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Leg[islative] Review - 5/99 - 21st Century Law Enforcement - Section by Section Analysis for Title I (5/99)

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SECTION BY SECTION ANALYSIS

FOR TITLE I

SEC. 1001. 21ST CENTURY COMMUNITY POLICING INITIATIVE.

MISSING

SEC. 1002. COMMUNITY PROSECUTION PROGRAM GRANTS.

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

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

Section 31702 lists six purposes for such programs:

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

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

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

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

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

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

Section 31703 states that, to be eligible for grants, state, Indian tribal, or local prosecutors, in concert with their jurisdiction's chief executive, shall submit applications in the form which the Attorney General reasonably requires. The grant applications shall (1) request funds for the purposes listed in section 31702; (2) describe the communities to be served, the

nature of local crime, including quality of life crimes that impact community safety; and (3) provide assurances that grant funds shall supplement, not supplant, non-Federal funds otherwise available for such purposes.

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

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

Section 31706 authorizes appropriations of \$200,000,000 for fiscal year 2000 and thereafter through fiscal year 2005 such sums as may be necessary.

Section 31707 directs the Attorney General to reserve no less than 1 percent and no more than 3 percent of each annual appropriation for research and evaluation of the program.

Section 31708 defines "Indian tribe" and "State."

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

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

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

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

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

SEC. 1004. AMENDMENTS TO THE POLICE CORPS ACT.

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

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

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

SEC. 1006. PROVISION TO FREE EXISTING PRISON SPACE FOR VIOLENT OFFENDER INCARCERATION.

Subsection (a) of this section rennumbers certain subsections of section 20105 of the 1994 Crime Act that created the Violent Offender Incarceration and Truth-in-Sentencing (VOI/TIS) Incentive Grants program, and subsection (b) inserts a new provision permitting any State or local unit of government with unexpended funds granted to it under either Part A program (for any of the fiscal years 1996 through 1999) to expend up to 25 percent of these funds to implement graduated sanctions, provided these expenditures are for the purpose of freeing up additional prison space for violent offenders. Subsection (b) also defines "graduated sanctions" as tangible, proportional consequences that hold offenders accountable and are imposed on offenders for every offense, that escalate in intensity with each offense, that are individualized sanctions suited to the offense, and that also take equal account of public safety and crime victim concerns. Such sanctions may include intensive community supervision, include regular drug testing and treatment supervised by drug courts or other criminal justice agencies; victim and community restitution; and certain, but short-term, incarceration.

Finally, subsection (c) extends the authorization for the VOI/TIS program, reflecting the amount currently authorized for Fiscal Year 2000 at \$2,753,100,000, and authorizing such sums as necessary for the years 2001 through 2005.

SEC. 1007. REAUTHORIZATION OF BUREAU OF JUSTICE ASSISTANCE AND THE BYRNE STATE AND LOCAL LAW ENFORCEMENT ASSISTANCE GRANT PROGRAMS

Paragraph 7(A) of subsection (b) of section 501 currently allows Byrne grant funds to be awarded for improving the operational effectiveness of law enforcement through the use of crime analysis techniques, street drug sales enforcement, schoolyard violator programs and gang related and low-income housing drug controls programs. Subsection (a) will make clear that funds under this purpose can be used for programs to reduce the illegal supply of firearms, especially to serious drug offenders, juveniles, felons and other prohibited persons, including comprehensive tracing of firearms recovered by law enforcement officials, trace analysis, strategy development and enforcement operations.

Subsection (b) reauthorizes funding to carry out the programs under both part D of Title I of the Omnibus Act (Bureau of Justice Assistance) and all of part E (the Byrne program) except for the Corrections Options Grants program which is not reauthorized. For fiscal year 2000 the total amount authorized is \$450,050,000, and for fiscal years 2001 through 2005 such sums as may be necessary.

SEC. 1008. BODY ARMOR PENALTY ENHANCEMENT.

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

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

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

SEC. 1009. EXTENSION OF BULLETPROOF VEST PARTNERSHIP GRANT ACT.

TO BE COMPLETED.

SECTION BY SECTION ANALYSIS OF TITLE II

SEC. 2001. INTEGRATED INFORMATION TECHNOLOGY ASSISTANCE ACT.

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

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

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

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

linkages to federal information systems, consideration of wireless technology plans, and consideration of geomapping plans.

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

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

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

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

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

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

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

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

into the process. Subsection (d) also remedies the exclusion of public defense agencies from integration funding under the Crime Identification Technology Act.

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

SEC. 2002. AUTHORIZATION TO LINK STATE AND LOCAL LAW ENFORCEMENT TO WORLDWIDE POLICE COMMUNICATIONS NETWORK.

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

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

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

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

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

This section gives USNCB clear statutory authority to buy and install INTERPOL

microcomputers for these State Liaison Offices, and to supply any suitable surplus equipment that the USNCB already owns. This will, for the first time, link U.S. state and local law enforcement directly to INTERPOL's international network, databases, and communications capability, and eliminate time-consuming administrative steps at the USNCB. The resulting efficiencies will markedly speed responses to U.S. and foreign requests for criminal investigative assistance. They should also increase the number of foreign investigative leads that state and local police are able to pursue. The section will also clearly authorize the USNCB's use of federal funds for travel, materials, and the related expenses of training state and local police personnel nationwide in using INTERPOL's computers, and in expanding their knowledge and use of INTERPOL's investigative capabilities.

SEC. 2003. HIGH-TECHNOLOGY CRIME ACT.

(b)(1)-(2) 18 U.S.C. 1030(c) -- Computer crime sentencing and criminal forfeiture

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

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

Proposed paragraph (2) also creates a criminal forfeiture provision requiring that anyone convicted of a violation of the Computer Fraud and Abuse Act forfeit to the United States property used or proceeds gained in the commission of the crime. It is the experience of the Department of Justice that forfeiture of property used in the commission of computer crime or

proceeds derived there from can provide effective punishment and deterrence, and that it makes little sense to return computers to convicted computer criminals. This appears particularly to be the case with respect to hacking into government computers, even if the offense is a misdemeanor under section 1030(a)(3). This forfeiture provision, to appear as a new subsection 1030(c)(5), is premised on the familiar forfeiture procedures set forth in section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. § 853). It differs, however, in making this forfeiture requirement expressly applicable to all criminal violations of section 1030 -- misdemeanors as well as felonies. A corresponding civil forfeiture provision is also proposed in part (b)(17) of this section.

(b)(3) 18 U.S.C. 1030(d) -- Secret Service Jurisdiction

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

(b)(4) 18 U.S.C. 1030(e) -- New and amended definitions

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

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

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

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

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

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

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

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

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

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

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

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

(d) Modification of directive to Sentencing Commission

Section 805 of the Antiterrorism and Effective Death Penalty Act of 1996, P.L.104-132, transmitted a directive to the Sentencing Commission to ensure that any individual convicted of a

violation of sections 1030(a)(4) or (a)(5), including those found to have violated the misdemeanor provisions of subsection (a)(5)(C), be imprisoned for not less than 6 months. The Commission has implemented this directive. See Guidelines §§ 2B1.3 and 2F1.1.

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

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

(e) Privacy Protection Act

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

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

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

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

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

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

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

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

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

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

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

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

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

NOTICE TO LAW ENFORCEMENT AGENTS:

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

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

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

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

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

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

of the PPA.

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

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

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

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

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

search. Additionally, of course, the link between the incidental items and the lawful object of the search or seizure must be reasonable on the facts of the case. Indeed, the Fourth Amendment, which requires reasonableness both in the scope of the warrant and in its execution, demands no less. See O'Connor v. Ortega, 480 U.S. 709, 726 (1987); United States v. Henson, 848 F.2d 1374 (6th Cir. 1988); United States v. Tamura, 694 F.2d 591 (9th Cir. 1982).

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

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

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

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

(f)-(g) Devices used to replicate counterfeit computer software

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

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

SEC. 2004. ESTABLISHING PERMANENT ONE PERCENT RESEARCH AND EVALUATION SET-ASIDES FOR CERTAIN PROGRAMS.

This legislation would establish permanent research and evaluation set-asides for certain grant programs administered by the Office of Justice Programs that were created by the Violent Crime Control and Law Enforcement Act of 1994, in order to more effectively gauge their effectiveness and implement program changes, where necessary. In each instance, the Attorney General is directed to reserve not less than one percent and no more than three percent of the sums which are actually appropriated in a particular fiscal year for research and evaluation of the grant program. All of the grant programs affected, except for the VOI/TIS grant program, are treated identically in the ten amendments that make up this proposal. The balance of this analysis simply identifies the programs so amended in each of the sections and, in the case of VOI/TIS, explains the additional change.

Subsection (a) applies to the VOI/TIS grant programs. And, because the existing VOI/TIS statute, at subsection 20108(b)(3), already contains language providing for the possible use of certain funds not only for research and evaluation but also for technical assistance, development and implementation of sentencing reforms as well, an additional subparagraph (4) is added to subsection 20108(a) to ensure that the Attorney General shall have a similar direction to reserve funds for the latter purposes.

Subsection (b) applies to the Certain Punishment for Young Offenders grant program.

Subsection (c) applies to the Residential Substance Abuse Treatment (RSAT) program.

Subsection (d) applies to the program of Grants to Combat Violent Crimes Against Women.

Subsection (e) applies to the program of Grants to Encourage Arrest Policies in domestic violence cases.

Subsection (f) applies to the Law Enforcement Family Support program.

Subsection (g) applies to the DNA Identification Grant program.

Subsection (h) applies to the Police Corps grant program.

Subsection (i) applies to the Motor Vehicle Theft Prevention program.

Subsection (j) applies to the Missing Alzheimer's Disease Patient Alert grant program.

SEC. 2005. PROVISIONS TO INCLUDE FEDERAL, MILITARY, AND DISTRICT OF COLUMBIA OFFENDERS IN THE DNA IDENTIFICATION INDEX.

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

Subsection (a) -- Expansion of DNA Identification Index

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

Subsection (b) -- Amendments to DNA Identification Statute

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

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

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

Proposed subsection (c), paragraph (1), directs the Director of the FBI to include in the DNA identification index identification records from persons convicted of or adjudicated delinquent for qualifying federal or D.C. crimes. The pertinent "qualifying" crimes will be defined by the Director of the FBI by regulation. It is expected that qualifying crimes will be defined to encompass sex offenses, crimes of violence as defined in 18 U.S.C. 924(c)(3), and certain burglary and robbery offenses which may not otherwise be covered.

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

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

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

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

Proposed subsection (c), paragraph (3), directs federal probation offices to collect DNA samples from persons under their supervision on or after the effective date of the subsection who

have been convicted or adjudicated delinquent for qualifying crimes. The Director of the Administrative Office of the Courts will specify the time and manner of collecting DNA samples from such persons.

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

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

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

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

restrain a person and collect a sample involuntarily remains necessary for cases in which other inducements are ineffective.

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

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

Subsection (c) -- Conditions of Release

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

Subsection (d) -- Effective Date

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

SECTION BY SECTION ANALYSIS FOR TITLE III

SUBTITLE A - VIOLENCE AGAINST WOMEN.

SEC. 3001. REAUTHORIZATION OF STOP GRANTS

(a) This section provides for the reauthorization of the STOP Grant program through FY 2005.

(b)(1) This section adds disabled women to the populations (racial, cultural, ethnic and language minorities) already designated for special outreach under the program.

(c)(1) Adds developing, implementing, or supporting public education campaigns against domestic violence and sexual assault as a purpose area for receiving STOP funds, so long as funding of such education efforts does not detract from provision of direct services to victims of violent crimes.

(c)(2) This section increases the set-aside for Indian tribal governments from 4 percent to 5 percent. It also establishes a 2 percent set-aside from overall STOP funds for state domestic violence and state sexual assault coalitions.

(c)(3) This section permits funding allocations from law enforcement, prosecution, and courts to be used to fund training or other services by nonprofit, nongovernmental agencies, which result in a direct benefit to law enforcement officers, prosecutors, or courts.

(c)(4) This section adds the definition of 'courts' and includes court components (such as court intake programs) in that definition.

(c)(5) This section defines 'State domestic violence coalitions' and "State sexual assault coalitions," which would be eligible for the 2 percent set-aside.

(d)(3) This section provides for reallocation of funds that remain unobligated at the end of the two year project period under the law enforcement, prosecution, and courts set-asides. States may use these funds to support other nonprofit, nongovernmental victim services projects. The section provides for the Attorney General to promulgate guidelines to implement this reallocation.

(e)(1) This section expands the definition of permissible services from strictly assisting victims through the legal process services to allow a more holistic, one-stop approach to victims services, including not only legal but also economic, health care or social services.

(e)(2) This sections tightens the definition of permissible services to exclude programs or activities that are targeted primarily for offenders.

SEC. 3002. ROLE OF THE COURTS

(a)(1) This section establishes State, local and tribal courts as eligible grantees under the STOP program.

(a)(2) This section changes the allocation of STOP funds to reflect the inclusion of courts and adjusts the percentages available to police and prosecutors, victim services, and courts. Under the new formula, not less than 25 percent each goes to police and prosecutors, not less than 30 percent goes to victim services, and not less than 10 percent goes to courts.

(b) This section reauthorizes State Justice Institute grants (previously authorized under the Equal Justice for Women in the Courts Act, Subtitle D of VAWA), which are intended to promote and provide training for judges and other court personnel. The section also makes various definitional changes related to the program.

(c) This section provides that the Federal Judicial Center include educational and training programs related to violence against women (as set forth in the Equal Justice for Women in the Courts Act) in its program offerings.

SEC. 3003. GRANTS TO ENCOURAGE ARREST POLICIES

(a) This section provides for reauthorization of the Grants to Encourage Arrest Policies program through 2005.

(b)(1) Additionally, it allows developing, implementing, or supporting public education campaigns against domestic violence and sexual assault as a purpose area for receiving funds under this program, so long as funding of such educational efforts does not detract from provision of direct victim services.

(b)(2) It also reserves at least 5% of the program funding for programs for Indian women.

SEC. 3004. REAUTHORIZATION OF RURAL DOMESTIC VIOLENCE AND CHILD ABUSE GRANTS.

(a) This section reauthorizes the program through 2005.

(b) This section provides for reallocation of funds that remain unobligated at the end of the two-year project period, allowing states to use the funds to support other nonprofit, nongovernmental victim service projects. It also provides that at least 5 percent of funds available be used for grants to Indian tribal governments.

SEC. 3005. EDUCATIONAL INSTITUTIONS AND VIOLENCE AGAINST WOMEN.

(a)(1)(A) This subparagraph expands the definition of relationships that can be addressed by the program to include dating relationships as well as cohabitation. The original statute was limited to marital relationships, which in no way adequately addresses most college relationships.

(a)(1)(B) This subparagraph amends the definition of eligible funding recipients to include private, nonprofit organizations or public, nonprofit organizations acting in a nongovernmental capacity. This change is necessary to allow programs to serve both private and public colleges and universities. The original statutory language precluded their participation.

(a)(1)(C) This subparagraph provides full definitions for 'campus domestic violence,' 'campus stalking,' and 'campus sexual assault,' which were missing from the original statute.

(a)(2) This subparagraph expands the covered population to include faculty and other members of the campus community.

(b) This section reauthorizes the program through fiscal 2005.

SEC. 3006. NATIONAL DOMESTIC VIOLENCE HOTLINE.

This section reauthorizes the National Domestic Violence Hotline ("Hotline") through fiscal year 2005. The Hotline is a toll-free number that offers shelter referrals and assistance to anyone who is in need. The Hotline is funded by HHS and has answered over 218,000 calls for help since it opened on February 21, 1996.

SEC. 3007. TEN PERCENT SET-ASIDE OF VAWA GRANT FUNDS FOR TRAINING AND TECHNICAL ASSISTANCE.

This section allows the Attorney General to dedicate up to ten percent of the funding for VAWA grant programs to provide technical assistance and training to grant recipients.

SEC. 3008. PROTECTION FOR VICTIMS OF TRAFFICKING.

Section Analysis

(A)Whoever -

(1)Employs, recruits, harbors, provides, transports, or secures, by any means, any person, knowing or having reason to know that person is or will be subjected to unlawfully exploitative labor conditions as defined in paragraph (B) of this Section, OR

Section (A)(1) addresses the need to fill the gap between the inadequate labor statutes and the difficult burdens in the criminal provisions of Title 18, as described in the "Discussion" Section below. This section reaches those who maintain or transport persons into an exploitative

labor relationship without the use of force or threat of force.

Section Analysis

(2)Knowingly benefits from, or makes use of, the labor of a person held to a condition of involuntary servitude or peonage as those terms are used in 18 U.S.C. §§1581 and 1584,

This section would provide for criminal prosecution of those who would, knowing that persons were held in slavery (as already codified in Title 18), profit from their forced labor. This section would enable the United States to prosecute those who would hide behind labor contractors or other contracting relationships to avoid culpability for involuntary servitude, while still profiting from the fruits of these inhumane conditions.

Section Analysis

shall be fined under this title or imprisoned not more than 10 years, or both.

Like the slavery statutes in 18 U.S.C. § 1581, et. seq., this section provides for up to 10 years incarceration.

Section Analysis

(B) The term “Unlawfully Exploitative Labor Conditions” means —

(1)The labor of a person is obtained or maintained by means of any plan or pattern, including but not limited to false and fraudulent pretenses and misrepresentations, such that the person reasonably believes he has no viable alternative but to perform the labor; and

(2)at least two acts have occurred within the five years preceding indictment, relating to the employment of the person who is subjected to the conditions set forth in (B)(1), that would constitute violations of the following provisions: 29 U.S.C. §§ 206 (except 206(c))(Fair Labor Standards Act - Minimum Wage), 207(Fair Labor Standards Act - Overtime), 211(d)(Fair Labor Standards Act - Homework Provision), 212(c)(Fair Labor Standards Act - Child Labor), 654(Occupational Safety & Health Act), 1811(Migrant & Seasonal Agricultural Worker Protection Act - Farm Labor Contractors) , 1822 (Migrant & Seasonal Agricultural Worker Protection Act - Migrant Worker Wage & Payment), 1823(Migrant & Seasonal Agricultural Worker Protection Act - Migrant Worker Housing Safety) , 1832(Migrant & Seasonal Agricultural Worker Protection Act - Seasonal Worker Wage & Payment) , and 1841(Migrant & Seasonal Agricultural Worker Protection Act - Motor Vehicle Safety), and 30 U.S.C. § 814(Mine Safety & Health Act), regardless of whether the employer would be a “covered” party were an action brought

under these provisions.

Paragraph (B) provides a definition of "unlawfully exploitative labor conditions" to address the factual scenarios we often see in our prosecutions -- situations such as fraud, deceit and manipulation coupled with unfair labor practices. It expands upon case law prior to Kozminski (as explained below).

In addition, it also requires that the exploitation is, indeed, a labor violation and requires at least two acts that would constitute labor law violations, regardless of whether the employer is a covered party under the labor provisions (as noted below, the labor laws include many exemptions to coverage that should not apply in the criminal code.) This approach, under which a series of violations of predicate offense will result in a distinct criminal violation, is suggested by the statutory scheme of 18 U.S.C. § 1961, the Racketeer Influenced and Corrupt Organizations (RICO) Act. Unlike RICO, however, the predicate offenses under this statute can either be civil or criminal violations and this Act requires an additional showing of compelled service in (B)(1). The statute also links (B)(1) and (B)(2) temporally and in regard to a particular victim. An employer should not be criminally penalized for violating wage and labor laws years earlier based on something he does to another employee later.

Section Analysis

This statute does not apply to labor performed where employer is a municipal, local, state, or federal government, and the relationship is penological, rather than pecuniary.

Because prisoners' labor is not categorically excluded from minimum wage protection of the Fair Labor Standards Act, we must include language which will have such an effect. The proposed addition adopts the test set forth in Hale v. Arizona, 993 F.2d 1387 (9th Cir.) (en banc), cert. denied, 510 U.S. 946, 114 S.Ct. 386 (1993).

II. BACKGROUND

In April 1998, the Attorney General announced the creation of an inter-agency Worker Exploitation Task Force (WETF). The mission of the Task Force is to encourage and coordinate the investigation and prosecution of worker exploitation cases throughout the United States. The ultimate objective is to prevent these cases from arising. These cases, which often involve the recruitment and smuggling of foreign Nationals into the United States, forced labor under abominable conditions, and the exploitation of migrant farm workers, sweatshop laborers and others, amount to modern-day slavery. This national inter-agency Worker Exploitation Task Force is chaired by the Acting Assistant Attorney General for Civil Rights, Bill Lann Lee, and the Solicitor of Labor, Henry Solano. The Department of Justice participants in this national effort include the Civil Rights Division, the Federal Bureau of Investigation, the Immigration and Naturalization Service, the United States Attorneys, the Criminal Division, the Office of Victims of Crime and the Violence Against Women Office. In addition, regional Worker Exploitation

Task Forces are being established -- linking a number of states and U.S. Attorneys' offices -- in order to most effectively address the often transient nature of the victims and the activities of employers, who often cross district lines in pursuit of their criminal activities.

As the Department addresses the problem of worker exploitation, the limitations of current law are becoming apparent:

- Present criminal law sets the standard for exploitation exceptionally narrow; it is limited to the slavery statute which requires a showing that there has been force, threat of force or threat of legal coercion. Existing federal law does not address the situation where a person is subject to other forms of purposeful coercion — economic, fear because of immigration status, power differentials between the employer and employee — that keep the victim from leaving his or her employment. Mere enforcement of the civil (and, in rare cases, criminal) wage and hour laws provide an inadequate deterrent;
- This overly high standard also curtails our efforts to prosecute traffickers (those who transport people for the purpose of worker exploitation). In most instances, the trafficker does not use force or threat of force; thus, traffickers rarely are charged as co-conspirators in a slavery case. Current law does not punish trafficking unless the victim is an illegal alien or is being trafficked for the purposes of the sex trade. Illegal alien transportation is an inapposite fit for these situations; the statute contemplates the workers as “contraband” rather than as “victims” of these heinous crimes;
- Present criminal law does not cover the use of farm labor contractors and other types of employment relationships which are designed to provide a liability shield between the direct oppressor and the economic beneficiary of the slave labor. In order to combat worker exploitation, it is necessary to punish those who knowingly benefit or profit from slavery or use contractors and others so that they can turn a blind eye to horrible conditions. Without such a statutory tool, these defendants will simply be able to hire another labor provider to replace those who we can apprehend and prosecute. The cycle of worker exploitation will continue; and
- Criminal provisions of the Fair Labor Standards Act and other Labor Statutes, which are currently the alternatives to slavery prosecutions, are weak criminal tools, carrying only a six- month or one-year maximum sentence.

Unless we address these gaps in the law, our enforcement efforts will be severely curtailed, as abusive employers will escape prosecution because their activities, though they may shock the conscience, do not rise to the high levels required by the current statutes as interpreted by the Supreme Court.

III. Present Statutory Scheme

A. Involuntary Servitude and Slavery

Title 18 U.S.C. §§ 1581 et seq. set out a variety of substantive crimes covering involuntary servitude, peonage, and the slave trade. The most commonly used statutes in this series are Involuntary Servitude (§ 1584) and Peonage (§ 1581). An additional provision, Section 1583, penalizes those who kidnap someone for slavery or entice someone to travel in order to be enslaved. Additionally, Title 18 U.S.C. § 241 provides a ten (10) year charge for those who conspire to violate a person's Thirteenth Amendment right to be free from involuntary servitude.

1. Statutory Language

- Title 18, Section 1584 of the United States Code (Involuntary Servitude) provides::

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than 10 years, or both.

- Title 18, Section 1581 of the United States Code (Peonage) provides:

(a) Whoever holds or returns any person to a condition of peonage⁴ shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section shall be liable for the penalties imposed in subsection (a).

- Title 18, Section 1583 of the United States Code (Enticement into Slavery) provides:

Whoever kidnaps or carries away any other person with the intent that such other person be sold into involuntary servitude, or held as a slave, or

Whoever entices, persuades, or induces any other person to go on board

⁴ "Peonage" is defined by case law as involuntary servitude for the purpose of repayment of a debt. As there is an extra element that must be met to prove peonage, but no difference in sentencing, general practice is to just charge violations of Section 1584 (Involuntary Servitude).

any vessel or to any other place with the intent that he maybe made or held as a slave, or sent out of the country to be so made or held —

Shall be fined under this title or imprisoned not more than 10 years or both.

- Title 18, Section 241 of the United States Code (Conspiracy Against Rights) provides in pertinent part:

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States ... They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

2. Legal Analysis

"Involuntary servitude," which is the rough legal equivalent of "slavery", is a condition of compulsory service or labor performed by one person, against their will, for another person. In United States v. Kozminski, 487 U.S. 931 (1988), the Supreme Court set forth the most definitive statement of what conduct could be criminally prosecuted as involuntary servitude or slavery. Kozminski requires the government to prove not only that the victim was held against his or her will, but holds that either force, threats of force, or threats of legal coercion are "necessary incident[s] of a condition of involuntary servitude." 487 U.S. at 952. This holding was based on an examination of the understanding of the terms "involuntary servitude" and "slavery" at the time of the passage of the Thirteenth Amendment. Thus, as a matter of law, some physical or legal coercion must exist to permit charging involuntary servitude, peonage, or conspiracy to violate those laws or rights.

The Kozminski Court severely curtailed the previously understood scope of the involuntary servitude statutes. Circuit courts would look to a totality of circumstances to determine whether the employer intended to, and did, coerce the victim into his service by subjugating his will. Early attempts to define the term were distilled by lower courts into a generally accepted and workable definition: a holding to involuntary servitude occurs when the victim is coerced into laboring for another because he feels he has no viable alternative but to work, or no way to avoid continued service or confinement.

The Kozminski Court recognized, however, that not all persons are of like courage and firmness, stating that "the vulnerabilities of the victim are relevant in determining whether the

physical or legal coercion or threats thereof could plausibly have compelled the victim to serve." Kozminski, 487 U.S. at 952. The background, education, and station in life of the victim and defendant, the relative inferiority or inequality between the person who performs the service and the persons exercising the force to compel its performance are material in this determination, but are not substitutes for the use or threats of force. Id. Thus, the Kozminski court overturned the conviction of a farmer who had held and exploited a mentally retarded man through psychological coercion that took advantage of his disability, because there was no evidence that the defendant had used force or threats of force or legal coercion to hold the victim.

B. Labor Statutes

The Fair Labor Standards Act (FLSA) and Migrant and Seasonal Agricultural Worker Protection Act (MSPA) statutes carry criminal penalties for willful violations of their protections. These criminal penalties of the FLSA and MSPA are not severe — six months maximum imprisonment for a FLSA violation (and only on the second offense) and one year maximum imprisonment for a MSPA violation. Unlike most Title 18 offenses, MSPA and FLSA only apply to certain covered persons. Because they are primarily civil regulatory statutes, MSPA and FLSA are somewhat convoluted and are accompanied by numerous regulations. Most violations of these statutes are addressed through the assessment of civil money penalties by the Wage & Hour Division, which are then litigated through an administrative law system. Because of their relative complexity and light sentences, these statutes have generally not been used by federal prosecutors.

Worker exploitation matters involving agricultural workers that do not rise to the level of slavery are currently prosecutable under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The MSPA, at 29 U.S.C. § 1801, et seq., requires agricultural employers, agricultural associations, and farm labor contractors to observe certain labor standards when employing migrant and seasonal agricultural workers, unless exemptions apply. Regulations in support of the MSPA are set forth at 29 C.F.R. Part 500.

The MSPA establishes, among other things, specific requirements with respect to record keeping, wage payment, disclosure, housing, and transportation, and requires that farm labor contractors register with the Department of Labor. In the most egregious cases, farm workers live in substandard housing as virtual slaves, completely dependent on the employer or crew leader for their basic needs. The MSPA is currently the only tool available with which to combat abusive working and living conditions in agricultural settings. A by-product of the general regulatory nature of the MSPA are the number and type of exempt employers. Because a criminal violation of MSPA is simply a MSPA violation done wilfully, these exemptions could act as an absolute defense to a criminal prosecution if the defendant falls under one of the exempt categories.

The FLSA establishes minimum wage, child labor, overtime pay, equal pay, and record-keeping standards for employees covered by the FLSA. Covered employers must pay employees

a minimum wage and an overtime premium. As with the MSPA, a violation of FLSA can be charged as a criminal offense if it is done willfully. The criminal provision of the FLSA only allows for a misdemeanor charge, and incarceration is only available on a second offense, with a statutory maximum punishment of six months incarceration. FLSA also contains exceptions to coverage, including those for businesses under \$500,000 gross a year.

IV. Limitations of Present Law and Need for New Legislation

The present statutory tools available to prosecutors have several limitations that will be cured by the addition of this statute.

First, as described above, prosecutors must prove “force or threat of force or legal coercion” in order to establish a violation of the slavery statutes or a conspiracy to violate the Thirteenth Amendment. This requirement stems from the Supreme Court’s ruling in Kozminski, which was based on the Court’s interpretation of the understanding of the terms “slavery” or “involuntary servitude” at the time of adoption of the Thirteenth Amendment and passage of the peonage laws in the 1870s. Congress has never sought to expand the definition of “slavery” or “involuntary servitude” in the wake of the Kozminski opinion. As a result, since 1988, we have been unable to bring cases that are facially egregious but that do not satisfy the Kozminski standard. Kozminski sets the standard so narrowly that cases which certainly satisfy common understanding of “slavery” can not be prosecuted as such.

Second, the narrow criminal standard also curtails efforts to prosecute traffickers (those who transport people for the purpose of worker exploitation). In most instances, the trafficker does not use force or threat of force; thus, traffickers rarely are charged as co-conspirators in a slavery case. Current law does not punish trafficking unless the victim is an illegal alien or is being trafficked for the purposes of the sex trade. Illegal alien transportation is an inapposite fit for these situations; the statute contemplates the workers as “contraband” rather than as “victims” of these heinous crimes.

Third, the use of farm labor contractors and other types of employment relationships which are designed to provide a shield between the oppressor and the beneficiary of slave labor has severely curtailed our enforcement effort. In both the Immigration and Labor contexts, Congress and the Administration have recognized that systemic change can only come from holding the beneficiary of the labor responsible. Therefore, to combat worker exploitation, it is necessary to punish those who benefit or profit from slavery. Without such a statutory tool, the beneficiaries will be able to simply hire another abusive labor provider to replace those who we apprehend and prosecute.

Finally, criminal alternatives of the Fair Labor Standards Act and other Labor Statutes, which are currently the fallback to slavery prosecutions, are weak criminal tools, carrying as they do only a six month or one year maximum sentence. Such short sentences provide little incentive for the United States Attorneys’ Offices, the Civil Rights Division or the Criminal Division to

invest the resources necessary to bring such cases; nor do they provide a sufficient disincentive to stop engaging in such activities.

(b) Recommended Amendment to the Sentencing Guidelines.

This section would recommend that the sentencing commission promulgate sentencing guidelines for trafficking that:

- are sufficiently severe to deter such offenses;
- adequately reflect the heinous nature of such offenses; and
- provide enhancements for offenses involving a large number of victims, a patterns of continued and flagrant violations, the use or threatened use of a dangerous weapon, or the death or bodily injury of a person or persons.

(c) Removal of the Sunset Provision for the S Visa Classification Program and New Visa for Victims of Trafficking

Removal of Sunset Provision for the S Visa Classification

This section repeals the current restriction, found in 8 U.S.C. § 1184(k)(2), which limits the duration of the S visa classification program to a five year period commencing on September 13, 1994. Unless this provision is repealed or modified, the S visa classification program would expire on September 12, 1999.

Section 13003 of the Violent Crime Control and Law Enforcement Act of 1994, Public Law 103-322, amended the Immigration and Nationality Act (INA) to establish a new “S” nonimmigrant visa classification for two categories of alien witnesses and informants. The first category of nonimmigrant classification, (S)(i), may be granted to an alien who the Attorney General has determined is in possession of critical reliable information concerning a criminal organization or enterprise, which the alien is willing to supply or has supplied to Federal or State law enforcement authorities or to a Federal or State court. 8 U.S.C. § 1101(a)(15)(S)(i). The Attorney General must also determine that the alien’s presence in the United States is essential to the success of an authorized investigation or the successful prosecution of an individual involved in a criminal organization or enterprise. The number of witnesses or informants who may be granted (S)(i) nonimmigrant classification in any fiscal year may not exceed 200. 8 U.S.C. § 1184(k)(1).

The second category of nonimmigrant classification, (S)(ii), may be granted to an alien who the Secretary of State and the Attorney General jointly determine is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation, which the alien is willing to supply or has supplied to Federal law enforcement authorities or to a Federal court. 8 U.S.C. § 1101(a)(15)(S)(ii). The Secretary of State and the Attorney General must also determine that the alien will be or has been placed in danger as a result of providing such information, and is eligible to receive a reward under Section 36(a) of the State Department

Basic Authorities Act of 1956 (22 U.S.C. § 2708(a)). The number of witnesses or informants who may be granted (S)(ii) visas in any fiscal year may not exceed 50. 8 U.S.C. § 1184(k)(1).

The INA also provides for nonimmigrant visas for immediate family members of (S)(i) and (S) (ii) category alien witnesses or informants, including spouses, married and unmarried children and parents. The Act requires that the Attorney General determine whether a ground for inadmissibility exists with respect to any S category visa applicant. The Attorney General has discretion to waive most grounds for inadmissibility if the Attorney General considers that is in the national interest to do so. 8 U.S.C. § 1182(d)(1).

The Attorney General may adjust the status of an (S)(i) nonimmigrant to that of an alien lawfully admitted for permanent residence, if, in the opinion of the Attorney General, the alien has supplied information as agreed, and the information has substantially contributed to a successful criminal investigation or prosecution. 8 U.S.C. § 1255(i)(1). Similarly, the Attorney General may adjust the status of an (S)(ii) nonimmigrant to that of an alien lawfully admitted for permanent residence, if the alien has, in the sole discretion of the Attorney General, supplied information as agreed, the information has substantially contributed to the prevention or frustration of an act of terrorism, or to a successful investigation or prosecution of an individual involved in such an act of terrorism, and the nonimmigrant has received a reward under Section 36(a) of the State Department Basic Authorities Act of 1956.

An alien witness or informant admitted as either an (S)(i) or (S)(ii) category nonimmigrant must report quarterly to the Attorney General, may not be convicted of any crime punishable by one year or more of imprisonment after the date of admission, must waive the right to contest, other than on a basis of an application for withholding of deportation, any action of deportation instituted before the alien obtains lawful permanent resident status, and must abide by any other condition, limitation or restriction imposed by the Attorney General. 8 U.S.C. § 1184(k)(4). The Attorney General is required by 8 U.S.C. § 1184(k)(5) to make an annual report to Congress regarding the granting of S visa classifications.

From the beginning of the S visa classification program until the end of Fiscal Year 1998, a total of 246 S visas had been issued for witnesses and informants and a total of 158 family members had been granted derivative S visa status. In addition, as of the end of Fiscal Year 1998, applications for an additional 40 witnesses and informants and their family members had been approved by the Criminal Division and were pending final approval by the Immigration and Naturalization Service. By the end of Fiscal Year 1998, when their nonimmigrant status was due to expire, all of the individuals granted S visas in Fiscal Year 1995 who were eligible to do so had applied for adjustment of status to lawful permanent resident.

The S visa classification program has proved to be very beneficial in prosecuting various international criminal organizations, and helping law enforcement efforts against terrorism, narcotics, fraud, immigration violations, and numerous other criminal activities. As required by 8 U.S.C. § 1184(k)(5), the Attorney General will continue to report annually to the Congress on

the use of this valuable law enforcement tool.

Creation of New Nonimmigrant T Classification

This section creates a new nonimmigrant classification at Section 101(a)(15)(T) of the Immigration and Nationality Act to benefit aliens who assist with certain criminal and civil law enforcement investigations and prosecutions.

Subsection (a) establishes the new nonimmigrant visa classification and sets forth the eligibility requirements. The classification is available to a alien who the Attorney General determines: (1) possesses critical reliable information concerning criminal or other unlawful activity; (2) is willing to supply or has supplied such information to Federal or State court; and (3) whose presence in the United States is essential to the success of the authorized investigation, prosecution, or other authorized law enforcement activity. In addition, the Attorney General may grant nonimmigrant T visas to the spouse, married or unmarried sons and daughters, and parents of such an alien, if accompanying or following to join, the alien.

Subsection (b) describes the conditions for admission under the nonimmigrant T classification. First, it provides that the Attorney General must determine whether a ground of inadmissibility exists with respect to the nonimmigrant. The Attorney General may waive certain grounds of inadmissibility: (a)(2)(D) (prostitution); (a)(4) (public charge); (a)(5) (labor certification); (a)(6)(A) (unlawful entry); (a)(7)(A) (immigrant visa); (a)(9)(B) (unlawful presence). Subsection (b) also sets an annual numerical limit of 1,000 T visas; limits the program to 5 years; and provides that the period of admission under the classification may not exceed 3 years. In order to qualify and maintain lawful status, the nonimmigrant may not be convicted of a crime punishable by a term of imprisonment of 1 year or more after the date of admission; must execute a waiver of the right to contest deportation; and abide by any other conditions set by the Attorney General. Finally, subsection (b) provides that nonimmigrants under the T classification may not change to any other nonimmigrant status.

Subsection (c) describes the terms under which a T nonimmigrant may adjust to lawful permanent resident status. Such a nonimmigrant is eligible for adjustment if the Attorney General determines that: (1) the alien supplied the critical reliable information that was the basis for the grant of nonimmigrant status; (2) the information substantially contributed to the success of the authorized criminal or other law enforcement activity or prosecution; and (3) the alien's life or freedom would be threatened as a result of providing the information if he or she was removed from the United States. Subsection (c) also provides that the Attorney General shall record the alien's permanent resident status and that the Secretary of State shall reduce the number of visas authorized to be issued under sections 201(d) and 203(b)(4) for the corresponding fiscal year. Finally, subsection (c) provides that this provision is the exclusive means of adjustment of status for T nonimmigrants.

(d) Employment Authorization for Cooperating Alien Witnesses.

The Immigration and Nationality Act allows the Attorney General to release from custody, under certain circumstances, aliens convicted of crimes who are cooperating with an investigation into major criminal activity. At present, law enforcement agencies seeking the assistance of aliens to uncover crime are hindered because such cooperating aliens may be ineligible for authorization to work in the United States.

This section clarifies the Attorney General's authority to authorize these aliens to work in the United States. This will aid in the enforcement of criminal laws. The amendment is not intended to create an avenue for aliens to remain indefinitely in the United States except in those special circumstances already determined proper by the Congress and controlled within the INA.

SEC. 3009. REAUTHORIZATION AND AMENDMENT OF PROGRAMS UNDER THE FAMILY VIOLENCE PREVENTION AND SERVICES ACT.

This section reauthorizes and amends programs under the Family Violence Prevention and Services Act, title III of the Child Abuse Amendments of 1984.

Subsection (a) amends section 305(a) of the Act to authorize the Secretary of Health and Human Services to appoint more than one employee to carry out the provisions of the Act.

Subsection (b) authorizes appropriations of \$102,300,000 for FY 2000 and such sums as necessary for each of FYs 2001 through 2005 for State demonstration grants, information and technical assistance centers, and State domestic violence coalitions, and sets aside 1.5 percent of the appropriation for the Secretary's use for monitoring, administration, and stewardship of certain portions of the program.

Subsection (c) eliminates the separate authorization of appropriations for the State domestic violence coalitions (for which appropriations are also authorized under section 310).

Subsection (d) authorizes appropriations of \$1,200,000 for FY 2000 and such sums as necessary for each of FYs 2001 through 2005 for the National Domestic Violence Hotline.

Subsection (e) authorizes appropriations of such sums as necessary for each of FYs 2000 through 2005 for the program of demonstration grants for community initiatives.

Subsection (f) adds a new section to the Act, "**SEC. 319. CULTURALLY APPROPRIATE SEXUAL ASSAULT PREVENTION AND TREATMENT SERVICES FOR UNDERSERVED POPULATIONS.**" This section authorizes the Secretary to provide, directly or by grant or contract, for culturally appropriate sexual assault prevention and treatment services for underserved populations, including ethnic minority populations, rural communities, American Indians and Alaskan Natives, and people with disabilities. It authorizes appropriations of \$1,500,000 for FY 2000, and such sums as necessary for each of FYs 2001 through 2005.

Subsection (g) adds a new section with the following provisions:

"SEC. 320. MONITORING VIOLENCE AGAINST WOMEN."

NATIONAL SURVEY OF VIOLENCE AGAINST WOMEN. Subsection (a) authorizes the Secretary, in cooperation with the Justice Department, to conduct a biennial survey of violence against women.

MONITORING DOMESTIC VIOLENCE AND SEXUAL ASSAULT THROUGH EXISTING DATA. Subsection (b) authorizes the Secretary to develop programs to use existing data, from public health agencies, social service agencies and organizations, criminal justice agencies, agencies and organizations concerned with domestic violence, and sexual assault agencies and organizations, to monitor domestic violence and sexual assault in a State or a local community.

AUGMENTATION OF EXISTING DATA SOURCES. Subsection (c) authorizes the Secretary to study and evaluate the use, for purposes of studying violence against women, of existing sources of information other than data that are routinely collected by State and local governments.

AUTHORIZATION OF APPROPRIATIONS. Subsection (d) authorizes appropriations of \$1,500,000 for FY 2000, \$3,000,000 for FY 2001, and such sums as necessary for each of FYs 2002 through 2005.

Subsection (h) adds a new section to the Act, **"SEC. 321. DEMONSTRATION PROGRAM FOR PREVENTING AND TREATING VIOLENCE AGAINST WOMEN."** The section would authorize the Secretary to provide for innovative and comprehensive ways to conduct activities designed to prevent domestic violence and sexual assault; to deliver services to victims, their families, and the perpetrators; and to provide access to help for victims, their families, and the perpetrators. The section authorizes appropriations \$2,500,000 for FY 2000, and such sums as necessary for each of FYs 2001 through 2005.

SUBTITLE B – CHILDREN EXPOSED TO VIOLENCE.

SEC. 3011. CHILD ABUSE MURDERS.

This section amends the federal murder statute, 18 U.S.C. 1111, to include child abuse among the predicate offenses for felony murder, and to classify child murders committed as part of a pattern or practice of abuse as first-degree murder. These changes will help to ensure that child abusers who kill their victims will receive penalties that reflect the heinousness of their crimes, and that juries in cases involving fatal abuse of children will be adequately informed about broader patterns of abusive conduct.

1. Felony murder. 18 U.S.C. 1111(a) currently classifies as first-degree murder any murder "committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, burglary, or robbery." The amendments in this section add "child abuse" to this list of felony-murder predicates. Certainly acts of child abuse with lethal consequences are as deserving of such treatment as killings occurring in the course of such offenses as burglary or robbery. A number of states have similarly included child abuse crimes as predicate offenses for felony murder. *See* Ariz. Rev. Stat. § 13-1105 (first degree murder); D.C. Code § 22-2401 (first degree murder); Fla. Stat. Ann. § 782.04 (first degree murder); Idaho Code § 18-4003 (first degree murder); Kan. Stat. Ann. §§ 21-3401, -3436 (first degree murder); Miss. Code Ann. § 97-3-19 (capital murder); N.D. Cent. Code § 12.1-16-01 (murder); Or. Rev. Stat. § 163.115(1)(b) (murder); Tenn. Code Ann. § 39-13-202 (first degree murder); Utah Code Ann. § 76-5-203 (murder); Wyo. Stat. Ann. § 6-2-101 (first degree murder).

Under the amendments, "child abuse" is defined for felony murder purposes as "intentionally, knowingly, or recklessly causing death or serious bodily injury to a child." As with other felony murder predicates under 18 U.S.C. 1111, such as robbery or sexual abuse, the commission of child abuse (as defined) together with the resulting death of the victim would suffice to establish liability for first degree murder. *See United States v. Thomas*, 34 F.3d 44, 48-49 (2d Cir. 1994). The amendments define "serious bodily injury" by cross-reference to 18 U.S.C. 1365. The amendments define "recklessly causing death or serious bodily injury" to encompass situations in which the perpetrator was aware of and disregarded a grave risk of death or serious bodily injury.

2. Pattern of abuse murders. The section also amends 18 U.S.C. 1111(a) to classify as first-degree murder "murder . . . perpetrated as part of a pattern or practice of assault or torture against a child or children." This covers both cases involving a pattern of abuse against the murdered child, *see, e.g., Estelle v. Maguire*, 502 U.S. 62 (1991), and cases involving a pattern of abuse against a number of children, *see, e.g., United States v. Woods*, 484 F.2d 127 (4th Cir. 1973).

In this context as well, there is substantial precedent at the state level for similar provisions. A number of states define homicidal offenses which essentially consist of killing a child where the fatal conduct was part of a broader pattern of abuse. *See* Alas. Stat. § 11.41.100 (liability for first-degree murder based in part on "a pattern or practice of assault or torture of a child" where "one of the acts of assault or torture results in the death of the child"); Del. Code Ann. title 11, § 633 (defining offense of murder by abuse or neglect in the second-degree in part as causing the death of a child where the person "has engaged in an act or previous pattern of abuse and/or neglect of such child"); Minn. Stat. § 609.185 (liability for first-degree murder based in part on causing "the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon the child"); Or. Rev. Stat. § 163.115(1)(c) (murder by abuse defined in part as causing the death of a child or a dependent person where the offender "has previously engaged in a pattern or practice of assault or torture

of the victim or another child . . . or . . . dependent person"); Wash. Rev. Code § 9A.32.055 (homicide by abuse defined in part as causing the death of a child where the person has "previously engaged in a pattern or practice of assault or torture" of the victim).

Provisions of this type reflect the fact that fatal child abuse offenses do not take place in a vacuum. The perpetrators of such crimes frequently have histories of abusive conduct committed against the victim of the killing and/or other children. If, for example, an abuser has effectively engaged in the slow killing of a child over time through a continuing course of abuse, the heinousness of his conduct is not less than that of a person who engages in a single homicidal act with premeditation. The inclusion of an explicit provision covering a "pattern or practice of assault or torture" also has evidentiary value, because the charging of the offense in these terms allows the disclosure at trial of all acts comprising the pattern or practice. This can provide necessary context for understanding the general abusive situation in which a child murder took place and the behavioral pattern of the abuser which led to its commission. See United States v. Woods, 484 F.2d 127, 133 (4th Cir. 1973) ("when the crime is one of infanticide or child abuse, evidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime"); Karp, Evidence of Propensity and Probability in Sex Offense Cases and Other Cases, 70 Chi. Kent L. Rev. 15, 30 (1994) (noting precedent for and value of provisions that "give the trier information about broader patterns of criminal behavior of which the particular incident is part").

The proposed amendments to 18 U.S.C. 1111 define "pattern or practice of assault or torture" as "assault or torture committed on at least two occasions." Hence, at least one act of assault or torture, in addition to the fatal act, is required. This is similar to Alas. Stat. § 11.41.100 and Or. Rev. Stat. § 163.115(1)(c), which specify that a total of two acts (including the fatal act) is sufficient to constitute a pattern or practice for purposes of the pattern-of-abuse murder provisions. The effect is to establish liability for first-degree murder whenever the perpetrator's conduct involved: (1) murdering a child through assault or torture, and (2) the commission of assault or torture on at least one other occasion against that child or another child or children. The terms "assault" and "torture" are defined by cross-reference to existing federal law provisions which use these concepts (18 U.S.C. 113 and 2340 respectively). See generally United States v. Juvenile Male, 930 F.2d 727, 728-29 (9th Cir. 1991) (regarding meaning of assault).

The amendments define "child" for purposes of both the felony murder and the pattern-of-abuse murder provisions as a person below 18 who is under the perpetrator's care or control or who is at least six years younger than the perpetrator. The limitations in the definition reflect the fact that the proposed provisions are focused on the problem of child abuse murders, and are not designed to reach every homicide in which the victim happens to be a juvenile. Some state provisions attempt to draw this line by setting a lower age ceiling than 18 under their child murder provisions. However, children in their mid-teens remain legally and practically under the control of their parents and caretakers, and hence remain particularly vulnerable to abuse – including potentially lethal abuse – by such persons.

Rather than excluding such older victims of lethal child abuse, the proposal requires either that the affected child or children be under the perpetrator's care or control, or that there be at least a six-year age difference. As a practical matter, in most fatal child abuse cases, some type of relationship of care or control exists between the perpetrator and the victim or victims, either generally or on the particular occasion(s) when abuse occurs. The alternative ground -- which categorically covers cases involving a significant age difference (at least six years) -- moots questions that otherwise could arise about whether a relationship of care or control exists in marginal or ambiguous situations. It also ensures coverage of cases in which there is no relationship of care or control, but which are appropriate in any event for coverage by special child murder provisions. For example, where the specified age difference exists, there would be no question about the applicability of the proposed provisions to a mother's sexual partner who is generally uninvolved with her child though present in the household, and who fatally assaults the child on a particular occasion; to a predatory child abuser who fatally attacks a child he does not know; or to a parent who has lost custody of his child but returns on a particular occasion and kills the child.

SEC. 3012. SENTENCING ENHANCEMENT FOR CRIMES COMMITTED IN THE PRESENCE OF CHILDREN.

Subsection (a) directs the United States Sentencing Commission to review and, if appropriate, amend its guidelines and its policy statements for person convicted of crimes of violence that are committed in the presence of a child.

Subsection (d) directs the Sentencing Commission to submit a report to Congress, no later than June 1, 2000, on issues relating to the exposure of children to crimes of violence.

SEC. 3013. AMENDMENTS RELATING TO CHILD VICTIMS' AND CHILD WITNESSES' RIGHTS.

This section makes the child victim-witness protection features of the law applicable to a child victim of, or witness to, any type of crime, provided the child was not a defendant or conspirator. It also extends the privacy protections of section 3509, which are currently limited to persons under the age of 18, to persons who were under the age of 18 at the time of the offense in question but who are at the age of majority at the time the privacy protections are to be applied. In addition, this section strengthens the privacy protections of section 3509 by (1) applying the relevant restrictions to any evidence or other items, not just documents and (2) clarifying that prosecutors, defense counsel, jurors, and others subject to the privacy protections continue to be subject to the restrictions even after their role in the case is over. This section also amends the disclosure provisions of section 3509 to permit disclosure to a victim-witness assistance program.

In addition, this proposal amends section 3509 of title 18, United States Code, which concerns child victims' and child witnesses' rights and authorizes the use of closed-circuit

television testimony and videotaped depositions of children under certain circumstances. The current law also contains provisions protecting the privacy of child victims and witnesses. The proposed amendments expand the reach of the statute to a broader class of child victims and witnesses and make a number of other improvements aimed at further protecting children. The statute applies “throughout the judicial process.” This term is usually interpreted as meaning following indictment and through all levels of appeal. However, some provisions might be applicable during grand jury proceedings to ensure that discovery will not reveal the minor’s identity beyond those to whom disclosure is necessary. In particular, the privacy protections of subsection (d) should be applied to the grand jury process.

Subsections (a) - (c) make the child victim-witness protection features of the law applicable to a child victim of, or witness to, any type of crime, provided the child was not a defendant or charged conspirator. Current law is overly limited in two respects. First, the definition of “child,” 18 U.S.C. §3509(a)(2), is limited to a victim of a crime of physical abuse, sexual abuse, or exploitation or to a witness to a crime committed against another person. 18 U.S.C. §3509(a)(2) (emphasis added). Children who are witnesses to narcotics transactions would not be covered under the current statute. Second, the availability of an alternative to live in-court testimony is limited to a proceeding involving an alleged offense against a child. 18 U.S.C. §3509(b)(1)(A) and (2)(A). The proposed amendment in subsection (b) seeks to expand the current statute to child victims of or witnesses to any crime. Finally, the provision permitting appointments of guardians ad litem, 18 U.S.C. § 3509(h), is currently limited to victims of or witnesses to offenses involving abuse or exploitation.

The amendments are necessary because child witnesses to a variety of offenses may have the same difficulty testifying in open court as child victims. As written the current law would not apply to victims of child pornography where the pictures are not discovered and the defendant not prosecuted until the child reaches the age of majority. Moreover, certain categories of crime, such as prostitution and contacts made with individuals using the Internet, may be construed narrowly with respect to a child’s victim status. A child’s ability to testify could be greatly enhanced through the use of closed-circuit television or videotaped depositions.

The defendant’s right to confrontation of witnesses is protected despite the proposed broadening of the statute’s coverage to all classes of crime and to child witnesses because the use of alternatives to live in-court testimony is dependent upon a judicial finding that the child is unable to testify for any of several specified reasons, such as fear or a substantial likelihood that the child would suffer emotional trauma from testifying. 18 U.S.C. §3509(b)(1)(B) and (2)(B).

Subsection (d) expands current law by assuring that its privacy protections relating to persons under 18 years of age extend to persons who were below that age at the time of the offense. The law authorizes a prosecutor, law enforcement agent, defense attorney, or juror to disclose documents identifying the child only to persons who, by reason of their participation in the proceeding, have reason to know the information. A minor who turns 18 before the defendant is prosecuted should have his or her childhood victim or witness status protected by

this and other privacy protections of the law including closed courtrooms, confidentiality of information, filing under seal, protective orders, disclosure of information, and closed courtrooms. In some cases, members of the press or other witnesses have revealed the names of juvenile prostitutes or youth who had been the subjects in child pornography after the youth testified in open court. The rehabilitation and counseling of these youth was thereby impaired and the purposes of § 3509 compromised. In one particularly egregious case, the defendant repeatedly changed lawyers and submitted numerous motions resulting in a delay until the victim had reached majority; the defendant then claimed that the provisions of 18 U.S.C. § 3509 should not apply.

