴⁴. Jennifer Mulhern Granholm, *Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches*, 64 U. DET. L. REV. 687 (1987).

⁴⁵. LaFave memo, *supra* note 2, at 10.

⁴⁶. Clifford Fishman, *Electronic Tracking Devices and the Fourth Amendment: Knotts, Karo, and the Questions Still Unanswered*, 34 CATH. U. L. REV. 3277 (1985).

preceded by any showing of suspicion, Knotts, the police rarely know whether a tracking device will end up revealing the contents of private areas (cf. Karo). Moreover, as Steinberg points out,⁴⁷ beepers allow prolonged surveillance that is often not feasible or even possible for police acting without such devices; thus, even if the target stays entirely in the public domain, the intrusion is arguably greater than would result from police tailing.⁴⁸ For the same reason, some limitation on the duration of the tracking warrant is advisable, as proposed in the second section above. However, relying on factor (4) (dealing with the object of the search), Fishman concludes that a warrant isn't necessary if the device tracks only contraband. Furthermore, it seems advisable to create an exigency exception to the court order requirement, if only to accommodate use of the anticipated "fleeing vehicle tagging system," which would make possible the attachment of a beeper on a fleeing vehicle using a projectile launcher system.⁴⁹

The third section of the provision deals with the advent of Automatic Vehicle Location Systems, also known as Intelligent Transportation Systems (ITS). These systems, when operational,

⁴⁷. Steinberg, *supra* note 4, at 623.

⁴⁸. Professor LaFave makes the same point: "Even if tracking by beeper is no search, it is nonetheless a considerable intrusion upon that privacy-by-anonymity which travellers generally enjoy--the ability to travel from point A to point B some distance away without the likelihood of any particular individual observing the totality of that occurrence." LaFave memo, *supra* note 2, at 12.

⁴⁹. Department of Justice, National Institute of Justice, Other Technology Projects Funded by NIJ (June 1994).

will permit recording the movement of particular vehicles throughout the covered geographic area. Although government use of this information might more sensibly be treated in rules dealing with accessing transactional data, it is covered here in case the Task Force decides not to develop the latter standards. At least one commentator has argued that the federal Communications Assistance for Law Enforcement Act requires some type of warrant to recover information obtained from an ITS.⁵⁰

Magnification and Illumination Devices. Use of devices to magnify or illuminate the object observed should be subject to the following conditions:

1. If the device is being use to observe the interior of a home or a similar location, it should be permitted only upon issuance of a warrant based on probable cause, unless:

(a) the device is being use to confirm a naked eye observation which gives the police reasonable cause to believe evidence of criminal activity will be discovered through use of the device; and

(b) the observation using the device is of brief (i.e. less than one minute) duration and focuses solely on the area necessary to obtain confirmation; and

(c) the observation using the device can take place from a lawful vantage point (i.e., a public area or that part of the curtilage which is routinely available to the public).

2. If the device is being used to observe a public or quasi-public location, it should be permitted only if the officer has reasonable cause to believe it will produce

⁵⁰. Dorothy J. Glancy, *Privacy and Intelligent Transportation Technology*, 11 *COMPUTER & HIGH TECH. L. J.* 151, 176 (1995) (on the ground that the Act limits the type of transactional information which can be obtained via subpoena to name, billing address, and length and type of service).

evidence of criminal activity and its use is reasonably limited to implementation of that objective.

Magnification and illumination devices are treated together because they raise virtually identical issues. The premise of these proposals is that, despite the tenor of many judicial decisions, the sophistication of given devices is irrelevant to the analysis; rather, the place observed and the manner of observation are the dispositive variables. Observation of one's home is intrusive regardless of the location of the observer or the availability of the observer's machine, and thus generally should trigger the usual fourth amendment protections associated with invasion of the home. At the same time, the proposed "confirmation exception" to the usual warrant/probable cause rule may be justified on the ground that, under appropriately limited circumstances, police should be able to take immediate advantage of inadvertent sightings of suspicious activity without having to resort to the warrant process. Of course, if the initial naked eye viewing is impermissible on fourth amendment grounds, the subsequent enhanced viewing would be tainted fruit.

The restrictions on public observation can be justified on two grounds, despite several judicial holdings that no search occurs even when magnification or illumination is used to peer into a house,⁵¹ much less when used to observe a public street. First, as noted at the outset, the fact that these devices allow surreptitious monitoring vastly enhances the potential invasiveness

⁵¹. LAFAVE, *supra* note 6, § 2.2.

of government surveillance of public as well as private places. Second, the minimal restrictions proposed above should not place a particularly heavy burden on the police. As Emil Moschella stated in a letter to Wayne LaFave, we should assume that an investigation is "legitimate . . . not arbitrary or done on a whim or taken on for inappropriate reasons. We should assume that it is initiated in good faith, and based on reasonable suspicion that criminal activity has, is, or may occur."⁵² In other words, the police already place the proposed burden on themselves.

Detection Devices. Use of devices that can detect criminal evidence or activity not visible through magnification or illumination (because of opaque barriers such as walls and clothes, or because it is not capable of being seen) should be subject to the following conditions:

1. If the detection device can only reveal information which might provide cause to believe an illicit item is present, then

(a) it may be used to monitor groups of people or effects if a judicial officer finds it is necessary to detect or deter a significant crime problem in the area and its use requires only a brief seizure or none at all;

(b) it may be used to monitor a particular person, effect, or home if there is reasonable cause to believe evidence of criminal activity will be discovered, and it can be used from a lawful vantage point.

2. If the detection device is also likely to reveal information which is not relevant in determining whether there is cause to believe an illicit item is present, then

⁵². Letter from Emil Moschella to Wayne LaFave, July 24, 1995 (quoted in LaFave memo, supra note 2, at 5-6 n. 7).

(a) it may be used to monitor groups of people or effects only if the conditions in 1(a) are satisfied, it does not reveal intimate detail, and the non-pertinent material it reveals is exposed only to a single officer of appropriate gender.

(b) it may be used to monitor a particular person, effect or home only if authorized with a warrant based on probable cause.

The two crucial variables reflected in the above proposals are the nature of the object detected (factor 4) and the invasiveness of the procedure (factor 7). When the detection device discloses only the possible presence of contraband, relatively little in the way of privacy is violated. Nonetheless, some strictures on its use are advisable. To avoid the dragnet use of such items, group surveillance should be avoided, unless necessary to detect or deter significant danger to the group; in the latter situation, not only is the state interest great but, for reasons given earlier,⁵³ the sense of intrusion should be minimal if members of the group know the purpose of the surveillance. When the device is used against a singled-out individual or his or her effects, the intrusion is somewhat greater, despite the fact that contraband is all that can be detected with the device. This is especially so when the surveillance is not surreptitious and requires some control of the person to be effective.⁵⁴ Even when it involves surreptitiously

⁵³. See *supra* note 16 and accompanying text.

⁵⁴. This would be the case, for instance, when a person or a person's effects are seized in order to perform a cocaine test, cf. *Jacobsen*, or a test to determine whether the person has handled money or other goods treated with fluorescent powder. Cf. *United States v. Kanaan*, 496 F.2d 181 (1st Cir. 1974) (holding that such a test is a search).

surveilling effects or a home, however, it allows the police to "view" something they ordinarily would need a warrant to see. Moreover, such devices virtually never indicate with certainty that what is "viewed" is illicit (for instance, guns can be fake or legally concealed⁵⁵). Thus, the thermal detection device cases which hold that no search occurs because the detected heat is "abandoned" may miss the point;⁵⁶ the "heat waste" is still privately-created information which is not known to be evidence of crime even once it is discovered, although it may, together with other information, give rise to probable cause.

When the detection device allows detection of information having nothing to do with contraband the level of intrusion is clearly more significant, and proportionately greater protection seems warranted. Compare, for instance, a device which reveals not only that a person is carrying something metallic⁵⁷ with a device which can make out the shape of all items carried by the person,

⁵⁵. At least 25 states have enacted some variety of concealed weapon permit statutes. David Harris, *Superman's X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology* 92 (in press).

⁵⁶. E.g., *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994).

⁵⁷. As is true of the airport magnetometer.

as well as anatomical features.⁵⁸ Use of the latter device should be subject to more regulation than the former.

Aerial surveillance. Aerial surveillance should be subject to the following conditions:

1. It should be permitted only if a judicial officer finds reasonable cause to believe evidence of criminal activity will be discovered.

2. The court order should direct that the officers executing the surveillance only observe the area for which there is reasonable cause, and that the aircraft avoid creation of hazards or disruption to the property or person of those observed.

3. Bad faith failure to follow the court order should result in exclusion of all evidence obtained during the surveillance.

As already noted, aerial surveillance can be very pervasive and disruptive if not appropriately limited. These provisions attempt to do so. Again, a reasonable suspicion requirement should not be onerous to police. Indeed, it was almost certainly met in all three of the Supreme Court's aerial surveillance cases.⁵⁹

⁵⁸. The detection device being developed by the Millitech corporation can detect weapons, small amounts of powders, solids and even liquids. Harris, *supra* note 55, at 62. The Pacific Northwest device can easily distinguish between male and female anatomy. LaFave memo, *supra* note 2, at 22.

⁵⁹. In *Ciraolo*, the police received an anonymous telephone tip that marijuana was growing in Ciraolo's backyard; in *Riley* an officer acting on an anonymous tip believed he saw marijuana poking out the roof of Riley's greenhouse; and in *Dow*, Dow Chemical had refused a second inspection, which the Court implied might have been enough to obtain an administrative "Camara-type" warrant.

MEMORANDUM

TO: NDAA BOARD OF DIRECTORS

RE: ASSET FORFEITURE

FROM: Jim Polley

DATE: February 29, 1996

In December 1995, Commonwealth's Attorney John Kloch, represented NDAA at a meeting with the staff of the Senate Judiciary Committee on potential asset forfeiture legislation. Also in attendance were representatives of the police leadership and membership organizations (FOP, IACP, Sheriffs, Troopers, etc) and the Department of Justice. Mr Kloch, along with Merri Hankins, of APRI, has been working with the Department of Justice to formulate their legislative effort on asset forfeiture.

The Senate Judiciary staff was represented by both majority and minority staff members and the introductory remarks emphasized that Senators Hatch and Biden wanted a bipartisan bill. To this end the DOJ bill would be the set piece of the Senate effort. The purpose of this meeting was to provide law enforcement groups a time-line for introduction of the legislation, elicit any strong problems the various organizations had with the legislation and cement our support for the effort. At that time Senator Biden's staff representative expressed reservations with the legislation and has, apparently, been negotiating with the majority to reshape the bill.

The game plan had been to introduce the Senate bill in mid-February with hearings to follow shortly thereafter. The Judiciary staff had hoped to get this to the floor early into the second session of the Congress. In subsequent discussions with the staff, however, it appears that there is only a minimum expectation that this legislation will pass this year and a possibility that it won't even be introduced. The pending Supreme Court cases on asset forfeiture, the short session and the inability of the Congress to actually get anything passed militate against a serious effort on asset forfeiture until the next Congress.

It appears that the "Hyde" bill is no longer being actively supported by its sponsor. The House Judiciary Committee is planning hearing in June on asset forfeiture but appear to be using the DOJ legislation as the basis for their effort.

From the open discussions at the Senate meeting, it is evident that the biggest issue will be the use of the proceeds from the program. While many groups would have preferred not to have any legislation, recent decisions by federal courts and the Supreme Court make it evident that legislation is necessary to clearly define the parameters of asset forfeiture. The shifting of the burden of proof, in civil forfeiture, will alleviate many of the criticisms while the increased types of forfeitures will enhance the program in the eyes of the law enforcement community. While some "horror" stories will surface most can be refuted and should not pose an overwhelming obstacle to passing the legislation. The more germane arguments will be on distribution of the

assets. There is a strong push to return them to the general funds of the Treasury while the police organizations are adamant they go for "hardcore" law enforcement. Not addressed at the meeting was the judicial reform initiative to first pay the court costs of the proceeding from seized assets.

Even though asset forfeiture legislation may not pass this session of Congress there appear to be several things that local prosecutors can do to buttress the overall effort.

- * First, and perhaps foremost, local prosecutors need to educate their Senators on both the effectiveness of the asset forfeiture program as a law enforcement tool and how the local prosecutor uses any monies they obtain from the program.

- * How prosecutors use the funds is important for two reasons.

- ** Key to retaining forfeited assets for law enforcement programs will be a showing that the funds are not used in a frivolous manner. At the meeting an example was cited where a photocopy machine was purchased with forfeiture funds. This was challenged as not being a true law enforcement use until it was explained that in a major drug case the volumes of documents that needed to be copied for discovery were overwhelming the prosecutor until the new machine was purchased. Explain to your senators what capabilities this program provides to you that you would not otherwise be able to do without your citizens paying extra taxes. For illustrative purposes it might be effective to get your county revenue office to provide some type of projection indicating what additional tax would have to be collected to fund the same types of program(s).

- ** Educating the members of the Congress on how prosecutors use the proceeds will be key to NDAA success in this bill. We don't have the equipment of the police forces and can't offer the sheer voting power of the unions; thus you need to show how the funds don't simply pay for routine activities but that they have a multiplying effect on your work (more bang for the buck). Thus the photocopying machine has a life beyond the single drug case as does the specialized education course on drug prosecution.

- * While much of the discussion on asset forfeiture will center on drug transactions look at other aspects of forfeiture in making your case. If computers are used for child porn and can be seized they have uses that can be capitalized upon by the prosecutor. The trend is to remove the "profit" from all crime; thus make your argument more far ranging.

- * There is a concern that the common "horror" stories will become a prime media event when this legislation is introduced. Mr Hyde's book cites many and others have become common lore for those opposing asset forfeiture. A prime concern is that the ACLU and NRA will again team up to attack law enforcement "encroachment" on everyday life. The media hype they can generate will be popular in the press. If the local prosecutor gets the chance - either by a letter to the editor, an editorial column, or through public appearances - they should take every opportunity to set the record straight. Educate the people of your community; the primary objective of asset forfeiture is to remove the profit from crime. Financial aspects that aid law enforcement efforts are a secondary benefit but they do reduce or limit local taxes.

DOJ is requesting information that they can use as success stories to buttress the need for asset forfeiture legislation. Since NDAA will, most likely, be invited to testify if legislation is actually introduced, the Association could use the same information. What we need are case histories where asset forfeiture:

- * Returned monies or property to victims, such as in fraud cases.
- * Seized property was "returned" to the community in the form of a community drug treatment center, a violence reduction program, etc.
- * Drug trafficking, or other form of crime, was reduced by virtue of the seizure of property (i.e. seizure of a crack house).
- * Forfeiture resulted in the disbanding of a major drug gang or similar organization.
- * Any other "success" stories you believe show both the need for asset forfeiture and how it contributes to the welfare of the community.

The police organizations frequently cite the need for seized monies for to enhance law enforcement and argue that this should be adopted as a meter of public policy. Their position is risky and subject to criticism as a bounty system. As prosecutors we need to show how the community, as opposed to the police, benefits from the seizures.

High Court to Rule on Forfeiture Cases

Suits to Seize Drug Traffickers' Proceeds Raise Double Jeopardy Issue

By Joan Biskupic
Washington Post Staff Writer

The Supreme Court yesterday announced that it will hear a pair of cases that could make or break the federal government's efforts to seize the cash, property and other proceeds of drug traffickers.

In recent years, the federal government and numerous states have gone after narcotics dealing, money laundering and other criminal wrongdoing with a double punch—prosecuting individuals for drug crimes, then seizing proceeds of the wrongdoing in civil forfeiture hearings. In addition to perhaps helping to deter criminal activity, this has produced billions of dollars of seized assets for law enforcement coffers since the late 1980s.

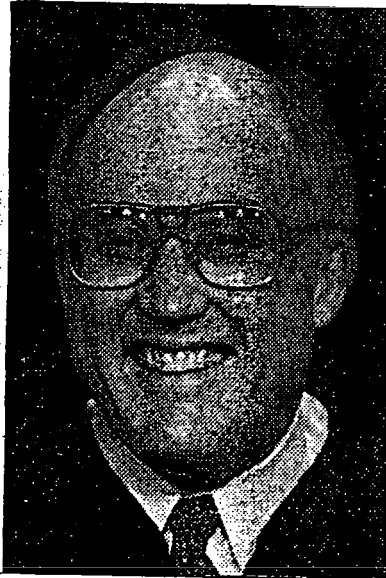
But two appeals courts, in cases from California and Michigan, have ruled recently that the combination of a criminal conviction and a civil forfeiture arising from the same offense violates the Constitution's double jeopardy clause. That provision of the Fifth Amendment protects an individual against multiple prosecutions for the same offense.

In its brief order yesterday, the Supreme Court said it would hear the Justice Department's appeal of both cases, *United States v. \$405,089 in U.S. Currency* and *United States v. Ursery*. Oral arguments are expected to be set in April and a decision handed down before the court recesses in late June.

The justices issued yesterday's order, arising out of a conference late Thursday, while the rest of the federal government in Washington was shut down because of snow. Chief Justice William H. Rehnquist kept the court open every day this week, making it the only government institution in the Washington area continuously running during the blizzard.

Only Rehnquist and Justice Sandra Day O'Connor actually made it to the court building yesterday. (No official session had been scheduled.) As is standard practice for the chief justice, Rehnquist was chauffeured by court police. O'Connor came in on her own in a car with front-wheel drive. "It was scary," she said of her drive through unplowed city streets, according to a court official.

In the California asset forfeiture case, James Wren and Charles Arlt were convicted of various counts of



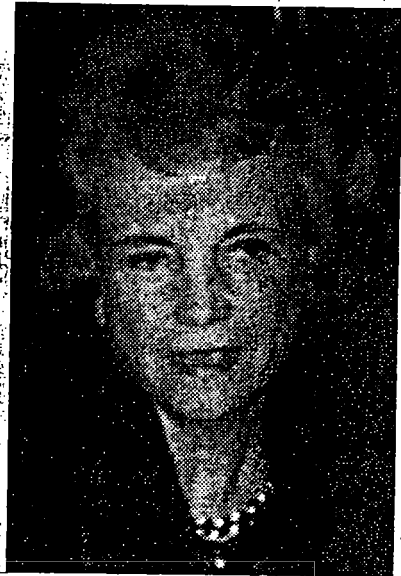
WILLIAM H. REHNQUIST
... kept court open in blizzard

conspiracy and money laundering arising from a large methamphetamine manufacturing operation and a phony gold mining scheme. In a separate civil forfeiture proceeding, they were forced to give up \$405,089 in proceeds.

A three-judge panel of the 9th U.S. Circuit Court of Appeals, ruled that the government's civil forfeiture claim constituted double jeopardy because of the criminal convictions. It said that both government actions against the men arose from identical violations of the identical laws. In an opinion by Judge Stephen Reinhardt, the court said prosecutors could have sought criminal forfeiture as part of the criminal case, rather than seeking a separate civil proceeding. But Reinhardt also noted that the government has an incentive to use a civil proceeding, in which more lenient standards of proof apply.

At the heart of the 9th Circuit ruling, Reinhardt rejected the government's claim that civil forfeiture is not "punishment" for purposes of double jeopardy. Referring to the standards of a 1993 Supreme Court case, *Austin v. United States*, the 9th Circuit said forfeiture historically has been considered a "punishment" and that the federal law used in the case focused on the culpability of a property owner and was tied to the commission of specific crimes.

Appeals Judge Pamela A. Rymer, who dissented from the 9th Circuit's denial of a rehearing in the case, said that if the decision is not reversed, it



SANDRA DAY O'CONNOR
... drove herself to work

"could free hundreds of drug dealers across the western United States... [since] a drug dealer whose illegally obtained proceeds have previously been seized may not thereafter be prosecuted because he will already have been punished."

She asserted that proceeds "are the functional equivalent of contraband," and that a forfeiture is a "remedial sanction that does not constitute punishment for double jeopardy purposes."

In the case from Michigan, the 6th U.S. Circuit Court of Appeals reversed Guy Jerome Ursery's conviction for growing marijuana because in an earlier proceeding he had forfeited \$13,250 based on the wrongdoing. Prosecutors had sought the farmhouse where police had found marijuana and drug paraphernalia, but Ursery agreed to a deal to pay the money rather than forfeit the house.

In urging the Supreme Court to take the cases, Solicitor General Drew S. Days III said the appeals rulings have "created grave uncertainty" about governments' asset forfeiture programs. He said prisoners have lodged "a large number" of appeals based on the rulings in an effort to get their criminal charges dismissed.

The justices in recent terms have been skeptical of governments' forfeiture efforts, ruling that forfeiture must not violate constitutional protection against excessive fines and requiring a hearing before property is seized.

Supreme Court Grants Review In Civil Forfeiture Cases

U.S. v. URSERY

Under *U.S. v. Halper*, 490 U.S. 435 (1989), and *Austin v. U.S.*, 61 LW 4811 (US SupCt 1993), in rem civil forfeiture, pursuant to 21 USC 881(7), of real property used to facilitate drug offense constitutes "punishment" for purposes of Fifth Amendment's Double Jeopardy Clause; forfeiture of real property that facilitated defendant's manufacturing of marijuana requires proof that defendant manufactured marijuana, and, therefore, forfeiture under Section 881(7) and criminal conviction for manufacturing marijuana are punishment for "same offense" for purposes of Double Jeopardy Clause; forfeiture proceeding pursuant to Section 881(7) and criminal prosecution constituted "separate proceedings" for purposes of Double Jeopardy Clause, in view of facts that they were instituted four months apart, were prosecuted by different government attorneys who were not communicating with each other, were presided over by different judges, and were resolved in separate judgments; jeopardy attached in non-trial forfeiture proceeding pursuant to Section 881(7) at time consent judgment was entered; defendant's criminal conviction of manufacturing marijuana following forfeiture of his real property pursuant to Section 881(a)(7) violated Double Jeopardy Clause, and judgment of conviction is reversed.

Question presented: Does Double Jeopardy Clause prohibit defendant's criminal prosecution for manufacturing marijuana because government obtained consent judgment in civil action that sought forfeiture of defendant's property on ground that it facilitated illegal drug activities?

U.S. v. \$405,089.23

In rem civil forfeiture action against property that is both proceeds of narcotics activity, under 21 USC 881(6), and "involved in" money laundering, under 18 USC 981(a)(1)(A), constitutes "separate proceedings," for purposes of Fifth Amendment's Double Jeopardy Clause, from parallel criminal prosecution for same narcotics activity and money laundering, in view of facts that two proceedings were instituted five days apart, were tried at different times before different judges, and were resolved in separate judgments; rather than looking at specific property sought to be forfeited in particular case in order to determine whether statute provides "punishment" for purposes of Double Jeopardy Clause as interpreted in *U.S. v. Halper*, 490 U.S. 435 (1989), courts must, according to *Austin v. U.S.*, 61 LW 4811 (US SupCt 1993), look to entire scope of statute; under factors set out in *Austin*, in rem civil forfeiture, pursuant to Sections 881(6) and 981(a)(1)(A), constitutes "punishment" for double jeopardy purposes; forfeiture under Sections 881(6) and 981(a)(1)(A) is dependent upon proof of underlying criminal offenses, and, therefore, forfeiture based on property's involvement in narcotics activity and money laundering constitutes punishment for "same offense," for double jeopardy purposes, as criminal convictions of narcotics activity and money laundering; forfeiture of claimant's property under Sections 881(6) and 981(a)(1)(A) following claimant's criminal convictions of narcotics activity and money laundering violated Double Jeopardy Clause, and judgment of forfeiture is reversed.

Question presented: Does Double Jeopardy Clause prohibit civil proceeding for in rem forfeiture of property alleged to be proceeds of narcotics and money laundering activities in case in which owners of property were also prosecuted for, and convicted of, narcotics and money laundering crimes?

U.S. v. Ursery

59 F.3d 568 568 (6th Cir. 1995)

JONES, Circuit Judge:

Defendant Guy Jerome Ursery is appealing his conviction and sentence for manufacture of marijuana on several grounds. Because we find that the civil forfeiture judgment followed by a criminal conviction in this case constitute double jeopardy, we reverse the decision of the district court. Because we find this issue to be dispositive, we decline to reach the other issues raised by Ursery in this appeal.

I. Background

In May 1992, the ex-fiancee of Defendant Ursery's son, Heather McPherson, n1 informed the Michigan State Police that Ursery grew marijuana on his property. Based on this information and further investigation by the police, the police obtained a warrant to search the Ursery home. On July 30, 1992, officers executed the warrant and seized 142 marijuana plants growing in six plots from a field to the west of the rural home. While the police initially believed that the field was part of Ursery's property, it was later determined that three of the plots were 25 feet from Ursery's property line and the other three plots were about 150 feet away from the property line. The plants ranged in height from about six inches to two feet. From the Ursery residence, the police obtained an ammunition case with two plastic bags filled with marijuana seeds, two loaded firearms, a box with ten plastic bags containing marijuana seeds, marijuana stems and stalks, and a growlight.

n1 McPherson was Brian Ursery's girlfriend and later fiancée from September 1989 to February 1992.

II. Discussion

Ursery argues that his criminal prosecution and punishment after settlement of a civil forfeiture proceeding based on the same conduct violated the Double Jeopardy Clause of the Fifth Amendment. This court reviews [⁵] de novo the constitutional issue of double jeopardy. *Costo v. United States*, 904 F.2d 344, 346 (6th Cir. 1990).

A. No Waiver

We address first, however, the government's argument that Ursery has waived his claim of double jeopardy. Ursery first raised his claim of double jeopardy in a post-trial Motion for Dismissal. The government argues that Federal Rule of Criminal Procedure [⁵⁷¹] 12 requires that motions which object to the institution of the proceedings must be raised prior to trial or they are waived. See Fed. R. Crim. P. 12(b)(1). Rule 12 also explicitly states that "the court for cause shown may grant relief from the waiver." See Fed. R. Crim. P. 12(f).

Our response to the government's argument is twofold. First, we note that although the government raised this issue of waiver below, the district court did not deem Ursery's double jeopardy argument waived, but addressed the merits of the issue. As such, we are entitled to review this as an issue that was passed upon below.³ Second, we find that Ursery has shown cause for not raising the Double Jeopardy issue prior to trial in indicating that the Supreme Court's decision in *Austin v. United States*, 125 L. Ed. 2d 488, 113 S. Ct. 2801 (1993), which clarified its position that any civil forfeiture under 21 U.S.C. @ 881(a)(7) constitutes punishment, was decided on June 28, 1993, a mere two days before Ursery's criminal trial commenced. Thus, we find that Ursery did not waive his double jeopardy claim, and we turn to the merits of his claim.

³ Even if the district court had not addressed the merits of this issue, we still would be entitled to reach this issue where we find that "injustice might otherwise result." See *Singleton v. Wulff*, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976) (quoting *Hormel v. Helvering*, 312 U.S. 552, 557, 85 L. Ed. 1037, 61 S. Ct. 719 (1941)).

B. Protection of the Double Jeopardy Clause

"The Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989). As the Ninth Circuit has recently noted, "at its most fundamental level [the Double Jeopardy Clause] protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense." *United States v. \$ 405,089.23 U.S. Currency*, 33 F.3d 1210, 1215 (9th Cir. 1994). To decide whether the government has violated Ursery's constitutional right this court must make three key determinations: (1) whether the civil forfeiture in the instant case constitutes "punishment" for double jeopardy purposes; (2) whether the civil forfeiture and criminal conviction are punishment for the same offense; and (3) whether the civil forfeiture and criminal prosecution are separate proceedings. Because we find the answer to each of these questions to be in the affirmative, we hold that Ursery's criminal conviction is a second punishment that violates the Double Jeopardy Clause.

The district court denied Ursery's motion for dismissal on double jeopardy grounds stating the following:

The forfeiture proceeding was settled by a consent judgment. That is not an adjudication. Furthermore, the forfeiture proceeding and criminal conviction were "part of a single, coordinated prosecution of [a] person[] involved in alleged criminal activity." *United States v. Millan*, [2 F.3d 17, 20] (2d Cir. 1993).

J.A. at 29-30. For the reasons that follow, we reverse this holding of the district court.

C. Jeopardy Attached

Before addressing the three key questions of the double jeopardy analysis outlined above, we note our first disagreement with the district court: the fact that the civil forfeiture proceeding was settled by a consent judgment does not preclude a double jeopardy analysis here. The consent judgment in the forfeiture proceeding was an adjudication for double jeopardy purposes because jeopardy attached when the judgment of forfeiture was entered against Ursery.

Ursery's consent judgment in his civil forfeiture action is analogous to a guilty plea entered pursuant to a plea agreement in a criminal case. Although in jury trials, jeopardy attaches when the jury is sworn, *Crist v. Bretz*, 437 U.S. 28, 38, 57 L. Ed. 2d 24, 98 S. Ct. 2156 (1978), and in nonjury trials jeopardy attaches "when the court begins to hear evidence," *Serfass v. United States*, 420 U.S. 377, 388, 95 S. Ct. 1055, 43 L. Ed. 2d 265, (1975), jeopardy attaches to a guilty plea pursuant to a plea agreement upon the court's acceptance of the

plea agreement. *United States v. Smith*, 912 F.2d 322, 324 (9th Cir. 1990); *United States v. Kim*, 884 F.2d 189, 191 (5th Cir. 1989); *Fransaw v. Lynaugh*, 810 F.2d 518, 523 & n.9 (5th Cir.) (collecting cases), cert. denied, 483 U.S. 1008, 97 L. Ed. 2d 742, 107 S. Ct. 3237 (1987); *United States v. Vaughan*, 715 F.2d 1373, 1378 n.2 (9th Cir. 1983). The fact that there has been no trial in which a jury is sworn or the court hears evidence does not preclude jeopardy from attaching to a plea entered pursuant to a plea agreement. Similarly, the fact that there has been no trial in a civil forfeiture proceeding does not precluded the attachment of jeopardy to a forfeiture judgment. Jeopardy attaches in a nontrial forfeiture proceeding when the court accepts the stipulation of forfeiture and enters the judgment of forfeiture. See *United States v. Tamez*, 881 F. Supp. 460, 1995 WL 139362, at * 8 (E.D. Wash. March 1995) (holding that jeopardy attached to stipulated civil forfeiture when court entered the decree of forfeiture).

Nor does the Seventh Circuit's holding in *United States v. Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 130 L. Ed. 2d 603, 115 S. Ct. 669 (1994), support the argument that jeopardy did not attach to the judgment of forfeiture in the instant case. In *Torres* the Seventh Circuit held the following:

Torres received notice inviting him to make a claim in the civil forfeiture proceeding. He did not. As a result, he did not become a party to the forfeiture. There was no trial; the \$ 60,000 was forfeited without opposition, and jeopardy did not attach. You can't have double jeopardy without a former jeopardy. *Serfass v. United States*, 420 U.S. 377, 389, 95 S. Ct. 1055, 1063, 43 L. Ed. 2d 265 (1975). As a non-party, Torres was not at risk in the forfeiture proceeding, and "without risk of a determination of guilty, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Id.* at 391-92, 95 S. Ct. at 1064.

28 F.3d at 1465. *Torres* does not stand for the proposition that jeopardy does not attach to a civil forfeiture when there is no trial; it stands for the proposition that jeopardy does not attach to a civil forfeiture when the party claiming double jeopardy was not a party to the forfeiture proceeding, and thus was never at risk of having a forfeiture judgment entered against him. [**11]

See *United States v. Shorb*, 876 F. Supp. 1183, 1187 n.4 (D. Or. 1995) ("As the law now stands, a criminal defendant who asserts a property claim in a forfeiture proceeding plainly does so under a threat of jeopardy."). See also *United States v. Walsh*, 873 F. Supp. 334, 336-7 (D. Ariz. 1994) (citing *Torres* for proposition that jeopardy did not attach to forfeiture proceeding where defendant did not make any claim in civil forfeiture proceeding); *United States v. Branum*, 872 F. Supp. 801, 803 (D. Or. 1994) (same); *United States v. Kemmish*, 869 F. Supp. 803, 805-06 (S.D. Cal. 1994) (same).

In the instant case, Ursery, unlike Torres, Walsh, Branum, or Kemmish, did make a claim in the forfeiture proceeding, and actively pursued that claim. Not only was Ursery at risk of a forfeiture judgment, he actually suffered forfeiture. Consequently, jeopardy attached when the forfeiture judgment was entered against Ursery.

D. Double Jeopardy Analysis

1. Punishment

In Halper, the Supreme Court considered whether and under what circumstances a civil penalty may constitute "punishment" for the purposes of double jeopardy analysis. 490 U.S. at 436. In Halper, the defendant was first criminally prosecuted for 65 counts of making false medical reimbursement claims totalling approximately \$ 585. He was convicted and sentenced to two years imprisonment and fined \$ 5,000. Subsequently, the government brought a civil action which potentially subjected Halper to a civil penalty of \$ 130,000 for the false claims. The Supreme Court determined that a particular civil penalty could be "so extreme and so divorced from the Government's damages and expenses as to constitute punishment" in spite of its civil label. 490 U.S. at 442. The Court stated the following:

The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. . . . From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.