Like subsection (d), subsection (e) addresses the privacy provisions of the current child victim-witness law in several ways. First, this subsection assures that not only documents but any evidence or other items that disclose the name or any other information that either clearly identifies a child directly or indirectly by identifying the child's family are subject to the law's privacy protections. Wherever practicable, disclosure of information that would clearly identify the child directly or indirectly by identifying the child's family should be avoided. This section also assures that prosecutors, defense counsel, jurors, and others subject to restrictions on disclosure of information continue to be subject to these restrictions after their status as such has ended. Thus, for example, a juror would continue to be subject to the existing restrictions on disclosure after being discharged from the jury. Finally, section 3 amends the disclosure provisions of section 3509 to clarify that disclosure is permissible to a victim or witness assistance program. Current law specifies that disclosure is not prohibited to certain persons, such as a multidisciplinary child abuse team or a guardian ad litem, as well as others when the court finds that disclosure is necessary to the welfare of the child. 18 U.S.C. §3509(d)(4). The addition of a victim-witness assistance program to the list of entities specifically authorized to receive information will assure that a child who seeks benefits from a victim-witness assistance program will be able to seek expeditious disclosure of records to the program.

Subsection (f) amends section 3509(i), which concerns adult attendants. The amendment specifies that the current requirement for the adult attendant's image to be recorded on videotape during the child's testimony or deposition applies only when an alternative to live in-court testimony is used for the child. There is no need for videotaping the adult attendant if the child has given live in-court testimony. By comparison, if the child has been deposed on videotape or has testified through closed circuit television, it would be important that the fact finder be able to ascertain whether the adult attendant provided answers to the child or engaged in any other problematic conduct.

SEC. 3014. TECHNICAL CORRECTIONS TO FORFEITURE STATUTES FOR SEXUAL EXPLOITATION OF MINORS.

Subsections (a) - (c) would amend the Criminal Forfeiture, Civil Forfeiture, and Civil Remedy statutes that apply to crimes of exploitation of minors to include 18 U.S.C. § 2425, Use of interstate facilities to transmit information about a minor.

H.R. 3494 was passed by Congress and signed by the President on October 30, 1998. It created a new crime: Section 2425, Use of the interstate facilities to transmit information about a minor. The purpose of the transmitted information must be "to entice, encourage, offer, or solicit any person to engage in sexual activity with a minor under the age of 16." In the same legislation, Congress amended the Criminal Forfeiture (2253), Civil Forfeiture (2254), and Civil Remedy (2255) statutes which apply to crimes of exploitation of minors. Because Section 2425 had not yet been enacted it was inadvertently omitted from the forfeiture provisions. This proposal would bring the new statute into agreement with the remainder of the statutes involving sexual exploitation of minors. For example, someone who uses a computer to post a child's name for these purposes, should forfeit the computer.

SEC. 3015. AMENDMENT TO RESTITUTION STATUTES.

Subsection (a) of this section would expand the permissible limits of restitution orders for victims of sex crimes first, by allowing for the same range of services for victims of crimes under chapter 117 as for other sexual exploitation crimes under chapters 109A and 110, and second, allowing for the same range of services when the sex or exploitation offense does not necessarily result in bodily injury to the victim. It also provides for restitution to victims prior to disbursement of forfeited property to law enforcement or other agencies. Subsection (b) amends the criminal forfeiture statute which provides for forfeiture for certain crimes committed under chapters 110 and 117.

Chapters 109A (sexual abuse) and 110 (child pornography) include provisions for mandatory restitution to victims. The victims in chapter 117 are similarly situated and in need of the restitution suggested in this proposal. The victims include youth lured through communications by computer to engage in sexual activity or to meet a defendant who intends to molest the minor. Other victims may be individuals trafficked for prostitution. The victims may be separated from their home environments, may be deprived of their courses of education (including junior and senior high school programs), and psychologically damaged by their experiences. However, unlike victims of crimes committed under chapters 109A and 110, it might not be possible to provide restitution to all victims of sexual exploitation crimes under chapter 117. For instance, it might not be possible to provide services for victims of sexual exploitation crimes committed by Americans in foreign countries under 18 U.S.C. § 2423(b) or for victims of trafficking once they are returned to their home countries under 18 U.S.C. § 2421. Therefore, the enactment of a mandatory restitution provision might not be advisable. However, it is clear that the provisions of 18 U.S.C. § 3663 do not now provide for the breadth of restitution for services needed by these victims as a result of the actions of the defendant(s). Subsection (a) of the proposal would allow for and serve to encourage such restitution. Subsection (b) provides for restitution to victims prior to disbursement of forfeited property to local or federal law enforcement and other agencies.

SUBTITLE C – VICTIMS ASSISTANCE.

SEC. 3021. ASSISTANCE FOR FEDERAL LAW ENFORCEMENT VICTIM SERVICES.

This section expands the grants authority of the Office for Victims of Crimes (OVC) Director to include assisting federal law enforcement agencies in providing services to victims of non-federal crime; providing financial support to U.S. citizens who are victims of crime outside the United States, and establishing a fellowship or internship within OVC to allow OVC to better utilize the expertise and experience of the victims community in program development, training, and technical assistance.

Paragraph (C). The paragraph is needed to cover a gap in OVC's current authority. At this time, OVC may provide funding to federal law enforcement agencies through 10603(c)(1)(B). However, this authority is limited to situations where a federal law enforcement agency is working only with victims of federal crime. In cases where the federal agency is assisting persons who are not federal crime victims, OVC is currently generally unable to assist the agency.

Paragraph (D). The paragraph is intended to give OVC the ability to provide services to victims of crimes that occur outside the United States. Currently, most State compensation programs are not able to assist these victims, and OVC can currently assist them only if the victims are victims of a "federal" crime.

Paragraph (E). The paragraph is intended to give OVC the ability to establish a fellowship program to bring victims rights advocates or service providers into OVC to serve as fellows or interns to assist OVC in program development, training and technical assistance, and providing services to the field.

SEC. 3022. COMPENSATION AND ASSISTANCE TO VICTIMS OF TERRORISM OR MASS VIOLENCE.

The change proposed in this section is clearly needed to indicate how much fund and what grant source would be used for the new grant authority outlined above.

SEC. 3023. AMENDMENT TO THE CRIME VICTIMS WITH DISABILITIES ACT.

As enacted, section 5 of the Crime Victims with Disabilities Act (Pub. L. 105-301 -- Oct.27,1998) requires the inclusion of these new statistics in the National Crime Victimization Survey within six months of the study to be conducted under section 4. This substitute section 5 would allow the Bureau of Justice Statistics an additional six months and direct it to experiment and pretest the results of the section 4 study before it must include such data in the Survey.

SEC. 3024. EXPANDED JURISDICTION OVER CHILD BUYING AND SELLING OFFENSES.

This section would expand federal jurisdiction under 18 U.S.C. 2251A, a statute which punishes by not less than twenty years' incarceration the buying or selling of children in relation to the production of child pornography. Currently, under subsection (c), there is federal jurisdiction if the actor or the child traveled in interstate or foreign commerce in the course of the offense, or if the offense took place "in any territory or possession of the United States." The proposed amendment would add the term "commonwealth" to "territory or possession" so as to clearly cover the Commonwealth of the Northern Mariana Islands, and would also add coverage of conduct occurring in the special maritime and territorial jurisdiction of the United States. There is no apparent reason why such jurisdiction was not included when the statute was passed in 1988. The proposed amendment would remedy this unwarranted gap.

SUBTITLE D – HEALTH CARE FRAUD AND ABUSE.

SEC. 3031. ATTORNEY GENERAL'S INJUNCTION AUTHORITY.

Under existing law (18 U.S.C. § 1345(a)(1)(C)), Federal prosecutors are able to obtain injunctive relief in connection with a wide variety of Federal health care offenses. This authority has proven to be extremely valuable in putting a halt to fraudulent behavior. Unfortunately, however, such relief is not available in connection with kickback offenses under section 1128B of the Social Security Act (42 U.S.C. § 1320a-7b) ("Criminal penalties for acts involving Medicare or State health care programs"). This is a serious omission. Because of the large amounts of money involved in these kinds of cases, it is essential that the Attorney General have the authority to enjoin kickback schemes while they are in progress. The draft bill would permit the Attorney General to do so.

SEC. 3032. ATTORNEY GENERAL'S AUTHORITY TO SEEK CIVIL PENALTIES.

Section 1128B of the Social Security Act (42 U.S.C. § 1320a-7b) establishes criminal penalties for kickback offenses committed against federal health care programs, such as Medicare and CHAMPUS. There is, however, no direct civil penalty applicable to such offenses. As a consequence, an attorney for the government is forced in cases of this nature to do nothing or pursue criminal charges – quite possibly in a case that, while meriting government action, might not be appropriate for criminal prosecution. The proposal would permit the Attorney General to bring civil actions against wrongdoers under the anti-kickback provisions of the Social Security Act. Civil penalties are, particularly important to successful prosecution of health care fraud cases, since the complex business arrangements that are often employed in connection with kickback schemes often make it difficult – or impossible – to demonstrate the necessary scienter needed to sustain a crime.

SEC. 3033. GRAND JURY DISCLOSURE.

Under existing law, an attorney for the government may not, as a general matter, disclose

matters that occur before a Federal grand jury. A violation of this non-disclosure requirement (set forth in Rules 6(e) of the Federal Rules of Criminal Procedure) is punishable as contempt of court. An overriding objective of this prohibition is to protect the integrity of criminal investigations by limiting opportunities to intimidate witnesses, destroy documents or otherwise obstruct justice. The prohibition is also important in protecting the rights and reputations of persons who appear before grand juries.

In 1989, Congress created an exception to Rule 6(e) when it enacted 18 U.S.C. § 3322 (“Disclosure of Certain Matters Occurring Before Grand Jury”) (enacted as section 964 of the “Financial Institutions Reform, Recovery, and Enforcement Act of 1989,” (Pub. L. 101-73)). Under 18 U.S.C. § 3322(a), an attorney for the government who is privy to grand jury information involving a criminal violation of the Federal banking laws may disclose that information to another attorney for the government for use in connection with civil actions commenced to enforce the banking laws. In enacting this provision, Congress recognized that, in this important class of cases, in which both criminal and civil actions are routinely brought against wrongdoers, and in which large amounts of money are at stake, the Rule 6(e) restriction on disclosure needlessly complicated investigations in complex financial institution fraud cases.

The draft bill would merely extend the existing Rule 6(e) exception to Federal health care offenses, as defined in 18 U.S.C. § 24. Enactment of this provision would not make available information to civil prosecutors that is not already available to them. Rather, it would simplify information sharing and would enhance the government’s ability to investigate wrongdoing. Such a provision would be very important for the effectiveness of our overall health care anti-fraud effort. In particular, by facilitating the sharing of information between criminal investigators and civil prosecutors, this proposal would enable prosecutors to proceed more quickly and efficiently to recover losses to Federal health care programs, such as Medicare, Medicaid, CHAMPUS, and the Federal Employee Health Benefit Program and to prevent wrongdoers from dissipating illegally obtained assets before appropriate action to recover the government’s losses can be taken.

SEC. 3034. AUTHORIZED INVESTIGATIVE DEMAND PROCEDURES.

Under section 248 of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104-191) (enacting new 18 U.S.C. § 3486), the Attorney General or her designee is authorized to issue an administrative subpoena in connection with an investigation relating to a “Federal health care offense.” Under 18 U.S.C. § 24, a “Federal health care offense” is defined to include only criminal offenses. In civil cases, however, the Department’s attorneys must rely on subpoenas issued by the Office of the Inspector General (OIG) of the Department of Health and Human Services (which are issued only to OIG agents assigned to a particular case) or upon civil investigative demands (which must be signed personally by the Attorney General). This constitutes a serious limitation on our ability to investigate civil health care fraud cases in an effective and efficient manner. As a consequence, this provision would make it clear that the Attorney General or her designee (e.g., a duly authorized Assistant United States Attorney)

would be permitted to issue an administrative subpoena in connection with any health care fraud case, criminal or civil, thus greatly facilitating our ability to pursue wrongdoers.

SEC. 3036. STUDY AND REPORT ON HEALTH CARE FRAUD SENTENCES.

Section 3036 directs the United States Sentencing Commission to review and possibly amend the sentencing guidelines with respect to health care fraud offenses. The provision requires the Commission to ensure that the guidelines reflect the serious harms associated with such fraud and to consider providing for increased penalties in appropriate circumstances. The Commission's review also must assure that the guidelines assure reasonable consistency and account for any circumstances that might justify departures from the guidelines. The provision also directs the Commission, by December 31, 2000, to submit a report to Congress on any changes to sentencing policy it has made relating to health care fraud, and to include any recommendations with respect to retention or modification of current statutory penalty levels.

SEC. 3037. PROVISIONS PROTECTING THE INTERESTS OF FALSE CLAIMS ACT MATTERS IN BANKRUPTCY PROCEEDINGS.

Certain actions not stayed by bankruptcy proceedings. The commencement or continuation of an action under 31 U.S.C. §§ 3729-3733 shall not be stayed by section 362(a)(1), (a)(2), (a)(3) and (a)(6) or under section 105(a) of Title 11, United States Code.

This subsection serves to codify judicial interpretation of the "police power" exception to the automatic stay provision in the Bankruptcy Code. The Bankruptcy Code's automatic stay provision prevents the commencement, continuation, enforcement or collection of a judicial, administrative, or other claim against the debtor or the recovery of a prepetition claim against a debtor, regardless of whether the assets involved are property of the debtor's estate. 11 U.S.C. § 362(a). Section 105(a) of Title 11 authorizes a bankruptcy court to fashion orders necessary to further the substantive provisions of the Bankruptcy Code. Those accused of defrauding the government sometimes threaten or commence bankruptcy proceedings in an effort to deter the government from pursuing them further under the False Claims Act, in hopes that the bankruptcy proceeding will somehow derail the government's efforts to recover money taken from it through fraud. However, the Bankruptcy Code exempts from the automatic stay actions by the government that are exercises of the "police" or "regulatory" powers. 11 U.S.C. § 362(b)(4). Although actions under the civil False Claims Act, 31 U.S.C. § 3729 *et seq.*, are not expressly exempted by this provision, it has been held that since the False Claims Act and other fraud-based statutes have a police and regulatory function to deter fraud, actions by the United States under such statutes come within the intended scope of the exemption. See, e.g., In re Commonwealth Companies, Inc., 913 F.2d 518 (8th Cir. 1990). To deter future litigation over this issue, this provision would amend the Bankruptcy Code so that it expressly exempts False Claims Act actions from the automatic stay provision.

Certain Debts not Dischargeable in Bankruptcy. No debt owed to the United States for

violating 31 U.S.C. § 3729 et seq. or under a compromise or other agreement resolving such a debt shall be discharged under Title 11, United States Code.

The general rule is that all monetary claims against an individual are "discharged" after the bankruptcy court confirms a plan of reorganization in a Chapter 7 or Chapter 11 bankruptcy proceeding. However, there are exceptions to this rule, and if a claim is not discharged, the claimant may continue to pursue collection of the debt after bankruptcy. See 11 U.S.C. § 524 (describing the effects of discharge.) At present, False Claims Act debts, which are not based on a showing of intent to defraud, can be treated inconsistently under the exceptions to the dischargeability provisions. For example, several courts have held that debts will be held nondischargeable under 11 U.S.C § 523(a)(2)(A), a provision that concerns debts arising from fraud, only if the debtor had an "intent" to defraud. See, e.g., Mayer v. Spanel Int'l., Ltd., 51 F.3d 670 (7th Cir.), cert. denied, 516 U.S. 1008 (1995). Likewise, some courts have held that 11 U.S.C. § 523(a)(6), which provides an exception for debts arising from "willful and malicious injury," requires proof that the debtor knew his conduct would automatically or necessarily cause the creditor's injury, see, e.g., In re Scarlata, 979 F.2d 521, 526 (7th Cir. 1992), a standard which is similar to an "intent" standard. And, while 11 U.S.C. § 523(a)(7) render fines and penalties nondischargeable, that provision likely would not render the single damages portion of a False Claims Act debt nondischargeable. Indeed, one court has held that no portion of a False Claims Act debt is nondischargeable under 11 U.S.C. § 523(a)(7) since the treble damage remedy is compensatory in nature. See In re Stelweck, 86 B.R. 833 (Bankr. E.D. Pa. 1988), aff'd on other grounds, 108 B.R. 488 (E.D. Pa. 1989).

The proposed provision would provide for consistent treatment of False Claims Act debts against individuals as nondischargeable in bankruptcy proceedings..

Repayment of Certain Debts Considered Final. No transfer on account of a debt owed to the United States for violating 31 U.S.C. § 3729 et seq. or under a compromise or other agreement resolving such a debt shall be avoided under sections 544, 545, 547, 548, 549, 553(b) or 724(a) of Title 11, United States Code.

As a general matter, a debtor that was "insolvent" at the time it settled a False Claims Act case under current law may recoup or "avoid" the settlement payment if the transfer was made within the 90 day period before the debtor petitioned for bankruptcy, unless the transfer was intended to be and was a contemporaneous exchange for new value given to the debtor. The courts have adopted different views on the issue of whether a release of claims is considered "new value" given to the debtor. By providing that False Claims Act debts may not be avoided in bankruptcy proceedings, this provision would in effect make clear that a release of False Claims Act liability is "new value" given to a debtor.

SEC. 3038. EXTENDING ANTI-FRAUD SAFEGUARDS TO THE FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM.

This section would extend important anti-fraud safeguards to the Federal Employees Health Benefit Program (FEHBP). The FEHBP is the largest employer-sponsored health care program in the United States, spending more than \$17 billion in taxpayer funds on health care benefits for federal employees. Unfortunately, when Congress extended powerful anti-fraud safeguards to the Medicare and Medicaid programs -- including strong anti-kickback provisions, enhanced civil money penalty provisions, and new tools to exclude dishonest providers from certain federal health care programs -- in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Congress explicitly excluded the FEHBP from these safeguards. There is no sound policy justification for such an exclusion, and this section would remove this unwarranted exclusion.

SEC. 3039. PREVENTING AND PUNISHING ABUSE AND NEGLECT OF ELDERLY AND OTHER RESIDENTS IN NURSING HOMES AND RESIDENTIAL HEALTH CARE FACILITIES.

Protecting elderly and disabled Americans from abuse and neglect is one of the Administration's highest priorities. While most nursing home operators and employees are honest and law abiding, too many vulnerable nursing home residents are subjected to serious abuse and neglect. Moreover, federal law currently provides inadequate remedies to deter, prevent, and punish widespread abuse and neglect in federally funded nursing homes and other residential health care facilities.

This section would create new federal criminal and civil penalties against any individual or organization that engages in a pattern of violations of federal laws, regulations or rules or state laws governing the health, safety or care of patients in residential health care facilities where at least one such violation results in physical or mental harm to a resident. For criminal penalties to attach, the violations constituting the pattern must be committed knowingly and willfully. Significantly, the scienter attaches to the violations that constitute the pattern rather than to the pattern itself. This section would also authorize the Attorney General to impose civil money penalties for patterns of violations resulting in harm, and to obtain injunctive and other equitable relief to prevent or enjoin violations of the new statute.

A number of important terms are defined in the new 18 U.S.C. 1348. Residents of residential health care programs, who frequently are totally dependent on the program's staff for basic health and safety needs, are particularly vulnerable to abuse and neglect. Therefore, the term "residential health care facility" is defined broadly to include skilled and unskilled nursing facilities, mental health and mental retardation facilities, and other facilities or programs that provides health care services in a residential setting and that receives more than \$10,000 in any calendar year from a federal health care program., including Medicaid.

The statute also defines "pattern of violations" or "pattern of knowing and willful violations" to mean multiple violations of a single law, regulation or rule or single violations of multiple laws, regulations or rules, that are widespread, systemic, repeated, similar in nature, or

result from a policy or practice. For example, a widespread group of violations, even if not the result of a common policy or practice or not involving the same or similar law, regulation, or rule, would be covered by the new statute. On the other hand, one or more isolated violations that do not rise to the level of a "pattern" would not be covered. The terms "pattern of violations" and "pattern of knowing and willful violations" are meant to incorporate an element of proportionality so that the number of violations required to establish a pattern within an entity operating numerous facilities across the country would be greater than the number of violations required for a single facility. The terms also are meant to incorporate an element of severity so that a lesser number of violations would be required if the harm was severe.

SUBTITLE E – CONSUMER FRAUD

SEC. 3051. BLOCKING TELEMARKETING SCAMS.

Throughout the 1990s, telemarketing fraud has been one of the most pervasive and problematic forms of white-collar crime. Whether purporting to offer substantial sweepstakes prizes, investment opportunities, purchases of foreign lottery chances, or the opportunity to donate to supposedly charitable causes, fraudulent telemarketers, operating in the United States and Canada, have victimized many thousands of people. Many of these victims lose thousands of dollars; some ultimately lose their life savings.

In addition, fraud schemes are increasingly taking advantage of the global access afforded by the Internet to expand their reach to prospective victims worldwide: for example by putting up a Web site or participating in chat rooms to attract victims to a fraudulent investment or business opportunity. Internet Fraud Watch, a project of the National Consumers League, reported that in 1998 it had received more than 7,700 complaints from consumers about online frauds. In addition, the Securities and Exchange Commission reportedly receives approximately 300 complaints a day about online securities schemes. One of the most frequently reported is a form of market manipulation known as "pump and dump" schemes. These schemes -- which typically use various devices to mislead online investors into putting large amounts of funds into speculative, thinly traded, or shell companies -- often resort to a variety of Internet-related communications, such as Web sites, communications in chat rooms, and E-mail, to further their market manipulations. Finally, law enforcement agencies and consumer groups are seeing increasing evidence that large-scale fraudulent operations are turning to the Internet as a medium where they believe they can operate more freely than traditional methods of mass communication, such as mail or telemarketing, allow. Consumers, for example, are now reporting unsolicited E-mails from what appear to be Nigerian-based fraud schemes, which had relied heavily on mass mailings to potential victims before the U.S. Postal Inspection Service had become so successful in identifying and destroying large volumes of those mailings.

In short, it is becoming increasingly clear that the success of future large-scale fraudulent operations, whether conducted by one person or many, will ultimately depend largely on reliable access to electronic communications, whether through long-distance telephony, the Internet, or

both. Although any criminal can use a pay telephone to contact an individual victim, the larger and more profitable telemarketing schemes typically require continuing service at a fixed location so that solicitors can work regular shifts to contact prospective victims. For this reason, when the United States-Canada Working Group on Telemarketing issued its report in November, 1997, on cross-border telemarketing fraud, it recommended that both governments examine the regulation of telephone services and consider options that would permit the denial of telephone services (whether by terminating service within a country or blocking particular calls from one country to the other) to persons engaging in telemarketing fraud.⁵

At present, federal law contains only one provision that specifically authorizes the termination of telephone service. Subsection 1084(d) of Title 18, United States Code, authorizes a common carrier subject to the jurisdiction of the Federal Communications Commission to discontinue or refuse the leasing, furnishing, or maintaining of a "wire communication facility" (a term broadly defined in 18 U.S.C. § 1084),⁶ after reasonable notice to the subscriber, if a federal, state, or local law enforcement agency notifies the common carrier in writing that the facility is being used or will be used "for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of federal, state, or local law. Subsection 1084(d) also provides that no damages, penalty, or forfeiture, civil or criminal, may be found against any carrier for any act done in compliance with any notice that it receives from a law enforcement agency. Finally, it states that nothing in section 1084 shall be deemed to prejudice the right of any person affected by the discontinuance or refusal of the facility to secure an appropriate determination, as otherwise provided by law, in a federal court or in a state or local tribunal or agency, that the facility should not be discontinued or removed, or should be restored.

Although a main purpose of section 1084 was to aid in the suppression of organized gambling activity, such as bookmaking, *see* H.R. Rep. No. 967, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 USCCAN 2631, 2631-32, the language of subsection 1084(d) is broad enough to encompass the use of the telephone for gambling-related information when criminal activity other than bookmaking is involved. For example, a number of fraudulent telemarketing operations contact prospective victims and offer them the opportunity to purchase chances in foreign lotteries. In at least one case, the Washington State Attorney General has successfully invoked subsection 1084(d) to have telephone companies deny telephone service to a lottery

⁵ *See* UNITED STATES-CANADA WORKING GROUP ON TELEMARKETING FRAUD, UNITED STATES-CANADA COOPERATION AGAINST CROSS-BORDER TELEMARKETING FRAUD at 19 (1997).

⁶ As used in Chapter 50 of Title 18, United States Code (which includes section 1084), the term "wire communication facility" means "any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission."

telemarketing operation based in British Columbia.

Subsection 1084(d), however, is clearly not broad enough to authorize the blocking or termination of telephone service for a subscriber who is engaging in any form of telemarketing fraud that does not involve gambling or wagering information. While federal and state law enforcement authorities have had considerable success in recent prosecutions of telemarketing schemes, broader authority is needed to enable common carriers and Internet service providers to block or terminate service to numbers or identities used by participants in fraud schemes without fear of civil liability for that blocking or termination. The proposed legislation would address that need.

This section would amend Chapter 113A of Title 18 — the chapter providing for enhanced sentencing and restitution in telemarketing fraud-related cases -- to create a new section 2328. Subsection (a) of the proposed section 2328 would authorize a federal court to order electronic communications services, such as carriers of telephone service subject to the jurisdiction of the Federal Communications Commission and Internet service providers, to block or terminate service to a telephone number, or to terminate service to any other subscriber number or identity (terms used in the Electronic Communications Privacy Act, 18 U.S.C. § 2701 et seq.), if two requirements are met. First, the court must find probable cause to believe that a person is committing or about to commit an offense listed in section 2326 in chapter 117A (i.e., 18 U.S.C. § 1028, 1029, 1341, 1342, 1343, or 1344, or a conspiracy to commit such an offense) in connection with the conduct of telemarketing (as that latter term is defined in 18 U.S.C. § 2325), and in furtherance of that offense is using the number or identity that is to be blocked or terminated. Second, the court must also determine that such an order is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the application is made. Because a number of the telephone numbers used to commit telemarketing fraud are located outside the United States and are serviced by foreign electronic communication services, Subsection (a) would enable the court to direct, with respect to telephone numbers only, that U.S.-based electronic communication services block those numbers so that they would not succeed in reaching telephone numbers located in the United States.

Subsection (a) also states that such order may be temporary or permanent, and may include provisions authorizing the electronic communication service to resume service to the telephone number or other subscriber number or identity specified in the order if that number or identity has been reassigned to another subscriber. This latter provision is intended to ensure that an electronic communication service will not be required to seek modification of the court's order if it chooses to reassign the number or identity to a subscriber other than persons involved in the fraudulent scheme that had used that number or identity. Subsection (a) further specifies that the order shall be served on an electronic communication service by delivering a copy to the service's principal place of business, and shall be served on a subscriber by (1) delivering a copy to the subscriber personally, (2) leaving a copy at the subscriber's principal place of business with some person of suitable age and discretion then employed therein or at the subscriber's

dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or (3) mailing a copy to the subscriber's last known address. In instances where it is not practicable to effect personal service or service at the subscriber's dwelling or business (e.g., where the subscriber is located outside the United States), mailing may be the only effective means of service on the subscriber.

The language of proposed subsection (a) is not intended to preempt the field with respect to common carriers' authority in any respect. Thus, common carriers or other electronic communication services would retain any common-law rights they may have to terminate a service used for illegal purposes. See *Delaware Sports Service v. Diamond State Tel. Co.*, 241 F. Supp. 847 (D. Del. 1965), *aff'd per curiam*, 355 F.2d 929 (3d Cir.), *cert. denied*, 385 U.S. 817 (1966).

Subsection (b) of the proposed section 2328 states that subsequent to the issuance of an order pursuant to subsection (a), any person whose service has been blocked or terminated may move that court to quash or modify the order. It further provides that the movant shall have the burden of proof to show good cause for quashing or modification of the order. To ensure that the movant has an appropriate opportunity for due process, this subsection further states that the court shall proceed as soon as practicable to the hearing and determination of such a motion. Because federal prosecutors are likely to seek an order under subsection (a) in connection with an application for a search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure, or at the time an indictment is returned against one or more individuals, subsection (b) distinguishes between situations prior to and after indictment. It states generally that a proceeding under this subsection is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against any person to whom the court's finding of probable cause in subsection (a) relates, discovery is governed by the Federal Rules of Criminal Procedure.

Subsection (c) of the proposed section 2328 states that no cause of action shall lie in any court against any electronic communication service, its officers, employees, agents, or other specified persons for taking any action, or providing information, facilities, or assistance for such action, in accordance with the terms of a court order under section 2. This provision is based on similar provisions relating to providers of wire or electronic communications service in 18 U.S.C. §§ 1084(d) and 2703(e).

Subsection (d) of the proposed section 2328 states that for purposes of the proposed section 2328, the term "electronic communication service" has the definition which is given that term in section 2510 of title 18.

Subsection (b) of section 3051 would amend the definition of "telemarketing" in section 2325 of title 18 to bring interstate or international "electronic communications" as well as telephone calls within the scope of Chapter 113A. This amendment would have two significant effects. First, it would ensure that federal courts could issue court orders pursuant to the

proposed section 2328 not only for fraudulent conduct that involved telemarketing through traditional conversations by telephone, but also for fraudulent conduct that involved the same kinds of conduct as traditional telemarketing but that was conducted largely or wholly through the Internet. Second, it would enable federal courts, in sentencing defendants in fraud cases that use mass-marketing methods, to apply the same kinds of sentencing enhancements in Internet fraud cases that are now applicable in the federal Sentencing Guidelines to traditional telemarketing fraud.

Subsection (c) of section 3051 would amend the table of sections in Chapter 113A to include the new catchline for the proposed section 2328.

SUBTITLE F – PENSION-WELFARE AND LABOR-MANAGEMENT RACKETEERING ACT

These proposals, in sections 3061-70 of the bill, are primarily designed to enhance federal criminal law enforcement in connection with employee pension benefit plans and other forms of retirement arrangements. The proposals also are directed at increasing protection for employee welfare benefit plans and collective bargaining relationships on which working people depend for wages and other employment-related benefits, including health care.

Section 3061 would create a new crime in Title 18 of the United States Code entitled "Retirement Fraud" which is modeled on existing statutes punishing bank fraud (18 U.S.C. § 1344) and health care fraud (18 U.S.C. § 1347). Section 3062 would create an action for civil penalties based on a violation or conspiracy to violate the new Retirement Fraud crime. Sections 3063 and 3064 would increase the maximum penalty for theft or embezzlement (18 U.S.C. § 664) from an employee pension or welfare benefit plan or connected fund from 5 to 10 years' imprisonment, and for bribery and graft in regard to the operation of an employee benefit plan (18 U.S.C. § 1954) from 3 to 10 years' imprisonment in the case of bribery and from 3 to 5 years' imprisonment for graft. Section 3064 also broadens existing law under section 1954 to cover attempts to give or accept bribery and graft payments and to proscribe bribery and graft payments to persons exercising de facto influence or control over employee benefit plans. Sections 3065-7 would strengthen current law which addresses corruption in labor-management relations by amending section 302 of the Labor Management Relations Act, 1947 (29 U.S.C. § 186). The amendments would punish the making and receipt of corrupt payments by employers, and persons who act in the interest of employers, to those who exercise the apparent influence or de facto authority of labor union officials or representatives of employees, but without regard to whether labor union officials and representatives of employees also financially share in the payment. Sections 3068-70 would amend the forfeiture provisions in 18 U.S.C. §§ 982 and 981 to make the proceeds of offenses against employee pension benefit plans and other retirement arrangements subject to criminal and civil forfeiture, respectively, without having to also prosecute the offender for money laundering (18 U.S.C. §§ 1956 and 1957) or for a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. § 1961 et seq.).

SEC. 3061. FRAUD IN RELATION TO RETIREMENT ARRANGEMENTS.

This section enacts a new offense in Chapter 63 of Title 18 of the United States Code which punishes "Retirement Fraud." The proposed legislation would directly prohibit criminal frauds that are intended to loot retirement savings, including both employee pension benefit plans covered by title I of Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, et seq., and other tax-favored retirement arrangements such as individual retirement plans, tax-sheltered annuities, and tax qualified plans for non-employees, including those covering self-employed individuals. Such retirement savings present a rich target for criminal frauds since they represent a significant pool of assets that cannot be expended until retirement and that are under the control of individuals with varying degrees of sophistication. The statute would also enhance the protection afforded to employee pension benefit plans subject to title I of the ERISA. Section 3062 would create a new cause of action whereby the Attorney General may bring a civil suit to impose a civil penalty on conduct which constitutes a violation of section 1348, or conspiracy to violate section 1348, in those cases where a civil penalty could not be imposed under existing law in regard to employee pension benefit plans subject to title I of ERISA.

BACKGROUND

On May 15, 1997, the Attorney General and the Secretary of Labor jointly announced a continuing initiative against the abuse of pension and retirement funds. As part of that initiative the Attorney General explained that greater emphasis would be placed on criminal enforcement and coordinated efforts by federal agencies against such abuses. The Secretary of Labor stated that although most pension plans are well-managed and financially safe, some unscrupulous persons see those plans as ripe targets to siphon off the hard-earned retirement money of American workers. As a result of efforts taken during the 8 months prior to the announcement of the initiative, for example, the Attorney General and the Secretary reported that monitored federal investigations had resulted in charges or convictions against 109 individuals in 70 cases nationwide involving more than \$90 million in pension plan losses.

In addition to the Criminal Division of the Department of Justice and various United States Attorneys' and state criminal prosecutors' offices, several federal investigative and regulatory agencies participated in the initiative. The latter included the Federal Bureau of Investigation, the Internal Revenue Service, the Securities and Exchange Commission, the Inspector General's Office of Investigations within the Department of Labor, and the Department of Labor's Pension and Welfare Benefits Administration, which had launched a national enforcement project in November 1995 to reduce the misuse of contributions to so-called 401(k) pension plans. In addition to the abuse of employee pension benefit plans regulated by title I of ERISA, which are protected to a degree by specific federal criminal statutes punishing theft, kickbacks and false statements (18 U.S.C. §§ 664, 1027, and 1954), a review of criminal abuses directed at retirement monies of non-employees disclosed fraudulent abuses which could not be

addressed by those statutes.

For example, a series of investigations by the Securities and Exchange Commission in the last several years have identified deliberate efforts by promoters of fraudulent investments to target retirement savings. In several cases the promoters of fraudulent investments included with their deceptive sales literature documents that enable a prospective investor to transfer IRA accounts to a "friendly" IRA administrator. Generally, the promoters established a relationship with the IRA administrator in advance and obtained assurances that the administrator would accept the offered investment in an IRA or other retirement account. In addition, salesmen offering such investments claimed that the very fact that the investments were available for investment in IRA accounts was evidence of the safety of the investment.

Criminal frauds of that type may sometimes be prosecuted under the criminal provisions of the federal securities laws. There are risks, however, in relying on those laws to reach all frauds that may be directed at retirement savings accounts. For example, some promoters of fraudulent investments investigated by the SEC deliberately structured their investments in an effort to avoid the jurisdiction of the federal securities laws.

The business of handling IRA accounts itself presents an opportunity for the unscrupulous to defraud persons of their IRA savings. IRS regulations require that an IRA trustee be either one of several types of regulated persons (e.g. a bank, insurance company, regulated investment company) or a person approved by the IRS in accordance with its regulations to act as a "nonbank trustee." However, the Securities and Exchange Commission has identified several firms that are not subject to any regulatory oversight or supervision that are in the business of administering IRA and other self-directed retirement accounts. They do so by establishing an agreement with a Bank that nominally acts as trustee, but which delegates all responsibility for maintaining the books and records identifying the ownership of customer funds to the unregulated Administrator. In addition, the Administrator is given authority to deposit and disburse funds in the accounts established for IRA funds at the trustee Bank. With no oversight or inspection, there is no mechanism that will in the ordinary course detect misappropriation of IRA savings by the Administrator. Since funds may not be called for until account holders reach retirement age, a shortfall may well go undetected for decades.

Between 1994 and May 1997, the Commission brought more than 22 cases seeking the return of more than \$160 million to defrauded IRA investors. In one case, the Commission alleged that over a period of 14 years such an Administrator misappropriated more than \$124 million from retirement accounts that it controlled. In a civil enforcement action against that IRA Administrator the Commission successfully invoked jurisdiction under the federal securities laws. However, depending on the particular facts, such an effort may not always succeed. For example, misappropriation of cash assets that are not provided in connection with the purchase or sale of a security, or that are held by an Administrator that does not possess the indicia of a statutory broker, may be found to be outside the jurisdiction of the federal securities laws.

Moreover, the Attorney General's initiative against pension abuse and the United States Department of Labor's enhanced enforcement effort directed at so-called 401(k) plans, the fastest growing segment of employee pension plans with assets of more than \$600 billion, demonstrated that employee pension plans are frequently at risk of abuse by employers that loot their workers' retirement plans in order to keep struggling companies afloat or finance other unauthorized expenditures.

In the case of employees' own contributions which are withheld from employees' wages by an employer, the employer's failure to remit such monies to the plan and conversion of such funds to his own use is punishable under existing law as embezzlement. See United States v. Grizzle, 933 F.2d 943 (11th Cir. 1991) (holding that unpaid employee contributions can be considered assets of the benefit plan and no longer property of the employer once withheld from employees' wages pursuant to Department of Labor regulations interpreting ERISA). In the case of an employers' failure to contribute monies or matching contributions on behalf of his employees, however, the employer's contribution may not be treated as property of the plan subject to prosecution for larceny unless the employer has agreed to treat the unpaid contributions as plan property under the terms of his contract or is otherwise subject to a statutory duty to pay over monies owed to the plan. See United States v. Panepinto, 818 F.Supp. 48 (E.D.N.Y. 1993), aff'd without opinion, 28 F.3d 103 (2d Cir. 1994) (holding that whether employer was subject to a statutory duty to pay the plan and larceny prosecution for non-payment turned on whether or not the employer's labor contract expressly surrendered all legal interest in the amounts owed to the plan once employees performed work which triggered the employer's duty to pay the plan). Accord, United States v. Lasky, 967 F.Supp. 749 (E.D.N.Y. 1997) (trust document cross-referenced in labor contract vested property interest in the plan). See also United States v. LaBarbara, 129 F.3d 81 (2d Cir. 1997) (upholding conviction of employer which failed to contribute monies owed under a collectively bargained contract for multi-employer plans which ERISA expressly requires payment by statute). But compare, Young v. West Coast Indus. Relations Ass'n, Inc., 763 F.Supp. 64, 74-76 (D.Del.), aff'd, 961 F.2d 1570 (3d Cir 1992) (holding that an employer's contractual obligation to pay contributions on behalf of employees was insufficient to create plan assets in the hands of the delinquent employer).

Moreover, the use of the mails or interstate wire transmissions in furtherance of schemes to defraud employee benefit plans in violation of the mail or wire fraud statutes (18 U.S.C. §§ 1341 and 1343) may be incidental and unnecessary to some fraud schemes. For example, the conviction of persons who engage in mail frauds of the type first upheld in United States v. S & Vee Cartage Co., 704 F.2d 914 (6th Cir. 1983), cert. denied, 464 U.S. 935 (1983), depends on the existence of a mailed document in furtherance of the scheme to defraud the employee plan. In that case the mail fraud statute punished the employers' concealment of their scheme to defraud the plans of contributions on behalf of employees, which were owed under a labor contract, because the employers mailed false financial statements to the plans which understated the true number of employees covered by the contract and the number of hours worked by employees on which obligations to fund the plan were based. If the statements had been hand-delivered to the

plan administrator, federal prosecution of the fraud on the plan would have been frustrated.

In the case of employee benefit plans that are maintained by employers which manage the employee benefit plans in-house without the assistance of outside administrators, the likelihood that mailings and commercial transmissions of matters in furtherance of the scheme is diminished. For example, in United States v. LaBarbara, 129 F.3d 81, 85 (2d Cir. 1997), the court of appeals reversed the mail fraud conviction of a benefit plan trustee because the government's evidence of a requisite mailing was insufficient to negate the possibility that documents used in furtherance of the fraud against the plan had been hand-delivered.

Section 1348(a). Operative Elements

The new retirement fraud offense described in proposed section 1348(a) would enhance the protection for participants and beneficiaries of employee pension benefit plans and other retirement arrangements by punishing deceitful schemes directed at the deprivation of property under the control or custody of the retirement arrangement or of "any . . . other person in connection with the establishment or maintenance of a retirement arrangement." For example, the statute would enable the prosecution of an employer or other plan sponsor who sought to actively conceal its failure to contribute monies on behalf of employee-participants in an employee pension plan whether or not such contributions could be prosecuted under the federal larceny statute covering such plans (18 U.S.C. § 664) or as a violation of the mail or wire fraud statutes (18 U.S.C. §§ 1341 and 1343). Under the new retirement fraud statute, the plan sponsor who actively misleads plan administrators or employee-participants about its failure to pay plan contributions, by misstating the number of employees or amount of work triggering the obligation to pay, for example, could be successfully prosecuted for retirement fraud whether or not it then held property of the plan under its control for purposes of a larceny prosecution or documents had been deposited in the mails or with a commercial carrier for delivery to the plan or its participants.

Proposed Section 1348(a) would proscribe the defrauding of any retirement arrangement or other person in connection with the establishment or operation of a retirement arrangement without proof that the scheme was accompanied by a foreseeable use of a mailing, communication by commercial carrier, or interstate wire transmission in furtherance of the scheme and artifice to defraud, as is now required for proof of mail or wire fraud (18 U.S.C. §§ 1341 and 1343) involving similar schemes. Because retirement savings and their investment have a significant and continuing impact on interstate and foreign commerce, it is believed that their protection from criminal fraud should not be dependent on a criminal actor's use of the mails, communications by commercial carrier, or interstate wire transmissions in order to accomplish the fraud. Such channels of commerce may be only incidental to accomplishment of the scheme to defraud. Moreover, because frauds directed at retirement arrangements and the individuals who participate in them generally have substantial effects on interstate and foreign commerce by reason of their repetition and aggregate effect on the economy, just as transactions involving the financial institutions protected by the existing bank fraud statute (18 U.S.C. §

1344) do, the proscribed offenses fall within the category of crimes based on the Commerce Clause of the Constitution where the "de minimis character of individual instances arising under [the] statute is of no consequence." See United States v. Lopez, 514 U.S. 549, 554 (1995)(where "a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under [the] statute is of no consequence").

Congress has already enacted a similar anti-fraud statute which protects employee health plans and other health care benefit programs without requiring proof of a mailing, communication by commercial carrier, or interstate wire transmission in furtherance of the scheme and artifice to defraud in violation of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 (18 U.S.C. § 1347). Furthermore, with the exception of cases in which retirement arrangements have been misrepresented as tax qualified in order to further the fraudulent scheme, the retirement arrangements protected by the statute would be subject to the Internal Revenue Code and based on the Federal Government's taxation powers in the Constitution.

Proposed section 1348(a) also reaches deceptive schemes to defraud victims of "honest service" described in 18 U.S.C. § 1346 because section 1346 applies to any offense within Chapter 63 of Title 18 United States Code. Where the administrators and managers of retirement arrangements are subject to duties of honest service created by statute, contract, or the terms of governing plan documents, schemes to defraud which involve deceitful breaches of fiduciary duty in relation to any retirement arrangement could be prosecuted under the retirement fraud statute in the same manner as they are currently subject to prosecution under 18 U.S.C. § 1346, but without proof of a foreseeable use of the mails, commercial communications, or interstate wire transmissions in furtherance of the fraudulent scheme. For example, persons with discretionary authority over the disposition of the property of an employee pension benefit plan subject to title I of ERISA have fiduciary responsibilities to safeguard plan assets and refrain from certain prohibited financial conflicts of interest by statute. See 29 U.S.C. §§ 1104 and 1106.

Moreover, inclusion of the offense in Chapter 63 of Title 18 will also mean that the Department of Justice may pursue a civil action under 18 U.S.C. § 1345 to enjoin fraudulent activity which is ongoing or about to be committed in violation of the retirement fraud statute. Although the Department of Labor has similar remedies to enjoin violations of title I of ERISA, the injunctive remedies in 18 U.S.C. § 1345 are not limited to frauds against retirement arrangements which are also employee benefit plans covered by title I of ERISA.

Section 1348(b). Definition of Retirement Arrangement

Proposed Section 1348(b) defines the term "retirement arrangement" which is the class of entities protected by the new statute against fraudulent abuse. Section 1348(b)(1) includes within the term employee pension benefit plans regulated by title I of ERISA, 29 U.S.C. § 1001, et seq. Currently, more than 700,000 such employee pension plans which promise or provide

retirement benefits to more than 85 million workers hold assets of approximately \$3.5 trillion.

New section 1348(b)(2) includes within "retirement arrangement" retirement plans which are tax qualified under the Internal Revenue Code (IRC). Such tax qualified plans include employee pension plans subject to ERISA as well as individual retirement accounts (IRAs) and other arrangements which are tax qualified. These include IRAs described in 26 U.S.C. §§ 408 and 408A; tax-sheltered annuity contracts, custodial accounts, and retirement income accounts described in 26 U.S.C. § 403(b); qualified plans described in 26 U.S.C. § 401(a); and qualified annuity plans described in 26 U.S.C. § 403(a). For purposes of the Internal Revenue Code, the term "qualified retirement plan" also includes any plan, contract, account, or annuity that, at any time, has been determined by the Secretary of the Treasury to be such a plan, contract, account or annuity. See 26 U.S.C. §4974(c). For example, because retirement arrangements maintained by church organizations for church employees can be tax qualified pursuant to the Internal Revenue Code, church plans which are otherwise excluded from regulation under title I of ERISA are included within the protection of the new retirement fraud statute. See 29 U.S.C. §§ 1002(33) and 1003(b)(2) (excluding church plans from coverage by title I of ERISA).

Proposed section 1348(b)(2) also includes within the definition of protected retirement arrangements "any arrangement which has been represented to be a qualified retirement plan." By means of this language, the statute is intended to reach fraudulent schemes perpetrated by persons operating an arrangement which is deliberately misrepresented to be a tax qualified retirement plan with knowledge that the arrangement is not so qualified and would not likely become so qualified by Internal Revenue Service in order to promote a scheme to defraud victims of their property or rights of honest service. As in the case of frauds under existing law, a good faith assertion that the arrangement was tax qualified or would likely become so qualified by the Internal Revenue Service would be a defense to a finding of intent to defraud based on the tax status of the arrangement, but would not be a defense to investigative and prosecutorial jurisdiction.

Proposed section 1348(b)(3) includes a medical savings account described in section 220 of the Internal Revenue Code because amounts in such accounts may be used for retirement purposes if the assets in such accounts are not exhausted for medical expenditures. The separate designation of such accounts is necessary because a medical savings account is not otherwise included within the definition of a qualified retirement plan under section 4974(c) of the Internal Revenue Code.

Proposed section 1348(b)(4) includes within the class of protected retirement arrangements funds established within the Thrift Savings Fund by the Federal Retirement Thrift Investment Board for employees of the Federal Government. In order to reach potential abuses of the large amount of Thrift Savings Fund assets which are invested in private securities and other investments managed by the private sector, the term "retirement arrangement" includes those funds currently within the Common Stock Index Investment Fund, the Fixed Income Investment Fund, the Small Capitalization Stock Index Investment Fund and the International

Stock Index Investment Fund. Although assets within the Government Securities Investment Fund consist of public securities issued by the Federal Government, fraud might also occur in connection with record keeping or within an employing agency.

Section 1348(c). Exclusion of Governmental Plans

With the exception of the Federal Thrift Savings Funds described above, proposed section 1348(c) also would exclude from the class of protected retirement arrangements employee "governmental plans" as defined in ERISA section 3(32), 29 U.S.C. § 1002(32). Under existing law, employee pension benefit plans which are either administered or funded by Federal or state governmental agencies on behalf of their employees are not regulated pursuant to title I of ERISA. See 29 U.S.C. § 1003(b)(1). The financial integrity of such state governmental plans historically has been overseen by the state governments which sponsor them rather than the Federal Government. In the case of governmental plans such as the Civil Service Retirement Fund for employees of the Federal Government, benefits are funded primarily by public funds of the Federal Government and are otherwise protected by existing law.

Section 1348(d). Investigative Authority

Proposed section 1348(d) would confer on the Attorney General the authority to investigate violations of the new retirement fraud offense. However, the regulation and investigation of the financial and fiduciary integrity of employee pension benefit plans subject to title I of ERISA is the primary responsibility of the Pension and Welfare Benefits Administration of the United States Department of Labor. The Department of Labor is authorized by ERISA to enter into arrangements with other federal agencies for cooperation and assistance in the performance of its enforcement responsibilities under ERISA, and in fact, has delegated parts of its criminal investigative powers under ERISA to the Federal Bureau of Investigation pursuant to such statutory authority. See 29 U.S.C. § 1136(a). The Labor Department's Inspector General has also been authorized to conduct criminal investigations of employee benefit plans subject to title I of ERISA in racketeering cases. Both the FBI and components within the Department of Labor are authorized to investigate violations of Title 18 and other federal laws related to employee benefit plans subject to title I of ERISA. See 29 U.S.C. § 1136(b). Section 1348(d) is intended to preserve that allocation of investigative responsibility in relation to employee benefit plans.

Nevertheless, it is anticipated that other federal agencies will detect and refer potential criminal violations of the new retirement fraud offense to the Department of Justice for further investigation and prosecution. Under existing law, the Federal Deposit Insurance Corporation as well as the Comptroller of the Currency and the Office of Thrift Supervision within the Department of the Treasury are responsible for oversight of federally insured banks and savings and loan institutions which act as trustees of individual retirement accounts and sponsor other retirement arrangements covered by the new retirement fraud crime. The tax qualification of such accounts and other retirement arrangements under the Internal Revenue Code is the

responsibility of the Internal Revenue Service within the Department of the Treasury. In the course of its responsibilities, the Securities and Exchange Commission also regulates the activities of organizations such as mutual funds and registered investment companies which act as IRA trustees and sponsor other forms of retirement arrangements that involve securities regulated by the federal securities laws. State regulatory agencies oversee insurance carriers which may offer annuities and other retirement arrangements protected by the new offense. It is expected that such federal and state agencies would use their regulatory and investigative powers under existing law to detect and refer evidence of retirement fraud proscribed by the new offense in 18 U.S.C. 1348.

SEC. 3062. CIVIL PENALTY FOR VIOLATION OF SECTION 1348

Section 3062 creates a new cause of action whereby the Attorney General may bring civil suit to impose a civil penalty on conduct which constitutes a violation of section 1348, or conspiracy to violate section 1348, in those cases where a civil penalty could not be imposed under existing law in regard to employee pension benefit plans subject to title I of ERISA. Subsection 1349(a) would authorize an action in the federal district courts under which proof of the civil defendant's unlawful conduct by a preponderance of the evidence would suffice as contrasted with the burden of proof in a criminal prosecution, namely, beyond a reasonable doubt.

The amount of the civil penalty imposed would be the amount specified in the statute, the amount of pecuniary gain to the violator, or the amount of pecuniary loss sustained by the victim, whichever is the greatest amount. The civil penalty could be imposed under section 1349(a) in addition to any other criminal, civil, or administrative remedy which is available to the United States or any other person except as provided in section 1349(b).

Subsection 1349(b) would provide that in regard to frauds, or conspiracies to defraud, involving employee pension benefit plans, as contrasted with other types of retirement arrangements, the Department of Labor would continue to exercise its authority under existing law to impose civil penalties on fiduciaries and other persons if the violation, or conspiracy to violate section 1348, would permit a civil penalty to be imposed under title I of ERISA. In the event that no civil penalty could be imposed in regard to the particular fraudulent abuse of an employee pension benefit plan, or other person in connection with the establishment or maintenance of such a plan, the Attorney General would be free to seek a civil penalty under section 1349.

Where civil penalties can not be imposed under ERISA, subsection 1349(b) would also permit the district court to waive or reduce a civil penalty which could be otherwise imposed under subsection 1349(a) where the court finds that the violator or other person acting in privity would suffer severe financial hardship under certain conditions. Those conditions include circumstances in which the violator or such other person may not be able to restore all losses to the victims of the retirement fraud offense or to otherwise comply with judgments in other civil

or criminal actions related to the fraudulent conduct. Such a waiver or reduction of the civil penalty could also occur where the court found that the violator or other person acting in privity with the violator could not pay a penalty or tax imposed under the Internal Revenue Code, such as excise taxes imposed on prohibited transactions involving tax qualified plans. In regard to such waivers and reductions, subsection 1349(b) affords relief from civil penalties similar to that available to fiduciaries and other persons subject to civil penalties imposed by the Department of Labor pursuant to section 502(l) of ERISA, 29 U.S.C. § 1132(l).

Amendments Pertaining to Employee Benefit Plans

Sections 3063-4 contain amendments designed to strengthen the law which prohibits the giving or acceptance of bribes or graft payments in connection with the operation of employee pension or welfare benefit plans (18 U.S.C. § 1954) and embezzlement or theft from such plans (18 U.S.C. § 664). Sections 664 and 1954 are the primary criminal enforcement tools for protecting approximately 6 million employee pension and welfare benefit plans in the private sector which are regulated by ERISA and provide benefits to more than 150 million workers and their families.

SEC. 3063. BRIBERY AND GRAFT IN CONNECTION WITH EMPLOYEE BENEFIT PLANS BACKGROUND.