490 U.S. at 447-49 (citations omitted) (emphasis added). This case provides the foundation for the instant determination.

In 1993 the Supreme Court decided *Austin v. United States*, 125 L. Ed. 2d 488, 113 S. Ct. 2801, in which it held that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures of property under 21 U.S.C. §§ 881(a)(4) and (a)(7). The Court found that civil forfeitures under §§ 881(a)(4) and (a)(7) were punishment because, under the rationale in *Halper*, these penalties did not serve solely a remedial purpose. 113 S. Ct. at 2812. Specifically, after careful review, the Court made the following declaration:

In light of the historical understanding of forfeiture as punishment, the clear focus of §§ 881(a)(4) and (a)(7) on the culpability of the owner, and the evidence that Congress understood those provisions as serving to deter and to punish, we cannot conclude that forfeiture under §§ 881(a)(4) and (a)(7) serves solely a remedial purpose. We therefore conclude that forfeiture under these provisions constitutes "payment to a sovereign as punishment for some offense," *Browning-Ferris [Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257] 265 [(1989)]*, 109 S. Ct. at 2915

Id. (footnote omitted). Thus, under *Halper* and *Austin*, any civil forfeiture under § 21 U.S.C. § 881(a)(7) constitutes punishment for double jeopardy purposes. Cf. *United States v. \$ 405,089.23 U.S. Currency*, 33 F.3d at 1219-22 (holding that civil forfeiture under § 881(a)(6) constitutes punishment for double jeopardy purposes because *Austin* "resolves the 'punishment' issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause").

2. Same Offense

The Double Jeopardy Clause protects the accused from multiple punishments in multiple proceedings for the same offense. Under *United States v. Dixon*, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993) and *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932), the test for whether two offenses constitute the "same offense" is whether "each offense contains an element not contained in the other." *Dixon*, 113 S. Ct. at 2856.

The government argues that the civil forfeiture and criminal conviction here do not constitute punishment for the same offense because the criminal prosecution requires proof that a person, the defendant, committed the crime, while the forfeiture requires proof that the property subject to forfeiture has been involved in the commission of a criminal violation. Thus each offense requires an element that the other does not. We disagree with this analysis.

We find that the forfeiture and conviction are punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense. The forfeiture applies to "all real property ~~and~~ which is used . . . to commit or to facilitate . . . a violation of this subchapter." 21 U.S.C. @ 881(a)(7). Even though the standard of proof is more easily met in the civil action, the fact remains that the government cannot confiscate Ursery's residence without a showing that he was manufacturing marijuana. The criminal offense is in essence subsumed by the forfeiture statute and thus does not require an element of proof that is not required by the forfeiture action. See *Oakes v. United States*, 872 F. Supp. 817, 824 (E.D. Wash. 1994) (reaching this very conclusion) n4 ; see also *United States v. Tilley*, 18 F.3d 295, 297-98 (5th Cir.) ("If the prior civil forfeiture proceeding, which was predicated on the same drug trafficking offenses as charged in the indictment, constituted a 'punishment,' the Double Jeopardy Clause will bar the pending criminal trial."), cert. denied, 115 S. Ct. 574 (1994); *United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489, 495 (9th Cir. 1994) ("Unless the civil forfeiture under @ 881(a)(4) can be predicated upon some offense other than those for which McCulloch has already been tried, the civil forfeiture is barred by the Double Jeopardy Clause."). n5

n4 The court declared the following:

Any forfeiture under section 881(a)(7), therefore, requires a preceding violation of the controlled substance statutes. Thus, the Government could not have attempted to take Mr. Oakes's home had Mr. Oakes not manufactured marijuana on the premises. To accept the Government's argument that the sections involve different elements simply because one section of the statute deals with property and the other people, would be to adopt a circular and illusory theory. 872 F. Supp. at 824.

n5 The fact that the government did not have to prove that Ursery manufactured marijuana to obtain the consent judgment in the instant case does not alter the nature of the same offense test. As with a plea of nolo contendere, the double jeopardy bar is triggered not by the evidence proved, but by the elements charged. Cf. *Brown v. Foltz*, 583 F. Supp. 1063, 1069 (E.D. Mich.) (holding that plaintiff was placed in double jeopardy when he pled nolo contendere to simple larceny and was subsequently convicted of armed robbery since under Michigan law larceny was a lesser-included offense of armed robbery and the convictions arose out of same transaction), aff'd, 754 F.2d 372 (6th Cir. 1984); *United States v. Marcus Schloss & Co.*, 724 F. Supp. 1123, 1126 (S.D.N.Y. 1989) (stating that nolo contendere plea furnishes sufficient basis for double jeopardy claim); *Chikitus v. Shands*, 373 So. 2d 904, 905 (Fla. 1979) (holding that plaintiff's double jeopardy claim based on his prior nolo contendere plea was not barred because relevant consideration is not nature of

evidence adduced at prior trial, but elements of previous crime charged); State v. Gobern, 423 A.2d 1177, 1179 (R.I. 1981) (holding that once nolo contendere plea is accepted by court, jeopardy attaches).

3. Separate Proceedings

The Supreme Court has made clear that the government may "seek[] and obtain[] both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." Halper, 490 U.S. at 450 (emphasis added). There is disagreement among the circuits, however, as to when a civil forfeiture action and criminal prosecution can properly be considered components of a single proceeding so that double jeopardy is not triggered. We find that the facts in this case simply do not support a determination that the civil forfeiture and criminal prosecution constituted such a single proceeding.

In *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994), the Second Circuit concluded that a civil forfeiture suit and criminal prosecution constituted a single proceeding that did not implicate double jeopardy concerns. In reaching this conclusion the court stated the following:

In the instant case warrants for the civil seizures and criminal arrests were issued on the same day, by the same judge, based on the same affidavit by the DEA agent. In addition, the Stipulation agreed to by the parties involved not only the seized properties of the civil suit, but also properties named in the criminal indictment that were under restraining order. Furthermore, the civil complaint incorporated the criminal indictment. Finally, the [Defendants] were aware of the criminal charges against them when they entered into the Stipulation. Given these circumstances, we reach the conclusion that the civil and criminal actions were but different prongs of a single prosecution of the [Defendants] by the government.

2 F.3d at 20. Comparing this statement to the facts of the instant case, the only similarity is that Ursery was aware of the criminal charges against him at the time he settled the civil forfeiture suit. This similarity is insufficient to warrant application of *Millan*'s holding to the instant case.

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In contrast, the Ninth Circuit has rejected the Millan view:

We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding."

\$ 405,089.23 U.S. Currency, 33 F.3d at 1216. The court found that the parallel proceedings in that case were separate proceedings for double jeopardy purposes. *Id.* at 1218.

The government argues that the fact that the civil forfeiture action and criminal action were commenced roughly four months apart should not deter application of Millan, and points to the Eleventh Circuit's recent decision, *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994), in which the court found a single proceeding even though the civil forfeiture action and criminal action began and ended on different dates. The government points to the Eleventh Circuit's explanation that, "as in Millan, there is no problem here that the government acted abusively by seeking a second punishment because of dissatisfaction with the punishment levied in the first action." 13 F.3d at 1499. We do not find this rationale to be dispositive of the issue.

The Ninth Circuit's rationale in \$ 405,089.23 U.S. Currency suggests that parallel civil forfeiture and criminal proceedings will always violate the Double Jeopardy Clause. See 33 F.3d at 1216 ("A forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time.") (emphasis in original). The Ninth Circuit completely rejects the Second and Eleventh Circuit's efforts to consider the parallel proceedings as one prosecution. See *id.* at 1217 ("We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of 'single, coordinated prosecution.'"). While we acknowledge the Ninth Circuit's approach, we also find it unnecessary to fully adopt the Ninth Circuit's view in this case. It is merely our view that in so far as the existence of a "single, coordinated proceeding" could arguably satisfy the requirements of the Double Jeopardy Clause, as suggested by the Second and Eleventh Circuits, the facts in this case fail to reveal such a single, coordinated proceeding. In the instant case, the record reveals no indication that the government intended to pursue the civil forfeiture action and the criminal prosecution as a coordinated proceeding. Moreover, as government counsel made clear at oral argument, there has been no communication between the government attorneys who handled Ursery's criminal prosecution and those who handled the civil forfeiture action. The civil forfeiture proceeding and the criminal proceeding were instituted four months apart, presided over by different district judges, and resolved by separate judgments.

The district court found these two proceedings to be part of a "single, coordinated proceeding" without providing any factual support for this determination. As a matter of principle, applying a label to something does not make it so. Without a reasonable analysis of the indicia of coordination, we do not believe these two proceedings logically become part of a single, coordinated procedure merely by labeling them as such. Similar to the Ninth Circuit, we find that applying the label of "single, coordinated prosecution" to the facts of this case simply goes too far. The civil forfeiture proceeding and the criminal prosecution were two separate proceedings for purposes of double jeopardy analysis. n6

n6 Nor does the Supreme Court's recent holding in *Department of Revenue v. Kurth Ranch*, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994) alter this conclusion. In *Kurth Ranch*, the Court examined "whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense." 114 S. Ct. at 1941. In beginning its analysis, the Court explained that "[the State] no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or indeed, if it had assessed the tax in the same proceeding that had resulted in his conviction. Here, we ask only whether the tax had punitive characteristics that subject it to the constraints of the Double Jeopardy Clause." *Id.* at 1945 (citations omitted) (emphasis added).

In *Kurth Ranch*, the Court found that the tax proceeding, initiated after the taxpayer's arrest for conduct giving rise to the tax obligation, constituted a successive proceeding to the taxpayer's criminal proceeding. *Id.* at 1947 n.21. The Court did not consider whether the contemporaneous criminal prosecution and tax proceeding could be viewed as a "single, coordinated proceeding" for purposes of double jeopardy analysis. See *Torres*, 28 F.3d at 1465 (noting the same in dicta). Instead, the Court found that the State's assessment of the tax in a proceeding separate from the taxpayer's criminal prosecution necessarily constituted separate proceedings for the purpose of double jeopardy analysis. This holding, to the extent that it is applicable to the instant case, is in accord with our view that the civil forfeiture proceeding and the criminal prosecution in the instant case were two separate proceedings for purposes of double jeopardy analysis.

Finally, we note that, contrary to the dissent's suggestion, the fact that the Court did not address the civil forfeiture proceeding which also existed in *Kurth Ranch* simply has no precedential value in this case.

III. Conclusion

For the reasons stated above, we find that the civil forfeiture judgment against Ursery followed by his criminal conviction constituted double jeopardy. Consequently, we reverse the judgment of the district court, and we remand the case to that court with instructions to reverse Ursery's conviction and vacate his sentence.

MILBURN, Circuit Judge, dissenting:

The majority holds that the civil forfeiture judgment followed by a criminal prosecution in this case violates the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States. I respectfully dissent.

Defendant argues that the imposition of criminal punishment against him, in addition to the civil forfeiture proceedings instituted against his home, is prohibited by the Double Jeopardy Clause. However, in its memorandum and order issued on September 14, 1993, the district court denied defendant's motion to dismiss on double jeopardy grounds, finding that the civil forfeiture proceeding and the criminal conviction were "part of a single, coordinated prosecution of [a] person involved in alleged criminal activity," J.A. 29-30, and that such an effort did not violate the Double Jeopardy Clause. For the reasons that follow, I would affirm this holding of the district court.

I.

In *United States v. Halper*, the Supreme Court held that a civil sanction, when applied against an individual also subject to criminal conviction, may constitute "punishment" that requires a double jeopardy analysis. *United States v. Halper*, 490 U.S. 435, 448, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989). However, the Court indicated that its decision was not intended to "prevent the Government from seeking and obtaining both the full civil penalty and the full range of statutorily authorized criminal penalties in the same proceeding." *Halper*, 490 U.S. at 450-51. Thus, the Double Jeopardy Clause offers protection when the government has already imposed a penalty, either civil or criminal, and seeks to impose further punishment out of dissatisfaction with the earlier result, *id.* at 451 n.10, but not in the instance of a single proceeding seeking the full range of available sanctions. See also *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994) (citing *United States v. Bizzell*, 921 F.2d 263, 267

(10th Cir. 1990)) (finding that the order of penalties is not material to the double jeopardy question). The Court recently reaffirmed this principle in *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945, 128 L. Ed. 2d 767 (1994). n1

Unlike the majority, I believe that this case involves a sufficiently coordinated proceeding to fall under the holdings in *United States v. Millan*, 2 F.3d 17 (2d Cir. 1993), cert. denied, 114 S. Ct. 922 (1994), and *United States v. One Single Family Residence Located at 18755 North Bay Road, Miami*, 13 F.3d 1493 (11th Cir. 1994). In *Millan*, the Second Circuit found that the civil forfeiture action against defendant's bank accounts and certain properties and his conviction on narcotics charges were not subject to double jeopardy analysis because the government's actions were part of a "single, coordinated prosecution of persons involved in alleged criminal activity." *Millan*, 2 F.3d at 20. It is true, as the majority points out, that *Millan* involved a much clearer case of coordinated proceedings. However, the Second Circuit's concern in that case, and its focus, was whether the timing of the civil and criminal actions allowed the government to punish the defendant with a second action if it believed that the defendant had not received a sanction that was adequately severe in the first case. The Second Circuit stated that its decision did not run afoul of the Supreme Court's concern in *Halper* that the government might abuse its resources by seeking to punish defendants a second time because the civil and criminal actions at issue were contemporaneous, and it was clear to all the parties that the government was pursuing the full range of its remedies regardless of the outcome in either the civil or criminal proceedings. *Millan*, 2 F.3d at 20-21. This was also the logic of the Eleventh Circuit in *One Single Family Residence*, in which the court found that "the circumstances of the simultaneous pursuit by the government of criminal and civil sanctions against [the defendant] . . . falls within the contours of a single, coordinated prosecution." *One Single Family Residence*, 13 F.3d at 1499. n2 It is this logic that underlies my conclusion that there was no double jeopardy violation in this case.

n1 In *Kurth Ranch*, the Court noted that "Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction." *Kurth Ranch*, 114 S. Ct. at 1945 (citing *Missouri v. Hunter*, 459 U.S. 359, 368-69, 74 L. Ed. 2d 535, 103 S. Ct. 673 (1983)).

n2 In *One Single Family Residence*, a civil forfeiture action was instituted against the home of the defendant in October 1990; five months later, in late March 1991, an indictment was returned against the defendant. The government pursued both remedies, obtaining a conviction on October 30, 1991, and a

subsequent order of forfeiture. The Eleventh Circuit noted, as the Second Circuit had in *Millan*, that the case involved no potential for the government to seek a second punishment out of dissatisfaction with the outcome in the first action because the commencement of a civil action before the imposition of a criminal penalty precluded such a result. *One Single Family Residence*, 13 F.3d at 1499 (citing *Millan*, 2 F.3d at 20).

I believe that the timing of the civil and criminal proceedings and the potential for government abuse of those proceedings are the central factors in assessing the double jeopardy concerns in this case. Such an approach avoids the inevitable difficulty of a case-by-case comparison of the level of coordination, the majority's method for making this determination. Merely looking at whether the proceedings at issue bear sufficient similarity to the proceedings in *Millan* presents the difficult problem of determining how much similarity is required to permit a finding of a single, coordinated proceeding. For example, in this case, the proceedings against defendant and his property took place in close time proximity to one another. The government commenced civil forfeiture proceedings against the home owned by defendant and his wife on September 30, 1992, and a grand jury returned an indictment against defendant on February 5, 1993. Pursuant to a stipulated settlement agreement, the district court entered a consent judgment in the civil forfeiture proceeding on May 24, 1993. Defendant was convicted on the criminal charge on July 2, 1993. It was clear to defendant at the time he entered into the stipulated settlement agreement that the government was pursuing its full range of remedies against him. Is this enough factual similarity to apply *Millan* and *One Single Family Residence*? The majority concludes that it is not, but another panel could easily reach a contrary conclusion. Given the inherent problems in following such an unpredictable approach, I feel it is necessary to determine the case on a more objective and reliable basis. I conclude that this case involves a single, coordinated proceeding because it does not present the potential for government abuse of process; the government instituted and pursued both proceedings against defendant before it knew the outcome of either case.

It is true, as the majority points out, that the civil and criminal proceedings against defendant were handled by separate counsel from the United States Attorney's office and that the government attorneys did not appear to be actively collaborating. However, in *Millan*, the Second Circuit observed that the fact of separate proceedings is not dispositive in determining whether the government is employing a single proceeding to prosecute a defendant. "Civil and criminal suits, by virtue of our federal system of procedure, must be filed and docketed separately. Therefore, courts must look past the procedural requirements and examine the essence of the actions at hand by determining when, how, and why the civil and criminal actions were initiated." *Millan*, 2 F.3d at 20. In this case, the civil and criminal proceedings against defendant

and his property were active during the same time frame, and defendant knew at the time of the settlement in the civil forfeiture action that a criminal action was pending. Moreover, both actions resulted from a search of defendant's property and the surrounding areas, a search that revealed extensive marijuana production and possession.

In *United States v. Torres*, 28 F.3d 1463, 1464-65 (7th Cir.), cert. denied, 130 L. Ed. 2d 603, 115 S. Ct. 669 (1994), the Seventh Circuit questioned the continued applicability of *Millan* and *One Single Family Residence* after the Supreme Court's recent decision in *Kurth Ranch*. However, I do not believe that *Kurth Ranch* necessarily changes this result. *Kurth Ranch* does not hold that every civil action the government pursues against a defendant subject [**31] to other penalties constitutes a separate proceeding. In fact, *Kurth Ranch* itself included a criminal penalty, a civil forfeiture action, a bankruptcy action, and a tax assessment. *Kurth Ranch*, 114 S. Ct. at 1941-44. There was apparently no challenge to the simultaneous pursuit of a criminal action and a civil forfeiture proceeding, the case we are dealing with here. Moreover, the Court, by its own language, distinguished *Kurth Ranch*, noting that the tax statute at issue did not raise "the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." *Kurth Ranch*, 114 S. Ct. at 1947 n.21.

The Court's primary focus in *Kurth Ranch* was on the issue of whether Montana's drug tax constituted a penalty for double jeopardy purposes. The Court never questioned the civil forfeiture action but dealt specifically and exclusively with the tax assessment. The language of the decision suggests that the Court viewed the case as different from other civil actions because it was based on a tax issue. The Court said: "The tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place." *Kurth Ranch*, 114 S. Ct. at 1947. Thus, in *Torres*, the Seventh Circuit interpreted *Kurth Ranch* as dealing with the collection of a monetary penalty for a crime. *Torres*, 28 F.3d at 1464-65. The Montana tax could be imposed only after a criminal conviction was obtained. There was no question that the same conduct was involved. That is not the case here. Defendant did not have to be convicted of the drug offense before a civil forfeiture could be pursued. In fact, the civil proceedings were begun first. Therefore, I conclude that neither the civil forfeiture nor the criminal conviction was imposed as punishment consequent upon defendant's criminal conviction or admission of guilt.

Because I conclude that the government was not acting to pursue a second punishment out of dissatisfaction with the first outcome, the only remaining concern is whether the "total punishment exceeds that authorized by the legislature." *Halper*, 490 U.S. at 450. Defendant was convicted of violating 21

U.S.C. @ 841(a)(1). Under 21 U.S.C. @ 841(b)(1)(B)(vii), defendant was subject to a term of imprisonment of not less than five years, nor more than 40 years; a fine not to exceed \$ 2,000,000; and a term of supervised release of at least four years. Defendant was sentenced to 63 months imprisonment and four years of supervised release. No fine was imposed. Thus, defendant's sentence was clearly within the range of authorized punishment.

In addition, pursuant to 21 U.S.C. @ 881 (a)(7), any real property that is used or intended to be used to facilitate the commission of a violation of 21 U.S.C. @ 801 et seq. that is punishable by more than one year in prison is subject to forfeiture unless the owner qualifies as an "innocent owner." Marijuana stems and seeds were found in defendant's home during the search of his property; furthermore, the police received notice that defendant had been seen with marijuana at his home and had shared marijuana with family members and acquaintances. Defendant's home was, therefore, properly subject to civil forfeiture under 21 U.S.C. @ 881(a)(7), a civil penalty well within the bounds set forth by Congress.

II.

I also note my disagreement with the majority's conclusion that the ³⁴ civil forfeiture action and defendant's criminal prosecution are based on the same offense. The majority concludes that the civil forfeiture and the criminal conviction are punishment for the same offense because the forfeiture necessarily requires proof that defendant was manufacturing marijuana, and the criminal offense is effectively subsumed by the forfeiture. Again, I disagree.

In the criminal prosecution in this case, defendant was convicted of one count of manufacturing marijuana in violation of 21 U.S.C. @ 841(a)(1). For defendant to be found guilty under this statute, the prosecution had to show (1) that defendant manufactured marijuana and (2) that he did so intentionally or knowingly. See *United States v. Litteral*, 910 F.2d 547, 550 (9th Cir. 1990) (requiring the same elements to prove a charge of manufacturing methamphetamine). However, defendant was charged with the manufacture of marijuana only during the year 1992.

By contrast, the civil forfeiture complaint charged that defendant's property was used or intended to be used to facilitate the unlawful processing and distribution of a controlled substance for several years. J.A. 19. In order to prevail ³⁵ in the civil forfeiture action, the government would have to have produced proof of probable cause to believe (1) that the property was used or intended to be used to facilitate the manufacture and distribution of marijuana and (2) that this offense was punishable under Title 21 of the United States Code by imprisonment of more than one year. 21 U.S.C. @ 881(a)(7); *United States v. Real Property Known and Numbered as Rural Route 1, Box 137-B, Cutler, Ohio*, 24 F.3d 845, 848 (6th Cir. 1994). The majority claims that

REINHARDT, Circuit Judge:

This case involves the constitutional limits on the government's ability to seek criminal penalties and civil forfeiture based on the same violations of law. The government brought a criminal prosecution against the claimants at approximately the same time as it instituted this separate and parallel civil forfeiture action under 18 U.S.C. @ 981(a)(1)(A) and 21 U.S.C. @ 881(a)(6). The question is whether the government violated the Double Jeopardy Clause of the Fifth Amendment by obtaining convictions in the criminal case and then continuing to pursue the forfeiture action. We answer the question in the affirmative and reverse the order of forfeiture.

I.

Claimants James Wren, Charles Arlt, and Payback Mines appeal pro se the forfeiture of their property following Wren and Arlt's criminal convictions of various counts of conspiracy and money laundering. In the criminal case, Arlt, Wren, and several others had been accused of conducting a large-scale methamphetamine manufacturing operation. Through a series of front corporations, including Payback Mines, the defendants had sought to create the appearance that they were engaging in legitimate gold mining activities.

The government instituted this civil forfeiture action on June 17, 1991, five days after the grand jury issued a superseding indictment in the parallel criminal case. The forfeiture complaint listed several hundred thousand dollars' worth of property: \$ 405,089.23 in a Security Pacific Bank account; \$ 8,929.93 in three Bank of America accounts; \$ 123,000 in cash and 138 silver bars seized at Mayhill Bail Bonds; one Bell 47 G-2 helicopter; one shrimp boat; a Piper 6 Cherokee airplane; and eleven automobiles and one boat purchased at an auction. The government argued that these pieces of property were connected to the offenses that were the subject of the parallel criminal case. It claimed that the property was forfeitable on two independent grounds: as proceeds of illegal narcotics transactions under 21 U.S.C. @ 881(a)(6), and as property "involved in" money laundering violations under 18 U.S.C. @ 981(a)(1)(A). Arlt, Wren, and Payback Mines filed claims to the res. Pursuant to a stipulation between the parties, the district court effectively stayed the civil forfeiture action pending the completion of the parallel criminal case.

The criminal case terminated on March 27, 1992, with the convictions of Arlt, Wren, and their codefendants. Over eight months later, on December 4, the government filed a motion for summary judgment in the parallel forfeiture action. The government's motion relied on the criminal conviction, a declaration submitted by I.R.S. Special Agent Phillip Mullins, and various pieces of documentary evidence. Asserting that this evidence established probable cause and therefore shifted the burden of proof to the claimants, see 19 U.S.C. @ 1615, the government claimed that the claimants had failed to demonstrate that the property was not subject to

A.

The most basic element of the Double Jeopardy Clause is the protection it affords against successive prosecutions - that is, against efforts to impose punishment for the same offense in two or more separate proceedings. That protection applies with equal force whether the first prosecution results in a conviction or an acquittal. See *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); *Brown v. Ohio*, 432 U.S. 161, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). Whatever other abuses the Clause prohibits, at its most fundamental level it protects an accused against being forced to defend himself against repeated attempts to exact one or more punishments for the same offense. "The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged criminal acts." *Abbate v. United States*, 359 U.S. 187, 198-99, 3 L. Ed. 2d 729, 79 S. Ct. 666 (1959) (opinion of Brennan, J.). This principle is "deeply ingrained in at least the Anglo-American system of jurisprudence," *Green v. United States*, 355 U.S. 184, 187, 2 L. Ed. 2d 199, 78 S. Ct. 221 (1957), and, in fact, traces its roots "deep into Greek and Roman times." *Bartkus v. Illinois*, 359 U.S. 121, 151-52, 3 L. Ed. 2d 684, 79 S. Ct. 676 (1959) (Black, J., dissenting).

There can be little doubt that this case implicates the core Double Jeopardy protection. Over a year after the claimants' criminal convictions, a different district judge in a different proceeding awarded the government title to nearly all of the claimants' property, because of its connection with the very offenses that resulted in criminal punishment. The forfeiture complaint in this case was based on precisely the same conduct addressed in the claimants' criminal case, and it sought to forfeit title to the claimants' property on the basis of precisely the same violations of the same statutes. In short, this civil forfeiture action and the claimants' criminal prosecution addressed the identical violations of the identical laws; the only difference between the two proceedings was the remedy sought by the government. Yet the government could have sought both remedies without subjecting Arlt and Wren to multiple and successive proceedings. It could have included a criminal forfeiture count in the indictment which led to the claimants' convictions. However, it did not choose to follow that course. Rather, it elected to pursue its forfeiture action in a separate and parallel proceeding, which was decided after the criminal trial. By doing so, the government prevented Arlt and Wren from "being able, once and for all, to conclude [their] confrontation with society" at the time of the jury's verdict. *United States v. Jorn*, 400 U.S. 470, 486, 27 L. Ed. 2d 543, 91 S. Ct. 547 (1971) (opinion of Harlan, J.).

The government's actions in this case clearly raise substantial double jeopardy concerns. However, to determine whether these actions violate the Fifth Amendment, we must consider two questions: whether the civil forfeiture action and the claimants' criminal prosecution constituted separate "proceedings," and whether civil forfeiture under 21 U.S.C. @ 881(a)(6) and 18 U.S.C. @ 981(a)(1)(A) constitutes "punishment." If the answer to both of these questions is yes, then the government's actions constituted a successive attempt to impose punishment, in violation of the Double Jeopardy Clause.

For the reasons we have expressed above, we have little difficulty in determining that this civil forfeiture proceeding constitutes a separate "proceeding" from the prosecution which resulted in the claimants' criminal convictions. We recognize that the Second and Eleventh Circuits have recently held in cases like this one that criminal prosecutions do not constitute separate "proceedings" from parallel civil forfeiture actions for double jeopardy purposes. See *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994); *United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993). Those courts relied on the fact that the forfeiture actions and criminal prosecutions took place at approximately the same time and involved the same criminal violations, and were part of a "single, coordinated prosecution." *One Single Family Residence*, 13 F.3d at 1499. For that reason, the Second and Eleventh Circuits refused to conclude that the parallel criminal and civil actions constituted separate "proceedings." However, we believe that the position adopted by the Second and Eleventh Circuits contradicts controlling Supreme Court precedent as well as common sense.

We fail to see how two separate actions, one civil and one criminal, instituted at different times, tried at different times before different factfinders, presided over by different district judges, and resolved by separate judgments, constitute the same "proceeding." n3 In ordinary legal parlance, such actions are often characterized as "parallel proceedings," but not as the "same proceeding." A forfeiture case and a criminal prosecution would constitute the same proceeding only if they were brought in the same indictment and tried at the same time. n4 The government could have sought criminal forfeiture in this case pursuant to 18 U.S.C. @@ 982, 3554 and 21 U.S.C. @ 853. If it had done so and included the forfeiture count in the same indictment as the other criminal counts and then proceeded to trial against the defendants on all counts, the forfeiture case and the criminal prosecution would have constituted the "same proceeding." n5 However, the government chose to proceed against the claimants on two separate fronts - in two separate, parallel proceedings. Because the district court followed the customary practice and held

n3 Cf. *Abbate*, 359 U.S. at 202 (Black, J., dissenting) ("The legal logic used to prove one thing to be two is too subtle for me to grasp.").

n4 We do not mean to suggest that the Double Jeopardy Clause prevents a forfeiture count from being tried separately from other criminal counts based on the same offense if the defendant consents to separate trials. Nor do we express any view as to bifurcated proceedings before the same fact-finder and presiding judicial officer.

n5 Such an attempt to impose multiple punishments in the same proceeding would satisfy the Double Jeopardy Clause so long as the legislature intended to impose both criminal forfeiture and the more standard criminal penalties for a violation of the criminal statutes at issue here. See *Missouri v. Hunter*, 459 U.S. 359, 74 L. Ed. 2d 535, 103 S. Ct. 673 (1983). The issue in such a case would simply be one of statutory construction.

the civil action in abeyance pending the outcome of the criminal prosecution, the government obtained a significant advantage: if it succeeded in the criminal case it could obtain summary judgment based on the conviction (assuming of course that it had probable cause at the time it instituted the forfeiture action), while if it lost it could still seek forfeiture and urge that the more lenient standards applicable in civil proceedings applied. See 1 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, Par. 10.01, at 10-4 to 10-5 (1993) (noting that it is to the government's advantage to have the civil forfeiture action heard after the criminal case). We believe that such a coordinated, manipulative prosecution strategy heightens, rather than [**13] diminishes, the concern that the government is forcing an individual to "run the gantlet" more than once. *Green*, 355 U.S. at 190. We are not willing to whitewash the double jeopardy violation in this case by affording constitutional significance to the label of "single, coordinated prosecution." n6

In fact, the Supreme Court has made clear that parallel actions, instituted at about the same time and involving the same criminal conduct, constitute separate proceedings for double jeopardy purposes. See *Jeffers v. United States*, 432 U.S. 137, 53 L. Ed. 2d 168, 97 S. Ct. 2207 (1977). In *Jeffers*, the government initiated parallel criminal actions against the same defendant based on the same conduct by bringing two separate indictments on the same day. One indictment charged a conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. @@ 841(a)(1) and 846. The other indictment charged Jeffers with conducting a continuing criminal enterprise to violate the drug laws, in violation of 21 U.S.C. @ 848. Jeffers opposed the government's motion to join the offenses for trial, and the district court denied the motion. After the first jury convicted Jeffers of the conspiracy count, he moved to dismiss the continuing criminal enterprise case on double jeopardy grounds. The district court held that 21 U.S.C. @@ 846 and 848 constituted separate offenses for double jeopardy purposes, and accordingly denied the motion. The Seventh Circuit affirmed on the same ground.

n6 Were we to consider successive attempts to exact punishment to constitute the "same proceeding" under the Double Jeopardy Clause simply because they were brought as part of a "single, coordinated prosecution," we would be encouraging one of the worst abuses of prosecutorial power - the government's coordinated use of multiple proceedings to harass or exhaust particular defendants. In one prominent recent example, the federal government unsuccessfully sought to engage in a coordinated campaign of multiple prosecutions in an attempt to shut down one of the largest retail distributors of sexually oriented literature in the United States. See *United States v. P.H.E., Inc.*, 965 F.2d 848, 850-53 (10th Cir. 1992) (describing this campaign); *PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15, 17-20 (D.D.C. 1990) (same). In the cited cases, the Tenth Circuit ordered a hearing regarding whether an indictment arising from this scheme should be dismissed on the grounds of prosecutorial vindictiveness, see 965 F.2d at 860, and the District Court for the District of Columbia issued a preliminary injunction against further prosecution of the scheme. See 743 F. Supp. at 27.