Section 3063 is designed to overcome impediments to the enforcement of section 1954 and to enhance the maximum penalty of imprisonment for bribery and graft involving employee benefit plans which is limited to a maximum sentence of imprisonment of 3 years under existing law. Approximately 700,000 employee pension plans regulated under ERISA provide retirement coverage and benefits to more than 87 million participants. During the period of high interest rates and yields formerly available from certain financial institutions, some pension plans were victimized as the result of criminal activity which took advantage of plan managers' desires to maximize the return on plan investments. In the largest employee pension kickback case prosecuted by the Federal Government to date, for example, a pension plan investment advisor and a financial broker were convicted of RICO based on violations of section 1954. The defendants had received \$14 million of undisclosed fees from banking institutions in which they had invested \$100 million of union-sponsored pension plan monies in certificates of deposit. United States v. Schwimmer, 924 F.2d 443 (2d Cir. 1991). The investment advisor was sentenced to 10 years' imprisonment because the transactions were successfully prosecuted under RICO. However, if the defendant had completed a criminal transaction of similar size and economic impact, but without engaging in the pattern of racketeering acts required for RICO, he would not have received an equivalent sentence under the existing penalty for bribery and graft because the maximum penalty for a violation of section 1954 is limited to 3 years' imprisonment.

More than 5.3 million employee welfare benefit plans provide employees and their families with assistance for accident, disability, unemployment, scholarships, children's day care centers, housing assistance, prepaid legal service, and health care, among other benefits. Of

special concern are the activities of corrupt operators of so-called multiple employer welfare arrangements (MEWAs) which purport to provide insurance-type benefits to small employers seeking to lower the high cost of maintaining health care for their employees. See 29 U.S.C. § 1002(40) (definition within ERISA of entity subject to state insurance regulation). In September 1991 the General Accounting Office reported that since 1988 MEWA operators had failed to pay \$132 million in claims for approximately 400,000 workers and their beneficiaries and that state insurance regulators had been able to obtain payment of only \$10 million of those claims. Corrupt MEWA operators who were prosecuted for federal crimes between 1990 and 1995 were responsible for approximately \$150 million in unpaid medical claims by employees and their families. Although the HIPAA added new crimes which reach health care fraud and other crimes directed at health care benefit programs, including privately funded plans and MEWAs regulated by ERISA, no bribery or graft offense was included in the HIPAA. Therefore, Section 1954 remains the only federal offense proscribing such criminal activity for employee health and welfare benefit plans subject to ERISA.

Moreover, as the President's Commission on Organized Crime explained in its 1986 report on labor and management racketeering entitled The Edge: Organized Crime, Business, and Labor Unions 12-15, 99-102 (1986), the corruption of labor unions and employee benefit plans by organized crime has involved the criminal participation of persons other than those occupying official positions inside an employee benefit plan or within the organizations which sponsor or serve such plans. Organized criminal groups can control employee benefit plans by their domination of particular affiliated labor unions and businesses and derive unlawful profits in specific transactions. Additional means are needed to punish the organized crime member or other person who exercises de facto control over plan affairs without proof that benefit plan insiders and other persons described in the four classes of prohibited receivers in section 1954(1) through (4) shared in the prohibited receipt of the bribe or graft payment. Furthermore, amendments of section 1954 are needed to facilitate the prosecution of attempted violations of the statute detected in undercover investigations in which federal investigators pretend to occupy benefit plan-related positions in anticipation that corrupt individuals will offer or solicit bribes and other prohibited payments to influence benefit plan operations.

New 18 U.S.C. § 1954(a) and (b): Penalties for Bribery and Graft

Section 3063 adds new subsections (a) and (b) of section 1954 and makes a distinction between the penalties for bribery ("with the intent to be influenced") and graft ("because of") similar to the grading under 18 U.S.C. § 201. The legislation provides that a more severe penalty could be imposed if the government proves that the thing of value given or received is intended as a bribery "quid pro quo" for the action taken in relation to a plan matter. A more severe penalty of imprisonment is justified where the corrupt payment in violation of section 1954(a) is the primary motivation for the conduct affecting the operation of the plan as contrasted with gratuities outlawed by section 1954(b) which do not require that the payment be made in contemplation of any specific favor affecting the plan.

Under the federal sentencing guidelines in effect since November 1987, the sentence for conviction of a section 1954 offense is increased on the basis of the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater. U.S.S.G. § 2E5.1(b)(2) (1997). For example, in the case of a bribery violation of section 1954 in which a fiduciary, such as a trustee of an employee benefit plan, is paid or derives a gross benefit from his crime valued at more than \$120,000, the sentencing guidelines call for a sentence range of 30 to 37 months' imprisonment for a first offender. Consequently, the enhancement becomes meaningless when the value or resulting benefit a defendant receives from the bribery or kickback exceeds \$120,000 because the maximum sentence of 36 months' imprisonment may not be further increased. Under existing law, a second offender would only have to receive or benefit by \$70,000 in order to reach the same range. U.S.S.G. § 2F1.1(b)(1)(G) and (H) (1997). In contrast, under the new penalty structure proposed by the amended section 1954, a first offender who is a plan fiduciary could be paid or receive value worth \$80 million as a bribe before his potential sentence would reach the new statutory maximum of 10 years' imprisonment. In the case of graft, or what the sentencing guidelines describe as the "receipt of a gratuity not requiring a specific understanding that the payment will corruptly affect an action of the recipient," the existing statutory maximum of 36 months' imprisonment is not reached until a first offender who is a plan fiduciary has received or agreed to accept between \$800,000 and \$1.5 million. U.S.S.G. § 5E5.1(a)(2) and 2F1.1(b)(1)(L) (1997). Under the amended section 1954, a gratuity to the same individual would have to reach a value of \$20 million before a sentence to the statutory maximum of 60 months could be imposed.

New Section 1954(a)(1)(E): Prohibited Receivers Who Exercise De Facto Authority

Proposed section 1954(a)(1)(E) would add a new class of prohibited receivers as statutory principals in order to expressly proscribe corrupt payments to persons "with actual or apparent influence or decision-making authority in regard to such [employee benefit] plan." Corrupt payments which adversely affect the operation of employee pension and welfare benefit plans are sometimes received by persons who have actual or apparent influence or decision-making authority with respect to plan matters, but who do not occupy the positions described by current law for prohibited receivers. For example, organized crime members or associates who effectively dominate or control the operation of an employee benefit plan and can influence or control plan investments and other expenditures are not subject to prosecution under the existing section 1954 for receipt of corrupt payments unless they occupy a position described in parts (1)-(4) of the statute or share in the receipt of the corrupt payment with some other person who does occupy the statutory position in relation to the plan such as trustee, administrator, employer with covered employees, union official with covered members, or service provider to the plan.

New Section 1954(a)(3) and (b)(3): Attempted Violations

Proposed subsections (a)(3) and (b)(3) of new section 1954 would punish an attempt to violate section 1954 to the same degree as the completed operative crime. Under existing law, an offer to pay, or an agreement to accept, a bribe or prohibited gratuity is punished to the same

degree as the actual payment or acceptance of the prohibited thing of value. However, section 1954 currently contains no proscription of an attempted violation in which the bribery or graft offense is not completed because the intended recipient does not in fact occupy a prohibited position or status in relation to the plan. Under existing law, the completed payment of a bribe to a federal law enforcement officer, who as part of an undercover investigation or "sting operation" only pretends to be a prohibited recipient subject to section 1954, does not violate section 1954 because the undercover officer does not hold a status required of prohibited recipients.

The amendment would prohibit a defendant's attempt to pay or receive a prohibited thing of value, provided he had the mental state required for the completed crime, in situations where another participant in the transaction only appears to hold the required status or to exercise influence or decision-making authority over the plan because that person was, or was cooperating with, a federal law enforcement officer. That is, when a defendant offers or pays value to a person whom he believes to be in a position to corruptly influence the operation of a pension or welfare benefit plan, or the operation of an entity which the defendant believes to be an employee benefit plan in fact, such conduct exemplifies the same degree of culpability in the defendant and potentially poses the same danger to the integrity of the benefit plan industry as if a scheme to compromise the loyalty of a real official of an actual employee benefit plan had been attempted.

New Section 1954(a) and (b): Third Party Payments

Proposed subsections (a) and (b) of the amended section 1954 would proscribe receipt of value "personally or by any other person" in the manner of the federal bribery and graft statute governing public officials and witnesses, 18 U.S.C. § 201. This language would also codify those judicial decisions interpreting section 1954 which hold that payments to third parties outside the class of recipients described in section 1954 are prohibited if connected to a statutory receiver's actions, decisions, or duties pertaining to plan operations. United States v. Robilotto, 828 F.2d 940 (2d Cir. 1987), holding that a bank's delivery of loans to a third party at the request of a plan official was a prohibited thing of value to the official when connected to the official's decision to deposit plan funds at the bank.

New Section 1954(a)(1) and (2): Intent of Bribe Maker and Bribe Taker

The structure of new subsections (a)(1) and (a)(2) also makes clear that mutuality of intent between the maker and the taker of the payment is not required. The revised section 1954 would eliminate any ambiguity in this area by expressly requiring that the mental state of the maker of a bribe payment is an "intent to influence" the recipient. Section 1954 currently prohibits a payer's giving of things of value "prohibited by this section" which literally refers only to a recipient's "intent to be influenced." In one case, an indictment charging an employer-payer "with intent to influence" the recipient was dismissed for failure to state a crime under section 1954. The "recipient" was a union official cooperating with the Federal Bureau of Investigation when the offense occurred; therefore the indictment had not charged the recipient's

"intent to be influenced." The court explained that the phrase "prohibited by this section" referred back to the operative elements imposed on the recipient, and therefore the Government must charge and prove the recipient's corresponding "intent to be influenced." Although published cases refer to prosecutions based on an "intent to influence" the recipient, they do so without discussion of the statutory structure. See, e.g., United States v. Provenzano, 615 F.2d 37, 43-44 (2d Cir. 1980) (affirming conviction for conspiracy to pay plan trustee); United States v. Berger, 433 F.2d 680 (2d Cir. 1970) (affirming conviction for conspiracy to pay a union official and plan trustee); United States v. Corrado, 307 F. Supp 513, 514 (S.D. N.Y. 1969) (conspiracy to influence pension plan agent).

New Section 1954(c)(1): Exception for Good Faith Compensation Involving Plan Administration

Proposed subsection (c)(1) would continue the exception and defense under existing law for "the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties" as a person described in the class of receivers. See United States v. Schwimmer, at 924 F.2d 448 (upholding the section 1954 conviction of an advisor to a benefit plan who concealed from the plan his outside compensation in connection with plan investments despite his assertion of the good faith compensation defense). However, in order to conform the defense to the amendment in section 1954(a)(E), prohibiting the payment of bribery or graft to persons having actual or apparent influence or decision-making authority in regard to a benefit plan, section 1954(c)(1) expressly includes such persons within the list of prohibited recipients who may assert the defense of good faith compensation.

New Section 1954(c)(2): Good Faith Defense Involving Settlor Activity

Proposed subsection (c)(2) is new and adds an exception for the payment to or acceptance by an employee benefit plan sponsor of any thing of value in good faith relating to his decision or action to establish, terminate, or modify the governing instruments of an employee benefit plan under circumstances which do not violate title I of ERISA, or any regulation or order promulgated under title I of ERISA, or any other law governing the plan. The purpose of the exception is to make clear that expansion of the class of prohibited recipients under the amended section 1954 would not result in the punishment of certain payments made to or received by plan sponsors acting as "settlers" who establish, terminate, or modify an employee benefit plan in good faith without violating their responsibilities under law. The statute will also except from its coverage payments to or acceptance by persons acting on behalf of the employee benefit plan sponsor of things of value relating to the sponsor's settlor decisions. A plan sponsor is defined by ERISA as the employer or employee organization which establishes or maintains the plan, or the entity created by two or more employers or by employers and employee organizations acting jointly to establish or maintain the plan. 29 U.S.C. § 1002(16)(B). So-called settlor functions include decisions to establish or terminate employee benefit plans as well as decisions concerning plan design as contrasted with the management and administrative operation of an

employee benefit plan which are subject to the fiduciary rules in ERISA. Generally, for purposes of ERISA a fiduciary is anyone who exercises any discretionary authority or control over plan assets or who renders investment advice for a fee. Therefore, an employer or other person acting as a settlor would not owe a fiduciary duty to the plan participants. For example, an employer's acceptance of a reversion of pension plan assets, beyond those needed to guarantee the payment of vested benefits to plan participants, following the employer's termination of his employees' pension plan would not violate section 1954 if the termination were otherwise accomplished in good faith and without violating the requirements of ERISA and other law governing the plan.

On the other hand, the exception would not apply, and prosecution under section 1954 would be possible, with respect to the prohibited payment of things of value to, or receipt by, a plan sponsor because of the sponsor's decision to establish, terminate, or modify the plan in a manner which demonstrated a knowing or reckless violation of a fiduciary duty or other responsibility under title I of ERISA in bad faith. For example, the receipt of a thing of value by an employer in return for terminating an ERISA pension plan without safeguarding the benefits of vested beneficiaries of the plan, under circumstances which demonstrated that the employer knowingly or recklessly disregarded the illegality of such conduct in bad faith, would violate section 1954. Similarly, an employer's termination of his employees' pension plan and substitution of an insurance contract for the payment of future benefits would violate section 1954 if it were done in return for the employer's bad faith receipt of commissions or other compensation which the employer knew were paid or received in violation of state insurance or trust law--even if the plan termination was lawfully executed under ERISA. Compensation for goods delivered or services performed in connection with transactions which involve plan operations, but which do not involve the establishment, termination, or modification of the plan, would continue to be governed by the exception in new subsection (c)(1).

SEC. 3064. INCREASED PENALTY FOR EMBEZZLEMENT AND THEFT FROM EMPLOYEE BENEFIT PLANS AND CONNECTED FUNDS.

Section 3064 increases the maximum imprisonment for embezzlement and other forms of theft from employee pension and welfare benefit plans subject to title I of ERISA, and their connected funds, in violation of 18 U.S.C. § 664, from 5 to 10 years' imprisonment. The Health Insurance Portability and Accountability Act of 1996 effectively increased the maximum penalty to 10 years' imprisonment for embezzlement and theft from privately funded health plans subject to ERISA and 18 U.S.C. § 664 by enacting a new crime at 18 U.S.C. § 669 which punishes embezzlement and theft from health care benefit programs. The enhanced penalty for embezzlement or theft in violation of 18 U.S.C. § 664 will extend similar deterrence and protection to employee pension benefit plans on which working and retired Americans rely for retirement income. Moreover, to the extent that the new offense at 18 U.S.C. § 669 does not afford the participants of employee health care plans the same protection they enjoy under the well-established case law governing 18 U.S.C. § 664, prosecutors will have the option of proceeding under the more established offense with no loss of penalty exposure for the defendant.

The Federal sentencing guidelines currently treat a "union or employee pension fund" or "any health, medical, or hospital association" providing medical benefits for "large numbers of persons" as a "financial institution" from which the theft of more than \$1 million warrants an enhanced sentence. See U.S.S.G. § 2B1.1(b)(6)(B) (1997) and Application Note 9. Consequently any theft by a first offender, even by a non-fiduciary, of more than \$1 million from an employee pension or welfare (health) benefit plan serving a "large number of persons" results in a sentencing range of 51 to 63 months' imprisonment. Under existing law that range meets and exceeds the maximum statutory sentence of imprisonment (60 months) permitted by section 664. In view of the large amounts of monies to be protected in employee benefit plans and the opportunities for larceny of such funds, the maximum penalty of imprisonment should be greater. Under the amended penalty and existing sentencing guidelines, a non-fiduciary first offender would not reach the maximum penalty of 120 months' imprisonment until he or she had stolen more than \$80 million from a pension or health plan serving a "large number of persons" -- assuming that more than minimal planning was required to accomplish the crime. See U.S.S.G. § 2B1.1(b)(1) (1997).

SEC. 3065. PAYMENTS OF THINGS OF VALUE TO PERSONS WITH ACTUAL OR APPARENT INFLUENCE OR DECISION-MAKING AUTHORITY.

Criminal prosecutions in the labor-management field during the past thirty years have demonstrated that certain labor unions and their affiliated employee benefit plans in particular industries have been dominated and controlled by organized criminal groups. In its report on labor-management racketeering and its effects on the economy, the President's Commission on Organized Crime concluded that, in addition to the traditional practice of using dominated labor unions to exact payoffs from employers for labor peace, organized crime has used labor unions as a tool to obtain monopoly power in certain markets and to give mob-run businesses an "edge." By manipulating the supply and the cost of labor, organized crime can raise its competitor's cost, force legitimate businesses to deal with mob-run companies, and enforce price fixing, bid-rigging, and other anti-competitive practices throughout an industry.

In many labor racketeering schemes legitimate businesses have willingly cooperated with organized crime and have derived benefits such as decreased labor costs, inflated prices, or increased business in a market. . . . Through its domination of select labor unions in major metropolitan areas, organized crime at various times has influenced a number of markets in construction, wholesale and retail meat processing, trucking, garbage carting, and waterfront trade. This type of control has enabled the mob to determine who will do business, to allocate territories and set prices, to decide when and where people will work, and even to dictate wages and benefits. This situation makes a mockery of free competition and collective bargaining.

Report of the President's Commission on Organized Crime, The Edge: Organized Crime, Business, and Labor Unions 1-3 (1986).

Consequently, when mob-favored businesses benefit from organized crime groups' extortion and use of other anti-competitive practices against their economic competitors in the marketplace, mob-favored companies may willingly distribute a share of the resulting benefits to their organized crime accomplices without being subjected to fear and coercion required for the prosecution of extortion. When such mob-favored companies obtain labor peace from mob-dominated unions, there is also likely to be no need for corrupt payments to officials of labor unions which might otherwise organize and fairly represent employees. Labor peace can be achieved for such businesses simply by direction of the organized crime member or associate who controls the particular labor organization and receives financial payment and support from the mob-favored employer. But, without the transfer of things of value to an officer or employee of a labor organization or other representative of employees, no violation of the federal labor-management bribery statute can be proven even though labor-management relations is corrupted to the same degree as if a labor union official had been corruptly paid.

Section 3065 would amend Section 302 of the Labor-Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. § 186, and add a new subsection (a)(5) to the existing statute. The amendment would punish bribery payments, by employers and other persons acting in the interest of employers, to persons with actual or apparent influence or decision-making authority in regard to a labor organization whether or not the recipient of the corrupt payment was a labor union official or representative of employees who shares in the payment as is required under existing law.

SEC. 3066. RECEIPT OF PAYMENT BY PERSON WITH ACTUAL OR APPARENT INFLUENCE OR DECISION-MAKING AUTHORITY.

Section 3066 would add new subsection (b)(2) to Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186, in order to make it unlawful "for any person with actual or apparent influence or decision-making authority in regard to a labor organization" to receive or accept such bribery payments "with intent to be influenced with respect to such person's duties, actions, or decisions relating to any question or matter concerning the labor organization." Existing subsection (b)(2) would be renumbered as subsection (b)(3).

The amended subsection (b)(2) would prohibit transactions which financially benefit non-union officials because of their apparent or de facto influence or control over labor-management relations in situations where persons occupying official positions within a labor union have not participated, shared in or benefitted from the financial transaction, but merely follow the dictates of the third-party exercising de facto influence or control over the labor organization. Report of the President's Commission on Organized Crime, supra. It should be noted that Congress has already indicated that persons who have been convicted of bribery and other crimes are barred from serving "in any capacity, other than in [a] capacity as a member . . . that involves decision making authority" with respect to a labor organization (29 U.S.C. § 504(a)(5)). See Sec. 803 of Pub.L. 98-473, 98 Stat. 2133 (1984). Thus, this amendment would only outlaw corrupt

payments to and receipts by persons whose criminal conduct Congress has already mandated shall disqualify them from running labor unions, such as organized crime figures who dominate or corruptly influence the organizations whom these statutes are designed to protect

Moreover, this amendment would also codify existing law with respect to circumstances where a third person, at the direction of the union official and statutory receiver whose favor is sought, receives a financial thing of value, but without any receipt of financial value by the union official. Holding that the Taft-Hartley Act is designed to protect employees and employers from the misuse of power by corrupt union officials or employee representatives, some judicial decisions interpreting 29 U.S.C. § 186 apply a "third party beneficiary" theory to prohibit such transactions. See United States v. DeBrouse, 652 F.2d 383, 387 (4th Cir. 1981) (affirming conviction of union official who requested that an employer pay wages to a third party as a "no-show" employee); United States v. Carlock, 806 F.2d 535 (5th Cir. 1986) (union official's power to direct employer payments for bogus services to third parties upheld as a prohibited thing of value received by the union official). However, the amendment would also eliminate confusion about when the statute penalizes such third-party benefits. In United States v. Cervone, 907 F.2d 332, 339, 346-47 (2d Cir. 1990), the court of appeals reversed the conviction of a union official who had requested that an employer pay off a rival labor representative in order to ensure the official's corrupt control of labor relations at a particular job site. Although the court acknowledged that DeBrouse and Carlock, *supra*, had upheld Taft-Hartley convictions in relation to third-party payments to friends and relatives of the labor official, it declined to adopt a theory of intangible benefits to the union official noting that the statute contemplated only the transfer of "tangible items or at least valuable services" to the statutory receiver.

SEC. 3067. ATTEMPT TO VIOLATE TAFT-HARTLEY SECTION 302.

Section 3067 would amend Section 302(d)(2) of the Taft-Hartley Act, 29 U.S.C. § 186(d)(2), to punish any person who "willfully attempts to pay, lend, deliver, receive, or accept a thing of value in violation of [section (d)(2)]." This provision is intended to cover attempts to do the operative conduct prohibited by subsection (d)(2) and is punishable to the same degree as the completed conduct itself. The amendment does not affect any part of subsection (d)(1) which governs prohibited things of value "received and used" by labor organizations, employee benefit trust funds, and labor-management committees as contrasted with individuals or other persons.

The new provision, however, will prohibit attempts to pay or receive a prohibited thing of value, done with the requisite state of mind for completion of the crime, in situations where another participant in the transaction only appears to hold the required status or exercise influence or decision-making authority over the union because that person was, or was cooperating with, a federal law enforcement officer. Under existing law, for example, the completed payment of a corrupt employer's bribe to a Federal law enforcement officer who, during an undercover investigation or "sting operation" only pretends to be a union official, does not violate section 29 U.S.C. § 186 because the undercover investigator is not operating as "representative of employees" and does not occupy the status of "officer or employee of a labor

organization" required for completion of the crime. Moreover, a corrupt union official's bribe solicitation of a federal law enforcement officer who merely pretends to be an employer or person acting in the interest of an employer is not a completed "request" for payment in violation of the statute because the undercover officer is not in fact an employer or person acting in the interest of an employer covered by the statute. This amendment will permit the prosecution of the corrupt participants in such "sting" transactions as attempts to violate the statute.

SEC. 3068. FORFEITURE FOR RETIREMENT OFFENSES.

Section 3068 adds to employee pension plans regulated by ERISA and other retirement arrangements protection which is similar to that given to privately funded employee health care plans by the HIPAA. The HIPAA amended 18 U.S.C. § 982 and made property that constitutes, or is derived, directly or indirectly, from proceeds traceable to the commission of a federal health care offense subject to forfeiture following conviction of the offense. For example, the HIPAA made the proceeds of embezzlement or theft from an employee health plan regulated by ERISA, or of bribery or graft affecting such a health plan, subject to criminal forfeiture without proof that the proceeds were also used in violation of the money laundering statute (18 U.S.C. §§ 1956 and 1957) or were part of a pattern of racketeering activity in violation of the RICO statute (18 U.S.C. § 1961, *et seq.*).

This section similarly would make the proceeds of any embezzlement or theft from an employee pension benefit plan regulated by ERISA, or bribery or graft effecting such a pension plan, directly subject to forfeiture without proof of money laundering or RICO crimes. It would also make the proceeds of the new retirement fraud crime and other crimes involving retirement arrangements subject to forfeiture. A "retirement offense" whose proceeds are subject to forfeiture is defined in terms of offenses relating to a retirement arrangement described in the proposed retirement fraud crime (18 U.S.C. § 1348) which would protect both employee benefit plans subject to ERISA and other forms of tax-advantaged retirement arrangements. The class of retirement offenses would include a violation of, a criminal conspiracy to violate, or solicitation to commit a crime of violence relating to a retirement arrangement involving a violation of section 664, 1001, 1027, 1341, 1343, 1348, 1951, 1952 or 1954 of Title 18, United States Code; or sections 411, 501, and 511 of ERISA (29 U.S.C. §§ 1111, 1131 and 1141).

Section 3068 also provides for civil forfeiture of the proceeds of these same crimes by amending 18 U.S.C. § 981 to include "retirement offenses." This amendment permits the proceeds of a retirement offense to be forfeited in the event that criminal prosecution is not warranted, or if a criminal defendant is a fugitive, or dies, and no prosecution is possible. In such cases, civil forfeiture will be available to recover the proceeds of the offense.

SEC. 3069. USE OF FORFEITED FUNDS TO PAY RESTITUTION TO CRIME VICTIMS AND REGULATORY AGENCIES.

Section 3069 amends the civil forfeiture statute, 18 U.S.C. § 981, to make it clear that the

forfeited property may be used to restore property to victims of the offense giving rise to the forfeiture. The civil statute, 18 U.S.C. § 981, explicitly authorizes the use of forfeited funds to restore property only in cases based on the offenses set forth in § 981(a)(1)(C) and (D), most of which involve financial institution fraud. The restitution provisions were enacted as part of the Financial Institutions Reform and Recovery Act (FIRREA) of 1989. At the same time, the criminal statute, § 982, permits forfeited funds to be restored to victims in virtually all instances. See 21 U.S.C. § 853(i) incorporated by reference in § 982(b). Taken together, these statutes imply that the Attorney General may not use forfeited funds to restore property to victims in other civil cases -- such as consumer fraud and money laundering. These amendments negate that implication by making it clear that the Attorney General may use the forfeiture laws to restore property to victims in all cases.

First, subsection (e)(6), which presently authorizes the payment of restitution to victims of any crime listed in § 981(a)(1)(C), is expanded to cover all offenses for which forfeiture is authorized under § 981. In the case of money laundering offenses, this includes the offense that constituted the underlying "specified unlawful activity."

Second, subsections (e)(3), (4) and (5), which authorize restitution to financial institutions in cases governed by § 981(a)(1)(C), is revised to take into account the fact that not all financial institution offenses are covered by subsection (a)(1)(C). See subsection (a)(1)(A) relating to money laundering offenses in which the underlying unlawful activity may be a financial institution offense. Thus, the introduction to each subsection, respectively, is amended to refer to "property forfeited in connection with an offense resulting in pecuniary loss to a financial institution or regulatory agency" regardless of what statutory provision is employed to accomplish the forfeiture.

Third, a similar amendment is made to subsection (e)(7) to reflect that not all crimes relating to the sale of assets by receivers of failed financial institutions are covered by subsection (a)(1)(D), see subsections (a)(1)(A) and (E), and to eliminate the need to revise the cross references in this section in the future each time the various subparagraphs of subsection (a)(1) are amended or redesignated.

SEC. 3070. VICTIM RESTITUTION IN CRIMINAL FORFEITURES.

Section 3070 establishes procedures in 21 U.S.C. § 853 for criminal forfeiture cases in which there is also the potential for court-ordered restitution pursuant to the Victim Witness Protection Act (18 U.S.C. §§ 3663-64). The criminal forfeiture procedures of section 853 are incorporated by reference in 18 U.S.C. § 982. These procedures already provide for the judicial resolution of third-party legal interests in forfeited property (21 U.S.C. § 853(n)(1)) and for "remission" or "restoration" of forfeited property to victims by the Attorney General (21 U.S.C. § 853(i)(1)). The amendment adds a new subsection in section 853.

New paragraph (1) adds a provision for the government's voluntary dismissal of the

criminal forfeiture proceeding in favor of court-ordered restitution where the defendant has no other assets with which to satisfy such restitution. It will also prohibit defendants from using forfeitable property to satisfy restitution orders obtained in criminal prosecutions where the defendant has additional assets that are not forfeitable and effectively requires a defendant with non-forfeitable assets to use those assets to satisfy the restitution order, not the property that is he subject of the criminal forfeiture.⁷ However, also makes clear that the government can use criminal forfeiture procedures -- including seizure warrants and restraining orders not available under the restitution statutes -- to recover and preserve forfeitable property, and then can move to dismiss the criminal forfeiture proceeding when necessary to make court-ordered restitution possible.

Because this section applies only to court-ordered restitution pursuant to the Victim Witness Protection Act in criminal proceedings, a defendant may use his property which is subject to forfeiture in order to make restitution to the victim(s) of his crime pursuant to an administrative order or civil judgment in favor of such victim(s) obtained in a parallel proceeding. For example, an employee benefit plan, a participant or fiduciary of such plan, and the United States Department of Labor, have standing to seek restoration of losses incurred by an employee benefit plan or its participants as part of civil remedies in section 502 of ERISA, 29 U.S.C. § 1132. Therefore, this section would permit such plaintiffs to pursue their remedies under ERISA with respect to a defendant's conduct, which had also resulted in criminal prosecution and forfeiture proceedings against criminal proceeds, and thereafter satisfy a civil judgment of restitution from the defendant's property which would otherwise be subject to forfeiture. Of course, in the case of civil restoration of losses to victims by the Department of Labor and/or other federal agencies, it is anticipated that the forfeiture of criminal proceeds and the conduct of civil restoration actions would be coordinated in a manner which does not diminish either restoration of victims' losses or forfeiture of criminal proceeds from available assets of the criminal defendant.

New paragraph (2) provides that if the government does forfeit the property and the defendant is unable otherwise to satisfy a criminal restitution order, the government must remit or restore the forfeited property to the victims pursuant to section 853(i)(1) as a first priority after deduction of the costs of the forfeiture. However, the property may not be remitted or restored to victims pursuant to section 853(i)(1) until the ancillary proceeding has been completed pursuant to section 853(n) to resolve the legal interests of third parties in the property and establish clear

⁷ This preserves the rule in existence before the enactment of the mandatory restitution statute in 1996, see United States v. Various Computers, 82 F.3d 582 (3rd Cir. 1996) (no double jeopardy violation to require defendant effectively to pay twice by forfeiting proceeds of crime and paying restitution to the victims), and negates any suggestion that the enactment of § 3663A provides a windfall to defendants by allowing defendants to pay restitution using assets that have been seized or restrained for forfeiture.

title for disposition. At that point, the government may also ask the court to appoint a special master to assist in identifying and distributing the property to victims, or take any other action that facilitates the process of providing restitution to the victims.⁸

New paragraph (3) defines the term "victim" for purposes of the section as a person not having the requisite legal interest in the forfeited property for third party standing and recovery under section 853(n) who may nevertheless be entitled to recovery from the forfeited funds pursuant to the Department of Justice regulations at 28 C.F.R. Part 9.8 governing the remission and restoration of forfeited property to victims of the offense underlying the forfeiture or related offenses. Therefore, an employee benefit plan, its fiduciaries or participants, and other victims of crimes whose proceeds were forfeited, for example, would be entitled to seek recovery of their losses from forfeited funds under this section by filing a petition with the Department of Justice in accordance with governing regulations. Moreover, forfeited funds would also be available using this procedure in order to satisfy a civil order of restitution in favor of such victims which had been obtained by the United States Department of Labor as part of its parallel remedies in favor of such victims under title I of ERISA.

SUBTITLE G – ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT.

SEC. 3081. JOINT FEDERAL, STATE, AND TRIBAL ENVIRONMENTAL ENFORCEMENT

Section 3081 authorizes Federal district courts to order convicted criminals to reimburse States, localities, and tribes for costs they incur during Federal environmental prosecutions. Moneys paid to State, local, and tribal governments under this provision may be used solely for environmental law enforcement. This reimbursement provision applies to prosecutions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Toxic Substances Control Act (TSCA); the Rivers and Harbors Appropriations Act of 1899; the Federal Water Pollution

⁸ Generally, victims of fraud and other financial crimes do not have standing to file a claim in the ancillary proceeding even if they can trace their interests to the property subject to forfeiture. That is because a person who voluntarily transfers his interest in property to another is no longer the owner of that property and thus does not have the requisite "legal right, title or interest." See United States v. BCCI Holdings (Luxembourg) S.A., 46 F.3d 1185 (D.C. Cir. 1995), cert. denied, 115 S. Ct. 2613 (1995) (crime victims are general creditors who lack standing to file claims in the ancillary proceeding); United States v. \$3,000 in Cash, 906 F. Supp. 1061 (E.D. Va. 1995) (same for civil forfeiture); United States v. \$79,000 in Account Number 2168050/6749900, 1996 WL 648934 (S.D.N.Y. 1996). The exception would be a person who is the victim of a theft or embezzlement whose property was taken from him without his consent. See United States v. Lavin, 942 F.2d 177 (3rd Cir. 1991). Thus, this section provides a source of relief for victims whose claims are not cognizable under § 853(n) but who nevertheless are entitled to restitution.

Control Act; the Marine Protection, Research, and Sanctuaries Act; the Act to Prevent Pollution from Ships; the Shore Protection Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; the Federal Land Policy and Management Act; and 49 U.S.C. § 5124, relating to transportation of hazardous materials.

This provision will strengthen criminal environmental enforcement by fostering cooperative efforts among Federal, State, local, and tribal officials. State and local inspectors and investigators often initiate what become Federal enforcement actions, and they continue to work with Federal officials through the trial stage. For example, State laboratories provide analytical support. Many State and local prosecutors participate in joint task forces and they sometimes are cross-designated as Special Assistant United States Attorneys. Although certain State courts may award costs to State and local governments in State criminal proceedings, Federal courts are not now expressly authorized to order such reimbursement. Providing for reimbursement will greatly increase the ability of State, local, and tribal officials to cooperate in Federal criminal proceedings to address violations of environmental law. Joint enforcement efforts also make the Federal program more responsive to local communities.

Because the court may order reimbursement only upon motion of the United States, the discretion of both the Federal prosecutor and the court will serve as a check against unwarranted cost awards. Allowable costs are limited to those incurred by a State, local, or tribal government or agency for assistance to the Federal government's investigation and prosecution of a case. Costs imposed on a defendant are payable directly to the State or local government in a manner analogous to the payment of restitution directly to the victims of a crime, thus obviating the need for a separate Federal fund or Federal administrator to collect and transfer the monies.

SEC. 3082. PROTECTION OF GOVERNMENT EMPLOYEES AND THE PUBLIC.

Section 3082 provides for enhanced punishment where a criminal violation of specified environmental laws directly or proximately causes serious bodily injury or death to any person, including any Federal, State, local, or tribal government official.

Police officers, firefighters, paramedics, and other public safety and public health personnel often are the first on the scene of an environmental crime. In their efforts to protect others from harm, they themselves may suffer serious injury or death resulting from other people's criminal mishandling of dangerous materials or failure to comply with their legal duty to notify the government of releases of dangerous substances. Members of the public can also be injured or killed as a result of environmental crimes.

Section 3082 will ensure that the criminals who cause this suffering will face an appropriately severe, enhanced punishment upon conviction. It does not establish a new or different crime, but instead provides for enhanced terms of imprisonment and enhanced fines for persons convicted of felony violations under specified Federal environmental laws where death or serious injury results. The laws covered by this provision are: the Federal Water Pollution

Control Act; the Marine Protection, Research, and Sanctuaries Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; and 49 U.S.C. § 5124. The section also provides for enhanced penalties for environmental misdemeanors under the Federal Insecticide Fungicide and Rodenticide Act and the Toxic Substances Control Act where death or serious injury results, thereby transforming those violations into felonies.

For enhanced punishment to be imposed, proposed subsection (b) requires that the defendant commit the underlying environmental crime and that the crime be the direct or proximate cause of serious bodily injury or death. The requirement of "direct or proximate" causation is in line with language used in other criminal provisions, see, e.g., 18 U.S.C. § 844 (personal injury resulting from arson), and limits the sentence enhancement to appropriate cases. Those who commit environmental crimes, for example, by illegally storing hazardous waste, are on notice that their actions may cause serious injury or death to other persons. Unlike existing endangerment provisions in certain environmental statutes that apply to threatened injuries, new subsection (b) requires actual injury or death, but does not require that the defendant intend or know of the injury or death that the defendant's crime causes.

For the most part, the definition of "serious bodily injury" in subsection (c) follows similar definitions in 18 U.S.C. § 113 (assaults within maritime and territorial jurisdiction) and 18 U.S.C. § 1365(g)(3) (tampering with consumer products). The definition in subsection (c), however, does not include "substantial risk of death." In other words, actual serious bodily injury or death (not just the risk of injury or death) must occur for enhanced punishment to be imposed under this definition. It also includes "unconsciousness" within the definition of "serious bodily injury," thereby conforming to the definition of that term in the Federal hazardous waste laws at 42 U.S.C. § 6928(f)(6).

Subsection (d) specifically lists certain government employees whose death or injury could trigger enhanced punishment. This listing is not intended to exclude other persons, including other government employees, from the provision's coverage, but rather to emphasize that the specified government employees are exposed to special risks and are thus especially likely to benefit from the added deterrence and protection engendered by this provision.

SEC. 3082A. ESTABLISHMENT OF THE STATE, LOCAL AND TRIBAL ENVIRONMENTAL ENFORCEMENT TRAINING PROGRAM.

This section responds to the urgent need expressed by State, local, and tribal officials for additional Federal training on environmental criminal enforcement. It establishes within the Environmental Protection Agency a separate program dedicated to the training of State, local, and tribal law enforcement personnel in the investigation of environmental crimes.

States and local governments are undertaking an expanded role in environmental

enforcement, not only of their own laws but also of Federal statutes pursuant to delegated authority. The Pollution Prosecution Act of 1990 mandated that EPA deploy 200 criminal investigators across the country and establish the National Enforcement Training Institute (NETI) to train State, local, and tribal law enforcement in safe and effective investigation of environmental crimes. This section will increase training for State, local, and tribal law enforcement officials and strengthen cooperative enforcement of the Nation's environmental laws. Under the mandate of the Pollution Prosecution Act of 1990, the Environmental Protection Agency has regularly trained State, local, and tribal investigators and regulatory personnel in courses conducted at the Federal Law Enforcement Training Center (FLETC) in Glynco, GA. The need and demand for such training, however, has been greatly increasing.

SEC. 3083. STATUTE OF LIMITATIONS.

Section 3083 provides for an extension of the statute of limitations where a violator has engaged in affirmative acts of concealment of specified environmental crimes.

As is the case for most Federal crimes, Federal environmental crimes are currently subject to a five-year statute of limitations, which runs from the time the offense is committed. 18 U.S.C. § 3282. Some environmental crimes, including some of the most egregious ones, involve affirmative acts of concealment by the wrongdoers. Criminals who are the most deceptive, and thus able to hide their wrongdoing the longest, are most likely to escape the legal consequences of their acts through expiration of the statute of limitations.

Section 3083 addresses this problem for a specified list of felony violations of environmental statutes by extending the limitations period for up to three years beyond the traditional five-year period when the defendant commits an affirmative act of concealment. In these circumstances, the limitation period extends to three years after discovery of the crime by the government. In no event does the limitations period extend beyond eight years after the offense was committed. This extended limitations period covers violations of various provisions under the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Act to Prevent Pollution from Ships; the Shore Protection Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; and 49 U.S.C. § 5124.

For example, if a violator committed an affirmative act of concealment and the environmental crime were not discovered until three, four, or five years after it was committed, this section would extend the statute of limitations to six, seven, or eight years after the crime was committed, respectively -- that is, up to three years after the time of discovery with an eight year cap. If a violator committed an affirmative act of concealment, but the crime were nevertheless discovered by any Federal, State, local, or tribal government agency immediately after it was committed, there would be no extension under this section, and the limitations period would be the five-year period running from the time the crime was committed. Similarly, where

there was no affirmative act of concealment, the five-year period would apply and would run from commission of the crime.

The burden rests on the government to prove an affirmative act of concealment under section 3083.

SEC. 3084. ATTEMPTS

Section 3084 amends specified environmental statutes to add attempt provisions. Under these new provisions, any person who attempts to commit an offense shall be subject to the same penalties as those prescribed for the offense itself.

The rationale for these new attempt provisions is similar to that for comparable provisions in other Federal criminal statutes. Under these existing attempt laws, when law enforcement authorities uncover planned criminal activity and a substantial step is taken towards the commission of the crime, the crime can be stopped before it is completed and the perpetrator may still be prosecuted. For example, Federal law makes attempted bank robbery a crime, punishable the same as bank robbery. 18 U.S.C. § 2113(a). Similar attempt provisions exist for numerous other crimes, such as uttering a Treasury check with forged endorsement (18 U.S.C. §§ 510); bank fraud (18 U.S.C. § 1344); damage to government property (18 U.S.C. § 1361); obstruction of court orders (18 U.S.C. § 1509); and obtaining mail by fraud or deception (18 U.S.C. § 1708).

There has been only one attempt provision in Federal environmental criminal enforcement statutes. As a result, Federal agents can be placed in the untenable situation of choosing between obtaining evidence necessary for a criminal prosecution and preventing pollution from occurring. For example, without an attempt statute, if agents stop a would-be environmental criminal from dumping hazardous waste, the perpetrator cannot be prosecuted for illegal dumping because no environmental crime has occurred. Only if the agents allow the dumping to occur, with the possibility of damage to the environment and risk to the public health, could the perpetrator be prosecuted for illegal dumping. These attempt provisions allow law enforcement personnel to stop environmental crimes before they are completed and still bring the wrongdoer to justice.

Attempt statutes serve another very important purpose in law enforcement. Undercover operations are widely recognized as a valuable tool to ferret out serious crimes. Where dangerous substances are involved, however, undercover operations carry the risk that the government will lose control of the substances and the public subsequently will be exposed to them. Attempt provisions facilitate undercover investigations by allowing prosecution where a defendant purposely engages in conduct that would constitute the crime if the circumstances were as the defendant believes them to be. Where feasible, attempt provisions allow the government to substitute benign substances for the substances that make the conduct illegal but still prosecute for attempt the person who believes he is engaging in illegal conduct.

The new language added by Section 3084 is analogous to the attempt provision contained in the Federal drug laws. 21 U.S.C. § 846. An attempt to commit the conduct constituting one of specified environmental criminal offenses is punished in the same manner as the offense itself.

SEC. 3085. ENVIRONMENT CRIMES RESTITUTION.

Section 3085 amends the Federal restitution statutes to clarify the authority of the courts to provide for restitution to victims in environmental crimes cases.

Existing restitution statutes provide for restitution for bodily injury and property loss. Those categories of restitution address the harm suffered by victims of violent and economic crimes and are intended to make them whole for their physical injuries and pecuniary damages. The victims of environmental crimes also may suffer physical injuries and pecuniary losses. Indeed, environmental crimes often are economic crimes. At the same time, however, an environmental crime also may cause more widespread and longstanding damage, with the harm inflicted on all members of a community or communities affected by the environmental pollution or damage.

Section 3085 clarifies the existing authority of the courts by including environmental offenses among the crimes explicitly enumerated in the restitution statutes. It makes plain that the costs of removal and remediation of environmental pollution or damage, and required restoration of the environment, are included within the coverage of that statute, to the extent of the pollution or damage resulting from the offense. This section recognizes that environmental crimes can harm entire communities and clarifies that the definition of "victim" in the restitution statutes may include all members of a community or communities, whether or not they are individually identified.

SEC. 3086. PREVENTION OF ALIENATION OR DISPOSAL OF ASSETS NEEDED TO REMEDY ENVIRONMENTAL HARMS CAUSE BY ENVIRONMENTAL CRIMES.

Section 3086 authorizes the government, after notice to the defendant, to seek an order from the court to prevent a defendant charged with an environmental crime from dealing with its assets in a manner that would impair its ability to pay for the harm caused by its environmental violations. The government bears the burden of establishing the costs involved, and the defendant may avert such an order by showing that it retains sufficient assets to cover those costs or that it already has paid such costs. The Federal Rules of Criminal Procedure govern any proceedings under this section for an order to prevent the disposal or alienation of assets. Such an order expires at the point of sentencing, or of dismissal or acquittal of the prosecution.

This section expressly codifies the authority already available to a court under the All Writs Act, 28 U.S.C. § 1651. It will prevent a defendant, during the pendency of criminal environmental charges, from concealing, disposing of, or otherwise dealing with its assets in

such a manner that, if it is convicted and is ordered to pay the costs of the harm caused by its actions, sufficient assets no longer will be available for that purpose. If such authority were not available, defendants could easily thwart the purposes of the restitution provisions of this act and those found elsewhere in the law. Similar authority, to prevent the disposal of assets to pay for violations of law, can be found at 18 U.S.C. § 1345 (Injunctions against Fraud). At the same time, the section allows a defendant that can show that defendant's other assets will be sufficient to pay for such harm, or that such costs already have been paid, to avoid being burdened by such an order.

SUBTITLE H – AIRCRAFT SAFETY ACT.

SEC. 3091. PREVENTION OF FRAUDS INVOLVING AIRCRAFT OR SPACEVEHICLE PARTS IN INTERSTATE OR FOREIGN COMMERCE.

This section, whose primary purpose is to safeguard U.S. aircraft and spacecraft, and passengers and crewmembers from the dangers posed by installation of nonconforming, defective, or counterfeit frames, assemblies, components, appliances, engines, propellers, materials, parts or spare parts into or onto civil, public, and military aircraft. Thus, even though the section is cast as an amendment to the criminal law, it is a public safety measure.

The problems associated with nonconforming, defective, and counterfeit aircraft parts have been explored and discussed in a number of fora for several years. For example, in 1995, the Honorable Bill Cohen, then Chairman of the Senate Subcommittee on Oversight of Government Management and the District of Columbia, (now Secretary of Defense) said: "Airplane parts that are counterfeit, falsely documented or manufactured without quality controls are posing an increased risk to the flying public, and the federal government is not doing enough to ensure safety." Similarly, Senator Carl Levin, in a 1995 statement before the same Subcommittee, said: "A domestic passenger airplane can contain as many as 6 million parts. Each year, about 26 million parts are used to maintain domestic aircraft. Industry has estimated that as much as \$2 billion in unapproved parts are now sitting on the shelves of parts distributors, airlines, and repair stations."

Notwithstanding increased enforcement efforts, the magnitude of the problem is increasing: according to the June 10, 1996, edition of Business Week magazine, "Numerous FAA inspectors . . . say the problem of substandard parts has grown dramatically in the past five years. That's partly because the nation's aging airline fleet needs more repairs and more parts to keep flying--increasing the opportunities for bad parts to sneak in. And cash-strapped startups outsource much of their maintenance, making it harder for them to keep tabs on the work." According to Senator Levin's 1995 statement, "over the past five years, the Department of Transportation Inspector General and the Federal Bureau of Investigation have obtained 136 indictments, 98 convictions, about \$50 million in criminal fines, restitutions and recoveries in cases involving unapproved aircraft parts. . . . The bad news is that additional investigations are underway with no sign of a flagging market in unapproved parts."

Yet, no single Federal law targets the problem in a systemic, organized manner. Prosecutors currently use a variety of statutes to bring offenders to justice. These statutes include mail fraud, wire fraud, false statements and conspiracy, among others. While these prosecutorial tools work well enough in many situations, none of them focus directly on the dangers posed by nonconforming, defective, and counterfeit aircraft parts. Offenders benefit from this lack of focus, often in the form of light sentences. One incident reveals the inherent shortcomings of such an approach:

in 1991, a mechanic at United [Airlines] noticed something odd about what were supposed to be six Pratt & Whitney bearing-seal spacers used in P&W's jet engines--engines installed on Boeing 727s and 737s and McDonnell-Douglas DC-9s world-wide. The spacers proved to be counterfeit, and P&W determined that they would have disintegrated within 600 hours of use, compared with a 20,000-hour service life of the real part. A spacer failure in flight could cause the total failure of an engine. Investigators traced the counterfeits to a broker who allegedly used unsuspecting small toolmakers and printers to fake the parts, as well as phony Pratt & Whitney boxes and labels. The broker . . . pled guilty to trafficking in counterfeit goods and received a seven-month sentence in 1994. (June 10, 1996, Edition of Business Week Magazine.)

Given the potential threat to public safety, a focused, comprehensive law is needed to attack this problem.

Prevention of Frauds Involving Aircraft or Spacecraft Parts in Interstate or Foreign Commerce remedies the problems noted above by amending Chapter Two of Title 18, United States Code. Chapter Two deals with "Aircraft and Motor Vehicles," and currently contains provisions dealing with the destruction of aircraft or aircraft facilities, and violence at international airports but says nothing about fraudulent trafficking in nonconforming, defective, or counterfeit aircraft parts.

Subsection (a) builds on the existing framework of Chapter Two by adding some relevant definitions to Section 31. The subsection defines "aviation quality," when used with respect to aircraft or aircraft parts, to mean aircraft or parts that have been manufactured, constructed, produced, repaired, overhauled, rebuilt, reconditioned, or restored in conformity with applicable standards, specified by law, regulation, or contract. The term is used in Section 38(b) of the Act, which sets forth the maximum penalties for violation of the offenses prescribed by Section 38(a). If the misrepresentation or fraud that leads to a conviction under Section 38(a) concerns the "aviation quality" of an aircraft part, then Section 38(b)(2) enhances the maximum punishment by 10 years imprisonment and doubles the potential fine.

This subsection also defines "aircraft." This definition essentially repeats the definition of aircraft already provided in Section 40102 of Title 49.

"Part" is defined to mean virtually all aircraft components and equipment.

“Spacevehicle” is defined to mean any man-made device, manned or unmanned, designed for operation beyond the earth’s atmosphere and would include rockets, missiles, satellites, and the like.

Subsection (b) adds a totally new Section 38 to Chapter Two. Proposed subsection 38(a)(1)-(3) sets out three new offenses designed to outlaw the fraudulent exportation, importation, sale, trade, installation, or introduction of nonconforming, defective, or counterfeit aircraft or aircraft parts into interstate or foreign commerce. This is accomplished by making it a crime to falsify or conceal any material fact, to make any materially fraudulent representation, or to use any materially false documentation or electronic communication concerning any aircraft or spacecraft part, or to attempt to do so.

The three provisions overlap to some extent but each focuses upon a different aspect of the problem to provide investigators and prosecutors with necessary flexibility. All are specific intent crimes; that is, all require the accused to act with knowledge, or reason to know, of his fraudulent activity.

Proposed subsection (c) prescribes the maximum penalties that attach to the offenses created in new subsection (b). A three-pronged approach is taken in order to both demonstrate the gravity of the offenses and provide prosecutors and judges alike with flexibility in punishing the conduct at issue. A basic 15-year imprisonment and \$250,000 fine maximum punishment is set for all offenses created by the new section; however, the maximum punishment may be escalated if the prosecution can prove additional aggravating circumstances. If the fraud that is the subject of a conviction concerns the aviation quality of the part at issue and the part is actually installed in an aircraft or spacevehicle, then the maximum punishment increases to 25 years imprisonment and a \$500,000 fine. If, however, the prosecution is able to show that the part at issue was the probable cause of a malfunction or failure leading to an emergency landing or mishap that results in the death or injury of any person, then the maximum punishment is increased to life imprisonment and a \$1 million fine. Finally, if a person other than an individual is convicted, the maximum fine is increased to \$25 million.

New subsection (d) authorizes the Attorney General to seek appropriate civil remedies, such as injunctions, to prevent and restrain violations of the Act. Part of the difficulty in stopping the flow of nonconforming, defective, and counterfeit parts into interstate or foreign commerce is the ease with which unscrupulous individuals and firms enter and re-enter the business: “Moreover, even when they are caught and punished, these criminals can conceivably go back to selling aircraft parts when their sentences are up.” (1995 Statement of Senator Joe Lieberman before the Senate Subcommittee on Oversight of Government Management and the District of Columbia.) In addition to providing a way to maintain the status quo and to keep suspected defective or counterfeit parts out of the mainstream of commerce during an investigation, this provision adds important post-conviction enforcement tools to prosecutors. The ability to bring such actions may be especially telling in dealing with repeat offenders since a court may, in addition to imposing traditional criminal penalties, order individuals to divest

themselves of interests in businesses used to perpetuate related offenses or to refrain from entering the same type of business endeavor in the future. Courts may also direct the disposal of stockpiles and inventories of parts not shown to be genuine or conforming to specifications to prevent their subsequent resale or entry into commerce. It is envisioned that the prosecution would seek such relief only when necessary to ensure aviation safety.

Proposed subsection (e) provides for criminal forfeiture and is designed to deprive an offender of both the proceeds and implements of the offenses specified in the Act, and to protect the public from defective aircraft parts. These forfeiture provisions are meant to supplement, not replace, the authorized punishments. The criminal forfeiture section provides for an in personam action against the offender, rather than one against the property itself, and preserves the rights of innocent third parties. The subsection incorporates through reference existing law to provide for procedures to be used in the detention, seizure, forfeiture, and ultimate disposition of property forfeited under the Act. Under these procedures, the Attorney General is authorized to grant petitions for mitigation or remission of forfeiture and for the restoration of forfeited property to the victims of an offense. The Attorney General may also take any other necessary or proper action to protect the rights of third parties in the interests of justice. In practice, victims are afforded priority in the disposition of forfeited property since it is the policy of the Department of Justice to provide restitution to victims of criminal acts whenever permitted to do so by law. Procedures for victims to obtain restitution are found at Section 9 of Title 28, Code of Federal Regulations. Forfeitures are also subject to a requirement of proportionality under the Eighth Amendment to the Constitution; that is, the value of the property forfeited must not be excessively disproportionate to the crime in question.