In affirming the judgment of Seventh Circuit, the Supreme Court explicitly rejected that court's reasoning. It held that 21 U.S.C. @ 846 was a lesser included offense of 21 U.S.C. @ 848. Accordingly, the two statutes stated the "same offense" under the Blockburger test, and the second and separate prosecution would ordinarily have been barred by the Double Jeopardy Clause. See *Jeffers*, 432 U.S. at 147-51 (plurality opinion); *id.* at 158 (Stevens, J., dissenting in part and concurring in the judgment in part). However, the plurality of four justices held that, by opposing the government's motion for joinder, *Jeffers* had waived any objection to the maintenance of separate proceedings. See *id.* at 152 (plurality opinion) ("Although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two offenses tried separately and persuades the trial court to honor his election."). In dissent, Justice Stevens (joined by three other justices) argued that *Jeffers* had not waived any double jeopardy objection, and that a separate trial on the second indictment was accordingly barred. See *id.* at 158-60 (Stevens, J., dissenting in part and concurring in the judgment in part). In short, the decisions of eight of the nine justices in *Jeffers* rested on the common sense proposition that two parallel criminal cases, which unquestionably were brought as a part of a "single, coordinated prosecution," constituted "separate proceedings" for double jeopardy purposes. n7 See also *Missouri v. Hunter*, 459 U.S. 359, 360, 366, 367, 368, 369, 74 L. Ed. 2d 535, 103 S. Ct. 673 (1983) (stating that there is no double jeopardy bar to the imposition of multiple punishments at a "single trial") (emphasis added); see also *id.* at 365 [**18] ("Because respondent has been subjected to only one trial, it is not contended that his right to be free from multiple trials for the same offense has been violated.") (emphasis added). We can discern no reason why two proceedings should be deemed one when one of the proceedings involves a criminal prosecution and the other a civil forfeiture action. We conclude, therefore, that whether or not two actions are brought as part of a "single, coordinated prosecution" is irrelevant for purposes of the Double Jeopardy Clause: a civil forfeiture action which is brought and tried separately from a criminal prosecution and is based upon the same offense constitutes a separate "proceeding." Thus, we must turn to the question whether the forfeiture the government seeks to impose constitutes "punishment."

n7 The ninth justice, Justice White, did not discuss this issue, because he concluded that 21 U.S.C. @ 846 was not a lesser included offense of 21 U.S.C. @ 848.

B.

A decade ago, the law was clear that civil forfeitures did not constitute "punishment" for double jeopardy purposes. In *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), the Supreme Court held that the claimant's prior acquittal on criminal charges did not bar a subsequent action for forfeiture under 18 U.S.C. @ 924(d). Applying the test set forth in *United States v. Ward*, 448 U.S. 242, 248, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980), the Court concluded that Congress intended for forfeiture to be "a remedial civil sanction." 89 *Firearms*, 465 U.S. at 363. Accordingly, it held that the Double Jeopardy Clause did not apply.

The *Ward* test, on which the Supreme Court rested its double jeopardy holding in 89 *Firearms*, focused heavily on the label Congress had attached to a particular sanction. If Congress indicated a preference that the proceeding be denominated "civil" rather than "criminal," the Court would defer to that preference except in extraordinary circumstances. See *Ward*, 448 U.S. at 248. However, as sometimes happens, the Court changed its collective mind. It abandoned the *Ward* approach in *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989). There, the Court held that "the labels 'criminal' and 'civil' are not of paramount importance" in determining whether a sanction constitutes punishment for double jeopardy purposes: "The notion of punishment, as we understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads." *Id.* at 447-48. Applying these principles, the Court adopted a new test for determining whether a nominally civil sanction constitutes "punishment" for double jeopardy purposes: "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 448 (emphasis added). Just last year it reaffirmed its new-found wisdom, emphasizing again that a sanction which is designed even in part to deter or punish will constitute punishment, regardless of whether it also has a remedial purpose. See *Austin v. United States*, 125 L. Ed. 2d 488, 113 S. Ct. 2801, 2806, 2812 (1993); see also *United States v. Hudson*, 14 F.3d 536, 540 (10th Cir. 1994) ("Appellants contend that the above quoted language means that unless a sanction is 'solely' remedial, i.e., not serving deterrent or retributive ends, it is punishment. This position is confirmed by the recent Supreme Court decision in *Austin v. United States*.").

Halper involved a civil action brought under the False Claims Act. In *United States v. McCaslin*, 959 F.2d 786 (9th Cir.), cert. denied, 121 L. Ed. 2d 292, 113 S. Ct. 382 (1992), we underestimated its force and refused to apply its rationale in a civil forfeiture action brought under 21 U.S.C. @ 881(a)(7). We held that "*Halper* has no application to the very ancient practice by which instrumentalities of a crime may be declared forfeit to the government." *McCaslin*, 959 F.2d at 788. However, in its subsequent decision in *Austin*, the Supreme Court said that we were wrong and directly rejected our *McCaslin* analysis. In *Austin*, the Court specifically applied the *Halper* test to determine whether a civil forfeiture under 21 U.S.C. @@ 881(a)(4) & (a)(7) constituted "punishment," and it concluded that those provisions did in fact impose punishment under that test. See *Austin*, 113 S. Ct. at 2812 ("In light of the historical understanding of forfeiture as punishment, the clear focus of @@ 881(a)(4) and (a)(7) on the

culpability of the owner, and the evidence that Congress understood these provisions as serving to deter and to punish, we cannot conclude that forfeiture under @@ 881(a)(4) and (a)(7) serves solely a remedial purpose.") (citing Halper, 490 U.S. at 448).

As the government notes, the specific holding in Austin was that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture actions. However, in determining whether the Excessive Fines Clause applied, the Court found it necessary to determine, as we are required to determine here, whether the forfeiture statutes at issue constituted "punishment." It employed the Halper test - the same test it had used to decide whether a civil monetary penalty constituted "punishment" for purposes of the Double Jeopardy Clause - in making that determination. We believe that the only fair reading of the Court's decision in Austin is that it resolves the "punishment" issue with respect to forfeiture cases for purposes of the Double Jeopardy Clause as well as the Excessive Fines Clause. In short, if a forfeiture constitutes punishment under the Halper criteria, it constitutes "punishment" for purposes of both clauses. n8 See Smith, supra. Par. 12.10[2], at 12-131 ("The Supreme Court's decision in Austin v. United States, makes it clear that Halper's double jeopardy protections do apply to the vast majority of civil forfeiture cases.") (footnote omitted). In light of the decision in Austin, and applying the Halper test here, we find the conclusion inescapable that civil forfeiture under 18 U.S.C. @ 981(a)(1)(A) and 21 U.S.C. @ 881(a)(6) constitutes "punishment" which triggers the protections of the Double Jeopardy Clause.

n8 To make it clear, we hold only that because the method of determining whether the forfeiture constitutes punishment is identical, the answer to the question whether a particular forfeiture constitutes punishment will always be the same for purposes of the Double Jeopardy Clause and the Eighth Amendment. Whether a violation of either clause exists involves factors that are different with respect to each clause. Thus, even though we may conclude that a particular forfeiture may involve "punishment," we could still conclude, depending on the facts in the case before us, that both clauses were violated, neither clause was violated, or a violation of one but not the other occurred.

The government argues that the Austin Court's reasoning does not apply to the forfeitures in this case. It asserts that this forfeiture involves only narcotics proceeds, and that such a forfeiture is entirely remedial. The government's position finds support in a recent Fifth Circuit case. See *United States v. Tilley*, 18 F.3d 295, 300 (5th Cir. 1994) (stating that the forfeiture of illegal proceeds does not constitute punishment).ⁿ⁹ We nonetheless reject that argument. We do so because the government fails to recognize the legal standard that Austin established.

Under Austin, in order to determine whether a forfeiture constitutes "punishment," we must look to the entire scope of the statute which the government seeks to employ, rather than to the characteristics of the specific property the government seeks to forfeit. The government appears to assume that we must determine in each case whether the particular forfeiture is so excessive in relation to any remedial goal that it must be denominated as "punishment." However, the Austin Court explicitly refused to apply such a case-by-case approach to determining whether a forfeiture constitutes "punishment." See Austin, 113 S. Ct. at 2812 n.14. Rather, largely because "forfeiture statutes historically have been understood as serving not simply remedial goals but also those of punishment and deterrence," *id.*, the Court held that any determination of whether those forfeitures constitute "punishment" must look to the requirements of the forfeiture statute as a whole. See Smith, *supra*, Par. 12.10 at 12-13 ("the Austin Court thought that in the forfeiture context it made sense to focus on the forfeiture statute as a whole."). In so doing, the Court adopted a categorical approach to "punishment" determinations in the forfeiture context, much like the categorical approach it has adopted for determining whether a particular statute defines a "violent felony" [**27] for purposes of the Firearms Owners' Protection Act. See *Taylor v. United States*, 495 U.S. 575, 600-02, 109 L. Ed. 2d 607, 110 S. Ct. 2143 (1990); see also *United States v. Sherbondy*, 865 F.2d 996, 1005-1010 (9th Cir. 1988).ⁿ¹⁰ To determine whether the forfeiture the government seeks to impose in these proceedings constitutes "punishment," we must focus on the characteristics of the forfeiture statutes on which it relies.

ⁿ⁹ The government also relies on the Fourth Circuit's pre-Austin decision in *United States v. Borromeo*, 995 F.2d 23, 27 (4th Cir. 1993). For the reasons set forth in the text, we believe that *Borromeo* does not survive Austin.

ⁿ¹⁰ The Court's decision in Austin to focus on the forfeiture statute, rather than on the particular conduct alleged by the government, in determining whether the Double Jeopardy Clause applies is also consistent with its decision the same term in *United States v. Dixon*, 125 L. Ed. 2d 556, 113 S. Ct. 2849, 2860 (1993). *Dixon* held that, to determine whether two prosecutions are for the same "offense" under the Double Jeopardy Clause, a court must look to the elements of the statutory offenses charged, rather than the conduct which is alleged to underlie these offenses in the particular case.

While the government appears to rely principally on its argument that the res consists entirely of illegal proceeds, ⁿ¹¹ we will also construe its argument, generously, as contending that the forfeiture statutes involved are limited to the forfeiture of illegal proceeds, and that they therefore do not impose "punishment." This argument not only misconceives the legal standard established in Austin but also misstates the scope of the statutes involved. In determining that forfeitures

under 21 U.S.C. § 881(a)(4) & (a)(7) constituted "punishment" under the Halper test. the Austin Court relied on three facts. First, the Court noted that "the historical understanding of forfeiture as punishment" weighed heavily in favor of the conclusion that forfeiture continues to serve punitive purposes. Austin, 113 S. Ct. at 2812. Second, the Court discerned a punitive purpose from "the clear focus of 21 U.S.C. § 881(a)(4) and (a)(7) on the culpability of the owner." Id. According to the Austin Court, this focus was evident from the fact that the statutes "expressly provide an 'innocent owner' defense," and thus authorize forfeiture only where the owner is himself involved in illegal activity. Id. at 2810. Finally, the Court in Austin relied on "the evidence that Congress understood those provisions as serving to deter and punish" to support its conclusion that the 21 U.S.C. § 881(a)(4) & (a)(7) did not serve solely remedial purposes. Id. at 2812. In substantial part, this evidence consisted of the fact that "Congress has chosen to tie forfeiture directly to the commission of drug offenses." Id. at 2811.

Austin thus makes clear that at least three principles are relevant to determining whether a forfeiture constitutes "punishment." First, because of "the historical understanding of forfeiture as punishment," id. at 2812, there is a strong presumption that any forfeiture statute does not serve solely a remedial purpose. Second, where such a statute focuses on the culpability of the property owner by exempting innocent owners or lienholders, it is likely that the enactment serves at least in part to deter and punish guilty conduct. Finally, where Congress has tied forfeiture directly to the commission of specified offenses, it is reasonable to presume that the forfeiture is at least partially intended as an additional deterrent to or punishment for those violations of law.

n11 If we were to look to the particular facts of this case, it is far from clear that we would accept the government's argument that the entire res consists of narcotics proceeds. The government apparently believes that we can conclude that money and property are derived from narcotics transactions simply because people with an interest in that property have been convicted of engaging in a narcotics conspiracy. Because, with few exceptions, the government has not provided any evidence of a more specific link between narcotics transactions and the property at issue, it would be most difficult, on the record before us, to conclude that the property consists entirely of illegal proceeds.

These principles dictate that forfeiture under the statutes at issue in this case constitutes "punishment." The historically-based presumption that forfeiture is punishment continues to apply. Moreover, the statutes on which the government relies in this case focus on "the culpability of the owner," *id.*, by providing an "innocent owner" defense. See 18 U.S.C. @ 981(a)(2) ("No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder."); 21 U.S.C. @ 881(a)(6) ("No property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."). Finally, in drafting 21 U.S.C. @ 881(a)(6) (directly tying forfeiture to "any violation of this subchapter") and 18 U.S.C. @ 981(a)(1)(A) (directly tying forfeiture to violation of specific criminal statutes), "Congress has chosen to tie forfeiture directly" to the commission of specific offenses. *Austin*, 113 S. Ct. at 2811. Thus, applying the principles set forth in *Austin*, we must conclude that the statutes relied upon by the government in this case operate at least in part to punish and deter.

Moreover, as we mentioned, the government misrepresents the sweep of the forfeiture statutes it invokes in this case. Despite the government's argument, the statutes are not limited to the proceeds of illegal activity. The so-called narcotics proceeds forfeiture statute, 21 U.S.C. @ 881(a)(6), applies to all money "furnished or intended to be furnished by any person in exchange for a controlled substance" as well as to any money which is "used or intended to be used to facilitate any violation of this subchapter." *Id.* (emphasis added). This statutory language is not limited to criminal proceeds - that is, money that has been furnished in exchange for drugs. Rather than rendering only the profits of drug dealers subject to forfeiture, the statute applies to nearly any money that is involved in a narcotics transaction in some fashion. In addition to narcotics proceeds, the statute renders forfeitable money that someone intends to use to purchase drugs, or even money that someone intends to use to purchase a car or boat in order to facilitate an illegal narcotics transaction.

The money laundering forfeiture statute, 18 U.S.C. @ 981(a)(1)(A), is similarly broad. It applies to any property which is "involved in" an illegal money laundering transaction. The government took pains to argue before the district court that property "involved in" a money laundering offense includes more than the actual money that is laundered. See Government's Memorandum of Contentions of Fact and Law (CR 46), at 17-20. Indeed, the government relied on a case which expressly rejected any limitation of @ 981(a)(1)(A) to criminal proceeds. See *United States v. Certain Funds on Deposit*, 769 F. Supp. 80, 84-85 (E.D.N.Y. 1991) ("As the Government contends, limiting the forfeiture of funds under these circumstances to the proceeds of the initial fraudulent activity would effectively undermine the purpose of the forfeiture statute. Criminal activity such as money laundering largely depends upon the use of legitimate moneys to advance or facilitate the scheme."), quoted in Government's Memorandum of Contentions of Fact and Law at 19. n12

As the Supreme Court did in *Austin*, we conclude that the forfeiture statutes at issue here do not serve solely a remedial purpose. Accordingly, "even assuming that [these statutes] serve some

remedial purpose, the Government's argument must fail." 113 S. Ct. at 2812 (emphasis added). The civil forfeiture the government seeks to impose constitutes "punishment." Because the government is attempting to exact this form of "punishment" in a separate proceeding from the claimants' criminal trials, this action is barred by the Double Jeopardy Clause.

III.

The Supreme Court's decision in *Austin* will doubtless have a significant effect on the government's manner of proceeding in many cases. Because in the case of statutes like those before us a criminal prosecution and a forfeiture action based on the same offense must now be brought in the same proceeding - that is, the same indictment - the government will often be forced to choose whether to include a criminal forfeiture count in the indictment (and thus forego the favorable burdens it would face in the civil forfeiture proceeding) or to pursue only the civil forfeiture action (and thus forego the opportunity to prosecute the claimants criminally). If, in such cases, the government wishes both to obtain forfeiture and to impose other forms of criminal punishment, it "will have to rely to a much greater extent on criminal forfeiture." *Smith*, supra, Par. 12.10[2], at 12-131 to 12-132. It is entirely reasonable to put the government to this choice. After *Austin*, the law requires it.

For the foregoing reasons, the judgment of the district court is REVERSED and the case is REMANDED with instructions to dismiss with prejudice.

n12 Because the government argued vigorously in the district court that @ 981(a)(1)(A) is not limited to the proceeds of illegal activity, and it continues to rely on that statute in defending the district court's order of forfeiture, it cannot now claim that this case involves only the forfeiture of illegal proceeds. See *Russell v. Rolfs*, 893 F.2d 1033, 1037-39 (9th Cir. 1990), cert. denied. 501 U.S. 1260, 111 S. Ct. 2915, 115 L. Ed. 2d 1078 (1991).



U.S. Department of Justice

Public Liaison and Intergovernmental Affairs

Office of the Director

Washington, D.C. 20530

January 25, 1996

MEMORANDUM FOR:

Interested Law Enforcement Groups

FROM:


Nicholas M. Gess
Director

SUBJECT:

Expanded and Revised Department of
Justice Policy Respecting Permissible
Uses of Equitably Shared Asset Forfeiture
Funds

We are pleased to provide you with a copy of the Justice Department's new policy regarding the permissible uses which may be made of equitably shared asset forfeiture funds. We have made these changes in response to requests from both prosecutors and police and believe that these changes will permit better law enforcement while guarding against the risk of improper conduct or the perception thereof.

The Asset Forfeiture Section of the Criminal Division is responsible for administration of this policy and you may contact that Section on (202) 614-0430 if you have any questions.

Enclosure

POLICY STATEMENT
(Use of Equitably Shared Asset Forfeiture Funds
To Pay the Salaries and Benefits of Law Enforcement Officers)

1. Asset forfeiture is an effective law enforcement tool the United States uses to deprive criminals of their ill-gotten gains by seizing the proceeds of criminal activity and property used to facilitate crime.
2. Seized property is shared with state and local law enforcement agencies which make substantial contributions to underlying criminal investigations, thereby not only depriving criminals of their ill-gotten gains, but returning the proceeds to law enforcement to use to fight crime. This program is called, "equitable sharing."
3. The prospect of receiving forfeited funds should not influence the relative priorities of law enforcement agencies. Moreover, there should be no appearance that law enforcement decisions are motivated by the prospect of receiving forfeited funds. Accordingly, asset forfeiture funds generally should not be used to pay the salaries of law enforcement officers.
4. However, there are limited circumstances when the use of asset forfeiture funds to pay the salaries and benefits of law enforcement officers is not likely actually to influence or appear to influence law enforcement priorities. In these instances, the use of equitably shared asset forfeiture funds is permitted.
5. In addition to the instances listed in the Department's 1994 Guide to Equitable Sharing, the only circumstances when equitably shared asset forfeiture funds may be used to pay the salaries and benefits of law enforcement officers are:
 - a. When expressly authorized by law;¹
 - b. When a law enforcement agency assigns a law enforcement officer to a task force for a period of no less than a year or the life of the task force and hires a new law enforcement officer to replace the officer so assigned, the agency may pay the salary and

¹ For example, the Community Oriented Policing Services (COPS) program established by the Violent Crime Control and Law Enforcement Act of 1994, expressly permits state and local law enforcement agencies to use equitably shared asset forfeiture funds to meet the local match requirements of that program.

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benefits of the replacement officer from equitably shared asset forfeiture funds as long as the replacement officer does not have the seizure of assets or narcotics law enforcement as his/her principal duty;²

- c. When a law enforcement agency has assigned an officer and paid for his/her replacement as specified in sub-section (b) and it becomes necessary to return the officer so assigned out of the task force, the law enforcement agency may continue to use forfeited funds to pay for the salary and benefits of the replacement officer for a period not to exceed six months.³
- d. A law enforcement agency may pay the salary and benefits of a law enforcement officer assigned to specific approved specialized programs which do not generally involve traditional law enforcement functions. The Attorney General shall establish a list of these programs.⁴
- e. The Attorney General may waive the

² For example, Agency A assigns Officer Y to a joint counter-narcotics task force operated by ten local jurisdictions. Agency A may then hire Officer Z and may pay Officer Z's salary from asset forfeiture funds. Officer Z may not be assigned to a narcotics unit and he may not be assigned to a unit which identifies assets for seizure. On the other hand, he may be assigned to routine patrol duties. If, during the course of his regular patrol duties, he stops a motor vehicle found to contain narcotics and cash, Agency A may continue to pay Officer Z's salary from asset forfeiture funds.

³ This provision is designed to afford law enforcement agencies the opportunity to rearrange staffing assignments without suffering severe financial hardships and also recognizes that the hiring process can take time. If Agency A assigns Officer X to a task force and hires Officer Z to replace Officer X, but later determines it appropriate both to recall Officer X from the task force and not to assign another officer to the task force, Agency A may nonetheless continue to pay Officer Z's salary from forfeited funds for a period of six months.

⁴ Officers assigned to programs such as DARE do not routinely perform narcotics law enforcement or seizure duties. Accordingly, there is little risk that their conduct will actually influence the setting of law enforcement priorities.

prohibitions of this section under such terms as the Attorney General may specify.⁵

6. The term "task force" means a law enforcement entity constituted under Federal, state or local law that is primarily engaged in specific and targeted law enforcement for not less than six months over a geographic area involving more than one local jurisdiction and over which the chief administrative officer of the law enforcement agency assigning an officer under section 3 of this policy does not maintain direct day-to-day operational control, although such chief administrative officer may participate in the policy-level control of such task force.⁶
7. The term "principal duty" means a duty that the officer in question is expected to perform as a regular part of his/her tour of duty.

⁵ The Attorney General may waive the provisions of this policy on a case-by-case basis. Examples include: 1) agencies which have paid for a replacement officer with asset forfeiture funds and have severe budgetary problems which would cause actual interruptions of law enforcement services were the six-month limit on dual payments maintained; and 2) agencies which are prepared to commit law enforcement resources to innovative programs which do not generally involve the actual seizure of assets by the officers so assigned.

⁶ For example, groups of state and local law enforcement agencies frequently establish separate units under the command of an experienced officer. All assigned agents have full law enforcement power within the combined area of the constituent agencies. The chief of police of any one constituent agency does not exercise day-to-day individual command authority over the task force, but may sit as a member of a Steering Committee, Board of Directors or other supervisory authority which sets general task force policies.



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February 9, 1996

James D. Polley, IV
Director, Government Affairs
National District Attorneys
Association
99 Canal Center Plaza
Suite 510
Alexandria, VA 22314

Dear Jim:

As promised, enclosed is our brand new policy on asset forfeiture adopted earlier this month at our Midyear Meeting.

We think it takes a moderate approach, one supported by both defense attorneys and prosecutors in the Criminal Justice Section.

Hope we might work together on this one, if indeed Congress gets around to the issue this year.

Sincerely,

Kevin J. Driscoll

AMERICAN BAR ASSOCIATION
CRIMINAL JUSTICE SECTION
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association urges that federal asset forfeiture laws be amended to comply with the attached "Statement of Principles on the Revision of the Federal Asset Forfeiture Laws," dated November 11, 1995.

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STATEMENT OF PRINCIPLES ON THE REVISION OF THE FEDERAL ASSET FORFEITURE LAWS

(November 11, 1995)

1. **Uniformity and simplicity.** The statutory procedures regarding administrative, civil and criminal forfeiture are mutually inconsistent and unnecessarily complex. In revising these statutes, Congress should simplify the procedures and make them as uniform as possible.
2. **Terms used to describe what is forfeitable.** Likewise, the statutory language describing what property is subject to forfeiture should be amended to avoid use of confusing and inconsistent terms such as “proceeds,” “gross receipts” and “gross proceeds” in favor of uniform, well-defined terms.
3. **Innocent owner defense.** Congress should enact a uniform innocent owner defense applicable to all civil and criminal forfeitures.
4. **Forfeiture as a law enforcement tool.** The seizure and forfeiture of the proceeds and instrumentalities of criminal acts is an important and appropriate tool of federal law enforcement. Congress should encourage the continued use of both civil and criminal forfeiture not only to deter and diminish the capacity of the criminal to commit future criminal acts, but to provide a means of restoring criminal proceeds to victims.
5. **Burden of proof.** Civil forfeiture statutes should be amended to provide that the government bears the burden of proof regarding the forfeitability of property at trial. That is, the government should be required to prove, by a preponderance of the evidence, that the crime giving rise to the forfeiture occurred, and that the property bears the required relationship to the offense.
6. **Time limits.** To enhance the ability of property owners to contest forfeiture actions, Congress should extend and make uniform the time limits for filing claims in civil and administrative forfeiture proceedings.
7. **Third party interests in criminal cases.** Congress should amend the provisions of the criminal forfeiture statutes regarding pre-trial restraining orders to provide a mechanism for addressing the interests of third parties in a timely manner that does not unduly interfere with the criminal trial.
8. **Attorneys fees.** The civil and criminal forfeiture statutes should contain a mechanism by which the court may make an early determination as to whether seized or restrained property may be made available to a criminal defendant to pay attorneys fees.

9. **Restraint of substitute assets.** If Congress provides for the pre-trial restraint of substitute assets in criminal cases, it should exempt assets needed to pay attorneys fees, other necessary cost of living expenses, and expenses of maintaining the restrained assets
10. **Forfeiture of criminal proceeds.** No person has a right to retain the proceeds of a criminal act. Accordingly, Congress should provide for the civil and criminal forfeiture of the proceeds of all criminal offenses, and it should authorize the government to restore forfeited property to the victims of the offense. In particular, this change in the law will eliminate the risk of overuse of the money laundering statutes to forfeit proceeds and restore property.
11. **Scope of criminal forfeiture.** To avoid the necessity of filing and defending successive criminal and civil forfeiture proceedings arising out of the same course of conduct when property is held jointly by defendants and non-defendants, Congress should provide a mechanism for adjudicating the forfeitability of the non-defendants' interests in the forfeited property as part of the ancillary proceeding in criminal cases.
12. **Facilitating property.** When property used to facilitate the commission of a criminal offense is made subject to forfeiture, Congress should enact a standard defining the required nexus between property and the offense.
13. **Availability of criminal forfeiture.** Current law outside of the drug enforcement context requires the government to bring most forfeiture actions as civil actions. The statutes should be amended to give the government the option, in all instances where civil forfeiture is presently authorized, of bringing a criminal forfeiture action as part of the criminal indictment in accordance with the standard rules for criminal forfeiture.

Report

In the summer of 1995, the ABA Criminal Justice Section created a working group to study the need for revision of the federal forfeiture laws and to prepare a report for consideration by the Section and potentially the ABA House of Delegates.

The members of the working group held widely divergent views on the details of any revision of the forfeiture laws, but found that there was general agreement that some legislative changes should be made to ensure that forfeiture is administered in accordance with the requirements of due process. Those areas of agreement were identified as thirteen (13) general principles on the revision of federal asset forfeiture laws. The principles, which represent a carefully balanced consensus between the defense and prosecution bars, were presented to the Criminal Justice Section Council at its fall meeting in Minneapolis, Minnesota. The Section subsequently adopted them for submission to the ABA House of Delegates.

The Section's first recommendation is a call to simplify current federal forfeiture laws and to make it more uniform. The federal code is replete with numerous and varied civil forfeiture laws enacted over the entire history of this country and covering a wide variety of conduct. These varied standards and procedures create uncertainty for property owners and courts, and can even result in disparate treatment of property owners based upon different statutory language adopted without the intent to cause different results.

No effort has ever been undertaken by Congress to reconcile the different standards or procedures for implementation of civil forfeitures, and with the increasing use of forfeiture laws generally, it is appropriate that Congress attempt to impart some uniformity and simplicity into federal forfeiture law. In that vein, the Section's second recommendation is that Congress select and retain uniform terminology, especially for such widely used terms as "proceeds," to describe that property which is forfeitable.

The different language employed by Congress in enacting the innocent owner defenses to civil forfeiture has caused courts to reach different interpretations about the scope of the innocent owner defense and to reach different results based upon property distinctions which may be unfair, unintended, or outdated. Accordingly, the third recommendation is that Congress adopt uniform innocent owner defenses for civil forfeitures and also uniform innocent owner defenses for criminal forfeitures. Because criminal forfeitures are of relatively recent origin, they currently have fairly uniform innocent owner defenses. Hence, the principal need for uniformity lies in the wide variety of different civil forfeiture statutes. Likewise, the Section has recommended that Congress enact statutory language more clearly defining what constitutes property "facilitating" a crime so as to make it subject to forfeiture.

The Section has endorsed forfeiture as a proper and useful law enforcement weapon, particularly in the effort to deprive criminals of the proceeds of their criminal conduct, and recognizes, ~~as has the Supreme Court,~~ that forfeiture has a punitive role in deterring crime. Nonetheless, the Section has called for modification of the existing civil forfeiture laws to prove that

the government must prove that property is forfeitable through a preponderance of admissible evidence, in contrast to the currently prevailing probable cause standard which the Section deems inadequate to protect the interests of property owners.

The Section urges Congress to extend and make uniform the time limits within which property owners can challenge civil or administrative forfeitures. Currently, property owners lose the ability to challenge many civil forfeitures unless they take legal action within ten (10) days of seizure, and this time period is an inadequate and unjustifiably short time in which to locate and consult or retain counsel to protect their interests.

The Section also urges Congress to amend the criminal forfeiture laws as they relate to third party property rights. Specifically, the current laws do not expressly provide that third parties have a right to challenge or to participate in pretrial decisions concerning restraints or seizures of assets pending completion of the criminal trial, and this may place third party property rights in a state of limbo for months and even years. Conversely, the government has a legitimate interest in avoiding pretrial disputes which would interfere with the criminal trial. The Section thus recommends that Congress amend the criminal forfeiture laws to provide a mechanism for pretrial judicial review of third party claims which would not unduly interfere with the criminal trial.

Similarly, the post-trial ancillary proceedings under 21 U.S.C. § 853(n) do not provide third parties with either a jury trial right or a right to address the forfeitability of their property, rights which are afforded claimants in civil forfeiture proceedings. Conversely, the government must often initiate separate and burdensome civil forfeiture proceedings after completion of a successful criminal prosecution in order to perfect a claim to title. The Section recommends that Congress consider modifying the existing post-trial ancillary procedures to provide for a fair adjudication of the rights of non-defendants in the forfeitable property.

In 1986, Congress provided for the criminal forfeiture of a defendant's legitimate assets as a substitute for forfeitable assets which are made unavailable for forfeiture by the defendant prior to his conviction. See, e.g., 21 U.S.C. § 853(p). The government's use of the statutory authority to forfeit such "substitute assets" as the basis for seizing or restraining the defendant's use of his legitimate property prior to his criminal trial is an issue that has divided courts and counsel. The Section recommends that if Congress were ever to provide express authorization for this practice, assuming arguendo that it has not already, that Congress should exempt from such restraints or seizure all assets needed by a defendant pretrial to pay for his attorney's fees or other necessary living expenses.

The Section recommends that the proceeds of crime be returned to its victims, and in furtherance of this goal recommends that the proceeds of all federal crime be forfeitable. While this may dramatically expand current forfeiture law, it would have the effect of discouraging the prosecutorial use of money laundering prosecutions, with their enhanced penalties, as the means of securing the forfeiture of proceeds. More important, as with other recommendations of the Section, the Section strongly urges Congress to consider this principle in the context of the other principles,

such that expansion of the forfeiture laws in this area would be accompanied by the enhanced procedural and substantive protections as to which the Section has reached a consensus.

Finally, the Section sees no reason why the government should not be able to use civil forfeiture laws to achieve the criminal forfeiture of a convicted defendant's assets so long as the requirements of the criminal law, such as compliance with the Criminal Rules of Procedure and other applicable constitutional or statutory provisions are followed.

Respectfully submitted,

Hon. Cara Lee Neville
Chairperson,
Criminal Justice Section

February 1996

MEMORANDUM

TO: NDAA BOARD OF DIRECTORS

RE: JUVENILE JUSTICE

FROM: Jim Polley

DATE: February 29, 1996

As predicted, juvenile justice is shaping up to be a prime topic for this session of Congress. Senator Thompson (R-TN), Chairman of the Youth Violence Subcommittee, Senate Judiciary Committee, has begun holding hearings on the reauthorization of the Juvenile Justice and Delinquency Prevention Act. The first two were held in Tennessee (where he's up for re-election this year) and the third in Washington. Copies of testimony from the Washington hearing are available at the Juvenile Justice Committee meeting. His staff has indicated that they do not have a specific agenda to fulfill and are holding the hearings to determine the scope of the problem and the range of solutions. NDAA will be invited to testify on Federal mandates later in the spring.

The Administration has also advanced legislation (attached) promoting federal prosecution of juveniles. To date the bill has not been introduced.

Also still pending is the legislation introduced by Senator Ashcroft (R-MO), the "Violent and Hard Core Offender Reform Act" (provided at the November 1995 Board Meeting). Previous review by the NDAA Board of Directors indicated the belief that it was an unwarranted attempt to place federal requirements on what is properly a local issue.

Senator Kohl (D-WI) is planning to introduce legislation loosening federal mandates and Senators Specter (R-PA) and Kohl have legislation pending (S. 724, the "Juvenile Corrections Act of 1995") on funding for juvenile incarceration.

In the area of prevention, Senator Kassebaums' (R-KS) Youth Development Block Grants have not progressed. With the appropriations stale mate over the DOJ grant programs this is not likely to pass since much of its funding would come from the Crime Bill Trust Fund.