Proposed subsection (f) discusses how the Act is to be construed with other laws relating to the subject of fraudulent importation, sale, trade, installation, or introduction of aircraft or aircraft parts. The section makes clear that other remedies, whether civil or criminal, are not preempted by the Act and may continue to be enforced. In particular, the Act is not intended to alter the jurisdiction of the U.S. Customs Service, which is generally responsible for enforcing the laws governing importation of goods into the United States.

Proposed subsection (g) deals with the territorial scope of the Act. To rebut the general presumption against the extraterritorial effect of U.S. criminal laws, this section provides that the Act will apply to conduct occurring both in the United States and beyond U.S. borders. Clearly the U.S. will apply the law to conduct occurring outside U.S. territory only when there is an important U.S. interest at stake. If, however, an offender affects the safety of U.S. aircraft, spacevehicles, or U.S. persons, this section would provide for subject matter jurisdiction even if the offense is committed overseas.

Subsection (h) of new section 38 authorizes administrative subpoenas to be issued in furtherance of the investigation of offenses under this section. Under this provision, the Attorney General or designee may issue written subpoenas requiring the production of records relevant to an authorized law enforcement inquiry pertaining to offenses under the new section. Testimony

concerning the production and authentication of such records may also be compelled. The subsection also sets forth guidance concerning the service and enforcement of such subpoenas and provides civil immunity to any person who, in good faith, complies with a subpoena issued pursuant to the Section.

The subsection is modeled closely on an analogous provision found in Section 3486(a)(1) of Title 18, pertaining to health care fraud investigations. Like the health care industry, the aviation industry--including the aviation-parts component of the industry--is highly regulated since the public has an abiding interest in the safe and efficient operation of all components of the industry. The public also has a concomitant interest in access to the records and related information pertaining to the industry since, often, the only evidence of possible violations of law may be the records of this regulated industry. Thus, companies and individuals doing business in this industry are in the public limelight by choice and have reduced or diminished expectations of privacy in their affairs relating to how that business is conducted. In such situations, strict probable cause requirements regarding the production of records, documents, testimony, and related materials make enforcement impossible. This provision recognizes this but also imposes some procedural rigor and related safeguards so that the administrative subpoena power is not abused in this context. The provision requires the information sought to be relevant to the investigation, reasonably specific, and not unreasonably burdensome to meet.

SEC. 3092. CONFORMING AMENDMENT.

This section would add the new offenses created by the Act to the list of predicate offenses for which oral, wire, and electronic communications may be authorized.

SUBTITLE I – ANTITRUST.

SEC. 3101. INCREASED MAXIMUM CORPORATE PENALTY FOR ANTITRUST VIOLATIONS.

Section 3101 would increase the maximum statutory fine for corporations convicted of criminal antitrust violations from the current Sherman Act maximum of \$10,000,000 to a new maximum of \$100,000,000. Subsection (a) would apply this increase to antitrust violations that consist of agreements in restraint of trade or commerce among the States, primarily price-fixing and bid-rigging violations. Subsection (b) would apply this increase to antitrust violations that consist of monopolizing, attempting to monopolize, or conspiring to monopolize trade or commerce among the States. Subsection (c) would apply this increase to antitrust violations that consist of agreements in restraint of trade in or among Territories of the United States or the District of Columbia and any State.

Analysis

I. Introduction

The Department of Justice supports amending the Sherman Act to raise the maximum corporate fine from \$10 million to \$100 million. Currently, the methodology adopted by the United States Sentencing Commission for imposing fines for criminal antitrust offenses bases those fines on a percentage of the volume of commerce affected by the violation. However, for an increasing number of corporate antitrust crimes that involve a very large volume of commerce, the Sentencing Commission methodology results in a fine greater than the current statutory maximum of \$10 million. In such cases, the only alternative to a fine capped at \$10 million is for the offending corporation to be sentenced under the "twice the gain/twice the loss" alternative sentencing provision found in 18 U.S.C. 3571(d). Unfortunately, proving gain or loss for antitrust offenses is much more difficult than is the case for most other economic crimes.

The end result is that for the largest, most harmful antitrust conspiracies--typically conspiracies involving international cartels and foreign corporations--the standard methodology adopted by the Sentencing Commission for calculating antitrust fines is mooted in favor of a fine calculation that tends to be considerably more lenient towards the offender. The current statutory scheme thereby provides less deterrent effect for firms whose illegal conduct affects the largest volume of commerce--an inherently incongruous result. Raising the maximum corporate antitrust fine in the Sherman Act to \$100 million would rectify this problem and ensure that multinational corporations that commit antitrust offenses involving hundreds of millions of dollars in U.S. commerce are punished just as severely as local firms that commit antitrust offenses involving hundreds of thousands of dollars.

II. The Proposed Change in the Context of the Existing Statutory Structure

The central statutory provisions governing sentencing of corporations convicted of antitrust offenses are the general fine sentencing statute, 18 U.S.C. 3571 and the Sherman Act, 15 U.S.C. 1-3. The fine sentencing statute provides that corporations "may not be fined more than the greatest of -- (1) the amount specified in the law setting forth the offense; (2) the applicable amount under subsection (d) of this section; . . ." 18 U.S.C. 3571(c). Subsection (d) is the alternative "twice the gain, twice the loss" fine provision: it states that for offenses resulting in pecuniary gain or loss to any person, the defendant may be fined "not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." 18 U.S.C. 3571(d). In the case of antitrust crimes, the "law setting forth the offense" is the Sherman Act: it provides for corporate fines of up to \$10 million. 15 U.S.C. 1-3. Thus, for antitrust offenses the maximum fine is \$10 million or twice the gross pecuniary gain or loss, whichever is greater.

Actual fines in antitrust cases are calculated pursuant to the United States Sentencing Guidelines. USSG §2R1.1 (in conjunction with §8C2.4) provides that the base fine for organizations in antitrust offenses is 20 percent of the affected volume of commerce. The base

fine is modified by the culpability score (calculated pursuant to §8C2.5⁹) to produce a fine range. The range can include a minimum fine as low as 15 percent of the affected volume of commerce and a maximum of as much as 80 percent of the volume of commerce affected by the violation depending on the culpability score.

For antitrust offenses with a volume of commerce of \$12.5 million or less,¹⁰ the \$10 million statutory maximum does not constrain the actual fine, and the fine calculation methodology adopted by the Sentencing Commission can be applied without difficulty. However, for larger antitrust conspiracies, the \$10 million statutory maximum prevents a court from imposing any sentence over \$10 million that might otherwise be required under the Sentencing Commission's methodology. Indeed, for any offense that involves a volume of commerce of greater than \$66.66 million, the \$10 million statutory maximum prevents a court from applying even the minimum possible Guidelines fine.¹¹

When the Sherman Act corporate maximum fine was set at \$10 million in 1990, the vast majority of antitrust offenses prosecuted by the Department involved a volume of commerce small enough to permit a full implementation of the fines provided by the Sentencing Guidelines without resort to the alternative fine statute. Just the opposite is true today. The vast majority of current investigations of national conspiracies and nearly all of the grand juries looking at suspected international cartel activity involve commerce which would result in fines above the current \$10 million statutory maximum. Perhaps the most telling indicator that the statutory maximum has not kept pace with the scope of Department enforcement is that the average fine obtained against corporations in criminal antitrust cases last year was higher than the statutory maximum. The average fine for all corporations was approximately \$12 million; the average fine for corporations involved in national or international conspiracies (the majority of the Department's prosecutions) was over \$16 million.

At present, the only way to obtain a fine in excess of \$10 million is to utilize the "twice the gain, twice the loss" provision of the alternative fine statute. Unfortunately, proving the gain or loss in an antitrust conspiracy is inherently very difficult¹²--a fact the Sentencing Commission

⁹ The culpability score takes into account factors such as the size of the organization, the level of participation in the offense of high-level personnel, any prior history of misconduct, the degree of cooperation and acceptance of responsibility, etc.

¹⁰\$12.5 million multiplied by 80 percent yields the \$10 million statutory maximum.

¹¹15 percent of \$66.66 million equals \$10 million.

¹²Given the *per se* nature of criminal antitrust offenses, proving gain or loss is unnecessary to establish liability and therefore, information supporting a calculation of gain or loss may not be extensively sought in an investigation. In many cases, data needed to calculate gain or loss may be unavailable. Calculating gain or loss may require a comparison of the prices

recognized when it opted for a fine calculation for antitrust offenses based on the volume of commerce affected by the violation rather than on gain or loss from the offense as is used for other economic crimes.¹³ Although the Department has been able to obtain fines greater than the statutory maximum of \$10 million on 12 occasions,¹⁴ all 12 involved negotiated settlements. To date, in large part due to the inherent difficulty of proving gain or loss, the Department has never sought to prove gain or loss to obtain a corporate antitrust fine above \$10 million.

Thus, under the existing statutory scheme, most antitrust fines are calculated using the methodology adopted by the Sentencing Guidelines which relies principally on a percentage of the volume of affected commerce. For the largest antitrust conspiracies, however, the fine is either capped at \$10 million (which may be substantially less than the fine that would otherwise be appropriate under the Guidelines methodology) or the Department must prove gain or loss--something which is inherently very complex and difficult.

III. Rationale for the Proposed Change

In the past few years the Department has devoted an ever-increasing amount of resources to cracking large international antitrust conspiracies. Criminal enforcement of the antitrust laws is the Department's top antitrust priority, and cracking large international cartels is perhaps the single most important focus of current criminal antitrust enforcement. Increasing international cooperation has enhanced the Department's ability to pursue international cartels even when they principally involve foreign firms and conduct on foreign soil that impacts American consumers.¹⁵

actually charged by the conspirators with prices that would have been charged in the absence of a conspiracy--an inherently speculative calculation. Finally, even where data is available, it will often be difficult to analyze, and different analyses will produce different estimations of gain or loss.

¹³See USSG §2R1.1, comment. (background). The Sentencing Commission adopted the volume of commerce approach and the 20 percent proviso expressly to relieve the Department of the need to prove the amount of loss in calculating Guidelines fines for antitrust offenses. The Commission's rationale was that calculating the amount of loss at sentencing in *per se* antitrust cases would be highly complicated and unduly burdensome, and that the much easier to determine volume of commerce affected by the violation could serve as a suitable proxy for the harm caused by the offense.

¹⁴Appendix A contains a listing of all of the antitrust defendants against which a fine of \$10 million or greater has been imposed.

¹⁵In late 1995, the Department indicted Nippon Paper Industries Co., Ltd. for participating in a conspiracy to raise the price of fax paper to American consumers. Even though the conspiratorial acts alleged took place in Japan, the U.S. Court of Appeals for the First Circuit held that the defendant could still be prosecuted because the conspiracy had an effect on U.S.

International conspiracies tend to be complex and extremely broad in their impact--both in terms of geographic scope and in the amount of commerce affected. As a result, it is no longer uncommon for the Department to be pursuing conspiracies where the affected volume of commerce is in the hundreds of millions, or even billions, of dollars. Currently over 30 U.S. antitrust grand juries are looking at international cartel activity¹⁶: in more than half of these investigations the affected volume of commerce is well over \$100 million, and in some the affected volume of commerce is well over \$1 billion. Unfortunately, the Sherman Act maximum fine has not kept pace with this increased activity.

As discussed above, if the affected volume of commerce involving a defendant is over \$66.66 million, the \$10 million statutory maximum will prevent a court from imposing even the minimum fine called for under the methodology adopted by the Sentencing Commission. If the affected volume of commerce is as little as \$12.51 million, the \$10 million statutory maximum may constrain a court's ability to impose the fine called for under the Sentencing Guidelines. Given that over a dozen corporate defendants successfully prosecuted by the Department have participated in conspiracies where the affected volume commerce resulted in a Guidelines fine greater than \$10 million, the \$10 million statutory maximum has already begun to affect fines imposed on the largest antitrust felons; needless to say, it may become an increasing obstacle to the use of the Sentencing Commission's methodology for calculating antitrust fines as the Department cracks more international conspiracies.

The ultimate effect of the \$10 million cap is that participants in the largest antitrust conspiracies--typically large international firms--tend to get, in relative terms, a more lenient sentence than participants in smaller antitrust conspiracies¹⁷--which are typically smaller domestic firms. Not only is this result inherently unfair, it creates a climate where deterrence is weakest where it actually should be strongest. Conspiracies affecting hundreds of millions or even billions of dollars are the most damaging to competition and consumers; it is therefore potential participants in these conspiracies where deterrence is most necessary. The fact that the

customers. See United States v. Nippon Paper Industries Co., 109 F.3d 1 (1st Cir. 1997). The Department has also prosecuted numerous companies for involvement in conspiracies where several of the conspiratorial meetings took place overseas.

¹⁶The subjects and targets of these investigations are located in over 20 different countries and on 5 continents.

¹⁷Although it is possible to secure a fine larger than \$10 million, such a fine can only be obtained via the "twice the gain, twice the loss" alternative sentencing statute. As discussed above, such a sentence requires the use of a methodology different than that usually employed for antitrust crimes under the Sentencing Guidelines--a methodology that requires proof of gain or loss. Given the extreme difficulty of accurately proving gain or loss for an antitrust offense, an antitrust defendant is significantly more likely to get a lesser sentence if the Sentencing Commission's volume of commerce-based methodology cannot be employed.

Department has discovered conspiracies involving hundreds of millions of dollars in the past few years suggests that large corporations are not adequately deterred by the current fine structure and that more deterrence, in the form of potentially greater fines, is necessary to protect American consumers.¹⁸

IV. Conclusion

The current Sherman Act \$10 million statutory maximum fine combined with the Department's increasing focus on large international conspiracies has created, in effect, a two-tiered sentencing system. Antitrust conspirators that engage in a small to moderate volume of commerce are sentenced under the volume of commerce-based methodology adopted by the Sentencing Commission; however, large international firms that engage in conspiracies affecting a huge volume of commerce obtain more lenient treatment: either they receive the \$10 million statutory maximum (which will often be considerably less than the fine that would be appropriate under the Sentencing Commission's volume of commerce-based methodology) or the Department must prove "gain" or "loss"--something which is so difficult in an antitrust case that the Department has never litigated a corporate antitrust fine in excess of \$10 million. The potential constraint on fines is such that the largest potential conspirators--those doing hundreds of millions or even billions of dollars in commerce--may regard the potential fine as merely a cost of doing business.¹⁹ In order to rectify this problem, provide adequate deterrence to the largest potential antitrust conspirators, and thereby protect American consumers, the Department of Justice supports amending the Sherman Act to raise the maximum permissible corporate fine from \$10 million to \$100 million.

¹⁸Increasing the maximum statutory fine would not adversely affect the ability of private parties to secure restitution nor would it jeopardize the continued viability of convicted corporate defendants. Under the Sentencing Guidelines and Department of Justice policy, restitution to injured parties takes precedence over criminal fines. Moreover, the Sentencing Guidelines provide that a court may depart downward from the specified Guidelines fine if the defendant is unable to pay that fine. Finally, it is important to note that all criminal fines in antitrust cases ultimately are deposited in the Crime Victims Fund, see 42 U.S.C. § 10601, which in turn supports two major formula grant programs: Victim Compensation and Victim Assistance. Over 90 percent of Fund deposits are used to support state victim compensation and assistance services for victims of domestic violence, sexual assault, child abuse, drunk driving, homicide, and other crimes.

¹⁹This problem is particularly acute for foreign-based firms: for domestic firms, the prospect of jail time for individuals provides a substantial added deterrent to engaging in antitrust offenses on behalf of their respective companies; for foreign-based firms, jurisdictional realities are such that foreign executives face much less risk of seeing the inside of a U.S. courtroom and therefore are less likely to be deterred from participating in antitrust conspiracies.

APPENDIX A

Sherman Act Violations Yielding a Fine of \$10 Million or More

Defendant (FY)	Product	Fine (\$ Millions)	Geographic Scope	Country
UCAR International, Inc. (1998)	Graphite Electrodes	\$110	International	U.S.
Archer Daniels Midland Co. (1997)	Lysine & Citric Acid	\$100	International	U.S.
Haarmann & Reimer Corp. (1997)	Citric Acid	\$50	International	German Parent
HeereMac v.o.f. (1998)	Marine Construction	\$49	International	Netherlands
Showa Denko Carbon, Inc. (1998)	Graphite Electrodes	\$32.5	International	Japan
Fujisawa Pharmaceuticals Co. (1998)	Sodium Gluconate	\$20	International	Japan
Dockwise N.V. (1998)	Marine Transportation	\$15	International	Belgium
Dyno Nobel (1996)	Explosives	\$15	Domestic	Norwegian Parent
F. Hoffmann-LaRoche, Ltd. (1997)	Citric Acid	\$14	International	Switzerland
Eastman Chemical Co. (1998)	Sorbates	\$11	International	U.S.
Jungbunzlauer International (1997)	Citric Acid	\$11	International	Switzerland
[Under Seal] (1998)	[Under Seal]	\$10.5	International	[Foreign]
Akzo Nobel Chemicals, BV & Glucona, BV (1997)	Sodium Gluconate	\$10	International	Netherlands
ICI Explosives (1996)	Explosives	\$10	Domestic	British Parent
Mrs. Baird's Bakeries (1996)	Bread	\$10	Domestic	U.S.
Ajinomoto (1996)	Lysine	\$10	International	Japan
Kyowa Hakko Kogyo, Co., Ltd. (1996)	Lysine	\$10	International	Japan

TITLE IV - SECTION BY SECTION ANALYSIS

SUBTITLE A - ZERO TOLERANCE DRUG SUPERVISION

SEC. 4001. GRANT AUTHORITY.

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

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

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

SEC. 4002. ADMINISTRATION.

(a) Consultation/Coordination--In carrying out this program, the Attorney General will coordinate with the other Justice Department initiatives that address drug testing and interventions in the criminal justice system.

(b) Guidelines--The Attorney General may issue guidelines necessary to carry out this part.

(c) Applications--In addition to any other requirements that may be specified by the Attorney General, an application for a grant under this part shallB

(1) reflect a comprehensive approach that recognizes the importance of collaboration and a continuum of testing, treatment, and other interventions;

(2) include a long-term strategy and detailed implementation plan;

(3) address the applicant's capability to continue the proposed program following the conclusion of federal support;

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

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

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

SEC. 4003. APPLICATIONS.

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

SEC. 4004. FEDERAL SHARE.

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

SEC. 4005. GEOGRAPHIC DISTRIBUTION.

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

SEC. 4006. TECHNICAL ASSISTANCE, TRAINING, AND EVALUATION.

- (a) Technical Assistance and Training--The Attorney General shall provide technical assistance and training in furtherance of the purposes of this part.
- (b) Evaluation--In addition to any evaluation requirements that may be prescribed for grantees, the Attorney General may carry out or make arrangements for a rigorous evaluation of the programs that receive support under this part.
- (c) Administration--The technical assistance, training, and evaluations authorized by this section may be carried out directly by the Attorney General or through grants, contracts, or cooperative agreements with other entities.

SEC. 4007. AUTHORIZATIONS.

There are authorized to be appropriated \$125,000,000 for fiscal year 2000 and for fiscal

years 2001 through 2005 such sums as are necessary.

SEC. 4008. PERMANENT SET-ASIDE FOR RESEARCH AND EVALUATION.

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

SEC. 4009. ADDITIONAL REQUIREMENTS FOR THE USE OF FUNDS UNDER THE VIOLENT OFFENDER INCARCERATION AND TRUTH-IN-SENTENCING GRANT PROGRAMS.

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

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

The language also adds several requirements to the conditions a state must meet in order to receive funding under the VOI/TIS program. Under the language added at (B), the state must have implemented by September 1, 1999 a program for drug testing/sanctioning and treatment for violent offenders housed in their corrections facilities. This plan needs to include sanctions for inmates who test positive. The language at (2) would permit the state to use funds received under the VOI/TIS program to pay the costs of the testing and interventions required under the new section 20105(b)(1)(B). Language at (2) also permits funds to pay the costs of certain drug reporting requirements. The language at (3) requires states to address the problem of drug trafficking within and into correctional facilities with a system of penalties and sanctions. Such sanctions and penalties would comply with guidelines issued by the Attorney General. A state's failure to comply with this requirement would result in a ten percent reduction in their VOI/TIS

funds. Further, as an incentive for those states that do comply, those funds resulting from the reductions, would be re-distributed among those states in compliance.

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

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

SEC. 4010. REAUTHORIZATION OF RESIDENTIAL SUBSTANCE ABUSE TREATMENT GRANT PROGRAM.

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

SEC. 4011. USE OF RESIDENTIAL ABUSE TREATMENT GRANTS TO PROVIDE FOR SERVICES DURING AND AFTER INCARCERATION.

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

SEC. 4012. REESTABLISHMENT OF DRUG COURTS.

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

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

Section 2201. GRANT AUTHORITY. This section empowers the Attorney General to may make grants to States, State courts, local courts, units of local government, and Indian tribal governments, directly or through agreements with other entities, for the purpose of operating diversion programs that provide for continuing judicial supervision over offenders with substance abuse problems who are not violent offenders. These programs are required to operate

with an integrated system of sanctions and services. They must include mandatory periodic drug testing during any supervised release or probation periods, drug abuse treatment for each participant and must involve the possibility of prosecution, confinement, or incarceration for noncompliance or failure to show satisfactory progress. Finally, Drug Court programs must provide for offender management, aftercare and such services as relapse prevention, health care, education, vocational training, job and housing placement, and child care or other family support services for each participant as needed.

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

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

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

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

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

Section 2206. FEDERAL SHARE. This section limits the federal share to 75 percent of

total program costs, unless the Attorney General waives all or part of the matching contribution.

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

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

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

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

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

SEC. 4013. EXCEPTIONS TO TIME LIMITS FOR BYRNE PROGRAM GRANTS FOR CERTAIN PURPOSES.

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

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

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

- (4), community-based programs for adult and juvenile drug-dependent and alcohol-dependent offenders;
- (5) monitoring of drug-dependent offenders; and
- (6), those innovative programs demonstrating new approaches to enforcement, prosecution and adjudication of drug and other serious crimes that include all aspects of community-based intervention, surveillance and supervision.

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

SUBTITLE B – ANTI-DRUG PROVISIONS.

SEC. 4020. NATIONAL STANDARD TO PROHIBIT OPERATION OF MOTOR VEHICLES BY INTOXICATED INDIVIDUALS.

TO BE COMPLETED.

SEC. 4020A. DRUG FREE TEEN DRIVERS.

TO BE COMPLETED.

SEC. 4021. AMENDMENTS CONCERNING TEMPORARY EMERGENCY SCHEDULING.

Proposed section 4021 removes two current impediments to the Attorney General's authority to temporarily schedule substances under the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq. Apart from the initial five schedules set by Congress when it enacted the law, most scheduling actions have been undertaken by the Attorney General. There are generally two scheduling processes, permanent and temporary. Permanent scheduling requires an evaluation by both the Attorney General and the Secretary of Health and Human Services (HHS), and prior notice and right to a hearing, before the ultimate decision by the Attorney General as to whether and where to schedule a substance. The permanent scheduling process can take several years. Temporary scheduling is a faster process typically used to schedule newly emerging drugs of abuse. Under 21 U.S.C. § 811(h), the Attorney General must find such scheduling "necessary to avoid an imminent hazard to the public safety." The law mandates consideration of a more limited set of factors, focusing on current levels of abuse and trafficking, than for permanent scheduling.

Under current law, there are two important limitations to the Attorney General's temporary scheduling authority. First, he or she cannot temporarily reschedule a substance to Schedule I, making it subject to stronger controls and higher penalties. Second, the Attorney General cannot temporarily control any substance if it is subject to an exemption issued by HHS for investigational new drugs (IND). The draft amendment eliminates the ban on rescheduling a previously controlled substance on an emergency basis. The draft also removes the IND barrier, but it includes safeguards to address concerns that scheduling actions may impede research on promising new drugs.

The draft text includes several features to protect research into IND drugs that may become subject to emergency scheduling. First, substances for which an IND is outstanding

would be placed in Schedule II rather than I, thus reducing the "Schedule I stigma" that concerns the research community. (Apart from certain mandatory minimum sentences trafficking penalties are the same for Schedule I and II substances.) Second, unless the substance subject to an IND was previously controlled in another schedule, IND holders would enjoy several exemptions from the normal CSA regulatory regime. Compliance with the recordkeeping and reporting requirements of the Federal Food, Drug, and Cosmetic Act (FDCA), required under the terms of an IND, would be deemed sufficient under the CSA; the draft amendment gives the DEA authority to inspect premises where records required by the FDCA are kept. Third, compliance with the physical security requirements under the FDCA would also be deemed sufficient for purposes of the CSA, except that if and when investigational drug development proceeds to stages of dosage form development that DEA regulations deem to be manufacturing, the drug developer would have to register as a manufacturer. See 60 Fed.Reg. 55310 (Oct. 31, 1995). In that case, however, the person or firm would be subject only to the physical security requirements for Schedule IV substances, not the stricter requirements of Schedule II. Fourth, IND researchers would benefit from the preemption of any state or local laws that would impose more stringent requirements or penalties than the federal law on IND activities that are exempted under the subsection.

Finally, the draft proposal would double the time period of temporary scheduling applicable in general -- one year plus a six-month extension, at the Attorney General's discretion, for a total of 18 months -- to a total of three years for IND drugs -- a two-year initial period followed by a one-year extension, at the Attorney General's discretion. The longer period is deemed advisable because, unlike the so-called "designer drugs" that were the object of the original 1984 amendment permitting temporary scheduling, the substances subject to IND do have potential medical applications. Consequently, pre-scheduling findings may well require a more extensive review of scientific literature, and it is more likely that interested persons will initiate contested administrative proceedings, including hearings, where IND drugs are at issue. The three-year time frame also provides a longer period of protection for IND researchers, through application of the less stringent regulatory regime discussed above, than that normal 18-month period.

The draft proposal would clarify that the temporary scheduling process does not require the Attorney General to make the schedule-specific findings required for permanent scheduling, which are set forth in 21 U.S.C. § 812(a). In this respect, it is intended to override contrary dicta in Touby v. United States, 500 U.S. 160, 166 (1991). It is impractical for the Attorney General to make the three findings set forth in 812(a) in the context of temporary scheduling. That process is usually undertaken swiftly in response to a sudden surge in the abuse of a substance; typically, there is not sufficient information to make the findings mandated for permanent scheduling in 812(a) with respect to "accepted medical use in treatment" or "safety . . . under medical supervision." These findings require more time, and include thorough review by and input from HHS, whose findings are given special weight on medical and scientific matters. The legislative history of the Comprehensive Crime Control Act of 1984, which enacted § 811(h), makes clear the intent to permit the Attorney General to focus only on the pattern, scope, and

significance of abuse of the substance and the risk it poses to the public health, while allowing her to bypass the prior notice and opportunity for a hearing required by § 811(a) and the findings required by § 812(b). See 1984 U.S.C.C.A.N. at 3446.

The draft proposal also makes clear that the disclosure of the existence of an IND in the context of this subsection will not be considered to be a prohibited disclosure under the FDCA, see 21 U.S.C. § 301(j), or 18 U.S.C. § 1905.

SEC. 4022. AMENDMENT TO REPORTING REQUIREMENT FOR TRANSACTIONS INVOLVING CERTAIN LISTED CHEMICALS.

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

Specifically, this section provides as follows:

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

Subsection (c) establishes exemptions from the reporting requirement of the redesignated paragraph (B). The first four exemptions are limited to the distribution of drug products.

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

The second exemption is designed to deal with infrequent deliveries to customers of drug products by retail distributors. As long as the frequency of the deliveries and the quantity of drug

product distributed in this manner is consistent with the definition of a retail distributor, the distribution would not be reportable.

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

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

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

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

SEC. 4023. AMPHETAMINE PENALTY INCREASES

This section would increase penalties for amphetamine, a substance closely related to methamphetamine, though not to the same level as methamphetamine penalties due to differences in the respective potencies of the two drugs.

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

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

result, more criminals are turning to the more widely available amphetamine precursor phenylpropanolamine.

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

SEC. 4024. ANABOLIC AGENTS.

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

Specifically, this section amends section 102(41) of the Controlled Substances Act (21 U.S.C. 802 (41)) by modifying paragraph (A) to read as follows:

"(41) The term "anabolic agent" means

(A) an anabolic steroid which is any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins, and corticosteroids) that promotes muscle growth, and includes-

(i) boldenone,

...

(xxviii) any salt, ester, or isomer of a drug or substance described or listed in this paragraph, if that salt, ester, or isomer promotes muscle growth; or".

It also redesignates subparagraph (B) as (C) and inserts a new (B) as follows:

"(B) any other substance, including its salts and isomers, which the Attorney General, after consultation with the Secretary, determines and specifies by regulation as (i) being capable

of producing anabolic effects similar to those of testosterone and (ii) which is abused for purposes of increasing muscle mass or strength or to enhance athletic performance."

Subsection (b) amends section 202(c) Schedule III(e) of the Controlled Substances Act (21 U.S.C. 812(c) Schedule III(e)) by striking the phrase "anabolic steroids" and replacing it with "anabolic agents".

SEC. 4025. DRUG PARAPHERNALIA.

Subsection (a) amends subsection (d) of section 422 of the Controlled Substances Act (21 U.S.C. 863(d)) by adding 'packaging' to the list of uses included in the definition of 'drug paraphernalia'. The Drug Enforcement Administration [DEA] has historically participated in narcotics investigations which involved individuals who sold materials which were primarily intended to facilitate the distribution of illegal drugs, but who could not effectively be prosecuted because the items they sold were not clearly defined under § 863(d) as "drug paraphernalia". For example, small glassine envelopes are primarily used by traffickers to package single dose quantities of heroin. *See United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976)(involved heroin packaged in glassine envelope); *United States v. Gomez*, 103 F.3d 249, 252 (2d Cir. 1997)("An inventory search of [defendant's] car . . . yielded 62 glassine envelopes of heroin, a small quantity of cocaine, a holster and bullets."); *United States v. Rosa*, 11 F.3d 315, 324 (2d Cir. 1993)("The [narcotics] Organization consisted of a highly structured distribution network that purchased relatively pure narcotics, diluted them, packaged them in glassine envelopes at locations known as 'mills,' and sold them through 24-hour street sales locations known as 'spots.' At its peak, the Organization received gross income from heroin sales of more than \$8 million a month."); *United States v. Sagaille*, No. 91-5714, 1992 U.S. App. LEXIS 20723, *3 (4th Cir. Aug. 28, 1992)("Drug paraphernalia, including aluminum foil, ziplock baggies, razor blades and glassine packets were found in the kitchen cabinet."); *United States v. Blake*, 888 F.2d 795, 797 (11th Cir. 1989)("A subsequent search of the bag revealed drug paraphernalia in the form of numerous glassine envelopes and little zip-lock bags typically used for packaging crack cocaine among the contents of the luggage."). *See also* Janet Allon, *Some Label All-Night Deli 'Drug' Store*, THE NEW YORK TIMES, p. 7 (Feb. 18, 1996)("A police raid last August yielded two guns, drug paraphernalia like vials and glassine envelopes but no actual drugs. Four people, some of whom worked there, were arrested and the deli closed for a few days."); *Police raid store, arrest two on paraphernalia charges*, THE BALTIMORE SUN, p. 2B (July 5, 1995)("Acting on a tip from a disgruntled neighbor yesterday afternoon, police raided a West Baltimore variety store, where they arrested two employees and reported seizing more than \$60,000 worth of suspected drug paraphernalia. . . . Police said thousands of packages of glass vials, vial caps, glassine bags, and laxatives and sweeteners to mix with cocaine and heroin were seized. Such items are used by drug dealers for packaging their wares, police said."); Michael T. Kaufman, *Seizing The Bullets In Drug War*, THE NEW YORK TIMES, p. 27 (Apr. 30, 1994)("We were able to obtain 32 million individual items of illegal drug paraphernalia," said Inspector Joseph Raguso, who commanded the operation. There is no typographical error in the preceding sentence: '32 million' is what the

inspector said. Glassine envelopes -- clear envelopes used to hold powdered drugs -- and crack vials represented the largest share, and though the inspector could not break it down, there were apparently several million vials taken from the 18 stores that nominally sold soda, magazines and candy, or that rented videos.").

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

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

This amendment will remedy this problem by expressly including packaging in the definition of "drug paraphernalia", and thus make it much easier to prosecute the individuals who manufacture these packaging materials, the individuals who sell them, and the individuals who possess them. This amendment would also bring the Federal paraphernalia definition more in line with the trend at the state level for state codes to specifically include "glassine envelopes" in their drug paraphernalia definitions. *See MD. CODE ANN. Health -- Controlled Dangerous Substances* § 287 (1998) ("Except as authorized by this subheading, it is unlawful for any person: . . . (d) To possess or distribute controlled paraphernalia, which shall mean: . . . (2) Gelatin capsules, glassine envelopes or any other container suitable for the packaging of individual quantities of controlled dangerous substances in sufficient quantity to and under circumstances which reasonably indicate an intention to use any such item for the illegal manufacture, distribution, or dispensing of any such controlled dangerous substance."); *NY CLS PENAL* § 220.50 (1998) ("A person is guilty of criminally using drug paraphernalia in the second degree

when he knowingly possesses or sells: . . . (2) Gelatine capsules, glassine envelopes, vials, capsules or any other material suitable for the packaging of individual quantities of narcotic drugs or stimulants under circumstances evincing an intent to use, or under circumstances evincing knowledge that some person intends to use, the same for the purpose of unlawfully manufacturing, packaging or dispensing of any narcotic drug or stimulant").

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

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

SEC. 4026. COUNTERFEIT SUBSTANCES/IMITATION CONTROLLED SUBSTANCES.

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

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

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

In the past, dealers who learned that their buyers were connected with law enforcement would simply not show up at the prearranged sale site. However, there have been instances in which the dealers have shown up, and either sold, or tried to sell, noncontrolled substances to law enforcement officers, all the while claiming the substance was a controlled substance, with the

intent to "rip-off" the police, i.e., give the officers phony drugs and keep the money.

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

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

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

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

- (1) designating the present text as (A);
- (2) designating the text after "a controlled substance" as "(i)";
- (3) inserting "characteristic," after "number,";
- (4) replacing the period at the end of the present text with a semicolon; and
- (5) adding new clauses (ii) and (iii) as follows:

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

or

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

(6) adding new paragraphs (B) and (C) as follows:

"(B) The term "imitation controlled substance" means a substance, which is not a controlled substance, that is

"(i) expressly or impliedly represented to be a controlled substance or to have a stimulant, depressant, narcotic, hallucinogenic or other effect similar to or the same as that of a controlled substance;

"(ii) distributed under circumstances which would lead a reasonable person to believe that the substance is a controlled substance or has a stimulant, depressant, narcotic, hallucinogenic or other effect similar to or the same as that of a controlled substance; or

"(iii) resembles, or is designed to resemble, the physical appearance or other characteristics of a controlled substance such that a reasonable person would believe that the substance is a controlled substance or has a stimulant, depressant, narcotic, hallucinogenic or other effect similar to or the same as that of a controlled substance."

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

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

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

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

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

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

"(3) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, an imitation controlled substance.". Note that section 401 specifically references controlled substances in (a)(1) and counterfeit substances in (a)(2) even though a counterfeit substance is by definition a controlled substance. The reason both terms are used here is to establish the basis for the different sentencing structure for offenses involving controlled substances which are counterfeit substances.

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

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

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

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

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

"(B) Paragraph (B) may be applied, mutatis mutandis, to make a determination that a

controlled substance is a counterfeit substance.

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

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

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

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

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

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

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

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

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

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

Subsection (g) amends section 403 of the Controlled Substances Act (21 U.S.C. 843) in paragraph (a)(2) by inserting “or list I chemical” after “controlled substance” each place it

appears; in paragraph (a)(3) by inserting "or a laboratory supply (as defined in section 402 of this title)" after "controlled substance"; and in paragraph (a)(5) by inserting "or substance" after "drug" each place it appears and by inserting "imitation controlled substance" after "controlled substance".

Subsection (h) amends section 506(a) of the Controlled Substances Act (21 U.S.C. 876(a)) by inserting "imitation controlled substances," after "controlled substances,".

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

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

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

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

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

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

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

Subsection (j) further amends section 607(b) of the Tariff Act of 1930 (19 U.S.C. 1607(b)) is amended by inserting ", 'imitation controlled substance'," after "'controlled substance'". Note that it is not necessary to add counterfeit substances to these various sections since counterfeit substances are by definition controlled substances.

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

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

substances which are counterfeit substances.

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

SEC. 4027. AMENDMENTS TO CONTROLLED SUBSTANCES IMPORT AND EXPORT ACT.

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 4029. CONFORMING AMENDMENT CONCERNING MARIHUANA PLANTS.

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

The least serious trafficking and importation violations, involving relatively small amounts of marihuana, are punishable by up to five years' imprisonment and appear at 21 U.S.C. 841(b) (1)(D) and 21 U.S.C. 960(b)(4).²⁰ The former provides for an up to five-year penalty for trafficking in "less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight." The latter provides for an up to five-year penalty for importing "less than 50 kilograms of marihuana, except in the case of 100 or more marihuana plants

²⁰Simple possession of marihuana is a misdemeanor, 21 U.S.C. 844.

regardless of weight."

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

SEC. 4030. CONFORMING AMENDMENT RELATING TO FLUNITRAZEPAM PENALTIES.

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

SEC. 5018. INCREASED PENALTIES FOR USING MINORS TO DISTRIBUTE DRUGS.

This provision would amend Section 420 of the Controlled Substances Act (21 U.S.C. 861) to increase the current mandatory minimum penalty for using or employing minors to distribute drugs from one year to three years. Similarly, the provision would increase the mandatory minimum penalty for a second or subsequent violation of this statute from one year to five years. The proposed increases are necessary to punish persons who use or employ minors to distribute illegal drugs and to deter others from engaging in such reprehensible conduct.

SEC. 5019. INCREASED PENALTIES FOR DISTRIBUTING DRUGS TO MINORS.

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

SEC. 5020. INCREASED PENALTY FOR DRUG TRAFFICKING IN OR NEAR A SCHOOL OR OTHER PROTECTED LOCATION.

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

SEC. 5021. SERIOUS JUVENILE DRUG TRAFFICKING OFFENSES AS ARMED CAREER CRIMINAL ACT PREDICATES.

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

SEC. 5022. INCREASED PENALTIES FOR USING FEDERAL PROPERTY TO GROW OR MANUFACTURE CONTROLLED SUBSTANCES.

This provision would increase the penalty for cultivating or manufacturing a controlled substance on federally owned or leased land. Currently, the extra penalty for using federal land

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

SEC. 5023. CLARIFICATION OF LENGTH OF SUPERVISED RELEASE TERMS IN CONTROLLED SUBSTANCE CASES.

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

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

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

SEC. 5024. TECHNICAL CORRECTION TO ENSURE COMPLIANCE OF SENTENCING GUIDELINES WITH PROVISIONS OF ALL FEDERAL STATUTES.

This section would amend 28 U.S.C. 994(a) to assure that sentencing guidelines promulgated by the United States Sentencing Commission are consistent with the provisions of all federal statutes. Currently, section 994(a) contains a requirement of consistency only with

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

SEC. 6053. EXCLUSION OF PERSONS WHO HAVE BENEFITTED FROM ILLICIT ACTIVITIES OF DRUG TRAFFICKERS.

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

SEC. 6074. ENHANCING PROSECUTIONS IN INTERNATIONAL DRUG AND MONEY LAUNDERING CASES.

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

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

The proposed presumption would work the same way in the civil forfeiture context. In other words, if the government brings a civil forfeiture action against a sum of money in the United States that was acquired by a person during the time in which the person was committing

a foreign offense for which forfeiture is authorized under § 981(a)(1)(B), the court would be empowered to presume that the money represented the proceeds of the foreign offense and it would be subject to forfeiture unless the person claiming the funds offered proof that the funds were derived from a legitimate source. The presumption is essential to the ability of law enforcement to forfeit the proceeds of foreign crimes because of the difficulty in tracing the proceeds of foreign offenses without access to foreign records.

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

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

SEC. 6101. IMPORT AND EXPORT OF CHEMICALS USED TO PRODUCE ILLICIT DRUGS.

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

If the importer is not the end user of the listed chemical, establishing the bona fides of the importer does not mean that the listed chemical will not be diverted. In the case of specific listed chemicals such as those essential for the production of cocaine that are shipped to the Andean region, it is necessary to have the authority to determine the final destination and use of the chemical. This proposal will authorize DEA to require by regulation additional information concerning the ultimate consignee and use of shipment of listed chemicals. The U.S. exporter involved in the transaction would be required to provide this information in addition to the information which is routinely supplied to DEA. This provision will also provide DEA with the authority to require advance notification on all imports of certain chemicals which are of greater concern to the agency. Examples of this would be ephedrine and pseudo-ephedrine which are

immediate precursors for methamphetamine.

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

SEC. 7006. AMENDMENTS OF DRIVE-BY SHOOTING STATUE.

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

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

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

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

The fourth paragraph under subsection (a) would add an intent to "kill" to the enumerated "intent" that must accompany the proscribed conduct of shooting into a group in furtherance of a major drug offense. The present statute lists only intent to "intimidate, harass, injure, or maim"

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

SUBTITLE D - ANTI-DRUG AND ORGANIZED CRIME

MONEY LAUNDERING ACT.

SEC. 4051. ILLEGAL MONEY TRANSMITTING BUSINESSES.

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

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

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

SEC. 4052. RESTRAINT OF ASSETS OF PERSON ARRESTED ABROAD

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

launderers whose bank accounts in the United States may be emptied within hours of an arrest by foreign authorities in the Latin America or Europe.

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

SEC. 4053. ACCESS TO RECORDS IN BANK SECRECY JURISDICTIONS.

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

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

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

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

SEC. 4054. LONG-ARM STATUTE FOR FOREIGN MONEY LAUNDERS.

This section amends the civil penalty provision of 18 U.S.C. § 1956(b). The first new provision is a long arm statute that gives the district court jurisdiction over a foreign bank that violates the money laundering statute, provided that the bank maintains an account in the United States and that the bank receives service of process pursuant to the applicable statutes or rules of procedure. The purpose of the provision is to ensure that a bank that violates the money

laundering laws of the United States and that conducts banking business through an account in the United States does not escape liability under Section 1956(b) by asserting that its contacts with the United States are not sufficient to satisfy the "minimum contacts" requirements for in personam jurisdiction.

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

SEC. 4055. LAUNDERING MONEY THROUGH A FOREIGN BANK.

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

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

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

SEC. 4056. SPECIFIED UNLAWFUL ACTIVITY FOR MONEY LAUNDERING.

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

obligation to extradite or prosecute offenders.

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

SEC. 4057. CRIMINAL FORFEITURE FOR MONEY LAUNDERING CONSPIRACIES.

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

SEC. 4058. SUBPOENAS FOR BANK RECORDS.

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

SEC. 4060. CHARGING MONEY LAUNDERING AS A COURSE OF CONDUCT.

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

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

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

SEC. 4061. VENUE IN MONEY LAUNDERING CASES.

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

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

The court suggested, however, that the situation might be different if the defendant had transported the funds from the district where the underlying crime occurred to the district where the financial or monetary transaction was conducted. In that case, the court said, the money laundering offense might be considered a continuing offense. *Id.* ("money laundering . . . arguably might rank as a 'continuing offense,' triable in more than one place, if the launderer acquired the funds in one district and transported them into another district"). Several courts of appeals have ruled that venue is appropriate in the district where the specified unlawful activity occurred in that situation. See United States v. Angotti, 105 F.3d 539 (9th Cir. 1997) (venue is proper where defendant committed the SUA because that is where defendant obtained the money involved in the money laundering transaction); United States v. Abuhouran, 1996 WL 451368 (E.D. Pa. 1996) (same); United States v. Beddow, 957 F.2d 1330 (6th Cir. 1992), *reh'g, en banc, den.*, 1992 U.S. App. LEXIS 5051 (1992) (venue is proper in district where defendant committed the SUA and began movement of the money to the district where it was laundered).

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

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

SEC. 4062. TECHNICAL AMENDMENT TO RESTORE WIRETAP AUTHORITY FOR CERTAIN MONEY LAUNDERING OFFENSES.

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

SEC. 4063. KNOWLEDGE THAT PROPERTY IS THE PROCEEDS OF A FELONY.

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

In fact, one court in the Northern District of Ohio has held that the defendant must *know* that the offense is a felony, but that is not correct. Although the offense must in fact be a felony, it is not necessary that the defendant be aware that the legislature has so classified the offense. See United States v. Stavroulakis, 952 F.2d 686, 692 n.2 (2d Cir. 1992), cert. denied, 1992 U.S. LEXIS 2948 (U.S. 1992) (defendant need not know that the underlying activity is unlawful or that it constitutes a felony; it is sufficient for the government to show that the defendant knew that the property was the proceeds of an activity, such as gambling involving more than a certain amount of money, that is defined as a felony under state [or federal] law). The amendment clarifies this point.

SEC. 4064. MONEY PURCHASED ON THE BLACK MARKET.

Much, if not most, of the drug money generated in the United States is sold on the black market peso exchange to South American customers. In this way, the drug trafficker exchanges U.S. dollars for the local currency he needs to pay his employees and continue his drug

trafficking operation. See "FinCEN Advisory: Colombia Black Market Peso Exchange," November, 1997. One of the best ways to interrupt the recycling of drug money in this fashion is to confiscate the money sold on the black market under the civil forfeiture laws.

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

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

The section takes the standard used in drug cases and other contexts and applies it to money laundering. It requires that a person who buys laundered drug money on the black market must establish that he was a *bona fide* purchaser who took all reasonable affirmative steps to make sure that he was not buying property derived from a criminal offense.

SEC. 4065. FUGITIVE DISENTITLEMENT.

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

464 (2d Cir. 1991) (applying the doctrine to bar an appellant who was resisting extradition from participating in related civil forfeiture proceedings).

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

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

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

SEC. 4066. MONEY LAUNDERING TRANSACTIONS; COMMINGLED ACCOUNTS.

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

The first issue concerns cases in which more than \$10,000 in criminally derived property is deposited into a bank account and commingled with other funds before an amount in excess of \$10,000 is withdrawn. The government is only required to prove that the withdrawal involved at least \$10,000 in criminally derived funds. See United States v. Adams, 74 F.3d 1093 (11th Cir. 1996) (at least \$10,000 of the property involved in the monetary transaction must be traceable to SUA proceeds). It is not required to prove that all of the money withdrawn from the account was

tainted money. See United States v. Johnson, 971 F.2d 562 (10th Cir. 1992) (in the context of a withdrawal, government is not required to prove that no untainted funds were commingled with the unlawful proceeds); United States v. Sokolow, 81 F.3d 397 (3rd Cir. 1996) (where \$20,000 in dirty money was commingled, government was not required to trace to prove that all money involved in the transaction was dirty; following Johnson). But the courts differ over what proof is required that the \$10,000 threshold has been reached.

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

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

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

To avoid creating any inference that a different rule would apply to Section 1956 cases, a parallel amendment is made to the definitions in that statute codifying the unanimous rule that for Section 1956 purposes, any transaction involving an account containing commingled funds is considered to be one involving SUA proceeds. See United States v. Tencer, 107 F.3d 1120 (5th Cir. 1997) (where defendant deposited \$451,000 in fraud proceeds and \$2.2 million in other funds into accounts, subsequent transfers from those accounts 'involved' SUA proceeds); United States v. Cancelliere, 69 F.3d 1116 (11th Cir. 1995) (government met burden of showing check drawn on account involved SUA proceeds by showing that \$80,000 in proceeds were deposited into the account and commingled with other funds; strict tracing not required); United States v. Rodriguez, 53 F.3d 1439 (7th Cir. 1995) (purchase of house involved SUA proceeds even though only \$1,000 of \$17,000 payment was drug money); United States v. Garcia, 37 F.3d 1359 (9th Cir. 1994) ("it is sufficient to prove that the funds in question came from an account in which tainted proceeds were commingled with other funds"); United States v. English, 92 F.3d 909 (9th Cir. 1996) (following Garcia); United States v. Marbella, 73 F.3d 1508 (9th Cir. 1996) (once SUA proceeds are commingled in an account, any withdrawal from that account involves proceeds, even if the balance in the account drops to zero between the time the proceeds are

deposited and the time of the withdrawal); United States v. Bencs, 28 F.3d 555 (6th Cir. 1994) (money launderer may not escape liability by commingling drug proceeds with other assets); United States v. Jackson, 935 F.2d 832, 840 (7th Cir. 1991) (transactions drawn on account containing commingled funds "involve" proceeds of SUA); United States v. Jackson, 983 F.2d 757 (7th Cir. 1993) (jury instruction that "substantial portion" of laundered funds had to be SUA proceeds was unnecessarily favorable to defendant; only some of commingled funds need be proceeds).

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

SEC. 4067. FUNGIBLE PROPERTY IN BANK ACCOUNTS.

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

First, and most important, amendment extends the period within which the forfeiture action must be commenced for the provisions of § 984 to apply from one year to two years, which is consistent with the Senate-passed version of the statute when it was enacted in 1992. The one-year limitations period has proven to be too short, particularly in cases involving undercover investigations where the government must refrain from seizing the laundered money until the investigation is over to avoid jeopardizing the case. See United States v. All Funds Presently on Deposit at American Express Bank, 832 F. Supp. 542 (E.D.N.Y. 1993) (seized property returned to Ecuadorian money exchanger despite evidence of drug trafficking because seizure occurred 18 months after money laundering and outside of § 984's one-year limitations period). The amendment makes clear that for the purposes of the limitations period, a forfeiture action is "commenced" either when the property is seized or when an arrest in rem is served.

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

remanded a case to determine if the limitations relating to interbank accounts in § 984 applied when property traceable to a money laundering offense was forfeited under § 981.

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

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

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

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

SEC. 4068. DISCOVERY PROCEDURE FOR LOCATING LAUNDERED MONEY.

This section amends 21 U.S.C. § 853(m) to give the court the discretion to exclude a convicted defendant from a post-trial deposition conducted for the purpose of locating the defendant's forfeited assets if the defendant's presence could frustrate the purpose of the inquiry. The provision is necessary because otherwise, under Rule 15 of the Federal Rules of Criminal Procedure, the defendant would have the right to be present at a deposition conducted for the purpose of locating assets that have been declared forfeited. United States v. Saccoccia, 913 F. Supp. 129 (D.R.I. 1996). If, for example, the assets include funds in bank accounts that the defendant had hoped to conceal from the government and the court, the defendant's presence at the deposition could frustrate its purpose because upon learning that the government had discovered the location of his secret accounts, the defendant could quickly take steps to remove the assets before government agents could recover them.

SEC. 4069. REPATRIATION OF PROPERTY PLACED BEYOND THE JURISDICTION OF THE COURT.

In criminal forfeiture cases, the sentencing court is authorized to order the forfeiture of "substitute assets" when the defendant has placed the property otherwise subject to forfeiture "beyond the jurisdiction of the court." Frequently, this provision is applied when a defendant has transferred drug proceeds or other criminally derived property to a foreign country. In many

cases, however, the defendant has no other assets in the United States of a value commensurate with the forfeitable property overseas. In such cases, ordering the forfeiture of substitute assets is a hollow sanction.

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

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

SEC. 4070. LAUNDERING PROCEEDS OF TERRORISM.

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

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

SEC. 4071. BULK CASH SMUGGLING.

As recent Congressional hearings and investigative reports in the press have revealed,²¹ currency smuggling is an extremely serious law enforcement problem. Hundreds of millions of dollars in U.S. currency — representing the proceeds of drug trafficking and other criminal offenses, as well as income not reported for income tax purposes — is annually transported out of the United States to foreign countries in shipments of bulk cash. Smugglers use all available means to transport the currency out of the country, from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad.

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

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

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

The statute is intended to apply to persons who commit any of a wide variety of smuggling offenses involving bulk cash — from the money brokers for the drug cartels who stuff \$20 bills into trucks bound for Mexico or appliances being exported to Colombia, to couriers

²¹ See “Dirty Money,” *The Bergen Record*, May 31, 1998 p.1; *id.* June 7, 1998 p.1; *id.* June 14, 1998 p.1.

who attempt to cross the border with currency concealed in their luggage. It would also apply to efforts to move money into or out of the United States at places other than ports of entry where CMIR reports are customarily filed. In other words, unlike the CMIR statute, which only applies once the duty to file the Customs report has been triggered, Section 5331 would apply to a person who had not yet reached the border, or was traveling at a place other than a port of entry, but was traveling (or intending to travel) toward the border with the intent to cross it, and had already concealed the money with the intent to evade the reporting requirement.

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

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

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

authorize only the full amount of structured or unreported currency.

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

SEC. 4072. CURRENCY COURIERS.

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

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

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

SEC. 4073. VIOLATIONS OF SECTION 6050I.

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

in both statutes.

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

SEC. 4074. FOREIGN JUDGMENTS AGAINST CRIMINALLY DERIVED PROPERTY.

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

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

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

Under Article V, a Party must provide for the forfeiture of drug proceeds derived from an offense occurring in another country by providing forfeiture assistance to a Party in whose jurisdiction the underlying drug or money laundering offense occurred. This obligation applies both to the drug proceeds themselves and to property of equivalent value. Under 18 U.S.C. § 981(a)(1)(B), the United States can initiate a civil action against foreign drug proceeds that

would result in the seizure and confiscation of such property. But because that statute is a civil in rem statute, it does not authorize the forfeiture of substitute assets of equivalent value.

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

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

Where the Minister [of Justice] approves a request of a foreign state to enforce the payment of a fine imposed in respect of an offense by a court of criminal jurisdiction of the foreign state, a court in Canada has jurisdiction to enforce the payment of the fine and the fine is recoverable in civil proceedings instituted by the foreign state, as if the fine had been imposed by a court in Canada.

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

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

SEC. 4075. PROCEEDS OF FOREIGN CRIMES.

This section is a parallel provision to the previous section and is also intended to reinforce the United States' compliance with the Vienna Convention. It amends 18 U.S.C.

§ 981(a)(1)(B) to allow the United States to institute its own action against the proceeds of foreign criminal offenses when such proceeds are found in the United States. As required by the Vienna Convention, it also authorizes the confiscation of property used to facilitate such crimes. The list of foreign crimes to which this section applies is determined by cross-reference to the foreign crimes that are money laundering predicates under § 1956(c)(7)(B).

SEC. 4076. AUTHORIZATION TO SHARE RECOVERED PROPERTY WITH COOPERATING FOREIGN GOVERNMENTS.

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

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

SEC. 4077. RESTORING RECOVERED PROPERTY TO VICTIMS.

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

SEC. 4078. IN PERSONAM JUDGMENTS.

In money laundering cases, the court is authorized, as part of a criminal forfeiture order, to direct the defendant to pay a money judgment equal to the total value of the laundered property. For example, in United States v. Voigt, 89 F.3d 1050, 1084 (3rd Cir. 1996), the Third Circuit held that "when a defendant has been convicted of committing \$1.6 million in money laundering offenses . . . , the government . . . is entitled to \$1.6 million in criminal forfeiture; that amount represents property "involved in" money laundering activity for purposes of § 982(a)(1)." The court went on to explain that a money judgment for the amount of money the defendant laundered does not, by itself, give the government the right to seize any of the defendant's property. To do that in the criminal case, the government must either trace property directly to the criminal offense, or satisfy the money judgment, in whole or in part, by forfeiting specific substitute assets pursuant to Section 853(p). Nevertheless, "the government continues to be entitled to \$1.6 million in criminal forfeiture," *id.* at 1088, which the government may seek to enforce in any manner authorized by law. *See also* United States v. Holland, 160 F.3d 377, 380

(7th Cir. 1998) (defendant ordered to pay judgment equal to value of property concealed from bankruptcy court and subsequently laundered); United States v. Sokolow, 1995 WL 113079 at *1 (E.D. Pa. 1995) (because money is fungible, government need not receive the identical money involved in the money laundering offense, so long as the amount involved is known), aff'd 81 F.3d 397 (3rd Cir. 1996); United States v. Cleveland, 1997 WL 537707 at *11 (E.D. La. 1997) (government entitled to a money judgment equal to the amount of money defendant laundered in money laundering case, adjusted to eliminate double counting); United States v. Stewart, 1998 WL 720063 (E.D. Pa. 1998) (court enters money judgment for "aggregate sum of all money laundering counts for which defendant was convicted," adjusted to eliminate double counting); United States v. Henry, 850 F. Supp. 681, 683 (M.D. Tenn. 1994) (court enters money judgment for \$191,206, which was the amount of Medicare fraud proceeds defendant was convicted of laundering), aff'd 64 F.3d 664, 1995 WL 478635 (6th Cir. 1995) (Table).

In one of the largest money laundering cases prosecuted to date, Operation Polar Cap, a group of defendants was found guilty of laundering \$136 million, only a fraction of which they personally retained. The balance of the money was sent, in the course of the money laundering operation, to bank accounts in the United States and abroad that were held by South American drug traffickers. Nevertheless, the defendants were ordered — jointly and severally — to pay a money judgment equal to \$136 million. United States v. Saccoccia, 823 F. Supp. 994, 1006 (D.R.I. 1993), aff'd 58 F.3d 754 (1st Cir. 1995); United States v. Saccoccia, 898 F. Supp. 53, 56 (D.R.I. 1995) (the money judgment may be satisfied out of the laundered funds, property traceable thereto, or substitute assets).

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

SEC. 4079. USE OF SUBPOENAED RECORDS.

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

SEC. 4080. CRIMINAL FORFEITURE OF PROPERTY IN GOVERNMENT CUSTODY.

This provision is intended to resolve any ambiguity that may exist as to whether a federal agency that has obtained lawful custody of property pursuant to a civil seizure warrant or otherwise may retain custody of the property without obtaining another warrant or restraining

order when the property is made the subject of a forfeiture count in a criminal case. See United States v. Schmitz, 156 F.R.D. 136 (E.D. Wis. 1994) (once government files criminal forfeiture action, it no longer has authority to retain property seized for civil forfeiture under § 881 unless it obtains a restraining order under § 853(e) or a seizure warrant under § 853(f)). The amendment makes clear that if the property is already in the custody of the government, obtaining a new seizure warrant or restraining order is unnecessary.

SEC. 4081. RESTRAINT OF PROPERTY SUBJECT TO CRIMINAL FORFEITURE.

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

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

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

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

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

SEC. 4082. INCLUDING TRIBAL GOVERNMENTS IN THE DEFINITION OF A

FINANCIAL INSTITUTION

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

SEC. 4084. LIMITATIONS PERIOD FOR CHALLENGES TO CASH SEIZURES BY PRISONERS

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

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

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

Challenges to administrative forfeitures are routinely and almost exclusively filed by federal prisoners who were arrested and incarcerated in connection with the criminal offense that gave rise to the forfeiture action. In such cases, the prisoner was aware that his property was seized at the time of the arrest, but for whatever reason determined that it was not in his interest to challenge the forfeiture. Later, however, the prisoner claims that he did not challenge the forfeiture because the government failed to provide him with adequate notice that the forfeiture was taking place. The usual claims are that the government sent the notice to a home address instead of to the place of incarceration, or sent the notice to a place of incarceration from which the prisoner had been moved, or sent the notice to the correct place of incarceration but failed to

ensure that the jailer delivered the notice to the prisoner. In recent years, the number of such cases has been legion. See e.g. Small v. United States, 136 F.3d 1334 (D.C. Cir. 1998); United States v. Clark, 84 F.3d 378 (10th Cir. 1996); United States v. Real Property . . . Lido Motel, 135 F.3d 1312 (9th Cir. 1998); United States v. Real Property (Tree Top), 129 F.3d 1266 (6th Cir. 1997) (Table Case); Weng v. United States, 137 F.3d 709 (2nd Cir. 1998); United States v. Giraldo, 45 F.3d 509, 511 (1st Cir. 1995); United States v. One Parcel . . . 13 Maplewood Dr., 1997 WL 567945 (D. Mass. 1997); Whiting v. United States, ___ F. Supp. 2d ___, 1998 WL 847933 (D. Mass. Nov. 30, 1998); Aguilar v. United States, 8 F. Supp.2d 175 (D. Conn. 1998); Scott v. United States, 950 F. Supp. 381 (D.D.C. 1996).

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

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

The amendment addresses both of these problems by providing that challenges to uncontested administrative forfeitures must be filed within 2 years of the entry of the declaration

of forfeiture pursuant to 19 U.S.C. § 1609, and by providing that the remedy in cases where a court finds that the notice was inadequate is to refile the forfeiture complaint without regard to the expiration of the statute of limitations on the forfeiture action. Both provisions, and most of the legislative language, is taken from a proposal introduced in 1997 by Reps. Hyde and Conyers and approved by the House Judiciary Committee. See H.Rep. 105-358, 105th Cong., 1st Sess., at p.3. The amendment does not change the current rule that the lack of procedural due process in the administrative forfeiture proceeding is the only ground on which a person may seek judicial review of an uncontested administrative forfeiture. See United States v. Deninno, 103 F.3d 82 (10th Cir. 1996) (jurisdiction is limited to adequacy of due process in the administrative forfeiture proceeding); United States v. Schiavo, 897 F. Supp. 644, 647 (D. Mass. 1995) (court could review adequacy of notice but not Fourth Amendment objection to seizure that claimant could have raised if he had filed a claim); Concepcion v. United States, 938 F. Supp. 134 (E.D.N.Y. 1996) (court lacks jurisdiction to review 8th Amendment challenge to administrative forfeiture).

SEC. 4085. PENALTIES FOR VIOLATIONS OF GEOGRAPHIC TARGETING ORDERS AND CERTAIN RECORD KEEPING REQUIREMENTS

31 U.S.C. §§ 5321 and 5322 impose civil and criminal penalties, respectively, for violations of the Bank Secrecy Act (BSA) and BSA regulations; Section 5324 creates additional criminal offenses for failing to file a report, filing a false or incomplete report, and structuring currency transactions in order to evade a reporting requirement under the BSA. Those statutes, however, do not specifically refer to reports required by GTOs issued under section 5326. This provision eliminates any possible doubt concerning the applicability of these provisions to GTOs by inserting specific references to section 5326 in the respective statutes.

TITLE V - SECTION BY SECTION ANALYSIS

SUBTITLE A--FEDERAL PROSECUTIONS TARGETING VIOLENT GANGS,

GUN CRIMES AND ILLICIT GUN MARKETS, AND DRUGS

SEC. 5001. INCREASED PENALTIES UNDER THE RICO LAW FOR CERTAIN GANG AND VIOLENT CRIMES.

This section would boost the penalty for certain crimes typically committed by gangs and other violent crime groups by eliminating an anomaly in the penalty provisions of the federal Racketeering Influenced and Corrupt Organizations statute (18 U.S.C. 1963(a)). Specifically, the amendment would increase the maximum penalty from twenty years to the greater of twenty years or the maximum term applicable to a racketeering activity on which the defendant is violation is based. This principle already applies under the RICO statute where the predicate racketeering activity carries a maximum life sentence. The present twenty-year maximum applicable to all other predicate racketeering offenses is anomalous in light of the fact that several of the predicate offenses that constitute "racketeering activity" themselves carry more than twenty-year (but less than life) maximum prison terms, *e. g.* , 18 U.S.C. 1344 (bank fraud) and 21 U.S.C. 841 (b) (1) (B) (large-scale drug trafficking).

SEC. 5002. PENALTY ENHANCEMENTS RELATING TO VIOLENT CRIMES UNDER 18 U.S.C. 1959.

This amendment would resolve an anomaly in 18 U.S.C. 1959, the law punishing violent crimes in aid of racketeering. The statute presently and anomalously reaches threats to commit any crime of violence (with the requisite intent) but only the actual commission of five enumerated such crimes, all of which are serious felonies, *e.g.*, murder and assault with a dangerous weapon. The proposal would eliminate the anomaly by confining the threat offense to only those serious felonies whose commission is also punishable under section 1959. Coverage of threats to commit minor violent offenses is not warranted in this context.

This proposal also would increase penalties for certain violent crimes in aid of racketeering in recognition of the serious nature of such crimes and to bring the penalties in line with other penalties for similar crimes in title 18. First, the amendment would increase from a maximum of ten years' imprisonment to a maximum of life imprisonment a conspiracy or attempt to commit murder or kidnapping, in violation of 18 U.S.C. 1959. That statute punishes various violent offenses committed in aid of racketeering activity. The present ten-year maximum penalty for a conspiracy or attempt to commit murder or kidnapping in aid of racketeering is clearly inadequate. The maximum penalty for a conspiracy to commit a murder within the special maritime and territorial jurisdiction of the United States is life imprisonment, 18 U.S.C. 1117, as

is the maximum penalty for a conspiracy to commit kidnapping, 18 U.S.C. 1201(c) . Such acts when performed with the additional intent of furthering racketeering activity deserve no lesser punishment. Moreover, an attempt warrants an equivalent sanction as a conspiracy. Second, the amendment would increase from five years to ten years the maximum penalty for committing or threatening to commit a crime of violence under paragraph (4). Finally, the amendment would increase from three years to ten years the maximum penalty for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon or assault resulting in serious bodily injury under paragraph (6).

SEC. 5003. ELIMINATION OF UNJUSTIFIED SCIENTER ELEMENT FOR CARJACKING.

This section would eliminate an unjustified and unique scienter element created for the offense of carjacking by the enactment of section 60003 (a) (14) of the Violent Crime Control and Law Enforcement Act. The carjacking statute, 18 U.S.C. 2119, essentially proscribes robbery of a motor vehicle. It punishes the taking of a motor vehicle that has moved in interstate or foreign commerce "from the person or presence of another by force and violence or by intimidation." The basic penalty is up to fifteen years' imprisonment but rises if serious bodily injury or death results.

Prior to the enactment of VCCLEA, the offense applied only if the defendant possessed a firearm. Section 60003(a)(14) of that law appropriately deleted the firearm requirement, as had been proposed in the Senate-passed bill, but in conference a new scienter element was added that the defendant must have intended to cause death or serious bodily injury. This unique new element will inappropriately make carjackings difficult or impossible to prosecute in certain situations. Robbery offenses typically require only what the carjacking statute formerly required by way of scienter, i. e. , that property be knowingly taken from the person or presence of another by force and violence or by intimidation. The Hobbs Act, 18 U.S.C. 1951, the quintessential federal robbery law which carries a higher maximum penalty than the carjacking statute, essentially defines "robbery" in this manner. The new requirement of an intent to cause death or serious bodily harm will likely be a fertile course of argument for defendants in cases in which no immediate threat of injury occurs, such as where a defendant enters an occupied vehicle while it is stopped at a traffic light and physically removes the driver. Even when a weapon is displayed, the defendant may argue that although it was designed to instill fear, he had no intent to harm the victim had the victim in fact declined to leave the car.

Carjacking is one of the most serious types of robbery precisely because, unlike other personal property, a car is a place where people are accustomed to feel safe and where they and their family spend hours of their lives. To give defendants who take cars from the person or presence of their occupants by force and violence or intimidation a new legal tool with which to resist their prosecution is unjustified. This new element should be eliminated as soon as possible from Section 2119. The proposed amendment would do so.

SEC. 5004. ELIMINATION OF THE STATUTE OF LIMITATIONS FOR MURDER AND CERTAIN CLASS A FELONIES.

Subsection (a) and (b) make important changes in federal law and will enhance the ability of federal prosecutors to bring serious offenders to justice. The first proposal relates to the prosecution of certain murders. Current law provides that no statute of limitations shall apply for the commission of a federal crime punishable by death. 18 U.S.C. 3281. This statute should be amended to further eliminate the statute of limitations for any federal offense involving murder, even if the crime does not carry the death penalty. The rationale behind this proposal is straightforward. Most States have no statute of limitations for murder. Moreover, the act of killing another person is so serious that no murderer should go unpunished simply because the government was unable to develop a case for many years.

By virtue of the 1994 Crime Act, most murders committed during the course of a federal offense are now punishable by the death penalty -- and thus already have no statute of limitations. The 1994 Crime Act only applies, however, to murders committed on or after September 13, 1994. The proposed legislation will help bridge this gap by eliminating the statute of limitations for murders committed at an earlier point whose limitation period has not run as of the date the legislation is enacted. Furthermore, the Crime Act did not provide for the death penalty for murders committed in violation of the RICO statute. 18 U.S.C. 1961 et seq. The proposed legislation would bridge another important gap by eliminating the statute of limitations for RICO offenses when murders are committed in furtherance of a racketeering enterprise.

Subsection (c) relates to the prosecution of certain violent crimes and drug trafficking crimes. Current law provides that the general federal five-year statute of limitations applies to non-capital crimes of violence and drug trafficking crimes. 18 U.S.C. 3282. This proposal extends to 10 years the statute of limitations for all crimes of violence and drug trafficking crimes (except for cases involving murder) currently classified as Class A felonies. Pursuant to 18 U.S.C. 3559, Class A felonies are the most serious federal crimes, which carry a maximum sentence of life imprisonment or death.

This proposal is necessary for several reasons. First, evidence of gang-related and other violent crimes, as well as drug trafficking crimes, often develop years after the crimes were committed because the organizations, gangs, and racketeering enterprises that typically perpetrate such crimes enforce strict codes of silence -- through violence and threats of violence -- on their members. Thus, some violent crimes and drug trafficking offenses are not solved until imprisoned defendants begin cooperating after spending years behind bars, during which the five-year statutes of limitations may have lapsed. Second, society's interest in repose and fairness to prospective defendants is greatly outweighed by society's interest in punishing those individuals who commit crimes that are so serious that Congress has imposed a maximum sentence of life imprisonment or death. Under current law, theft of major art work carries a 20-year statute of limitations (18 U.S.C. 3294), and most white-collar crimes involving financial

institutions (e.g., theft of money by a bank teller) carry a 10-year statute of limitations (18 U.S.C. 3293). Given that Class A crimes of violence and drug trafficking crimes generally are at least as harmful to society as these offenses, there is no reason for these Class A felonies to carry such a relatively short statute of limitations.

SEC. 5005. FORFEITURE FOR CRIMES OF VIOLENCE, RACKETEERING, AND OBSTRUCTION OF JUSTICE.

This section extends the forfeiture statutes to cover all crimes of violence plus the racketeering crimes set forth in Chapter 95 (18 U.S.C. 1951-60), including extortion, murder-for-hire, and violent crimes in aid of racketeering, and the obstruction of justice offenses set forth in Chapter 73 (18 U.S.C. 1501-17). Presently, there is no forfeiture authority for such offenses except when they are included in a RICO prosecution.

SUBTITLE B--PROTECTING WITNESSES TO HELP PROSECUTE GANGS AND OTHER VIOLENT CRIMINALS

SEC. 5031. INTERSTATE TRAVEL TO ENGAGE IN WITNESS INTIMIDATION OR OBSTRUCTION OF JUSTICE.

This section would amend the Travel Act (18 U.S.C. 1952) to add witness bribery, intimidation, obstruction of justice, and related conduct in State criminal proceedings to the list of predicates under the Travel Act (18 U.S.C. 1952). Recent studies demonstrate that witness intimidation is one of the most serious impediments to the prosecution of violent street gangs and drug trafficking organizations in State courts. This amendment responds to the growing witness intimidation problem by authorizing federal prosecution of persons who travel in interstate commerce with the intent to bribe or intimidate a witness, obstruct a criminal proceeding, or engage in related conduct. An identical proposal passed the House by a lopsided vote in 1998 (H.R. 2181).

SEC. 5032. EXPANDING PRETRIAL DETENTION ELIGIBILITY FOR SERIOUS GANG AND OTHER VIOLENT CRIMINALS.

This section would make amendments to the pretrial detention statutes designed to enhance the ability, in appropriate circumstances, to use these statutes in prosecutions against gang members and against other violent criminals. Under the Bail Reform Act, 18 U.S.C. 3141 et seq., defendants charged with certain offenses can be detained pretrial if the court concludes there is clear and convincing evidence that no condition or combination of conditions of release will adequately assure the safety of any other person and the community. See 18 U.S.C. 3142 (e) and (f). The kinds of charges that permit such detention on grounds of the defendant's dangerousness include certain serious drug trafficking offenses and a "crime of violence". They also include any felony if the defendant has previously been convicted of two or more crimes of violence or serious drug trafficking offenses.

Subsection (a) would add a definition of the term "convicted" to include adjudications of juvenile delinquency. Thus, it would permit pretrial detention, upon the requisite showing, of persons charged with any felony, e.g., interstate transportation of a stolen automobile, who had two or more prior violent or drug convictions, including juvenile delinquency adjudications for such conduct. This should facilitate the use of pretrial detention when appropriate against young career offenders such as gang members.

Subsection (b) deals with the fact that, under the Bail Reform Act, 18 U.S.C. 3141 et seq., defendants charged with certain offenses can be detained pretrial if the court concludes there is clear and convincing evidence that no condition or combination of conditions of release will adequately assure the safety of any other person and the community. See 18 U.S.C. 3142(e) and (f). The kinds of charges that permit such detention on grounds of the defendant's dangerousness include certain serious drug trafficking offenses and a "crime of violence". The term "crime of violence" is defined in 18 U.S.C. 3156(a)(4). That definition reaches offenses (A) that have as an element the use or attempted or threatened use of physical force, (B) any other felony offenses that, by their nature, involve a substantial risk that physical force may be used in the course of their commission, and (C) any felony under chapters 109A and 110 (which proscribe sex offenses and child pornography).

It is not clear whether the offenses of possession of explosives or firearms by convicted felons qualify as "crimes of violence" under the second or (B) branch of the definition. What little case law exists suggests that they do. See, so holding, United States v. Sloan, 820 F. Supp. 1133, 1136-41 (S.D. Ind. 1993); United States v. Aiken, 775 F.Supp. 855 (D. Md. 1991). See also, United States v. Dodge, 846 F. Supp. 181 (D. Conn. 1994). The Sloan court noted that, although the Supreme Court held in Stinson v. United States, 508 U.S. 36 (1993), that a similar definition of "crime of violence" in the sentencing guidelines did not encompass the felon-in-possession statutes, because the Sentencing Commission had promulgated a policy statement to that effect, the bail statutes serve a very different purpose from sentencing enhancements and should be more broadly construed to protect the public from continued endangerment by convicted felons charged with a new offense of weapon possession. (Prior to the Commission's policy statement, the courts were divided as to whether a violation of 18 U.S.C. 922(a) was a crime of violence for sentencing purposes). This proposed amendment would codify the result reached in Sloan. It would not mandate pretrial detention but would permit the government to show, in the case of a convicted felon charged with violating the proscriptions against possession of explosives or firearms, that no one or more conditions of release would be adequate to safeguard society.

Subsection (c) amendment would make membership or participation in a criminal street gang, racketeering enterprise, or other criminal organization a factor to be considered by courts in making bail determinations. Presently, many other personal history and characteristics of the individual charged are required to be considered in making bail decisions, such as prior convictions, drug abuse, and whether the alleged offense was committed while on parole,

probation, or other form of release pending criminal trial. Clearly, gang or organized crime group membership is a relevant factor that bears both on dangerousness and risk of flight and that courts should take into account in making bail determinations. The amendment is not intended to impinge on rights of freedom of association but rather to reach membership or participation in those organizations that exist, at least in part, for the purpose of committing crimes or depriving third parties of their lawful rights. See Madsen v. Women's Health Center, Inc., 114 S.Ct. 2516, 2530 (1994).

**SEC. 5033. CONSPIRACY PENALTY FOR OBSTRUCTION OF JUSTICE
OFFENSES INVOLVING VICTIMS, WITNESSES, AND INFORMANTS.**

Increasingly typical of many criminal gangs is violence directed at silencing or retaliating against witnesses or potential witnesses and informants. 18 U.S.C. 1512 and 1513 set forth offenses and penalties that, generally speaking, adequately deter and punish such offenses. However, a conspiracy to engage in witness intimidation or retaliation in violation of these statutes is punishable only under the catchall conspiracy statute, 18 U.S.C. 371, which carries a maximum prison term of only five years. This is clearly inadequate to vindicate an offense that involves, for example, a conspiracy to kill a witness or potential witness in a federal criminal proceeding. Such a conspiracy, if perpetrated within the special maritime and territorial jurisdiction, would be punishable by up to life imprisonment. 18 U.S.C. 1117. This is consistent with the principle, recognized in some federal statutes and prevalent in modern State criminal codes, that a conspiracy warrants the same maximum penalty as the offense which was its object. For example, 21 U.S.C. 846 (drug conspiracies), 18 U.S.C. 1956(h)(money laundering conspiracies), and 18 U.S.C. 844(n) (explosives conspiracies). The proposed amendment in this section would apply this principle to 18 U.S.C. 1512 and 1513 and thus provide better protection from gang violence to witnesses and informants.

SUBTITLE C--PROTECTING VICTIMS' RIGHTS

Subtitle C would expand the rights and protections afforded to the victims of crime, particularly crimes committed by juvenile offenders and crimes committed against children. It should be noted that Title III, Subtitle C also addresses the rights and protections of crime victims.

**SEC. 5041. ACCESS OF VICTIMS AND PUBLIC TO RECORDS OF CRIMES
COMMITTED BY JUVENILE DELIQUENTS.**

This section would amend 18 U.S.C. 5038(a) (6) to correct an oversight in current law. The new statutory language clarifies that communication is allowable with the victim about "the status or disposition of the [juvenile] proceeding or in order to effectuate any other provision of [state or federal] law." This language clears up any ambiguity in current law by explicitly extending to victims of juvenile offenders the right to information about the juvenile proceeding that they might need or be entitled to under any other state or federal law, such as the victims'

rights set out in 42 U.S.C. 10606. Thus, under this new language, victims of juvenile offenders would be treated like victims of adult offenders. For example, victims would be able: to know about the status of the proceedings and the release status of the offender; to consult intelligently with the prosecutor; and to make a knowledgeable victim impact statement at the time of the disposition. In addition, if state law allows victim compensation or grants any other rights, this provision allows communication about the federal delinquency proceeding in order to effectuate those provisions.

Also, under the amendments in this section, fingerprints and photographs of adjudicated delinquents found to have committed the equivalent of an adult felony offense or a violation of 18 U.S.C. 922(x) and 924(a) (6) (possession of a handgun by a juvenile) would be sent to the Federal Bureau of Investigation (FBI) and made available in the manner applicable to adult defendants.

The limited availability of juvenile criminal records is a serious concern in connection with violent and firearms offenses. In order to address this problem, the Department of Justice amended its regulations in 1992 to expand the ability of the FBI to receive and retain records from state courts for "serious and/or significant adult and juvenile offenses." 28 C.F.R. 20.32. The proposed bill would further alleviate this problem by making corresponding changes in the statutory rules for reporting offenses by juveniles who are prosecuted federally.

Further reporting, retention, disclosure and availability of records or information relating to a juvenile or a delinquency proceeding would be authorized if it would be permitted under the law of the state in which the delinquency proceeding took place. Juvenile records could also be used for analysis by the Department of Justice if so requested by the Attorney General.

Finally, the new section 5038(c) would be amended to allow the disclosure of "necessary docketing data." This is necessary because the nationwide military justice system cannot process traffic tickets without disclosing some docketing information.

SUBTITLE D—FEDERAL PROSECUTION OF SERIOUS AND VIOLENT JUVENILE OFFENDERS

SEC. 5051. DELINQUENCY PROCEEDINGS OR CRIMINAL PROSECUTIONS IN DISTRICT COURTS.

Under current law, the decision to charge a juvenile as an adult for specified crimes is made by the United States district court as a result of a motion by the United States to transfer the juvenile for criminal prosecution. The list of offenses for which such transfer is permitted is very limited, and if the court grants the government's motion the juvenile can immediately appeal thereby delaying the ultimate trial and thwarting efforts to try the juvenile along with adult confederates.

There is virtually universal agreement among federal prosecutors that the present system is cumbersome and has frequently inhibited them from seeking adult prosecution. Prosecutors who have sought the transfer of juveniles to adult status have experienced many difficulties in the application of an outmoded statute or have encountered judges personally opposed to the transfer of juveniles, even in cases involving very serious crimes. Moreover, there is a presumption under present law in favor of a juvenile adjudication, and a district court's decision to decline transfer to adult status may be reversed only upon a finding of abuse of discretion. United States v. Juvenile Male #1, 47 F.3d 68 (2d Cir. 1995). The result is a juvenile justice system which fails to provide an effective deterrent to juvenile crime and fails adequately to protect the public.

The proposed statute would amend 18 U.S.C. 5032 to strengthen and simplify the process for prosecuting the most dangerous juveniles as adults in federal court. The legislation would bring federal law into conformity with that of many states by giving prosecutors, rather than the courts, sole discretion to prosecute as adults older juveniles (above the age of 16 when the offense occurred) alleged to have committed the most serious felonies such as murder, carjacking, and rape.

All other determinations to prosecute a juvenile as an adult would, as under current law, be subject to court review and approval. The proposed statute would likewise retain the minimum age of 13 in existing law for prosecution of a juvenile as an adult; but it would expand the list of offenses prosecutable down to the minimum age to include additional serious violent, gun or drug felonies. A number of states have similar statutes.

The legislation would also create a distinction between juveniles 16 years of age and older and those who are younger. Prosecution of juveniles 13 to 15 years of age at the time of the offense would require approval of the Attorney General or his or her designee at a level not lower than Deputy Assistant Attorney General. This internal Justice Department approval requirement (which would not be litigable) has been used in other types of particularly sensitive cases and would ensure that careful scrutiny and uniform standards are used in determining whether to bring criminal charges against younger juveniles. Prosecutors would retain the discretion to proceed against anyone under age 18 as a juvenile delinquent. In those cases, the current requirements for prosecutorial certification would apply, thus assuring that most such cases are handled at the state or local level.

Under the amended statute, a juvenile could be prosecuted as an adult, with the approval of the court, for the following offenses:

- (A) a crime of violence (as defined in section 3156(a)(4)) that is a felony;
- (B) an offense described in section 844 (d), (k), or (l), or paragraph (a) (6) or subsection (b), (g), (h), (j), (k), or (l), of section 924;
- (C) a violation of section 922(o) that is an offense under section 924(a)(2);

(D) 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);

(E) a conspiracy to violate an offense described in air of subparagraphs (A) through (D); and

(F) an offense described in section 401 or 408 of the Controlled Substances Act (21 U.S.C. 841, 848) or a conspiracy or attempt to commit that offense which is punishable under section 406 of the Controlled Substances Act (21 U.S.C. 846), 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, 1003, 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952, 953, 955 or 959), or a conspiracy or attempt to commit that offense which is punishable under section 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 963).

To ensure the prosecution in one trial of all offenses charged, a juvenile tried as an adult for one of the designated offenses could also be prosecuted as an adult for any other offenses properly joined under the Federal Rules of Criminal Procedure. With these amendments, juveniles convicted as adults could receive sentences commensurate with their crimes and criminal histories.

The existing statute excludes younger juveniles in Indian country charged with certain crimes from prosecution unless the tribal government opts to have the provision apply. The proposal would continue this provision.

Except for the handful of most serious offenses committed by older juveniles, the bill provides that, if the government wishes to prosecute a juvenile as an adult it must (as under present law) file a motion with the appropriate district court seeking transfer of the juvenile to adult prosecution status. The criteria by which the court must decide the motion, set forth in the proposed statute, are identical to those in current law, except that the "mental condition" of the juvenile is also made a factor under the bill. In addition, in an effort to overcome the problems sometimes caused under present law by courts taking an inordinate amount of time to decide transfer motions, the bill provides that the court must hear and determine the motion on an "expedited basis." The procedure for appellate review of the court's ruling would be similar to that presently used after a motion to suppress evidence. If the trial court determined that the juvenile should be tried as a juvenile delinquent, the government would have the right to seek an expedited appeal. In the event the court determined that the juvenile should be tried as an adult, then the case would proceed to trial as an adult prosecution and the juvenile could appeal in the event of a guilty verdict. This too is designed to expedite the transfer motion process.

Juveniles under the age of 16 charged as adults, but who have not previously been adjudicated delinquent of a serious violent felony, and who are charged with certain limited

offenses would be sentenced under the sentencing guidelines but would not be subject to mandatory minimums.

Proposed section 5032 (a) (4) would provide that federal juvenile proceedings are normally open to the public but may be closed in the interests of justice or for good cause shown. It also includes a provision allowing victims, their relatives and guardians to be included when the public is otherwise excluded, unless the same two tests applied for exclusion of the public also independently require exclusion.

SEC. 5052. CUSTODY PRIOR TO APPEARANCE BEFORE JUDICIAL OFFICER.

This section make minor changes to clarify that the procedures applicable to the arrest of a juvenile prior to the formal filing of charges apply whether or not it is anticipated that the juvenile will be charged as a juvenile or as an adult.

SEC. 5053. TECHNICAL AND CONFORMING AMENDMENTS TO SECTION 5034.

This section amends 18 U.S.C. 5034 to clarify that it applies to juvenile proceedings only.

SEC. 5054. SPEEDY TRIAL.

This section would provide that for a juvenile in custody juvenile delinquency proceedings must begin within 45 days, rather than the current 30 days. Exclusions in the Speedy Trial Act (18 U.S.C. 3161(h)) would also be made applicable for the first time in juvenile delinquency proceedings. This additional time is necessary, particularly in cases involving both adult and juvenile defendants such as in the prosecution of gangs, to protect witnesses and critical evidence by ensuring that the trial of a juvenile does not proceed before the case against the adults. The time within which a disposition hearing must be held after an adjudication of delinquency would also be increased from 20 to 40 days. Within the 40 days, the probation office would prepare a predisposition report which would include victim impact information. Forty days is consistent with federal court practice generally and will provide the time necessary to prepare a comprehensive report.

SEC. 5055. DISPOSITION; AVAILABILITY OF INCREASED DETENTION, FINES AND SUPERVISED RELEASE FOR JUVENILE OFFENDERS.

This section would amend section 18 U.S.C. 5037 to make fines and supervised release -- not presently sentencing options -- available for adjudicated delinquents in addition to probation and detention. The maximum period of official confinement for an adjudicated delinquent would be increased to ten years or through age 25 to give judges increased sentencing flexibility for juveniles who are adjudicated delinquent. The maximum period for probation would be increased to the same period applicable to an adult. To strengthen the accountability of juveniles to victims, mandatory restitution would also apply to adjudicated delinquents.

SEC. 5056. TECHNICAL AMENDMENT OF SECTIONS 5031 AND 5034.

This section makes technical and conforming amendments to 18 U.S.C. 5031 and 5034.

SUBTITLE E--INCARCERATION OF JUVENILES IN THE FEDERAL SYSTEM

Sections 5061 and 5062 relate to the detention and commitment of juvenile offenders and would provide greater protection than current law. Specifically, section 5061 would amend 18 U.S.C. 5035, to provide that juvenile offenders even if being prosecuted as adults may only be detained prior to disposition in a juvenile or other suitable facility where they would not have regular contact with adults convicted of a crime or awaiting trial on criminal charges. Present law only mandates such housing restrictions for juveniles alleged to be delinquent.

Section 5062's amendments to 18 U.S.C. 5039 would permit juveniles 18 years of age or older and adjudicated delinquent to be placed with adults in community-based facilities in order to provide transition services as they move from incarceration to the community and to allow such older adjudicated delinquents to be housed in their home communities. These changes would also help protect younger juveniles 13 or 14 years old, from 19 or 20 year-olds who, although adjudicated delinquent, may be as dangerous as adults.

The current requirement in 18 U.S.C. 5039 that every juvenile under 18 years of age who is in custody be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment would continue to apply to every juvenile charged as an adult who is detained prior to trial and sentencing and would be expanded to provide for reasonable safety and security as well.

SUBTITLE F - OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION

This subtitle lays the groundwork for subtitles G through H with a statement of findings, a declaration of purpose and policy, and some additional definitions.

Section 5071 gives the short title, the "Juvenile Justice and Delinquency Prevention Act of 1999," as the citation for subtitles F through I of the title. Hereafter, the Juvenile Justice and Delinquency Prevention Act of 1999 will be referred to as "the Act."

Section 5072, a statement of findings, notes that the juvenile crime rate remains unacceptably high; that there is a need to better understand the causes of youth crime and violence and to identify effective initiatives and strategies to reduce and prevent it; that accurate statistics and analysis are needed to fully assess and address youth violence issues; that juvenile courts, prosecutors, and public defenders, as well as probation services and correction facilities are overburdened; that emphasis must be placed on prevention; that the federal government has a

unique and vital role to furnish necessary leadership, focus, and resources. Finally, the statement points out that juvenile crime causes enormous costs and immeasurable loss of life, and personal security as well as wasted human resources -- a growing threat to the national welfare requiring immediate and comprehensive federal action.

Section 5073 declares the policy of the Act: that the federal government must create and fortify, through enforcement and funding initiatives, more effective alliances with states, local governments, and tribal leadership in the fight against juvenile crime, its causes, and consequences. The Act's purposes are: to hold juvenile offenders accountable by graduated sanctions; to implement an effective, comprehensive effort to furnish needed resources and other support for state, tribal, and local juvenile crime enforcement, sanction, and prevention initiatives, including those relating to drug- and alcohol-related crime; and to promote research, evaluation, and data collection to identify and disseminate information about effective initiatives, test promising strategies and programs, and establish flexible demonstration programs that support state and local initiatives. The remaining key purposes are to maintain fundamental safeguards to protect juveniles from harm while in custody, and to provide resources to enable courts to expand corrections options, both for violent offenders and other, less dangerous juvenile offenders.

Section 5074 adopts a number of additional definitions for clarification.

SUBTITLE G - CONTINUATION OF THE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION

Sections 5081 and 5082 continues the existence of the "Office of Juvenile Justice and Delinquency Prevention" and its operations under the terms of the Juvenile Justice and Delinquency Prevention Act of 1999. The redesigned Office of Juvenile Justice and Delinquency Prevention responds to the changing nature of juvenile and youth crime and delinquency and represents a more focused, efficient, and effective office. Fundamental protections safeguarding juveniles and youth within the juvenile justice system are maintained, while operations under the terms of the Juvenile Justice and Delinquency Prevention Act of 1999 are streamlined to better coordinate and integrate juvenile and youth crime initiatives with other Department of Justice activities, particularly activities within the Office of Justice Programs, the National Institute of Justice, and the Bureau of Justice Statistics, as well as with states, units of local government, Indian tribal governments, and local communities.

SEC. 5081. CONTINUATION OF THE OFFICE.

Section 5081 continues the existence of the "Office of Juvenile Justice and Delinquency Prevention" by the terms of the Juvenile Justice and Delinquency Prevention Act of 1999, under the general authority and the "supervision and direction" of the Assistant Attorney General for the Office of Justice Programs, United States Department of Justice. The words "supervision and

direction” are used to describe the line of authority and reporting relationship between the Administrator of the Office of Juvenile Justice and Delinquency Prevention and the Assistant Attorney General for the Office of Justice Programs in the same way the words “supervision and direction” are used to describe the line of authority and reporting relationship between the Secretary of the Department of Health and Human Services and the Assistant Secretary of Health as cited at 42 United States Code, section 202.

This section continues the Department of Justice’s efforts in maintaining coordination and cooperation among those federal agencies whose jurisdictions involve the health, welfare, education or general well-being of youths and/or juveniles.

This section provides the Administrator with the authority to transfer funds to any Federal agency to develop or demonstrate new methods and to supplement effective or needed programs.

There are numerous transitional elements that provide for the continuity between the Office of Juvenile Justice and Delinquency Prevention which operated under the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, and the Office of Juvenile Justice and Delinquency Prevention redesigned under the terms of the Juvenile Justice and Delinquency Prevention Act of 1999.

SEC. 5082. AUTHORIZATION OF APPROPRIATIONS.

Section 5082 provides for the authorization of appropriations to carry out the functions of the redesigned Office of Juvenile Justice and Delinquency Prevention.

SUBTITLE H - JUVENILE CRIME AND DELINQUENCY ASSISTANCE

Subtitle H of Title V maintains and establishes numerous federal grant programs and initiatives: the “Juvenile Justice and Delinquency Prevention Formula Grant Program,” the “Indian Tribal Grant Program,” the “Incentive Grant Program,” the “Developing, Testing, and Demonstrating Promising Programs” program, the “At-Risk Children Grants Program,” and two initiatives that provide additional funding for research, statistics, evaluation, and training, and technical assistance.

SEC. 5091. FORMULA GRANT ASSISTANCE.

Section 5091 amends the Omnibus Crime Control and Safe Streets Act of 1968 by maintaining but revising the formula grant program. This federal grant program has fewer state planning requirements, specifically allocates ten percent of all appropriated grant funds to be set aside and used for research activities (including program evaluations, data collection efforts, and studies to identify initiatives that reduce juvenile and youth crime and violence), and specifically allocates two percent of all appropriated grant funds to be set aside and used for providing training and technical assistance to states and local communities for the implementation of

initiatives and programs that have demonstrated a high likelihood of success.

Under a new formulation, all states receive 50 percent of their allocation. To receive the remaining funds a state must continue to follow established practices and procedures for protecting juveniles within the juvenile justice system. These provisions are reflected in the Department of Justice's regulations at 28 CFR Part 31, which govern this section. Should a state fail to meet the requirements of this section, the unallocated funds may be redistributed within the state.

SEC. 5092. INDIAN TRIBAL GRANTS.

Section 5092 establishes for the first time a direct federal grant program whereby funding goes directly from the Office of Juvenile Justice and Delinquency Prevention to Indian tribal governments without utilizing state pass-through procedures. Grant funds under this section shall be used for initiatives designed to reduce, control, and prevent juvenile and youth crime on Indian lands. This method of direct funding is expected to better address and respond to the needs and concerns of Indian tribes as well as increase funding for these tribes. Also included is language amending the Violent Crime Control and Law Enforcement Act of 1994 to substantially increase funding targeted for correctional facilities on Indian tribal lands.

SEC. 5093. AT-RISK CHILDREN GRANT PROGRAMS.

The "At-Risk Children Grant Program" is a new federal grant program administered by the Office of Juvenile Justice and Delinquency Prevention that provides federal assistance to states for their distribution to local units of government and locally-based organizations to combat truancy, school violence, and juvenile crime and delinquency by providing funding for local crime and delinquency prevention and intervention strategies. Programs and initiatives funded with these grants are designed to address youth within the juvenile justice system who, with some focused supervision, direction, and discipline, can go forward to lead crime-free, productive lives. This program is an expansion of what is currently known as Title V of the Juvenile Justice and Delinquency Prevention Act of 1974.

Grants awarded pursuant to this part may be used for: supporting locally based efforts for assisting high-risk juveniles and juveniles within the juvenile justice system; preventing and reducing truancy and school drop-outs; enforcing juvenile curfews; supporting school safety programs, juvenile mentoring, violence reduction programs, intensive supervision services, jobs and life skills training, family strengthening interventions, early childhood services, after-school programs for juveniles, tutoring programs, recreation and parks programs, parent training initiatives, health services, alcohol and substance abuse services, restitution and community services activities, leadership development, accountability and responsibility education, and other such efforts designed to prevent or reduce truancy, school violence, and juvenile crime and delinquency.

Local units of government that participate under this part must utilize a local planning board to develop a three-year plan.

SEC. 5094. DEVELOPING, TESTING, AND DEMONSTRATING PROMISING PROGRAMS.

Section 5094 establishes new federal discretionary grant programs for states, units of local government, and Indian tribal governments that are administered by the Office of Juvenile Justice and Delinquency Prevention to develop, test, and demonstrate initiatives and programs that have a high probability of preventing, controlling, and/or reducing juvenile crime. These grants were developed to motivate states, units of local government, and Indian tribal governments to independently generate innovative initiatives to combat juvenile crime and youth violence.

This section replaces the current multiple discretionary categorical grant programs currently established by the Juvenile Justice and Delinquency Prevention Act of 1974, by consolidating several categorical grant programs into a single, flexible, and broad program.

SEC. 5095. INCENTIVE GRANT PROGRAM.

This section establishes new federal formula grant programs for states, units of local government, and Indian tribal governments to develop and advance initiatives to prevent, control, reduce, evaluate, adjudicate, or sanction juvenile or youthful crime.

The state agency that receives a formula grant is eligible to apply for a grant under this part. Every applicant must submit assurances to the Administrator of the Office of Juvenile Justice and Delinquency Prevention that they have or will have within one year of submittal of an application:

- (1) implemented a system of accountability-based graduated sanctions; and/or
- (2) implemented a system of information collaboration and dissemination regarding acts of juvenile delinquency and adjudication of the same.

Grants authorized under this section may be used to:

- * achieve paragraphs (1) and/or (2) above;
- * advance initiatives that prevent or intervene in the unlawful possession, distribution, or sale of a firearm by or to a juvenile;
- * implement initiatives that facilitate the collection, dissemination, and use of information regarding juvenile crime;

- * implement new initiatives that assist state and local jurisdictions in tracking, intervening with, and controlling serious, violent, and chronic juvenile offenders;
- * implement comprehensive program services in juvenile detention and correction facilities;
- * implement procedures designed to prevent and reduce juvenile disproportionate minority confinement; or
- * for any other purposes related to juvenile crime reduction, control, and prevention as determined by the Administrator of the Office.

SEC. 5096. RESEARCH, STATISTICS AND EVALUATION.

Better research, evaluation, and statistical analysis is critical to understanding and addressing the causes of juvenile and youth crime. Under this section, increased funding is combined with a collaboration between the Administrator of the Office of Juvenile Justice and Delinquency Prevention and the Directors of the National Institute of Justice and the Bureau of Justice Statistics to better direct and expand these functions.

SEC. 5097. TRAINING AND TECHNICAL ASSISTANCE.

This section provides for specific federal grant funding for much-needed technical and training assistance for individuals in the fields of juvenile justice and juvenile and youth crime and delinquency. Funding under this section will enable more communities to implement effective programs and initiatives that reduce, control, and prevent juvenile and youth crime delinquency. Though this is a new federal grant program, training and technical assistance have been established functions of the Office of Juvenile Justice and Delinquency Prevention. In further recognition of the importance of high quality and focused research, statistical analysis, evaluation, training, and technical assistance, Title V includes specific provisions within each funded program setting aside a percentage of grant funds appropriated for the above-mentioned functions. These monies are in addition to funding appropriated for these functions in sections 409 and 410 of Title V. Specifically, sections 403, 404, 405, 406, 407, and 408 of Title V of this Act provide that 2 percent of all funds appropriated for each funded program shall be set aside for training and technical assistance consistent with Title V. Similarly, sections 403, 404, 405, 406, 407, and 408 provide that 10 percent of all funds appropriated for each funded program shall be set aside for research, statistics and evaluation activities consistent with Title V.

SUBTITLE I - MISSING AND EXPLOITED CHILDREN

Section 5101 authorizes appropriations for the Missing and Exploited Children program of such sums as are necessary for fiscal years 2000 through 2005, and also directs annual set-asides of 10 percent of funds appropriated for research, statistics, and evaluation, and 2 percent

for training.

Section 5102 makes minor, technical corrections to the legislation.

SECTION BY SECTION ANALYSIS OF TITLE VI

TITLE A--INVESTIGATING AND PUNISHING VIOLENT CRIMES

AGAINST U.S. NATIONALS ABROAD

SEC. 6001. EXTORTION AGAINST U.S. NATIONALS ABROAD IN FURTHERANCE OF ORGANIZED CRIME.

This section provides additional discretionary authority for investigations and prosecutions of organized crime groups who perpetrate criminal acts against U.S. nationals abroad. With the expanded role of federal law enforcement, specifically the Federal Bureau of Investigations, in the investigation of international organized criminal groups, additional legislation is needed to counteract crimes occurring abroad. Statutes now in effect are narrow and generally address these kinds of issues only when they are related to international terrorism matters. This provision broadens the scope of other current statutes so that they can be of assistance in targeting violent criminal acts committed against U.S. nationals by members of organized criminal groups. The same safeguards are required that have been established in statutes relating to international terrorism, *i.e.*, such a prosecution cannot be brought without the approval of the Attorney General, the Deputy Attorney General, or an Assistant Attorney General. In proposed subsection (g), the statute places a monetary limitation in extortion cases, and defines an organized criminal group by reference to the RICO statute. These limitations have been included to preclude any expectation that the United States will devote resources to investigate and prosecute cases which are of primarily local (versus international) impact or those which the foreign nation is adequately addressing.

SEC. 6002. MURDER AND SERIOUS ASSAULT OF A STATE OR LOCAL OFFICIAL ABROAD.

This section provides additional discretionary authority to investigate and prosecute murders and serious assaults of state and local officials that occur abroad when the state and local officials are involved in a federally-sponsored training or assistance program. As the United States expands its efforts to fight international crime and bring peace and stability to nations the world over, the role of state and local officials -- law enforcement, judges, and others -- in federally-sponsored training and other forms of assistance programs is also increasing. The scope of these programs is broad, and includes programs designed to bolster law enforcement, promote trade and tourism, and improve education. As with United States military personnel, these officials may become targets of violent acts committed abroad. Insofar as these officials are often involved in training designed to assist a host country in improving its criminal justice system or other public-sector infrastructures, the host country may lack the resources and skills to effectively investigate and prosecute such crimes. Because these officials are acting under the

auspices of the federal government, the United States has a strong interest in prosecuting those criminals who attack and kill them. As with other provisions of law that allow extraterritorial jurisdiction over crimes, this provision requires that the Attorney General approve any prosecutions under this section.

TITLE B--STRENGTHENING THE BORDERS OF THE UNITED STATES

CHAPTER 1--VIOLENCE COMMITTED ALONG U.S. BORDER

SEC. 6011. FELONY PUNISHMENT FOR VIOLENCE COMMITTED ALONG THE U.S. BORDER.

This section will establish a specific criminal penalty of up to ten years for "portrunning," that is, intentionally evading border inspections by driving through ports of entry without stopping, causing injury to or putting at risk of injury federal officers and civilians alike. The section provides strict sanctions where the "portrunning" involves a crime of violence against customs officers, immigration officers, or other persons charged with enforcing laws along U.S. borders, or is accompanied by an attempt to smuggle contraband or controlled substances. It also would enhance the criminal penalty under 18 United States Code 111 for persons who knowingly disregard or disobey the lawful authority of a federal officer charged with enforcing laws along the border and thereby recklessly endanger the safety of any person or property.

Drug, alien, and other smuggling activity has always been associated with a potential for violence along the southwest border. Increasingly, smugglers have taken to violent and dangerous means to evade apprehension at our borders, endangering law enforcement officers and innocent members of the public. Such activity includes over a thousand recent incidents of "portrunning." Currently, there is no specific federal jurisdiction over crimes of violence committed in the course of evading our border controls, and state law has to be used, where applicable, to prosecute violators that injure civilians. This section will correct that problem by creating specific sanctions, such that the federal government will be able to prosecute "portrunners," as well as those committing crimes of violence at our borders, more easily and effectively under federal law.

CHAPTER 2--STRENGTHENING MARITIME LAW ENFORCEMENT ALONG U.S. BORDERS

The Coast Guard is authorized to enforce, or assist in the enforcement of, all applicable federal laws on, under, and over the high seas and waters subject to the jurisdiction of the United States (14 United States Code 2). Coast Guard commissioned, warrant, and petty officers are also deemed to be customs officers (14 United States Code 143; 19 United States Code 1401). The Coast Guard may board and examine any vessel subject to the jurisdiction of the United States (14 United States Code 89). To carry out this broad grant of authority, statutory sanctions are needed against the master, operator, or person in charge of a vessel who fails to obey the

order of a federal law enforcement officer to heave to, or who otherwise obstructs the exercise of law enforcement authority.

Under existing law, a civil penalty can be imposed for failure to heave to a vessel upon the command of a customs officer (19 United States Code 1581(d)). However, the penalty only applies to violations involving vessels at those places where a customs officer is authorized to stop and board. In addition, a criminal and civil penalty can be imposed for failure to stop a vessel when hailed by a customs officer or other government authority within 250 miles of the territorial sea of the United States (19 United States Code 1590(g)(8)). However, these penalties may be imposed only on vessels caught with prohibited or restricted merchandise. As a last resort, to compel vessels to heave to, the Coast Guard is authorized, after firing warning shots, to fire into and disable a vessel which has failed to stop (14 United States Code 637).

Appropriate sanctions are required to facilitate and enhance the Coast Guard's interdiction of vessels smuggling contraband. The Coast Guard requires an intermediate measure -- short of firing into a vessel -- to compel a vessel to comply with a lawful order to heave to. Without such sanctions drug smugglers can delay or sometimes prevent the legitimate exercise of Coast Guard law enforcement boarding authority.

Such sanctions are necessary to address the following scenario. The operator of a vessel fails to heave his vessel to in order to delay a Coast Guard boarding. After a lengthy pursuit, the vessel is finally boarded and no contraband is found. Or the operator of a vessel avoids being boarded by failing to heave his vessel to and fleeing; he eventually enters the territorial waters of a safe haven country. In either case, the vessel may have initially been carrying contraband -- which has been jettisoned -- or may have been acting as a decoy to divert Coast Guard assets away from other vessels carrying contraband. The use of such tactics by drug smugglers not only thwarts Coast Guard drug law enforcement efforts, but diverts Coast Guard assets from their other missions.

Sanctions are also required to deter non-forcible acts of obstruction during a Coast Guard boarding. While forcibly obstructing a federal law enforcement officer is a crime (18 United States Code 111, 113), no statute provides penalties, criminal or civil, for non-forcible acts of obstruction during a Coast Guard boarding. Such penalties are needed as a deterrent to prevent confrontational situations from escalating from non-physical obstructions of boardings to physical assaults on Coast Guard boarding officers.

Sanctions are also required as a means to compel persons on board vessels to provide truthful information regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew. False information concerning a vessel's nationality or registration can delay the determination as to whether the United States has jurisdiction over a vessel, or hinder attempts to obtain consent from a foreign country for the United States to exercise jurisdiction. This offers drug smugglers the opportunity to jettison contraband and destroy evidence. Truthful information concerning the vessel's destination, origin, ownership, cargo, or crew facilitates the

ability of the boarding team to determine whether the vessel may be engaged in drug smuggling. This information is also important for the successful prosecution of drug smuggling cases.

Sections 6021 - 6023 of this title address these gaps in current United States drug interdiction law by increasing the authority of federal law enforcement officers over the movement of vessels. Criminal penalties are provided by section 6021 for failure to obey the order of a federal law enforcement officer to heave to a vessel. These same sanctions are imposed against persons on board vessels who fail to comply with an order in connection with the boarding of a vessel, impede or obstruct a boarding, or provide certain false information during a boarding. These provisions are bolstered by section 6022, which provides civil penalties for failure to support maritime law enforcement, and by section 6023, which clarifies the authority of Customs officers in foreign countries.

SEC. 6021. SANCTIONS FOR FAILURE TO HEAVE TO, OBSTRUCTING A LAWFUL BOARDING, AND PROVIDING FALSE INFORMATION.