States go harder on juvenile criminals

Young offenders strain systems

By Joyce Price
THE WASHINGTON TIMES

A Virginia bill that would open juvenile courts to the public and require teen-agers charged with murder or rape to be tried as adults is part of a national trend toward dealing more harshly with serious juvenile offenders.

This tendency has fueled anti-gang ordinances and anti-cruising laws, led to teen curfews in roughly three-fourths of the nation's 200 largest cities, and prompted at least 24 states and the District of Columbia to make more juveniles eligible for criminal court.

The goal, obviously, is to hold juveniles accountable for the sharp rise in violent crimes they are committing.

"Juvenile crime is absolutely an epidemic that's raging throughout the nation. ... Youths under the age of 25 account for almost half of the violent crime," said David G. Walchak, police chief of Concord, N.H., and president of the International Association of Chiefs of Police.

Chief Walchak called the tougher measures "helpful" and "necessary." "Juvenile arrests doubled between 1983 and 1992, and they are expected to double again by 2010 ... and gun homicides by juveniles have nearly tripled since 1983," he said.

Howard B. Merker, deputy state's attorney for Baltimore County, said he understands the urge. "Something has to be done to put the concept of punishment in the juvenile [justice] system, rather than the premise of rehabilitation it was based on," he said.

When the juvenile court system was established in the 19th century, Mr. Merker said, "they were dealing with misdemeanors. ... No one then could imagine that kids could commit the kinds of

VIOLENT JUVENILE CRIME RISING

U.S. juvenile courts handled 68 percent more violent crimes in 1992 than in 1988. Cases involving property crime climbed 20 percent during the same period.

Offense	1992 cases	Percent change 1988-92
Total	1,471,200	26
Person offenses	301,000	56
Homicide	2,500	55
Forcible rape	5,400	27
Robbery	32,900	52
Aggravated assault	77,900	80
Simple assault	152,800	47
Other violent sex offenses	9,900	60
Other person offenses	19,800	63
Property offenses	842,200	23
Burglary	156,400	22
Larceny-theft	361,600	16
Motor vehicle theft	73,000	34
Arson	8,300	24
Vandalism	121,700	50
Trespassing	58,500	17
Stolen-property offense	28,900	- 7
Other property offense	33,700	57
Drug law violations	72,100	- 12
Public order offenses	255,900	21
Obstruction of justice	87,100	10
Disorderly conduct	69,300	50
Weapons offense	41,000	86
Liquor law violations	12,500	- 26
Non-violent sex offenses	12,900	19
Other public order offenses	33,000	- 8
Violent crime index	118,600	68
Property crime index	599,400	20

Source: "Juvenile Court Statistics 1992," a report prepared by National Center for Juvenile Justice for the federal Office of Juvenile Justice and Delinquency Prevention

The Washington Times

crimes they are committing today. ... Not long ago, truancy was classified as a delinquent act."

Mr. Merker said Maryland has a law that says "any 14-year-old who commits a crime that causes death or a life-threatening injury is automatically considered an adult [and tried in criminal court]."

A 1995 General Accounting Office report that looked at 1989 and 1990 criminal court data for seven states found that in six of the seven, most juveniles prosecuted for serious violent and property offenses and drug violations were convicted.

The GAO found that in four of the seven states more than half of

the juveniles sentenced in criminal court were incarcerated.

Some Maryland lawmakers believe even tougher legislation is needed. Mr. Merker said a bill under consideration by the legislature would open the adult criminal court system to youth of any age who commit certain violent crimes.

Not everyone likes this emphasis on punishment rather than rehabilitation.

"Juvenile crime only accounts for 18 percent of all violent crime, and yet juveniles are being blamed for everything," said Scott W. Henggeler, a psychologist at the Medical University of South Caro-

lina, who developed some successful programs for treating violent juvenile offenders.

Said Melissa Sickmund of the National Center for Juvenile Justice, co-author of a 1995 "national report" for the Justice Department that examined juvenile offenders and victims: "More than half the states have made changes in laws dealing with disposition of cases involving juveniles. These changes are being driven by public and political perceptions of juvenile crime that may be unwarranted."

Mrs. Sickmund acknowledged arrest rates indicate that ages "15 to 25 are violence-prone years." But she pointed out that "most of the legislative action" and "media focus" have been on crime committed by "those under 18."

According to charts in the national report on juvenile offenders and victims, based on FBI crime data and prepared for the Office of Juvenile Justice and Delinquency Prevention, percentage increases in juvenile and adult arrests have been "roughly similar over the past 10 years" except for murder, weapons violations and auto theft.

In those three areas, juvenile arrests "far surpassed the growth in adult arrests," the report said. It found that the average increase for murder arrests by juveniles "was double the average increase for young adults."

Chief Walchak said street gangs have been a significant factor in the increased homicide rates by juveniles in some areas.

"For example, since 1990, street gangs have been responsible for more than a third of all homicides in Los Angeles County," he said.

MONDAY, JANUARY 1, 1996 ★

ABA says accused juveniles need better defense

ASSOCIATED PRESS

Too many youths in trouble are left without lawyers — a particularly troubling prospect as juvenile courts are doling out tougher punishments, a new American Bar Association study finds.

The report, titled "A Call for Justice," says juvenile court defendants in some parts of the country regularly appear with no lawyer at their side, or with an overworked lawyer whose caseload makes effective help impossible.

"The juvenile court system never has been properly empowered to do the job it can do," ABA project director Patricia Puritz said in an interview.

"As society tries to turn the screws in its current get-tough mood, the report recognizes that there must be fairness and some degree of accuracy," she said. "The illusion of representation doesn't contribute to fairness or accuracy."

In some states, the report says, racial and ethnic minorities are likely to be dealt with more harshly than whites. Those states

"The need for access to quality defense attorneys for juveniles has never been greater. . . . At several sites, children literally met their lawyers . . . at the detention hearings."

are not identified by name.

The report, two years in the making, was funded under the federal Juvenile Justice and Delinquency Prevention Act of 1992. The report, based on a survey of hundreds of juvenile court defense lawyers and defendants, was prepared by the ABA and two advocacy organizations, the Youth Law Center in Washington and the Juvenile Law Center in Philadelphia.

"The juvenile justice system is a sick patient," the Juvenile Youth Center's Robert Schwartz said in an interview. "The next few years will be telling."

The report says: "Youth face the prospect of much longer sen-

tences, mandatory minimum sentences, and time in adult jails or prisons. . . . The need for access to quality defense attorneys for juveniles has never been greater."

But the report finds that juvenile court defense lawyers work, on average, on more than 500 cases at any one time. "At several sites, children literally met their lawyers as they sat down at counsel table in the detention hearings," the report says.

And more than half the public defenders in juvenile courts remain in their jobs less than two years, meaning most are inexperienced.

The report cites "serious gaps

in the training available to juvenile defenders." It says about half of all public defender offices lack any money to send even new lawyers to training programs; 78 percent lack continuing-education funds.

The report also says low salaries and low morale are common.

Among the recommendations the report makes are these:

- State and local governments should create programs aimed at improving the quality of legal representation.

- State legislatures should provide the funding for such programs.

- State and local bar associations should encourage more lawyers to provide their services free of charge to juvenile court defendants.

- Public defender offices should ensure that their lawyers have manageable caseloads and develop community-based services.

- Congress should hold hearings to document the quality and accessibility of lawyers in juvenile courts and the protection of children's rights.

Marijuana Use by Youths Continues to Rise

By CHRISTOPHER S. WREN

The use of marijuana by adolescents continues to bound back after years of decline, and parents, many of whom once tried drugs themselves, may not have a clue that their own children are experimenting too, according to a nationwide survey scheduled for release today.

The survey, commissioned by the Partnership for a Drug-Free America, tracked attitudes toward drugs last year among 8,520 children and 822 parents across the United States.

"A profound reversal in adolescent drug trends is continuing," the survey found, with teen-agers more tolerant about marijuana and drugs in general.

The survey attributed this in part to a glamorization of drugs in pop music, movies and television shows and to an absence of national and community leadership in discouraging experimentation with drugs.

"Today's teens are less likely to consider drug use harmful and risky, more likely to believe that drug use is widespread and tolerated, and feel more pressure to try illegal drugs than teens did just two years ago," the survey reported.

But it also found that there was still resistance to some hard drugs like crack cocaine, and that so far, adolescent drug use was below the peak years of the late 1970's, although higher than the low point that was reached in 1992.

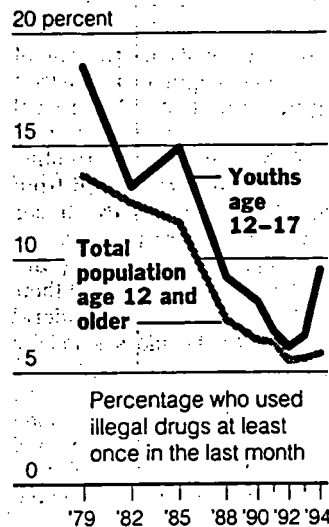
Parents also underestimate their children's encounters with drugs, the survey reported. Only 14 percent of the parents interviewed thought their children had experimented with marijuana, while 38 percent of the teen-agers said they had tried it. And 34 percent of the parents thought their children might have been offered drugs, while 52 percent of the teen-agers said they had.

Underscoring the lack of communication, 95 percent of the parents said they had discussed drugs with their children, but only 77 percent of the children reported such talks.

Three out of every four parents interviewed said they would be upset if their children tried drugs, even though 60 percent of the parents admitted they had used marijuana themselves at some time in their lives. Even so, 77 percent agreed that parents should forbid their children to use drugs at any time. Only 9 percent felt hypocritical about giving such warnings.

"We find parents strongly anti-drug and committed to their children's non-use," the survey said. "However, we do find that parents are suffering from a 'not my kid' syndrome."

Youth Drug Use Rising Again



Source: Department of Health and Human Services, National Household Survey on Drug Abuse

As evidence that greater parental involvement discourages drug use, the survey found that teen-agers were twice as likely to use marijuana in the past year if they had not learned about the risks from their parents.

But one-third of the parents said they felt they had little influence over whether their children would try marijuana. And 57 percent welcomed information that would persuade their children not to do so.

The study was conducted for the Partnership for a Drug-Free America by Audits & Surveys Worldwide, a market research company in New York. This survey, like one done two years ago, was based on confidential questionnaires in schools and homes across the country. Six earlier surveys done by another company had relied on encounters with young people in shopping malls.

The study confirms other reports that drug use by adolescents has been rising since 1992. An annual National Household Survey on Drug Abuse issued by the Substance Abuse and Mental Services Administration, part of the Department of Health and Human Services, reported that monthly use of illicit drugs by adolescents 12 to 17 years of age dropped from 1985 to 1992, from 3.2 million to 1.3 million, only to increase to 2.1

million in 1994.

Lloyd D. Johnston, a social psychologist at the University of Michigan's Institute for Social Research, described the resurgence as a case of "inter-generational forgetting," as adolescents who learned the dangers of drugs grew up and moved on. He said the resurgence did not extend to college students or young adults.

"Each new generation needs to learn the same lessons about drugs if they're going to be protected from them," said Dr. Johnston, a specialist on drug use by adolescents. "Unless we do an effective job of educating the newer generations, they're going to be more susceptible to using drugs and have their own epidemic. And I think that's what is happening now."

Dr. Johnston's own study, "Monitoring the Future," which was made public last December, reported that since 1992, the number of 12th-grade students taking drugs in the previous 12 months rose to 35 percent from 22 percent, and that the number of 10th-grade students doing so increased to 29 percent from 15 percent. Most alarming, from 1991 to 1995 the number of eighth graders trying drugs nearly tripled, to 16 percent from 6 percent.

James E. Burke, chairman of the Partnership for a Drug-Free America, said the trend was disturbing because it echoed what happened in the late 1960's, when the use of drugs became trendy with young people. "After years of tremendous progress, the country is losing precious, hard-won ground in its effort to curb adolescent drug use," Mr. Burke said in a statement.

The survey reported that the number of teen-agers who agreed that "taking drugs scares me" declined to 36 percent from 47 percent since the last survey in 1993, and that the number of teen-agers saying that "being high feels good" rose to 45 percent from 33 percent.

Children 9 to 12 years of age were more opposed to drugs but also reported being offered marijuana or having friends who used it. The survey included 2,424 children in the 4th through the 6th grades, and 6,096 adolescents in the 7th through the

A CLOSER LOOK

Drug Use Among Teen-agers: Is it Socially Acceptable?

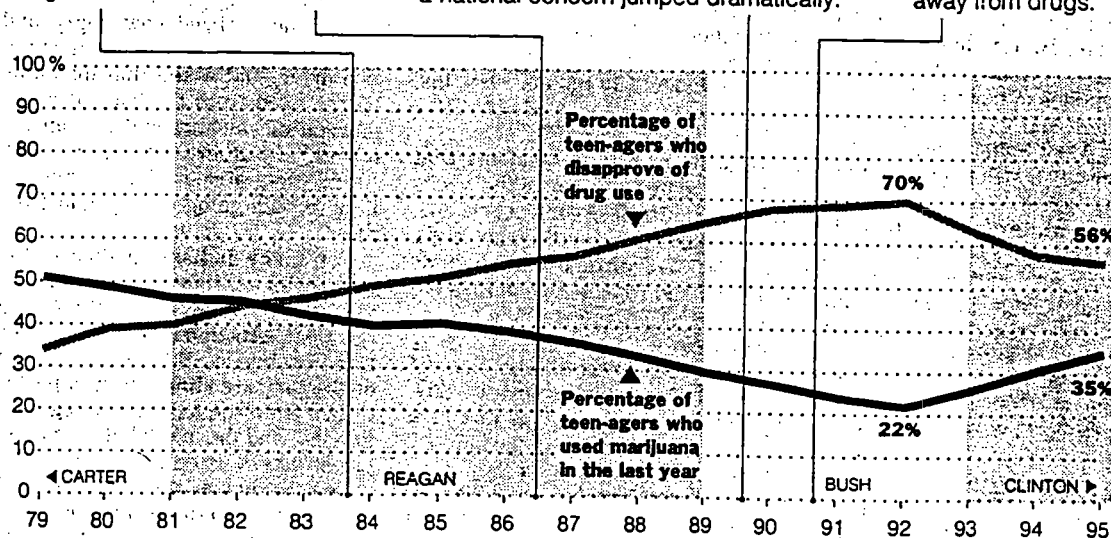
This chart shows the percentage of 12th graders who used marijuana compared with the percentage of teen-agers who say that drug use is socially unacceptable, and significant events involving drug use:

OCT. 1983
Nancy Reagan's "just say no" to drugs campaign began.

JUNE 1986
Basketball star Len Bias died from an overdose of cocaine.

SEPT. 1989 During a prime-time television speech, George Bush holds up a bag of crack cocaine seized near the White House. Public opinion rankings of drugs as a national concern jumped dramatically.

AUG. 1990 The onset of the Persian Gulf war began to focus national attention away from drugs.



Source: Monitoring the Future study, University of Michigan Institute for Social Research

12th grades.

Specialists in drug use like Mr. Burke and Dr. Johnston see a link between the increase in the use of marijuana by teen-agers and fewer warnings by politicians, the press and the entertainment industry.

Nancy Reagan's admonition to "just say no," while ridiculed by her critics, presaged a fall in illegal drug use by adolescents in the 1980's, the

specialists say. A fatal cocaine overdose by the basketball star Len Bias in June 1986 also had an impact.

The resurgence began in 1992, the last year of George Bush's Presidency, and continued under President Clinton. Although drugs have not become a major political issue this election year, they worry many Americans. A Gallup Poll last December reported that 94 percent of

those surveyed considered drugs a serious problem.

The Partnership for a Drug-Free America uses surveys like the one being made public today to develop advertising campaigns and other publicity aimed at discouraging drug use. Ginna Marston, the organization's research director, said objective data were needed to formulate strategies and gauge their success.

Department of Justice Juvenile Justice Legislative Proposal "Enhanced Prosecution of Dangerous Juvenile Offenders Act"

In January 1996, the Justice Department transmitted the above titled bill to Congress that would amend current Federal Juvenile Delinquency statutes. The bill is expected to be introduced early in Congress' legislative session. Highlights of the bill include the following:

Prosecution of Serious Offenders as Adults

Prosecutors would have the discretion to prosecute serious juvenile offenders as adults. For certain serious felonies, prosecutors would have the discretion to charge a juvenile who was 15, 16 or 17 at the time of the offense as an adult or as a juvenile. For certain serious felonies, prosecutors would have the discretion to charge a juvenile who was 13 or 14 at the time of the offense as an adult only with the approval of the Attorney General or designee at a level not lower than Deputy Assistant Attorney General.