This section makes several changes to enhance enforcement of federal law involving vessels. Proposed subsection (a)(1) provides that it shall be unlawful for the master, operator, or person in charge of a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to fail to obey an order to heave to that vessel on being ordered to do so by an authorized federal law enforcement officer. Paragraph (2) would provide that it shall be unlawful for any person on board a vessel of the United States, or a vessel subject to the jurisdiction of the United States, to: (A) fail to comply with an order of an authorized federal law enforcement officer in connection with the boarding of the vessel; (B) impede or obstruct a boarding or arrest, or other law enforcement action authorized by any federal law; or (C) provide false information to a federal law enforcement officer during a boarding of a vessel regarding the vessel's destination, origin, ownership, registration, nationality, cargo, or crew. Nothing in this section is a limitation on 18 United States Code 1001, which makes it a crime to give a false statement to a government agent.

Proposed subsection (b) provides that this section does not limit in any way the preexisting authority of a customs officer under section 581 of the Tariff Act of 1930 or any other provision of law enforced or administered by the Customs Service, or the preexisting authority of any federal law enforcement officer under any law of the United States to order a vessel to heave to. This section is necessary to establish that this statute in no way **limits** the potential actions of federal law enforcement officers that exist under other statutes.

Proposed subsection (c) specifies that a foreign nation may consent or waive objection to the enforcement of United States law by the United States under this section in an international agreement, or, on a case-by-case basis, by radio, telephone, or similar oral or electronic means. Consent or waiver may be proven by certification of the Secretary of State or the Secretary's designee.

Proposed subsection (d) defines the terms used in this section, including "vessel of the United States;" "vessel subject to the jurisdiction of the United States;" to "heave to;" and "Federal law enforcement officer."

Proposed subsection (e) sets forth penalties for violation of this section. Any person who intentionally violates the provisions of this section shall be subject to: (1) imprisonment for not more than five years; and (2) a fine as provided in this title.

Proposed subsection (f) authorizes the seizure and forfeiture of a vessel that is used in violation of this section. Existing customs laws and duties shall apply to such seizures and forfeitures. This subsection further provides that any vessel that is used in violation of this section is also liable in rem for any fine or civil penalty imposed under this section. This provision gives added force to the prohibitions contained in the section, and provides additional incentives to would-be portrunners to comply with the law.

SEC. 6022. CIVIL PENALTIES TO SUPPORT MARITIME LAW ENFORCEMENT.

This section amends chapter 17 of title 14, United States Code, by adding a new section 675. Proposed subsection (a) authorizes the Secretary of Transportation to impose a civil penalty of not more than \$15,000 upon the master, operator or person in charge of a vessel, who fails to comply with an order of a Coast Guard commissioned officer, warrant officer, or petty officer relating to the boarding of a vessel issued under the authority of section 2237 of title 18, United States Code. The Secretary is authorized to impose a civil penalty of not more than \$25,000 for intentional violations. This order is to be communicated according to any applicable, internationally recognized standards, or in any other manner reasonably calculated to be received and understood. Proposed subsection (b) provides that any vessel used in violation of this subtitle is also liable in rem.

SEC. 6023. CUSTOMS ORDERS.

Section 6023 adds a new subsection (i) to section 581 of the Tariff Act of 1930 (19 United States Code 1581) that defines "authorized place" as that term is used in section 581. Authorized place is defined as the following: with respect to a vessel or vehicle, a location in a foreign country at which United States customs officers are permitted to conduct inspections, examinations, or searches. This amendment clarifies the law enforcement authority of customs officers in foreign countries.

CHAPTER 3--SMUGGLING OF CONTRABAND AND OTHER ILLEGAL PRODUCTS

SEC. 6031. SMUGGLING CONTRABAND AND OTHER GOODS FROM THE UNITED STATES.

Under existing law, there is no general criminal statute covering illegal exports. Congress long ago created such a statute for importation activity conducted contrary to law, 18 United States Code § 545, and this amendment is intended to create a parallel provision for exportation activity conducted contrary to law.

The amendment is needed because, although there are currently many provisions of federal law that prohibit or restrict the exportation of certain items, specific criminal sanctions do not exist for all of the export restrictions. Examples of export prohibitions that already exist but lack a criminal sanction include 7 United States Code § 136, et seq., which deal with insecticides and pesticides, 15 United States Code § 45, which covers unfair deceptive practices including unlawful textile exports, and 42 United States Code § 7522, which deals with air pollution and motor vehicle emissions.

This amendment is primarily intended to cover those export prohibitions that lack criminal sanctions. The amendment is not intended to affect in any fashion the ability of the United States to bring prosecutions under other provisions of law, where applicable, that also cover illegal exports.

The provision also amends the money laundering statute, 18 United States Code § 1956, to make a violation of this new provision a predicate under the money laundering statute. The intent of this change is to make this provision as powerful a tool as possible to combat illegal export smuggling. The definitional sections proposed are patterned after similar provisions in 18 United States Code § 545.

Subsection (d) provides for civil forfeiture of the goods involved in a violation of this provision. Subsection (d) would provide clear authority for civil forfeiture of merchandise exported contrary to federal law, and of property used to facilitate the receipt, purchase, transportation, concealment or sale of such merchandise prior to exportation. Subsection (d) would amend one of the principal customs forfeiture statutes, 19 U.S.C. 1595a, which already provides for, among other things, the civil forfeiture of merchandise introduced in the United States contrary to law. This subsection is necessary because, although Congress has already provided some authority under current law for the forfeiture of commercial goods (in 22 United States Code § 401), that statute is designed primarily to provide for the forfeiture of exported illegal war materials.

SEC. 6032. CONTROLLING ILLICIT LIQUOR TRAFFICKING.

In recent years, there has been a dramatic increase in illegal commerce in liquor. The majority of this illegal commerce is between the United States and Canada because the excise taxes in Canada are significantly higher than those in the United States. The Canadian government has formally requested the assistance of United States law enforcement agencies in this matter.

Intelligence gathered indicates that international organized crime is heavily involved in the illegal diversions to Canada. It is estimated that States have lost millions of dollars due to liquor diversion, while Canadian authorities estimate that Canada is losing more than one billion dollars a year in tax revenues from illegal diversion. Moreover, the monies obtained by diversion finance other illegal activities such as money laundering, alien smuggling, narcotics trafficking, and illegal firearms trafficking. It follows that the proceeds of diversion avoid federal and State income taxes as well. Although these diversion-related transactions involve violations of federal, State, and foreign laws, there is currently no comprehensive federal felony which could be applied to the various diversion schemes. Therefore, a statute is needed that provides a uniform and systematic approach to the problem of liquor diversion by providing both an adequate deterrent to this conduct, as well as an enforcement tool that will aid prosecutors.

Proposed section 6032 will combat the problem of illicit liquor on three fronts. First, the bill will broaden the jurisdiction of the U.S. Customs Service under 18 United States Code § 546 by prohibiting the smuggling of merchandise into foreign countries by means of vehicles or aircraft, in addition to the existing prohibition against smuggling via vessel. Second, it will make a violation of § 546 a predicate under the money laundering statute. Third, on a more minor note, it would remove an archaic requirement that the government must prove the foreign country has laws proscribing violations of U.S. customs revenues, an element of proof that involves courts and prosecutors in difficult and unnecessary litigation. Fourth, the bill will add a new section to title 18 of the United States Code. This provision would allow the United States to stop the illegal liquor trafficking as soon as the distilled spirits are shipped in violation of state law. It also allows the Department of Treasury's Bureau of Alcohol, Tobacco and Firearms (ATF) to attack the diversion schemes in their incipency, if the illegal commerce involves a distillery or wholesaler of distilled spirits who is licensed and subject to record keeping requirements and inspection by ATF officers. The proposed legislation would thus allow ATF to cut off the flow of illicit liquor at the source.

Specifically, proposed section 6032 would:

(1) Create federal felonies which would uniformly apply with respect to diversions of liquor from the United States to Canada. There is no current federal felony statute that ATF and the Department of Justice can utilize to uniformly prevent the diversion of liquor from the United States to Canada before such liquor enters Canada. The proposed legislation sets a minimum threshold of 360 liters (30 cases) of liquor, which is presumed to be more than is intended for personal use. The transportation, shipment, or introduction of 360 or more liters into a State in violation of its laws therefore triggers a federal felony which would provide significant penalties for violations which occur in the United States; and

(2) Provide for the seizure and forfeiture of any conveyance, liquor, or monetary instrument involved in a violation of 18 United States Code § 1266, or any property, real or personal, which constitutes or is derived from proceeds traceable to a violation of 18 United States Code § 1266.

The proposed legislation is in harmony with the Twenty-First Amendment, which bars the transportation of distilled spirits from one State into another "for delivery or use therein" in violation of the laws of the recipient State, and with the Commerce Clause of Article I, which empowers Congress to "regulate Commerce with foreign Nations, and among the several States." In the Webb-Kenyon Act, which is a statutory reiteration of the Twenty-First Amendment, Congress clearly directed that the federal government assist states in the exercise of their police powers regulating the traffic or control of alcoholic beverages within their borders. Further, in the Federal Alcohol Administration Act, 27 United States Code § 203, Congress directed close federal regulation of the interstate and foreign commerce in liquor, protection of the revenue, and limitation of such commerce to qualified and licensed individuals. Finally, Congress has, through the enactment of the Interstate Transportation in Aid of Racketeering statute, 18 United States Code § 1952, and the Contraband Cigarette Trafficking Act, 18 United States Code § 2342, demonstrated its desire that the federal government maintain a strong federal enforcement presence with respect to illegal interstate trafficking in commodities such as liquor and tobacco.

This section would be especially helpful in maintaining a strong federal enforcement presence in the area of liquor diversion because states and foreign governments do not always have the resources, expertise, or jurisdiction to attack this problem when it transcends state and international boundaries.

SEC. 6033. CUSTOMS DUTIES.

The proposal amends 18 United States Code 542 to establish a five year sentence for violation of 18 United States Code 542 (entry of goods by means of false statements), thereby curing a problem that has arisen with respect to the embezzlement of customs duties by customs brokers. Section 545 of Title 18 (smuggling) provides for a five year sentence, while Section 542 of Title 18, which is Section 545's sister statute, currently only provides a two year sentence. Moreover, Section 542 has been interpreted to require that the government establish that a customs broker had the specific intent to deprive the government of duties in order to obtain a conviction for embezzling importers' funds that are earmarked for payment of customs duties. See United States v. Yip, 930 F.2d 142 (2nd Cir. 1991). Prior to this case, it was the government's position that it need only show that the broker's actions were willful. Restoration of that interpretation will remove a significant impediment to the successful prosecution of importers' agents who abscond with clients' funds. The legislation will render Section 542 consistent with Section 545 and will cure the defect associated with the Yip case by requiring that the government show only that the defendant's actions were willful and that they resulted in a deprivation of lawful duties.

SEC. 6034. FALSE CERTIFICATIONS RELATING TO EXPORTS.

This section creates a criminal statute that proscribes a false certification that exported goods qualify for preferential treatment under international agreements to which the United States is a signatory. Currently, there is no such general proscription. Under the North American

Free Trade Agreement (NAFTA), the United States pledged to provide, at a minimum, the same legal consequences for exporters or producers who falsely certify goods as originating goods under the NAFTA, as would apply to importers who make false statements to Customs upon the importation of merchandise. See Article 504. This legislation will fill a gap that was inadvertently created when the NAFTA implementing legislation created a civil penalty for such an activity but failed to create a corresponding criminal penalty. The proposal will also proscribe similar activities that violate future trade agreements.

TITLE C--DENYING SAFE HAVEN TO INTERNATIONAL CRIMINALS

CHAPTER 1--STRENGTHENING EXTRADITION TO ENSURE INTERNATIONAL CRIMINALS ARE BROUGHT TO JUSTICE

SEC. 6041. EXTRADITION FOR OFFENSES NOT COVERED BY A LIST TREATY.

The United States currently has extradition treaty relations with approximately 110 countries. Well over half of these treaty relationships were developed more than 20 years ago, when common international extradition practice was to negotiate "lists" or "schedules" of extraditable offenses with our extradition treaty partners based on the serious crimes common to the legal systems of the United States and each treaty partner at the time of the negotiation. As a result, the treaty relations of the United States with many countries do not include more modern offenses such as money laundering, bribery, counterfeiting, and some crimes of violence, including certain crimes against children. This section will amend existing extradition law to authorize the United States to extradite to treaty partners for modern crimes that may not be included in these older list treaties.

The statute allows the Attorney General to authorize the filing of a complaint under this provision for both list and certain serious non-list offenses as though all were covered by the existing treaty, and provides that the extradition process will be handled by judicial officers in the same manner as for list offenses. All provisions of the relevant treaty would apply as if the offense were a crime provided for by the treaty.

The proposal incorporates important safeguards before extradition may be ordered when a treaty exists but it fails to cover the crime for which extradition has been requested. A certification is required by the Attorney General that, in the judgment of the Attorney General, the offense is serious and submission of the request is important to the law enforcement interests of the United States or is otherwise in the interests of justice. A separate certification is required by the Secretary of State that, in the judgment of the Secretary, submission of the request would be consistent with the foreign policy interests of the United States and the facts and circumstances then known would not appear likely to present a significant impediment to the ultimate surrender of the person if found extraditable.

As provided in most of our extradition treaties, the proposal provides for provisional

arrest in cases of urgency. Extradition under the statute would be possible only for enumerated serious offenses. In addition, the provision follows present practice under extradition treaties by vesting in the Secretary of State the final determination whether to surrender a fugitive and, if appropriate, to impose conditions upon such surrender.

SEC. 6042. EXTRADITION ABSENT A TREATY.

Except for a narrow provision of the Antiterrorism and Effective Death Penalty Act of 1996 permitting extradition of non-U.S. nationals who are charged with committing a crime of violence against U.S. citizens overseas (18 United States Code 3181(b)) and a provision of law providing for extradition from the United States to the war crimes tribunals for the Former Yugoslavia and Rwanda (18 United States Code 3181 Note), existing law permits the United States to extradite offenders to foreign nations only when there is a treaty or convention in force with that nation. However, the process of negotiating and ratifying new treaties is both time consuming and complex, and the United States cannot always predict when law enforcement needs will call for an extradition treaty with a particular country. At present, there are close to 70 countries in the world with which the U.S. has no extradition treaty at all.

This inability to surrender even escaped convicts to a large number of nations without a treaty means that criminals can, at least in some instances, find "safe haven" in the United States. It also impedes our ability to secure extradition without a treaty from non-treaty partners. There are countries in the world which can extradite in the absence of a treaty. However, such countries are usually willing to do so only when there exists at least the possibility of reciprocity. Consequently, this statute would create the legal authority for such reciprocal treatment, and open the door for the extradition of important fugitives back to the United States from countries with which our extradition treaty relationship is non-existent.

The proposal incorporates important safeguards before extradition may be ordered in the absence of a treaty. A certification is required by the Attorney General (delegable only to the Deputy Attorney General) that, in the judgment of the Attorney General, the offense is serious and submission of the request is important to the law enforcement interests of the United States or is otherwise in the interests of justice. A separate certification is required by the Secretary of State (delegable only to the Deputy Secretary of State) that, in the judgment of the Secretary, based on facts then known, submission of the request would be consistent with the foreign policy interests of the United States, the facts and circumstances -- including humanitarian considerations -- do not appear likely to present a significant impediment to the ultimate surrender of the person if found extraditable, and the country submitting the request is not doing so in order to try or punish the person based primarily on the person's race, religion, nationality, or political opinions.

The proposal provides for the provisional arrest of a person when there is probable cause to believe the person is extraditable. As in extradition pursuant to a treaty, a judicial officer may only find a person extraditable if it finds probable cause to believe that the person before the

judicial officer is the person sought in the foreign state, and probable cause to believe that the person before the judicial officer committed the offense for which such person is sought, or was duly convicted of that offense in the requesting state.

Extradition under the statute would be possible only for enumerated serious offenses, mostly of a character punishable by more than ten years imprisonment in the United States such as drug trafficking, money laundering, and crimes of violence, including certain crimes against children. In addition, the provision maintains present law by vesting in the Secretary of State the final determination whether to surrender a fugitive. The Secretary's decision takes into account humanitarian considerations, and the Secretary may impose conditions upon the surrender and demand assurances of compliance as the Secretary believes appropriate. The statute further provides that the Secretary shall demand in every case that the person not be tried or punished for an offense other than for which the person has been extradited, and that the person not be subject to capital punishment unless the person was subject to the same punishment by the applicable laws in the United States.

SEC. 6043. TECHNICAL AND CONFORMING AMENDMENTS.

This section is necessary to reconcile the changes made to existing statutes by sections 6041 and 6042.

CHAPTER 2--STRENGTHENING IMMIGRATION LAWS TO EXCLUDE INTERNATIONAL CRIMINALS FROM THE UNITED STATES

SEC. 6051. EXCLUSION OF PERSONS FLEEING PROSECUTION IN OTHER COUNTRIES.

This section will add flight to avoid lawful prosecution as an additional ground of inadmissibility under the Immigration and Nationality Act and designate the country seeking to prosecute such individuals as the primary country of deportation. This section will be triggered if the crime for which prosecution is sought is a crime of moral turpitude, other than a purely political offense.

Individuals often seek refuge in the United States to avoid prosecution for crimes committed in other countries. Presently, if such persons are detected attempting to enter the United States, the United States must either find some other basis for exclusion (e.g., having been previously convicted of another crime), or embark on lengthy extradition proceedings, assuming there is an applicable extradition treaty, which is not always the case.

This section will provide an independent statutory basis to remove persons who enter or attempt to enter the United States for the purpose of avoiding lawful prosecution in another country and to return them to the country seeking their prosecution unless the Attorney General, in his/her discretion, determines that such return would be impracticable, inadvisable, or

impossible. An additional ground of removal under INA section 237 is not necessary because such an alien fugitive found in the United States would be removable under section 237(a)(1)(A) as an alien inadmissible at the time of entry or adjustment of status. The provision is intended to reach situations where the person flees after a warrant has been issued or in anticipation of a warrant being issued. Nothing in this proposed new section would alter U.S. obligations to protect bona fide refugees. Persons covered by this section remain eligible to apply for withholding of deportation under INA section 241(b)(3), and asylum under section 208, to the extent those remedies would otherwise be available.

SEC. 6052. EXCLUSION OF PERSONS INVOLVED IN RACKETEERING AND ARMS TRAFFICKING.

This section will provide for inadmissibility of any individual whom a consular officer has reason to believe has or is engaged in certain RICO and arms trafficking offenses, or any criminal activity in a foreign country that would constitute such an offense if committed in the United States, regardless of whether a judgment of conviction has been entered or avoided due to flight, corruption, etc. This section treats serious criminals with the same standard applicable to drug traffickers and will make our ability to exclude aliens involved in such activities less dependent upon our ability to draw inferences about a person's intent to do something illicit in the United States. With only minor exceptions, the RICO offenses referenced constitute crimes involving moral turpitude that are already grounds for exclusion under the Immigration and Nationality Act.

The section will similarly exclude the spouse, son or daughter (regardless of age) of such persons if, within the previous five years, they benefitted from such illicit activity and reasonably should have known that the benefit was the result of illegal activity. This exclusion of close family members will increase pressure on aliens involved in racketeering and arms trafficking to abandon their illegal activity, and will ensure that such aliens cannot benefit by having their spouses, sons, or daughters travel to the United States with impunity.

The provision includes a waiver provision that allows the Attorney General to waive its applicability for offenses other than aggravated felonies. This provision has been added to provide the Attorney General flexibility to waive these provisions in the event that there is a law enforcement, humanitarian or other important national interest justifying such waiver.

SEC. 6054. EXCLUSION OF PERSONS INVOLVED IN INTERNATIONAL ALIEN SMUGGLING.

This section will address the problem of excluding international alien smugglers where there is evidence that they have assisted aliens to illegally enter countries other than the United States, but not the United States. Often there is a strong likelihood that such assistance was part of a scheme to illegally bring such aliens into the U.S. or could develop into a scheme to illegally bring such aliens into the U.S., but under current law the alien providing such assistance may not

be excludable. This provision will allow consular officers and the Immigration and Naturalization Service to find such aliens ineligible for entry into the U.S. when the alien should have known that the illegal entry into another country would have assisted other aliens to enter the U.S. in violation of law.

CHAPTER 3--ADDITIONAL TOOLS TO DENY SAFE HAVEN TO INTERNATIONAL CRIMINALS

SEC. 6061. TEMPORARY TRANSFER OF PERSONS IN CUSTODY FOR PROSECUTION.

This section addresses two situations. In the first, a person wanted to stand trial in the United States is already in detention -- perhaps serving a long sentence -- in another country. Some of our most modern extradition treaties permit the defendant to be "temporarily surrendered," that is, temporarily transferred to the United States for purposes of trial, and then returned to the foreign country to complete service of sentence. However, the majority of treaties do not, and absent such a treaty provision, any transfer must wait until the defendant's foreign sentence has expired, which delay significantly jeopardizes the prospects for an effective prosecution and which may deny to victims and defendant the benefits of a speedy trial. This provision ameliorates that problem.

In proposed subsection (a) it provides independent, discretionary statutory authority for the Attorney General to request the temporary surrender for purposes of trial of defendants in custody who have been found extraditable to the United States, to maintain their custody while in the U.S., and to return them expeditiously at the conclusion of trial, so that they may serve out the remainder of their foreign sentence (or if in pretrial custody, to proceed to trial in the foreign jurisdiction).

In the second situation, a defendant wanted in a foreign country is in custody in the United States either pending trial or post-trial. New subsection (b) gives the Attorney General authority -- where the Attorney General and the Secretary of State agree -- to temporarily surrender a defendant incarcerated in the U.S. to a foreign country to which the defendant has been found extraditable by the appropriate judicial officer in the manner prescribed by applicable federal extradition law. This provision will not only allow us to assist a foreign country in assuring a prompt trial of the offender, but also, by allowing us to make assurances of reciprocity, enhance the prospects of foreign countries being willing to send incarcerated defendants to the U.S. under the circumstances contemplated in proposed subsection (a).

Because new subsection (b) applies to persons in pretrial as well as post-trial detention, the statute is drafted to make clear that a temporary transfer for prosecution of a person in pre-trial detention pursuant to this provision interrupts that person's pretrial detention status. The statute provides that, during the period of such interruption, a person who had been in pretrial detention prior to their temporary transfer not challenge the conditions of their confinement in

the foreign country to which they have been transferred based on the terms of this statute. Because pretrial detention is a creature of statute, see 18 United States Code § 3142, this provision accomplishes that end by limiting that existing provision of law to make clear it does not apply to persons while in the foreign country temporarily pursuant to this provision.

Because there may be new conditions that arise during the interruption in pretrial detention status but which are not -- for the reason discussed above -- properly the subject of a motion to revisit conditions of release, it is contemplated that a pretrial detainee who is temporarily transferred could bring a motion pursuant to 18 United States Code § 3142(f), and receive a new hearing to assess their conditions of confinement, immediately upon their return to the United States.

Similarly, although it is not mandated by the statute, it is contemplated that a prisoner under sentence in the United States who was temporarily transferred to a foreign country and is returned back to the United States pursuant to this provision could, upon his or her return, bring an appropriate motion under 18 United States Code §§ 2241 or 2255.

Further, although 18 United States Code § 3142(i)(2) requires that any pretrial detention order state that such persons be "committed to the custody of the Attorney General for confinement in a corrections facility", the impact of that provision is necessarily altered to the extent that the Attorney General is empowered by this provision to interrupt the pretrial detention and temporarily transfer pretrial detainees to a foreign country.

Finally, because such confinement is an interruption in that person's U.S. custody, it is contemplated that a person transferred to a foreign country under this provision would not be entitled to receive credit under 18 United States Code § 3585(b) for any time spent in custody in that foreign country.

The intent of these provisions and associated comments is to make clear that a person transferred under this provision is not, by virtue of this statute, in U.S. custody while in the foreign country. Rather, but for the fact that they are eventually returned to the United States, such persons are treated the same way as any other person not in custody or pretrial detention who is picked up by legal authorities in the United States and is extradited to a foreign country pursuant to existing treaties and extradition statutes.

Proposed subsection (c) addresses those situations in which the defendant is willing to be transferred and to forego formal extradition proceedings. This may often be the case since a temporary transfer for prosecution may enable the defendant to defend the foreign case while any exculpatory evidence is most readily available. In those situations, the Attorney General may exercise the transfer authorities under proposed subsections (a) and (b) without a prior finding of extraditability if the defendant to be transferred and all the governments involved consent.

Proposed subsection (d) makes it clear that the return of the person at the conclusion of

the proceedings for which he was transferred does not require extradition or immigration proceedings, nor is a person being temporarily transferred to the U.S. able to use his transfer for trial as an avenue for obtaining asylum. This provision is necessary to prevent temporary transferees from frustrating the statute's purpose and remaining in the United States despite an agreement between the United States and the prisoner's country of origin.

The statute requires that, before a decision is made to request a transfer under new subsections (a) and (b), the Attorney General shall make a determination, in consultation with the Secretary of State, that such a transfer would be consistent with the United States' international obligations. This will ensure that any humanitarian concerns, such as the possibility that the person may be subjected to persecution or torture upon transfer or return to the foreign country, may be considered prior to the transfer.

Lastly, as to any defendant temporarily transferred to a foreign country pursuant to this provision who was in custody pretrial, it is contemplated that such transfer would constitute "delay resulting from trial with respect to other charges against the defendant," for purposes of the Speedy Trial Act, 18 United States Code § 3161(h)(D). Thus, any time spent in the foreign country answering charges there would be excluded by Courts applying the Speedy Trial Act in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence.

SEC. 6062. TRANSFER OF FOREIGN PRISONERS TO SERVE SENTENCES IN COUNTRY OF ORIGIN

This section amends the prisoner transfer statute to eliminate the statutory requirement that prisoners consent to a transfer. This would allow for non-consensual transfers where permitted by treaty. Currently, all United States prisoner transfer treaties require the consent of the prisoner before transfer, and it is not anticipated the United States will seek wholesale renegotiation of existing treaties. Nonetheless, this amendment is sought to facilitate implementation of any prisoner transfer treaties that might be negotiated or ratified in the future without a consent requirement.

Recently, a protocol to the Council of Europe ("COE") Convention on the Transfer of Sentenced Persons has been negotiated. It would eliminate the consent requirement in two situations: cases in which the offender has already been ordered deported, and cases in which the offender has escaped from the sentencing country and returned to the home country. This new protocol is still under review by the Departments of State and Justice and has not been submitted to the Senate for ratification. If the new protocol is submitted for advice and consent to ratification, however, implementation would require changes in federal law such as those proposed by this section.

If the United States ratifies the COE protocol or if non-consensual treaty provisions are otherwise negotiated, it will not necessarily follow that transfer of most or all eligible aliens will

be appropriate. Each transfer will need to be approved on an individual basis and only after an evaluation is made of all relevant considerations, including the particular foreign prison system at issue.

SEC. 6063. TRANSIT OF FUGITIVES FOR PROSECUTION IN FOREIGN COUNTRIES.

It is not uncommon that international fugitives being transferred from one country to face trial in another may need to transit a third country such as the United States. Indeed, the international airports of the U.S. are logical transit points between other continents. It is important that the practical necessity of transit not serve to frustrate international cooperation in the rendition of fugitives, and this proposal is intended to assure that the U.S. can cooperate effectively with law enforcement partners overseas when they must pass through the U.S. as they escort a prisoner to stand trial.

Many U.S. extradition treaties provide for, and indeed set out obligations regarding, transit. However, those treaties do not provide an adequate framework of authority to deal with the full range of circumstances and issues pertaining to international transit of prisoners. First, the person may be in transit to a country with which we do not have a current extradition treaty, or with which we have an old treaty that does not address transit. Such a situation might arise, for example, where a Russian organized crime figure was being extradited to Russia, with which we have no treaty, from a country in South America, and transit through the U.S. were required. While the Attorney General's parole authority under the immigration laws may provide some basis for holding transiting prisoners, it was not developed with this situation in mind and, of course, it can have no application where the prisoner is a U.S. citizen.

Second, fugitives are not always returned through a formal extradition process, the process generally necessary to invoke the transit provisions of a treaty. Instead, a country may have exercised lawful authority to deport or exclude a fugitive. In those situations, clear statutory authority to accommodate a foreign request to permit transit will be extremely helpful.

Third, even where a treaty transit provision is applicable, such provisions generally deal with mechanisms, often diplomatic communications, through which the treaty partners seek and grant transit requests, but not with the underlying basis for maintaining the custody of the person. For these reasons, a clear statement of statutory authority for the Attorney General to permit the transit and maintain the custody of the person is warranted.

The language of this provision makes it clear that the decision of the Attorney General to exercise the transit authority is a discretionary matter and not subject to judicial review. Of course, the discretionary nature of the authority set out in this section is not in anyway intended to derogate any obligations of the United States to grant transit in accordance with the provisions of our extradition or other relevant treaties. In exercising this discretion, the Attorney General would consult with the Secretary of State. Such coordination between the State and Justice

Departments is common with respect to treaty provisions regarding transit. Moreover, such consultations will be extremely useful in the event there are foreign policy reasons or international human rights concerns that might argue against the granting of transit in a particular case.

Finally, it is not intended that prisoners, by virtue of the practical necessity of their transitting the United States on the way to face trial, should thereby be subject to the same documentation requirements, and be afforded the full range of rights and remedies otherwise applicable to aliens in the United States, under the Immigration and Nationality Act of 1952. This concern is specifically addressed in the final sentence of the new section, which provides that such transitting prisoners are required to have only such documents as required by the Attorney General, shall not be considered to be admitted or paroled into the United States, and shall not be entitled to apply for asylum or any other right or remedy under that Act.

TITLE D--SEIZING AND FORFEITING THE ASSETS OF INTERNATIONAL CRIMINALS

SEC. 6071. CRIMINAL PENALTIES FOR VIOLATIONS OF ANTI-MONEY LAUNDERING ORDERS.

Section 5326 of title 31, United States Code, permits the Secretary of the Treasury to issue "geographic targeting orders" lowering various Bank Secrecy Act ("BSA") reporting threshold requirements for 60 day periods to permit the government to detect attempts to evade the BSA. For example, such an order, commonly referred to as a GTO, may be used to lower the currency reporting requirement from \$10,000 to some lower amount for 60 days to detect the transfer of narcodollars from a given area such as New York to Colombia through money transmitters.

31 United States Code §§ 5321 and 5322 impose civil and criminal penalties, respectively, for violations of the BSA and BSA regulations; Section 5324 creates additional criminal offenses for failing to file a report, filing a false or incomplete report, and structuring currency transactions in order to evade a reporting requirement under the BSA. Those statutes, however, do not specifically refer to reports required by GTOs issued under section 5326. This provision eliminates any possible doubt concerning the applicability of these provisions to GTOs by inserting specific references to section 5326 in the respective statutes.

SEC. 6072. BORDER SEARCH AUTHORITY FOR CERTAIN CONTRABAND.

Each year, billions of dollars worth of illegal drugs and other contraband are sold in the United States. A substantial portion of this illicit trade is controlled by, or linked to, international crime groups. Like most criminal organizations, these groups must either launder their ill-gotten gains in the United States or smuggle bulk currency out of the United States. In addition, a substantial amount of illegal firearms, child pornography, instrumentalities of terrorism, and

other dangerous articles are smuggled out of the United States. There is ample evidence demonstrating that criminal organizations -- including international drug cartels -- use the U.S. mail to smuggle money and contraband out of the United States, in part because of the current restrictions on searches of outbound U.S. mail. For example, a 4 lb. letter-class package -- which under current law may not be searched without a warrant -- can hold approximately \$100,000 in \$100 bills.

This proposal would enhance the ability of Customs investigators to search outbound U.S. mail for money, firearms, drugs, and other contraband under prescribed conditions. Section 6072 would authorize searches of letter-class outbound mail upon reasonable suspicion it contained a monetary instrument (checks or cash), drugs, firearms, weapons of mass destruction, information related to national defense, or several other categories of dangerous materials. The proposal further would authorize suspicionless searches of outbound non-letter class packages. Such authority was endorsed by the Gore Commission on aviation security and terrorism.

The statute would not be used by Customs to engage in the wholesale opening of letter class mail containing monetary instruments in small amounts. Moreover, the statute is not a vehicle to allow Customs to read letters in outbound mail, even when those letters accompany monetary instruments. As the statute sets forth, any correspondence found inside such a letter or package could not be read without first obtaining a warrant based upon probable cause. Individuals could gain further privacy protection by not sending correspondence and monetary instruments in the same letter.

There is substantial support in federal law and court decisions supporting broad authority for Customs searches at U.S. borders, including authority to search outbound mail. See, e.g., 31 United States Code 5317 (authorizing Customs searches at the border of persons, conveyances, envelopes, and other items) (emphasis added); United States v. Ramsey, 431 U.S. 606 (1977); United States v. Oriakhi, 57 F.3d 1290 (4th Cir. 1995); United States v. Smith, 29 F.3d 270 (7th Cir. 1994). Despite this authority, Treasury regulations and Customs practice are more circumscribed than the Fourth Amendment might otherwise permit. Section 6072 is designed to provide broader authority to search outbound mail in a manner that balances the need to halt the smuggling of drugs, firearms, child pornography, other dangerous articles and monetary instruments through the use of outbound mail against the privacy concerns associated with letter-class mail of domestic origin. The current proposal is not designed to codify the outer reach of Customs search authority under the Fourth Amendment.

SEC. 6073. FORFEITURE OF PROPERTY USED TO VIOLATE FEDERAL EXPLOSIVES LAWS.

The unlawful use of explosive materials is widely recognized as a serious violent crime problem. This section would authorize the civil and criminal forfeiture of any conveyance, chemicals, laboratory equipment or any other device made, possessed, used or intended to be used to commit a violation of the federal explosives law (except for record keeping and storage

offenses). Currently, only the explosive material can be forfeited. The enhanced forfeiture authority would deprive criminals of the materials used to continue their illegal trade in explosive materials.

SEC. 6075. ADMINISTRATIVE SUMMONS AUTHORITY UNDER THE BANK SECRECY ACT.

This section will amend 31 United States Code § 5318(b)(1) to expand the situations in which an administrative summons will be sufficient to obtain information from financial institutions subject to the Bank Secrecy Act (BSA). At present, the Secretary of the Treasury is permitted to examine information maintained at financial institutions under the requirements of the BSA, but is permitted to summon information or individuals only "in connection with investigations for the purpose of civil enforcement of violations of" the BSA, its regulations, or certain related statutes. BSA policy requires the government to focus on the efficacy of compliance systems rather than attempt to identify particular BSA violations. Restriction of summons authority to investigations for the purpose of civil enforcement of BSA violations could hamper the ability of the Secretary to review the adequacy of compliance systems. In addition to existing civil enforcement authority, this amendment will enable the Secretary to review the adequacy of BSA compliance systems. Subpoena requests will remain subject to the account holder rights specified in the Right to Financial Privacy Act.

SEC. 6077. EXEMPTING FINANCIAL ENFORCEMENT DATA FROM UNNECESSARY DISCLOSURE.

This section will amend the International Emergency Economic Powers Act (IEEPA) and the Trading with the Enemy Act (TWEA) to exempt from disclosure information collected by the Department of the Treasury's Office of Foreign Assets Control in the administration of economic sanctions programs. IEEPA and TWEA currently do not exempt information submitted, obtained, or considered in connection with any transaction that is prohibited under these titles, including license applications, licenses or other authorizations, information or evidence obtained in the course of any investigation, and information obtained or furnished in connection with international agreements, treaties, or obligations. As a result, the agency devotes considerable time and resources to searching and indexing documents pursuant to Freedom of Information Act (FOIA), requests and then preparing the justification for withholding those documents from release due to certain FOIA exemptions. This information is ordinarily withheld on the grounds that it is proprietary information. However, the process of applying that FOIA exception involves a considerable expenditure of law enforcement resources and delay. Therefore, this information should be exempt on the ground that it is necessary for the purposes of IEEPA and TWEA.

These amendments would provide such information with the same statutory protection provided for similar information obtained or submitted under the Export Administration Act (EAA), which is placed outside the scope of searches required to be performed under FOIA

requests. The Department of Commerce, Bureau of Export Administration, also favors this amendment to IEEPA, since it has been acting under IEEPA during periods when the EAA has lapsed and this amendment would ensure identical treatment of these documents under either statute.

SEC. 6078. CIVIL PENALTIES UNDER THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT.

This provision will increase the monetary limits of the civil penalty authorities provided for in the International Emergency Economic Powers Act (IEEPA). IEEPA currently provides for civil penalties of up to \$10,000 per violation of IEEPA prohibitions. This limitation no longer constitutes an effective deterrent for flagrant violations of IEEPA and is significantly less than the penalty limitations provided for in the Trading with the Enemy Act for violations of economic sanctions imposed under that statute. The ineffectiveness of the civil penalty cap is particularly apparent in situations where the IEEPA violation relates to transactions (and profits) valued at many times the maximum penalty amount. This section will raise the IEEPA civil penalty authority to \$50,000 per violation.

SEC. 6079. ATTEMPTED VIOLATIONS OF THE TRADING WITH THE ENEMY ACT.

This section will amend the Trading with the Enemy Act (TWEA) to provide that criminal and civil penalties may be imposed not only against any person who violates a license, order, or regulation issued under TWEA, but also against a person who attempts to violate such a license, order, or regulation. Last year, Congress added an "attempt" provision to the International Emergency Economic Powers Act (IEEPA), but did not add a similar provision to its companion statute, TWEA. TWEA lacks an attempt provision similar to those found in other export administration statutes, for example, the Export Administration Act. Recent executive orders imposing economic sanctions and regulations implementing such orders typically include language prohibiting attempted violations. Current case law in the federal circuit courts of appeal supports promulgation of regulations prohibiting attempts to violate statutes not explicitly containing attempt language. In spite of these factors, the absence of an attempt provision in TWEA makes prosecution of attempted violations more problematic. To clarify existing law, and to insulate prosecutions of attempted violations from any possibility of attack based on the scope of the President's authority, these amendments expressly prohibit attempts to violate TWEA.

TITLE E--RESPONDING TO EMERGING INTERNATIONAL CRIME THREATS

CHAPTER 1--COMPUTER AND HIGH-TECH CRIME

SEC. 6081. ENHANCED AUTHORITY TO INVESTIGATE COMPUTER FRAUD AND ATTACKS ON COMPUTER SYSTEMS.

This section would add certain violations relating to computer crime to the list of serious criminal activity for which 18 United States Code 2516 permits court authorized interception of wire, oral, and electronic communications when the rigorous requirements of chapter 119 (including section 2516) are met. Violations of 18 United States Code 1030 can include computer fraud and attacks on computer systems, such as those controlling the public telecommunications networks, air traffic control, and the electric power network. In computer attack cases, since the evidence of the crime may lie largely in cyberspace, interceptions of wire and electronic communications may be the primary or only available avenue of investigation. Moreover, in computer cases where the activities originate from a business or university, voicetaps may be the only way to complete the identification of the criminal actually using the terminal involved. The statute limits wiretap authority to investigation of felony offenses.

SEC. 6082. JURISDICTION OVER CERTAIN FINANCIAL CRIMES COMMITTED ABROAD.

This section clarifies the extraterritorial jurisdiction of 18 United States Code 1029 (access device fraud). It expressly recognizes United States jurisdiction over access device fraud -- including credit card fraud, debit card fraud and telecommunications fraud -- in cases where the fraud causes an effect on an entity within the jurisdiction of the United States, even if the defendant has never physically entered the United States. Such a clarification is of great importance to the United States' ability to protect its financial system. The modern financial system relies substantially on access devices to access and utilize a vast array of accounts and systems, including credit and debit card accounts, accounts in banks and other financial institutions, electronic funds, and telecommunications systems. Increasingly, U.S. financial, corporate and government entities have implemented access device payment systems to conduct transactions reaching billions of dollars per day. The dramatic increase in electronic and computerized access to such systems from outside the United States has enhanced the vulnerabilities of these systems to criminal activities internationally. By recognizing that the United States has the authority to protect its access device systems against both foreign and domestic threats, this section ensures the security and integrity of United States based payment systems in the same way that 18 United States Code § 470 ensures the integrity of United States currency. Together, this section and 18 United States Code § 470 will enhance the United States' ability to protect its financial system and combat transnational financial crimes that target that system.

CHAPTER 2--ALIEN SMUGGLING

SEC. 6091. FORFEITURE FOR ALIEN SMUGGLING.

These amendments to the Immigration and Nationality Act will enhance the ability of the Immigration and Naturalization Service (the Service) to address the problem of alien smuggling by broadening the authority to obtain forfeiture of property used in or derived from smuggling

operations.

Under current law, the Service may obtain forfeiture of conveyances (vehicles, boats, aircraft) used to smuggle, transport, or harbor aliens. This section would amend section 274(b) of the INA, 8 United States Code 1324(b), to broaden this forfeiture authority. The amendment makes subject to civil and criminal forfeiture all property, both real and personal, used or intended to be used to smuggle aliens. Also subject to forfeiture is any property, real or personal, which constitutes, is derived from, or is traceable directly or indirectly to the proceeds of the smuggling, transportation, or harboring of aliens. Innocent owners of property are protected by the proposed uniform innocent owner statute, to be codified at 18 United States Code § 983.

TITLE F--PROMOTING GLOBAL COOPERATION IN THE FIGHT AGAINST INTERNATIONAL CRIME

SEC. 6111. STREAMLINED PROCEDURES FOR EXECUTION OF MLAT REQUESTS.

This section expands the authority of U.S. district courts to execute, or order execution of, foreign requests for assistance in criminal matters made pursuant to mutual legal assistance treaties (MLATs), conventions, and executive agreements such as an "antitrust mutual assistance agreement" (see, e.g., 15 United States Code § 6201 et seq.), or in accordance with 28 U.S.C. § 1782. This section applies only when the execution of such a request requires or appears to require the use of compulsory measures in more than one district. On such occasions, this section permits a judge or judge magistrate in any district involved in a multidistrict execution, or in the District of Columbia, to execute the entire request.

The U.S. generally relies on 28 U.S.C. § 1782 -- which authorizes the practice of appointing a "commissioner" to execute a foreign request for assistance -- to provide the framework for executing foreign requests for assistance, whether made by letter rogatory, letter of request, request pursuant to an MLAT, or other similar form of request. Section 1782 calls for execution of the foreign request in the district where the witness resides or is found, or where the evidence is located. Consequently, the Attorney General -- the authority to whom foreign requests in criminal matters are generally sent for execution -- often transmits the same request to each district in which a witness or evidence may be located for execution of that portion directly connected to the district.

This practice of transmitting a request to each and every district in which assistance requested may be found is inefficient and prone to creating delay. A majority of requests entail execution in multiple districts. Execution of a multiple district request requires substantial coordination by U.S. authorities (e.g., often documents located in different districts must be produced and analyzed before testimony from witnesses located in other districts can be profitably taken) and duplication of efforts by U.S. authorities (e.g., a judge or magistrate judge, prosecutor, and assisting agent or agents in each district must become familiar with and involved

in executing the same request). In addition to the profligate expenditure of U.S. resources, the practice often results in delay, rendering the U.S. unable to provide foreign law enforcement authorities, and especially foreign treaty partners, with the level of service that the U.S. would like to receive with respect to U.S. requests. Another problem often encountered with multidistrict requests is that a U.S. Attorney's Office designated to execute a portion of a request is unable to devote the necessary resources at the time requested. If timing is critical, and it often is, execution of the request in a district involved in another aspect of the execution, or in the District of Columbia, is a reasonable solution.

This proposal provides an alternative to the current practice of executing foreign requests for assistance only in each and every district in which a witness or evidence is located. Placing authority in a U.S. district court for a district otherwise involved in the execution of a multidistrict request, or in the U.S. District Court for the District of Columbia, should dramatically improve:

- (1) the efficient use of U.S. resources to execute foreign requests that involve multiple districts, and
- (2) the execution of requests involving multiple districts in a timely manner.

Providing the U.S. District Court for the District of Columbia as an alternative venue also permits the Attorney General, with requests that require substantial allocation of resources or coordination, to provide attorneys to undertake execution in the District of Columbia in conjunction with the United States Attorney's Office for the District of Columbia.

Finally, this proposal recognizes that executing foreign requests in criminal matters by requiring witnesses to appear in different districts from those in which they are located may create some hardships for witnesses, just as it does in domestic criminal investigations and prosecutions where the U.S. prosecutor subpoenas witnesses to appear anywhere in the U.S. (i.e., wherever in the U.S. the investigation or prosecution is taking place). This proposal contemplates the same possibility of travel to comply with a commissioner's order as in a domestic criminal investigation or prosecution; however, it provides a procedure to balance the hardship against the exigencies of the request. Upon notice to either the court or the commissioner executing the request, the court will decide whether to transfer execution involving the complaining witness to that witness' district by balancing the (1) inconvenience to the witness against the (2) negative impact upon execution of the request.

SEC. 6112. TEMPORARY TRANSFER OF INCARCERATED WITNESSES.

U.S. mutual legal assistance treaties generally provide a mechanism for the U.S. to send and receive persons in custody who are needed as witnesses. Current section 3508 of Title 18 was enacted in 1988 to provide authority, in the absence of such a treaty, for the Attorney General to request such persons to appear at criminal proceedings in the U.S., to maintain their

custody while here, and to assure their expeditious return to the country of their incarceration once their presence at the U.S. proceeding was no longer necessary.

This proposal amends section 3508 to permit the United States, as a matter of comity and reciprocity, to send persons in custody in the U.S. abroad to appear in foreign judicial proceedings. Such transfers, when based solely on the statutory authority set out in this section, would require the consent of the person in custody as well as of the foreign state. Moreover, in the case of State prisoners, consent of the appropriate State authorities would be required as well.

These provisions carry forward the language of the current statute which makes it clear that the return of persons transferred shall occur as soon as the person's presence is no longer required and shall not require formal extradition proceedings.

Proposed subsection (e) has been added to make it clear that persons who have consented to their transfer to the United States for purposes of appearing in a U.S. proceeding, may not transform the transfer process into a vehicle for gaining entry into the United States for purposes of seeking asylum.

New subsection (f) has been added to ensure that any decision by the Attorney General to transfer or a return a prisoner to foreign country (made after consultation with the Secretary of State) is consistent with U.S. international obligations, including those related to humanitarian concerns, and is not subject to judicial review.

In such instances, the U.S. may have been misled with respect to the person's ostensible motives in consenting to the transfer and providing the testimony, and the failure to promptly return a prisoner has immediate and direct consequences upon the foreign affairs of the United States. For example, it may significantly strain law enforcement relations between the United States and the country in which the person was incarcerated. The considerable complications which may unfold if a transferred witness can make an asylum claim are suggested by the chain of events at issue in Wang Zong Xiao v. Reno, 81 F.3d 808 (9th Cir. 1996).

For persons in the United States in pretrial detention, it is contemplated, for purposes of interpreting the bail statute, that they remain in U.S. custody while in the foreign country. However, those witnesses who are transferred with their consent also should be required to waive their right to challenge the conditions of their confinement while in the foreign country to prevent them from bringing a motion pursuant to 18 U.S. Code § 3142(f)(2) while they are abroad.

Finally, it is contemplated that a decision by the Attorney General to exercise their authority under this provision is adequate to support a finding by a court, pursuant to 18 United States Code § 3161(h)(8)(A), that the time the witness spends abroad should be excluded from calculation under the Speedy Trial Act because "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."

SEC. 6113. TRAINING OF FOREIGN LAW ENFORCEMENT AGENCIES.

By its very nature antiterrorism assistance requires that foreign law enforcement officials be provided training and advice to combat terrorism effectively. For this reason, assistance provided with funds specifically appropriated for the Department of State's antiterrorism program under Chapter 8 of Part II of the Foreign Assistance Act of 1961, as amended (the "Act") has always been authorized to be provided notwithstanding section 660 of the Act, which prohibits, with certain exceptions, the use of Foreign Assistance Act funds for police training or advice.

This provision would ensure that foreign assistance funds that are otherwise available for combatting terrorism could similarly be used notwithstanding the section 660 restriction, regardless of whether they were specifically appropriated to carry out chapter 8 of Part II of the Act. It will thus provide a significant tool for the United States in the international fight against terrorism. At the same time, adoption of this provision will clarify an issue raised in connection with recent amendments (Section 121 of P.L. 104-164) to the Foreign Assistance Act authorities that govern the antiterrorism assistance (ATA) program. In those amendments, in place of the previous provision in the ATA authorities that specifically authorized the provision of assistance notwithstanding section 660, a broader and very important authority was provided that authorizes antiterrorism assistance "notwithstanding any other provision of law that restricts assistance to foreign countries." In the context of this particular provision, the Administration has interpreted that phrase to encompass the restrictions on assistance embodied in section 660 of the Foreign Assistance Act, and this amendment will clarify this point.

SEC. 6114. DISCRETIONARY AUTHORITY TO USE FORFEITURE PROCEEDS TO PROMOTE COOPERATION WITH FOREIGN AGENCIES.

This proposal amends the statute governing both the Justice Department's forfeiture fund to provide for disbursements to indemnify foreign governments, in certain circumstances, against adverse judgments that may result from the foreign government's repatriation to the United States of assets forfeitable pursuant to U.S. law.

The proposal permits use of the funds to indemnify foreign governments that repatriate forfeitable property to the U.S. in the event they are sued domestically by third parties challenging the legality of the repatriation. The indemnification would be limited to the amount of a judgment within five years of the date that the property was repatriated to the United States and not to exceed the amount of funds deposited to the funds, plus interest earned on the fund, less any awards and equitable shares paid by the fund to the foreign government or those acting at its direction in connection with a particular case. The provision relating to the Justice Department forfeiture fund was Section 410(e) of the "Forfeiture Act of 1996" previously submitted to Congress. Under current U.S. law, there is no provision allowing the return of forfeited property to a foreign country or other entity, such as a foreign bank, that suffers foreign legal liability as the result of assisting a United States forfeiture action. This amendment authorizes the Attorney General to return the forfeited property plus interest in such

circumstances. Without assurances that the property plus interest can be returned, a number of foreign jurisdictions have been unwilling to seize or repatriate property on behalf of the United States.

TITLE G--STREAMLINING THE INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES IN U.S. COURTS

SEC. 6121. REIMBURSEMENT OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES IN INTERNATIONAL CRIME CASES.

This proposal authorizes the Attorney General to designate funds to defray unusual expenses incurred by state and local jurisdictions in international extradition cases, including the costs of transporting the fugitive back to the United States and the cost of translating the extradition documents into the language of the foreign state.

State and local prosecutors are sometimes forced to abandon efforts to extradite serious offenders who have fled abroad because the prosecutors lack the resources to pay the costs of international extradition. Because extradition in cases involving violent offenders or career criminals is a national priority, this provision would authorize the Attorney General to allocate funds to pay the costs of such extraditions in serious cases if the state or local authorities certify that the financial assistance is needed. The Marshals Service spent about \$900,000 last year transporting federal fugitives back to the U.S., and it estimates that transportation of all state and local fugitives could cost twice that amount. The Marshals Service currently retrieves fugitives from abroad for state and local jurisdictions, on a reimbursable basis.

This provision is not intended to shift the entire financial burden that may be involved in international cases from states and localities to the federal government. Rather, it provides authority to assist state and localities in meeting extraordinary expenses that could not reasonably be anticipated in the local jurisdiction's ordinary budget process.

SEC. 6122. SAFE CONDUCT FOR FOREIGN WITNESSES TESTIFYING IN U.S. COURTS.

This section will provide an independent statutory basis for a discretionary grant of "safe conduct" for witnesses in foreign countries whose testimony in the United States is needed in connection with a state or federal criminal matter. Some foreign witnesses are reluctant to travel to the United States to testify, absent an assurance that they will not be arrested or subject to process once here. To address this problem, most U.S. mutual legal assistance treaties contain "safe conduct" provisions. Absent such a treaty provision, however, the extent to which such safe conduct may be granted is unclear. Accordingly, this provision provides clear authority to facilitate the appearance of foreign witnesses by granting safe conduct. However, the decision to grant safe conduct is to be a matter solely within the discretion of the Attorney General, and there is no intent to create any right whatsoever on the part of a witness or party to demand such a

grant of safe conduct. To the extent the "safe conduct" provisions of a mutual legal assistance treaty are inconsistent with the section (e.g., by providing a different duration of the period of safe conduct), the treaty provisions will control.

SEC. 6123. PROHIBITING FUGITIVES FROM BENEFITTING FROM TIME SERVED ABROAD.

This proposal is designed so that defendants who become fugitives either by fleeing the United States, or by remaining outside the United States (in the event they are sought based on an assertion of extraterritorial jurisdiction), in order to avoid trial and punishment do not inappropriately benefit from their actions. Because U.S. prison time is now credited to fugitives after their return to the U.S. for the time during which fugitives pursue tactics in foreign countries designed to delay their return and trial in the United States, the current law unwittingly encourages fugitives to file every frivolous challenge to their rendition which is available, in order to delay the case and perhaps weaken the prosecution's case. This proposal is needed because the time consuming and complex nature of the international extradition process which involves foreign sovereigns, foreign legal laws and processes, and foreign languages, typically creates substantially longer delays than the delays that occur in the comparable domestic situation. Nationwide federal jurisdiction and interstate compacts typically result in the swift rendition of interstate fugitives.

SEC. 6124. SUSPENSION OF STATUTE OF LIMITATIONS FOR COLLECTION OF EVIDENCE LOCATED ABROAD.

Currently, ascertaining the length of time tolled is guesswork, and often the fact that "final action" has been taken in a foreign country is not known to U.S. authorities until later, sometimes causing the statute to expire without the evidence in hand, the primary purpose of the tolling. This proposal will clarify that the time tolled runs from the date of making an official request for assistance to the date of receiving the results of that request by the authority requesting assistance.

SEC. 6125. CLARIFICATION OF DISCRETIONARY NATURE OF PAYMENTS TO INFORMANTS.

This provision clarifies that the authority to make payments to informants is entirely discretionary and does not create any right relating to the failure to make such payments that is enforceable in a court of law, court of equity, or otherwise.

TITLE H – TERRORISM

SEC. 6131. EXPANSION OF THE BIOLOGICAL WEAPONS STATUTE.

Subsection (a) contains the Congressional findings and purpose for Section 6131.

Subsection (b)(1) adds several new criminal provisions and civil penalties to Section 175 of title 18, United States Code, the biological weapons statute.

In accordance with the Biological Weapons Convention, proposed Subsection 175(c)(1) would create a ten year criminal penalty for any person who knowingly possesses any biological agent, toxin, or delivery system of a type or in an amount that cannot be reasonably justified by any prophylactic, protective or other peaceful purpose. As such, proposed Subsection 175(c)(1) strengthens the implementation of the treaty obligation of the United States under Article IV of the Biological Weapons Convention to control within the territory of the United States biological agents, toxins, and delivery systems by establishing further measures to ensure their possession is for, and is consistent with, a purpose permitted by the Convention. The subsection contains a narrow exception to criminal liability for "possession" of a naturally occurring biological agent or toxin that has not been cultivated or collected and which remains in its natural, wild state. This narrow exception merely recognizes the fact that an owner of property should not be held criminally liable because nature created a dangerous biological agent or toxin on his property, so long as the agent or toxin is not cultivated by humans and is not being exploited, harvested, or utilized in any way.

Proposed Subsection 175(c)(2)(A) would establish a misdemeanor offense for any person who, with conscious disregard of an unreasonable risk to public health and safety, handles a biological agent, toxin, or delivery system, knowing it to be such, in a manner that grossly deviates from accepted norms. Proposed Subsection 175(c)(2)(B) creates higher penalties when the mishandling causes bodily injury or results in death to any individual. A possible death penalty is not provided when a death resulted from a violation of Section 175(c)(2) because, unlike the death penalty provision being proposed in subsection (d) for a violation of Section 175(a) when death resulted from the violation of that provision, a violation of proposed Subsection 175(c)(2) does not require that the biological agent, toxin, or delivery system be possessed for use as a weapon. The Government can also act against violations of these new provisions by utilization of the seizure, forfeiture, and injunctive authorities provided the Attorney General under Sections 176 and 177 of title 18, United States Code. The publication by the Centers for Disease Control and Prevention (CDC) and the National Institutes of Health (NIH) entitled "Biosafety in Microbiological and Biomedical Laboratories" (BMBL), Third Edition, May 1993, describes appropriate procedures for the safe handling of biological agents and botulinum toxins, and that publication (or any successor edition) should be consulted for guidance. See also, 62 Fed. Reg. 18134, 18135 (1997) (describing the security levels for the Equine morbilli virus, the Sabia virus and the Junin virus). In addition, toxins must be handled under the requirements established by the Occupational Safety and Health Administration (OSHA) pursuant to 29 C.F.R. § 1910.1450, the "Occupational Exposure to Hazardous Chemicals in Laboratories." Nothing contained in proposed Subsection 175(c)(2) limits any requirement mandated under any other federal law or regulation.

Proposed Subsection 175(d) creates criminal and civil penalties for falsely reporting the possible violation of Section 175(a) or (c) of title 18, United States Code, when the person knows

such information to be false. Because the expert resources available to the Government to deal with biological weapons and the unsafe handling of biological agents and toxins are quite limited, the false reporting of such crimes dangerously impairs the Government's ability to deal with real situations. Moreover, such false reports adversely affect interstate and foreign commerce, can cause needless worry or even panic in the general public, and encourage copycat episodes.

Proposed Subsection 175(e) creates six provisions relating to those biological agents and toxins ("select agents") which the Secretary of Health and Human Services has determined to have the potential to pose a severe threat to public health and safety. The list, published pursuant to Section 511(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132), is found in Appendix A to 42 C.F.R. Part 72. Proposed paragraph (e)(1) generally requires that any person who is not registered pursuant to 42 C.F.R. § 72.6(a) or exempted under 42 C.F.R. § 72.6(h) (i.e., not a "registered entity"), must report their possession of a select agent to the appropriate federal agency (i.e., the "designated agency") within the time limit specified. That agency is authorized to prescribe regulations concerning the nature and manner of the required notice. (Persons who meet the definition of a registered entity shall report as otherwise directed by the designated agency.) Proposed paragraph (e)(2) creates a three year felony for any person who willfully fails to make the required report. Proposed paragraph (e)(3) creates a \$5,000 civil penalty for any person who fails to make the required report. Proposed paragraph (e)(4) creates a misdemeanor offense for any person who possesses a select agent and who has failed to file the report with the designated agency. Any person who files a false report with the designated agency would be subject to prosecution under 18 U.S.C. § 1001. Proposed paragraph (e)(5) prohibits anyone from knowingly transferring a select agent to any other person who is not a registered entity. It does not encompass authorized transfers in the workplace of select agents between employees of the same registered entity or between employees of any person who has filed the report required by paragraph (e)(1).

Proposed paragraph (e)(6) deals with the possession of select agents by "restricted individuals." The restricted individuals are similar, although not identical, to those who, under Section 922(g) of title 18, United States Code, are precluded from lawfully possessing a firearm. Subparagraphs (6)(A) and (B) make it a crime for a restricted individual to knowingly possess a biological agent or toxin which is a select agent. This criminal prohibition, like the criminal prohibition under 18 U.S.C. §§ 922(g) and 924(a)(2), is a general intent statute. Thus, it is unnecessary to prove that the defendant knew that his possession of the select agent was in violation of the law. He merely has to know that he was in possession of a dangerous biological agent or toxin, e.g., anthrax or ricin; but he need not specifically know that it was a select agent. The prohibition is not triggered by a restricted individual merely working for a registered entity or for a person who has filed the report required by Subsection 175(e)(1), provided that such individual does not possess a select agent.

Subparagraph(6)(C) mandates that employers of individuals who will possess select agents in the course of their employment require such individuals to complete a form in which

the individual affirms or denies the existence of each of the restrictions found in proposed paragraph (8) of section 178 of title 18, United States Code. New employees must complete the form prior to being given access to select agents. Existing employees must complete the form within 90 days after the enactment of the provision. The form is to be retained by the employer for at least five years after the employee terminates his employment with the employer. Subparagraph (6)(D)(i) makes it a five-year felony to wilfully and knowingly falsify or conceal a material fact or make any materially false, fictitious, or fraudulent statement or representation in completing the form required under subparagraph (6)(C).

Subparagraph (6)(D)(ii) creates an exemption to the prohibition on possession by a restricted individual of a select agent in the workplace of his employer if the basis for the prohibition relates solely to subparagraphs (A) (under indictment for a crime punishable by imprisonment for a term exceeding one year), (B)(i) (convicted of a crime punishable by imprisonment for a term exceeding one year but not more than 5 years), or (E) (has been adjudicated as a mental defective or has been committed to any mental institution) of proposed Section 178(8) of title 18, United States Code, and the employer makes a written determination that, in the employer's judgment, the conduct or event underlying the prohibition is an insufficient basis to prohibit that individual's access to and possession of any select agent in the employer's workplace. The determination must be retained by the employer for at least five years after that employee terminates his employment with the employer.

Subparagraph (6)(D)(iii) creates an exemption to the prohibition on possession by a restricted individual of a select agent in the workplace of his employer if the basis for the restriction relates solely to subparagraphs (B)(ii) (convicted of a crime punishable by imprisonment for a term exceeding five years) or (G) (dishonorable discharge from the Armed Forces of the United States) of proposed Section 178(8) of title 18, United States Code, the restriction is more than five years old (not counting periods of custody) and the employer makes a determination that the basis for the restriction is no longer necessary, in the opinion of the employer, to protect the public. The employer's determination must be in writing and must be retained for five years after the individual terminates his employment. Subparagraph (6)(D)(iv) defines the term "employer" to mean any person who is a registered entity or has filed the report required by Subsection 175(e)(1) and employs a restricted individual, provided that the restricted individual has no controlling ownership interest or senior managerial position in such person.

Subparagraph (6)(E) deals with aliens in the United States who are not lawfully admitted for permanent residence. Such an alien may seek a waiver of the restriction found in proposed 18 U.S.C. § 178(8)(F) from the designated agency. The designated agency may grant a waiver if that agency determines, in consultation with the Attorney General, that the possession of the select agent by such alien is in the public interest. However, no alien who is illegally or unlawfully present in the United States can be granted a waiver.

Proposed Subsection 175(f)(1)(A) requires that the court order any person convicted of a violation of Section 175(a), (c), or (e) of title 18, United States Code, to reimburse the United

States for any expenses incurred by the United States incident to the seizure, storage, handling, transportation, and destruction or other disposition of any property seized in connection with an investigation of the commission of such offense by that person. Proposed Subsection 175(f)(1)(B) requires that the court order any person convicted of a violation of Section 175(d)(1) of title 18, United States Code, to reimburse the United States for any expenses incurred by the United States incident to the investigation of the commission by that person of such offense, including the cost of any response by any federal military or civilian agency to protect public health or safety during the course of such investigation. Proposed Subsection 175(f)(2) makes the owner or possessor of any biological agent, toxin, or delivery system seized and forfeited under the authority of chapter 10 of title 18, United States Code, liable for the expenses incurred by the United States relating to the seizure and forfeiture, including the handling, storage, transportation, and destruction or other disposition of the seized property. Proposed Subsection 175(f)(3) makes any person ordered to reimburse the United States for any expenses under this chapter jointly and severally liable for such expenses with any other person ordered under this subsection to reimburse the United States for the same expenses.

Subsection (b)(2) clarifies confusing language in Section 176(a) of title 18, United States Code.

Subsection (b)(3)(A) establishes a timetable for the President to designate the appropriate federal agency to prescribe the regulations required under new Section 175(e)(1) of title 18, United States Code, and for that agency to promulgate the regulations. Subsection (b)(3)(B) grants the designated agency authority to inspect the facilities where any select agent reported under Section 175(e)(1) is kept to determine whether it is being handled in a safe manner, being held for a peaceful purpose, and is of a type and quantity that are reasonable for that purpose. The designated agency may also inspect any form required by subparagraph (C) and any determination made pursuant to subparagraph (D) of Section 175(e)(6) of title 18, United States Code. Subsection (b)(3)(C) creates an exemption from the Freedom of Information Act (5 U.S.C. § 552(a)) for any information provided to the Secretary of Health and Human Services pursuant to regulations issued under Section 511(f) of the Antiterrorism and Effective Death Penalty Act of 1996 (42 C.F.R. § 72.6) (i.e., the "select agent" regulation) and for any information provided to the federal agency responsible for administering Section 175(e)(1) of title 18, United States Code. The effective date for this exemption is made retroactive by Subsection (b)(3)(E)(i) to the effective date for the select agent regulation (i.e., October 24, 1996) in order to clearly protect the information already provided to the Secretary of Health and Human Services by those entities that have registered as transfer agents. However, the Secretary of Health and Human Services and the federal agency responsible for administering Section 175(e)(1) of title 18, United States Code, may disclose information that they have collected to protect the public health and enforce any provision of law. Information may also be disclosed to appropriate Congressional committees upon request.

Subsection (b)(3)(D) amends appropriate provisions of Section 511 of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132) to make specific reference to

biological "toxins" in order to alleviate any possible confusion as to the scope of that section. These changes are made retroactive by Subsection (b)(3)(E)(ii) to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996.

Subsection (c) proposes some revised definitions for the biological weapons statutes (18 U.S.C. §§ 175-177) as well as providing the definitions for "select agent," "registered entity," "restricted individual," and "designated agency."

The biological definitions proposed in Subsections (c)(1)(A), (B), and (C) represent the most accurate definitions of the statutory terms according to scientists from the Centers for Disease Control and Prevention and the National Institutes of Health. The definitions in the currently enacted legislation are inaccurate.

With respect to the definition of "biological agent," it is more accurate to list the types of "microorganisms" that may be used in biological weapons, rather than making it appear, as does present law, that a virus is something different from a microorganism. In addition, the term "biotechnology" in the definitions (which is included in the enacted version) is removed because it is a slang expression.

The term "synthesized" component is added for a specific reason. A "bioengineered" component of a microorganism implies that the product undergoing engineering occurs in nature. It is also possible, however, for scientists to chemically synthesize molecules in a test tube. Scientists would not understand such a product to be "bioengineered," but it would constitute a biological agent that could be used in a weapon.

Further, the enacted version of "vector" is changed to delete the words "or biological product that may be engineered as a result of biotechnology" (because the term "recombinant" means just that), and to add the words "or synthesized." As a result, the definition for "vector" should read: "The term 'vector' means a living organism or molecule, including a recombinant or synthesized molecule, capable of carrying a biological agent or toxin to a host."

With respect to the definition of "toxin", the term "product" is added because the term "toxic material" is not all inclusive. An organism may contain toxic material as it exists in nature. However, it is also possible to create a toxic product from a naturally occurring organism. For instance, ricin is manufactured from castor beans. It is the intent of the definition to include toxic products that may be manufactured from plants, animals, microorganisms, etc., in addition to the toxic material that the organism naturally contains.

The term "select agent" is defined to mean a biological agent or toxin that is on the list established by the Secretary of Health and Human Services pursuant to section 511(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (Public Law 104-132) (a "select agent" defined in 42 C.F.R. 72.6(j) which is not exempted under 42 C.F.R. 72.6(h) or Appendix A to part 72). As such, it does not include a select agent if the agent is merely part of a clinical

specimen intended for diagnostic, reference or verification purposes. The term "registered entity" is defined to mean a registered facility, or a certified laboratory exempted from registration, pursuant to the regulations promulgated by the Secretary of Health and Human Services under section 511(f) of the Antiterrorism and Effective Death Penalty Act of 1996 (42 C.F.R. 72.6(a), 72.6(h)). Such certified laboratories are exempt if they utilize a select agent only for diagnostic, reference, verification, or proficiency testing purposes.

The term "restricted individual" is defined to include an individual:

(1) under indictment for a crime punishable by imprisonment for a term exceeding one year (an exemption by the employer is possible);

(2) convicted of a crime punishable for a term exceeding one year (an exemption by the employer is possible, although the criteria for exemption are more stringent if the crime is punishable by more than 5 years of imprisonment);

(3) who is a fugitive from justice (no exemption or waiver is possible);

(4) who is an unlawful user of or addicted to a controlled substance (no exemption or waiver is possible);

(5) adjudicated as a mental defective or has been committed to a mental institution (an exemption by the employer is possible);

(6) who is an alien other than an alien lawfully admitted for permanent residence (a waiver from the designated agency is possible); or

(7) who has been discharged from the Armed Forces of the United States under dishonorable conditions (an exemption by the employer is possible if at least 5 years have expired since the discharge and release from military custody).

The definitions for "alien" and "lawfully admitted for permanent residence" contained in the Immigration and Nationality Act (INA) are incorporated by reference. Finally, the term "designated agency" is defined to mean the agency designated by the President to promulgate reporting requirements for the possession of select agents.

Subsection (d) adds a possible death penalty for violations of Section 175(a) of title 18, United States Code, if death results from the commission of the offense. Under current law, 18 U.S.C. § 2332a, there is a death penalty when the use of, the attempted use of, or the conspiracy to use a biological weapon results in a death.

SEC. 6132. RAIL AND MASS TRANSPORTATION ANTI-TERRORISM AND VIOLENCE.

Subsection (a) provides that the section may be cited as the “Rail and Mass Transportation Anti-Terrorism and Violence Prevention Act of 1999.”

Subsection (b) provides that the purpose of the section is to protect the passengers and employees of railroad carriers and mass transportation systems, and other persons while on railroad or mass transportation property, and the movement of freight by railroad, from terrorist attacks and other acts of violence.

Subsection (c) proposes to amend existing 18 U.S.C. § 1992, dealing with wrecking trains, to create criminal sanctions for violent attacks against railroads, railroad employees and railroad passengers similar to sanctions currently provided for attacks against airlines, vessels on the high seas, motor carriers, and pipelines. See 18 U.S.C. § 32 and § 884(g)(1) (destruction of aircraft or aircraft facilities); 18 U.S.C. § 33 (destruction of motor vehicles or motor vehicle facilities); 18 U.S.C. §§ 2271-8, 2280, 2281 (violence against maritime navigation); and 49 U.S.C. § 60123 (damaging pipelines).

The need for strong criminal legislation to deter attacks against railroads is highlighted by the following examples of incidents that have occurred in recent years: on April 15, 1999, someone set on fire a railroad trestle spanning the Nisqually River east of Olympia, Washington, forcing the rerouting of passenger and freight trains; on March 20, 1999, children discovered a pipe bomb next to a Union Pacific Railroad signal control box in Antioch, California; on February 20, 1999, two Amtrak trains in Havre, Montana were evacuated in response to a false phone threat that radioactive materials had been placed on board the trains; on July 5, 1998, someone removed railroad spikes and track couplers from track near Marienville, Pennsylvania, causing a tourist train with 30 people on board to derail – no one was hurt; on December 16, 1997, vandals hit four locations along a nearly 30-mile stretch of Burlington Northern Santa Fe Railway track in south-central Kansas, cutting wires, tearing railroad signals and lights off railroad-highway grade crossing gates -- the damage was discovered before an accident occurred; on August 12, 1997, a man carrying a loaded shotgun and several knives was caught pouring gasoline into sinks in several Amtrak passenger car restrooms; on April 1, 1996, fire damage to a railroad trestle nearly resulted in the destruction of an Amtrak passenger train between Santa Fe, New Mexico and Las Vegas, Nevada (arson is suspected); on October 9, 1995, the intentional derailment of an Amtrak passenger train near Hyder, Arizona resulted in one death and 78 injuries; on May 21, 1993, the intentional derailment of an Amtrak passenger train near Opa-Locka, Florida resulted in the injury of six of the train’s passengers and crewmembers; and on August 12, 1992, the intentional derailment of an Amtrak passenger train at Newport News, Virginia resulted in the injury of 70 of the train’s passengers and crewmembers. Vandalism has also resulted in runaway railroad cars, freight train derailments, which in at least one case resulted in a hazardous material spill, and the burning of railroad equipment.

The requisite federal jurisdictional showing has been reduced to maximize the deterrent effect of the statute. The existing wrecking trains statute is limited to acts of violence, committed within the United States, against trains, engines, motor units or cars used, operated or employed

in interstate or foreign commerce by any railroad or against various fixed facilities used in the operation of a railroad in interstate or foreign commerce. The amendment expands the coverage of the statute to include acts of violence against foreign-based dispatching centers and their foreign-based employees that control train operations in the United States. In addition, the statute is expanded to include acts of violence against any railroad carrier operating in the United States if the person committing the act travels, communicates, or transports materials across State lines in aid of the commission of such acts.

Subsection (a) of § 1992 incorporates the existing statutory prohibitions, with some modifications, and adds additional prohibitions. The first paragraph is similar to the existing section, which prohibits wrecking, derailling, or disabling railroad equipment, but adds a prohibition against setting fire to such equipment.

The second paragraph is similar to the existing section, which prohibits the placement of any explosive substance in, upon or near railroad equipment or other railroad property with the intent to derail, disable, or wreck a train or other railroad equipment, with certain exceptions. First, paragraph two is limited to acts against railroad equipment; acts against other railroad property is covered in paragraph three. Second, a prohibition against the placement of a biological agent or toxin for use as a weapon is added. The terms 'biological agent,' 'for use as a weapon,' and 'toxin' are defined in subsection (c). Third, to be consistent with existing federal criminal laws, the term "explosive substance" has been replaced with the term "destructive substance," which is defined as any explosive substance, flammable material, infernal machine, or other chemical, mechanical, or radioactive device or matter of a combustible, contaminative, corrosive, or explosive nature. Fourth, a prohibition against the placement of a destructive device is added. The term "destructive device" is defined in subsection (c). Fifth, the intent to derail, disable, or wreck railroad equipment requirement is replaced with a requirement that the placement of the biological agent or toxin, destructive substance, or destructive device on the equipment be unauthorized, and with intent to endanger the safety of any passenger or employee of the railroad carrier, or with a reckless disregard for the safety of human life.

The third paragraph is similar to the existing section with the following exceptions. First, the activity must be unauthorized. Second, a prohibition against the placement of a destructive device, or a biological agent or toxin for the use as a weapon is added. The terms 'biological agent,' 'for use as a weapon,' and 'toxin' are defined in subsection (c). Third, the term "explosive substance" has been replaced with the term "destructive substance." Fourth, railroad signals are no longer covered by this paragraph but are covered in paragraph four. Fifth, the intent to derail, disable, or wreck requirement is replaced with a requirement of "knowing or having reason to know" such activity would likely derail, disable, or wreck railroad equipment.

The fourth paragraph makes punishable damaging or otherwise impairing a railroad signal system, including a train control system, a centralized dispatching system, or highway-railroad grade crossing warning signal. The existing statute is limited to acts of violence against signals, and would not cover, for example, an instance of an individual willfully damaging a

computer located in a centralized dispatching facility in Fort Worth, Texas, for the purpose of creating a false proceed signal in Butte, Montana.

The fifth paragraph makes punishable acts which disable or incapacitate a dispatcher, locomotive engineer, conductor, or other person while they are employed in dispatching, operating or maintaining railroad equipment. There is no parallel provision in the existing statute; however, section 1991 of Title 18 of the United States Code does cover entering a train to commit murder, robbery, or violence. Despite the fact that the acts covered by the fifth paragraph are less likely to occur in the railroad context than in other modes of transportation, the provision is, nevertheless, a necessary one. For example, it is possible that an individual could gain access to a locomotive engine and incapacitate a locomotive engineer in order to wreck the train. Alternatively, an individual might incapacitate a dispatcher, in order to reroute trains onto a collision course. These and similar acts would be covered by this provision.

The sixth paragraph makes punishable an act, including the use of a dangerous weapon with the intent to cause death or serious bodily injury to an employee or passenger or any other person on the property of a railroad carrier. Examples of acts that would be covered include gas attacks, and killing or seriously injuring railroad employees in a dispatching center or passengers in a station. There is no parallel provision in the existing statute.

The seventh paragraph makes punishable causing the release of hazardous materials on railroad property, including bulk and non-bulk freight, with the intent to endanger the safety of any person, or with a reckless disregard for the safety of human life. There is no parallel provision in the existing statute. However, 49 U.S.C. § 5104(b) prohibits the tampering with a package, container or freight car used to transport hazardous materials; a person knowingly violating this section can be fined under title 18, imprisoned for not more than 5 years, or both. 49 U.S.C. § 5124.

The eighth paragraph makes punishable conveying or causing to be conveyed false information, knowing the information to be false, concerning any act which would be prohibited by subsection (a), such as bomb threats or other similar acts. There is no parallel provision in the existing statute.

The ninth paragraph makes punishable attempts, threats, and conspiracies to do any of the acts described in paragraphs (1) through (7), or in the case of a threat or conspiracy, such act would be committed, on, against, or affecting a railroad carrier engaged in or affecting interstate or foreign commerce, or if in the course of committing such acts, that person travels or communicates across a State line in order to commit such acts, or transports materials across a State line in aid of the commission of such acts. The existing statute is limited to attempts to do acts proscribed by the statute.

Subsection (b) of § 1992 explains the penalty for willfully committing any of the acts described in subsection (a) of § 1992 is a fine or imprisonment of not more than twenty years, or

both; this is similar to the penalty provision in the existing statute. A person convicted of any crime prohibited by subsection (a) is also subject to:

- imprisonment of not less than thirty years or for life if the railroad train involved carried high-level radioactive waste or spent nuclear fuel at the time of the offense--this is in the existing statute;
- life imprisonment if the railroad train involved was carrying passengers at the time of the offense--there is no comparable provision in the existing statute; and
- life imprisonment or death if the offense has resulted in the death of any person--this is in the existing statute.

Subsection (c) of § 1992 prohibits acts involving the propelling of objects, biological agents or toxins for use as a weapon, destructive substances, or destructive devices, at any locomotive or car of a train, and makes such acts punishable by a fine or imprisonment for not more than five years, or both. If the offense results in the death of any person, the act is punishable by imprisonment for not more than twenty years. There is no parallel provision in the existing section. Railroads have reported instances of trains being shot at, and cinder blocks and other dangerous objects being thrown at locomotives; these activities jeopardize railroad employees and passengers.

Subsection (d) of § 1992 provides definitions for certain of the terms used in the section. For example, "railroad carrier" is defined as that term is traditionally defined in the railroad safety laws (49 U.S.C. § 20102(2)), as a person providing transportation by railroad. The term "railroad" is defined as in 49 U.S.C. § 20102(1), to include transportation by means of conventional trains, new high-speed rail systems, magnetically levitated trains, as well as commuter or other short-haul railroad passenger service, but to exclude rapid transit operations in an urban area that are not connected to the general railroad system of transportation. Use of the term "serious bodily injury" from 18 U.S.C. § 1365 is intended to help exclude minor altercations, such as a fist fight between two passengers, from coverage. "High-level radioactive waste" and "spent nuclear fuel" are defined as those terms are used in the Nuclear Waste Policy Act of 1982 (42 U.S.C. § 10101(12),(23)).

Subsection (d) modifies the analysis of chapter 97 of title 18, United States Code, to reflect the new title to § 1992.

Subsection (e) creates a new § 1993 of title 18 to make punishable acts of terrorism and other violence against mass transportation systems. Currently, there are no federal laws specifically addressing terrorism of mass transportation systems. Section 1993 is designed to parallel, to the extent applicable, acts of terrorism or other violence against railroad carriers (amendment to 18 U.S.C. § 1992 in section three of the bill). There are three principal differences between the two sections.

First, in § 1993, the phrase "rail grade crossing warning signal" is used, whereas "highway-railroad grade crossing warning signal" is used in § 1992. Omitting the term

“highway” makes it clear that this provision covers only tampering with signals for fixed rail mass transportation systems such as subways and light rail, rather than covering all mass transportation signal systems, which would include, for example, highway traffic signals or aids to navigation.

Second, § 1993 defines “mass transportation” as that term is defined in 49 U.S.C. § 5302(a)(7), including subways, buses, and ferries, but is expanded to include schoolbus, charter, and sightseeing transportation.

Third, § 1993 does not have a prohibition similar to the prohibition in § 1992(a)(8) dealing with the release of a hazardous material. Railroads, unlike mass transportation vehicles or ferries, regularly transport large quantities of hazardous materials which could pose substantial safety risk to the public.

The need for strong criminal legislation to deter attacks against mass transportation systems is underscored by the following incidents: on August 1, 1997, New York police and federal agents arrested three men and seized five powerful bombs (the men apparently intended to blow up subways); during the last two weeks of February 1997, there were several bomb threats against the ferry in Seattle (no bombs were discovered); on September 16, 1996, an improvised explosive device was discovered by a maintenance worker in a trash receptacle at Grand Central Station in New York (the device was safely exploded by the bomb squad); on November 26, 1995, two armed bandits squirted gasoline through the change tray of a subway token booth in Brooklyn and then ignited the gasoline causing the occupied booth to explode, resulting in the death of the toll booth clerk; in December 1994, a lone passenger boarded a subway in Manhattan carrying an incendiary device which exploded, causing numerous injuries; on December 7, 1993, a lone gunman with an automatic weapon opened fire on board a rush hour Long Island Railroad train, resulting in six fatalities and 17 injured commuters; and on February 26, 1993, a massive truck bomb exploded in the parking garage under New York’s World Trade Center, resulting in six deaths and 1,000 injuries, and causing damage to the subway running beneath the building.

Subsection (f) adds a new section 1994 to indicate that the Federal Bureau of Investigation (FBI) shall lead the investigation of all offenses under chapter 97. The FBI is to cooperate with the National Transportation Safety Board and with the Department of Transportation in safety investigations by these agencies, and with the Treasury Department’s Bureau of Alcohol, Tobacco and Firearms concerning an investigation regarding the possession or use of explosives.

SECTION BY SECTION ANALYSIS OF TITLE VII

SUBTITLE A - BOLSTERING FEDERAL LAW TO FIGHT VIOLENT CRIME AND APPREHEND DANGEROUS FUGITIVES

SEC. 7001. FUGITIVE APPREHENSION ACT.

According to some estimates, there are at present approximately 45,000 fugitives from justice in federal felony criminal cases, and in excess of 500,000 fugitives from justice in state and local felony criminal cases nationwide. A significant percentage of these fugitives are convicted felons who are wanted on court bench warrants for a failure to appear in court and answer charges that they are in violation of their probation or parole status. This situation represents not only an affront to the rule of law, but also a threat to the safety and security of Americans. Fugitives in violation of probation or parole commit a significant percentage of criminal offenses, crimes that would not occur if they were apprehended first.

As a general matter, under federal law, if there is no intent to seek federal indictment -- as is true in the great majority of fugitive apprehension investigations -- law enforcement officers may not use a grand jury subpoena to obtain information relevant to a fugitive investigation. Indeed, to do so would constitute abuse of the grand jury process.

Although there are some mechanisms to obtain this information through application to the court, time spent by law enforcement seeking state or federal court orders to obtain release of the information can make the difference between the apprehension or further flight of the fugitive.

This provision would remedy the current deficiency in the law by providing for administrative subpoena authority in fugitive investigations. The provision is based on the administrative subpoena authority provided in Title 21, United States Code, Section 876, which authorizes the Attorney General to issue administrative subpoenas in controlled substance-related criminal investigations and administrative proceedings. However, this provision incorporates significant restrictions on its use in order to satisfy concerns over an expansion in the use of administrative subpoenas.

First, this is more narrowly tailored than Title 21, United States Code, Section 876, in that proposed section 7001 does not authorize the Attorney General to obtain testimony in response to the subpoena, only documents.

Second, the statute is limited in its application to fugitives in federal and state felony cases.

Third, the statute strictly controls any delegation of the Attorney General's authority to issue such subpoenas, by requiring that any such delegation be accomplished only through formal

Attorney General guidelines that would be subject to scrutiny.

Fourth, the statute requires that, before a subpoena can be issued, the Attorney General must find that the records sought are “relevant or material,” *i.e.*, there are “articulable facts” that show the fugitive’s whereabouts may be discerned from the records sought.

Fifth, the statute makes clear that an administrative subpoena issued under this section does not “trump” protections accorded records under existing statutes, such as electronic records whose production is covered by section 2703 of Title 18 and financial records whose production is covered by section 3402 of Title 12. Rather, this statute is to be construed and applied consistent with such existing statutes.

The provision would help bring to justice the large number of federal fugitives who the government has already decided merit prosecution insofar as they have been charged with and/or convicted of a federal felony offense or have escaped after having been convicted of such an offense. These are individuals who, by their conduct, have indicated a complete lack of respect for our nation’s criminal justice system and an unwillingness to play by its rules. As to these fugitives, the government does not need proof that they have moved in interstate commerce prior to issuing a subpoena.

The provision also would allow federal law enforcement officials to issue an administrative subpoena to assist state law enforcement officials in apprehending state fugitives when the fugitivity affects interstate commerce or when there is a request for assistance from the appropriate state official, and the Attorney General finds that the request gives rise to a federal interest sufficient to warrant exercise of federal jurisdiction under section 1075. This portion of the statute is modeled on similar provisions in title 28 U.S.C. §§ 540 and 540A. It responds to the need of state officials to use the unique, nationwide detection and enforcement capabilities of federal law enforcement agencies in apprehending fugitives, many of whom cross state lines to avoid capture. It also recognizes the importance of, and provides additional support for, ongoing cooperation between state and federal officials in capturing fugitives, particularly in joint federal/state task forces.

Under 28 U.S.C. §566(e)(1)(B), the U.S. Marshals Service has authority to investigate fugitive matters “as directed by the Attorney General.” The FBI has the authority to investigate fugitive matters (in violation of 18 U.S.C. §1073) under 28 U.S.C. §533(1). This statute would neither increase nor decrease the Attorney General’s authority under those statutory provisions to direct the activities of the Marshals Service and the FBI.

Finally, the provision would provide investigators a mechanism to obtain documentary information in cases alleging a violation of the federal Unlawful Flight to Avoid Prosecution (UFAP) statute for fugitives unlawfully fleeing from testimonial responsibilities or to avoid lawful process (18 U.S.C. §§1073(2) and (3)). As to this lower priority category of fugitives, the proposal incorporates by reference the UFAP interstate movement requirement.

SEC. 7002. AMENDMENTS RELATING TO VIOLENT CRIME IN INDIAN COUNTRY AND AREAS OF EXCLUSIVE FEDERAL JURISDICTION.

This section makes several interconnected amendments designed to strengthen the laws punishing violent crime in Indian country and other areas of exclusive federal jurisdiction. The amendments are set forth in subsections, which are discussed below.

(a) Recently, prosecutors of serious assaults in Indian country have experienced considerable difficulty in obtaining convictions for assaults resulting in "serious bodily injury." The difficulty is traceable to the definition of that term in 18 U.S.C. 1365 (which is cross-referenced in the assault statute, 18 U.S.C. 115), which omits explicit coverage of injuries requiring medical intervention such as hospitalization or surgery. The branch of the current definition most commonly relied on, e.g., when an assault requires hospitalization, covers injuries that cause "extreme physical pain." But juries have, through questions to judges during deliberations, expressed confusion as to whether the pain must continue after the crime or whether it is enough that it happened while the assault was taking place; and many victims have also been reluctant, on the witness stand, to admit that they experienced great pain. In addition, some serious assaults have eluded prosecution because the victim, while suffering a severe beating, was unconscious or so drunk as not to experience "extreme physical pain."

The Sentencing Commission, in the Guidelines, has augmented the statutory definition in section 1365 with another branch encompassing situations in which the injury "requires medical intervention." Guidelines, §1B1.1. This appears to be a superior formulation in that it provides an objective test, for example whether hospitalization ensued from, or emergency medical services were used to treat, the injury, or whether such treatment was medically "required" even if the victim did not seek or receive it. The proposed amendment would therefore adopt the Sentencing Commission's clarification to the statutory definition, by adding it to the existing definition of "serious bodily injury" in section 1365. It is intended that the same interpretation be given to the statutory term "medical intervention" as has been given to that term under the guidelines in order to distinguish among less serious assaults.

(b) This subsection eliminates a superfluous intent element in 18 U.S.C. 113(a)(3), an assault with a dangerous weapon statute applicable in the special maritime and territorial jurisdiction and, through being referenced in 18 U.S.C. 1153, in Indian country. No other assault with a dangerous weapon statute includes an extra element that the actor must have intended to "do bodily harm" as does section 113(a)(3). See, e.g., 18 U.S.C. 351 (assault on Members of Congress and Cabinet officials); 18 U.S.C. 2113(d) (assault during bank robbery); 18 U.S.C. 2231(b) (assault upon persons executing search warrant). The problem with this extra element is that it may give rise to a defense based on intoxication that the actor lacked the specific intent to do bodily harm even though he or she was using a dangerous weapon. The prospect of such a defense being asserted has indeed led in recent years to the inability of federal prosecutors to bring felony charges against defendants in Indian country who used knives or other dangerous weapons in the course of an assault. Elimination of this superfluous and unjustified intent

element in section 113(a)(3) will bring that statute into conformity with other federal assault with a dangerous weapon offenses and facilitate the ability to bring appropriate charges and secure convictions in serious assaultive cases, especially in Indian country.

(c) This subsection would eliminate an unjustified restriction in the assault resulting in substantial injury statute, 18 U.S.C. 113(a)(7). Currently, that statute, which is a lesser felony to the assault resulting in serious bodily injury statute, 18 U.S.C. 113(a)(6), applies only when the victim is less than sixteen years of age. This is unjustified. Adult victims should also be protected against assaults that cause significant physical injury, although not rising to the level of "serious bodily injury" as defined in the law. Section 113 defines "substantial bodily injury" to include injuries that involve a "temporary but substantial disfigurement" or a "temporary but substantial loss or impairment of the function of any bodily member, organ, or mental faculty." Thus, if a victim were so severely beaten as to be temporarily knocked out and/or so as to produce major facial bruises, the assault would fall under the "substantial bodily injury" category. Such situations do unfortunately arise with some frequency in Indian country, where often the adult victim may not experience (or be willing to admit to having experienced) "extreme physical pain" which would bring the assault within the present statute punishing assaults that result in "serious bodily injury." Accordingly, in addition to eliminating the restriction to minor victims in section 113(a)(7), the instant proposal makes that offense a predicate under the Major Crimes Act, 18 U.S.C. 1153, which now covers only assaults against victims under the age of sixteen.

This part of the proposal also would clarify that the Major Crimes Act does not divest Indian tribes of their inherent power to prosecute all Indian offenders for crimes committed in Indian country, even if those crimes are punishable under that Act, subject to the limitations on the maximum penalty that may be imposed by tribal courts (currently one-year's imprisonment or a fine, or both). This clarification, which is consistent with present appellate court caselaw, Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995) is significant because tribal courts exercise concurrent jurisdiction over these offenses and act as an important supplement to federal courts in enforcing Major Crimes Act violations. Notably, Congress has previously acted to clarify tribes' inherent jurisdiction by statute in 25 U.S.C. §1301, which removed any common law impediment that might otherwise have existed to the exercise of inherent tribal criminal jurisdiction over all Indian offenders.

This amendment, in conjunction with the amendments made by the two previous subsections, would remedy a gap in the coverage of the federal assault laws that unjustifiably allows some serious violent offenders to escape justice and that fails adequately to protect victims of assaults in areas of exclusive federal jurisdiction.

(d) The definition of "racketeering activity" in the RICO statute includes the commission of any act or threat involving a series of enumerated felonies, including murder, kidnapping, arson, robbery, and extortion which are "chargeable under State law." Because State law is inapplicable in Indian country, see 18 U.S.C. 1151, a consequence of this definition is that

certain violent felonies, such as murder, robbery, and kidnapping, if committed by a gang in Indian country or elsewhere in an area of exclusive federal jurisdiction, cannot be prosecuted under RICO. The RICO statute has proven to be the most effective federal tool for prosecuting violent gangs throughout the United States and there seems no justification for denying the citizens and residents of Indian country and other areas of exclusive federal jurisdiction its protection and benefits to the same extent as those living elsewhere in the United States.

Recently, according to the F.B.I., violent gang activity in Indian country has increased and is now a significant problem. For example, the F.B.I. reports that on the Navajo Reservation in Arizona alone, there are more than fifty violent gangs, many of which have ties to other gangs throughout the nation. Thus, this gap in the RICO law, which previously was of little or no importance, should now be remedied.

(e) This subsection would increase the maximum penalty for voluntary manslaughter within the special maritime and territorial jurisdiction of the United States from ten to twenty years. Voluntary manslaughter is an unjustified killing that occurs in the heat of passion or upon a sudden quarrel. It is only slightly less serious in terms of culpability than second degree murder under 18 U.S.C. 1111, which also requires no premeditation, yet second degree murder carries a sentence of up to life imprisonment whereas voluntary manslaughter is punishable by a maximum of only ten years' incarceration.

In 1998 the United States Sentencing Commission, in a letter to the Chairmen and ranking minority members of the House and Senate Judiciary Committees, endorsed an increase in the maximum penalty for voluntary manslaughter from ten to twenty years. Likewise a federal judge wrote the Attorney General to urge that the penalty for voluntary manslaughter be raised, as the judge had experienced several voluntary manslaughter cases in which female victims had been brutally slain as the result of domestic violence. Most States also treat voluntary manslaughter more severely than does current federal law. Accordingly, this section would increase the maximum penalty available for voluntary manslaughter to twenty years.

(f) Recently, several incidents have occurred in Indian country involving feuding residents firing shots at occupied buildings, houses, and trailers. Such conduct, if committed by a non-Indian against an Indian in Indian country, by an Indian against a non-Indian, or on a federal reservation would be punishable under 18 U.S.C. 1363 by up to twenty years' imprisonment since the offense not only damaged or destroyed property but was either directed at a dwelling or endangered human life. But because section 1363 is not listed in the Major Crimes Act, 18 U.S.C. 1153, the conduct cannot presently be prosecuted if committed by an Indian against an Indian in Indian country, absent proof of an intent to kill or injure (as opposed to frighten or intimidate). This proposal would add aggravated violations of section 1363 (acts that are directed at dwellings or that place a human life in jeopardy) that carry a maximum twenty-year prison term to the Major Crimes Act, thereby plugging this loophole in existing law.

(g) This proposal is a response to the decision of the Second Circuit in United States v.

Markiewicz, 978 F.2d 786, 804-5 (1992), cert. denied, 506 U.S. 1086 (1993), which held that the statute punishing receipt of property stolen from an Indian tribal organization, 18 U.S.C. 1163, required proof not only that the defendant knew the property was stolen but knew that it was stolen from an Indian tribal organization. The court reached this conclusion because of the presence of the word "so" before "embezzled" and "stolen" which, the court said, referred to the first paragraph of the statute proscribing theft from the organization. The legislative history indicates that Congress intended to model section 1163 on other federal stolen property statutes such as 18 U.S.C. 641, which require no proof of knowledge of the particular source of the stolen goods. The Second Circuit's interpretation of section 1163 produces a result that is contrary to sound policy. It makes no difference in culpability whether or not the defendant knew the particular source of the stolen property as opposed to the fact that it had been stolen generally, and no other federal receipt of stolen property law requires this extra element, see, e.g., 18 U.S.C. 2113(c) (stolen bank proceeds). The proposal would amend section 1163 to bring it into harmony with similar title 18 statutes by eliminating the troublesome word "so", thus clarifying that the defendant need only know that the property was stolen.

SEC. 7003. KIDNAPING.

This section would add new but traditional jurisdictional bases to the kidnapping statute which, because of its genesis and relative age, remains quite limited. 18 U.S.C. 1201 was originally fashioned in reaction to the interstate kidnapping of the Lindbergh baby. Because of this, its Commerce Clause scope applies only to instances in which the victim is transported interstate and does not include other, traditional bases for federal jurisdiction such as travel by the offender in interstate commerce, or the use of a facility in interstate commerce or the mails in the commission of the crime. Compare, e.g. 18 U.S.C. 1952, 1958. The proposed amendment would add these bases to the kidnapping statute. This would enable federal prosecution in such cases as the kidnapping some years ago of an Exxon executive in New Jersey, where the FBI, after a painstaking investigation, apprehended the perpetrators but lacked federal jurisdiction to prosecute because the victim had never been transported out of New Jersey, although the defendants had used interstate facilities during the commission of the crime.

SEC. 7004. OFFENSES COMMITTED OUTSIDE THE UNITED STATES BY PERSONS ACCOMPANYING THE ARMED FORCES.

This section would address gaps in federal law that have existed for forty years and that literally have permitted individuals to "get away with murder." The gaps result from the fact that the Supreme Court held in Reid v. Covert, 354 U.S. 1 (1957), Kinsella v. Singleton, 361 U.S. 234 (1960), and Toth v. Quarles, 350 U.S. 11 (1955), that court-martial jurisdiction could not constitutionally be applied (1) to crimes committed in peacetime by persons accompanying the armed forces of the United States abroad,²² or (2) to crimes committed by a member of the armed

²²Reid so held with respect to capital offenses; Kinsella extended Reid to non-capital crimes.

forces after the member's service with the armed forces has expired. Because foreign nations often have no interest in vindicating crimes committed by American servicemen or their dependents or employees against other Americans or against victims who are not citizens of the host country, the present lack of civilian court jurisdiction over such crimes, coupled with the Supreme Court's invalidation of the previously existing court-martial jurisdiction over them, means that many such offenses, although extremely serious in nature, have gone and are likely to continue to go unpunished. On the other hand, there have been cases in which the United States had to turn United States civilians over to host country authorities for potentially harsh punishment because the United States was unable to take appropriate enforcement action.

The instant proposal, although having a lengthy history, was developed most recently in response to the request of the House Armed Services Committee to the Department of Defense for the views of that Department on then pending legislation (H.R. 4531) near the end of the 103rd Congress.²³ The proposed legislation, which was introduced in the 104th Congress as part of S. 2083, would create a new chapter 212 in title 18, United States Code, consisting of four sections, 18 U.S.C. 3261-4. Section 3261 would provide for appropriate penalties for any person who, while serving with, employed by, or accompanying the armed forces outside the United States, engages in any conduct that would constitute a felony if committed within the special maritime and territorial jurisdiction of the United States. The crimes covered are primarily violent in nature such as murder (18 U.S.C. 1111), manslaughter (18 U.S.C. 1112), assault (18 U.S.C. 113), arson (18 U.S.C. 81), destruction of buildings (18 U.S.C. 1363), sexual abuse (18 U.S.C. 2241-3), and robbery (18 U.S.C. 2111).²⁴

Although this would give rise to civilian court concurrent jurisdiction over overseas crimes committed by active servicemen, it is anticipated that a memorandum of understanding between the Departments of Defense and Justice would provide for primary military jurisdiction in all but exceptional cases. Civilian court jurisdiction over an active serviceman might occasionally be appropriate, for example in a situation in which a murder or robbery was committed jointly by the serviceman and a civilian dependent. In such a case, civilian court jurisdiction over both perpetrators would avoid the need for separate military and civilian trials.

So as to avoid unjustified double punishment, cases in which the offender was prosecuted (or is being prosecuted) by the foreign nation in which the crime occurred could not be federally prosecuted, unless such a prosecution was personally approved by the Attorney General or the Deputy Attorney General (or a person acting in either such capacity). See, for similar

²³It is also similar to the 1971 recommendation of the National Commission on Reform of Federal Criminal Laws (see Final Report, §208(f), (h)), and to provisions in the ensuing federal criminal code reform bills of the 1970s and 1980s (e.g., S. 1630, 97th Cong., 1st Sess., §204; S. Rep. No. 97-307, 97th Cong., 1st Sess., pp. 53-4 (1981)).

²⁴Also covered are theft (18 U.S.C. 661-2), false pretenses (18 U.S.C. 1025), and possession of child pornography (18 U.S.C. 2252).

requirements, 18 U.S.C. 245(a), 1119(c) and 2332(d).

Under section 3261(d), law enforcement officers in the Department of Defense (and of Transportation when the Coast Guard is not operating as part of the navy) designated by the Secretary would be authorized to arrest persons who they have probable cause to believe engaged in the conduct prohibited by the section, and to deliver such persons to the custody of civilian law enforcement authorities for removal to the United States to face trial.²⁵ Such officers would also be empowered, under section 3262, to deliver arrested persons to the custody of a foreign nation which so requested them for purposes of trial, if the delivery is authorized by a treaty or international agreement between the country and the United States. Section 3263 provides for regulations to be promulgated by the Secretary of Defense, in consultation with the Secretary of State, relating to the apprehension, detention, and delivery of persons under this chapter, while section 3264 contains definitions of some key terms.

SEC. 7005. STATUS KILLING OF FEDERAL EMPLOYEES AND CONSOLIDATION OF 18 U.S.C. 1114 AND 1121.

With one relatively minor exception, subsection (a) of 18 U.S.C. 1121 is wholly encompassed within 18 U.S.C. 1114 as that latter statute was enacted in the Effective Death Penalty and Anti-terrorism Act of 1996. Section 1121(a) punishes killings of State or local officials while working with federal officials in a federal criminal investigation, either (1) while the victim is engaged in the performance of duties, (2) on account of the performance of such duties, or (3) because of the status of the victim as a public servant. It also punishes killings of any person assisting a federal criminal investigation while that assistance is being rendered and because of it. Section 1114 punishes killing (or attempting to kill) any officer or employee of the United States and any person assisting such an officer or employee either while engaged in or on account of the performance of official duties.

Section 1114 is obviously considerably broader overall than section 1121(a) and completely covers all the conduct made criminal by that section, except for killings of State or local officials assisting in a federal criminal investigation that are motivated by the status of such officials. Since it is anomalous that "status" killings of State and local officials assisting federal officials in an investigation are proscribed while such killings of federal officials themselves are not, the proposed amendment would add this concept to section 1114 (along with section 1121(a)'s "status" coverage of State officers and employees assisting federal officials). Tribal officers assisting federal law enforcement personnel would also be protected. With that accomplished, subsection (a) of 18 U.S.C. 1121 would become totally redundant, and the proposed amendment therefore deletes it and redesignates the remaining subsections accordingly.

²⁵It is contemplated that arrests would be made consistent with the requirements of any applicable treaty and in accordance with principles of international law. Compare United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

SEC. 7007. THREATS AGAINST FORMER PRESIDENTS AND OTHERS ELIGIBLE FOR SECRET SERVICE PROTECTION.

This section would expand the coverage of 18 U.S.C. 879, which deals with threats against former Presidents, the immediate families of the President and Vice President, major Presidential and Vice Presidential candidates, and certain other persons protected by the Secret Service. Currently, the statute limits coverage to the enumerated persons “who are protected by the Secret Service.” While 18 U.S.C. 115 covers some more serious threats against some of the individuals covered in section 879, there are important gaps that need to be addressed. For example, section 3056(a)(3) limits future protection of former Presidents and their spouses. Likewise, there is no protection for the immediate family of a major candidate for the Presidency.

The Secret Service has a legitimate interest in investigating threats against a former President or a current major Presidential candidate regardless of whether the individual is receiving Secret Service protection. The status of the person as “former President” or “major candidate” is generally the reason why those persons are the subjects of a threat and not whether they have Secret Service protection. An individual who threatens a former President or a major candidate is also the type of person who may threaten or attempt to harm other Secret Service protectees. It is thus important for the Secret Service to be able to investigate these threats.

SEC. 7009. CLARIFICATION OF INAPPLICABILITY OF 18 U.S.C. 2515 TO CERTAIN DISCLOSURES.

This section would make a carefully limited and clarifying amendment to 18 U.S.C. 2515, the statutory exclusionary rule for violations of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, so as clearly to exempt two situations: (1) those in which private persons, not acting for any government authority, illegally intercept or record a communication, but the recording later lawfully comes into the possession of the government, which then wishes to use it in a criminal investigation or trial; and (2) those in which a private or government actor violates chapter 119 (e.g., by engaging in an illegal wiretap) and the government thereafter seeks to use the communication to prosecute that violator.

At present, appellate decisions are in apparent conflict over whether section 2515 precludes the use of communications in the first category described above. Under one possible interpretation of section 2515, if a private individual consensually records a conversation in aid of an illegal activity, or illegally records a conversation between other parties without their consent, the contents of such recordings are not admissible in a criminal trial or hearing even if the government had no role in having the evidence recorded and only acquired it, through lawful means, at a later date. This is because, under 18 U.S.C. 2511(2)(d), a recording by a consenting party, not acting under color of law, is permissible only if the recording is for a non-criminal or non-tortious purpose. Thus, if a briber secretly records a transaction in which a bribe is paid to an official, and the government later obtains the recording and seeks to use it against the official to prove the bribe, section 2515 arguably precludes such use. One appellate court has so held.

United States v. Vest, 813 F.2d 477 (1st Cir. 1987).

By contrast, another appellate court has held that section 2515 does not bar the government from using evidence where individuals operating an illegal gambling business record bets placed by telephone so as to facilitate their business by avoiding disagreements with bettors over the amount of their bets. United States v. Underhill, 813 F.2d 105 (6th Cir.), *cert. denied*, 484 U.S. 821, 846 (1987). While the court in Vest acknowledged that no deterrent purpose would be served by suppression, since the government played no role in the illegal recording, it relied on the fact that further disclosure in court of the contents would magnify the original privacy violation. The court in Underhill, on the other hand, relied on clear legislative history indicating that Congress, despite the facial breadth of section 2515, did not intend to permit lawbreakers to immunize themselves from prosecution by their own acts, the criminal purposes of which made the recordings illegal.

The same disagreement among circuit courts exists as to the admissibility of recordings made by private actors intercepting communications without the consent of any of the parties. In one case, a court barred the use before a grand jury of such illegally intercepted communications. See In re Grand Jury, 111 F.3d 1066 (3d Cir. 1997). By contrast, where a wife secretly installed a recording device to intercept her husband's conversations with other persons, the Sixth Circuit concluded that section 2515 did not bar the use of the contents of those communications in a prosecution of the husband, given the government's lack of involvement in the original interception. See United States v. Murdock, 63 F.3d 1391 (6th Cir. 1995).

Whether or not Vest and In re Grand Jury were correctly decided under the existing statutory provision, an exemption should be created under section 2515 for that narrow class of cases in which private illegal recordings are later lawfully acquired by the government and sought to be used as evidence in a criminal trial or hearing. The truth-seeking function of a criminal proceeding is of paramount importance and, in the absence of any deterrent purpose to be served by exclusion, should prevail over the remaining concern that disclosure in the criminal proceeding would somehow exacerbate the original illegal recording. The instant amendment reflects the view that the severe remedy of exclusion of otherwise probative evidence should not be applied against the government in a criminal case with respect to a private violation of the statute (just as the Fourth Amendment, of course, does not apply to non-governmental searches and seizures). Accordingly, this section would amend section 2515 to expressly exempt such cases from its purview.