The list of offenses for which a juvenile may be tried as an adult would be augmented to include drug conspiracies and several additional firearms offenses.

Detention of Serious Juvenile Offenders Prior to Disposition

Governs the type of facilities in which a juvenile can be detained prior to trial if he is charged as an adult and deemed a danger to the community or a risk of flight.

Detention of Serious Juvenile Offenders Post-Disposition

A juvenile offender convicted as an adult could be confined with adults. A juvenile adjudicated delinquent could not be confined with adults until he was 21, except for placement in a community-based facility.

Treatment of Juveniles Adjudicated Delinquents

Fines, supervised release and mandatory restitution would apply to adjudicated delinquents. The maximum period of official detention would be increased to 10 years to give judges increased sentencing flexibility for juveniles who are adjudicated delinquent but in no event exceed the age of 25. The maximum period for probation would be increased to the same periods applicable to an adult.

Use of Juvenile Records

The bill would expand the permitted use of juvenile records. The information that could be provided to victims of juvenile offenses would be expanded. Fingerprints and photographs of adjudicated delinquents found to have committed the equivalent of an adult felony offense or possession of a handgun by a juvenile would be sent to the FBI and made available in the manner applicable to adult defendants.



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 19, 1996

Honorable Newt Gingrich
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed is a legislative proposal to amend the federal juvenile delinquency statutes, 18 U.S.C. § 5031 et seq., to facilitate the vigorous prosecution of serious juvenile offenders.

The legislation I am transmitting today is intended to respond to the critical problem of youth violence by dramatically strengthening the federal laws which can be used to deal with certain serious juvenile offenders who fall within federal jurisdiction. While, as with most crime, it is the States that must shoulder the bulk of the burden with respect to violent juvenile offenders, the Federal Government has the responsibility to assure that its laws represent an effective and contemporary framework for protecting the public safety.

In this regard, current federal law is outmoded and inadequate. While rehabilitation must remain an important and dominant goal for most federal juvenile offenders, our statutes need to be amended to better address the small but highly dangerous and growing number of juvenile offenders whose criminal records or offenses are so serious that they have forfeited the right to lenient treatment and must, like adults, receive swift and certain punishment as well as prison sentences that will ensure the public's safety.

This legislation will accomplish this objective. The proposed legislation would afford prosecutors the discretion to determine whether or not a juvenile offender should be prosecuted as an adult criminal or as a juvenile delinquent. This system, in force in several States, will greatly simplify current, cumbersome procedures by eliminating the need for time-consuming judicial hearings and interlocutory appellate review. In addition, the proposed bill toughens federal law, by adding

- 2 -

certain serious drug and firearms offenses to the list of serious offenses for which juveniles can be tried as adults, and by increasing the time for which juveniles adjudicated delinquent for serious misconduct may be confined.

We urge early consideration and enactment of this important legislation. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this legislative proposal.

Sincerely,



Andrew Fois
Assistant Attorney General

Enclosure



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 19, 1996

Honorable Albert Gore, Jr.
President
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Washington, D.C. 20510

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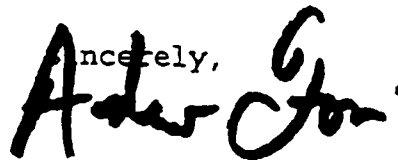
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Sincerely,


Andrew Fois
Assistant Attorney General

Enclosure

A BILL

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

SEC. 1. This Act may be cited as the "Enhanced Prosecution of Dangerous Juvenile Offenders Act of 1995".

SEC. 2. DELINQUENCY PROCEEDINGS OR CRIMINAL PROSECUTIONS IN DISTRICT COURTS

Section 5032 of title 18, United States Code, is amended to read as follows:

"§ 5032. Delinquency proceedings or criminal prosecutions in district courts

"(a) (1) A juvenile alleged to have committed an act of juvenile delinquency shall not be proceeded against in a court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (A) the juvenile court or other appropriate court of a State does not have jurisdiction or declines to assume jurisdiction over the juvenile with respect to such act of alleged juvenile delinquency, or (B) the offense charged is described in subsection (b) (2) (i) - (vi), and (C) there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction. The requirements of this paragraph do not apply to prosecutions pursuant to subsections (b) or (c) or for offenses committed within the special maritime and territorial jurisdiction of the United

States for which the maximum authorized term of imprisonment does not exceed six months.

"(2) If the Attorney General does not so certify, such juvenile shall be surrendered to the appropriate legal authorities of such State. For purposes of this section, the term 'State' includes a State of the United States, the District of Columbia, any commonwealth, territory, or possession of the United States and, with regard to an act of juvenile delinquency that would have been a misdemeanor if committed by an adult, a federally recognized tribe.

"(3) If a juvenile alleged to have committed an act of juvenile delinquency is not surrendered to the authorities of a State pursuant to this section, any proceedings against the juvenile shall be in an appropriate district court of the United States. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The Attorney General shall proceed by information or as authorized by section 3401(g) of this title, and no criminal prosecution shall be instituted except as provided below.

"(b) A juvenile may be prosecuted as an adult under the Federal Rules of Criminal Procedure --

"(1) if the juvenile has requested in writing upon advice of counsel to be proceeded against as an adult; or

"(2) if the juvenile is alleged to have committed an

act on or after the juvenile's fifteenth birthday which if committed by an adult would be --

"(i) a crime of violence (as defined in section 3156(a)(4)) that is a felony;

"(ii) an offense described in section 844(d), (k), or (l), 922(x), 924(b), (g), (h), (j), (k), or (l) of this title;

"(iii) a violation of section 922(o) that is an offense under section 924(a)(2) of this title;

"(iv) a violation of section 5861 of the Internal Revenue Code of 1986 that is an offense under section 5871 of such Code (26 U.S.C. 5871);

"(v) a conspiracy to violate an offense described in subsections (i), (ii), (iii) or (iv); or

"(vi) an offense (or a conspiracy or attempt to commit an offense) described in section 401 or 408 of the Controlled Substances Act (21 U.S.C. 841, 846, 848), or an offense punishable under section 409 or 419 of the Controlled Substances Act (21 U.S.C. 849, 860), or an offense described in section 1002(a), 1003, 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, or 959).

"(c) A juvenile may also be prosecuted as an adult under the Federal Rules of Criminal Procedure if the juvenile is alleged to have committed an act on or after the juvenile's thirteenth birthday and before the juvenile's

fifteenth birthday which if committed by an adult would be an offense described in subsection (b)(2)(i)-(vi), upon approval of the Attorney General or the Attorney General's designee. Any such designee shall be at a level not lower than a Deputy Assistant Attorney General. Such approval shall not be granted if, with respect to such a juvenile who is subject to the criminal jurisdiction of an Indian tribal government and who is alleged to have committed an act over which, if committed by an adult, there would be federal jurisdiction based solely on its commission in Indian country (as defined in section 1151), the governing body of the tribe having jurisdiction over the place in which the alleged act was committed has prior to such act not notified the Attorney General in writing of its election that the provisions of this subsection shall apply.

"(d) A determination to approve or not to approve, or to institute or not to institute, a prosecution under subsection (b) or (c) shall not be reviewable in any court.

"(e) In a prosecution under subsection (b) or (c), the juvenile may be prosecuted and convicted as an adult for any other offense which is properly joined under the Federal Rules of Criminal Procedure, and may also be convicted of a lesser included offense."

SEC. 3. CUSTODY PRIOR TO APPEARANCE BEFORE JUDICIAL OFFICER

Section 5033 of title 18, United States Code, is amended to read as follows:

"§ 5033. Custody prior to appearance before judicial officer

"Whenever a juvenile is taken into custody, the arresting officer shall immediately advise such juvenile of the juvenile's rights, in language comprehensible to a juvenile. The arresting officer shall promptly take reasonable steps to notify the juvenile's parents, guardian, or custodian of such custody, of the rights of the juvenile, and of the nature of the alleged offense.

"The juvenile shall be taken before a judicial officer without unreasonable delay."

SEC. 4. TECHNICAL AND CONFORMING AMENDMENTS TO SECTION 5034

Section 5034 of title 18, United States Code, is amended --

(1) by designating the existing paragraphs as paragraphs (1), (2), and (3), respectively; and

(2) by inserting at the beginning of such section "In a proceeding under section 5032(a) --".

SEC. 5. DETENTION PRIOR TO DISPOSITION OR SENTENCING

Section 5035 of title 18, United States Code, is amended to read as follows:

"§ 5035. Detention Prior To Disposition

"(a) (1) A juvenile 15 years of age or older proceeded against under section 5032(b) or (c), if detained at any

time prior to sentencing, shall be detained in such suitable place as the Attorney General may designate. Preference shall be given to a place located within, or within a reasonable distance of, the district in which the juvenile is being prosecuted.

"(2) A juvenile less than 15 years of age proceeded against under section 5032(b) or (c), if detained at any time prior to sentencing, shall be detained in a suitable juvenile facility located within, or within a reasonable distance of, the district in which the juvenile is being prosecuted. If such a facility is not available, such a juvenile may be detained in any other suitable facility located within, or within a reasonable distance of, such district. If no such facility is available, such a juvenile may be detained in any other suitable place as the Attorney General may designate.

"(3) To the maximum extent feasible, a juvenile less than 15 years of age proceeded against under section 5032(b) or (c) shall not be detained prior to sentencing in any facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.

"(b) A juvenile proceeded against under section 5032(a) shall not be detained prior to disposition in any facility in which the person has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges.

"(c) Every juvenile who is detained prior to disposition or sentencing shall be provided with reasonable safety and security and with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment."

SEC. 6. SPEEDY TRIAL

Section 5036 of title 18, United States Code, is amended by --

- (1) striking "If an alleged delinquent" and inserting "If a juvenile proceeded against under section 5032(a)";
- (2) striking "thirty" and inserting "forty-five"; and
- (3) striking "the court," and everything that follows and inserting "the court. The periods of exclusion under section 3161(h) of this title shall apply to this section."

SEC. 7. DISPOSITION; AVAILABILITY OF INCREASED DETENTION, FINES AND SUPERVISED RELEASE FOR JUVENILE OFFENDERS

Section 5037 of title 18, United States Code, is amended to read as follows:

"§5037. Disposition

"(a) In a proceeding under 5032(a), if the court finds a juvenile to be a juvenile delinquent, the court shall hold a hearing concerning the appropriate disposition of the juvenile no later than forty court days after the finding of juvenile delinquency unless the court has ordered further

study pursuant to subsection (e). A predisposition report shall be prepared by the probation officer who shall promptly provide a copy to the juvenile, the juvenile's counsel, and the attorney for the government. Victim impact information shall be included in the report, and victims, or in appropriate cases their official representatives, shall be provided the opportunity to make a statement to the court in person or present any information in relation to the disposition. After the dispositional hearing, and after considering any pertinent policy statements promulgated by the Sentencing Commission pursuant to 28 U.S.C. 994, the court shall enter an order of restitution pursuant to section 3556, and may suspend the findings of juvenile delinquency, place the juvenile on probation, commit the juvenile to official detention (including the possibility of a term of supervised release), and impose any fine that would be authorized if the juvenile had been tried and convicted as an adult. With respect to release or detention pending an appeal or a petition for a writ of certiorari after disposition, the court shall proceed pursuant to the provisions of chapter 207.

"(b) The term for which probation may be ordered for a juvenile found to be a juvenile delinquent may not extend beyond the maximum term that would be authorized by section 3561(c) if the juvenile had been tried and convicted as an

adult. Sections 3563, 3564, and 3565 are applicable to an order placing a juvenile on probation.

"(c) The term for which official detention may be ordered for a juvenile found to be a juvenile delinquent may not extend beyond the lesser of --

"(1) the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult;

"(2) ten years; or

"(3) the date when the juvenile becomes twenty-six years old.

Section 3624 is applicable to an order placing a juvenile in detention.

"(d) The term for which supervised release may be ordered for a juvenile found to be a juvenile delinquent may not extend beyond five years. Sections 3583(c)-(i) are applicable to an order placing a juvenile on supervised release.

"(e) If the court desires more detailed information concerning a juvenile alleged to have committed an act of juvenile delinquency or a juvenile adjudicated delinquent, it may commit the juvenile, after notice and hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency or entity. Such observation and study shall be conducted on an outpatient basis, unless the court

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determines that inpatient observation and study are necessary to obtain the desired information. In the case of an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and the juvenile's attorney. The agency or entity shall make a complete study of the alleged or adjudicated delinquent to ascertain the juvenile's personal traits, capabilities, background, previous delinquency or criminal experience, mental or physical defect, and any other relevant factors. The Attorney General shall submit to the court and the attorneys for the juvenile and the government the results of the study within thirty days after the commitment of the juvenile, unless the court grants additional time. Time spent in custody under this subsection shall be excluded for purposes of section 5036."

"(f) With respect to any juvenile prosecuted and convicted as an adult under section 5032(c), the court may, pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28, determine to treat the conviction as an adjudication of delinquency and impose any disposition authorized under this section. The United States Sentencing Commission shall promulgate such guidelines as soon as practicable and not later than one year from the date of enactment of this Act.

SEC. 8. RECORDS OF CRIMES COMMITTED BY JUVENILE DELINQUENTS

11

(a) Section 5038 of title 18, United States Code, is amended --

(1) in subsection (a), by amending the introductory language before the colon to read as follows:

"Throughout and upon completion of the juvenile delinquency proceeding pursuant to section 5032(a), the court records of the original proceeding shall be safeguarded from disclosure to unauthorized persons. The records shall be released to the extent necessary to meet the following circumstances";

(2) in subsection (a), by adding in paragraph (3) before the semicolon "or analysis requested by the Attorney General";

(3) in subsection (a), by amending paragraph (6) to read as follows:

"(6) communications with any victim of such juvenile delinquency, or in appropriate cases with the official representative of the victim, in order to apprise such victim or representative of the status or disposition of the proceeding or in order to effectuate any other provision of law or to assist in a victim's, or the victim's official representative's, allocution at disposition."; and

(4) by striking subsections (d) and (f), by redesignating subsection (e) as subsection (d), by inserting "pursuant to section 5032(b) or (c)" after "adult" in subsection (d) as so redesignated, and by adding at the end new subsections (e) and (f) as follows:

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"(e) Whenever a juvenile has been adjudicated delinquent for an act that if committed by an adult would be a felony or for a violation of section 922(x), the juvenile shall be fingerprinted and photographed, and the fingerprints and photograph shall be sent to the Federal Bureau of Investigation. The court shall also transmit to the Federal Bureau of Investigation the information concerning the adjudication, including name, date of adjudication, court, offenses, and sentence, along with the notation that the matter was a juvenile adjudication. The fingerprints, photograph, and other records and information relating to a juvenile described in this subsection, or to a juvenile who is prosecuted as an adult pursuant to section 5032(b) or (c), shall be made available in the manner applicable to adult defendants.

"(f) In addition to any other authorization under this section for the reporting, retention, disclosure, or availability of records or information, if the law of the State in which a Federal juvenile delinquency proceeding takes place permits or requires the reporting, retention, disclosure, or availability of records or information relating to a juvenile or to a juvenile delinquency proceeding or adjudication in certain circumstances, then such reporting, retention, disclosure, or availability is permitted under this section whenever the same circumstances exist."

SEC. 9. RESTRICTION ON COMMITMENT

Section 5039 of title 18, United States Code, is amended to read as follows:

"5039. Commitment

"(a) The Attorney General shall not cause any juvenile less than 21 years of age adjudicated delinquent under section 5032(a) to be placed or retained in an adult jail or correctional facility in which the juvenile has regular contact with adults incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges, except for placement in a community-based facility.

"(b) Every juvenile adjudicated delinquent who has been committed shall be provided with reasonable safety and security and with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, counseling, education, training, and medical care including necessary psychiatric, psychological, or other care and treatment.".

SEC. 10. TECHNICAL AMENDMENTS OF SECTION 5031 AND 5034

(1) Sections 5031 and 5034 of title 18, United States Code, are each amended by striking "his" each place it appears and inserting "the juvenile's".

(2) Section 5034 of title 18, United States Code, is amended by striking "magistrate" each place it appears and inserting "judicial officer".

SEC. 11. SERIOUS JUVENILE DELINQUENCY DRUG TRAFFICKING

ADJUDICATIONS AS ARMED CAREER CRIMINAL ACT PREDICATES.

Section 924(e)(2)(A) of title 18, United States Code, is amended --

- (1) by striking "or" at the end of clause (i);
- (2) by inserting "or" at the end of clause (ii); and
- (3) by adding at the end the following:

"(iii) any act of juvenile delinquency that if committed by an adult would be a serious drug offense described in this paragraph;".