In addition, the amendment would also permit the use of illegal intercepts made by governmental actors for the limited purpose of prosecuting those actors. In one recent case, a State officer illegally intercepted conversations between a prisoner and his attorney. When the United States sought to use the recording to prosecute that violation, the district court ruled the evidence inadmissible. The amendment would permit such use, but only for the limited purpose of prosecuting the violator of chapter 119; the recordings could not be used against the victims of the violation even if those recordings contained evidence of separate criminal activity by the

parties to the communication.

A conforming amendment is also made to section 2518(10)(a).

SEC. 7010. PARTICIPATION OF FOREIGN AND STATE GOVERNMENT PERSONNEL UNDER FEDERAL SUPERVISION IN CERTAIN INTERCEPTIONS.

This section would amend 18 U.S.C. 2815(5) to make clear that foreign, State, and tribal government personnel, if acting under federal supervision, may help in conducting court-authorized interception. The current language in the statute permits such assistance by "Government personnel," but it is uncertain whether this covers foreign, State, and tribal government personnel as opposed to federal employees.

There is often great utility in permitting foreign, State, tribal government personnel to assist in monitoring a wiretap, such as in joint investigations involving terrorist or other offenses in which the particular language skills of such personnel are necessary. Currently, federal agencies such as the FBI may employ such personnel through the cumbersome device of cross-designating them as federal agents. See United States v. Bynum, 763 F.2d 477 (1st Cir. 1985). The paperwork involved in such methods is burdensome and costly, with no corresponding benefit to privacy or other interests served by the statutes. It would be far more efficient, and consistent with the purpose of the 1986 amendment adding "Government personnel" to 18 U.S.C. 2815(5), if that provision expressly authorized foreign or State government personnel, acting under the supervision of a federal officer, to participate in the conduct of a Title III interception. The proposed amendment would effect this result.

SEC. 7011. IMPROVED LAW ENFORCEMENT ACCESS TO CERTAIN RECORDS.

This proposal would correct anomalous situations that arise under the Cable Communications Policy Act of 1984. In the interest of protecting the privacy of cable subscribers, that legislation included, at 47 U.S.C. 551(c) and (h), provisions prohibiting the disclosure of individual subscribers' records to governmental entities, including law enforcement agencies, except by court order based on a showing of the relevance of the information sought to a criminal investigation, with an additional requirement that the subscriber be given an opportunity to contest the disclosure. This extremely restrictive provision gives greater protection to cable subscriber records than the law provides with respect to any other type of commercial information about a person, including bank records (12 U.S.C. 3401 et seq.), credit records (15 U.S.C. 1681 et seq.), motor vehicle records (18 U.S.C. 2721), video tape rental records (18 U.S.C. 2710), and billing records of customers of electronic communication service providers (18 U.S.C. 2703(c)). The provisions are so restrictive that it is not even certain that a cable company could comply with a court order authorizing the use of a wiretap or pen register/trap and trace device to collect information about a subscriber.

Although there is considerable justification for prohibiting indiscriminate disclosures of records about a person's cable television viewing habits, there is no justification for making it more difficult for law enforcement agencies to obtain such records for legitimate law enforcement purposes than to obtain bank, credit, motor vehicle, video tape rental, or electronic mail records. Although prosecutors do not often need access to cable television records, information about a person's cable service may be relevant to various types of criminal investigations. For example, such records have been sought in order to establish a pattern of expenditures in tax evasion prosecutions, and they can be of use in locating fugitives or others whose location can be traced through their subscriber records. Of course, providing notice to the subscriber of such a request for records in many cases would jeopardize the criminal investigation. Hence, in some instances, prosecutors have abandoned attempts to get access to cable records once they have learned of the uniquely restrictive provisions of section 551.

The proposed amendment would enable governmental entities, both State and federal, to get access to cable subscriber records by means similar to those provided for access to records concerning electronic mail subscribers under 18 U.S.C. 2703. For billing records that show only the subscriber's name, length of service, and similar basic account information (but not records of particular program viewing habits), the government could use a subpoena without providing notice to the subscriber. Moreover, the court could order that no notice of the request or information furnished by the provider be divulged to the subscriber. For access to other information about specific transactions, such as the names of pay-per-view programs selected or lists of choices made on interactive services, the governmental entity may use a court order based upon a showing of relevance, as under present law, although the proceeding could be ex parte. As under section 2703, a court would be given authority to quash or modify a court order or subpoena upon a showing by the service provider that compliance would be unduly burdensome.

In addition, the amendment takes account of the fact that today--unlike in 1984--many cable companies offer not only traditional cable programming services, but also Internet access and telephone service. Like traditional telephone carriers and Internet service providers, cable companies offering such services must comply with court orders and other legal process permitted under Title III (the wiretap statute), the Electronic Communications Privacy Act (ECPA), and the pen register/trap-and-trace statute. In recent years, however, cable companies have increasingly balked at complying with such process, noting the seeming inconsistency with their duty of nondisclosure (except under stringent limits) under 47 U.S.C. 551. See In re Application of United States, 36 F. Supp. 2d __ (D. Mass. Feb. 9, 1999) (noting apparent statutory conflict and ultimately granting application for order under 18 U.S.C. 2703(d) against cable company providing Internet service). These complications have at times delayed or frustrated investigations.

Applying the restrictions of section 551, even as modified above, makes little sense in the context of investigations based on these other statutes. For example, computer crime investigators should not be hampered by the requirement under section 551 that the subscriber be a suspect in a criminal investigation. In many cases involving online evidence, this requirement

may be impossible to meet. Consider, for example, a case in which a fugitive is believed to be corresponding with his or her spouse via electronic mail. Under 18 U.S.C. 2703, government investigators could obtain a court order to compel the spouse's Internet service provider to turn over records reflecting the addresses of the innocent spouse's online correspondents, thus facilitating apprehension of the fugitive. If a cable company is providing that Internet service, 47 U.S.C. 551 could be read as barring such disclosure.

The Department believes that rules governing law enforcement access to the records of communication service providers' customers should not depend on whether the provider of telephone or Internet service is a cable company. Accordingly, the amendment inserts a new subsection 551(c)(2)(E) to confirm that cable companies, like other providers, remain subject to ECPA, the wiretap statute, and the pen register statute notwithstanding section 551.

However, new subsection 551(c)(2)(E) preserves the Cable Act's primacy with respect to records revealing a customer's cable TV viewing habits. Thus, in a case where a customer receives both Internet access and conventional cable TV service from a single cable provider, only those customer records relating to Internet service could be compelled under ECPA.

SEC. 7012. REMOVAL OF THE SUNSET PROVISION FOR THE S VISA CLASSIFICATION PROGRAM.

Section 418 repeals the current restriction, found in 8 U.S.C. § 1184(k)(2), which limits the duration of the S visa classification program to a five year period commencing on September 13, 1994. Unless this provision is repealed or modified, the S visa classification program would expire on September 12, 1999.

Section 13003 of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) amended the Immigration and Nationality Act (INA) to establish a new "S" nonimmigrant visa classification for two categories of alien witnesses and informants. The first category of nonimmigrant classification, (S)(i), may be granted to an alien who the Attorney General has determined is in possession of critical reliable information concerning a criminal organization or enterprise, which the alien is willing to supply or has supplied to Federal or State law enforcement authorities or to a Federal or State court. 8 U.S.C. § 1101(a)(15)(S)(i). The Attorney General must also determine that the alien's presence in the United States is essential to the success of an authorized investigation or the successful prosecution of an individual involved in a criminal organization or enterprise. The number of witnesses or informants who may be granted (S)(i) nonimmigrant classification in any fiscal year may not exceed 200. 8 U.S.C. § 1184(k)(1).

The second category of nonimmigrant classification, (S)(ii), may be granted to an alien who the Secretary of State and the Attorney General jointly determine is in possession of critical reliable information concerning a terrorist organization, enterprise, or operation, which the alien is willing to supply or has supplied to Federal law enforcement authorities or to a Federal court.

8 U.S.C. § 1101(a)(15)(S)(ii). The Secretary of State and the Attorney General must also determine that the alien will be or has been placed in danger as a result of providing such information, and is eligible to receive a reward under Section 36(a) of the State Department Basic Authorities Act of 1956 (22 U.S.C. § 2708(a)). The number of witnesses or informants who may be granted (S)(ii) visas in any fiscal year may not exceed 50. 8 U.S.C. § 1184(k)(1).

The INA also provides for nonimmigrant visas for immediate family members of (S)(i) and (S) (ii) category alien witnesses or informants, including spouses, married and unmarried children and parents. The Act requires that the Attorney General determine whether a ground for inadmissibility exists with respect to any S category visa applicant. The Attorney General has discretion to waive most grounds for inadmissibility if the Attorney General considers that is in the national interest to do so. 8 U.S.C. § 1182(d)(1).

The Attorney General may adjust the status of an (S)(i) nonimmigrant to that of an alien lawfully admitted for permanent residence, if, in the opinion of the Attorney General, the alien has supplied information as agreed, and the information has substantially contributed to a successful criminal investigation or prosecution. 8 U.S.C. § 1255(i)(1). Similarly, the Attorney General may adjust the status of an (S)(ii) nonimmigrant to that of an alien lawfully admitted for permanent residence, if the alien has, in the sole discretion of the Attorney General, supplied information as agreed, the information has substantially contributed to the prevention or frustration of an act of terrorism, or to a successful investigation or prosecution of an individual involved in such an act of terrorism, and the nonimmigrant has received a reward under Section 36(a) of the State Department Basic Authorities Act of 1956.

An alien witness or informant admitted as either an (S)(i) or (S)(ii) category nonimmigrant must report quarterly to the Attorney General, may not be convicted of any crime punishable by one year or more of imprisonment after the date of admission, must waive the right to contest, other than on a basis of an application for withholding of deportation, any action of deportation instituted before the alien obtains lawful permanent resident status, and must abide by any other condition, limitation or restriction imposed by the Attorney General. 8 U.S.C. § 1184(k)(4). The Attorney General is required by 8 U.S.C. § 1184(k)(5) to make an annual report to Congress regarding the granting of S visa classifications.

From the beginning of the S visa classification program until the end of Fiscal Year 1998, a total of 246 S visas had been issued for witnesses and informants and a total of 158 family members had been granted derivative S visa status. In addition, as of the end of Fiscal Year 1998, applications for an additional 40 witnesses and informants and their family members had been approved by the Criminal Division and were pending final approval by the Immigration and Naturalization Service. By the end of Fiscal Year 1998, when their nonimmigrant status was due to expire, all of the individuals granted S visas in Fiscal Year 1995 who were eligible to do so had applied for adjustment of status to lawful permanent resident.

The S visa classification program has proved to be very beneficial in prosecuting various

international criminal organizations, and helping law enforcement efforts against terrorism, narcotics, fraud, immigration violations, and numerous other criminal activities. As required by 8 U.S.C. § 1184(k)(5), the Attorney General will continue to report annually to the Congress on the use of this valuable law enforcement tool.

SEC. 7013. FEDERAL JUDICIARY SECURITY ACT.

This section strikes existing §566(e)(1)(A) and inserts a new section remedying a deficiency in authority. The amended language makes permanent the authority of the U.S. Marshals Service (USMS) to provide for security at the residences of federal jurists. This proposal addresses an upward trend in threats to the judiciary and an environment of increasing violence and hostility towards the criminal justice system. The authority is necessary to fulfill the USMS's statutory mandate, ensure the efficiency of the criminal justice system and prevent loss of life.

SEC. 7014. AUTOPSY AUTHORITY

This proposal would create federal authority, in the Attorney General or the head of another federal agency, as the case may be, to conduct autopsies when necessary or appropriate in the conduct of federal criminal investigations. It is not intended that enactment of the proposal would result in the hiring, by federal law enforcement agencies, of medical examiners. Rather, as in the past, the agencies will rely on local coroners, or as appropriate the Armed Forces Medical Examiner and his staff, to perform autopsies.

The primary need for federal autopsy authority arises in the case of offenses, such as acts of terrorism, outside the United States. At present, except in cases involving military personnel, there is no federal authority to perform autopsies outside the United States. When a non-military United States national dies outside the United States as a result of a possible offense against the United States, the federal investigative agency must have the authority to perform an autopsy. Typically the victim's body must be transported back to the United States before an autopsy can be performed, which may significantly delay both the return of the loved one's remains to his or her family, as well as cause potentially vital delays in the criminal investigation. Enactment of this proposal would enable the Federal Government to respond more effectively to terrorist incidents against United States nationals abroad, by permitting (consistent with the laws of the foreign country in which the act occurred) autopsies to be performed without the need to transport the victims' bodies back to the United States.

Although thus far the lack of federal autopsy authority pursuant to a criminal investigation has not proved to be a major problem in cases involving murders within the United States, such as in Indian country or other places of exclusive federal jurisdiction, there may also be a crucial need for federal autopsy authority in some domestic situations. Ordinarily, as noted above, when a federal investigative agency such as the F.B.I. is investigating a possible homicide within the United States, the agency relies on local authorities such as coroners' offices to

perform an autopsy. This has proved to be a generally satisfactory arrangement, although State and local laws with respect to the conduct of autopsies vary widely. Nothing in the present proposal is intended to change this practice of reliance upon local authorities. There may, however, be a need for independent federal autopsy authority in certain cases involving mass victims of possible domestic terrorism (or cult activity involving a federal victim such as Jonestown had it occurred within the United States) that occur in remote locations where the local coroner's resources to perform an autopsy or related forensic procedures are inadequate to the needs of the investigation. Enactment of this proposal would enable the F.B.I., or possibly the Bureau of Alcohol, Tobacco, and Firearms in certain bombing incidents, to enlist the assistance of the Armed Forces Medical Examiner or other private forensic practitioners by contract to perform the necessary autopsies in a timely manner.

The proposal includes requirements that are sensitive to the needs of the affected victims' families as well. Before conducting an autopsy, the Attorney General or other agency head would have to make an effort to notify the victim's family, if known; and once the autopsy is completed, the victim's remains must be returned to his or her family (assuming identification of the victim) as soon as practicable.

[SEC. 7015. ADMINISTRATIVE SUMMONS AUTHORITY FOR THE UNITED STATES SECRET SERVICE'S PROTECTIVE INTELLIGENCE RESPONSIBILITIES.]

This act authorizes the Director of the United States Secret Service (Secret Service) and supervisory level special agents of the Secret Service designated by the Director to issue and have served summons requiring the production of documents, recordings and other tangible things. The material requested under such a summons must be relevant to the investigation of a threat to the life or safety of the President of the United States or other person protected by the Secret Service under the provisions of title 18 of the United States Code, section 3056.

This authorization is sought by the Secret Service in an effort too most effectively perform the protective function of the Secret Service. Pursuant to title 18 of the United States Code, section 3056, the Secret Service is charged with the responsibility for the protection of the President and Vice President of the United States, their immediate families, visiting heads of state, and other individuals as designated by the President. Under title 18 of the United States Code, sections 871 and 879, the Secret Service is also responsible for conducting investigations into threats made against Secret Service protectees. In order to meet its critical mission, special agents of the Secret Service must be reasonably empowered to retrieve, assemble, evaluate, and utilize data in an expeditious manner. Given the nature of the Secret Service missions time is essential. The administrative subpoena, when properly utilized, could pay life saving dividends in speeding the ability of the Secret Service to retrieve information essential to it protective function.

There is no question that a conventional subpoena for requested information or records

may be obtained through the courts. However, that process does take additional time and resources. Given the nature of threat assessment and investigation, time may well be critically limited. Provided it is utilized in controlled circumstances, having been authorized by a high ranking Secret Service official; with regular reporting requirements to Congress, allowing the Secret Service to have administrative subpoena power will be an invaluable tool which could save lives.

There is an abundance of precedent for providing administrative summons authority to federal government agencies: title 18, United States Code, section 1968, allows the issuance of "civil investigative demands" for documentary materials believed to be relevant to a racketeering investigation; title 21, United States Code, section 876, authorizes the Attorney General to issue subpoenas in connection with the investigation of controlled substances; title 26, United States Code, section 7602, provides administrative summons authority to the Secretary of the Treasury for matters pertaining to internal revenue tax investigations; and title 15, United States Code, section 78u(b), provides authority to the Securities and Exchange Commission to compel the production of documents and records for the purpose of any investigation conducted by the Commission. Additionally, Inspector Generals' Offices, the Merit Systems Protection Board, and the Office of Special Counsel are each authorized to issue subpoenas for testimony and evidence in connection with their investigative mandates.

This bill provides the Secret Service with this same authority in connection with its responsibility to protect the life of the President of the United States and other individuals, and investigate such threats pursuant to title 18, United States Code, 871 and 879.]

SUBTITLE B – COMBATING CRIME AND IMPROVING OPERATIONS IN CORRECTION FACILITIES

SEC. 7021. INCREASED PENALTIES AND EXPANDED JURISDICTION FOR SEXUAL ABUSE OFFENSES IN CORRECTIONAL FACILITIES.

SEC. 7022. INCREASED PENALTIES AND EXPANDED JURISDICTION FOR CONTRABAND OFFENSES IN CORRECTIONAL FACILITIES.

Crimes of sexual abuse punishable under chapter 109A of title 18 are, in some circumstances, misdemeanor offenses punishable by a maximum sentence of one year. They also require that the offense occur in the "special maritime and territorial jurisdiction of the United States or in a Federal prison." the same jurisdictional limitation as to federal prisons applies under the prison contraband statute, 18 U.S.C. 1791.

With strong encouragement from Congress, the Department of Justice is entering into contracts with State and local governments and private commercial entities to house federal offenders. Courts have held that penal facilities that are not owned or operated by the Federal Government are not federal correctional, detention, or penal facilities as defined in the statutes.

See United States v. Gibson, 880 F.2d 795, 796 (4th Cir. 1989); United States v. Jimenez, 454 F.Supp. 610, 611 (M.D. Tenn. 1978). The proposed legislation would afford protection to victims of sex crimes involving federal prisoners in contract facilities. In addition, the proposals would elevate the misdemeanor offenses to felony status through increasing the maximum period of incarceration to three years and two years, respectively. Finally, by extending jurisdiction over contraband offenses by federally convicted prisoners in contract facilities, the proposals would greatly benefit the administration of such facilities inasmuch as State and local law enforcement officials have little interest in pursuing such crimes.

SEC. 7023. REMOVAL OF WIRETAP RESTRICTIONS FROM PRISON COMMUNICATIONS.

This section would clarify that federal laws relating to the interception of communications and the use of pen registers and trap and trace devices do not apply to persons in federal or state custody. It is well settled that, in view of the overriding interest in maintaining security in penal institutions, prisoners have no constitutionally protected reasonable expectation of privacy. See Hudson v. Palmer, 468 U.S. 517, 527 (1984); Lanza v. New York, 370 U.S. 139, 143-4 (1962); United States v. Amen, 831 F.2d 373, 379 (2d Cir. 1987). It is less clear, however, whether current federal statutes allow law enforcement authorities to intercept communications or to use pen registers and trap and trace devices with respect to prisoners. Most prisons contain prominent signs warning inmates and others that their communications may be monitored. Prisoners' use of the facilities has been held to constitute implied consent to such routine monitoring. E.g., United States v. Amen, *supra*. But where the monitoring is not random but occurs because of suspicion that the particular inmate is engaged in illegal activity, it is uncertain that the posting of the standard "Notice" signs would suffice to constitute implied consent. Accordingly, there is a need for a statutory clarification that, with respect to persons in the custody of the Attorney General or of a state or political subdivision, the current federal statutes that proscribe the interception of communications are inapplicable. This section so provides.

SEC. 7024. IMPROVING EFFICIENCY THROUGH IMPROVED MEDICAL PAYMENT RULES IN PRISONS AND RELATED FACILITIES.

This section would assist the Department of Justice in ensuring that appropriate medical care for detainees and prisoners is provided in a cost efficient manner. Passage of this legislation would allow for significant cost savings in connection with providing health care services for individuals in the custody of the Attorney General and save taxpayer dollars.

Specifically subsection (a) of this section will disallow certain providers of medical care to charge more than the medicare rate for treatment of prisoners in the custody of the Attorney General. Regulations would establish the applicable medicare rate as the maximum rate for medical care in these cases, although medical care could still be contracted for at a lower rate.

Subsection (b) of this section strikes existing §4006 of Title 18 and inserts new language.

The new language more appropriately defines cost of subsistence and medical care as "fair and reasonable". This proposal permits the USMS to evaluate the cost to the agency for subsistence and medical care based on adequate price competition, market prices~ past prices, cost and pricing data or value analysis, with an emphasis on the relative cost to the USMS of providing services given the nature and location of the place of confinement. It would allow the U.S. Marshals Service (USMS) to pay no more than the medicare or medicaid rate for medical treatment of detainees in the custody of the Attorney General. This proposal does not authorize the Department of Justice to participate in the Medicare or Medicaid program, but rather permits the Department of Justice to follow medicare and medicaid rate schedules.

SEC. 7025. JUDICIAL DISTRICT DESIGNATION.

This proposal would make a technical amendment to title 28 concerning the location of a Bureau of Prisons correctional complex in a particular federal judicial district. Currently, 28 U.S.C. 113 references the Federal Correctional Institution, Butner as being within the Eastern District of North Carolina. Given the expansion of correctional facilities at Butner, this reference should be modified to reflect that the entire correctional complex at Butner will be within the Eastern District. Passage of this proposal would avoid confusion and ensure that all legal matters involving Butner will be carried out in the same judicial district.

SUBTITLE C – IMPROVEMENTS IN FEDERAL LAW RELATING TO WHITE COLLAR CRIME

SEC. 7031. ELIMINATION OF PROOF OF VALUE REQUIREMENT FOR FELONY THEFT OR CONVERSION OF GRAND JURY MATERIAL.

18 U.S.C. 641 is a general theft of government property statute that carries up to ten years' imprisonment unless the value of the property stolen is \$1000 or less in which event it is a misdemeanor. It is well settled that the statute covers theft of intangibles as well as tangible property, such as the information in confidential law enforcement files or in documents containing secret grand jury information. E.g., United States v. Jeter, 775 F.2d 670 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); United States v. Friedman, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971); United States v. Girard, 601 F.2d 69 (2d Cir.), cert. denied, 444 U.S. 871 (1979); United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). However, in such cases proof of the value of the property taken is often difficult, because the information may have no general or fair market value; rather it may have worth only to a particular individual or small group of individuals. See DiGilio, *supra*, in which the court held that the government had failed to prove the requisite value of the information in FBI files that was improperly disclosed. Whatever the situation as regards other kinds of intangible government property, the strong societal interest inherent in protecting the secrecy of grand jury material warrants the availability of felony penalties in instances of its theft or improper conversion and disclosure. Accordingly, this section would amend 18 U.S.C. 641 so that the misdemeanor penalty for thefts of government property worth less than \$1000 will not

apply when the property consists of matters occurring before the grand jury within the meaning of Rule 6(e) of the Federal Rules of Criminal Procedure.

SEC. 7032. AMENDMENT OF INTERSTATE TRAVEL FRAUD STATUTE TO COVER TRAVEL BY PERPETRATOR

This amendment would remedy an unjustified gap in 18 U.S.C. 2314, which proscribes interstate travel or transportation in the execution of a scheme to defraud. For reasons that are unknown, the statute covers those who transport or cause others to travel in interstate commerce but not interstate travel by the fraud perpetrator. The proposal would add such perpetrator travel to section 2314, since States can have as much difficulty in prosecuting such cases as those involving interstate movement by others (e.g. victims).

SEC. 7033. CONFORMING PENALTY AMENDMENT FOR FRAUDS RESULTING IN SERIOUS INJURY OR DEATH.

This amendment would add penalty enhancements for mail and wire fraud schemes under 18 U.S.C. 1341 and 1343 that result in serious bodily injury or death. An identical enhancement was included in the health care fraud statute (18 U.S.C. 1347) enacted by Congress as part of the Health Insurance Portability and Accountability Act of 1996, P.L. 104-191. Mail and wire fraud schemes may often cause serious injury or even death, for example when they involve supplying defective equipment or parts. Presently, these rather old statutes contain no enhancements for such consequences, although many more recent statutes include them. A five-year maximum sentence such as is provided in sections 1341 and 1343 today is insufficient to vindicate some fraudulent activities that produce serious bodily injury or death. Accordingly, this amendment would add penalty enhancements, of the same degree as Congress provided in the health care fraud statute, to the mail and wire fraud laws.

SUBTITLE D – FEDERAL LAW ENFORCEMENT PROGRAMS

SEC. 7041. AUTHORITY TO PROVIDE HUMANITARIAN ASSISTANCE TO CERTAIN EMPLOYEES.

Subsection (a) increases the current statutory authority given to the DEA and the FBI from the present amount of \$25,000 per fiscal year to \$50,000 per fiscal year. This section also combines and therefore simplifies the past statutory language which was separately stated for both agencies under the previous authority enacted by Public Law 101-647, Title XXXII, § 3201.

Subsection (b) permits the DEA and the FBI to use government equipment, including vehicles, and incidental materials when necessary in humanitarian matters. Inclusion of this section clarifies that it is a proper use of government resources, on a non-interference basis, to comfort and aid employees and their immediate family members during the stressful and demanding circumstances surrounding the serious injury, serious illness or death of an employee

while on official business.

Subsection (c) permits the Administrator, DEA and the Director, FBI to promulgate such regulations as they may deem appropriate to facilitate to carry out the Declaration of Congress and the purpose of this statutory language.

Subsection (d) provides language indicating that these provisions were not to convey any private right of action to any individual seeking payment or services under the provisions of this statutory enactment.

SEC. 7042. FEDERAL PROSECUTOR ETHICS ACT.

This section repeals a provision that was included in the Omnibus Appropriations Act for FY '99 that would require that Department of Justice attorneys, and federal law enforcement agents supervised by them, comply with "state laws and rules and local federal court rules" in each state where the Department attorney "engages in that attorney's duties." This will have a significant, detrimental impact on federal law enforcement because some state rules were not drafted with federal prosecutors in mind and would interfere with completely lawful and legitimate law enforcement techniques.

SEC. 7043. STRENGTHENING LAW ENFORCEMENT EFFORTS IN U.S. TERRITORIES AND POSSESSIONS.

Subsection (a) of this proposal would amend title 5, United States Code, to create a new section 5757, which would authorize extended assignment incentives.

Subsection (a) of the new section would provide the head of an Executive agency the authority to pay an extended assignment incentive to an employee if (1) the employee had completed at least 2 years of continuous service in one or more civil service positions in a single United States territory or possession; (2) the agency determines that replacing the employee would be difficult; and (3) the agency determines it is in the best interest of the Government to encourage the employee to complete an additional period of employment with the agency in the territory or possession, not to exceed 5 years. This authority would cover an "employee" as defined by 5 U.S.C. 2105.

Subsection (b) of the new section would provide that the sum of extended assignment incentive payments for a service period may not exceed the greater of 25 percent of the annual rate of basic pay of the employee at the beginning of the service period, times the number of years in the service period, or \$25,000 per year in the service period.

Subsection (c) of the new section would provide that payment of an extended assignment incentive is contingent upon the employee entering into an agreement with the agency. The agreement would specify the terms and conditions under which the extended assignment

incentive is payable including the period of service and any use of an initial lump-sum payment, installment payments, or a final lump-sum payment upon completion of the entire period of service. The agreement must describe the conditions for canceling the incentive (e.g., upon separation, relocation, poor performance). The agreement must require that if, at the time the incentive is canceled, the employee has received incentive payments which exceed the amount which bears the same relationship to the total amount to be paid under the agreement as the completed service period bears to the agreed-upon service period, the employee must repay that excess amount, at a minimum. The agreement must not require an employee who is involuntarily reassigned to a position stationed outside the territory or possession or involuntarily separated (not for cause on charges of misconduct, delinquency, or inefficiency) to repay any excess payments.

Subsection (d) of the new section would prohibit the payment of an extended assignment incentive while an employee is fulfilling a recruitment or relocation bonus service agreement or during a period for which an employee is receiving a retention allowance. Subsection (e) of the new section would provide that extended assignment incentive payments are not part of the basic pay of an employee for any purpose.

Subsection (f) of the new section would provide OPM the authority to regulate the extended assignment incentive authority. This subsection would also provide that neither this new section nor implementing regulations would impair an agency's independent authority to administratively determine compensation for a class of its employees. Paragraph (2) of subsection (a) of the proposal would add the appropriate new reference to new section 5757 to the analysis for chapter 57 of title 5, United States Code.

Subsection (b) of the proposal would amend section 5307(a)(2)(B) of title 5, United States Code, to provide that extended assignment incentives would apply toward the aggregate limitation on pay of level I of the Executive Schedule.

Subsection (c) of the proposal would provide that the amendments made by this Act would take effect on the first day of the first applicable pay period beginning on or after 6 months after the date of enactment of the Act.

SUBTITLE E – IMPROVEMENTS TO FEDERAL SENTENCING LAWS

SEC. 7051. PRISON CREDIT AND AGING PRISONER REFORM.

Congress has long been concerned with unwarranted disparity in sentencing and time served among federally convicted offenders. In 1984, in furtherance of the goal of avoiding unwarranted disparities in time served, Congress passed the Sentencing Reform Act, which dramatically changed federal sentencing practices in order to ensure that offenders who committed similar crimes would serve similar sentences. This section is intended to remedy certain remaining anomalies in federal law that work against the goal of avoiding unwarranted

disparities in time served.

The section has three components. The first, contained in subsection (a), would amend section 3585 of title 18 to eliminate inappropriate accrual of custody credit and avoid the resulting unwarranted disparities in time served by federal offenders. This would be accomplished by repealing section 3585(b)(2) which among other problems, as explained herein, confers credit excessively and unfairly and actually rewards defendants who commit further state offenses while on release from federal charges.

Under section 3585 of title 18, an offender is credited both for the actual time served in the custody of the BOP pursuant to the sentence (§ 3585(a)) as well as for certain specified time spent in official detention prior to the date the sentence commences (§ 3585(b)(1) and (2)). The original purpose for crediting periods of custody prior to sentencing was to ensure uniformity in the amount of time served by sentenced federal offenders as a result of their federal offenses, regardless of their pre-sentence release status or imprisonment location. Section 3585(b)(2), however, goes far beyond the original and legitimate purpose of the crediting statute, detailed below, by providing credit for time served as a result of certain unrelated offenses for which the awardee defendant is arrested after the commission of the federal crime for which he is later sentenced. This provision actually operates to reward defendants for committing additional acts for which they are arrested and confined and results both in unwarranted disparities in time served and the inappropriate accrual of custody credit. This section of the bill would repeal this anomalous provision of current law.

The history of the credit provisions in federal law reveals their primary purpose to be to eliminate unwarranted disparities in time served among similarly sentenced offenders. The first statutory credit provision was enacted in 1932 to clarify when a federal sentence began to run. See 18 U.S.C. § 709(a) (1934). The 1932 statute gave offenders credit for time spent in custody awaiting transfer to the facility at which the sentence would be served. The purpose of the statute was to ensure that post-sentence time spent in custody for the sentenced offense — whether that custody be awaiting transfer or at the facility at which the sentence would be served — would count towards an offender's sentence. The credit statute thus eliminated disparities based on custodial transfers within the federal prison system.

The credit statute retained that limited thrust until 1960, when Congress broadened it to eliminate disparities in time served under mandatory minimum sentencing statutes based on an offender's bail status for the offense under which the sentence was imposed. See 18 U.S.C. § 3568 (1961). Before the 1960 amendment, offenders who were detained pre-trial because they could not post bail and who were later found guilty of an offense carrying a mandatory minimum sentence would serve more time in custody than a similarly situated offender who was released pre-conviction. This occurred because there was no provision to credit the pre-trial detention period toward the mandatory minimum sentence or reduce the mandatory sentence itself. As stated in the House Report accompanying the bill, its purpose was "to eliminate the disparity in sentences under statutes requiring mandatory terms of imprisonment" by allowing the pre-trial

detention period resulting from the failure to post bail to be credited towards service of the sentence. H. Rep. No. 86-2058 (1960) reprinted in 1960 U.S.C.C.A.N. 3288, 3289. Under the 1960 statute, all offenders sentenced to the mandatory minimum term would serve that term as a result of the offense, no more and no less. In 1966, Congress further broadened the credit statute — in the Bail Reform Act of that year — by providing credit for all pre-sentence detention resulting from the sentenced offense and by making such credit available for all offenses including those that did not carry a mandatory minimum sentence. Pub. L. No. 89-465, § 4, 80 Stat. 217.

While the breadth of the cases eligible for credit under the statute increased from 1932 to 1966, the policy goal underlying all of the statutes remained the same: to ensure credit towards a sentence for detention resulting from the sentenced offense and thus avoid disparities in the time served as a result of the offense for similarly sentenced offenders.

In the 1970s federal policy changed in favor of conferring credit not only for custodial periods connected with the act or offense on which the defendant was ultimately sentenced but also for certain unrelated pre-sentence custodial periods. In companion cases before the Supreme Court, see Nelson v. United States, 402 U.S. 1006 (1971), the Department of Justice took the position that certain pre-sentence custodial periods unrelated to the sentenced offense should also be credited towards an offender's sentence. The objective of this policy was apparently to provide relief for offenders who served so-called "dead time" prior to their federal sentence — periods of custody that would not otherwise be credited to any other sentence.

In Nelson, the defendant was convicted in federal court of transporting stolen cattle and sentenced to a three-year prison term. Nelson was released pending appeal. When the appeal was ultimately dismissed, Nelson was ordered to surrender within 30 days. During the 30-day period, state authorities arrested Nelson for a new and unrelated burglary charge, and he was detained pending trial. Nelson remained in state custody for over two years — unable to post bond — during which time he was convicted for the burglary charge, received a sentence of ten years, appealed his conviction, and then finally won reversal of that conviction because of a defective search warrant.

Subsequently, in federal court, Nelson sought credit for the two years he was in state custody on the burglary charges, during which time, he argued, he would otherwise have been serving his federal sentence. Nelson's claims were denied in the lower courts, but in the Supreme Court, the Solicitor General conceded that Nelson should get credit for the state custody, notwithstanding the fact that it was as a result of conduct unrelated to the federal offense for which Nelson had been sentenced. The Solicitor General reasoned that had Nelson been able to post bond on the state charges, he would have been surrendered to federal authorities and would have served his term of imprisonment.²⁶ "To construe Section 3568 to deny Nelson relief

²⁶The Department of Justice's position in the Supreme Court followed several lower court cases that held, as a matter of statutory interpretation, that credit should be given for unrelated

under these circumstances would be inconsistent with the spirit of numerous decisions of this Court requiring that justice be applied equally and not on the basis of ability to pay. [Citations omitted.] Section 3568 is in our view not so inflexible in its provisions as to be incompatible with an interpretation that would give Nelson the relief he seeks." Memorandum of the United States in Response to Defendant's Petition for Certiorari, Nelson v. United States, 402 U.S. 1006 (1971). The Court remanded the cases back to the appellate courts for reconsideration "in light of the position asserted by the Solicitor General." Nelson v. United States, 402 U.S. at 1006. The lower courts subsequently released the defendants and ordered that credit be given. United States v. Gaines, 449 F.2d 143, 144 (2nd Cir. 1971); Nelson v. United States, 445 F.2d 631 (8th Cir. 1971);

In response to Nelson and similar cases, the BOP in 1973 issued Program Statement 7600.55 that provided credit for unrelated periods of custody that occurred while a federal detainer was pending, if the custody was not ultimately credited against some state charge. But credit was limited, under the Nelson rationale and the Program Statement, to circumstances when federal imprisonment would have occurred except for the unrelated custody. That policy remained in place until November, 1987, when the Sentencing Reform Act of 1984 which included section 3585(b)(2) went into effect and which dramatically expanded the periods of unrelated pre-sentence custody that qualify for credit.²⁷

As previously indicated, section 3585(b)(2) provides credit for unrelated pre-sentence custody that is not credited towards another offense, whether or not bail was an available option and whether or not a federal detainer was issued. Thus while under the Nelson rationale an offender receives credit only when he would have been serving his federal sentence had bail been made on the other charges, under section 3585(b)(2) an offender who is arrested and confined on an unrelated charge receives credit for all pre-sentence incarceration not otherwise credited to a sentence regardless of whether he would have been serving a federal sentence and regardless of whether bail was available for the unrelated custody period. Current law thus provides offenders credit broadly for periods of "dead time" that occur following the commission of the federal crime.

pre-sentence custody in certain limited circumstances. See e.g., Davis v. Attorney General, 425 F.2d 238 (5th Cir. 1970) (credit should be given toward a federal sentence if a federal detainer lodged against a prisoner prevented bail from being set on a state offense); Willis v. United States, 438 F.2d 923 (5th Cir. 1971) (credit should be given against a federal sentence for unrelated pre-sentence time spent in state custody that is not credited to any the state sentence).

²⁷The legislative history of section 3585 is unhelpful in explaining the genesis of subsection (b)(2). See S. Rep. No. 98-225, p. 129 (98th Cong., 1st Sess.) (1983). Cf. Final Report of the National Commission on Reform of Federal Criminal Laws, § 3205 (1971), which was a precursor to many bills in the 1970s and early 1980s that led to the enactment of the Sentencing Reform Act of 1984.

Section 3585(b)(2) creates unwarranted disparities between federal offenders who accrue so-called “dead time,” by providing relief only to those who have been separately arrested after the commission of the federal offense for which they are ultimately sentenced. Furthermore, the current law is clearly insupportable for the class of federal offenders who, before sentencing on the federal charge, commit a new crime only to have charges for that crime dropped solely because of the impending federal sentence. Take the example of two persons convicted of federal bank robbery, both of whom are released on bail after conviction. One is arrested and incarcerated pretrial on state armed robbery charges, for conduct occurring while the defendant was on release status, which are later dismissed when the state prosecutor learns of the pending federal charge; the other defendant engages in only law abiding conduct while on federal release and suffers no state arrest or detention. Under section 3585(b)(2), only the first, clearly least deserving defendant, receives credit toward his federal sentence. This is without any legitimate rationale. In applications such as this, section 3585(b)(2) actually gives more favorable treatment to the defendant who is subject, by his own culpable actions, to multiple, unrelated charges.

Ordinarily, a defendant will be held in custody prior to trial (the most typical situation in which section 3585(b)(2) operates) only if a judicial officer has determined that there is probable cause to believe he has committed a crime. There are many reasons, most unrelated to factual innocence, why such a defendant may ultimately be released without sustaining a conviction and sentence on the charge for which he is held — thus accruing “dead time.” These include (inter alia):

- (1) a prosecutorial decision not to file formal charges;
- (2) having pending charges dismissed as part of a plea agreement whereby the defendant pleads guilty to an unrelated charge;
- (3) the suppression of inculpatory evidence on the grounds that some constitutional or statutory process was not followed; and
- (4) the destruction or loss of physical evidence or the death of a critical witness or other event that necessitates the dismissal of charges.

It has long been national policy that a defendant held in custody pre-trial who was later released without being convicted, or even after acquittal, is not entitled to compensation for that period of custody absent extraordinary willful or malicious conduct. Courts have long held that prisoners have no right to credit for such dead time, including even when the confinement was unlawful. See, e.g., United States v. Tagbering, 116 F.3d 1484 (8th Cir. 1997) (“a prisoner has no constitutional right to credit for prison time served on a prior illegal conviction”); Holscher v. Young, 440 F.2d 1283, 1290 (8th Cir. 1971); United States v. Rundle, 279 F.Supp. 453, 454 (E.D. Pa. 1968). In addition, because public officials and entities enjoy qualified or absolute immunity for their actions, only in the most egregious circumstances might such pre-trial custody result in financial compensation following an action for malicious conduct. Finally, there has never been

any congressional action to provide redress for the typical accrual of dead time.²⁸ Thus, defendants who accrue “dead time” normally receive no compensation for such time. Section 3585(b)(2) flies in the face of this longstanding policy and, in doing so, even as to its most sympathetic applications such as the Nelson case, supra, creates unwarranted disparities and bestows a windfall benefit on some defendants.

Moreover, the rationale in Nelson — that Nelson was being penalized because of his inability to post bail in his state criminal case — was misguided. Nelson was not being penalized while being detained in state custody; rather he was being detained because there existed probable cause to believe that he had committed a burglary — a culpable act on his part, voluntarily engaged in while on release. Second, to credit Nelson while not compensating other similar defendants is unjust. For example, if Nelson had had a state co-defendant who was similarly incarcerated until the state appeal was won, only Nelson would have received a benefit: a two-year reduction on his federal offense.

Hence, the more appropriate policy is to provide credit for pre-sentence time served only for custody resulting from the federal offense. Such a policy will reasonably ensure that all offenders serve no more and no less time than their sentences prescribe by eliminating relief for “dead time.” Relief of any kind is not now provided for most offenders who accrue “dead time,” and it is inappropriate to use prison credits to provide such relief for a limited group of such offenders, primarily those who accrue “dead time” only because they choose to commit new offenses for which they are properly charged and confined but which do not result in a conviction and prison sentence.

The proposed amendment to section 3585 also addresses another credit inequity. The amendment further adds language to section 3585 to preclude credit for time spent in official detention that has been applied to an undischarged concurrent term of imprisonment. This would overturn an inappropriate exception to current policy that was created by two appellate court cases. Kayfez v. Gasele, 993 F.2d 1288 (7th Cir. 1993); Willis v. United States, 438 F.2d 923 (5th Cir. 1971). Although current BOP policy is to preclude crediting time that has been served and already credited to a state offense, Kayfez and Willis held that all time credited to a state sentence that was ordered to run concurrently with a federal sentence must, under section 3585(b), be also credited to the federal sentence, even if the time was spent in custody before the federal sentence commenced. These holdings have the unwarranted effect of reducing the time served for the federal offense and inappropriately benefitting federal offenders who have committed other state offenses. Although disagreeing with the two cases, because of the

²⁸The 1998 Department of Justice Appropriations Bill did include a provision, commonly known as the “Hyde Amendment,” that authorizes the court in a criminal case to pay a prevailing defendant his or her attorney’s fees and other litigation expenses when the government’s position was “vexatious, frivolous, or in bad faith.” This provision, by its very terms, would apply only to the most extraordinary circumstances and thus would not cover the typical defendant who accrued dead time.

resulting disparities and administrative confusion if the BOP chose to follow them only within their respective circuits, the BOP has felt obligated to apply this exception nationwide. The proposed amendment to section 3585(b) would harmonize credit policy by alleviating the double-crediting mandated by these two cases and ensuring that all offenders serve no more and no less time for their federal offenses than other similarly situated offenders.

The recommended changes to section 3585, if enacted, will greatly enhance fairness but some effect on the size of future federal prison populations is also inevitable. To estimate the impact, the BOP reviewed its credit records for a random sample of current inmates. Based on this review, the BOP estimated that about 20 percent of all federal inmates currently receive an average of 62 days of credit under section 3585(b)(2). Therefore, eliminating section 3585(b)(2) credit will, over time, lead to a very small increase in the average time served of the federal prison population.

The second component, contained in subsections (b) and (c), would amend section 4105(c)(1) to ensure that so-called "good time credits" are provided to foreign prisoners transferred to the United States in such a way as to ensure that foreign and domestic prisoners who have committed similar crimes are treated in a similar way.

This provision addresses and resolves a conflict in circuits regarding the calculation of "good time" for offenders sentenced to imprisonment in a foreign country who are transferred pursuant to treaty to serve their sentences in the United States. As a result of appellate court decisions interpreting provisions of law relating to good time credits for treaty prisoners, some prisoners have been able to serve substantially less time in prison than domestic offenders who are guilty of similar crimes. Subparagraphs (b) and (c) would eliminate this unwarranted disparity in time served.

The question addressed by the courts is whether foreign and domestic good time credits under section 4105(c) of title 18, United States Code, were intended to be applied to the foreign sentence or, instead, to the "release date" set by the United States Parole Commission by reference to the sentencing guidelines. Until a few years ago, the BOP had applied all credits stemming from time served in confinement to the foreign sentence, not the release date under section 4106A. However, in Trevino-Casares v. United States Parole Commission, 992 F.2d 1068 (10th Cir. 1993), the court held that the credits are to be applied to the "release date" established by the Parole Commission under section 4106A of title 18, United States Code. The Tenth Circuit's interpretation conflicts with that of the Fifth Circuit, which takes the approach that the credits are to be applied to the full term of the foreign sentence, Cannon v. United States Department of Justice, 961 F.2d 82 (5th Cir. 1992), cert. denied, 113 S. Ct. 2354 (1993). The BOP has changed its earlier approach and now follows the rule established by the Tenth Circuit, with which the Fourth and Ninth Circuits agree. Asare v. United States Parole Commission, 2 F.3d 540 (4th Cir. 1993); Ajala v. United States Parole Commission, 997 F.2d 651 (9th Cir. 1993).

However, the current majority approach is particularly troubling as a policy matter with respect to sentences imposed by such countries as Mexico and England, which give more generous service credits than the United States. Under the majority courts' interpretation, transferred offenders from such countries receive a windfall as compared with similarly situated United States offenders because (1) transferees receive a combination of both foreign credits and domestic ones, and (2) the combined credits apply to advance a release date established under the sentencing guidelines, even when that release date is earlier than the full term of the foreign sentence. For example, the transferee in Trevino received twice the credits a domestic offender would have received with the same term of imprisonment.

The proposed amendment of section 4105(c)(1) would establish that the domestic and foreign service credits are to be applied to the entire foreign sentence. However, the proposal recognizes that in some cases this approach will produce a sentence substantially longer than that faced by a United States offender. This would be true, for example, where the foreign sentence is longer than what the sentencing guidelines provide and the foreign good time credits are less than ours. Thus, an alternative calculation that would benefit such an offender is available under proposed section 4105(c)(3). This alternative calculation would apply where the term of imprisonment determined by the Parole Commission under 18 U.S.C. § 4106A is less than or equal to the foreign sentence on the basis of considerations other than the limitation arising from the length of the sentence imposed by the foreign country under section 4106A(b)(1)(C) (which provides that the term of imprisonment, when combined with supervised release, may not exceed the foreign sentence). In such a case the amendment directs the BOP to calculate credits for satisfactory behavior under domestic law, 18 U.S.C. §3624(b), and to compute such credits on the basis of the term of imprisonment established by the Parole Commission, rather than the foreign sentence. If the release date so calculated is earlier than the release date determined on the basis of the combined domestic and foreign credits applied to the foreign sentence, the earlier release date prevails. This alternative is available only where the term of imprisonment determined by the Parole Commission is less than or equal to the foreign sentence on the basis of sentencing factors, and not the limitation of the foreign sentence, so that an offender who would have faced a longer United States sentence but for the foreign limitation does not receive a windfall by virtue of deduction of the good time credits from the reduced term of imprisonment.

As with the proposal in subsection (a), enactment of the proposed amendments in subsection (b) and (c) will greatly increase fairness but will likely have some impact on the length of prison sentences. Although, due to the varied sentencing and credit laws of the foreign countries from which transferred offenders come, no precise determination of the effect is readily calculable, it is believed that the overall impact of the proposal is slight, considering the small number of incoming American foreign transferee prisoners -- approximately 100 per year over the last three fiscal years -- compared with the total federal prison population of approximately 124,000.

Finally, subsection (d) would amend section 3582 of title 18 which permits, upon the approval of the Director of the Bureau of Prisons (BOP) and a federal court, non-dangerous

federal prisoners over the age of 70, except those who have been convicted of a sexual abuse offense, to be released after they have served at least 30 years in custody. Currently, only elderly prisoners who have been sentenced under the so-called "three-strikes" law may be released pursuant to section 3582. This bill would eliminate disparities by making all prisoners over 70 -- except sexual abuse offenders -- who have served 30 or more years eligible to be considered for release regardless of the statute under which they were convicted.

Title VII of the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322) enacted the so-called "three strikes" statute, 18 U.S.C. 3559(c). That statute mandates a life sentence for a person convicted of a serious violent felony (as defined) and who has at least two previous convictions for a serious violent or drug offense. Congress, however, as part of the "three strikes" provision, also enacted a unique ameliorating feature, codified at 18 U.S.C. 3582(c)(1)(A)(ii), that allows a person convicted under the "three strikes" law and who has served at least thirty years of his life sentence and has attained the age of 70 to be released by the court, if the Director of the Bureau of Prisons finds "that the defendant is not a danger to the safety of any other person or the community." Of course, this provision has not yet been utilized since far less than thirty years has elapsed since the enactment of the "three strikes" statute.

But the provision is significant because it reflects the latest expression of Congressional policy with respect to aging prisoners. The federal elderly prisoner population remains relatively small. However, it is growing rapidly and is likely to continue to grow for the foreseeable future. In 1992, there were 639 federal prisoners over the age of 65, but by 1997 the number of elderly prisoners had grown to 1,655, a 159 percent increase. Kathleen Maguire and Ann L. Pastore, eds., Sourcebook of Criminal Justice Statistics 1997, U.S. Department of Justice, Bureau of Justice Statistics, Washington, DC: USGPO 1998. Statistics provided by the Sentencing Commission and the BOP suggest that the number of elderly prisoners will continue to increase in coming years.

There are numerous issues relating to elderly prisoners, including providing special facilities to address certain unique needs and exceedingly expensive health care costs. And while the problem of how to deal with an aging federal prison inmate population is larger than merely providing for the discretionary release of some non-dangerous prisoners who have served a lengthy portion of their sentences, nevertheless this policy represents part of the solution. There seems no sound reason why the provision enacted by Congress for application solely to the "three strikes" statute, which requires at least three convictions for serious violent and drug offenses, and thus is available to the "worst of the worst" offenders, should not also apply to other federal prisoners serving a sentence in excess of thirty years who has attained the age of 70. This proposal would accordingly effect such an expansion, by deleting the language in section 3582(c)(1)(ii) that limits the operation of the provision to persons convicted under section 3559(c), except for those offenders convicted of sexual abuse offenses under chapter 109A of title 18. The BOP advises that there are currently approximately 538 prisoners over 70 years of age in federal custody of whom 10 could be eligible for relief under this proposal over the next ten years.

The other part of the proposed amendment to section 3582(c)(1)(A) is complementary. A court exercising its discretion whether or not to release a person convicted of a serious crime, even if the person is over 70 years old, may properly be reluctant simply to release the prisoner back into society unless another sentencing option such as home confinement or reporting restrictions as a condition of probation or supervised release can be imposed. Presently, however, it is doubtful whether a court can order such a sentence since section 3582(c)(1)(A) speaks only in terms of reducing "the term of imprisonment," not imposing in its stead a lesser type of sentence. Compare Rule 35(b), F.R.Crim.P., which gives a court the power to "reduce a sentence" to reflect substantial assistance. Hence the proposed amendment would confer express authority on courts who opt to release an individual under section 3582(c)(1)(A) to impose a sentence of probation or supervised release with or without conditions. This added flexibility is consistent with the purposes for which this statute was designed and will likely facilitate its use in appropriate cases.

SEC. 7052. CORRECTION OF ABERRANT STATUTES TO PERMIT IMPOSITION OF BOTH A FINE AND IMPRISONMENT RATHER THAN ONLY EITHER PENALTY.

Of the thousands of federal criminal offenses that carry imprisonment as a sanction, virtually all also permit a court to impose a fine in addition to imprisonment. Indeed, in 1984 Congress enacted 18 U.S.C. 3571, which made uniform the amounts of allowable fines for offenses throughout all titles of the United States Code, and authorized the imposition of such fines even if the statute defining an offense was silent as to the availability of a fine.

Five statutes in title 18, however, because of a quirk in draftsmanship, expressly provide for the imposition of imprisonment or a fine but not both. This proposal would remedy this anomalous and occasionally troublesome feature of these statutes, by adding the words "or both" at the appropriate place in each provision, so as to permit a court the customary sentencing flexibility to impose both a fine and a prison term if so desired. The Administrative Office of the United States Courts has written in support of this amendment.

The statutes affected are 18 U.S.C. 401 (criminal contempt), 18 U.S.C. 1705 (destruction of letter boxes), 18 U.S.C. 1916 (unauthorized employment or disposition of lapsed appropriations), 18 U.S.C. 2234 (willfully exceeding authority in executing a search warrant), and 18 U.S.C. 2235 (maliciously procuring and executing a search warrant). Of these, section 401 is the only one which has generated caselaw with respect to the punishment issue. Although criminal contempt is an offense of hoary lineage, dating from the Judiciary Act of 1789, see Green v. United States, 356 U.S. 165 (1958), no legislative history or other explanation apparently exists for why the statute is drafted in the disjunctive to permit only a fine or imprisonment but not both, and the Senate Judiciary Committee has stated that this feature was probably unintended and in past years had proposed to correct it in a comprehensive criminal code reform bill. See S. Rep. No. 96-553 (96th Cong., 2d Sess., p. 375). This statutory quirk has produced occasional windfalls to undeserving defendants, and has proved a trap for unwary

judges who, being unaware of the statute's unusual restriction on their sentencing authority, impose an illegal sentence of both a fine and imprisonment. See, e.g., United States v. Versaglio, 85 F.3d 943, 945-7 (2d Cir. 1996)(and cases cited). The Supreme Court has held that, in such a case, if the defendant tenders payment of the fine to the clerk before the error is corrected, the sentence is fully satisfied and the imprisonment portion of it must be vacated. In re Bradley, 318 U.S. 50 (1943); see also United States v. Versaglio, *supra*; United States v. Holmes, 822 F.2d 481, 486 (5th Cir. 1987)(and cases cited); United States v. Sampogne, 533 F.2d 766 (2d Cir. 1976). Presumably, the same result would obtain under the other statutes similarly worded, although no case law exists as to these seldom prosecuted offenses. Since there is no sound reason for limiting a court's customary sentencing discretion to impose both a fine and imprisonment when the offense so warrants, this amendment would so provide as to the aberrant statutes described above.